

# APPENDIX 1

## RESPONSE FROM ATTORNEY-GENERAL'S DEPARTMENT TO SUBMISSIONS RECEIVED FOR THIS INQUIRY<sup>1</sup>

### Schedule 1

Submission	Item no.	Issue	Response
Clayton Utz 2.8	Item 10	The exclusion of <i>PPSA retention of title property</i> from Part 5.2 should be widened to include transfers of accounts.	Part 5.2 does not currently apply to <i>PPSA retention of title property</i> . The Bill does not exclude <i>PPSA retention of title property</i> from Part 5.2. It merely maintains the existing scope of the application of Part 5.2, including in relation to transfers of accounts.
AFC / AELA 1	Item 10	In the definition of PPSA retention of title property, the words <i>...unless provided otherwise expressly or by necessary implication</i> may unintentionally mean that controllers include secured parties exercising enforcement rights against PPSA ROT property.	The exception is intended to create a strong presumption in the Corporations Act that the references to <i>property of the corporation</i> refers to property to which the company has title. For the exception to apply, it must be an express reference or a necessary implication that the provision refers to retention of title property. Given the availability of other constructions for the term <i>property of the company</i> (ie that it refers to property that the company owns), the exception is unlikely to be relevant.
Clayton Utz 8	Item 10	Transitional security interests should not be excluded from the definition of PPSA security interests. At the time when a transitional security interest ceases to have the protection of Part 9, PPS Act, it should cease to be a transitional security interest for the purposes of the Corporations Act.	The exclusion of transitional security interests from <i>PPSA security interests</i> is a drafting device that allows the amending Bill to apply to functional approach to security interests prospectively (ie without affecting arrangements that existed at the registration commencement time).
Clayton Utz 10.3	Item 20	Section 553E is subject to s 279 (to be repealed). The Bill only deletes the reference to s 279 but s 553E should remain subject to <i>the priority regime for security interests under the PPS Act and the operation of Part 10.13 of the Corporations Act</i> .	The reference to s 279 is to be repealed because the Bill will repeal s 279. It is not necessary to make s 553E subject to the priority rules in the PPS Act and the operation of the Part 10.13 because s 553E is not inconsistent with those provisions.
DLA Philips Fox 3-4	Item 36	<i>PPSA retention of title property</i> should not be included as property of the company in s 441A, because a general security interest	The Department considers that the Bill has the intended effect that the references to property of the company in s441A would

1 'Inquiry into the Personal Property Securities (Corporations and Other Amendments) Bill 2010: Summary of submissions and comments by the Australian Attorney-General's Department', *Submission 11*.

<p>AAR, Freehills, MSJ, BD</p> <p>Clayton Utz 2.2</p> <p>Westpac</p> <p>AFC/ AELA 5</p>		<p>would not extend to that <i>PPSA retention of title property</i> (a company can only grant security in the contractual rights it has over property whose title is held by another party). It remains unclear, whether a fixed and floating charge over all of the assets of a company will now extend to this property enabling a secured party (and arguably, holders of future security interests over all the assets of a company) to exercise rights under s 436C and 441A of the Corporations Act.</p>	<p>not, after the registration commencement time, in relation to a transitional security interest that is a charge, refer to retention of title property.</p>
<p>ABA</p>	<p>Item 36</p>	<p>The Bill should make it clear that an all present and after acquired security interest and a fixed and floating charge over all the company's assets are sufficient to satisfy the requirements of s 436C and s 441A, Corporations Act.</p>	
<p>Clayton Utz 10.1</p>	<p>Item 36</p>	<p>Under s 441AA, if a grantor acquires assets after the secured party has commenced enforcement, the secured party should be able to enforce against this property even if the security interest is unperfected (because it has not attached) if the security interest is unperfected over the other assets.</p>	<p>Attachment can occur at any time when the grantor acquires rights in the property, including after the secured party has commenced enforcement action. The security interests will be perfected when it attaches.</p>
<p>Clayton Utz 9</p>	<p>Items 36,37 and 42</p>	<p>Because the power to appoint a receiver or controller flows from the security interest itself, all references to receiver or controller appointed for the purpose of Part 5.2 should be amended to all <i>receivers or controllers appointed under security interests to which Part 5.2 applies...</i></p>	<p>The Department considers that the form of words use in the Bill is effective.</p>
<p>Piper Alderman 1</p>	<p>Item 40</p>	<p>Proposed new s 441EA(1)(c) should refer to property being in the possession or control of the secured party (to be consistent with the new definition of possessory security interest).</p>	<p>Proposed s441EA(1)(c) refers to 'the property is in the possession of the secured party' and replaces existing s 440BA(c) which refers to 'the property is in the lawful possession of the holder of the lien or pledge'. The new concept of <i>possessory security interest</i> was premised on the assumption that its only substantive effect (apart from bundling the existing concepts of liens and pledges) would be to add in a reference to PPSA security interests perfected by possession or control. This proposal involves a policy change not related to PPS reform that would extend the ambit of s 441EA beyond that currently provided for by s 440BA.</p>
<p>Clayton Utz 7.2</p>	<p>Item 40</p>	<p>Section 441EA replaces s 441JA but doesn't provide that it only applies where there is no higher ranking security interest (as does s441JA). There is also no corresponding provision to s 127, PPS Act which sets out the rights of higher ranking secured parties. Furthermore, if there is a higher ranked secured party, no provision has been made for them to claim any proceeds.</p>	<p>Currently, a holder of a pledge or lien against a company may enforce their lien or pledge by selling the secured property, applying the proceeds towards the amount owed under the lien or pledge, and paying the balance to the company (see Corporations Act 2001, section 441JA). However, the holder of the pledge or lien may only exercise this power if the pledge</p>

DLA Philips Fox 6	Item 40	S 441EA is inconsistent with the distribution rules in s 140 and not subject to the PPSA priority rules or control arrangements.	or lien is not subordinate to another security. Item 40 of the Bill proposes the substantial re-enactment of section 441JA as section 441EA of the Corporations Act, with adjustments made to reflect the enactment of the PPS Act (for example, the references to lien or pledge are replaced by the term <i>possessory security interest</i> ). Proposed section 441JA does not retain the requirement that the lien or pledge not be subordinate to another security. This is consistent with the approach taken in the PPS Act that any secured party with an interest in the collateral may enforce their security interest.
Clayton Utz 5	Item 40	The dual requirement to have a possessory security interest and be in possession of the property should be done away with. Otherwise, s 441EA requires that a secured party must have possession before they can sell the property and retain the proceeds and control of the property would be insufficient and under s 440B(3), a party with a possessory security interest can only continue to possess the property during administration but not continue to exercise control.	
DLA Philips Fox 8	Item 40	Because most security interests include enforcement provisions, Subdivision C would not apply to enforcement and it is unclear what s 441EA applies to.	Subdivision C would apply to, for example, leases that are not PPS leases.
Piper Alderman 2	Item 86	Section 124(1)(f) should refer to a security interest rather than being restricted to a circulating security interest and the company's property in this context should include PPSA retention of title property.	This proposal involves a policy change not related to PPS reform that would extend the ambit of s124(1)(f). Proposed s124(1)(f) allows a company to 'grant a circulating security interest over the company's property' and replaces existing s124(1)(f) which allows a company to 'grant a floating charge over the company's property'. By referring to 'a circulating security interest', and not applying to PPSA retention of title property, proposed s124(1)(f) maintains the effect of existing s124(1)(f).
Clayton Utz 10.2	Item 89	The new s 443E(1)(b) is unnecessary because the unsecured debts referred to are already covered by s 443E(1)(a).	Section 443E(1)(b) is included to provide legal certainty concerning the debts covered by the provision.
Clayton Utz 6	Item 125	The exception in s 440JA, for the enforcement of security interests during administration, should also apply to security interest held by an ADI in its own accounts. Otherwise the exception would apply to the ADI's rights of set-off but not to a possessory security interest over the ADI account.	The amendments proposed for s440JA do not affect the existing application of Division 6 or Part 5.3A to security interests held by an ADI in its own accounts. Proposed s440B(3), table item 1 will continue the existing prohibition in existing s440B against an ADI enforcing a security interest in an ADI account held with it (except in certain circumstances). The amendment does not affect the ADI's existing right of set-off.
Clayton Utz 7.1	Item 135	Section 442CB(1) should not extend the duty to act reasonably when selling property subject to liens or pledges to all secured personal property.	Currently, an administrator is an officer of the company (see s9 (definition of <i>officer</i> ) and s180, Corporations Act, which already require the exercise of a reasonable degree of care and diligence. While the amendment to s442CB extends the circumstances in which the duty owed under that section applies, it does not place additional obligations on an administrator to act reasonably. Also, applying the same

			duty regardless of the nature of the security interest is consistent with taking a functional approach to security interests.
DLA Philips Fox 5  Clayton Utz 2.6  AFC/AELA 4  AAR, Freehills, MSJ, BD	Item 152	<p>A receiver/ controller should be liable for rents and other amounts payable in respect of PPSA retention of title property, that is PPSA retention of title property should not be excluded from s 419A(1).</p> <p>The amendments to s 443B mean that a voluntary administrator becomes personally liable for payment of amounts under leases which are treated as security interests, effectively giving the holders of leases privileges not enjoyed by the holders of other security interests. The changes also make it difficult for the voluntary administrator to avoid that liability.</p>	The Corporations Act 2001 currently provides that controllers (see section 419A) and voluntary administrators (see section 443B) are personally liable for payments owing under certain transactions entered into by the company before the commencement of the receivership or administration, unless they disclaim the transaction. Item 152 removes a receiver's liability for these transactions, while Item 165 removes the administrator's capacity to avoid the liability for these transactions.
Clayton Utz 4	Item 156	It is not appropriate that all interests in personal property that are security interests for the purposes of the PPSA are treated the same as charges, liens and pledges. For example, under proposed s 440B, Corporations Act, a secured party can't exercise its rights during administration of the company. This would include the transfer of accounts even where a transfer was not made for the purpose of securing payment or the performance of an obligation.	Section 440B, Corporations Act currently prevents the enforcement of a charge on property of the company (except in certain circumstances). This would include a charge on a book debt (or an <i>account</i> for the purposes of the PPS Act). Consistently with the functional approach to security interest implemented by s 440B, PPS Act provides equivalent treatment for a charge on a book debt and a transfer of the same book debt.
DLA Philips Fox 7	Item 183	It is unclear why s 588FP (which is intended to replicate s 267) excludes <i>PPSA retention of title property</i> .	The exclusion of <i>PPSA retention of title property</i> from s588FP has the effect that s588FP (like s267) will not extend to PPSA retention of title property. Including PPSA retention of title property in s588FP would extend the coverage of s588FP beyond that of existing s267.
Clayton Utz 1.3	Item 183	Section 588FL should not be included in the Corporations Act, having regard to PPS Act, s267.	Section 588FL replaces existing s266 of the Corporations Act, though modified to take account of the PPS Act. It voids a security interest that has been perfected by registration shortly before the grantor company enters into certain forms of external administration. This provision is part of the preference provisions of the Corporations Act, and this is reflected in its proposed relocation to <i>Part 5.7B—Recovering property or compensation for the benefit of creditors of insolvent company</i> .
AAR, Freehills, MSJ, BD	Item 183	The new s 588FL(2)(b)(iii), in order to operate as intended, should be amended so that the registration "clock" ticks for foreign security interests from the time registration could be required under Australian law.	The validity of a security interest in goods (which includes its enforceability against third parties) is always governed by the law of the jurisdiction in which the goods are located (see PPS Act s 238(1)).

	<p>Instead of just referring to the time that a security interest first became enforceable against third parties under the law of Australia, it should refer to the later of that time and the time that under Part 7.2 of the PPSA, the law of Australia first governed the validity, perfection and effect of perfection or non-perfection of the security interest. Section 588FL(3) applies where registration is required under foreign law. Section 588FL(3)(a) and (c)(iii) should be amended in similar fashion to (b)(iii) so that it is consistent with Part 7.2 of the PPSA, and only looks at the effect of foreign law when Part 7.2 says that it should. Subsection (3) should not apply where the security interest is registered on the PPSA register. Finally ss (3) should not apply where a foreign law does provide for the public registration of the security interest, but the security interest is not required to be registered under that foreign law in order to be effective. For example, the foreign law may not provide for vesting in insolvency or may provide for perfection by some other means that has been satisfied (eg because the secured party has possession or control or their equivalent).</p>	<p>Section 588FL applies only when a security interest is granted by a company (see s 588FL(1)).</p> <p>The reference in proposed s 588FL(2)(iii) to a security interest becoming enforceable under a law of Australia refers to the application of Australian law to the security interest. When the collateral is goods, Australian law will apply to the security interest when the collateral is located in Australia or the grantor is an Australian entity (see s 6, PPS Act).</p> <p>Proposed s 588FL(2)(b)(iii) refers to ‘the security agreement giving rise to the security interest came into force under the law of a foreign jurisdiction’. When the collateral is goods, this would occur when both the goods are located outside Australia and the grantor is not an Australian entity</p> <p>Proposed s 588FL(2)(b)(iii) refers to a ‘security interest first became enforceable against third parties under the law of Australia after the time that is 6 months before the critical time’.</p> <p>When the collateral is goods located outside Australia, the law of Australia will begin to apply when the grantor becomes an Australian entity (see s 6(1)(a), PPS Act). Accordingly, s 588FL(2)(b)(iii) has the effect that when goods are located outside Australia, and the grantor converts from being a foreign entity to a company (so that the security interest becomes enforceable against third parties under the law of Australia), and the critical time arises within the following 6 months, then the security interest will not vest in the company provided the security interest was perfected before the earlier of the critical time or 56 days after the grantor became a company. This provision is necessary because of the repeal of s 601BC(6)(c), which requires the registration of any charges when a foreign entity converts to a company. Instead of requiring the immediate registration of the charges, the Corporations Act will visit invalidity on a charge that is not registered within a certain period before the critical day.</p> <p>Proposed s 588FL(3) applies when a company enters into a form of external administration (s 588FL(1)), and a security</p>
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Clayton Utz 1.4	Item 183	Section 588FL(3) should not be included in the Corporations Act.	Section 588FL(3) is consistent with the policy underlying s588FL that a security interest should be void if it is disclosed only shortly before the company enters into external administration.
Clayton Utz 2.1  DLA Philips Fox 6	Item 183	It should be possible for <i>PPSA retention of title property</i> to include property that is used or occupied by, or that is in the possession of, the corporation. For example, it should include property that the corporation has leased to another person.	The term <i>PPSA retention of title property</i> covers property that a company would currently hold as lessee, and not property that the company has leased as lessor (and the rights that the company has as lessor). A security interest will include a PPS lease made to the grantor. When the grantor has in turn leased the property to a 3 <sup>rd</sup> party (whether or not as a PPS lease), the grantor's property will include its interest in that lease. Accordingly, a security interest in all of the company's property will extend to the grantor's rights under the lease, but not to the property itself.
Clayton Utz 3	Item 187	<p>A registrable charge which is not registered prior to the RCT cannot be registered on the ASIC Register after the RCT and this will prevent them taking advantage of the Chapter 2K priority provisions which confer priority on later registered charges (eg s 279(3), Corporations Act).</p> <p>The ASIC Register of Charges should remain open for 45 days after RCT to allow registrable charges to be registered or the definition of registrable charge should be amended to only include charges actually registered or charges entered into within 45 days prior to RCT where they are registered on the PPSR within 45 days after RCT.</p>	<p>The Bill will prevent a registrable charge created during the 45 days before the registration commencement time from being registered on the ASIC register of company charges after the registration commencement time (see proposed s 1503, Corporations Act).</p> <p>The charge will be a transitional security agreement for the purposes of the PPS Act (see s 307, PPS Act). Transitional security interests will initially be perfected for a period by force of the PPS Act without the need for registration with either ASIC or the PPS Register (see proposed s 322, PPS Act). The transitional security interest will, in effect, be deemed to be registered from immediately before the registration commencement time, and have priority under the PPS Act from that time.</p>

Clayton Utz 10.4	Item 187	Under s 1504(2), if a registrable charge is void under s 266, then s266 continues to apply. But s266 doesn't render a charge void in its entirety but only <i>void as a security on that property as against a liquidator, the administrator of the company, or the deed's administrator (s266(1)) or void to the extent that it secures the liabilities which were not notified to ASIC or void to the extent that it relates to the same property ...as another particular charge (s266(3)).</i> This needs to be clarified.	The Bill achieves its intended effect that if, as at the registration commencement time, a registrable charge is void as a security as against the liquidator, the administrator of the company, or a deed's administrator, then, despite s 1504(1), it would continue to be void as against the liquidator, the administrator of the company, or a deed's administrator.
DLA Philips Fox 1		The structure of Schedule 1 is confusing and all item numbers should be in numerical order	The structure of Schedule 1 is consistent with normal legislative drafting practices and does not affect the outcomes achieved by Schedule 1.
DLA Philips Fox 2		There should be a consistent approach to the inclusion of PPSA retention of title property in the definition of property in the provisions on receivership, administration, deed of company arrangement, voluntary winding up and PPSA retention of title property should only be included if the security interest is unperfected.	Please see responses above in relation to particular provisions.

## Schedule 2

DLA Philips Fox 1	N/A	The PPSA is to commence on 1 February 2012 or an earlier time approved by the Minister. To provide businesses with as much certainty as possible, the Minister should indicate his intention as to the start date as soon as possible.	In its response to the Senate Committee's March 2009 recommendations, COAG agreed that the PPS scheme would commence in May 2011.
DLA Philips Fox 2	Item 17	The meaning of grantor may create uncertainty as 'interest' is very broadly defined and is not limited to people with an equitable or legal interest in personal property. Multiple security interests could be granted by multiple people creating priority and enforcement problems for security interest holders. Suggest that the definition of grantor or 'interest' be limited to people with a legal or equitable interest in the property.	Confining the 'interest' in which a security interest may be granted to legal or equitable interests in the property would not be consistent with the functional approach to security interests proposed by the Bill.
Piper Alderman  AFC/ AELA 2-3	Item 73	The proposed amendment to s 116 seems to confirm the enforcement provisions in Chapter 4 will have limited, if any, application where the grantor of the security interest is a company. This is because any seizure or control of the property for enforcement purposes will arguably make the secured party a controller for the purposes of the CA. Replace existing s 166(4) with <i>Despite s 116, while a person is a controller of the property, s 115, s 123, s</i>	Section 116 of the PPS Act excludes the operation of Chapter 4 of the Act in relation to property while a person is a receiver, a receiver and manager, or a controller of the property. This reflects an early consensus reached among stakeholders that, for these security interests, Part 5.2 of the Corporations Act 2001 would apply instead of Chapter 4 of the PPS Act.

		<i>124, s 128 of Chapter 4 apply.</i>	
DLA Philips Fox 3	Item 104	The proposed s 252B could be used against secured parties seeking to exercise their enforcement rights to retain or sell collateral and could be used by secured parties to dispute the entitlement of a third party purchaser who would otherwise have the benefit of the extinguishment rules.	Proposed section 252B is required to ensure that the PPS Act does not infringe the constitutional guarantee against the acquisition of property otherwise than on just terms (see Constitution s 51(xxxi)).
DLA Philips Fox 4	N/A	There needs to be a provision that the vesting provisions in the Corporations Act will override the vesting provisions in the PPSA where the grantor is a corporation.	The vesting provisions in the PPS Act and the Corporations Act apply in different circumstances and are intended to operate concurrently.
DLA Philips Fox 5		Where a registrable charge is not migrated because the Registrar does not accept the data the security holder would have to receive notice of the failure to migrate the registration.	The Department has commenced discussions with ASIC and significant registrants on the registration migration process. At this stage, it is proposed that the Department would provide a facility allowing secured parties to become aware of which registrations had been migrated.
DLA Philips Fox 6	Item 123	In s 333(5), the reference to personal property should be to security interest.	The reference to personal property rather than security interest does not alter the effect of the provision.
DLA Philips Fox 7	Item 183	Where a security lease (the vast majority of leases) vests in the grantor and the administrator/ liquidator sells the property, is the lessor or lessee liable for the tax gain or loss?	The Department is unable to comment on the taxation matters arising from the particular transactions.
Clayton Utz 11	Item 39	Under s 21(2)(c)(i), a security interest in an account, can only be perfected by control by the ADI with whom an account is held. But s 25(1) contemplates that control can be obtained by different means. Sections 25(1)(a)(ii)-(iii) and 25(1)(b) suggest that a third party could obtain control of the account and need to be amended. If these provisions are intended to extend the meaning of control for s 25, and not to determine whether a security interest is perfected, these provisions should be included within s 340-341 (similarly to inventory and accounts in s 341). Also s 75 cross refers to s25(1)(a)(ii) which contemplates control by a third party and should be amended to <i>a perfected security interest, held by an ADI, in an ADI account with the ADI has priority over any other perfected security interest in the ADI account.</i>	The location of s25(1)(a)(ii) – (iii) does not affect the operation of the PPS Act. The reference to s25(1)(a)(ii) in s75 recognises that the ADI may agree to subordinate its security interest to another secured party by allowing that other secured party to direct disposition of the funds from the account without further consent by the grantor
Clayton Utz 12	Item 110	Proposed s 267A provides for an unregistered security interest that attaches to collateral after the s 267(1)(b) event, to vest in the grantor in the same way as security interests that attached before the relevant time. This is even though s 267 already provides that such a security interest vests in	The policy objective of ss267 and 267A is to provide for vesting when a registration has not been made before the critical time. Section 267A is intended to vest in the grantor a security interest that attaches after the critical time in accordance with an agreement made before the critical time, and



		the grantor and it does not address the possibility of a security interest being perfected after the s 267(1) event. Section 267A should provide that <i>a security interest does not vest in the grantor if the conditions in s 267A(1)(a), (b) and (c)(i) apply and there was at the critical time a registration on the PPS Register that would perfect the security interest when it attached and attachment was after the critical time.</i>	there is no registration at the critical time. It would in part defeat the purpose of s267A to allow the secured party to make a registration after the critical time.
Clayton Utz 13	Not in current Bill or EM	The statement on proceeds in the EM - <i>The effect is that the secured party would lose the benefit of the super-priority when it takes enforcement action to dispose of collateral perfected by control</i> - implies that the proceeds arising from an enforcement action are included within the definition of proceeds. Section 31(3)(b) should be amended to clarify that <i>proceeds received on the enforcement of a security interest, whether enforcement is under Chapter 4 of the PPS Act or otherwise are not proceeds.</i>	The quoted passage is intended to refer to the Bill's existing effect that while a secured party might have priority because its security interest is perfected by control, it will not have the same priority over any proceeds of the controlled property (and would therefore lose the benefit of the super priority when it takes enforcement action against the proceeds). Proposed s52(2A) will ensure that the secured party retains its control super-priority in the proceeds of controlled collateral (subject to the rights of another person who controls the proceeds).
Clayton Utz 14.2	Not in current Bill	Section 314 provides that Chapter 4 should not apply to a security interest not evidenced by a security agreement for example, a pledge created by the delivery of pledged assets. Therefore s 314 should be drafted in the negative so Chapter 4 will not apply to security agreements made before the registration commencement time.	Section 314 has the effect that Chapter 4 applies only in relation to security interests arising under security agreements made after the registration commencement time. It follows that Chapter 4 does not apply in relation to security interests arising from a transaction that does not involve a security agreement, such as when the secured party has taken possession or control of the collateral (see s 20(1)(b)(i) and (iii), PPS Act). Whether the Chapter 4 should extend to these kinds of security interests is something that could be considered in the review of the Act required by s 343, PPS Act.
Clayton Utz 14.3  ABA	Item 121	The Table in s 320 is incorrect because it assumes that all priority disputes are determined under s 55 of the PPS Act whereas s 55 sets out the default priority rules only. Furthermore a perfected transitional security interest will not have priority over a later security interest perfected by control (as stated in the Table). Suggest remove the Table and include a statement that <i>subject to s323 and s 324, the priority of transitional security interest should be determined in accordance with the other provisions of the Act following the application of s 321 and s 322.</i>  Transitional security interests which are either migrated or registered on the PPS Register during the two year transitional period are at risk of losing priority where subsequent security interests over the same collateral are perfected by control.	The Bill provides that a security interest perfected by control has priority over a security interest perfected by any other means.  Secured parties who are concerned that they will lose their priority after the registration commencement time to another secured party who perfects their security interest by control should consider perfecting their security interest by control before the registration commencement time.

Clayton Utz 14.4 Gilbert and Tobin	Item 121	<p>The Regulation to be made under s 322(3) provides that if there is a period in which a transitional security interest must be registered on a transitional register and that period has not yet expired at the registration commencement time, then that transitional security interest is not prescribed. So a security interest created by a company in the 45 days before the registration commencement time would be perfected for up to 24 months even though a third party would have no way of determining if a security interest exists and there would be no incentive for a secured party to register the security interest. Therefore if a transitional security interest is not registered before the registration commencement time, it should not have the benefit of the temporary perfection provisions.</p> <p>The Bill attempts to encourage secured parties to register their interests but deemed security interests will not be able to rely on Chapter 4 for enforcement.</p>	<p>The secured party would have an incentive to register the security interest because the temporary perfection applies only for 24 months. The fact that the security interest would not be discoverable on a search is a feature of the Act in relation to all transitional security interests that are not required to be registered before the registration commencement time. Some registrants may not be able to register charges created during the 45 days before the registration commencement time: especially when the charge is created the day before the registration commencement time.</p>
Clayton Utz 15	Item 128	<p>It is unclear why in determining whether an asset is a circulating asset (s 341), the inventory will have its general law meaning if the s 10 meaning of inventory is intended to be different from the general law meaning (either narrower or broader) then the differences should be stated.</p>	<p>The term <i>inventory</i> is intended to have its general law meaning so that the expression circulating assets will more closely correspond with the existing concept of property subject to a floating charge (which involves the general law concept of inventory).</p>
Clayton Utz 16.3		<p>Section 61 provides that a secured party may agree to subordinate its security interest in collateral should also provide that any guarantor that is entitled to be subrogated to the rights of that secured party will be bound by any priority agreement agreed to by that secured party.</p>	<p>Whether a guarantor should be bound by any priority agreement could be considered in the review of the Act required by s343 of the PPS Act. The PPS Act does not currently deal with the rights of guarantors.</p>
Clayton Utz 17	Item 121	<p>Where a DOCIMAGE number has been assigned but an ASIC search is yet to reflect the registration or provisional registration, of the charge, the charge should be considered to be provisionally registered for the purpose of s 322(c) of the PPS Act</p>	<p>A charge should be considered to be provisionally registered when ASIC has caused the word 'provisional' to be entered in the register of company charges in relation to the entry (as required by Corps Act s265(4)(b) or s265(6)(a)).</p>
ABA  Westpac	Item 14	<p>The exclusion of water rights would be extended to rights held by an irrigator and derived from a contract with the operator of the water corporation/co-operative responsible for the distribution of the water which rights are currently registrable on the ASIC Register of company charges (to be repealed). Item 14 should be deleted.</p>	<p>The PPS Intergovernmental Agreement provides that the PPS Act will not apply to water rights. The proposed amendment would put beyond any doubt that the Act does not apply to water rights of any kind.</p>
AAR, Freehills, MSJ, BD	Item 4	<p>In s 6(2)(c), PPS Act, <i>intangible property that consists of</i> should be removed as chattel paper is financial property which is expressly excluded from the definition of intangible property.</p>	<p>The provision should be read as follows:  'The security interest is an interest of a transferor under a transfer of  (a) intangible property that consists of an account or</p>

			<p>(b) chattel paper, and ...'</p> <p>(that is, the words <i>intangible property consists of</i> should be read to qualify the words <i>an account</i> and not the words <i>or chattel paper</i>). The alternative construction presents the difficulties raised by the submission, and should be rejected because it raises those difficulties in the face of the viable construction set out above.</p>
AAR, Freehills, MSJ, BD	Item 41	The position of securities in Austraclear and the CHESSE register needs to be clarified. As CHESSE operates just the share or securities register of the company which issued the relevant shares or securities and there is no real intermediary or separate register, shares and other securities on CHESSE should be regarded as investment instruments and not disintermediated securities even though it is operated by a CS facility licence holder (see s 15). The control provisions applying to investment instruments (s 27) are broader than the provisions relating to disintermediated securities in (s 26) and match current market practice, whereas those in s 27 may not.	Securities on CHESSE are treated as intermediated securities because this reflects the international understanding of the status of these securities, and to adopt another treatment may be misleading in international securities markets. The Department does not agree that s 27 is broader than s 26. Section 26(4) specifically recognises existing market practices. Section 27 is drafted in more general language that includes the cases covered by s 26.
AAR, Freehills, MSJ, BD	Item 42	The amendments to s 32 do not do enough to preserve a security interest where the dealing is expressed to be subject to the security interest. Similarly, the extinguishment rules should not apply where the dealing that would otherwise attract them is expressed to be subject to the security interest. The law should not override the parties' express intentions regarding the survival of security interests.	The PPS Act is based on the international precedents. The proposal would allow a secured party and grantor to bind a purchaser of the collateral to the security agreement. A purchaser who is happy to take the collateral subject to an existing security agreement could agree to grant a security interest in the collateral on the same terms as the seller.
AAR, Freehills, MSJ, BD  Westpac 3  Gilbert and Tobin	Items 47 and 52	In many cases, the transitional period, and the protection afforded by migration, may be illusory, as secured parties will need to register or take other steps to have full protection. This is particularly problematic for serial numbered goods (if a search of the PPS Register immediately before the time of sale does not disclose a serial number, a third party will take the collateral free of the security interest).	Depending on the outcomes of consultations on the PPS Regulation currently being conducted, the issues raised in relation to serial number goods could be addressed by regulations made under s45 of the PPS Act deferring the application of s45 to certain kinds of motor vehicles (essentially those not registrable on an existing register) under the end of the 24 month transitional period.
ABA	Items 47 and 52	The extinguishment and priority provisions of the PPS Act should not apply to transitional security interests during the 24 month transitional period or alternatively the legislation should provide greater certainty surrounding the continuing validity of migrated security interests and transitional security interests that are registered in the transitional period.	Subject to specific matters raised elsewhere in this document, the PPS Act retains the priority of security interests established by a security agreement made before the registration commencement time over security agreement made after the registration commencement time. The PPS Act does not affect the validity of security interests established under security

			agreements made before the registration commencement time.
AFC/ AELA	Items 47 and 52	The transitional provisions should allow a period of 24 months after the registration commencement time for existing security interests to be registered and ensure that transitional security interests which will be migrated from existing registers retain the priority they had prior to migration.	The PPS Act allows a transitional period of 24 months for existing security interests to be registered.
AAR, Freehills, MSJ, BD  ABA  Westpac 3	Item 46	Section 52(1) will apply to all perfected transitional security interests and the effect of this would be that a purchaser or lessee for new value without actual notice that the sale or lease constitutes a breach of a security agreement with respect to a transitional security interest will take the personal property free of the transitional security interest.	The 24 month temporary perfection period provides priority for transitional security interests against later registered security interests. Section 52(1) involves balancing the interests of existing secured parties against the interests of persons who buy or lease the collateral after the registration commencement time. The PPS Act currently favours the purchaser over the secured party, as the PPS Register will not disclose a registration of the security interest to a purchaser who searches the PPS Register.
ASF	Item 51	The process for giving notice to the holders of PMSI's should be straightforward. The holder of an intended priority interest and requiring 15 instead of 5 business days' notice is too onerous for the priority interest holders (assuming it is feasible to give notice to each of the innumerable PMSI holders).	The PPS Act requires that a person who is purchasing an account give 15 days notice to a person whose interests will be subordinated to the interests of the purchaser. The Department is unable to comment on the practicality of particular business processes for giving notice to holders of purchase money security interests who lose their priority to a transferee of the account. The adequacy of the requirement to give 15 days notice could be considered in the review of the PPS Act required by s343 of the Act.
AFC/ AELA 1  Westpac 1	Item 51	It may be difficult for PMSI holders to establish the time the grantor obtained possession of the goods, when registering PMSIs, especially in respect of serial numbered goods and refinancing purchases. The starting time for determining the 15 day period should be easily identifiable, such as the date of settlement or provision of finance, rather than date the grantor takes possession.	The PPS Act needs to balance the interests of the PMSI holder against the interests of others who may acquire an interest in the collateral relying on a search of the register. The Act currently allows a secured party 15 business days (ie at least 3 weeks) to register their security interest. This has been increased from the 5 business days provided for by earlier drafts of the Act because of concerns raised by stakeholders.
AAR, Freehills, MSJ, BD  Westpac 5		Section 74 considerably weakens the position of secured creditors, in that it gives execution creditors priority over security interests to the extent they relate to goods that attach after the execution order is made.	It is not clear to the Department whether, in practice, this is likely to be a material issue. This matter could be considered in the review of the PPS Act required by s343 of the Act.
AAR, Freehills, MSJ, BD	Item 82	The example in s 151 appears contrary to the wording of the section and the description may encourage parties to claim that they have security over "all assets" even though they have security only over a specified class. This would make the register	The examples in s151 are intended to increase certainty concerning the operation of s151 in response to concerns such as those raised by this comment. The requirement in s62(2)(c) that PMSI registrations include a PMSI indicator, and

		misleading, cumbersome, and very difficult for searching parties to determine the true position.	the design of the PPS register, and fees payable for a registration, are all matters that could influence the extent to which secured parties rely on “all assets” registrations.
AAR, Freehills, MSJ, BD  Westpac 5  ABA	Item 125	Sections 164 and 165 should not render ineffective security interests which are "seriously misleading" when the information was migrated from another register. Section 337 should automatically override s 164 and 165 in relation to migrated security interests.	Proposed section 337(2) would allow the PPS Registrar to determine by legislative instrument that certain registrations are effective.
AAR, Freehills, MSJ, BD	Item 126	Section 340(2) unintentionally means that an ADI will need to register its security interest in an ADI account held with it in order to protect it fully.	Section 340(2) has the intended effect that the ADI will need to disclose by a registration that the ADI account is not a circulating asset. The registration is not required for the ADI to retain its super-priority for security interests in ADI accounts held with it.