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To **Committee Secretary**, Senate Standing Committee on Legal and Constitutional Affairs

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Confidential Email

Dear Sir

Submission for Personal Property Securities Bill 2008

We attach our submission regarding the revised draft of the Personal Properties Securities Bill, dated 10 November, 2008.

This has been produced by four large law firms, Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques and is authorised by partners of those firms.

Regards

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Senate Standing Committee on Legal and Constitutional Affairs

PPS Exposure Draft
Personal Property Securities Bill 2008

Joint submission of:

Allens Arthur Robinson

Blake Dawson

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9 January 2009

1. Introduction

1.1 Who we are

We are four law firms with significant financing and insolvency practices: Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jaques.

These practices include both retail and wholesale finance: consumer finance, corporate finance, project finance, equipment and asset finance, structured finance, takeover or leveraged finance, construction finance, debt capital markets, securitisation and derivatives. Our practices also include corporate and other insolvencies, enforcements, restructures and workouts. Many of these transactions have an international element. Some have little or no connection with Australia.

1.2 Our object and approach

Our object in providing this submission is to highlight improvements that should be made to the Bill so that it works well and achieves its stated objectives.

We have previously provided a detailed submission to the Australian Government Attorney General's Department on the Consultation Draft of the Bill. Since making that submission we have engaged in numerous extensive and detailed discussions with the Australian Government Attorney General's Department. We have appreciated the opportunity to discuss some concerns regarding the drafting and a significant number of concerns have been addressed in the current draft of the Bill. However, as you will see from our submission there are a still considerable number of concerns that need to be carefully considered and addressed, and we have some overall concerns as to the approach.

The views in this submission may also be incomplete in that we are not confident that have identified all the issues that arise from the current draft of the Bill. We have the impression that the proponents of the Bill have seriously underestimated the difficulty and complexity of the task they have undertaken. It appears to us that serious adverse unintended consequences are a likely rather than possible consequence of the expansive approach to law reform taken by the Bill.

We have in a number of places in our detailed submissions queried points rather than stated a particular position. It should not be inferred from this that we are indifferent to the position or think that the government should form its own view. Rather, we raise these issues because they are important issues and require consultation with stakeholders to ensure the right policy position is taken. While we appreciate that in the broad context there has been significant consultation, the complexity of the reform proposals is such that we do not believe that sufficient stakeholder input has been obtained in relation to many of these key issues.

The views in this submission are our own – they may not reflect the views of clients.

2. Overview

2.1 The current position –flexibility but a legislative mess

Australia has been able to build up sophisticated financial markets including debt markets. Australia has developed expertise in all major areas of wholesale finance, and has been among world leaders in such areas as project finance and securitisation (without the problems that have attended securitisation elsewhere).

There are many factors behind this development, but one significant factor has been the flexibility and clarity of the law (including the law relating to security and the rules of equity) which has allowed significant creativity. In our experience, it is considerably easier to do transactions under Australian law than under many other systems of law, including that of the United States. Australian law is similar to English law in this respect. England has jealously guarded its law as a means of promoting the use of that law, and the use of England as a financial hub.

The company charge in particular is an example of this flexibility and clarity. It has been a very flexible technique; the priority rules are relatively few in number and have been worked out over the years; and there is a one stop registration system.

Where individuals and partnerships rather than corporations have been giving security, the situation is a little different. The priority rules are still simple, and the flexibility great, but the economy has not been well served by the plethora of State registration systems (and some State legislation with formal requirements) even though their number and ambit has been declining steadily over the years.

2.2 Reform welcome –but which approach

We therefore welcome the object of the Bill in sweeping aside those registration systems and replacing them with one, and removing formal requirements.

We support the stated objectives of the Personal Property Securities Reform to establish a more certain, consistent, less complex and cheaper regime in relation to security interests in personal property[1].

In particular, we support achieving these objectives through the establishment of:

- a single national register of all security interests in personal property (subject to certain exceptions) and other specific interests in personal property; and
- a uniform national law and the repeal of the multiple state and territory laws that currently regulate personal property security interests and other interests in a piecemeal manner.

However, we do not think an approach akin to article 9 of the US *Uniform Commercial Code* (the basis of the Bill) is necessary to achieve that goal, and has considerable disadvantages, including rigidity and complexity. We think that

[1] Australian Government Attorney-General's Department, *Personal Property Securities Reform – Personal Property Securities Bill 2009 Commentary*, May 2008, 12

Australia would have been better served if it had followed the UK example and rejected that approach, for all the reasons that persuaded the relevant authorities in the UK,[2] and as set out by Professor Philip Wood.[3]

Nevertheless, we recognise that a decision has been made to adopt an Article 9 approach. We appreciate the level of work and consultation that has so far gone into providing the draft legislation, and the readiness of representatives of the Attorney-General's Department to make themselves available and allow us to participate in the consultation process.

2.3 Our goals

We have analysed the Bill with the benefit of our own experience in financial transactions and insolvency. We have the following particular goals in mind:

(a) that it should preserve (and where possible enhance) the current flexibility and adaptability of Australian commercial law and equity, particularly that of security over personal property;

(b) that it should not cause any additional cost or difficulty or uncertainty with respect to the "wholesale" transactions referred to above or indeed any transactions;

(c) that it should be clear, and where possible, certain, with its principles easily grasped and understood;

(d) that it should preserve and enhance Australia's potential as a financial hub; and

(e) that it should not detract from the attractiveness of Australian law as a chosen governing law, and Australian companies as vehicles in transactions.

In our view, the draft legislation does not sufficiently achieve these goals in its current form. The legislation is in many important respects very uncertain, inflexible and complex, and in its large sweep can have many unintended consequences. It may add to the cost and reduce the assurance of taking and enforcing security.

We strongly support the government's efforts to promote Australia as a financial hub, and legal certainty, flexibility and simplicity are central to Australia's attractiveness in that regard

2.4 Our view – if adopted the Bill should be cut back

We attach a more detailed commentary on the Bill.

In our view, if the Bill in its current approach is to proceed, it should be cut back to deal only with its stated objectives and the primary principles of security interests:

[2] After a review by the Department of Trade and Industry, these aspects of the United Kingdom Law Commission report (*Company Security Interests*, Report no. 296, 2005) were not enacted in the *Companies Act 2006* (UK).

[3] Wood, *Comparative Law of Security Interests and Title Finance* (2nd ed, 2007) ch 10.

registration and priority and the abolition of formal requirements under State and Territory laws.

As can be seen from our discussion, there are a considerable number of complex issues in the drafting and principles that need to be carefully worked through. If a cut back approach is adopted then many can be avoided, but a number still remain to be thought through

Some of the issues should only be dealt with after detailed analysis. This is unlike recent regulatory reforms (like Financial Services Reform and Anti-money Laundering) whose rough edges and consequences can be (and often are) smoothed and modified by the regulator. This legislation affects property and contractual rights between private parties with no such scope for amelioration. There is a real danger that this more ambitious scope will:

- add to the cost of taking security and its enforcement;
- increase uncertainty;
- re-regulate security interests rather than de-regulate them;
- affect adversely Australia's attractiveness as a financial hub, and the use of Australian law and Australian corporate vehicles;
- lead to unforeseen consequences; and
- affect significantly the rights of parties to contracts which are not in any way security interests.

This comes at a time when there is a considerable reduction on the availability of credit. It would not be appropriate at this time to increase the cost and uncertainty of secured transactions.

We are frequently called upon to provide opinions on the enforceability of security agreements. Clients and other parties to transactions rely on those opinions and the provision of such an opinion in satisfactory form is a condition precedent to most significant secured financing transactions. If the Bill is adopted in the broad form proposed, the opinions that we provide will be more qualified and less satisfactory to finance parties.

2.5 A cut-back model which still fulfills the goals

We suggest the Bill could still achieve its goals, with less adverse or unforeseen consequences, and be completed with less difficulty and resources, if the following are done.

- Remove provisions regulating consumer credit transactions and their enforcement. This can be left to the UCCC, and the new consumer credit and small business credit legislation which will emerge from the current review.
- Remove provisions regulating or restricting enforcement. Instead rely on the general law and any consumer credit and other legislation referred to above, and the unconscionability provisions of the Trade Practices Act and ASIC Act and related state legislation (such as fair trading acts).

- Remove provisions prescribing the rights and obligations attaching to security interests, leaving them to the general law, and agreement between the parties (subject to consumer credit and similar legislation).
- Delete ss124 and 125 (which alter or affect the rights of parties to contracts) and instead continue to rely on the general law.
- Not provide that the sanction for non-perfection is invalidity in a winding up but rather follow the New Zealand model.
- Remove provisions dealing with transactions which are clearly not security interests, like pure assignments of debt, as if they are security interests. If it does contain a registration regime for them, then it should not impose on such transactions any other consequences of being a security interest.
- Remove attempts to define or modify generally understood concepts and leave them to the general law.
- Not prescribe what is necessary to create a security interest (as opposed to perfect it for the purposes of priority) but leave it to the general law. Under general law, except perhaps for certain public policy considerations, anyone can create a security over any thing to secure any obligation, in most cases, either orally or in writing.
- Delete references to chattel paper.

Ideally also:

- the Bill should as far as possible avoid an elaborate taxonomy, (the priority rules are elaborate and complex) and not distinguish between different types of property except to give effect to the special priority rules applicable to control;
- it should simplify the rules relating to commingling and accession, relying on the general law; and
- the State and Territory law it is replacing should be repealed in full, rather than just overridden.

The Bill should not:

- impose new, uncertain obligations in parties' dealings with each other (for example, concepts of "commercially reasonable manner" and "reasonable probability";
- attempt to codify well settled principles of law;
- increase formalities and unduly restrict freedom of contract and dealings between parties (for example the new additional requirement for security interests to be "in writing, signed by the grantor" as a pre-condition to enforceability);
- impose stricter consequences for non-compliance with formalities than our long developed general law, such as loss of validity rather than priority;

- materially depart from the current commercial law and law of contract in Australia (see, for example, our discussion regarding section 124); and
- diminish the current flexibility and adaptability of Australian commercial law and equity and thereby detract from Australia as a financial hub and Australian law as a choice of law (for example, by restricting parties' ability to contract out of formality and other provisions- see our discussion in clause 154.

We do not support these aspects of the Bill, which extend beyond the stated objects of the reform and have potentially serious unintended consequences.

We attach a more detailed commentary on the legislation. It contains an outline of some of the key issues. It is followed by a detailed section by section summary of some of our concerns.

We are grateful for the opportunity to provide this submission and welcome an opportunity to discuss the points directly with the Committee.

Senate Standing Committee on Legal and Constitutional Affairs

PPS Exposure Draft Personal Property Securities Bill 2008

Detailed commentary

Joint submission of:
Allens Arthur Robinson
Blake Dawson
Freehills
Mallesons Stephen Jaques

9 January 2009

1. Some key points

The following is a summary of some of the key issues. It is by no means complete, there are many other issues set out in the main part of this submission.

The overwhelming majority of these issues go away if the ambit of the legislation is reduced to cover only matters relating to the registration and priority of security interests.

1.1 Security interests

The Bill would give greater certainty and clarity if it either removed the words "in substance" or clarified what they mean by reference to objective criteria. We recognise that the Bill is based on the policy that the question of whether a security interests exists is to be determined by reference to the substance (rather than the form) of a transaction. However, we are concerned that this test does not provide sufficient certainty to parties trying to determine whether they need to register a particular transaction.

Absolute assignments (whether at law or in equity) which do not secure obligations, should not be regarded as security interests. There are a number of distorting effects of including something as a security interest when it is not and when the grantor retains no interest in the subject matter. Further, combined with other provisions, it would remove the ability to have a voluntary assignment or an unwritten assignment.

1.2 "Non-constitutional" interests

A number of interests, including some types of security interests, are correctly carved out of the Bill under Section 6. However, except in the case of liens arising by operation of law and similar interests, such excluded interests seem to lose priority. Some of these interests are extremely important to the operation of the financial markets. This should be amended, so that their priority is preserved as it would be under general law. The Bill also goes too far in preferring security interests to all other interests (that is, it is not only security interests not covered by the Bill that lose priority to security interests covered by the Bill).

1.3 The requirement of writing

It should continue to be possible to have securities which are effective, which are not created by writing, particularly when they are registered. There should not be particular formal requirements for the description of collateral. The object of the Bill should be to reduce formal requirements.

1.4 "Grantor" definition

This should be confined to the party that actually granted the security interest. Paragraph (a) should not, as it currently does, apply to *any* person who has *an* interest (or right) in personal property to which a security interest is *attached*.

There may be a vast shifting population of such persons, none of whom are party to the security interest. It should refer the person who *grants* the interest over whatever interest they have in the personal property.

The wide sweep creates significant difficulties and complexities regarding:

- a secured party's ability to obtain valid registration;
- the question of the enforcement rights as against superior interests;
- the mechanics of enforcement; and
- the ability to "contract out" of the enforcement provisions.

It also raises difficulties in relation to the choice of law rules as currently drafted.

1.5 "Control", "Possession" and "Circulating Assets"

The concepts of control and possession need to be generalised, and it may be beneficial to subsume the concept of possession within the concept of control.

Concepts of ADI accounts should be expanded to include bank accounts outside Australia.

When determining whether an asset is a circulating asset or not, the test should be broadly similar to that under current law. That is, the relevant test should be whether dealing with the asset is restricted, rather than whether the secured party has control, (which would also save duplication of definitions) except in relation to debts, where the relevant test should also look at whether there are restrictions on dealing with the bank account into which proceeds are required to be paid.

The law should preserve the ability of floating charge holders (that is holders in security over circulating assets) to preserve priority over notices from the Australian Tax Office under s218 of the *Income Tax Assessment Act 1936* and similar provisions.

1.6 Chattel Paper

The inclusion of *chattel paper* is confusing because it has no relevant legal underpinning in Australian law. We recommend that the provisions be removed.

We understand that a market for chattel paper exists in America, and maybe Canada. If so, it presumably exists because there is a legal infrastructure for the operation of chattel paper outside the context of a PPS system. Since the underlying legal concept of chattel paper does not exist in Australia, we do not think it should be included in the PPS legislation. We do not think the PPS legislation gives that underpinning. We also query the policy rationale behind giving holders of chattel paper super priority.

1.7 Section 60 – Future Advances

This is confusing and potentially too restrictive: the clause should be generalised or it should be removed.

1.8 Priority and extinguishment provisions

The priority provisions should not allow a party to take priority over a security interest of which it has prior actual notice. We query the absolute priority given to security interests perfected by control over security interests perfected by other means. Equally, the extinguishment provisions should give greater weight to notice of existing security interests, and the restrictions imposed by them. The extinguishment provisions should not apply when the grantor has nothing to sell: for example, where there has been an absolute assignment, or where the grantor has only an interest under a lease. The extinguishment provisions and the priority provisions should be consistent in principle as to when a party can take an interest which overrides the existing secured interest. Currently they are not.

1.9 Extinguishment of security interests on compulsory acquisition of shares

It is extremely important that the extinguishment provisions allow parties who are acquiring shares in a company through a "mopping up" compulsory acquisition under the Corporations Act, or through a scheme of arrangement, to be able to acquire the shares free of security interests. The requirement in section 90 that the transaction be "consensual" casts considerable doubt on this.

1.10 5 Business Days reaction time

The 5 Business Day reaction time in a number of provisions is far too short for a large organisation like a bank to react to receipt of the relevant knowledge; to determine that it requires action to pass it through to the relevant people; to formulate a response; to obtain the necessary information to effect a registration or take another step; and to perform that step. This would apply particularly if, say, the necessary activity needed to occur over the Christmas/New Year period.

Section 257, inserted in the latest Exposure Draft, which allows a court to extend the time is of limited comfort. The period is so short that it is likely that there will be a large number of expensive applications to extend the period.

1.11 Section 117 – Negotiability

We do not think that the legislation should change tried and true notions of negotiability or needs to do so. This is particularly so in relation to bills of exchange, which constitute a major portion of the money market in Australia. Negotiability is fundamental to the operation of that market. The draft legislation weakens that concept.

1.12 Section 124 – Ability to transfer collateral

Section 124 as currently drafted, seems to cut across most of the other protections normally available for secured parties by giving the grantor full freedom to deal with the collateral. It may also cut across the rights of parties to contracts by giving even greater freedom to assignment of the collateral and other assets by their counterparties in breach of the contract than section 126.

1.13 Section 125 – Rights of parties to contract

This entire provision is a major rewrite, and in many cases alteration, of the current commercial law and law of contract. It is not necessary for the efficacy of the Bill. It should not be introduced without significant review and debate. It affects the rights of parties to contracts in an unprecedented way even when they are not involved in security interests.

1.14 Commingling and accession

These provisions are complex. Given the definition of "accession" they overlap considerably, indeed it is difficult to see how the provisions providing for removal of accessions can operate, as accessions have, by definition, lost their identity.

The commingling provisions should have a different regime for pools of fungibles.

1.15 Enforcement Provisions

We query the policy reasons for including these. We understand the utility of facilitative provisions, but these go beyond facilitation. They contain significant new restrictions and regulations, which in many cases duplicate what is in the *Uniform Consumer Credit Code* and presumably will be in the new Commonwealth legislation arising from the current review. The restrictions in that legislation should be sufficient.

The provisions also set out very cumbersome procedures which will inevitably add to the cost of enforcing security. In particular, they seem to fetter the right of secured parties to hold on to the collateral in the hope of getting a better price or to earn income from it. They give significant ability to junior creditors to limit that flexibility, and to limit other flexibility of the senior creditors. In fact in most practical circumstances debts owed to junior creditors in an enforcement position are "underwater", so they have no effective interest in the outcome.

They also add to the administrative burden of enforcement, and extend the duties of enforcing secured parties, and create a fertile field for litigators and challenge. It adds to the costs of security interests and reduces their value. These provisions should be significantly cut back and should be optional. There is no evidence that under current law the well understood duties of good faith are being abused. If there is such evidence, then the issue should be handled in general consumer credit legislation which will apply to all security interests, not just those on personal property. There should be a “one stop shop“ for regulation.

Contracting out is difficult and may in many circumstances be impossible, particularly when there are other parties with an interest in the property. If a grantor contracts out, then that should bind all lower or equal-ranking secured parties, and also those with interests in the collateral claiming through the grantor. Parties should be able to contract out of all the provisions.

The provisions also interfere with the normal right of lenders to choose their moment as to when and how to enforce, and to retain funds for subsequent applications.

1.16 Deemed Notice

Given the importance of notices to parties, there needs to be provisions, similar to other legislation, allowing for notice to be taken to be given if left at the relevant address etc.

On the other hand there are some provisions which have been inserted which are open to abuse by unscrupulous lenders which go far beyond the powers they currently have, enabling the secured party to "buy" or simply acquire the collateral. The protections afforded under the current law, in the process of foreclosure, do not apply.

1.17 Register

The register should contain some provision for noting restrictions on transfer or granting of security interests: there is a practical utility to being able to see these restrictions noted on the register. As described above, the registration provisions should contain some demonstrations as to what is sufficient for registration. General descriptions by class or cross reference should be sufficient in order to preserve flexibility. The consequence of mistakes is currently too draconian.

At the moment, it is cumbersome in certain of its requirements, and the challenge regime is weighted in favour of the grantor.

There should, like the Torrens title regimes, be provision for compensation by the registrar in the case of registrar error.

1.18 Section 190 – Vexatious registrations

Section 190 places too onerous an obligation on parties claiming a security interest, given the uncertainty as to what is or may not be a security interest. If parties believe there is just a risk that their interest may be a security interest, they should be able to be registered. Otherwise, they are in a difficult position, facing prosecution if they register and loss of security if they don't.

1.19 Non-registration consequences

We query why the Bill does not follow the New Zealand precedent approach in making the sanction for non-registration the loss of priority, rather than loss of validity. If the provisions about loss of validity are to remain, we believe that there needs to be greater clarity about their scope and effect. This is of particular importance given the uncertainty of some of the concepts, for instance of "grantor" and the difficulty of achieving an accurate registration and the openness of the register to challenge.

As currently drafted, the Register will be of little use in informing unsecured creditors and other counterparties of the true position of a grantor. It will only cover, for example, security interests over assets with an Australian connection. This is in contrast to the current position with companies which applies to the relevant class of security interest with respect to assets everywhere. It does not cover security interests perfected by possession or control.

If you do preserve the invalidity consequence, a better approach would be to confine it to Australian companies (preferably as part of the general corporate insolvency regime), and to provide that all security interests need to be registered to preserve validity, except those that are exempt, or are perfected anywhere by control or possession.

1.20 Obligation to act honestly and in commercially reasonable manner

We query why the Bill goes beyond its stated objectives and adds additional obligations to act "honestly" and in a "commercially reasonable manner" on parties. These are new tests which will need litigation over many years to define. These can significantly add to the burden of secured parties, when the common law and statute law is adequate in its current form. They will add to uncertainty and the cost of enforcement, and have the potential to give rise to significant amounts of litigation. It decreases flexibility in a party's ability to protect its commercial interests. They run counter to the Bill's aim for simplicity and clarity and should be deleted.

1.21 Adoption of foreign models

We do not think that it is necessary to adopt the entire approach or drafting of overseas PPS legislation: it should be looked at in Australian conditions in the light of Australian policy and legal framework. Each part of the legislation, particularly a provision which is not a necessary part of the core purpose of the legislation, needs to be looked at in Australian terms, and there is no need to adopt the whole of it as a package.. The goal of accessibility is not served if the legislation is drafted in a way that relies on foreign case law to interpret it.

1.22 Transitional provisions – bankruptcy and insolvency and priority and vesting

The definitions of Bankruptcy and Insolvency leave unclear the relationship of the provisions to non-Australian entities or its applicability to voluntary administration. There are good reasons that it should not extend to non-Australian entities as Australian law does not cover their insolvency. We query the constitutional effectiveness of the notion that the Commonwealth can reverse entrenched rights, like priority rights, simply because it does so in insolvency.

Also we wonder whether it is sensible to have a regime where security interests can reverse priority on the occurrence of insolvency.

Having a shorter period govern the priority between migrated security interests and other transitional security interests in the 24 months allocated to transitional security interests can have unfair consequences. If the concept is that holders of transitional security interests have 24 months to register then that concept should remain whether or not they are competing with migrated security interests.

These provisions should not apply to existing transfers of accounts. Parties who think they have bought accounts absolutely would not be minded to register when they think they have absolute title.

The 24 month grace period should also apply to the vesting consequence for non-registration and the extinguishment provisions. Otherwise it is of little benefit.

1.23 Section 282 – Preservation of Security Interests

At the moment this section arguably only preserves existing security interests to the extent they relate to existing property. It should preserve them to the extent they cover future assets.

2. Drafting approaches

2.1 Overseas legislative models – similarities and differences

In our view, any Australian PPS legislation should carefully consider Australian circumstances, and should not be unduly slavish in following overseas prototypes. We would caution against the assumption that the "safe" course is to follow the overseas models because they are "tried and true". This assumption is mistaken on a number of counts.

- First, ongoing litigation in Canada suggests the existing models are not "tried and true".[4] Even after 50 years in the US there are still frequently cases being run on the basic question of what "rights in the collateral" are sufficient to create a security interest.
- Second, whatever laws are adopted need to be tested in the context of Australia's existing legal framework. What worked in Canada may not work here. To take one example, the standard of exercising rights in a "commercially reasonable manner" is a standard that, however familiar it may be in Canadian law, is foreign to the current Australian law of contract. In particular, in Australia there is a greater focus on preserving the rules of equity as a distinct body of law from rules of common law.
- Third, Australian courts will not simply adopt the overseas jurisprudence – they will be required by our rules of statutory construction to give effect to the words of the Bill as they see them. Therefore, the drafting of Australian legislation must be responsive to our local judicial and interpretative context.
- Fourth, the Australian market and experience are different from that in New Zealand, and the financial markets have become significantly more varied, sophisticated and globalised since the Canadian legislation was introduced. An example is the Hague Convention.
- Fifth, policy decisions and drafting should be looked at on their own merits to decide what is best for Australia in the current circumstances. Policy objectives that were appropriate for the US economy 50 years ago will not necessarily be appropriate for today's or tomorrow's economy here in Australia. Further, a large

[4] See Mike Gedye, "Reflections on some practical issues which have arisen under New Zealand's Personal Property Securities Act and some lessons for Australia" (2004) 15 JBFLP 20 at 22–23.

number of provisions which may have been introduced into overseas legislation (and which may be seen as part of a "package") which do not deal strictly with registration and priority — such as regulating enforcement — may have been necessary in overseas jurisdictions to answer then-current policy requirements, or to address perceived gaps in their law. Those motivating factors may simply not exist in Australia.

As discussed in Professor Wood's talk at the BFSLA Conference in Queenstown, different countries have different attitudes to security. In America the environment has been more suspicious, and this is reflected in Article 9. In Australia there has been a lighter and more facilitative touch, allowing a great flexibility in security, which can be easily enforced, subject to duties of good faith.

- Sixth, there is no overall policy reason why foreign legislation needs to be adopted as a "package". Each policy decision needs to be looked at in the Australian context on its own. Many parts of the legislation are not necessary for the functioning of other parts.
- Seventh, Australia should take the opportunity to improve the legislation so as to remove uncertainty; to increase flexibility; and to remove rigidity and over-prescription.
- Eighth, it is sometimes said that Australia can rely on overseas jurisprudence. If the Bill is meant to be straightforward and to simplify matters, then it is not appropriate to create a new need to rely on case law from jurisdictions such as Canada or New Zealand, which appear to adopt judicial approaches that differ from Australian law in many respects. Also, the law would be much less accessible if it relies on Canadian or other overseas case law.

2.2 Use of legislation to "clarify" existing concepts

In many cases the legislation attempts to codify or clarify the existing law. The assumption behind some of the drafting is that it adds clarity and certainty to reflect in legislative form commonly understood concepts. The suggestion is that, in those circumstances, those who want to know about the effect of the law do not need to look at another book setting out the case law.

In our experience, when settled principles are set out in new legislation often the reverse is the case. The legislation then needs to be interpreted in its own terms, and litigation is necessary to interpret the legislation.

Those who want to learn of the application of the law often need to wait for case law and then not only to look at the Act, but also cases or texts explaining it. It appears that the New Zealand and Canadian legislation need such texts to explain it. In other words, there will be the need for yet another book of case law and commentary.

Any such codification or clarification should only follow a detailed analysis of what the law is, as well as what it should be, on the particular point. Though there has been consultation on many aspects of the broad sweep of the legislation, there has not been that detailed analysis of key issues of this type.

Further, this approach can mean that similar issues are dealt with inconsistently in different statutory regimes and in the general law, meaning that the same issue will be dealt with in different ways in relation to different transactions, when the principles should be the same. The approach to policy issues is fragmented, allowing confusion and complexity. Examples in this legislation of this approach are the provisions which relate to corporate knowledge and constructive knowledge.

2.3 Inconsistency in dealing with similar concepts

As mentioned above, if the legislation amends traditional concepts of commercial law and equity but does so only in relation to security interests, it means that there is inconsistency in treatment of similar concepts.

2.4 Interaction between security interests and non-security interests, and between legal and equitable interests

One aspect of the Bill which appears to be unsatisfactory and unclear is the extent to which it preserves or overrides existing legal concepts about:

- the interaction of security interests and non-security interests in property (e.g. the interests of beneficiaries in trust assets);
- the distinction between legal and equitable property;
- restrictions on assignment.

2.5 Interaction between the PPS Bill and the Uniform *Consumer Credit Code*

The interaction between the PPS Bill and the Uniform *Consumer Credit Code* is not always clear or straightforward. There are numerous cases where consumer credit issues are addressed in the Bill rather than in the UCCC, for example:

- Proceeding under land laws – this is excluded for security interests over household goods. Why? The commentary suggests a concern that the consumer protections under land laws are inadequate. Why is the UCCC not enough? Is regulation thought good enough to protect the family home really thought not good enough to protect the family plasma TV? If there are inadequacies under the current consumer protection laws, they should be addressed as part of the Commonwealth review of those laws.
- Contracting out – this is limited in section 154 for security interests in collateral "used wholly or predominantly for personal, domestic or household purposes". Why not leave it to the UCCC to regulate contracting out?

If consumer credit issues need to be dealt with in the Bill, they should be dealt with in terms consistent with the UCCC, such as by referring to mortgages regulated by the Code rather than security interests over household goods.

Section 158 of the Bill is not as helpful as it should be in alleviating the compliance burden of the two laws. In our view, the PPS Bill should reflect the most basic of standards so that a deeming provision is not necessary: compliance with the UCCC should suffice. The approach as currently drafted invites the development of parallel and inconsistent regimes.

Other parallel areas include section 96(3) of the UCCC and section 170 of the Bill, and section 97 of the UCCC and the distributions of proceeds clauses in the Bill.

We recognise that the Commentary proposes that there be regulations regarding some of these matters, but we believe that it would be preferable to clarify these matters in the primary legislation.

2.6 Use of terms from other legislation

The legislation follows the current trend in incorporating definitions and referring to concepts from other pieces of legislation such as the Corporations Act. A difficulty is that these definitions are often designed for different policy purpose, and may be interpreted, drafted or changed in relation to the policy of that other legislation in ways that are inappropriate to the application for this legislation. Those concepts are also often subject to carve-outs, geographical limitations, or the possibility of inappropriate future amendment. For example:

- "Clearing and settlement facility" is a concept in the Corporations Act which can only be interpreted through a complex and time-consuming chain of other definitions and provisions in the Corporations Act and Regulations. Many have exceptions relevant to the policy of the Corporations Act, but not to the question as to whether something should be regarded as a clearing settlement facility for the purpose of this legislation.
- "financial product" is defined with numerous carve-outs, including ones relating to credit facilities.

3. Part 1 – Preliminary

The Bill should not proceed unless it receives referral from all States and Territories. The complexity and uncertainty arising from the arrangements contemplated by clauses 6 to 12 would be far worse than under laws currently in effect.

3.1 Section 6 – Application of Act to interests

	It is not clear whether section 6 is intended to have the effect that interests described in the section will not be security interests, or whether it is intended to apply more broadly – or example, whether an assignment of an account to satisfy a pre-existing indebtedness (section 6(1)(f)(vii)) is capable of extinguishing an existing security interest under one of the extinguishment provisions. This should be clarified
6(1)(f)(vi)	We query why this provision does not also exclude assignments of chattel paper that are made to facilitate collection, rather than just assignments of accounts made for that purpose.
6(1)(j)	We query whether this is intended to exclude "crops" as defined in section 26.

3.2 Relationship with other laws

	In our view, it would be preferable to ensure that the inconsistent State legislation is repealed. If the State legislation is not repealed, then the Commonwealth PPS Bill should be expressed to cover the field. One of the problems with the current law is that overriding provisions in the *Corporations Act* do not completely match the relevant State laws, meaning that bits of State laws survive, leading to confusion and lack of clarity. Unless the PPS Bill takes a more assertive approach, it will perpetuate that problem and leave us with 71 separate pieces of legislation instead of 70. The Bill should at least provide that State and Territory laws be prescribed in relation to formal requirements.]=

4. Definitions

4.1 Section 26 – Definitions

Account	This should be limited to actual debt. Otherwise, the definition would extend to cover every contract under which payment can be required to be made, which is virtually every contract, not just debts due. This would have the consequence that core contracts are treated as "circulating assets" including insurance contracts. Because of the limited definition of "investment instrument", the definition of *account* would also cover debt securities like bonds and debentures (except those listed on an Australian exchange), which represent a very substantial market. Under the current drafting, assignments of corporate bonds registered with a clearing system anywhere else in the world could need to be registered twice; once with a clearing system and once with the PPS register. We note that the definition of “account” is the same in the New Zealand legislation. In our discussions with New Zealand practitioners on this issue, we have been told that in practice, only assignments of debts tend to be registered. However, this more relaxed approach may be due to the fact that the consequence of non-registration in New Zealand is only loss of priority (rather than loss of validity).
ADI Account	There needs to be a concept of account with a bank or deposit taking entity which is not Australian.
Bankruptcy and Insolvency	It would be preferable not to use the constitutional concept and to prefer more specific definitions. These definitions should be specific and refer to voluntary administration, liquidation and bankruptcy under the *Bankruptcy Act*. We think this needs to be very clear. We understand the approach that says ‘to ensure constitutional validly, use constitutional terms’ however if there is any doubt that the insolvency head includes voluntary administration then there is an unacceptable problem. That is there might be a loss of priority in one form of administration but not another. The concept should apply for both forms of administration or it should not apply at all. We suggest it would not be appropriate to extend this concept to foreign entities. This whole concept of the transitional provisions, that priority is only affected in insolvency, can have very odd results. For instance, if ‘A’ has priority to ’B’ and ’A’ starts enforcing but then insolvency intervenes, ’A’ would be required to stop enforcement halfway to let ’B’ take control.
Chattel Paper	See the discussion of section 36. We do not think that the concept of "chattel paper" is a helpful one: rather, it will generate significant uncertainty and confusion. We recommend that it be deleted.

Clearing and Settlement Facility	This incorporates a Corporations Act definition which is a complex provision designed for a different policy perspective, which can only be understood by a very time consuming exercise of following through a large number of other complex definitions and provisions in the Corporation Act and Regulations. What should be a simple concept is made unnecessarily complex. It could lead to inadvertent failure to perfect security if what parties think is a clearing and settlement facility (and would normally be thought of as a clearing and settlement facility) is not because of some technical exception in a provision of the Corporations Act or Regulations. This is one example of difficulties that arise when definitions are imported from other statutes.
Consumer Property	We wonder whether this definition is necessary. It is barely used in the legislation, and where it is used it would be better for the legislation to refer to security interests that are subject to the UCCC than to security interests over certain types of property. To the extent a definition is retained, this definition may be over-broad, as it covers all property held by an individual, and not just consumer goods. For example, individuals will often hold shares and other investments for which they have no ABN as they are not carrying on a business, but it seems to be anomalous and inappropriate to classify such investments as "consumer property". Why is it not limited to property acquired for personal, domestic or household purposes? Also some business owners of aircrafts and ships visiting Australia would not have an ABN if they do not have a business in Australia. Finally, foreign businesses that own assets (like investment interests) in Australia may also not have an ABN.
Controllable Property	This definition seems to be unduly restrictive (or misleadingly named), as there are many other types of property which can be subject to control. We are unsure why this covers letters of credit, and (assuming letters of credit were deliberately included) why it does not also cover performance bonds and bank guarantees.
Control	There are two different sets of definitions: one set only relating to controllable property; the other to the concept of what is a circulating asset. This can give rise to confusion. We suggest that where additional concepts are necessary in the context of circulating assets, they are expressed in terms of restrictions, rather than control. This would make the legislation easier to follow. Given the breadth of the ordinary concept of control, we are unsure why this definition applies only to certain accounts and certain property. For example, the definition is silent on: • accounts with foreign banks and deposit taking institutions; • debt securities that are not debentures (because they are within one of the exceptions of the definition of “debenture“). (For example, a debt security issued by an ADI in the ordinary course of its banking business); or • negotiable instruments that are evidenced by a certificate.

Future advance	See below for our comments on section 60. In light of our view that section 60 would be better served simply by saying that a security interest may secure any obligation, present or future, actual or contingent, the current definition of "future advance" unduly narrows what obligations can be secured.
Grantor	Although the distinction between "debtor" and "grantor" is in our view appropriate, the definition of "grantor" is somewhat counter-intuitive, particularly paragraphs (a) and (f). Paragraphs (b), (c) and (d) appear to confine the concept of the "grantor" to the actual party to the arrangement who creates the "security interest". This appears to us to be the correct approach. Paragraph (a) and (f) (and paragraph (e) to the extent it picks up those paragraphs) extend the concept to other parties, some of whom may have absolutely no connection with the security interest other than having an interest in the collateral. Considerable practical difficulties arise because it is the "grantor" that must be noted on the register (and so the secured party must know the details of every current grantor to have a valid registration); who must receive notices of enforcement; and who must "contract out" of the enforcement provisions. Grantors can change without the secured party's knowledge. **Example:** R, a responsible entity of a managed investment scheme enters into a mining joint venture with B and C. The joint venture is unincorporated so that all joint venturers own all property as tenants-in-common. R gives a cross-charge over its interest in the joint venture to B and C and subsequent security interests to financier F and to G as trustee for bond holders. There are 200 bondholders.. There are 2,000 unitholders in the managed investment scheme. R, B and C take a lease over equipment from O (which may be more or less than a year). In this circumstance, "grantor" is each party with an interest in the property. In relation to the security interest given to F, as well as R this will include O (the owner of the property), B and C (as “co-owners“ with R and also as chargees under the cross-charges), F and G (as holders of security interests) and each of the bondholders and unitholders in the trust. Alternatively, if, as would be the case under current law, the lease is not regarded as giving an "interest" in property to the lessee, the grantor would be O. It is not clear from the legislation whether a right to possession which is not an interest in the property in the traditional sense, is "an interest". In either scenario, if it was subsequently found that O held the equipment on a constructive trust, then the beneficiaries of that trust would also be a "grantor". If the operator of the joint venture on behalf of R, B and C sends off a major part of the equipment to a repairer, then while in the possession of the repairer, the repairer's lien arguably gives it an interest in the property, and the repairer should be registered as a grantor, and the recipient of notices. Equally, if a unit in the trust is transferred, the same thing would be required. If F wishes to enforce its security interest and seizes possession of the dragline, the Bill is not clear as to whether it can only seize and deal with whatever interest R has in the collateral, or whether it can effectively override the interests of D, C, O (if

	the lease was for less than a year) and the repairer. As a further example, if one of the unitholders gave a charge over its units in the trust, then the chargor will be at least the unitholder, together with R as its trustee. Arguably, it might be suggested that as a unit gives the holder interest in the equipment, it should include all of the other parties mentioned above. The definition creates problems for the priority and notice rules later in the Bill: these provisions appear to assume that "grantor" means only the person who created the particular security interest in question, but as defined the term is much wider. Further, if there can be many "grantors", and a shifting population of them, it creates significant difficulty for the operation of the choice of law rules, which also assume the existence of only one a grantor when their number could be legion. It makes life very difficult as a matter of practice. Every “grantor” needs to be noted on the Register. Every “grantor” needs to be served with notices. Every grantor agrees to waive enforcement provisions. In each of those cases it would refer to anybody with any interest in the property, but it should refer to the relevant party to the security agreement. This also adds to the confusion as to which parties are affected by the consequences of insolvency. The legislation and the registration system should be at pains to ensure that there is no confusion between partnership assets, and security given by the partnership, and the interest in the partnership assets of the individual partners. Partnership assets under general law are first available for the partnership creditors. Partners only have a right to distribution of the partnership property after payment of creditors. The definition should be confined to the party that actually granted or was responsible for the creation of the security interest and its successors in title as to the particular interest or right which is subject to the security interest. It should not, as it currently does, apply to *any* person who has *an* interest (or right) in personal property to which a security interest is *attached* rather than the person.
Investment Instrument	This definition may be too limited, since it excludes: • financial products traded on markets outside Australia (and are not included in the other part of the definition); • derivatives that are excluded from the definition "derivative" by virtue of section 761D of the Corporations Act; and • debt securities that are carved out of the definition of "debenture" in the Corporations Act in particular, many debt securities issued by ADIs. These issues again have arisen because of the use of provisions in the Corporations Act, particularly in Chapter 7, the Financial Services Reform provisions - which are notoriously convoluted and difficult to follow. It should generally be extended to tradable investments and securities (see

	above).
Licence	Not all licences are property, and including term "licence" within the definition of "personal property" does not make them so. If that result is desired, it would be better to have a separate provision to explicitly state that licences are property, and may be the subject of a security interest and dealt with by the secured party in accordance with the security interest unless otherwise provided by the Act creating the licence or regulations made under it. It is also not clear why the definition should be limited to licences that are transferable.
Negotiable instrument	This definition may be counter-intuitive as it includes things that are not negotiable in the legal sense (paragraphs (d) and (e)) as well as things that are negotiable (paragraphs (a), (b), (c). This is particularly relevant in looking at the issues of priority and title, as the essence of negotiability is that a holder for value can take free of all prior interests. The inclusion of letters of credit in paragraph (e) appears inappropriate, as letters of credit are rarely transferable, or if they are, are only transferable once. The intention behind section 41(2)(c) is unclear: does it include transfers of mortgages?
New value	It is not clear why the definition of *new value* should exclude value that is provided by way of reducing or discharging an existing debt or liability. What if the existing debt or liability had fallen due for payment? Alternatively, what if the value was provided by way of a partial release of an earlier debt or liability?
Perfection	Sections 80 to 83 appear to assume that a security interest under a foreign jurisdiction can be "perfected" (as defined) in the manner prescribed by that foreign jurisdiction. However, section 64 only recognises methods which are effective in Australia and registration in Australia. For example, under English law as under current Australian law, a security interest in a share granted by an individual can be "perfected" without registration and without control. For these reasons, the definition of "Perfection", when it relates to foreign jurisdictions, should relate to the perfection of that security interest under that particular law. See our comments on section 64 below.
Signed	There should be provision allowing other parties to rely on the assumptions in ss128 and 129 of the Corporations Act, and other rules as to ostensible authority.

4.2 Section 19 – Security Interest when other laws prevail

	This section and Sub-division C should make it clear that no formality or requirements for granting security under any state law apply.

4.3 Section 28 – Meaning of *Security Interest*

28(1)	The aim of the PPS register and legislation is to create certainty, but the current breadth of the definition of "security interest" in section 28 undermines that certainty in a number of ways: First, the reference to arrangements that "in substance" secure payment or performance of an obligation will generate uncertainty in an area of law in which traditional distinctions of legal form are respected by the courts and are relied on by parties to commercial and consumer transactions. Unless the PPS Bill provides greater clarity about how "substance" is to be assessed, the current definition of "security interest" is likely to unsettle negotiated allocations of contractual risk. We note the observations of the New Zealand academic Mike Gedye that: > "The logic of treating alike all transactions which in economic substance serve as security is convincing. But, as is so often the case, much of the devil is in the detail. It should not be assumed that the greater certainty the new legislation was intended to bring will initially result in less litigation. The Canadian experience has been the converse; even a quarter of a century after the PPS legislation was first introduced in Canada there are sufficient reported cases each year to fill a volume of a specialist case series… Even members of the Canadian judiciary sometimes still show an apparent lack of understanding of quite simple issues…" (2004) 15 JBFLP 20 at 22–23. For example, in New Zealand and Canada, litigation has been necessary to determine whether an ordinary trust (that is, when there is no obligation other than those owed by the trustee of the normal kind to a beneficiary) is a security interest.[5] Litigation may be required to determine whether a *Quistclose* trust where moneys advanced by a lender is held on trust for the lender when the purpose of the loan fails, is a security interest. There are many other examples. Second, in view of the sanctions that apply if something is a security interest but is not registered, parties will be inclined to register everything they could remotely consider as a security interest. This could lead to significant over-registration and the clogging of the register with arrangements which are not security interests per se, but are registered for more abundant caution. The risk is that the register will become a listing of most commercial arrangements, thereby obscuring its central utility as a register of proprietary interests in personal property. It would be useful to clarify what is meant by "in substance" and exclude particular arrangements that might arguably be included in the definition, but (a) are not generally regarded as security interests, or (b) should not be included as

[5] *Re Skybridge Holidays Inc* (1999) 173 DLR (4th) 333 (BCCA); *Strassny v North Shore City Council* [2008] 1 NZLR 825; *Graff v Bitz* (1991) 86 DLR (4th) 184.

	security interests, for policy reasons. Examples include options, the *Quistclose* trust, or the repo.
28(3)(a)	As discussed, why should an assignment which is not a security interest be regarded as a security interest, particularly given the width of the definition of "account" and "chattel paper"? **Unwritten and voluntary assignments** It can give rise to unforeseen consequences: for instance, it will no longer be possible to have an unwritten assignment enforceable against third parties and, if not handled correctly, it may add to the complexity and cost of securitisation. It could lead to dual registration of transfers of debt securities in the ordinary course. **Book Debts** Under current law, an absolute assignment of book debts is effective without a proceeds account. It is not subject to the same issues of control over proceeds as apply with floating and fixed charges.[6] If an assignment of book debts is made absolutely, and not by way of security, there is no need for a proceeds account under current law. Including absolute assignments as security interests will change this. **Relationship with extinguishment provisions** This also brings into conflict the policy behind the extinguishment provisions and the priority provisions. Under the extinguishment provisions, transfers of assets are effective to extinguish security interests in a number of cases. If those transfers are themselves security interests (even if they don't secure anything) then they would need to be registered in order to become effective, and always rank after the pre-existing security interests. The extinguishment provisions are in many ways more favourable to the holders of security interests than the priority provisions. This arises particularly in the circumstances where the transferee is aware of breaches of the security interest. We query why a different policy regime seems to apply with respect to accounts. We suggest there should be a similar concept as provided in subsection (5) so that the secured party is taken to have "possession" of investment entitlements, investment instruments, and negotiable instruments that are evidenced by an electronic record if they are registered in the name of the secured party. At the moment that appears to have been left out of the definition of "control". **Relationship with other statutes** It is not at all clear how the various provisions relating to assignments fit in with section 12 of the *Conveyancing Act 1919* (NSW) and similar provisions. The Bill provides that it prevails over a law of a State or Territory, or a rule of law or

[6] *Re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680.

	equity, to the extent of any inconsistency but it is not intended to exclude them to the extent they can operate concurrently with the Bill (section 15). In New Zealand, commentators have stated that their equivalent to section 12 (s130 of the Property Law Act 1952 (NZ)) assumes the existence of a system recognising the assignability of choses in action but that it only applies to fill in any gaps left by the NZ PPS legislation and is irrelevant where an assignee registers its security interest.[7] There will be gaps, for instance, where the relevant assignment is to discharge an existing debt and is therefore not a security interest, or where the choice of law provisions recognise another law because the grantor is not in Australia, but the debt is situated in Australia for common law purposes and therefore subject to section 12. Is the Bill intended to preserve the concurrent operation of legal and equitable interests in personal property, or are these distinctions to be abolished by force of statute? **Transfers and novations** The Bill does not define "transfer" for the purposes of section 28(3)(a). We assume that this includes an assignment and does not include a novation. An assignment by a financier of its rights under a loan agreement will be regulated by the Bill, whereas a novation of its rights and obligations under the agreement will not. Financiers use both methods to transfer their rights under a loan agreement. **Trusts** We also assume that a "transfer" does not include a simple declaration of trust. This should be clarified **Absolute assignments and control** If absolute assignments are retained as security interests, then we suggest that where a notice is given to the party that owes the account, and it is an absolute transfer, that is, of the type referred to in s12 of the *Conveyancing Act 1919* (NSW) and its equivalents, or its equitable analogue, then that should be regarded as "control" or "possession" for the purpose of the provisions of the legislation. In other words, no registration should be necessary.
28(3)(a)	We recommend that a legal assignment of an account or chattel paper (that is an absolute assignment where notice has been given to the account debtor) be excluded. There is no need, where an account or chattel paper has been legally assigned to a third party, for the transfer to be registered as a security interest against the transferor, as there can be no risk that another person dealing with the transferor could wrongly assume that the transferor still owns the account or chattel paper (that is, there can be no concern about "apparent wealth"). It would also be quite inappropriate for some provisions (for example) for section

[7] See M Gedye, RCC Cuming and RJ Wood Personal Property Securities in New Zealand (Thomson Brookers, 2002) at [102.1] and L Widdup and L Mayne Personal Property Securities Act: a conceptual approach (LexisNexis Butterworths, Wellington NZ, 2002) at [25.6] to [25.7].

	125(3) to apply where there has been a legal assignment of an account or chattel paper, as the transferor will have no ongoing interest in the account or chattel paper.
28(3)(c)	The definition of "commercial consignment" will include arrangements which are not functionally security interests. While the example of the auctioneer has been correctly excluded, it leaves in arrangements such as artists leaving their paintings with a gallery for exhibition and sale.
28(5)	This sub-section appears to be designed to overcome the risk that a person cannot take a valid security interest over the benefit of obligations that the person itself owes to the grantor. If the legislature is to take this step, it would be appropriate to extend it to apply to all obligations, rather than just obligations under an account.

4.4 Section 30 – Whether leases secure payment or performance of obligations

30(1)	This section seems to serve no purpose. Should it be deleted?
30(2)(a)	The meaning of the words "is an obligation for the term of the lease" is quite unclear. We suggest that the meaning be clarified.
30(9)(a)	In most lease transactions, the implicit interest rate will not be "specified". We recommend that the discount be determined by the implicit yield in the lease, and that the section only rely on a specified interest rate where a rate is specified expressly for this purpose.

4.5 Section 32 – Meaning of *Purchase Money Security Interest*

32(1)	It is unclear what is meant by "the collateral" when more than one asset is bought under the one arrangement. **Example:** If one borrows $100,000 to buy 10 cows at $10,000 per cow, do the cows as a group constitute the collateral, or does each cow secure $10,000?
32(1)(b)	It is not uncommon in financing transactions for value to pass through the hands of a number of parties before it is ultimately applied to acquire an asset. Similarly, value could be paid to one party, in consideration for that party separately providing funding to the party that ultimately acquires the asset. It is also possible for the value to be provided in a structured financing after the asset has been acquired. It will be important that this section be sufficiently flexible to accommodate all these types of arrangements.
32(4)	This section may cause confusion. Does it mean that the same security interest has to secure the refinancing or consolidation, or, for example, if Bank X provides a loan secured over a plane, and Bank Y provides a loan to refinance the loan by Bank X secured over the same plane by a new security interest? Even if the secured parties can be different?

	This question would be easier to answer if the definition "purchase money obligation" was broader.
32(5)	It is not clear how a refinancing would fit into the definition of "purchase money obligation". In a refinancing money is provided to repay money which was used to enable the grantor to acquire its interest. The value given by the refinancing lender does not assist the grantor acquire the collateral, it has already acquired the collateral.

4.6 Section 34 – Meaning of *Accession*

34(1)	This should be expressed as the separate identity of the other tangible property being lost. The identity of the improved property will continue. If an accession only occurs where its identity is lost, then a number of provisions in the Bill dealing with severance of accessions in particular would seem otiose. See our comments in Section 133 below.

4.7 Section 36 – Meaning of *Chattel paper*

36	The concept of "chattel paper" is not familiar in Australian law, and will cause confusion. It appears to be based on the assumption that dealing with the paper a contract is written on does something to the underlying debt. The function of the term "chattel paper" in the Bill seems to be to confer unusually favourable treatment on a particular class of financier (for example, they need to exercise less care in the conduct of their business in order to be protected against prior interests). We understand that the concept of chattel paper was originally developed in the US to facilitate floor plan financing and instalment financing. It was then extended to lease financing. By comparison, under the current law in Australia, if a financier takes collateral over assets and receivables it does so without “chattel paper”. Under current Australian law, there is not the existing legal basis for the operation of chattel paper. The Bill does not seem to change that, so that the concept will not be able to be used in practice. The definition of account suggests that, if a debt obligation is evidenced by chattel paper, it cannot be separately sold or assigned as an account receivable (that is, a debt obligation in connection with goods cannot be separately assigned from those goods). However, debtors often finance receivables and the goods to which they relate separately to different parties. Transactions in the secondary debt market will be substantially restricted if they must always be coupled with the underlying asset. It is also unclear to us why there is a separate regime for dealings with the

	lessor's and secured party's rights under leases and security interests in tangible property, intellectual property licences, or intellectual property. Treating assignments of such rights as security interests can have significant effects on securitisation.

4.8 Section 42 – Meaning of *Proceeds*

42(1)	The reference to a "dealing" is perhaps over-broad, or else should be clarified. For example, does it include granting a new security interest, or letting the property for hire?
42(2)	What is this section designed to achieve? It appears that the Bill only recognises security interests over transferable property, and if the property is not transferable there could be no security interest under the Bill. If it was possible to have a security interest over non-transferable property, then why should it not be possible to obtain a security interest over proceeds (e.g. compensation for termination of a licence)?

5. Possession and Control

5.1 Section 43 – Meaning of *Possession*

43(5)	We presume that possession has been used because special priority is given to acquirers of chattel paper who take possession of it under section 118. It may also be helpful to set out when non-electronic chattel paper is possessed. Chattel paper may be executed in counterparts. If possible, the Bill should make it clear whether it is possible to possess such chattel paper and, if so, which copy the acquiror must take possession of to perfect its security interest.

5.2 Section 47 – Control of a Letter of Credit

	The drafting of this section is somewhat unclear: • The requirement that the issuer of the letter of credit must consent to the assignment is an unnecessary complication, as no such consent is often currently necessary. • Why the reference to "assigning the proceeds" of the letter of credit, when all rights may be assigned? We are not sure why the definition of "controllable property" only includes a "letter of credit" and does not extend to similar contingent instruments, such as bank guarantees or performance bonds.

5.3 Section 48 – Control of investment entitlements

	There should be a provision similar to section 45(4) covering the position where someone on the secured party's behalf is registered as owner of the investment entitlement. As discussed above, there does not seem to be any provision covering the position where the secured party is actually registered as owner of the investment entitlement. That, we suggest, should be regarded as possession.

5.4 Section 49 – Control of Uncertificated Negotiable Instruments

	It is unclear how this section deals with a negotiable instrument that is itself an instrument and is not evidenced by a certificate, for instance, a promissory note, letter of credit or a bill of exchange. Possession of that bill of exchange or promissory note should suffice. Alternatively, control could be obtained if it were endorsed in favour of the secured party. As negotiable instruments are defined by reference to an instrument, in what

	circumstances would it be represented by a certificate that is not the instrument itself?

5.5 Section 51 – Definition of *Circulating Asset*

51(1)(a)	We suggest that control would be sufficient, but also there should be a new test as to dealing with the asset being restricted. This would more accurately reflect current law. The relevant test is whether the grantor is in the document, or by conduct, given the power to deal with the asset in the ordinary course of business. More generally, the current position is that the holder of a floating charge can protect its position against execution creditors, and also against the Australian Tax Office in relation to notices under s218 of the *Income Tax Assessment Act 1936* and similar provisions, by providing for automatic crystallisation of the charge. This protection should continue.
51(2)	Under current law, an absolute assignment of accounts could not be a floating charge, and thus would not be available for preferential creditors. If there is an absolute assignment, there is no requirement for the proceeds to be paid into a proceeds account. It should be sufficient if the register indicates that it is an absolute assignment. The same principle should also apply to a transfer to chattel paper (if that concept is retained).
51(2)(b)	As mentioned above, "control" only applies to a band of assets, and not all possible current assets. This points to the need for a wider definition of restricting dealing. There is, it appears, no definition of control for currency, or a negotiable instrument that is evidenced by a certificate (or is an instrument).

5.6 Section 52 – Control of a non–ADI Account that is the proceeds of inventory

	We have suggested wording in the Annexure to our initial submission in August. We suggest that the tests should not be 'controlled' which is already used in a different context in relation to what is or is not controlled in the context of 'controllable property'. It should be whether dealing with the asset is restricted, with the requirement (as per recent English cases) that proceeds be paid into an account in which there are some restrictions. It should be noted that in that drafting we have assumed that ADI account is defined to include accounts with overseas banks and other similar financial institutions.
52(1)	The same principles should apply to an account with an offshore bank as apply to an ADI account. Equally in subsection (2), the money should be able to be paid into an account with a non-ADI offshore which is under control. This is not uncommon in foreign currency transactions.
52(2)(b)	The reference to a person's "usual practice" is unduly restrictive, and may be

	difficult to prove as a matter of fact. For example, payment into the account may be a new requirement, or it may relate to a "one-off" asset or payment. It may be clearer (and closer to the current position) if the section were expressed the other way around: namely, that the secured party had control unless it is shown that the grantor's usual practice, with the express or implicit consent of the secured party, is to pay the proceeds elsewhere.

5.7 Section 53 – Control of inventory

53(2)	This section should be deleted. The current relevant test as to whether or not there is a floating charge or a fixed charge over what otherwise might be stock-in-trade, is whether there is a restriction on dealing. There should be no separate test in respect of inventory. If the definition of "inventory" remains wide, then this is an onerous requirement. This definition appears to assume that inventory is always goods which can be "removed". At the moment the definition includes a wide variety of property. It should also be possible to have control in this manner if the grantor agrees not to dispose of the relevant inventory. That would make it closer to the existing fixed charge requirement.

6. Part 2.1 – Security Interests: General Principles

6.1 Section 59 – Security interests in after–acquired property

	We question the purpose of Section 59. This section merely states that the agreement may provide for the security interest in after-acquired property – it does not deal in any way with the consequence of the agreement having done so. Issues may also arise in the case of after-acquired land. Currently, a registered all-assets fixed and floating charge will at least give notice of the security interest over land owned by the company: given the exclusion of land from the operation of the PPS Register, this means that less notice will be available to those who wish to search the register than is currently the case. It is also unclear how this clause would affect the existing distinctions between, for example, legal and equitable mortgages as they affect after-acquired property. Currently, in the case of a legal mortgage, specific action is required on the part of the grantor before the security interest can be perfected, and there cannot be security over a future asset.

6.2 Section 60 – Security Interest in future advances

	Under current law, security interests can secure any obligation, actual, contingent, present or future, foreseen or unforseen. This section could be seen as limiting what may be secured, as the Courts try to give it some purpose. This section could more easily do its job, and preserve the existing position, by simply stating that a security interest may secure any obligation of any type, whether or not existing or contemplated at the time the security interest is created. We believe that the provision could be deleted without any damage. There does not seem to be any provision covering an ability to secure liabilities occurring before the security interest has been assented to in writing. There is no need to clarify that secure interests can secure any liability, as that is the current position.

6.3 Section 61 – When a security interest attaches to personal property

	It would be better for the section to say that security interest attaches to the grantor's interest or right in the property. Alternatively it should include a separate subsection that the security interest extends no further than the interest of the grantor in the personal property.

61(1)	This would be clearer if "both of the following have been satisfied" was inserted after "when" in the introduction.

6.4 Section 63 – Enforceability of security interests against third parties

63(3)(a)	The requirement of writing, is a significant departure from current law, with little policy justification, particularly in the case of absolute assignments. Currently there can be an effective assignment for value without writing in equity. We note that there are means other than writing by which it can be clear that the personal property is to be covered by the security interest (e.g. if the secured party is given control over it (where it is not "controllable property") or a notice is given to the debtor). The mere fact of registration should also be sufficient to mitigate fraudulent intercreditor claims. It should be sufficient that the description enables the identification of the property or that the grantor does some other act to appropriate particular property to the contract. This would be consistent with the existing general law rules governing appropriation of property to contracts. We also note that making signing an element of enforceability against third parties is problematic in the context of the *Corporations Act* assumptions as to due execution by a company: these assumptions, which are much relied on in commercial practice, are only available against the company concerned. In the event of challenge by another creditor or other interested party, a secured party would be compelled to prove a proper authorisation and execution process was followed by the company that granted the security. This is an outcome contrary to the policy objectives of section 129 of the *Corporations Act*. We also question the policy behind this departure from the current law and the potential impact on small business transactions such as commercial consignments. These transactions are often conducted by invoices and course of dealings, and not via formal written contracts, "signed" by the grantor.
63(5)	This would mean the effectiveness of a security agreement and a security interest depends on the intention of the grantor, which can change without the knowledge of the secured party. **Example:** A motor car dealer gives a security interest over its stock, describing it as inventory. Some cars acquired as stock are used as demonstrators, courtesy vehicles for customers, or vehicles for its staff. They will cease to be subject to the security interest. The secured party, on enforcement, does not know which is which. The result will be that there will be defensive registrations, so that the collateral will also be described in other ways, and registered under other descriptions, or alternatively, that secured parties who do not take this precaution will inadvertently lose out when the grantor does change the use. It would give grantors an easy avoidance measure. It is not entirely clear (though we note that foreign commentators have made certain assumptions) as to whether distinctions between legal and equitable security would still exist. For example,

	in whether section 28 in defining a secured interest to require there to be an "interest" effectively preserves the nature of the interest, albeit that the Bill gives it certain consequences. This can be relevant in determining priority between secured interest and other forms of interest in property.
64(3)(b)	The requirement for particularised description seems to us to be unduly restrictive. If description is necessary, a reference to all assets at a particular location, or in a particular business or by reference to a particular list or writing should suffice. This is important in relation to securitisation and project finance, and also cross charges between participants in a joint venture. As drafted, the requirement for particular types of description is a significant restriction on the ability of parties, currently enjoyed, to have security over what they like. It would be helpful if the Bill or regulations contained examples of the sort of description that would satisfy the Bill's requirements (both in relation to the requirements of this section and the requirements of the register), otherwise courts may interpret this strictly, particularly if they believe that the purpose of registration is to give notice of the particular property which should be apparent from the face of the register. We suggest the following: **Examples:** *1. All assets of the Grantor now or in the future used in connection with the Last Chance Gold Mine.* *2. All equipment of the Grantor at its Alice Springs factory.* *3. All the interest of the Grantor in the present and future Joint Venture Assets as defined in Badger Downs Joint Venture Agreement dated 8 August 2008.* *4. All gold now or in the future extracted at the Last Chance Mine and the proceeds of that gold.* *5. All present and future proceeds of any dealing with inventory of the Grantor in its widget division.* *6. All shares of the Grantor held in Patch Works Limited.* 7. *All accounts now or in the future referred to in [describe computer ledger].*

6.5 Section 64 – How a security interest is *perfected*

	As stated above, in our view, the definition of "perfected" or the drafting should cover the security interest becoming effective under foreign law (including where they do not have a notion of perfection). "Perfection" as drafted only deals with Australia. The difficulty is the drafting of other provisions assumes there can be "perfection" under the laws of other relevant jurisdictions. Simply extending the definition of "perfection" to cover perfection overseas will not be sufficient. "Perfection" may be an artificial concept under many foreign laws, and it may not be easy to establish an analogue to the Australian concept of perfection

	because: • it does not mean enforceability against third parties (because you can have that without perfection); • it does not mean doing the most you can do to protect your position (because then only "control" would be perfection); and • it does not mean doing what you have to do to be enforceable against a liquidator (because not all jurisdictions have this sanction.

7. Part 2.2 – Attachment and Perfection: Particular Situations

7.1 Section 67 – Attachment of security interests in after–acquired property

67(1)	It is not clear to us whether the concept of "after-acquired property" encompasses only things that are the property of the grantor at general law, or whether it is intended to capture property that is taken to be "collateral" under any other security interest granted by the grantor. For example, if a company has given a charge over its present and after-acquired property, and then acquires possession of an asset by way of finance lease, does the charge attach to the grantor's leasehold interest in the asset, or does it attach to the asset itself? The "substance over form" approach (and section 142(1), by implication) would take you to the conclusion that the charge attaches to the asset itself, and the priority provisions are more meaningful if you read it this way as well, but this is not clear. It is unclear how this section would affect the existing distinctions between, for example, legal and equitable mortgages as they affect after-acquired property. Currently, in the case of a legal mortgage, specific action is required on the part of the grantor before the security interest can be perfected, and there cannot be security over a future asset.
67(3)	We see no reason to include this provision. Relevant restrictions on consumer mortgages are included (and reflect the outcome of extended policy and legislative consultation) in the uniform *Consumer Credit Code* and presumably will be included under the new Commonwealth Consumer Credit Legislation the Bill should not add to them. If the provision is included, it should turn on whether the security interest is regulated by the UCCC or its Commonwealth replacement, rather than the type of goods the security interest relates to.

7.2 Section 68 – Proceeds when covered by security interest

68(4)	We have the greatest difficulty with the policy behind this subclause. It appears that there are many circumstances in which an asset can be sold subject to a security interest, without the secured party being able to prevent it. This seems to be the policy of section 124. In those circumstances, this seems to be particularly unfair on the secured party that it effectively limits the recourse to the asset over which it was counting on security. For example, proceeds can be amounts received in partial discharge of an investment instrument. If the market value of the investment instrument has increased, or the market value before giving rise to the proceeds, plus the proceeds, are less than the debt, there is no reason to limit recovery. A security interest in collateral generally is not limited to its market value, and the same

	should be true if it gives rise to proceeds. Note that the term "proceeds" also applies to the proceeds of any dealing. This can give rise to great unfairness, with little policy justification. Why should the rights of the secured party be limited? **Example:** A lender has provided a loan of $500,000 secured on shares or derivatives which are initially worth $700,000. The market falls through the floor so that the shares or derivates are worth $200,000. The grantor then sells the shares or derivatives, but so they would still be subject to the security interest. The shares or derivatives then again become worth $600,000. This would leave the secured party secured only with respect to assets worth $200,000 (the shares and derivatives) plus the proceeds. However, the proceeds are easily dispersed, and it may lose security over them. Thus, it may be left with security worth $200,000, even though its original security is worth $600,000. Sub-sections (4) and (5) have been introduced to since the first consultation draft but they do not address this issue. If it is retained, this sub-section should only apply where the proceeds have arisen because the grantor has transferred the collateral and no longer has an interest in it. For example, this section should not apply where the collateral is shares and the proceeds are a dividend payment, or the collateral is a physical asset and the proceeds are an insurance payment for damage to it.

7.3 Section 69 – Proceeds – Perfection when covered by registration description etc.

69(3)(b)	This should also apply to a right to payment of the sale price. It would be helpful to clarify the situation where a security interest perfected under a foreign law gives rise to proceeds in Australia (e.g. when a chattel or an intangible owned by a grantor located outside of Australia is sold and the proceeds paid into an ADI Account).

7.4 Section 70 – Proceeds – Perfection when not covered by registration description etc.

70(2), (3)	The reference to 5 business days is too short, particularly as the secured party needs to react to an event of which it may know nothing.

7.5 Section 75 – Tangible Property possessed by bailee – temporary perfection while negotiable document of title in transit

75	We do not see why a secured party should lose its security interest in collateral simply because the bailee issues a document of title, an event over which the secured party has not control.
75(1)(c)	In any event, the reference to 5 business days is too short. Again, the secured party appears to have no way of knowing whether or not the bailee has issued a negotiable document of title. Five business days is in any event a very short

	period for a large financial institution to realise that the knowledge is relevant, to work out that there are responses needed, and to put in place that response.

7.6 Section 76 – Tangible Property possessed by bailee – Return to Grantor or Debtor for dealing etc.

	If a secured party does need to register a security interest in order to continue to maintain perfection, the relevant time of perfection should date from the original perfection by control. This section seems to apply also so as to remove perfection altogether even though security interest is perfected both by control and registration. If so, it should only apply if the security interest is not registered. The reference to 5 business days is too short.

7.7 Section 77 – Negotiable and Investment Instruments – Return to Grantor or Debtor for dealing etc.

	We refer to our comments on section 76 above. The reference to 5 business days is too short.

7.8 Section 78 – Returned Tangible Property – Security Interest

	It is unclear why this applies equally to the grantor to whom possession is returned, and to the transferee of chattel paper who is a new party.
78(3)	In our view, the security interest should also be perfected by control.

7.9 Section 79 – Account or chattel paper in returned tangible property – Security Interest

	We are puzzled by the operation of this section . In particular, how it would work where the assignment of the account (or chattel paper) was absolute, that is it did not secure any obligation. What would the deemed security interest in the returned collateral secure? How would the transferee of the account learn of the return of the collateral, in order to be able to perfect it within the 5 business day period referred to? It is unclear why the person who receives a transfer of the debt arising on the sale should automatically receive a security interest over the goods. This should be left as a matter of contract for the two parties. The reference to 5 business days is too short.
79(4)	Why is temporary perfection required if the transferee's security interest is already perfected by possession or registration?

7.10 Section 81 – Collateral moved to Australia – temporary perfection after move

81	This should have an exception for such items as aircraft and ships only temporarily brought into Australia.

7.11 Section 83 – Collateral moved to Australia – location of collateral

83	This needs to provide rules for the location of investment entitlements. Sub-section (3) needs to deal with the portion where the issuer is an individual who moves, or has locations in several states. Either a more complex provision is called for or it should be left to general law.

8. Part 2.3 – Acquiring Personal Property Free of Security Interests

This part should not apply where the "security interest" is an absolute assignment of an account or chattel paper. In that case, the grantor has no interest capable of being dealt with.

Unless the Register will disclose restrictions on the transfer of property (and not simply security interests in that property), as we suggest, the provisions in this Part which relate to notice of breaches of a security interest will have little practical effect.

It is not always clear how the provisions of this Part will interact with section 116.

8.1 Section 84 – Scope of this division

	In our view, the Division should not apply when the grantor has nothing left to sell: that is, where the "security interest" is an absolute transfer. Under current law, leasing property other than real property does not give the lessee any interest in the property within the ordinary meaning of that term: a "lease" of personal property is just a bailment. Also, it is unclear how the Division is intended to apply in the case of interests acquired for value other than by way of purchase (e.g. a declaration of trust given for value).

8.2 Section 85 – Acquiring personal property free of unperfected security interest

85(1)(b)	The previous consultation draft provided that the purchaser would take subject to the unperfected security interest if it knew that the transfer breached the security agreement. We don't understand the reason for the deletion. This provision at least should continue. To allow a commercial party to obtain priority over a defrauded prior secured creditor in circumstances where they knew of the fraud is quite extraordinary and runs completely counter to many of the most basic principles of our commercial law. Even the Torrens title system, where registration is paramount, recognises such a circumstance as one which warrants interfering with the indefeasible title of the registered proprietor. It may be preferable to provide that this rule applies where the transferee has no knowledge of the security interest rather than knowledge of a breach of the security agreement creating the security interest.

8.3 Section 86 – Acquiring personal property free of security interest if serial number incorrect or missing

86(1)(a)	Our understanding is that all-assets security need not be described by serial numbers. This provision should only apply where property must be described by serial

	number (like the corresponding provision in s55(b) of the New Zealand legislation). If the property may (but need not) be described by serial number, then a search against the actual serial number of the property will not disclose a registration that perfected the security interest in that property. If property need not be described by a serial number, then it does not seem fair to extinguish the security interest of a secured party who has registered its interest but has not included the serial number of the property. It is not a significant burden to expect parties to search by grantor name, although a different rule could apply where as a result of a transfer of the property the registration no longer records the name of the owner of the property. Also, query the extent to which this section will actually apply. If collateral must be described by serial number, the registration is ineffective under section 199(a). This means that the security interest is not perfected and section 86 will not apply.
86(1)(b)	In our view, this provision should not apply when the transferee had actual knowledge of the transferor, and a search against the transferor would have revealed, for instance, that there was a charge over all its assets. As currently drafted, this provision significantly detracts from the worth of having an all-assets security. It would seem to be no great imposition to expect the transferee to conduct two searches rather than one.
86(1)(e)	It would be preferable to vary this to "the transferee has no knowledge of the security interest". We see no policy reason in the context of this rule for effectively enabling parties to assume that a known security interest did not prohibit a transfer of the property.

8.4 Section 87 – Acquiring personal property free of security interest in ordinary course of business

87(c)	This section could have very wide-reaching effects: case law traditionally interprets "ordinary course of business" very widely in this context, far wider than in the ordinary course of trading.

8.5 Section 88 – Acquiring personal property free of security interest in personal, domestic or household property

88(1)(c)	It is unclear whether the threshold is an amount per item, or the amount for an aggregate sale. **Example**: If a consumer buys a refrigerator and a stove from a kitchen supplier, each worth $3,000, or a load of 6,000 bricks at $1.00 per brick, how does the threshold apply? It is also unclear how this provision would apply if the market value is greater than $5,000, but the transferee (reasonably) believes that the market value is

	less than $5,000.
88(1)(f)	It may also be appropriate to limit the definition of "knowledge" that applies to this clause. The inclusion of constructive knowledge can be quite onerous, and is potentially inconsistent with the clause's aim of facilitating ordinary commercial transactions.

8.6 Section 90 – Acquiring personal property free of security interest in investment instrument

90(b)	This provision is unsatisfactory as currently drafted. Shares are often acquired by non-consensual transactions (e.g. compulsory acquisition under the *Corporations Act*, where an acquirer "mops up" minority interests). Also, shares can be, and often are, acquired under schemes of arrangement where the majority of shareholders can bind the minority to force a transfer. Schemes of arrangement are the currently favoured method for company takeovers. Similar things can happen with units in trusts and options. It is extremely important to retain this ability. For various commercial and legal reasons, it is vital for the acquirer following compulsory acquisition or a scheme of arrangement to acquire all shares in the company free of any interest.

8.7 Section 92 – Acquiring personal property free of security interest in motor vehicle

92(2)	We support the inclusion of this section in addition to section 81, although it may be possible to combine the two provisions into one. Given the existing special regulation of motor vehicle dealers, and the unlikelihood of consumers undertaking a search before completion of the sale, purchasers of motor vehicles should not be jeopardised by the existence or otherwise of a serial number registration
92(1)(h), (2)(g)	It may also be appropriate to limit the definition of "knowledge" that applies to this clause. The inclusion of constructive knowledge can be quite onerous, and is potentially inconsistent with the clauses' aim of facilitating ordinary commercial transactions.

8.8 Section 95 – Extinguishment provisions do not apply to non-constitutional security interests

	In this and other sections referring to security interests to which the Act does not "operate" it is not clear what is referred to. This extends beyond constitutional boundaries and so the heading is misleading. "Does not operate" we think should be replaced with "does not apply" – the language of Section 6.

8.9 Section 98 – Rights of secured party and transferee on acquiring personal property free of security interest

98(2)	This appears to us to be unduly wide. For example, it appears to subrogate the secured party to the rights of predecessors in title which relate to the property irrespective of what type of rights they are, and against whom the rights may be exercised. This should be limited to the rights as against the transferee or the rights arising out of the particular transfer. We note that, in many cases, the secured party will also have rights because the right to the purchase price is "proceeds".

9. Part 2.4 – Priority between Security Interests

9.1 Section 100 – Priority of security interests in same collateral when the Act provides no other way of determining priority

100(3)	In our view, a party who has a registered security interest should not be defeated by a party that takes a subsequent security interest in the asset by control when the subsequent security interest holder has notice of the registered security interest. We do not understand the policy requirement that would allow someone to disregard a pre-existing security interest, particularly one perfected by registration. It would be a return to the law of the jungle if a purchaser or security-holder were able, simply by acquiring control, to trump a security interest of which it had knowledge. This is a particularly important issue. It would significantly erode the flexibility and value of all assets security, if the security holder had to go to the trouble of obtaining control over every controllable asset in order to avoid losing priority, even to parties who took with notice. It would be burdensome, and would restrict the activities unduly of the grantor, if the secured party had to take control, for example, over every share in subsidiaries, or in a portfolio that an operating company had, or in other assets, in order to preserve priority. There are certain circumstances under a fixed and floating charge where they can lose priority, but never to a party that takes with notice. Why do secured interests perfected by control have priority over secured interests perfected by possession?
100(4)	Again, if the subsequent security interest holder has notice of the first, it should not get priority.
100(6)	If a secured party has a security interest by control, but subsequently takes one instead by registration and gives up control or loses control, but at no stage is unperfected, the priority time should perhaps be the date on which it was first perfected by control. However, the register should reflect the earlier priority date.
100(8)	It would be helpful to expand or clarify the priority rules that apply in this case, or else state that the general law applies. For example, priority could be established by the time of attachment, followed by the time of execution of the security agreement as a tie-breaker. Tie-breakers would be needed under these rules where there were two security agreements each granting security over an asset which is acquired later. Both would attach when the asset was acquired.

9.2 Section 101 – Priority rules and intervening security interests

101	If this section is designed to resolve circular priority positions, that is, where A has priority over B which has priority over C which has priority over A, it will not work, as there is nothing to say which is the ***first security interest***.
101(1)(a)	How can a security interest have priority over a security interest which does not exist? How do you select what sort of security interest the putative non-existent security interest would be?

9.3 Section 103 – Priority between constitutional and non–constitutional security interests

	It seems to us that section 103 could be deleted without any damage. It is hard to see what role the section should have. It certainly should not have the effect of privileging security interests which are covered by the Act over those which are excluded under section 6. The heading of the section is misleading, as the question of whether the Act applies to some security interests is not necessarily answered on constitutional grounds (see section 6). Why should the legislation prejudice section 6 interests and give them even lower status and protection than other dealings, which at least get some protection under the extinguishment provisions? This section effectively raises the whole question as to whether the arrangements referred to in section 6, including such things as set-off and netting arrangements, are security interests. In light of these concerns, it would be preferable to provide that the ranking (if any) between security interests and other interests (whether or not they are referred to in section 6) are to be determined under the general law.

9.4 Section 109 – Priority of purchase money security interests in inventory

109(1)(c)	The notice requirements would seem to be quite onerous for someone who has a retention of title arrangement in relation to a trading relationship. Also, it is not clear how the paragraph would apply to a party who has a charge over all assets (that is, a security interest that does not particularly describe the inventory), or if at the time the purchase money security interest is perfected there are no other secured parties. If notice remains a requirement, then it should be effective in relation to those secured parties who receive it, whether or not other secured parties receive it. In other words, the holder of the purchase money security interests would rank ahead of those who receive the notice.
109(3)(b)(ii)	If the description in the notice cannot be general, this could be very time-consuming on behalf of holders of purchase money security interests,

	particularly suppliers of goods under ROT terms. It should be possible to give a generic description.

9.5 Section 111 – Non–proceeds security interests in an account

111(3)	This section seems objectionable to us at least to the extent that it applies to assignments are in substance security interests, and we note that it is not found in the NZ legislation. It is unclear what, if any, steps the holder of the purchase money security interest could take to protect its position once it receives a notice. It is unclear why a purchase money security interest in an asset should lose priority over the proceeds of the asset in this way. In our view, receivables financiers should not be preferred over other secured creditors. The policy underlying the Bill is that the priority of a purchase money security interest should trace to proceeds; whether this policy is sound is open to debate but the rules should not tilt the playing field in favour of particular forms of financing over another, as to do so is contrary to the purpose of the reforms. In particular, we do not think that this provision should give the holder of a security interest priority over an earlier interest of which the holder was aware at the time it took the security interest. In general terms, if absolute assignments are defined as security interests, then assignments of receivables should be dealt with in the same way as other extinguishment provisions even though they are defined as security interests, and the approach should be consistent. The reference to 5 business days is too short.

9.6 Section 112 – Priority between competing purchase money security interests

112(1)	We understand the logic of having a short period because the secured party is aware of the grantor acquiring the possession, and should be prepared for it. Nevertheless, 5 business days still seems a little short.

9.7 Division 4 – Priority of security interests in transferred collateral

	The rules generally provide for temporary perfection of the transferor-granted interest for 24 months, but it is unclear why this time period was chosen. It seems too long a period to protect third parties and not long enough to protect defrauded financiers. We see no reason for a different rule (namely, 5 business days after knowledge is acquired) where another security interest is granted. By including this rule, the Bill therefore favours subsequent secured parties over other parties who may be prejudiced by the continuing security interest, but we see no policy justification

	for the difference in treatment. The logic behind these rules is not always clear to us: • Why temporarily perfect the transferor-granted interest as against purchasers for 24 months but as against secured parties for only 5 days after knowledge is acquired? • Why elevate the commercial interests of financiers over those of other commercial parties? • Why provide for temporary perfection, but then make it depend on the very uncertain test contained in clause 70?

9.8 Section 114 - Priority when Collateral Registered with a Serial Number

114(2)	The holder of the transferee's security interest should not get priority where it had actual knowledge that the acquisition constituted a breach of the transferor's security interest. This provision sits strangely with the fact that if the first and second security interest had both been granted by the one party, and the first security interest was not registered according to the serial number, but the second was, the first would still take priority. It seems an odd result if it should be different simply because the grantors are different. This section seems to throw up a problem with the terminology adopted in the Act in respect of referring to registration of collateral rather than registration of security interests. If the transferee granted security interest is in collateral that has been "registered with a serial number" then it follows that [so is the transferor granted security interest.] The point is there is nothing in the wording of the section to require the transferor granted security interest, as opposed to the property to which it relates, to be the subject of a registration by serial number. So the effect of the holder of the transferee granted security interest registering with the serial number would be to protect the position of the holder of the transferor granted security interest.

9.9 Section 116 – Priority of creditor who receives payment of debt

	This should not expressly prejudice the operation of insolvency legislation (relating to preferences etc). The provision is generally too wide – it enables creditors who are vaguely aware of security agreements, or that a company might be in trouble, to pursue payment, knowing that if they receive payment, it will be free of security interests. There should be some concept here of payments in good faith in the ordinary course of business. It is also unclear why this section applies only to certain types of payment. It may also be appropriate to limit the definition of "knowledge" that applies to

	this clause.

9.10 Section 117 – Priority of a person who acquires a negotiable instrument or an interest in a negotiable instrument

	In relation to instruments that are truly negotiable interests (that is, bills of exchange, promissory notes and other instruments that are under legislation are negotiable or are treated by the law merchant as negotiable), there are settled principles of law understood worldwide protecting bona fide purchasers for value without notice: this is the essence of negotiability. There is no need for any attempt at restatement or modification of these principles in the context of the PPS Bill. Provisions like the *Bills of Exchange Act* (which is generally believed to be a triumph of the drafter's art) and the law merchant as to negotiability are clearly understood, and well settled. There is no need to depart from them and there is certainly no reason for weakening concepts of negotiability. This is extremely important for the operation of the money-market which relies on bills of exchange, and on much of the banking system which relies on cheque clearance. Simply making this Act subject to the Bills of Exchange Act under section 18 would probably not achieve this aim.
117(b)(i)	This section makes a new qualification on negotiability and the ability of a party to acquire good title, which significantly erodes the concept of negotiability. Under the current law, only actual knowledge (not constructive knowledge) of defects will undermine negotiability. It may be better that this section simply state that a party who acquires a negotiable instrument (defined to include only instruments that are truly negotiable at law) acquires it free of a security interest if, under the *Bills of Exchange Act* or other relevant law, the holder takes free of all interests.

9.11 Section 118 – Priority of person who acquires chattel paper or an interest in chattel paper

	Given our views on the utility of the concept of chattel paper, we think it would be preferable to treat these priority issues (if they are retained at all) in the same way as accounts.
118(2)(b)	The purpose of this provision is unclear.

9.12 Section 120 – Priority between security interests and other interests

	It is unclear whether this section is meant to be exclusive. If it is, it seems implicitly to give an extraordinary privilege to holders of security interests over holders of other interests in property. Particular difficulties arise when the grantor of the security interest, has higher rights to the asset, than the party

	whose action created the priority interest, for example, if the person whose action created the priority interest just has a temporary right to possession of the asset. The section seems to apply whether or not the security interest is perfected or has attached, and irrespective of the time of creation. It is also unclear how this section sits with section 103.
120(1)	It is unclear as to how this fits in with the extinguishment provisions: that is, it seems to be an extinguishment provision all of its own, at least one in which the new interest (which could be ownership) takes priority over the security interest. If the new interest is ownership, then effectively the security interest will lose its value.
120(4)	By expressly referring to section 6(f)(ii), this means that section 120 would be interpreted so as to give priority over security interests which are covered by the Act over any other security interest of the type referred to in section 6. This is unfair. See our comments on section 102 above.

9.13 Section 121 – Execution creditor has priority over unperfected security interest

	Currently, an execution creditor has priority over an uncrystallised floating charge, but automatic crystallisation can trump them. This section would effectively replicate the position of an automatic crystallisation clause. There does not seem to be any clarification of the position of holders of security interests in circulating assets as against the Australian Taxation Office in relation to accounts and notices (e.g. under section 218 of the *Income Tax Assessment Act 1936*).

9.14 Section 122 – Priority of security interests held by ADIs

122(1)	Usually an ADI could simply rely on a combination of accounts or set-off, which is not a security interest. However, if the ADI goes to the trouble of taking a security interest, but there is already a security interest over the account which has been perfected, it is unclear why it should gain priority. It may be said in those circumstances that, as it has a right of combination of accounts or set-off, no damage can be caused to another party. However those rights of combination of accounts or set-off would have ceased when mutuality ceased when a subsequent party acquired a security interest in that account, or took an assignment of it.

9.15 Section 123 – Priority of security interests in returned tangible property

123(1)	See our comments on section 79 above. The questions addressed by this section would not arise if the question as to what happened in relation to

	returned goods where a party has an assignment of the account arising from those goods is left to the parties.

10. Part 2.5 – Transfer and Assignment of Rights in Collateral

It is unclear to us why it was thought necessary to have this part. This part has substantial effects on dealing with the rights of assignees to contracts, the law of set-off, netting arrangements and the nature of security interests. It goes far beyond what is necessary to have a system of registration of security interests, or even a PPSA model. It affects the rights between parties to transactions which are not security interests. It affects the rights of parties to contracts which are not security interests.

If the PPS Bill is meant to promote the flexibility and granting of security interests, it should not (as Part 2.5 currently does) limit the rights of holders of security interests; limit the rights of assignees of debts and contracts; and limit the rights of parties to contracts.

10.1 Section 124 – Transfer of grantor's rights in collateral

124(1)	We do not understand the need for this section. It seems to give a wide-spread licence to parties to ignore contractual prohibitions on transfer of personal property. It seems to allow them to do this whether or not the contractual prohibitions are in a security agreement. They could be in some entirely different agreement, for instance a shareholder's agreements. It would only seem to leave the parties with contractual remedies after the event. There does not seem to be any scope of have an injunction, or to exercise other proprietary rights before the event. The provision applies to "collateral" and any security agreement *or any other agreement*. We do not see why simply because an asset is the subject of a security interest, it should be free from any restriction on assignment. If for some reason there is a policy within the Act that all restrictions on assignment of any nature in relation to personal property can be ignored, then we wonder why it should only apply to personal property that just happens to be subject to a security interest. The holder of a security interest should be able to restrict dealings with his, her or its collateral: that is normally thought of as being the nature of a security interest. A key part of any credit decision is character, which also goes to the character of the person who holds the collateral. This would be seriously undermined if a grantor can simply transfer the collateral to another party, albeit subject to the security interest. An item of collateral may be a key part of the security, either because it is necessary for the grantor to be able to carry on business, or for the secured party to be able to exercise the security so as to continue that business. How does this provision sit with various provisions in Part 6, where a dealing may gain or lose priority or be free of the security interest according to whether or not it is in breach of the security interest?

	The effect of this section is also unclear in relation to: • collateral/property that courts have regularly said is unassignable e.g. insurance contracts and contracts of employment; or • assignment to a party incorporated in another jurisdiction, which may or may not result in Australian law ceasing to apply to that security interest. This section seems to be a substantial change from existing law, allowing the grantor of the security interest to deal with the property even though the security interest forbids it. It would be best to leave it as a matter to be dealt with between the parties. It should also make clear that this doesn't apply where the transferor has no interest to create, in particular, where it is a lessee, or it has absolutely assigned its interest in accounts or chattel paper. We read this section in this way because of the permissive use of the word "may" which indicates a power to override the restrictions in the document. This section would also appear to allow parties to override pre-emption provisions in documents. It would also destroy the value of set off rights on insolvency (as there would no longer be mutuality). The section appears to overlap somewhat with section 126, and give even greater ability to parties to contracts to disregard negotiated restrictions on assignment of the contract. If, contrary to our views, the policy of the Bill is to permit a transfer in breach of a security agreement or any other agreement, the Bill should say so more clearly, and it should spell out the consequences of such a transfer. Section 124(1) refers to restrictive provisions in either a security agreement or any other agreement. This suggests that the provision applies to restrictive provisions given in favour of persons other than secured parties. If this is correct, section 124(3) should be expanded to refer generally to the rights of the person for whose benefit the restrictive provision was given (rather than just the rights of the secured party). The effect of such a provision will be to encourage the use of foreign law, rather than Australian law, in contracts where the parties wanted to rely on prohibitions against assignment.

10.2 Section 125 – Rights on transfer of account or chattel paper

	This provision need not be included to achieve the policy of the bill, and should not be adopted without very comprehensive review. In many ways, it changes the rights of parties to contracts who are not parties to security interests. It is not necessary for the overall policy of the Bill. We see no reason why a law designed to reform the law of security interests should so substantially change the position of parties to transactions that are not in the nature of security. In particular, much of it applies in relation to an assignment, which is not a security interest in the traditional sense, and to

	contractual rights generally, whether or not related to an actual or deemed security interest.
125(1)	The interaction between sections 125(1)(a) and (b) needs to be clarified. Paragraph (a) contains no temporal restriction in relation to when the defence will have accrued or arisen. On that basis either paragraph (b) is redundant or paragraph (a) needs to be read down. If paragraph (a) needs to be read down then query in what other respects it is to be read down.
125(1)(a)	The language has now been modified and since the first consultation draft to resemble more closely the current law. We still query the need for it.
125(3)	This is an unnecessary departure from current principles: it should be left to the parties to decide. If a secured party has an assignment of all (or any) of the rights under a contract, the parties should not be free to deal with it: why can a party change what it has sold? Why should substitution be available? This sub-section will have a significant effect in such things as project finance where the nature of the thing being assigned is important, and in securitisation where set-off against the securitised debts is a major issue. It introduces considerable uncertainty, and the use of terms such as "commercially reasonably" and "material adverse effect" are fertile ground for litigation.
125(5)	This causes particular difficulty in the circumstances of project finance and also in many other areas. If a party has taken assignment of a debt, or a contract, why is it that the assignor can still change it? If the parties intend there to be a right to change it in some fashion which they agree is immaterial, then that should be left to the parties. It should not be up to the courts to determine whether or not modification is "commercially reasonable" or has a "material adverse effect". They may be matters on which the parties have their own views. It would be on that basis that they may have entered into the transaction.
125(7)	The transferor should simply be able to make an irrevocable direction to the account debtor to make payments to the transferee, as is currently the position. This seems to add significant difficulties and uncertainties in an area where currently there are none. Currently, if the account debtor receives notice of an assignment, or an irrevocable direction, it can comply with it. It might, but need not, as a matter of prudence, obtain proof as to its authenticity. For example, under paragraph (b), it appears that the direction would not work if the transferee fails to provide proof on the 6th Business Day. Also, we are not sure why the transferee needs to provide proof when the direction would have come from the transferor. One would normally expect the notice to have been supplied by the transferor.
125(8)	We do not understand why this clause is necessary, and why it cannot be left to the general law. For example, why can the account debtor ignore any

	irrevocable direction from the transferor which is not in the form of the Notice? Why is it that the transferee has only five business days to provide proof? It simply may not be possible in the five business days. If it eventually provides proof after a longer period then it should be effective from time of proof.

10.3 Section 126 – Rights on transfer of account of chattel paper – certain restrictions

126(1)	Further difficulties arise for borrowers who want to restrict the ability of banks to assign their rights in respect of loans made by the borrowers, say, to hedge or vulture funds. From the point of view of a borrower, the identity of a lender is important as they have significant ability to influence the business of the borrower, and can enforce, or waive, covenants etc. The provision, if it is retained, should also permit an account debtor to obtain injunctive relief to prevent a transferor from proceeding with a prohibited transfer. The introduction of this provision would encourage those parties to whom restrictions on assignment are important to select a law where this provision would not apply, particularly English law. This will have significant effects on the competitive position of Australian law firms and the import or export of legal services. If parties are encouraged to choose foreign laws then this will increase the cost to Australian companies and businesses of entering into such transactions as a result of the need to obtain foreign legal advice. The provision if adopted should not prevent the grant of an injunction to prevent an assignment, or the rights to terminate the contract. In many cases, damages will be inadequate. Finally, it is curious that this provision refers to a "transfer" of an account, and not other forms of security interest.
126(2)	This is unnecessary, even if sub-section (1) is accepted. For example, the account debtor should have an action against the transferee for inducing a breach of contract, if the transferee took with knowledge of the breach.

10.4 Section 127 – Security interests in intellectual property licences

127(1)	This provision is unnecessary, as it would be a rare security agreement that would be binding on a licensor in those circumstances. It is hard to imagine how a holder of an intellectual property, who gives a licence to use the intellectual property to a party who then gives a security interest, is bound by the security interest.

11. Part 3.1 – Agricultural Interests, Accessions and Commingling

The provisions regarding commingling are complex and create various problems. First, the current drafting has the effect that a party who has not negotiated an extended retention of title clause

gains the benefit of one: in our view, this is an inappropriate rewriting of commercial agreements. Second, some redrafting is needed to clarify that one's interest in the commingled mass is proportionate to the *value* of the goods contributed. Third, there is no clarity for whether the commingling or accessions provisions apply.

11.1 Section 129 – Relationship between security interest in crops and interest in land

129(1)	This section seems to leave a few gaps. For example, it does not seem to cover a position where a security interest in crops is granted, but a lease or mortgage of the land is granted after the grant of the security interest in crops, but before the perfection of the security interest in crops. It does not deal with a sale or "other encumbrance on" the land given before perfection of the security interest in the crops. If the land is sold before the security interest of the crops is perfected, by a mortgagee who is not subject to the security interest in crops, then the sale should not be subject to the security interest in crops. It does not seem to deal with security interest in crops being granted after the creation of some other form of interest in the land other than a lease or mortgage.

11.2 Section 130 – Priority of crops

	We recommend that this section be expanded to explain what the priority position is as between two competing security interests that both arise under the clause. It would also be helpful to expand on the meaning of "to enable the grantor to produce the crops" in section 130(b).

11.3 Section 131 – Priority of livestock

	We make the same comments as for section 130.

11.4 Section 133 – Scope of this division

	The boundary between accessions and commingling are unclear. Both are defined by reference to identity being lost. To give a few examples, which is commingling and which an accession in the following cases: • resin being added to chips to make chipboard; • resin being applied to paper to make a book; • resin being applied to the papers in a book to restore the book.

11.5 Section 134 – General rule that interest in accession has priority

	This seems to apply whether or not the security interest in the accession has been perfected. This seems contrary to the principles in the remainder of the legislation. The general law rule is that the accession, and the title of the owner of it, disappears when it becomes part of the improved property. In the absence of any security interest affecting the improved property, this presumably would continue. If there is a security interest over the improved property, then it would seem to follow that the rights of the owner of the accession, such as they are, have priority over a holder of the security interest in the improved property, but not over the owner of the improved property itself.

Section 135 – Accession installed or affixed before the acquisition of interest in improved property

135(c)	The policy rationale behind the requirement that the security interest have been perfected immediately after the person acquired the security interest, and have been continuously perfected ever since, is not clear. For example, if the improved property is acquired in March, the security interest over the improved property is perfected in April, but the security interest in the accession is not perfected until May, why should it matter whether the security interest In the improved property is perfected in March or April?
135(e)	This seems to be contrary to the policy of the priority provisions in section 100, in giving protection to an unperfected security interest over a perfected security interest when the perfected security interest takes with knowledge of the breach of the unperfected security interest.

11.6 Section 136 – Accession installed or affixed after acquisition of interest in improved property

136(c)	If the security interest is not even attached to the accession, why is this section necessary at all? How could a security interest attach to an accession, after its identity had been lost?

12. Part 3.3 – Commingling

As stated above, it is not clear to us the relationship between these provisions and those relating to accession.

12.1 Section 139 – security interest in tangible property that becomes commingled

139(1)	It would be appropriate for this section to also confirm that the security agreement will also be taken to have satisfied section 67(3)(ii).

12.2 Section 140 - Limit on value of obligations secured by interests in tangible property that becomes commingled, etc

	We question whether this is the correct approach, particularly in relation to a mass of fungibles.
	Mass of fungibles If the initial property is fungible and becomes part of an undifferentiated mass (e.g. wheat in a silo, or gold bars in a vault), rather than limit the amount of the obligation, it may be more appropriate to provide that the secured party is entitled to a proportionate part of the whole, or of the proceeds of the whole. Presumably, this provision should only apply when the security interest does not apply to the remainder of the mass. It would be of benefit if it could solve the issue of preserving security interests in fungibles which become part of a mass of fungibles. Clauses 139 and 140 do not seem to achieve that. **Other masses** For other masses, we question whether the commingling provisions are of assistance. The tracing of security interests in component elements into a security interest in a manufactured whole promotes, rather than resolves, uncertainty and conflicts between competing interests and does much to increase the complexity of the bill. Although we do not think the Bill should prevent such tracing where the parties agree to it (and the secured party registers accordingly), we question whether it is desirable for the Bill to promote it.
140(b)	There seems to be a drafting issue in Section 140(b) – it refers to the tangible property continuing in the product. We query whether the limit on the value of the continuing security should be referable to the value of the original property relative to the value of the whole product (or the original value of its constituent components) rather than its original value.

12.3 Section 142 – Application of section 177

142(2)	The use of the word "equally" in line 3 appears to be at odds with the "pro rata" mechanism in section 143. We recommend that it be deleted.

12.4 Clause 143 – Value of obligations if insufficient proceeds

	Mass of fungibles As stated above, if the property is fungible and becomes part of an undifferentiated mass, then the secured parties should be entitled to a proportionate part of the whole, or the proceeds of the whole. **Different secured parties** Presumably also section 143 should only apply when the security interests are held by different parties. **Timing** The relevant time should be the time at which the security interest is enforced or the property disposed of, rather than the time of accession, to cover fluctuations in value. Where the relevant collateral is a tangible which becomes lost in a mass (for instance, wheat in a wheat silo) then the secured party should be entitled to its proportion of the mass, according to the market value when the mass is dealt with, not when the amount is lost. Otherwise, there can be strange results, for instance, if the market value of the fungibles goes down after the commingling (in which case all other holders of interests in the mass lose and the secured party gets a windfall, or at least a fortuitous protection against loss), or it goes up (in which case the others get a windfall).

12.5 Section 144 – Secured party who is entitled to seize property may remove it

	We query how this section can operate if, by definition, the separate identity of the accession will have been lost.

13. Part 3.4 – General provisions: priority and enforcement

13.1 Section 145 – Secured party must give notice of removal of collateral

	There should be some general notice provision like s170 of the *Conveyancing Act 1919 (NSW)* to allow deemed service by leaving notices at an address etc. This should apply to all notices required under the Act.

14. Chapter 4 – Enforcement

It is not clear why these provisions are necessary, particularly those regulating enforcement. Many of them seem to add to the cost and burden — and remove the flexibility — of enforcing security. It is unnecessary to have further regulation of powers which are regulated either under general law or elsewhere.

We understand that the purposes of these provisions is to be facilitative, so that parties do not have to insert enforcement provisions in their documents. However, they include a number of restrictions, which can significantly add to the burden of enforcement and remove flexibility. There appears to be one mental model and that is of a holder of a security interest enforcing the security interest over one asset immediately. That is often not the case, security interest can be over a business, or a large variety of assets, securing a variety of liabilities, actual and contingent, present and future. It may not be necessary or desirable to sell an asset immediately, or immediately to apply it against payment on secured liabilities.

We suggest that if it is intended that these be facilitative, that they be entirely that, so that any restrictions can be contracted out.

The legislation seems not only to say what the powers are, but also say a great deal about how they can be exercised, in an environment where there is no policy need to be so prescriptive.

Currently, the law relating to the exercise of mortgagees' powers works well, and is generally well understood. To the extent that any greater consumer protection is needed, it is afforded by statutory provisions such as the Uniform *Consumer Credit Code*, the *Trade Practices Act*, the *Australian Securities and Investments Commission Act*, state *Fair Trading Acts* and non-statutory arrangements such as the Code of Banking Practice.

There will be a further chance to review the policy in the current review of credit legislation and legislation relating to small business lending.

If the purpose of the legislation is to facilitate security, then any enforcement regime should be simple, there should also be simple regulations relating enforcement, rather than a plethora of different legislation. Further, at a time when there is a significant restriction of the amount of credit available, we do not think it appropriate to put further uncertainties on the enforcement of security, and therefore the value of the security, nor increases of the cost of enforcements.

A number of provisions require notice to be given to the "grantor". See for example clauses 160(4), 161(2)(a), 168(1)(a), 170(1) and (4) and 173(1)(a). Given the breadth of the definition "grantor", this could involve a large number of parties, being anybody with an interest in the relevant collateral. It would be preferable to limit this to the party who is actually a party to the security agreement.

There is nothing to allow service by post, or for deemed service if it is posted to the address, or left at the address which appears on the register, and is last known to the secured party. It would seem appropriate to allow for the security agreement to specify when notices can be deemed to be given, and the manner in which they are given. Further, the Act should have express provisions which would allow notices to other parties to be left at their last known address and to provide other usual methods of deemed service: section 182 does not cover this sufficiently.

In general, we think that provisions are unnecessarily onerous, giving rights to subsequent security holders and requiring notices and reports.

14.1 Section 149 – Application of chapter

149(4)	As stated above, we suggest that the regulation of consumer items should be left to the Uniform Consumer Credit Code or its Commonwealth successors.

14.2 Section 150 – Rights and remedies

	By listing just three parties, this section begs the question as to what happens to the rights between other parties. Presumably, this section should also provide that it does not derogate from other powers that the secured party may have in respect of the property. It may be better if this section were drafted to make it clear that except where it expressly provides to the contrary, the Part does not derogate from any right that any person may have against another in respect of the security agreement or the collateral, including the parties to the security agreement.

14.3 Section 154 – Contracting out of enforcement provisions

	Contracting out should be easy and complete, otherwise it reduces the value and flexibility of security. As stated above, we do not think that the provision should exclude consumer transactions, consumers are sufficiently protected elsewhere. However, to the extent the Bill does deal differently with consumer transactions, this should be by reference to whether the security interest is regulated by the UCCC rather than by reference to the nature of the goods to which the security interests relates. Existing security interests will not contain any clause "contracting out" of the provisions, as the relevant provisions did not exist when they were created. There should be a provision in the Bill, providing that security agreements will be deemed to have contracted out of the relevant provisions if they were entered into before the commencement of the legislation. In addition, there will very often be security interests governed by foreign laws, where there is a legitimate choice of law which will not contain an express contracting out of Australian provisions, but which covers property that happens to be in Australia as part of security over a portfolio. A prime example is where investment instruments or entitlements are in Australia. The Bill should provide that if a foreign law is selected as the governing law, the parties will be deemed to have contracted out of these provisions. The above two points would of course only apply where express contracting out would be permitted. As discussed above, we think that that should be general, but if the current policy is retained, then it would not apply in relation to collateral that is used predominantly for personal, domestic or household purposes (or, preferably, to security interests regulated by the UCCC). If the definition of “grantor“ is left wide, it may be difficult, if not impossible, to “contract out“ as it would require the secured party to contract with everybody with an interest in the collateral.
154(1)	This should refer to goods to be used predominantly for personal, domestic or household purposes *at the time they were initially acquired*. Otherwise there will be significant uncertainties on enforcement, for example where borrowers in financial difficulty allege that vehicles used in a farm or personal business were mostly used for personal domestic or household purposes. A secured party should be able to rely on the certificate as to the use of the collateral, similar to section 11 of the UCCC. Clauses 172(2) and 177 should be added to the list.
154(2)	This appears to take away from the ability to contract out of giving notice because the parties cannot contract out of obligations in relation to person who are not parties to the security agreement: for example, requiring notice to be given to other parties in relation to disposal. This would remove much of the benefit of being able to contract out, and would impose duties and restrictions in relation to the enforcement of security interests that are not found in the current law. In relation to 154(2) sub-section (5) is not adequate to deal with the issue.

	The secured party has no control over who may have an interest in the property. It cannot ensure that it contracts with everyone. Also it does not deal with any other rights that other holders of interest of the property may have by virtue of the provisions. The existing law in relation to mortgagees' duties should be sufficient to protect other parties with interests in the property. If the grantor is able to contract out, then all parties claiming through the grantor should be affected by that contracting out.

14.4 Section 155 – Relationship between this Chapter and the Corporations Act 2001

	Under current law, the ability to appoint a receiver or receiver and manager over a property is not dependent upon the *Corporations Act*, nor does it arise under the *Corporations Act*: It is something which is created under the instrument. The provisions in the *Corporations Act* relating to the appointment of receivers are relatively recent, dating from the Harmer Report, but the ability to appoint a receiver under an instrument dates from the 19th Century. Such instruments can be created by companies, bodies corporate whether or not registered under the *Corporations Act*, whether or not Australian, partnerships and individuals. They can be appointed over any type of property, wherever situated. Receivers under general law have duties quite apart from those under the *Corporations Act*. It would be better for the PPS Bill to recognise the possibility that receivers can be appointed by anyone over property anywhere and, if it is necessary to derogate from this in some cases, by regulation or otherwise to provide for it. To do otherwise, particularly in the case of entities which have assets in Australia but are not incorporated here, or entities that are incorporated here but have assets in many jurisdictions, will significantly derogate from the convenience of this method of enforcing security, and add to the cost.

14.5 Section 156 – Relationship with land laws

	This provision could cause significant complexity, for example where the land and personal property are in different jurisdictions. If the ability to choose between enforcement regimes is retained, it should not be subject to a requirement that the choice be "reasonable": it would be highly undesirable to suggest that it is "unreasonable" for a secured party to choose the enforcement regime that is most advantageous to it.

14.6 Section 157 – Proceeding as if personal property were land

	It is unclear how this section would operate. Section 157(4) says that, with two exceptions, the enforcement provisions do not apply. Section 157(6)(a) then says that this does not affect the rights of any other secured party. However, the enforcement provisions contain numerous provisions that apply for the benefit of other interested parties. How can these provisions be excluded without affecting the rights of other parties? What outcome is intended? If the secured party is proceeding as if the property is land, the notice requirements should not differ from those applicable to security interests over land. We do not understand why there is a need for the elaborate provisions giving all parties a notice that the mortgagee intends to enforce the securities as if it were land. There are already significant protections under general law and by statute in relation to enforcement of mortgagees' duties over land.

15. Part 4.2 – Enforcement of liquid assets

15.1 Section 159 - Enforcement of liquid assets

159(3)	This can put the account debtor under a difficult position, if it is unsure as to the efficacy of the security, or the validity of the notice. The timing is also interesting. Why should an account debtor get five days grace of payment simply because it needs to pay it to another party? Does this give an automatic statutory stay of 5 Business Days? This may be the one provision in the Bill where the 5 Business Day period is too long. This entire section 159 seems over-prescriptive. A better provision would be simply one that was general, and said that the secured party can exercise any of the rights of the grantor in relation to the collateral.
159(4)	Further, this seems to be inconsistent with sub-section (5).

15.2 Section 160 – Notice to higher priority parties and grantor

160(5)	The reference to 5 business days is too short. How does this section relate to clauses 161(2) and 162(2)? In combination, they seem to require a secured party to give 2 notices (possibly 3 in the case of s159(2)(a)). This whole section seems to be able to provide a lower ranking secured party the ability to force a higher ranking secured party to enforce its security. The current position, for good reason, is that the higher secured party has a higher right to the asset. There may be a number of good reasons why it does not wish to enforce, and it should not be forced to. The lower ranking secured party should only be able to deal with such rights as there are subject to the rights of the higher secured party.

15.3 Section 161 – Secured party may seize collateral

	This section seems to give the secured party the right to seize collateral, even though another party may have a higher right (which need not be a security interest) to possession, or where the grantor only has a limited right to possession. Examples might include where the grantor of the security interest is a beneficiary of a trust, or has a short-term right to possession. This raises the overall question as to whether the "collateral" is the asset, or the right of the grantor to that asset. Much of the drafting of the Bill seems to be premised on the former. Under current law, a party can only give a security interest over rights that it has. We understand that there may be circumstances where that principle may be sacrificed in relation to the ranking of security interests. For instance, where the prior interest is an unregistered lease that is regarded as a security interest, the rights of the lessor may lose to a perfected security granted by the lessee, but this should not be the case in relation to interests which are not "security interests". Otherwise innocent parties will lose their rights, and there might be an acquisition of the property of the prior ranking interest holders on unjust terms. We note that there is an apparent gap relating to the seizure of shares and any other property excluded from the definition of intangible property. The section should make provision for deemed "seizure" of other intangible assets like accounts. Seizure should be deemed to have occurred if notice is given to the account debtor and should not be necessary if notice has already been given to the account debtor, so that the secured party is in control in the wider sense. We do not understand the policy behind sub-section (3). If a secured party now has possession and control of an asset, so that all the world knows that it has possession and control, why shouldn't it be taken to have perfected its security interest? Sub-section (2) should be a general provision and not limited to Chapter 4.

15.4 Section 162 – Secured party who has perfected an interest in collateral by possession or control

	It is unclear what happens if the secured party has possession or control sufficient to be able to sell, but because of the nature of the asset the possession or control does not constitute perfection, but is perfected by other means.
162(2)	It is unclear what happens if notice cannot be given because the grantor cannot be found. It is also not clear what the notice needs to state. For example, a mere notice that the debtor is in default should not trigger the enforcement process. Rather, the process should only be initiated if the notice states (for example) that the secured party is to be taken to have seized the collateral.

15.5 Section 163 – Obligation to dispose of or retain collateral

163(1)	Because of the deeming provision in section 162, if a secured party has perfected possession or control of the collateral and the borrower is in default, this section forces an enforcement even though the secured party may not wish to enforce then. Generally, the thrust of the enforcement provisions seems to be that a secured party needs to seize an asset, and then having done so, must promptly sell it. The current law reflects a more reasonable commercial and policy position. That is, the secured party can choose its time for sale. It can wait before enforcing. It could use the asset to generate further revenue. It could achieve value out of the asset in other ways. It can improve its value. It can choose its time to obtain the best price. It can use the proceeds and revenue generated by the asset for the purpose of enhancing the value of other assets, or carrying on the business, so as eventually to try to generate further cashflow. The conceptual model behind much of the drafting seems to be that there is one asset subject to the security interest which should be sold as soon as possible. Reality is often very different.
163(3)	Under the current law, mortgagees' duties have given considerable latitude in relation to selecting the time for sale. It is very much a question of judgment subject to the overriding duty of good faith. Adding an extra requirement that there be no delay could give rise to a whole new charter for grantors to challenge enforcement "reasonableness". It gives a new field of uncertainty. It is a higher duty of care than the normal "good faith". Currently, secured parties are allowed to have regard to their own interests. Requiring them to have regard to the interests of a large number of other parties is a significant change, may be onerous and will certainly be a fertile field for litigation. In any event, we are not aware in Australia of there being any compelling policy reason to require prompt sale. There is no evidence that we are aware of that mortgagees are delaying enforcement other than for good reason (including concern for mortgagors). When mortgagees are exercising their powers, they are concerned in their own interests as much as the mortgagors to obtain the best price. That may involve choosing a moment, or developing the asset, or using the asset for another purpose.
163(3)(a)	We don't see why an express permission for delay is required. The default position should be the current one, namely that the secured party can sell the property at what it thinks is the appropriate moment, subject to its duties. Few security agreements, at least of existing security interests, specifically allow for delay. They are simply silent as to the timing. They should be regarded as permitting delay. The duties of a mortgagee under current law are for good reason, limited to the mortgagor and those lower ranking holders of security interest. The reasonableness test requires the secured party to take into

	account a whole lot of other parties' interest. It should be remembered that the secured parties' interests is to obtain the best price, it should be able to make a commercial decision without fear of suit, as to when that might be. It should not be at risk if it thinks the market will go up and holds, and the market price goes down.

15.6 Section 164 – Apparent possession of collateral

	In our view, the "necessarily incidental" test is a harsh one, particularly by comparison with other tests which relate to reasonableness.

15.7 Section 165 – Seizure by higher priority parties

	The reference to 5 business days is too short. It is not uncommon in corporate financing arrangements for secured lenders to agree that a junior-ranking lender is to have control (or no control) of any enforcement proceedings. Section 165(1) would not allow the secured parties to enter into an agreement of this type. The "contracting out" list in section 154(1) should be extended to include this section as well. We query whether this should require a notice in all circumstances. If the higher ranking party is entitled to possession as against the other parties, it should be able to take it. The provisions for seizure by higher ranking parties should not be limited to security interests – if another party with a prior claim to a secured party is entitled to possession of the property they should be able to take it.
165(4)	This seems to be drafted so as to always require a longer period than 5 business days. If the collateral is immediately deliverable, and the higher ranking secured party is entitled to it, then it should be immediately delivered. There is no reason why a lower ranking secured party should have any longer grace period in delivering possession than the grantor.
165(5)	A higher priority party should not be obliged to pay costs incurred by a lower ranking party: such a rule seems to give a blank cheque to a lower ranking party. There are no tests in relation to the incurring of costs by the lower ranking party, and they could be incurred in a way that would not have been incurred had the higher priority party acted, and may have been incurred before the higher priority party knew that action had been taken. The normal rules should apply, namely that a lower ranking security holder should take its chances. If it thinks the seizure would justify the costs and be able to pay out the higher ranking creditors, then it could do so. If not, it wears the risk that there is insufficient money to pay its costs and the higher ranking party. This provision significantly tilts the balance in favour of lower ranking secured parties.
165(7)	This timing limit seems unduly restrictive, given that the higher priority party

	needs to receive and check through invoices. The current general rule is that a higher priority party is entitled to immediate possession as against lower priority parties. This section should not limit section 161 in the general law power to take possession. The current law position should be preserved, which is that a holder of a security interest only has to compensate grantors of security interests and lower ranking owners of security interests if it breaches its duties as mortgagee. The provision also gives undue leverage to lower ranking parties to put commercial pressure on higher ranking parties who may want to have a work-out or leave a business running in the interests of overall recoveries.

15.8 Section 166 – Secured party may dispose of collateral

	As mentioned above in relation to section 161, this seems to suggest that a secured party may sell collateral, even though it only has limited rights to that collateral. Seizure should not be necessary for the secured party to sell collateral. It may be that control and possession is not necessary for sale: it might be sold "as is, where is", or the secured party may have sufficient possession or control to be able to sell the asset without having sufficient control or possession to have perfected the security interest. There may be circumstances in which the secured party may or not wish to control or possess the collateral, for example, because of the risk of incurring liability as a result (e.g. environmental liability).
166(2)	It would be better for the Bill to provide that a secured party may lease the relevant collateral subject to the terms of the security agreement (rather than permit the parties to agree that the secured parties may lease the collateral). This is consistent with the powers of a receiver and liquidator under the Corporations Act (both of whom may dispose of property in any manner). Again, powers to lease etc. will be subject to overall secured parties' duties, so there is little avenue for abuse. We do not see why section 166(2)(b) should not apply to some forms of properties for personal, domestic or household purposes, subject to the UCCC. For example, if the collateral is a private plane, if the best way to recover amounts from it is a lease for a term, why should the secured party not be able to lease it?
166(3)	We wonder what the purpose of this section is. The collateral is not entirely disposed of, because the owner still retains ownership: it is merely subject to a lease. This would be particularly concerning if that was held in some way to extinguish the security interest, which would still bite in relation to the collateral. We wonder whether this section is necessary.
166(4)	We wonder why this section is necessary: surely all enforcements of security agreements must be in accordance with the security agreement? Further, this seems to suggest that the power to dispose of an intangible other

	than a licence can be done otherwise than in accordance with the terms and conditions of that intangible.
166(6)	This seems to be inconsistent with section 124(1).
166(7)	We don't understand the note at the bottom of this subsection . We do not read section 68 and subclauses 42(2) and (3) to have that effect. If they do, they should be changed. The proceeds are just as much subject to the priority arrangements as the collateral itself; the only difference being that they are able to be applied directly in payment of the secured obligations. This would be a peculiar result.

15.9 Section 167 – Disposal by purchase

167(3)(b)	Because of the elasticity of the concept of "market value", this could give significant avenues for unscrupulous holders of security interests.

15.10 Section 169 – Duty of secured party disposing of collateral to obtain market value

	This considerably extends the number of people who can bring a claim. We think that there should be some limit, otherwise this legislation seems to give a possibility of a great deal of tactical or nuisance litigation. For example, this would allow anyone with a unit in the unit trust to bring an action against a secured party who enforces the security against the trustee. We wonder why the debtor is referred to in the section as the debtor has no interest in the collateral.

15.11 Section 170 – Secured party to give statement of account

170(1),(2)	This may be burdensome if the sale is being conducted in many lots over a period of time. Its purpose would be served if an account was required to be given at the end of the enforcement period when all assets have been disposed of. Where a financing was significantly "underwater", the parties involved or interested may simply give up. In those circumstances, it would significantly reduce the cost of enforcement if accounts were only given on disposal.
170(3)	This could be burdensome, particularly estimating receipts under a lease. It would be much better simply to give an account after a period which deals with all receipts over that period, rather than an item by item description. Otherwise, this could be extremely time consuming and costly for a secured party enforcing a security interest over a collection of assets, or over a business. A lease should not be regarded as a disposal. The lessee under such a lease should only be able to obtain the rights under the lease. It should not be entirely free of the rights of the owner of the property, who would be the lessor, or the secured party.

170(5) & (6)	This effectively requires the secured party to prepare accounts of a business that is taking over a business. Companies are only required to produce accounts annually, and have a significantly longer period than 1 month in which to produce them. This would create more onerous obligations in relation to their accounts.

15.12 Section 171 – Disposing of collateral free of interest

171(1)(a)	Given the width of the definition of "grantor", this would give the secured party the right to dispose of the asset free of interests which are superior to that of the secured party.
171(1)(c)	This should relate to all lower ranking interests, not just security interests.

15.13 Section 172 – Proposal of secured party to retain collateral

172(2)	It is unclear why this provision is necessary. It seems to be quite an onerous requirement on a secured party, particularly where it is deemed to have seized the property and has still not yet made up its mind as to what actions to take as a result of the default. This seems to be generally incompatible with the normal provision that a security holder can choose its moment to exercise its power of sale, and also hold onto property in order to extract value from it. Parties who are lower down the priority chain can always force a sale by paying out the higher ranking security interest.

15.14 Section 174 – Retaining collateral free of interests

	It is unclear why this provision is necessary, given that there is the remedy of foreclosure, and also that a secured party has an ability to buy the assets under section 167. Unlike foreclosure and purchase by the holder of the secured security interest, there doesn't appear to be any full or partial discharge of the amount secured. If the enforcement provisions are excluded for deemed security interests, like commercial consignments and leases, then it would be appropriate for there to be no discharge of the secured obligation. They should be able to exercise their current rights, that is, to keep the property, and to sue for the amount recoverable (albeit, mitigated by their retention of the assets).

15.15 Section 175 – Persons entitled to notice may object to proposal

	The normal rule is that a challenge to a power of sale requires the payment into court of the amount secured. This is designed to stop unnecessary and vexatious interference. This provision should be more clearly limited to notices

	where the secured party proposes to acquire the property itself.

15.16 Section 176 – Person making objection may be requested by secured party to prove interest

	This section may not be particularly helpful: if there is a dispute of this kind, it is likely to end up in court.

15.17 Clause 181 – Entitled persons may reinstate security

	This is a concept which should be left to credit regulation, if it appears at all. This is a significant and unnecessary departure from existing rights, which should not be retained in the Bill. In particular, it is unclear why it is necessary to extend any protection given by the UCCC by prohibiting contracting out of the right in the context of consumer transactions. Once an amount is accelerated, a grantor should not be able to reverse the acceleration. This can have significant costs in relation to the secured party who may have incurred break costs in relation to its funding position, or converted currencies. Unscrambling the omelette may be very difficult. The reasons why lenders have a right to accelerate loans are the same as the reasons for termination of any contract: that is, the terminating party can no longer have faith in the willingness or ability of the party to continue to perform the contract; or the basis of the transaction has substantially altered and is entitled to bring the relationship to an end; or as the ultimate sanction for non-performance. To change this right gives a "rogues charter" to allow borrowers to delay making payments of principal and interest, or maintain the security property, until the death knock and then making that payment of principal and interest and all other accruals or remedying the breach, before starting the process again. This will significantly reduce the value of security. If the grantor has waived its right under this provision, then this should also apply to everyone else.

16. Chapter 5 – Personal Property Securities Register

16.1 Clause 186 – Personal property securities register

186(4)	If the Registrar refuses access or suspends the register, the Bill does not offer any guidance about what effect would be had on priorities etc. This concern applies particularly in relation to temporary perfection.

16.2 Section 187 – What the register contains

187(c)	What other interests (other than security interests) are contemplated here?

16.3 Section 189 – Registration - application

189(2)(c)(ii)	If the Registrar is satisfied that the application is made in contravention of section 190, what redress does the security party have?

16.4 Section 190 – Registration – Security interests in personal property

190(1)	This is in fact an onerous requirement and will put secured parties into a difficult bind given the uncertainty of the "in substance" approach. If a party that has some sort of right or interest with respect to property believes that there is a chance that it may constitute a security interest (as defined in the Act) and be registerable under the Bill, then it will register it in order to avoid the consequences of failure to register, that is, a loss of priority plus invalidity. It will do this even if it believes that the better view is that it is not, if say, there is a 10% or 20% chance that it is a security interest. The parties should be entitled to register on reasonable grounds that it believes that there is a risk that its interest is a security interest and registerable. With such broadly worded provisions, parties should be at liberty to be as cautious as they like in applying for registration. From discussions on the previous exposure draft we think the concern this is trying to address is unscrupulous financiers running out and taking out "pre-emptive" registrations in order to gain a priority position – this can be addressed by a requirement that the person believe on reasonable grounds that they will obtain the interest for which they are applying for registration – it shouldn't matter whether or not it's a security interest. Alternatively the requirement should be that they believe on reasonable grounds that they will have an interest in the property and that they believe that interest might be regarded as a security interest.

16.5 Section 191 – Registration contents

Item 1 – the secured party	Often, security is held by a trustee for a shifting band of secured parties. The requirement should be satisfied simply by mentioning the name of the trustee.
Item 2 – the grantor	It is unclear how much detail will be required, especially if the secured party does not have all the detail to hand. The grantor is defined not only to be the actual grantor of the security interest, but also all parties with an interest in the collateral, as well as the trustee for the grantor, and the secured party may have no way of knowing who they are. As stated above, they may be legion. This

	seems to put a lot of information onto the register which could slow down the registration of security interests. A solution may be to limit it to the actual party that grants the security interest.
Item 4 – the collateral and proceeds	It is unclear how an "all assets" charge would fit with this requirement. If the collateral cannot be described without having to describe serial numbers, the legislation will be very retrogressive: the relevant state legislation has entirely removed such a requirement. Use of the term "equipment" includes property that is not in any sense either inventory or equipment in the normal use of those terms, which would render the register somewhat misleading to those not familiar with the detailed provisions of the legislation. A simple mention of "proceeds" should be sufficient to describe proceeds. More generally, we do not see why the classification of property as consumer, equipment or inventory is necessary – nothing in the Bill turns on what the registration says about this classification, so the requirement to specify this description seems to achieve nothing more than to create a risk of invalidity as a result of a misdescription. We also query why the registration must relate to a single class of assets. It seems undesirable to apply have to review multiple registrations (each with the potential for an invalidating error) in order to protect a single security interest. In particular, how does this apply in the context of an “all assets” security? It is unclear how the Bill proposes to deal with the transfer of accounts in batches, for instance in a securitisation. It would help if the permitted descriptions are as broad as possible. For example, parties should be able to distinguish between accounts by any variety of descriptions, including designations made in books or other documents or records. It would help if the regulations gave examples, and a sufficient number of examples, to make clear that there is a wide field of possibilities. Otherwise, courts may interpret this strictly. It should be made clear that the examples do not limit the other ways in which registration can be effective.
Item 6 – The end time for registration	We note our earlier comment on the breadth of the definition of *consumer property*. Seven years may be an appropriate time for cars or household goods ("consumer property" in the ordinary sense), but it may be inappropriately short for many other types of property owned by individuals (e.g. investments). As noted previously, it would be better to refer to security interests regulated by the UCCC rather than security interests over particular types of property. We also query the 7 year rule for serial numbered property – in particular, how does this apply in the context of an “all assets” security?
Item 7 - Subordination	We do not see the need for the registration to describe subordination arrangements. The parties to these will obviously know about them. What purpose is served by disclosing their existence to the world? Requiring these details creates the risk of invalidity due to misdescription, particularly if the subordination arrangements change (e.g. because one party is discharged).

Item 9 – any matter prescribed	There should be provision for insertion of information about restrictions of dealings with the asset, or the granting of further security interests.

16.6 Section 196 – End of effective registration – general rule

196(1)(c)	This unacceptably puts parties at risk of mistakes or failures by the Registrar or the Registry that cause the description to be "unavailable".

16.7 Section 198 – Defects in registration

198(2)	It is unclear whether this means that, for example, a registration is ineffective if the secured party fails to disclose all parties interested in the collateral (and therefore currently defined as "grantors") even if it did not know about them. There should be some saving in relation to misleading entries honestly made by the secured party, otherwise there is a very heavy onus on the secured party and a significant risk of misstatement and loss of the security.

16.8 Section 199 – Ineffective registration – particular defects

199(a)	It is not clear what property is contemplated to be covered by the regulations as to be covered by serial numbers. This could have serious effects in relation to "all assets" charges.

16.9 Section 200 – Registration continues despite certain defects

200(2)	The reference to 5 business days is too short.

16.10 Section 203– Registration amendments – security interests in personal property

203(1)	The same comment applies here as section 189(2). That is, there may be some doubt as to whether an interest or right it s security interest. In that case, the party should be entitled to make any defensive registration, and require the Registrar to enter it into the Register.

16.11 Section 207 – Amendment demand

207	There seems to be no equivalent requirement for the party seeking the amendment to have a belief on reasonable grounds.

16.12 Section 208 – Scope of division

208(1)(c)	It is not clear to us why a security trust instrument should be excluded.

16.13 Section 209 – Administrative process – amendment notices

209(5)	Five business days is far too short a period for a large financial institution to respond to the demand, to find the appropriate materials in its files, and to compose a response.

16.14 Section 210 – Administrative process – registration amendments

210	This seems to be extraordinarily biased against the secured party, particularly in giving it five business days to determine what needs to be done, identify the relevant issues, and assemble the facts to make a response.

16.15 Section 223 – Verification statements – notice to be given to grantors etc.

223(3)	This seems to require that every time a secured party registers a security interest it needs to give notice to the grantor and others, adding to the paperwork.

16.16 Section 224 – Verification statements – to be given to secured parties etc.

	If the register is electronic and can be checked electronically by the secured party, the Registrar should not need to add to its costs by giving the secured party a copy of the new registration or amendment initiated by that secured party.

16.17 Section 227 – Search – who may search, and for what purpose?

Item 7	This should extend to parties who propose to deal with a person, who are to take an exposure to risk on that person, but not "provide credit" to it. An example would be parties that propose to enter into derivatives with it, or some other contractual dealing.
Item 14	This should extend to administrators appointed under different laws outside Australia, that are analogous to receivers, administrators, liquidators etc.

17. Chapter 6 – Miscellaneous

17.1 Section 233 – When certain unperfected security interests vest in grantor

	This is a departure from the New Zealand system, where the only sanction for failure to register is loss of priority. The invalidity of the security in liquidation and voluntary administration is a heavy sanction, and we are concerned that the current drafting will create unnecessary difficulties. While certain charges against a company are registrable under the *Corporations Act* and the consequences of non-registration within a certain period is that it was void against a liquidator, this only applies to certain categories of clearly defined security interests. By contrast, given the vagueness of the term "security interest" under the PPS Bill, parties will through abundance of caution register arrangements which may have the remotest possibility of being security interests. It is particularly draconian if the penalty of misstatement in a registration is removal from the register (and thus removal of the efficacy of the security interest). The difficulty is that if the goal of the Register and this provision is to give some notice to unsecured and other creditors, it does not fully achieve its purpose. There will be many security interests which were perfected by control or possession. It only covers assets with an Australian connection, not assets overseas.
233(1)	The sudden death cut-off date is too draconian. Secured creditors may get no warning, in particular, of the decision of the directors to appoint an administrator. Under the existing Corporations Act, there is a period in which the chargee can register a charge. One possibility is to say that the relevant security interest will be void unless registered by the later of the relevant dates referred to or a period after the date of creation of the security interest. It would be better to have the relevant provision providing that the security interest is void as against the relevant insolvency official, rather than vest in the official. An administration is often a temporary appointment. If the administrator is removed, then it still should be possible for the secured creditor to retain its rights. Under this arrangement, it would lose them irreparably. The court should have the discretion to allow perfection after commencement of the winding up etc, as the court currently does in relation to charges.
233(4)	We find this section very difficult to follow.

17.2 Section 234

	We think this section is too narrow in scope. Any person who has their rights vested in the grantor should be entitled to compensation. The only qualification on that should be that where the right confiscated secures another obligation it should not entitle them to additional compensation over and above the other obligation. As drafted the section is too narrow and risks a situation where property of a kind not specifically identified is confiscated without appropriate compensation being in place.

17.3 Section 235 – Rights and duties to be exercised honestly and in a commercially reasonable manner

	This additional duty is unnecessary and may be counterproductive. It appears higher than any existing standard and will create a great deal of uncertainty for all parties, as well as an opportunity for litigators. Currently there are general duties revolving around good faith, and are generally well understood. There is some application of statute where necessary under the *Trace Practices Act* or the *Australian Securities and Investment Commission Act*, the state *Fair Trading Acts*, the Uniform *Consumer Credit Code* and other legislation. If the purpose of the legislation is to make it easier to obtain security and to obtain effective security, then this section significantly derogates from that principle and will add to the cost of enforcement. We understand that a similar test applies in Canada, and that enforcement costs there are higher. Our understanding of the Canadian experience is that this section has also had a significant impact on transactions that are not security interests, such as guarantees. If such a section must remain, it should simply include an obligation to act in good faith. It is unclear why sub-section (2) is necessary. Because it omits to refer to the interests of that person as well as "some other person", it appears to indicate some derogation from the principle that a party is entitled to act in accordance with its own interests.

17.4 Section 236 – Entitlement to damages for breach of duties or obligations

	This section is objectionable. It appears to extend the field of parties entitled to damages to those currently owed no duty of care. This will significantly increase the difficulty and expense of taking and enforcing security.

17.5 Section 237 – Liability for damages

	Most legislation providing for registers in relation to land give rights to statutory compensation for misstatements in the register, rather than trying to absolve the registrar from responsibility. The absence of such a statutory compensation scheme, coupled with the immunity from suit, is an unnecessarily retrograde step.

17.6 Section 241 – Secured party to provide certain information relating to security interest

	This seems onerous, particularly the requirement to itemise property when the security may just cover all assets, or a class of assets. The holder of the security interest has no such information. The provision could be made of little effect if, as we presume would be the case, all parties make an agreement as provided in subsection (6).

17.7 Section 273 – Presumption in case of related entities etc.

	What is the rationale for including presumptions about transactions between related entities? The commentary states that the presumptions "are derived from current state legislation". Which legislation? The presumption that a related company does not provide value to acquire an interest in personal property may cause problems in structured transactions, and securitisation transactions. There are many transactions in which one or more legs are within a group of companies,. As sated above, "value" should not be a requirement for an effective security interest. It does not seem appropriate to require a criminal standard of proof ("beyond reasonable doubt") to rebut the presumptions in this clause.

17.8 Section 281 – Initial application of this Act – references to fixed and floating charges

	Where parties have agreed between themselves a division between a fixed and floating charge over assets, that should continue so that an asset which is subject to a floating charge under an existing fixed and floating charge (that is entered into before the relevant time) should be regarded as circulating assets and fixed charge assets as non-circulating assets. The legislation should preserve the existing position in relation to the ATO and execution creditors, that is, that the automatic crystallisation is effective. If the suggestion made above is adopted, then this be acceptable as it would continue the effect of existing documents. If not, then what is meant by "a security interest arising after the registration commencement" should be clarified. Does that exclude security interests arising under security agreements entered into before the time over any assets acquired after that day? Or does it include security interest in relation to assets acquired after that time? This provision does not apply to State and Territory Acts and instruments made under them presumably because of constitutional limitations. Will the states and territories enact similar legislation which includes a comparable provision for references to fixed and floating charges in state and territory acts and instruments made under them?

17.9 Section 282 – Initial application of this Act - enforceability of transitional security interests against third parties

	This section only provides that an existing interest is enforceable "in respect of particular personal property" if it would have been "so" enforceable before the commencement time . The "so seems to suggest that it must have been enforceable in respect of that particular personal property This seems to leave unprotected existing security interests to the extent they cover assets acquired after the time. The words "in respect of particular personal property" should be removed.

17.10 Section 284 – Correct time

	This provision applies the priority rule in section 120 of the PPS bill to interests arising under legislation or a rule of law or equity after the "registration commencement time". What happens to such interests arising before that time? Will the states and territories enact similar legislation which includes a comparable provision for interests arising under states and territories acts and instruments made under them?

18. Part 7.3 – Division 1 – Priority on insolvency / bankruptcy

This division should not apply to the security interest to which section 233 does not apply, particualrly absolute assignments.

Otherwise it rewrites history - deprives the assignee of property to which it is absolutely entitled. In circumstances where it may not even have the records or knowledge to know it needs to register a security interest and would not expect to have the need to register the assignment as a security interest.

Constitutional Efficacy

We wonder whether this division is constitutionally effective.

It is true that the creation of new rights or the adjustment of existing rights as between competing parties is a recognised basis on which an acquisition will not be "unjust", especially where the law is supported by an express head of power. An example is *Nintendo* and *Centronics* (1993 – 1994) 181 CLR 134, which concerned the use of the copyright and patents power to create new IP rights in computer circuit boards so as to balance the interests of those who created technology with those who wanted to copy it. Another example is the use of priority rules and bankruptcy law.

Part of the problem with applying this approach to the Bill is that there is also a contrary principle, namely that an acquisition of property can be unjust if existing priority rights are prejudiced by a new statutory scheme which insufficiently protects those rights. An example of this is *Smith V AML* (2004) 204 CLR 493, which concerned a statutory compensation scheme that replaced the common law right to damages. In that case what was in effect a six month transitional period did not provide "just terms" because it was too short.

The types of "property" involved are classic existing proprietory rights (and not more speculative rights such as clauses of action, future property or the right to participate in a statutory scheme). The consequences can be quite abrupt once an existing interest becomes subject to the Bill (eg. the 5 business day registration requirement in the case of property bought into Australia).

Of particular concern is where the Bill prejudices (and might therefore "acquire") the non-security interest in the property (eg. subordination on distribution of proceeds).

18.1 Section 287 – Application of division – insolvency / bankruptcy

	Should the reference to "another security interest": in the second line be to "another **transitional** security interests"? The priority rules in clause 292 apply to priority disputes between transitional security interests.

19. Part 7.3 - Division 2

19.1 Section 294 - Priority not on insolvency / bankruptcy or registration

	The priority between competing security interests will depend on such things as whether the security interests are legal or equitable. It is unclear as to whether this distinction is maintained. If all new security interests under the bill are to be regarded as legal security interests and deprive existing equitable security interests of priority then query the constitutional effect.
294(1)(b)	The specific provisions of the Bill that apply should be stated, ie. parts 2.4 and 3.1 of the Bill.

19.2 Section 301 – Meaning of *migrated security interest*

301(b)	There does not appear to be any obligation on the states to give data in a transitional register to the Registrar. As noted above, an obligation should be imposed on the states to give data in a transitional register to the Registrar in this bill or if there are constitutional limitations in corresponding legislation enacted by the States and Territories.

19.3 Section 302– Registration of authorised migrated interests

302(2)	What happens if the migrated information is migrated incorrectly and parties suffer loss as a result of the incorrect migration? There appears to be no compensation if the Registrar makes a mistake. We know this is consistent with the bill which absolves a Registrar from the responsibility for misstatements in the PPS register. See our comments on section 237.