



Personal Property Securities Reform

Discussion Paper

Regulations to be made under the
Personal Property Securities Act

August 2008



Note: This paper does not necessarily represent the views of the Standing Committee of Attorneys-General or any individual Attorney-General

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Further copies of this paper are available from www.ag.gov.au/pps.

Comments/submission on this paper are sought by no later than **17 October 2008**

Comments/submissions may be provided by email to pps@ag.gov.au.

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Status of the Discussion Paper

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GLOSSARY

A selection of key concepts is provided to assist readers with the discussion paper.

Accessions

An accession is an item of personal property that is installed in, or affixed to, another item or items of property.

Attachment

Attachment is a term used to describe the successful creation of a security interest in personal property that can be enforced against that personal property. Attachment is therefore a prerequisite to effectively creating an interest in a way that can be enforced against personal property. A security agreement which has not attached may create rights which are merely personal or contractual rights between the parties.

Collateral

Collateral is personal property that is subject to a security interest.

Commingled goods

Commingled goods are goods that have become part of a product or mass and, in the process, have become so manufactured, processed or assembled that their identity is lost in the product or mass. An example of commingled goods is the ingredients used to make processed food products such as the flour and yeast used to make bread.

New value

New value means value other than antecedent debt or liability. A person provides new value to an entity when they provide property that increases the gross value of the entity.

Original collateral

A person has a security interest in personal property as original collateral when the security interest attaches to the personal property otherwise than as proceeds.

Perfection

Perfection is a term used to describe the steps required in order to ensure that a security interest will have priority over other security interests created in the same property. A security interest is perfected if it has attached and all of the necessary steps to perfect it under the legislation have been performed (such as registration on the PPS Register, taking possession or control of the collateral, or by temporary perfection by force of the Bill).

Perfection is necessary to protect a secured party's interest against a debtor's bankruptcy trustee or judgment creditor or against a buyer or lessee of the collateral who has no knowledge of the

interest. Perfection is also necessary for the secured party to gain a ranking against other perfected security interests in the collateral.

Personal property

Personal property is any form of property other than land, and includes a licence.

Priorities

Priority rules govern competition between competing interests in collateral. The general rule is that where there are two security interests in relation to a single piece of property, the security interest that was perfected first, for example by being registered, has priority. That is, the holder of that interest will be able to take the benefit of that interest ahead of an unperfected interest or an interest that was perfected later in time.

Proceeds

Proceeds are the identifiable or traceable personal property in which the debtor has an interest and is derived directly or indirectly from dealing with collateral or the proceeds of collateral.

Security interest

A security interest is any interest in personal property which is created or evidenced by an agreement that in substance secures payment or performance of an obligation, without regard to the form of the transaction (that is, the legislation would apply regardless of whether the interest is a mortgage, charge, financing lease or supply under a retention of title arrangement) or the identity of the person who has title to the collateral (that is, it is not necessary for the debtor to have any proprietary interest in the collateral before a security interest can be created in it).

Temporary perfection

Ordinarily, a security interest is perfected when it is registered or when the security holder has taken possession of the collateral. However there are some circumstances in which an interest can be perfected for a limited period without registration or the security holder taking possession of the collateral. The concept of temporary perfection may be applicable, for instance, where collateral is brought from a foreign jurisdiction or where a security interest in proceeds is not continuously perfected from the interest in the original collateral.

Writing

Writing includes the recording of words or data in any way (including electronically), or the display or other representation of words or data by any form of communication that is recorded in any way (including electronically) if, at the time that it was made, it was reasonable to expect that the words or data would be readily accessible so as to be useable for subsequent reference.

INTRODUCTION

Scope of this Discussion Paper

1. This discussion paper is about the content of the regulations that may be prescribed under the Personal Property Securities Act. It details the proposed content and policy rationale for each regulation that it is proposed, at this stage, would be prescribed under the Act under the relevant enabling provision. This discussion paper also explains where it is proposed that a regulation, at this stage, would not be prescribed under the Act.

2. Throughout this discussion paper a number of general and specific questions are posed. Comments are sought generally on this discussion paper and the specific questions posed in boxed text are not intended to confine the issues that may be raised in submissions.

Recent developments in personal property securities reform

3. On 16 May 2008 the Australian Attorney-General, the Hon Robert McClelland MP, released a consultation draft Personal Property Securities Bill (the Bill) for public comment. The release of the Bill represented a significant milestone in PPS reform. The Attorney-General's Department has been engaged in extensive consultations on the Bill with key stakeholders in the banking, finance and legal sectors. The feedback from these consultations is being used to refine the Bill. In the week beginning 26 May 2008 public seminars on the Bill were held in Sydney, Melbourne, Perth and Brisbane. A public seminar was also held in Adelaide on 3 July 2008. These seminars were all very well attended and received.

4. Submissions on the Bill were invited by 15 August 2008. In light of the public consultation on the Bill it is likely that there will be some refinement to various aspects of the Bill. This discussion paper follows the structure of the Bill released on 16 May 2008. Where a change to the Bill is proposed and it relates to a matter addressed in this discussion paper, the discussion paper identifies that a change to the Bill may be made.

5. The development of the PPS Register is also progressing well and on schedule for a commencement date in May 2010. On 16 May 2008 the Attorney-General's Department released a request for tender for systems integrator services to design and develop the new national register. It is anticipated that a request for tender for a national PPS contact centre will be released in the coming months.

Key aspects of the Personal Property Securities Bill

6. The Bill would establish a national framework for the regulation and registration of security interests in personal property. This national framework would benefit businesses, individuals and consumers by delivering more certain, consistent, less complex and cheaper arrangements for the financing of personal property.

7. At the centre of this framework would be the establishment of a single national law governing security interests in personal property. The national law would replace the more than 70 pieces of Commonwealth, State and Territory legislation that currently govern personal property securities in

Australia. The Bill would also establish a single national online register of personal property securities (the PPS Register). The new registration system would help prospective purchasers and lenders to determine whether personal property may be subject to a security interest and would facilitate the resolution of priority disputes. The PPS Register would replace the more than 40 existing registers currently administered by Commonwealth, State and Territory agencies.

8. One key feature of the Bill is that it takes a functional approach to the characterisation of personal property securities. This means that the Bill would apply to security interests in personal property that secure payment or the performance of an obligation regardless of the form of the transaction, the legal personality of the grantor, or the jurisdiction in which the property or parties are located or in which the transaction occurred. This approach contrasts with and would be a significant improvement on the current formal approach to securities in personal property where the form of the transaction largely determines the nature of the interest held.

9. Importantly, the Bill would codify rules concerning the creation of security interests in personal property as well as rules for determining priority between competing interests in personal property. This would remove the uncertainty arising from the patchwork of existing legislation and the uneasy interaction of that legislation with the common law and equitable legal principles. The new arrangements would apply consistently throughout Australia.

10. These rules would be complemented by provisions in the Bill that establish when a person acquires personal property free of a security interest, such as where the transaction occurs in the ordinary course of business or in relation to low value consumer goods. A streamlined and effective enforcement regime has also been developed to supplement contractual arrangements in this area. It is important to note that the Bill would preserve the operation of the Consumer Credit Code.

11. In preparing the Bill careful consideration has been given to similar reforms that have occurred in New Zealand, Canada and the United States of America. It also draws on work by the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT). The differences between the Bill and its international counterparts reflect issues raised by stakeholders, differences in the Australian consumer and commercial environment, advances in information technology, and drafting styles adopted to improve legal certainty and consistency with Australian drafting practices.

12. Further information on the Bill and the benefits of PPS reform can be obtained from the Attorney-General's Department website www.ag.gov.au/pps

Who should read this Discussion Paper

Anyone with an interest in the reform of Australia's personal property securities laws should read this discussion paper. In particular, those stakeholders who engage in the financing of personal property and the registration of data on existing registers are encouraged to give careful consideration to the proposals made in this discussion paper. State and Territory agencies that currently maintain personal property securities registers are also encouraged to give careful consideration to this document.

OVERVIEW OF REGULATIONS

13. The Bill contains a number of provisions that enable the making of regulations.

14. Some of the regulations relate to the operation of the new PPS Register. The content of these regulations will feed into the design and development of the PPS Register in the later part of 2008 and through 2009. The Attorney-General's Department particularly invites comment on the regulations in relation to the PPS Register.

15. The following table lists each of the regulation making provisions in the Bill and states whether or not it is proposed at this stage that a regulation would be prescribed under the provisions. A detailed discussion of the content of the proposed regulations and the rationale for prescribing or not prescribing a regulation under specific provision follows. This discussion follows the structure of the Bill.

Part	Enabling provision	Regulation prescribed?	Page
1	^4 - External Territories	Yes	14
1	^16 - Relationship with other laws—formal requirements	Yes	14
1	^18 - Relationship with other laws—regulations	No	15
2	^19 – Definition of business day	Yes	16
2	^19 – Details about a person	Yes	17
2	^19 – Definition of fish	No	20
2	^19 – Definition of investment instrument	No	20
2	^19 - Lease for a term of more than one year	No	20
2	^19 – Definition of motor vehicle	Yes	21
2	^21(4)(b) – Meaning of security interest	No	21
2	^22 (g) – Application of Act to interests	No	21
2	^50(7)(a)(ii) - Investment entitlements	No	22
4	^63(2)(a) - Attachment of security interests in after acquired property	Yes	22
4	^75(1)(v) - Returned tangible property—security interest	No	23
4	^76 - Account or chattel paper in returned tangible property—security interest	No	23
5	^80 - Acquiring personal property free of unperfected security interest	No	24
5	^81(2) - Acquiring personal property free of security interest if serial number incorrect or missing	No	25

Part	Enabling provision	Regulation prescribed?	Page
5	^83 - Acquiring personal property free of security interest in personal, domestic or household property	No	25
5	^86 - Acquiring personal property free of security interest in motor vehicle	Yes	26
6	^100 - Priority of purchase money security interest in inventory	No	28
8	^134 - Returned improved property—security interest	No	29
8	^154 - Secured party must give notice of removal of collateral	No	30
9	^164 - Relationship between this Part and the Corporations Act 2001	-	31
9	^166 - Proceeding as if personal property were land	No	32
9	^167 - Relationship with the Consumer Credit Code	Yes	32
9	^177 - Notice of disposal of collateral	Yes	33
9	^182 - Notice of retention of collateral	No	35
10	^191- PPS Register	No	36
10	^193 - Registration of data other than data in registrations	Yes	36
10	^194(d) – Prohibited registrations	Yes	37
10	^195 – Table item 4 (b) collateral must be described by serial number	Yes	37
10	^195 – Table item 4 (c) classes of collateral	Yes	40
10	^195 – Table item 4 (d) description of proceeds	Yes	41
10	^195 – Table item 7 details of subordination agreements	Yes	42
10	^195 – Table item 9 matters prescribed by the regulations	Yes	44
10	^203 – Defects in registration	No	46
10	^207 – Authorised amendments	No	47
10	^212 - Statement by person giving demand under section ^210	Yes	47
10	^227(3)(d) - Search—general	Yes	49
10	^228 – Search criteria	Yes	50
10	^231 – Search result	Yes	51
11	^261 – Limits of jurisdiction of Federal Magistrates Court	No	52
11	^274 – General regulation making power	Yes	52

PART 1– PRELIMINARY

16. Part 1 of the Bill contains the preliminary provisions of the Bill such as the application of the Bill to Australia’s external Territories as well as the provisions that outline the Constitutional operation of the Bill.

Section ^4(1) – Application of Act to External Territories

17. Section ^4(1) provides that the PPS Act extends to such external Territories (if any) as are prescribed by the regulations.

18. At this stage, it is proposed that the PPS Act would not extend to Norfolk Island which has an established Companies Act. It is necessary however that the PPS Act extend to Australia’s Indian Ocean Territories (Christmas Island and the Cocos Keeling Islands). The law of Western Australia is applied in those Territories. Western Australia’s PPS arrangements will cease to operate on commencement of the national system.

Section ^16(1)(c) – Relationship with other laws-formal requirements

19. Subdivision C of Division 2 of Part 1 of the Bill establishes the relationship of the Bill with other laws (such as a law of a State or Territory). As a general rule, where there is an inconsistency between the Bill and a law of a State or Territory or a rule of equity the Bill would prevail to the extent of any inconsistency. However, the Bill is not intended to exclude or limit the operation of a law of a State or Territory, or of a rule of law or equity, that is capable of operating concurrently with the Bill, subject to the to the rules in Subdivision C.

20. Section ^16 provides an exception to that general rule. It is proposed that a regulation **would** be prescribed under section ^16(1)(c).

Content of enabling provision
Section ^16 provides that failure to comply with the formal requirements of a security agreement for a security interest under an applicable State or Territory law does not affect the validity, or limit the effect of the security interest, or the assignment of the security interest. Section ^16(1)(c) would prescribe the applicable State or Territory law.
Content of proposed regulation
The State and Territory legislation that would be prescribed for the purposes of section ^16 are the: <ul style="list-style-type: none">• <i>Bills of Sale and Other Instruments Act 1955</i> (Qld)• <i>Liens or Crops of Sugar Cane Act 1931</i> (Qld)• <i>Bills of Sale Act 1886</i> (SA)• <i>Liens on Fruit Act 1923</i> (SA)

- *Stock Mortgages and Wool Liens Act 1924 (SA)*
- *Bills of Sale Act 1900 (Tas)*
- *Stock, Wool and Crop Mortgages Act 1930 (Tas)*
- *Bills of Sale Act 1899 (WA)*
- *Instruments Act 1935 (NT)*
- *Instruments Act 1933 (ACT)*
- *Instruments Act 1958 (Vic).*

Rationale

21. It is necessary to prescribe these laws to clarify that a security agreement or an assignment of a security agreement that would meet the requirements of the Act would be effective regardless of a failure to comply with laws of a State or Territory related to formalities. This is necessary to ensure that the Act creates nationally uniform formal requirements for security interests in personal property.

Questions

Should other applicable laws be prescribed under section ^16?

Section ^18(1)(a) and (b) – Relationship with other laws

22. Regulations may be made under section ^18(1) of the Bill excluding the operation of a provision of the Bill from a matter that is dealt with by a law of a State or Territory, or to modify the operation of the Bill in relation to particular matters, so that no inconsistency arises between the operation of the Bill and a State or Territory law.

23. It is **not** proposed to prescribe any regulations under section ^18 subject to further consultations with the States and Territories on this issue.

Question

Should any regulations be prescribed under section ^18 excluding the operation of a provision of the Act from a matter that is dealt with by a law of a State or Territory or to modify the operation of the Act so that no inconsistency arises between the operation of the Act and a State or Territory law?

PART 2 - INTERPRETATION

24. Part 2 of the Bill contains the interpretation provisions. Key concepts are defined in section ^19. Concepts that are defined in section ^19 include personal property, grantor and collateral. Section ^19 contains a number of regulation making provisions and it is proposed that regulations would be prescribed under some of these provisions. Part 2 also contains key provisions relating to the meaning of security interests as well as references to fixed and floating charges and knowledge requirements under the Bill.

Section ^19 – Definition of business day

25. The Bill specifies that certain actions are to be performed in or certain rights accrue within a specified period of ‘business days’. It is important to ensure that the Bill operates consistently and equitably on a national basis and that all businesses have approximately the same time to perform actions required under the Bill. Consequently, section ^19 provides that *business day* means a day other than:

- a Saturday or a Sunday
- a day which is a public holiday for the whole of any State, the Australian Capital Territory, or the Northern Territory, or
- a day that is prescribed by the regulations for the purposes of this definition.

26. It is proposed that the Bill will be amended to exclude the days between Christmas Day and New Years Day inclusive (namely 26, 27, 28, 29, 30 and 31 December) from the definition of business days for the purposes of the Bill. At this stage, it is proposed that a regulation would **not** be made under section ^19 prescribing any other day from the definition of business day.

Question

Are there any other days that should be prescribed as not being a ‘business day’ for the purposes of the Bill?

Section ^19 – Details about a person

27. It is proposed that a regulation **would** be made under section ^19 prescribing details about a person.

Content of enabling provision:			
Section ^19 provides that details about a person, means details about the person that are prescribed by the regulations.			
Content of proposed regulation:			
The regulations would prescribe how grantor and secured party details would be recorded on the PPS Register. The same rules would apply regardless of whether the person or entity was the grantor or the secured party.			
The regulations would provide that where a transaction concerns more than one grantor, each grantor should be separately identified on the PPS Register. Similarly, where the transaction involves multiple secured parties, each secured party should be separately identified (section ^196(1) of the PPS Bill allows for multiple grantors and/or secured parties in any given registration).			
The following table sets out the details that would be required to be entered onto the PPS Register as grantor and secured party details			
No.	Entity type	Source of data	Information to be recorded
When the person is an individual and the personal property is not held pursuant to an enterprise to which an ABN has been allocated.			
1	An individuals who is known to the secured party pursuant to the <i>Anti-Money Laundering-Counter Terrorism Financing Act 2006</i> (the AML-CTF Act)	Existing data held by the secured party pursuant to the AML-CTF Act	The individual’s name and date of birth as known to the secured party pursuant to the AML-CTF Act
2	An individual not covered by (1), that is, who is not known by the secured party pursuant to the AML-CTF Act	Drivers licence issued by the relevant State or Territory licensing body	The individual’s name and date of birth as recorded on the drivers licence

No.	Entity type	Source of data	Information to be recorded
3	All individuals not covered by (1) or (2), that is, those not known to the secured party subject to the AML-CTF Act and not in possession of a drivers licence	Proof of identity or proof of age card issued by the relevant State or Territory body	The individual's name and date of birth as recorded on this document
4	Individuals who are Australian citizens and are not covered by items (1) to (3)	Current Australian passport issued by the Australian Government	The individual's name and date of birth as recorded on this document
5	Individuals who are not Australian citizens and are not covered by items (1) to (3)	Current visa issued by the Australian Government (note: these are not always notified to the individual)	The individual's name and date of birth as recorded on this document
6	Individuals who are not Australian citizens, not covered by items (1)-(3) or (5) and who do not hold a current visa document	Current passport issued by the jurisdiction in which the individual ordinarily resides	The individual's name and date of birth as recorded on this document
7	Individuals who are born in Australia and not covered by items (1) to (6)	Birth certificate	The individual's name and date of birth as recorded on this document
When the person is an individual, and the personal property is held pursuant to an enterprise to which an ABN has been allocated			
8	Sole trader carrying on an enterprise to which an ABN has been allocated	Same sources as for individuals specified in items (1) to (7) above	The name and date of birth of the individual as specified in the highest level document (that is, from (1) to (7)) that applies.
9	When the personal property is partnership property and an ABN has been allocated to the partnership.	Australian Business Register (see http://www.abr.business.gov.au/)	Name of the partnership as recorded on the Australian Business Register.

No.	Entity type	Source of data	Information to be recorded
When the person is a body corporate			
11	Companies to which an Australian Company Number (ACN) has been allocated under the Corporations Act	National Names Index administered by ASIC (see http://www.search.asic.gov.au/)	ACN
12	Registrable bodies to which an ARBN has been allocated under the Corporations Act	National Names Index	ARBN
13	A body corporate that has not been allocated an ACN or ARBN	The body's constitution or other equivalent document	The name of the entity as specified in this document
When the grantor is a body politic¹			
14	When the body politic holds the collateral in the course or furtherance of an enterprise to which an ABN has been allocated	Australian Business Register	ABN
15	When the body politic holds the collateral otherwise than in the course or furtherance of an enterprise to which an ABN has been allocated	The constitution of the body politic	The name of the body politic
Where the grantor is a responsible entity for a registered managed investment scheme			
16	Where the property is held in the course or furtherance of a registered managed investment scheme under the Corporations Act	National Names Index	Australian Registered Scheme Number

¹ A body politic is a government entity such as the Commonwealth of Australia, an Australian State or Territory or a foreign government. It is intended that this definition would also apply to discrete parts of such an entity, such as government departments and executive agencies.

No.	Entity type	Source of data	Information to be recorded
Where the grantor is an unincorporated association or other body of persons			
17	When the body holds the collateral in furtherance of an enterprise to which the ABN has been allocated	Australian Business Register	The name of the body recorded against the ABN
18	When the body holds the collateral otherwise that in furtherance of an enterprise to which an ABN has been allocated	The constitution of association or body	The name of the association or body as specified in this document

Rationale

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

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

AML-CTF Requirements

30. The proposal to record information pursuant to the AML-CTF Act requirements has been suggested to encourage a discussion about its merits. The proposal recognises the additional costs that organisations would incur by having to comply with two streams of rules dealing with individual identity.

31. In providing comments on this issue, AML-CTF Act organisations should be aware that while their own registrations will be valid under the PPS Bill so, too, will the registrations of other AML-CTF organisations who may have recorded security interests against the same grantors and same property but under different names. The advantage of this approach may be offset by corresponding (or even outweighing) disadvantages.

32. If AML-CTF organisations were to respond to risk by checking other forms of identification, such as driver licences, a question arises as to the value of applying the AML-CTF Act as the primary source of identity information for the PPS Register.

33. It is noted that non AML-CTF Act organisations may be disadvantaged in relation to earlier security interests granted by AML-CTF Act secured creditors as they would have limited

opportunity to discover the name by which a particular grantor was known at a time before the PPS Bill came into force. Regardless, it is anticipated that whatever approach is adopted in the regulations, industry will respond by introducing appropriate due diligence practices.

Australian Business Numbers not recorded

34. It is proposed that the PPS Bill will be amended to state that the details required to be recorded on the PPS Register would not include an ABN.

35. During consultations on the Bill many stakeholders emphasised the potential difficulties that may arise if partnerships and sole traders were to be identified on the PPS Register by an ABN. In particular, many stakeholders were concerned that searching the PPS Register by ABN with certainty might be compromised because partnerships or sole traders may have more than one registered ABN.

36. Requiring secured parties to register against all the current ABNs that a partnership or sole trader may have would also be problematic. This is because a partnership or sole trader may register another ABN following the registration of the security interest on the PPS Register.

37. Identifying partnerships by the name of the partnership on the Australian Business Register and sole traders by the name and date of birth of the individual would ensure, on balance, that the certainty of the PPS Register is maintained.

Question

Comment is invited as to whether the above rules cover all entities against which PPS registrations might be made, and whether the information required would be sufficiently particular to identify grantors and secured parties.

Section ^19 – Definition of fish

38. At this stage it is proposed that a regulation would **not** be prescribed excluding any species of fish from the definition of fish in section ^19.

Question

Are there species of fish that should be excluded from the definition of fish?

Section ^19 – Definition of investment instrument

39. Section ^19 defines the term ‘investment instrument’ in a way which allows other financial products prescribed by the regulations to be included. It is proposed that, at this stage, a regulation would **not** be prescribed under section ^19 prescribing any other financial products as an investment instrument for the purposes of the Bill.

40. The definition of ‘investment instrument’ is being reviewed following consultations with stakeholders. The precise financial products that should be included within the definition will be

determined after further work has been undertaken on the definition of investment instruments generally.

Section ^19 – Definition of lease for a term of more than one year

41. Section ^19 enables a regulation to be made that excludes from the definition of ‘lease for the term of more than one year’ a lease over property prescribed for the purposes of this definition.

42. Currently it is proposed that a regulation would **not** be prescribed for the purposes of this section. It is not considered that there are any types of leased property that should be excluded from this definition at this time.

Question

Are there any types of leased property that should be excluded from the definition of lease for a term of more than one year?

Section ^19 – Definition of motor vehicle

43. It is proposed that a regulation **would** be prescribed under section ^86 prescribing the meaning of ‘motor vehicle’ for the purposes of the Bill (see page 26).

Section ^21 – Meaning of security interest

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

45. At this stage it is proposed that a regulation would **not** be prescribed under section ^21(4)(b) to prescribe interests that would be excluded from the definition of a security interest. Section ^21(4)(b) is intended to allow for a prompt response to address emerging commercial practices that are undesirable to treat as security interests and that would fall within the definition.

Section ^22 – Application of Act to interests

46. A number of interests in personal property are excluded from the operation of the Act pursuant to section ^22, including an interest of a kind prescribed by the regulations for the purposes of this section.

47. The implementation and operation of the proposed national system is predicated upon a referral of State residual jurisdiction in respect of personal property securities law.

48. However, the national system may have to accommodate circumstances where a State does not refer to the Commonwealth its legislative power over PPS. Where this occurred, the operation of the Bill would be confined to the constitutional power of the Commonwealth. This may result in scenarios where, without a regulation under this clause, it would not be clear how the Bill interacted

with State law. It would be necessary to provide certainty to the relevant jurisdiction as well as the market as to how the prior State law would interact with the Bill.

49. It is proposed that **no** other interests in personal property would be prescribed as being excluded from the operation of the Act at this stage.

Section ^50 – Application of law in relation to security interests in investment entitlements

50. Section ^50 provides that for the purposes of the PPS Bill ‘investment entitlement’ means, amongst other things, any of the financial products mentioned in certain paragraphs of the definition of investment instrument other than a security interest or a financial product of a kind prescribed by the regulations.

51. There is still further work to be undertaken on the specific definition of ‘investment instrument’ which will impact on what financial products will be prescribed by the regulations. Whether a regulation will or will not be prescribed will be assessed when the definition is settled.

PART 3 – SECURITY INTERESTS: GENERAL PRINCIPLES

52. Part 3 of the Bill contains the general principles governing security interests including the formal requirements for a security agreement, attachment and perfection of a security interest, and enforceability of a security agreement against a third party. Part 3 contains no regulation making provisions.

PART 4 – ATTACHMENT AND PERFECTION: PARTICULAR SITUATIONS

53. Part 4 of the Bill sets out special rules for attachment and perfection in relation to particular types of collateral, or dealings with the collateral which may give rise to proceeds or result in transfer of the collateral to a third party.

Section ^63 – Attachment of security interests in after-acquired property

54. Section ^63 contains a general rule that states that where a security agreement provides for a security interest in after-acquired property, the security interest attaches without specific appropriation by the grantor. This means that if a security interest covers all present and after acquired property, or if it covered all cars, and the grantor obtained a car after granting the security interest, it would nevertheless attach automatically to the car.

55. This ‘automatic’ attachment can have far reaching consequences for a grantor. It means any property that the grantor acquires after entering into the security agreement that gives rise to the security interest will also be subject to the security interest. Section ^63 provides a number of exceptions to the general rule including that the security interest will not automatically attach if the after acquired property is of a kind prescribed by the regulations (s 63(2)(a)).

56. The Consumer Credit Code prohibits the attachment of security interests to certain after-acquired property (section ^41).

57. It is proposed that a regulation **would** be prescribed under section ^63(2)(a) with the effect that the Act would prevent the attachment of security interests to after-acquired goods to the same extent as the Consumer Credit Code.

Section ^75 – Returned tangible property-security interest

58. Section ^75 provides that although a person may take collateral free of a security interest due to the operation of an extinguishment provision, a security interest in tangible property will reattach to the tangible property in certain circumstances including any circumstances prescribed by the regulations (section ^75(1)(d)(v)).

59. Section ^75(1)(d)(v) was included to allow the Commonwealth to prescribe by regulation certain circumstances in which this section would apply if State or Territory legislation provided for a similar result. The intention is to preserve the operation of corresponding State and Territory legislation.

60. At this stage, it is **not** intended to make a regulation prescribing any other circumstances because the circumstances described in section ^75(1)(d) cover the circumstances dealt with in the existing State and Territory legislation (for example, see section ^7(9) *Chattel Securities Act 1987* (Vic)).

Question

Do the circumstances described in section ^75(1)(d) cover all the circumstances covered by State and Territory legislation?

Section ^76 – Account or chattel paper in returned tangible property-security interest

61. Section ^76 provides that a transferee of an account or chattel paper created by an acquisition would be deemed to have a security interest in returned goods in certain circumstances including any circumstances prescribed by the regulations.

62. As with section ^75, this regulation making power has been included to allow the Commonwealth to prescribe by regulation certain circumstances in which this section would apply if State or Territory legislation provided for a similar result. The intention is to preserve the operation of corresponding State and Territory legislation.

63. At this stage, it is **not** intended to make a regulation under this provision because the circumstances described in section ^76(1)(d) are likely to cover the circumstances dealt with in State and Territory legislation.

Question

Do the circumstances in section ^76(1)(d) cover all the circumstances covered by State and Territory legislation?

PART 5 – ACQUIRING PERSONAL PROPERTY FREE OF SECURITY INTERESTS

64. Part 5 of the Bill establishes the range of circumstances in which a person may acquire an interest in personal property free of a security interest. The circumstances generally involve the transfer of the collateral from the debtor to another person.

65. Perfection of a security interest in personal property is normally sufficient to ensure that a secured party can enforce their security interest against third parties. Occasionally, however, reasonable commercial expectations require protection of the title acquired by a third party transferee. That protection is required regardless of whether the security interest is perfected or unperfected.

Section ^80 – Acquiring personal property free of unperfected security interest

66. Section ^80 provides that a person will acquire an interests in personal property free of a security interests if:

- the security interest is unperfected
- the person has no knowledge that the acquisition constitutes a breach of the security agreement, and
- the person acquires the personal property for new value.

67. Section ^80(2) provides that the regulations may specify that the requirement of actual knowledge would not apply to personal property prescribed under the regulations.

68. The Australian Government is considering whether Australia should sign and ratify the *Convention on International Interests in Mobile Equipment 2001* (the Convention) and the associated *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (the Protocol).

69. If Australia were to sign and ratify the Convention and the Protocol, it is likely that the kind of personal property that would be prescribed under section ^80(1) would be defined to be consistent with the definition of ‘aircraft objects’ in the Protocol. ‘Aircraft objects’ is defined in the Protocol as airframes, aircraft engines and helicopters.

70. The regulation making power in section ^80(1) has been included in the Bill to facilitate implementation of the Convention and the Protocol if it is decided to sign and ratify it. It is important to note that no decision has been made on this.

71. It is proposed that a regulation would **not** be prescribed under section ^80(1) at this stage.

Section ^81 – Acquiring personal property free of security interest if serial number incorrect or missing

72. Section ^81 provides that a person will acquire an interest in personal property free of a security interest if:

- the regulations provide that the property may, or must, be described by serial number
- searching the register by the actual serial number of the property would not disclose a registration that perfected the security interest
- the person has no knowledge that the acquisition constitutes a breach of the security agreement, and
- the person acquires the personal property for new value.

73. Section ^81(2) provides that the regulations would specify that the requirement of actual knowledge would not apply to personal property prescribed under the regulations.

74. The regulations will specify the kinds of personal property that may or must be described by serial number on the PPS Register (see discussion under section ^195 table item 4(b) at page 37).

75. It is proposed that a regulation would **not** be prescribed under section ^81(2) at this stage.

76. Similar to the discussion on section ^80 above the personal property to be prescribed is contingent on whether the Australian Government ratifies the Convention and its associated Protocols. As outlined above it is anticipated that the regulations would specify mobile assets such as airframes, aircraft engines and helicopters.

Section ^83 – Acquiring personal property free of security interest in personal, domestic or household property

77. Section ^83 provides that a person will acquire personal, domestic or household property free of a security interest in the property if:

- the person intends to use the personal property for personal, domestic or household purposes
- the market value of the total new value given for the property is not more than \$5000
- the property is not collateral that is required to be described by reference to a serial number
- the person acquires their interest for new value, and
- the person has no knowledge of the security interest.

78. Section ^83 provides for what is known as the ‘low value consumer goods exception’. It provides important protection to consumers because it addresses the scenario where a consumer buys a low value good from a transferor who is not transferring the interest in the ordinary course of their business, for example, purchases at a garage sale.

79. Pursuant to section ^83, the regulations may prescribe an amount greater than \$5,000 for the total new value given for the property for the purposes of the exception.

80. There are **no** plans to prescribe an amount greater than \$5,000 for the purposes of section ^83.

Section ^86(1) – Acquiring personal property free of security interest in motor vehicle

81. Section ^86(1) extends the extinguishment provisions in the Bill to purchasers of motor vehicles where an existing interest in the motor vehicle is incorrectly recorded on the PPS Register.

82. The regulations **would** prescribe the definition of motor vehicle for the purposes of this section.

Content of enabling provision:

Section ^86(1) provides that a person will acquire personal property free of a security interest in the personal property if, amongst other things, the personal property is a motor vehicle prescribed by the regulations for the purpose of this section.

Content of proposed regulation:

The regulations would specify that a motor vehicle for the purposes of section ^86 would include ‘Registrable Motor Vehicles’ and ‘Unregistrable Motor Vehicles’.

A “Registrable motor vehicle” would be defined by the regulations as any vehicle that:

- is registrable under the road transport vehicle registration laws of a State or Territory to be used on public roads, and
- has a Vehicle Identification Number (VIN) allocated to it or, if it does not have a VIN, a number affixed to the vehicle by its manufacturer intended to uniquely identify the vehicle; or if there is no such number, a single number affixed to it by another person.

An ‘Unregistrable motor vehicle’ would be defined by the regulations as any vehicle that is not a ‘Registrable motor vehicle’ that:

- has a VIN allocated to it or, if it does not have a VIN, there is a number affixed to the vehicle that identifies the vehicle, and
- is built to be propelled on land by a motor that forms part of the vehicle or a vehicle with a motor, and may include a vehicle designed for use exclusively in the mining industry, a trailer, tractor or farm machinery, a self-propelled wheel-chair, a self-propelled vehicle designed for off-road work in construction, maintenance or warehouse operation.

Rationale

83. ‘Motor vehicle’ is defined differently in State and Territory legislation. Vehicles that may be defined as motor vehicles in some jurisdictions and registrable on encumbrance registers by way of serial number might not necessarily be treated the same way in other jurisdictions.

84. The proposed definition of ‘motor vehicle’ has been developed to strike a balance between the current divergent approaches to this matter. To ensure that the reforms meet stated objectives it is important that vehicles that are currently registrable as serially numbered goods on State and Territory registers fall within the definition of ‘motor vehicle’ for the purposes of the PPS Bill.

Question

Comment is invited generally on the proposed definition of motor vehicle for the purposes of section ^86.

Section ^86(2) - Acquiring personal property free of security interest in motor vehicle

85. Section ^86(2) also extends the extinguishment provisions in the Bill to purchasers of motor vehicles where the motor vehicle is purchased from a class of prescribed persons.

86. It is intended that a regulation **would** be made under section ^86(2) prescribing that class of persons.

Content of enabling provision:

Section ^86(1) provides that a person will acquire personal property free of a security interest in the personal property if, amongst other things, the personal property is a motor vehicle prescribed by the regulations and the person from whom the person purchases the motor vehicle is in a class of persons prescribed by the regulations for the purposes of this subsection.

Content of proposed regulation:

The regulations would specify that the class of persons prescribed by the regulations for the purposes of this subsection would include motor vehicle dealers or traders as defined and licensed under the following State and Territory legislation:

- *Motor Dealers Act 1974 (NSW)*
- *Property Agents and Motor Vehicle Dealers Act 2000 (Qld)*
- *Motor Car Traders Act 1986 (Vic)*
- *Second-Hand Vehicle Dealers Act 1995 (SA)*
- *Motor Vehicle Dealers Act 1973 (WA)*
- *Motor Vehicles Act 1956 (NT)*
- *Sale of Motor Vehicles Act 1977 (ACT)*

The regulations would also specify that the class of persons prescribed by the regulations for the purposes of this subsection would include persons who have been issued with motor vehicle dealer plates under the following legislation (including any subordinate legislation made under that legislation):

- *Transport Operations (Road Use Management) Act 1995 (Qld)*
- *Motor Vehicles Act 1959 (SA)*
- *Vehicle and Traffic Act 1999 (Tas).*

Rationale

87. The rationale for the extinguishment rule in section ^86(2) is that a purchaser who acquires an interest in a motor vehicle from a motor vehicle dealer or trader in good faith should not have to search the PPS Register prior to acquiring their interest. This rule should also extend to a person financing the acquisition. Section ^86(2) is modelled on section 7(1B)(2) of the *Chattel Securities Act 1987* (Vic).

88. All jurisdictions (except for Tasmania) have motor vehicle dealer or trader licensing legislation. However, in Queensland and South Australia, the motor vehicle dealer or trader licences that are issued under the legislation only permit the licensee to sell or trade second hand motor vehicles. Motor vehicle dealers that sell unregistered motor vehicles (generally new motor vehicles) require special registration plates ('trade plates') to drive those motor vehicles on public roads (for test driving purposes, etc). In order to make sure that the operation of the extinguishment rule in section ^86(2) would apply to new motor vehicle dealers in South Australia and Queensland, it is necessary for the regulations to prescribe that persons who hold 'trade plates' under the relevant legislation in those jurisdictions are in a class of persons prescribed by the regulations for the purposes of section ^86(2).

89. In Tasmania, a person who holds 'trade plates' under the *Vehicle and Traffic Act 1999* (Tas) would be a class of persons prescribed by the regulations for the purposes of section ^86(2).

Question

Is the class of persons listed above appropriate for the purposes of section ^86(2) of the Bill?

PART 6 – PRIORITY BETWEEN SECURITY INTERESTS

90. Part 6 of the Bill sets out the priority rules to be applied between different interests in personal property. The priority rules in Part 6 determine which of the secured parties is entitled to seize the collateral when more than one of them becomes entitled to do so in accordance with their security agreement. The rules also determine whether a secured party is entitled to take over an enforcement process initiated by another secured party.

Section ^100 – Priority of purchase money security interest in inventory

91. Section ^100 provides that a purchase money security interest (PMSI) in inventory would have priority over a perfected security interest that is granted by the same grantor in the same collateral if, amongst other things, notice is given to all other secured parties who have a registration describing the inventory. The section provides that notice is not required to be given to the other secured parties in relation to inventory of a class, or in circumstances, prescribed by the regulations (if any).

92. There is presently **no** intention to make a regulation under section ^100.

93. The purpose of this regulation making power is to allow for the requirement of notice to be dispensed with should it become apparent that the notice requirement is too administratively onerous on or effects the business operations of the secured party holding the PMSI. There is currently no evidence that those difficulties will arise and accordingly no regulation will be made.

PART 7 – TRANSFER AND ASSIGNMENT OF RIGHTS IN COLLATERAL

94. Part 7 of the Bill contains rules dealing with the transfer and assignment of various parties rights in collateral. In particular, the rules in Part 7 deal with the:

- transfer of a grantor’s rights in collateral
- rights of various parties on transfer of account or chattel paper, and
- transfer of security interests in intellectual property licences.

95. There are no regulation making powers in Part 7 of the Bill.

PART 8 - AGRICULTURAL INTERESTS, FIXTURES, ACCESSIONS AND COMMINGLING

96. Part 8 of the Bill sets out special rules on priorities, extinguishment and enforcement for security interests in agricultural products, fixtures, accessions and commingled goods.

Section ^134 – Returned improved property-security interest

97. Section ^134 provides that although a person may take collateral free of a security interest due to the operation of an extinguishment provision, a security interest in an accession to improved property will reattach to the accession in certain circumstances, including circumstances prescribed by the regulations.

98. As with sections ^75 and ^76, this regulation making power has been included to allow the Commonwealth to prescribe by regulation certain circumstances in which this section would apply if State or Territory legislation provided for a similar result (that is, there may be circumstances not covered by the Bill where a security interest will re-attach to the improved property).

99. At this stage, it is **not** proposed to make a regulation prescribing any other circumstances where a security interest will re-attach to an accession under section ^134. The circumstances described in section ^134 should comprehensively cover the circumstances dealt with in existing State and Territory legislation.

Question

Are there any other circumstances where the security interest should reattach to the accession?

Section ^154 – Secured party must give notice of removal of collateral

100. Section ^154 provides that a secured party who proposes to remove collateral that is an accession to tangible property must provide notice to a number of other parties (including the grantor and other secured parties) at least 10 business days before the day the collateral is removed. Section ^154(3) specifies that the notice must contain certain details including any other matter required by the regulations for the purposes of this subsection.

101. The details set out in section ^154(3) to be contained in the notice would provide comprehensive notice to the other parties that the secured party proposes to retain the collateral in a certain timeframe.

102. It is **not** proposed that the regulations would prescribe any other matter that a notice provided under section ^154 should contain.

Question

Are there any other matters that should be contained in a notice given to the other parties under section ^154?

PART 9 - ENFORCEMENT

103. Part 9 of the Bill details the rights and obligations of parties in the event that a debtor defaults in meeting its obligations under a security agreement. It establishes the remedies available and the process to be followed when enforcement action is taken against collateral.

104. Currently, enforcement remedies are defined according to the contractual arrangements between the parties and any existing relevant law (which may vary between jurisdictions). Different remedies may be applied depending upon the particular security device utilised. The enforcement sections in the Bill provide simple and comprehensive remedies for all security transactions regardless of the nature or form of the transaction.

105. The enforcement sections are intended to ensure that where enforcement action is taken by a secured party others with an interest in the collateral have an opportunity to protect their own interests. The enforcement sections may be categorised as providing rights, obligations and protections governing the relationship between the following parties in the event of debtor default:

- the secured party enforcing against the collateral
- the grantor or owner of the collateral
- the debtor (where this is not the grantor)
- secured parties other than the enforcing party, and

- other interested parties.

106. The Bill does not attempt to codify the rights, duties and obligations of the parties. It recognises that parties to security agreements are best placed to make judgements about their enforcement terms. Accordingly, the enforcement sections do not establish definitive rights in relation to enforcement. The parties to a security agreement would be able to contract out of some of the sections.

Section ^164 – Relationship between this Part and the Corporations Act 2001

107. Section ^164(1) provides that the enforcement provisions would not apply to property while a person is appointed as a receiver, or a receiver and manager, of the property under Part 5.2 of the *Corporations Act 2001*. Due to the constitutional basis of the *Corporations Act 2001* Part 5.2 only applies to specific property.

108. Pursuant to section ^164(2) the regulations could enable a receiver or other controller of property to be appointed under a security agreement in relation to personal property in circumstances not covered by the *Corporations Act 2001*. It is proposed that a regulation **may** be made under section ^164 applying and modifying where necessary Part 5.2 of the *Corporations Act 2001* to achieve this outcome.

109. Part 5.2 of the *Corporations Act 2001* could be extracted in the regulations to apply to receivers and controllers of personal property:

- belonging to registrable Australian bodies within the meaning of the *Corporations Act 2001* if
 - the Personal Property Securities Act applies in relation to the personal property, and
 - the personal property is tangible property located within the State or Territory of its origin or outside Australia
- belonging to a foreign company not registered under the *Corporations Act 2001* if the personal property is tangible property located in Australia.

110. Expanding the application of Part 5.2 of the *Corporations Act 2001* in the manner described above would ensure the consistent application of existing rules to a broader class of property and circumstances than is currently available under the *Corporations Act 2001*. This is consistent with the broader rationale of the reform to increase consistency and certainty in personal property securities law.

111. While it is acknowledged that there would be particular benefits from also expanding the operation of Part 5.2 to the personal property of individuals, it is noted that during consultations with State and Territory governments on the Bill it has been agreed that, at their request, Part 5.2 of the *Corporations Act 2001* should not be applied through the regulations to the personal property of an individual.

Question

Is the extension of Part 5.2 through the regulations as proposed worthwhile given that Part 5.2 will not be extended to the personal property of individuals?

Section ^166 – Proceeding as if personal property were land

112. Section ^166 enables the application of real property legislation in the States and Territories to personal property so that a secured party with a security interest in both real and personal property may take one set of enforcement action against both types of property.

113. In order to ensure that the State and Territory real property legislation is applicable to personal property, section ^166 empowers regulations to amend a provision of an applicable land law to facilitate the application of the provision to personal property.

Question

Comment is invited generally on the content of any regulation that may need to be made under section ^166.

Section ^167 – Relationship with the Consumer Credit Code

114. The Bill and the Consumer Credit Code (the Code) would operate concurrently. Where both the Code and the Bill contain parallel obligations, regulations **would** be prescribed pursuant to section ^167 to provide that compliance with specific obligations in the Code would be deemed compliance with comparable obligations in the Bill.

Content of enabling provision:

Section ^167 provides that the regulations may provide that a specified provision of Part 9 of the Bill is taken to have been complied with in specified circumstances if a specified provision of the Consumer Credit Code of a State or Territory has been complied with in those circumstances.

Content of proposed regulation:

The regulations would provide that performance of certain obligations under the Code would be deemed to be compliance with certain obligations under the Bill. These provisions would be as follows:

<i>Consumer Credit Code provision</i>	<i>Bill provision deemed to be complied with</i>
<i>Section 94</i> Within 14 days of taking possession a secured party must provide a notice to the debtor and must not sell the goods within 21 days of providing the notice.	<i>Section ^177</i> A secured party must give notice at least 10 business days to a grantor (who may be a debtor) prior to the disposal of the collateral.

<p><i>Section 96(3)</i></p> <p>After the sale a secured party must give the mortgagor a notice stating the gross amount realised, the net proceeds of the sale, the amount required to pay out the credit contract, any further action the secured party intends on taking and any other matters required under the regulations.</p>	<p><i>Section ^179</i></p> <p>A secured party must give to the grantor and other interested persons a notice outlining the total amount received from the sale, any amounts paid to interested parties and the balance owing to the owner or from the debtor to the secured party.</p>
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Rationale

115. Because the Bill is not intended to exclude or limit the operation of the Code, to the extent that the two frameworks are able to operate concurrently, a secured party would have to comply with both the enforcement requirements in Part 9 of the Bill and the enforcement provisions in Part 5, Division 2 of the Code.

116. There is a need to ensure that compliance with both regimes is not unnecessarily onerous on secured parties undertaking enforcement. Accordingly, it is intended that a secured party performing the above listed acts and obligations under the Code would not be required to undertake any additional acts and obligations under the Bill.

Question

Are there other provisions of the Code that, once complied with, should be deemed to constitute compliance with the Bill?

Section ^177 – Notice of disposal of collateral

117. The enforcement regime in Part 9 of the Bill confers a power upon a secured party to take possession of collateral and dispose of it to apply its realised value towards the outstanding obligation. Disposal may occur by way of sale or lease.

118. Prior to disposal the secured party must provide a notice to interested parties as specified in section ^177. An expansive definition of interested persons is provided including the grantor, the secured party and any other person.

119. The information that must be provided in the notice includes any other matter required by the regulations. It is proposed that the regulations **would** prescribe additional matters required to be included in a notice of disposal of collateral.

Content of enabling provision:

Section ^177(3)(g) provides that a notice of disposal of collateral must contain any other matter required by the regulations for the purposes of this subsection.

Content of proposed regulation:

It is proposed that the regulations would specify that the notice of disposal of collateral would have to contain the following additional details:

- a statement that, on payment of the amount required to satisfy the obligations secured by the security interest, the grantor, or if the grantor is not the person owing the obligation that other person, may redeem the collateral
- a statement that, on payment of the amount in arrears, or on the curing of any other default, together with the payment of reasonable expenses incurred in seizing, repossessing, holding, repairing, processing or preparing for disposal of the collateral the grantor may reinstate the security agreement
- a statement that unless the collateral is redeemed or the security agreement reinstated, the collateral will be disposed of and the debtor will be liable for any deficiency, and
- the time and place where the secured party proposes to dispose of the collateral.

It is also proposed that where the collateral was proposed to be leased, the regulations would prescribe that the secured party would be required to provide the grantor and all other interested parties with the following information:

- the details of the lessee
- the lease amount
- the term of the lease amount, and
- details of any options to renew the lease.

The regulations would also specify that if this information was not known at the time the notice of disposal was issued, the enforcing party would not be required to provide it.

Rationale

120. The notice of disposal under section ^177 serves several functions including providing an opportunity to:

- place parties with an interest in the collateral with an opportunity to redeem the collateral
- place the grantor on notice of the pending disposal to provide them with an opportunity to reinstate the collateral, and
- provide interested parties with an opportunity to police the enforcement.

121. The regulations would extend the matters to be contained in the notice of disposal to achieve these functions.

Question

Are there any other matters that the regulations should prescribe should be contained in a notice of disposal under section ^177 of the Bill?

Section ^182 – Notice of retention of collateral

122. Part 9 of the Bill confers a power upon a secured party to take possession of collateral and retain it in satisfaction of the outstanding obligation. Prior to retention of the collateral, the secured party must provide a notice in relation to the retention of collateral to interested parties as specified in section ^182.

123. Section ^182 lists what information must be included in the notice. The section provides flexibility to require the notice to contain other information as prescribed by regulations. Similarly it also confers a power to prepare an approved form on which a notice under the section must be provided.

124. It is proposed that a regulation would **not** be made under section ^182 prescribing any other matters to be contained in a notice of retention of collateral.

Question

Are there any matters that the regulations should prescribe should be contained in a notice of retention of collateral under section ^182?

PART 10 – PERSONAL PROPERTY SECURITIES REGISTER

125. Part 10 of the Bill contains the legislative framework that would establish the single national PPS Register. Once established, the PPS Register will serve as a public noticeboard of existing and possible security interests in personal property.

126. In addition to provisions that would establish the PPS Register, Part 10 also contains provisions detailing:

- the content of the data that would be registrable
- the effectiveness and ineffectiveness of a registration
- the process for amending and removing registrations, and
- who may search the PPS Register and the criteria they may use in their search.

127. Many of the provisions in Part 10 contain regulation making powers. Therefore a significant portion of the legislative framework for the PPS Register will be contained in the regulations. This approach has been adopted to provide flexibility in the design and development of the IT architecture for the new system.

Section ^191 – Personal Property Securities Register

128. Section ^191 provides that the Registrar must ensure that the PPS Register is operated at all times except if the Registrar considers that it is not practical to provide access to the PPS Register or in other circumstances prescribed by the regulations. Where the Registrar considers that it is not practical to provide access to the PPS Register, the Registrar may:

- refuse access to the PPS Register, or
- otherwise suspend the operation of the PPS Register, in whole or in part.

129. The circumstances in which the Registrar may refuse access to or otherwise suspend the operation of the PPS Register under section ^191 are broad and would likely encompass the situations in which the Registrar may need to cease the operation of the PPS Register. Accordingly, it is **not** proposed at this stage to make a regulation pursuant to section ^191 prescribing any other circumstances in which the Registrar may need to cease the operation of the PPS Register.

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

130. To ensure that prospective purchasers and lenders obtain the most up to date information about the status of personal property, section ^192 of the Bill provides scope for the PPS Register to contain data in relation to interests in personal property that are prescribed by the regulations other than security interests.

131. It is proposed that the regulations **would** prescribe certain interests in personal property other than security interests would be registrable on the PPS Register. Those other kinds of interests could include interests such as those of State and Territory agencies that arise under State and Territory motor vehicle confiscation and impoundment legislation, confiscation of proceeds of crime legislation, as well as guardianship orders issued by State and Territory Public Trustees over

motor vehicles. In considering the other data to be included on the PPS Register, regard must be had to the purpose and scope of the PPS Register.

Questions

What other interests in personal property should be registrable on the PPS Register?

Section ^194(2)(d) – Prohibited registrations

132. Section ^194 provides that a person may apply for registration of personal property as collateral and the Registrar must give effect to the application for registration if certain criteria are complied with. Among these criteria are that the registration would not be prohibited by the regulations. It is proposed that a regulation **would** be prescribed under section ^194(2)(d).

133. The regulations would prescribe that a registration on the PPS Register would be prohibited where, in all the circumstances, the Registrar considers that the registration of the data would be inappropriate to register on a public register.

134. The purpose of this regulation is to prohibit, amongst other things, the registration of data on the PPS Register that would cause offence, is defamatory or otherwise unlawful.

Questions

Comment is invited generally on the contents of this proposed regulation.

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

135. It is proposed that the regulations would set out which personal property *must* be described by serial number for the purposes of section ^195, table item 4(b). A separate regulation would be made pursuant to section ^195, table item 9 to prescribe property that *may* be described as a serial numbered good. For ease of reference, the details to be included in a registration where a number is a serial numbered good that would be prescribed under section ^195, table item 9 are discussed here.

Content of enabling provision:

Section ^195 provides that a registration consists of the data required by the table in section ^195, including that the collateral must be described by serial number if required by the regulations.

Content of proposed regulation:

The regulations would provided that the following property must be described by a serial number:

- motor vehicles used for consumer purposes
- boats used for consumer purposes, and

- aircraft used for consumer purposes.

The regulations would prescribe that the following information *must* be provided (as appropriate) in respect of property that *must* be prescribed as a serial numbered good.

Motor vehicles

Where the vehicle has a VIN - the VIN.

Where the vehicle does not have a VIN - a number affixed to the vehicle by its manufacturer intended to uniquely identify the vehicle or, if there is no such number, a single number affixed to it by another person.

Boats

The boat's hull identification number (HIN).

Aircraft (airframes, aircraft engines and helicopters)

The serial number affixed to the object by the manufacturer. Other general information that would be required to be registered for aircraft pursuant to section ^195, table item 9, would be the registration mark assigned pursuant to Part 47 of the Civil Aviation Safety Regulations where one has been assigned.

Rationale

136. Serial numbered goods receive special treatment under the PPS Bill because they are generally highly mobile personal property and can be readily identified by a number that is unique, accurate and affixed permanently to the property. The purpose of prescribing property as a serial numbered good is to ensure that that such property is subject to specific rules under the Bill, for example, in relation to the acquisition of property free of a security interest and priority.

137. The proposed regulation provides a choice between whether a VIN or a chassis number is recorded for motor vehicles. This is because the question of whether the VIN or chassis number exists depends upon the date that the motor vehicle was manufactured.

138. Motor vehicles, boats and aircraft that are inventory or used as equipment would be able to be described as serial numbered goods, but this would not be mandatory. The capacity to describe these goods as a serial numbered good would be prescribed under section ^195, table item 9 (see content of proposed regulation below).

139. It is important to note that for all serial numbered property, registrants would have the option of recording other details, for example the colour of the vehicle, in the free text field.

Question

Comment is invited generally on this proposed regulation.

Definition of Aircraft

140. It is proposed that a regulation **would** be made defining ‘aircraft’ for the purposes of the Act. For convenience the definition of aircraft is discussed here.

Content of enabling provision:
Section ^274 is the general regulation making power.
Content of proposed regulation:
<p>The regulations would define aircraft as either airframes with aircraft engines installed thereon, helicopters and other aircraft. The regulations would define airframes, aircraft engines, helicopters and other aircraft as follows:</p> <ul style="list-style-type: none">• ‘airframes’ means airframes (other than those used in military, customs or police services) that, when appropriate aircraft engines are installed thereon, are type certified by the Civil Aviation Safety Authority to transport:<ul style="list-style-type: none">- at least eight (8) persons including crew, or- goods in excess of 2750 kilograms,together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines), and all data, manuals and records relating thereto• ‘aircraft engines’ means aircraft engines (other than those used in military, customs or police services) powered by jet propulsion or turbine or piston technology and:<ul style="list-style-type: none">- in the case of jet propulsion aircraft engines, have at least 1750 lb of thrust or its equivalent, and- in the case of turbine-powered or piston-powered aircraft engines, have at least 550 rated take-off shaft horsepower or its equivalent,together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto• ‘helicopters’ means heavier-than-air machines (other than those used in military, customs or police services) supported in flight chiefly by the reactions of the air on one or more power-driven rotors on substantially vertical axes and which are type certified by the Civil Aviation Safety Authority to transport:<ul style="list-style-type: none">- at least five (5) persons including crew, or- goods in excess of 450 kilograms,

together with all installed, incorporated or attached accessories, parts and equipment (including rotors), and all data, manuals and records relating thereto

- **‘other aircraft’** means something that is not an airframe with aircraft engines installed thereon or a helicopter that has a registration mark assigned pursuant to Part 47 of the Civil Aviation Safety Regulations

Rationale

141. Defining aircraft as either airframes with aircraft engines installed thereon or helicopters is consistent with the definition of aircraft in the *Convention on International Interests in Mobile Equipment 2001* and the associated *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*. It is necessary to extend the definition to ‘other aircraft’ to ensure that the Bill applies to aircraft (such as light aircraft) that might not necessarily fall within the definition in the Convention and the Protocol.

Question

Comment is invited generally on the proposed definition of aircraft.

Definition of Boat

142. It is proposed that a regulation would be made defining ‘boat’ for the purposes of the Act. For convenience the definition of boat is discussed here.

Content of enabling provision:

Section ^274 is the general regulation making power.

Content of proposed regulation:

The regulations would define ‘boat’ for the purposes of the Bill as a vessel designed for transporting persons or things on water that has a Hull Identification Number.

Rationale

143. Boats are not registrable on an encumbrance register in every State and Territory. This definition would ensure that boats that are currently registrable on State and Territory registers are registrable on the PPS Register as serial numbered collateral.

Question

Comment is invited generally on the proposed definition of boat.

Section ^195 – Table item 4(c) classes of collateral

144. Section ^195, table item 4 requires that all collateral must belong to a single class. It is proposed that a regulation **would** be prescribed under section ^195, table item 4(c).

145. In addition to falling within a class of personal property under this regulation an item of personal property would, in accordance with the relevant definitions in the Bill, be characterised as inventory, consumer property or equipment. As part of the registration process, a registrant would indicate whether the collateral being registered is inventory, consumer property or equipment before further describing the collateral.

Content of enabling provision:
Section ^195, table item 4(c) provides that a collateral description must describe collateral as belonging to a single class of collateral prescribed by the regulations.
Content of proposed regulation:
<p>The regulations would prescribe the following classes of property:</p> <ul style="list-style-type: none">• current assets (other than inventory)• goods: motor vehicles• goods: boats• goods: airframes, aircraft engines, helicopters and aircraft• goods: crops or livestock• goods: other• transfer of an account or chattel paper• chattel paper• documents of title• investment instruments or investment entitlements• intangibles: other• all present and after acquired property• all present and after acquired property except specified property <p>When the security interest is a lease for a term of more than one year, or a commercial consignment (see ss21(3)(b) and (c)), the relevant class would be the property being leased or consigned.</p> <p>The categories would be defined so that no item of collateral could fall within more than one description: apart from ‘all present and after acquired property’ and ‘all present and after acquired property except specified property’ which necessarily embrace the other categories.</p>

Rationale

146. The purpose of this rule is to ensure that there is no ambiguity about what is described on the PPS Register. Generally, the classes will be mutually exclusive (that is, apart from the all present and after acquired property classes).

147. Where collateral belongs to different classes, separate registrations must be made. For example, separate registrations would have to be made for security interests in motor vehicles and security interests in windscreens that are not affixed to motor vehicles. These registrations would cover the classes of ‘motor vehicles’ and ‘other goods’ respectively.

148. In applying classes of property, it is important to identify collateral with sufficient particularity so that users are able to readily identify the type of property involved. The list of classes set out above is developed from other jurisdictions such as New Zealand and Saskatchewan. It is proposed that registrations could also include a free text description to ensure that collateral is described with sufficient accuracy. This capacity would be enabled by regulations made under section ^195, table item 9 and section ^207, table item 7. For example, to register a security interest in all present and after acquired property other than dairy cattle, the registrant would apply the class of ‘all present and after acquired property except’ and record ‘dairy cattle’ in a free text field.

<p>Question</p> <p><i>Are there any other classes of property that should be included in the regulation under section ^195, table item 4(c)?</i></p>

Section ^195 – table item 4(d) description of proceeds

149. Section ^64 of the Bill provides for a security interest to continue into proceeds of collateral. The security interest in the proceeds can be perfected by registration under section ^65. If the security interest is not perfected against the proceeds it will receive a temporary perfection period under section ^66 for 5 days following the time the collateral gave rise to proceeds.

150. Pursuant to section ^195, table item 4(d) the regulations would prescribe the means by which a security interest that continued into proceeds would have to be described on the PPS Register.

<p>Content of enabling provision:</p>
<p>Section ^195, table item 4(d) states that if proceeds are described in a collateral description they must be described in accordance with the regulations.</p>
<p>Content of proposed regulation:</p>
<p>It is proposed that the regulations would provide that an interest in proceeds may be described in a collateral description in any of the following ways:</p> <ul style="list-style-type: none">• that the interest in proceeds is claimed generally• that the interest in proceeds is claimed in an or assets assigned to a particular class of property prescribed in accordance with section ^195, table item 4(c), and• that proceeds are claimed in the property described in the free text field.

Rationale

151. It is important to ensure that secured parties are able to reflect the interest in proceeds that they may have under a security agreement on the PPS Register. It is common in current commercial practice for secured parties to maintain an interest in proceeds generally as well as an interest in proceeds in specific items of personal property. The proposed regulation to be made under section ^195, table item 4(d) has been developed to reflect these commercial practices.

Question

Comment is sought generally on the content of this regulation.

Section ^195 – table item 7 details of subordination agreements

152. To ensure business efficacy, it is important that a registration indicate the extent to which registered collateral is subject to subordination. It is proposed that the regulations **would** prescribe the details to be recorded on the PPS Register of any subordination that the secured party may choose to register.

Content of enabling provision:

Section ^195, table item 7 provides that a secured party may register details of a subordination agreement on the PPS Register.

Content of proposed regulation:

It is proposed that the regulations would prescribe that the registration of the subordination details would include:

- the unique registration code (assigned by the Registrar pursuant to section ^195, table item 9 of the Bill) of other PPS registrations to which the subordination agreement relates
- where a benefiting secured party does not have a PPS registration that relates to the subordination agreement, the details and address of the benefiting secured party.
- if the subordination agreement applies to only part of the collateral, a description of the part to which the subordination relates, and
- the end date of the subordination agreement where the subordination agreement ceases before the end date recorded for the registration.

Rationale

153. The Bill establishes a facility allowing notice be given to third parties that a lower ranking secured party (or other party with an interest in the registered collateral) would benefit from a subordination agreement, particularly in respect of enforcement action, bankruptcy or insolvency.

154. While the key concern is to apprise third parties of the existence of an agreement, the registration should also provide sufficient information about the benefiting party to enable a third

party to make further inquiries about the agreement. In New Zealand, this is achieved by recording the unique identifier assigned to the related PPS registration under the Act.

155. It is proposed to allow registrants to record the unique registration code assigned to the related registration(s) by the Registrar (that is, the code issued pursuant to regulations made under section ^195, table item 9). Where there is no related PPS registration (this is expected to be rare), the secured party would provide the details and address for the benefiting party. Should this proposal raise privacy concerns, it may be appropriate to disapply the rule in respect of benefiting parties who are individuals acting in a capacity unrelated to an enterprise carried on by them.

156. As the subordination agreement may relate to only part of the property covered by the registration, the secured party would be required to describe the part of the collateral to which the property relates. For example, a registration may cover all present and after acquired property but the subordination agreement may relate only to antique furniture.

157. It is proposed that secured parties be allowed to indicate the expiry date of the subordination agreement where that date occurs before the end date of the registration. This will help third parties to be aware of the duration of the subordination. The New Zealand regulations require registrants to provide information about the end date of a subordination agreement where that end date occurs before the end of the subordinated registration and/or any elevated registration. It is unnecessary to record such details where the agreement expires before any related registration as loss of perfection by registration should not affect the capacity of a secured party to subordinate its interest.

Question
Comment is sought generally on the content of this regulation.

Section ^195 – table item 9 any other matter prescribed by the regulations

158. This regulation would prescribe data for the purposes of section ^195, table item 9, which provides that a registration consists, among other things, of data prescribed by the regulations.

Content of enabling provision:
Section ^195, table item 9 provides that a registration consists of details of the matter prescribed by the regulations.
Content of proposed regulation:
<p>The regulations would prescribe that the registration of collateral on the PPS Register, or an amendment to the registration of collateral on the register, would:</p> <ul style="list-style-type: none"> • allow the Registrar to assign a unique identifier to each registration • allow registrants to provide descriptive material about the collateral in a free text field • allow registrants to attach an electronic file or files to a registration in order to provide additional descriptive information about the collateral • allow registrants to indicate that the registration related to a purchase money security interest

- allow registrants to disclose whether the secured party has control of an asset that is a ‘current asset’ (that is, currency, negotiable instruments, accounts or inventory)
- state whether the collateral is covered by a ‘transitional security agreement’ as defined in the PPS Transitional Provisions and Consequential Amendments Bill, being an agreement in force immediately before the registration commencement date in relation to which the PPS Act would have applied had it been fully in force (in relation to a referring state or otherwise), and
- allow registrants to provide a serial number for goods described as equipment and/or inventory that are described by the class ‘motor vehicles’, ‘boats’, ‘aircraft’ or ‘intangibles’ (where the intangibles are intellectual property).

Rationale

159. The main effect of this regulation would be to allow (and in some cases require) registrants to provide additional information about collateral described on the PPS Register.

Registration code

160. It is proposed that the Registrar would be given the discretion to assign a unique identifier to each registration. This identifier will allow ready identification of the registration in notices given to the secured party under the Act, but also to describe related registrations on the PPS Register, for example, where the secured party records the existence of a subordination agreement. It is likely that the identifier will not be a number but will consist of alpha-numeric characters and will be randomly generated so that registrations are not easily discoverable.

Free text field

161. To ensure that registrants have the flexibility to adjust their registration to their needs, registrants will have the capacity to provide a free text description of the property. For example, a person who registers against motor vehicles as inventory can narrow the registration further by inserting further information in the free text field, for example, ‘cars built in Australia before 1965’. This is important for grantors who may not want registrations against them to apply too broadly, particularly where they wish to use other property (such as foreign built cars) to secure additional finance. As with all data in registrations, the free text field will be subject to other restrictions (specifically, the regulations on prohibited registrations under section 194(2)(d)). Thus, if the description is of a kind that is prohibited by the regulations, it will not be registered or may be removed after registration.

162. When the collateral is described as an assignment of an account, there would be no capacity to provide free text. This is necessary to prevent disclosure of the identity of the account debtor whose debt is being assigned.

Attachments

163. Registrants will be given the capacity to attach an electronic file or files to their registrations. The file may be a document (for example, where copyright in a book is being registered), an audio file (such as a soundtrack), a video file (for example, a movie), a graphic file (such as a photograph or a picture file) or other electronic file. For example, a person who took a security interest in a particular painting might like to include a photograph of the painting on the PPS Register to provide

greater certainty. Again, if the description is of a kind that is prohibited by the regulations, it will not be registered or may be removed after registration.

Current assets subject to control

164. The PPS Bill sets out the requirements for determining whether collateral is a 'circulating asset'. Subsection ^37(2) of the PPS Bill provides that a 'current asset' (being currency, negotiable instruments, accounts and inventory) would not be a 'circulating asset' if the secured party has registered a collateral description that discloses that the secured party has control of that asset, and the secured party does, in fact, have control.

165. For this reason, the regulations would need to allow registrants to indicate whether the secured party has control of the current assets described in a registration. Where a registrant fails to record control, the collateral would be a 'current asset', and therefore a 'circulating asset', even if the asset was actually under the control of the secured party. When the registration is for inventory or another current asset, it will be possible to indicate whether the secured party controls the collateral.

Transitional security agreements

166. The new PPS regime will operate in respect of certain security interests that arise from security agreements in force before the commencement date for the new PPS Register.

167. The PPS (Transitional Provisions and Consequential Amendments) Bill 2008 provides transitional arrangements for such security interests, a number of which operate upon a registration on the PPS Register that flags that the interest arises out of a 'transitional security agreement' (being a security agreement that was made before the registration commencement time). These rules generally concern the priority accorded to a security interest arising out of a transitional security agreement, and are intended to encourage secured parties to perfect prior interests by registration on the PPS Register.

168. At migration, the Registrar would assign the flag of 'transitional security agreement' to migrated security interests. For security interests arising out of non-migrated transitional security agreements, secured parties who opt into the new system will also be able to assign a 'transitional security agreement' flag. Similarly, where a migrated security interest is amended or becomes the subject of a new registration (for example, upon transfer of the security interest to a new secured party), the secured party will be able to use this flag as a means of demonstrating prior priority over the property. The effect of the flag would be to show that the registration was effective prior to the commencement of the new PPS regime. Failure to indicate that a registration relates to a transitional security agreement may result in the secured party losing its priority position.

Serial numbered goods

169. The requirements for goods that must be described by a serial number are set out in relation to the discussion of 'serial numbered goods' for the purposes of section ^195, table item 4(b). However, some provisions of the PPS Bill operate specifically with respect to property that may be described as serial numbered goods, for example, section ^81 (which establishes a rule for the acquisition of property free of security interests). Consequently, it is necessary to provide that certain goods may (rather than must) be described by a serial number and for the relevant serial number to be recorded.

170. For motor vehicles, boats and aircraft, it is envisaged that the same numbers would be recorded regardless of whether the property must or may be described by a serial number. These are set out in the discussion about serial numbered property (section ^195, table item 4(b)). For intellectual property rights that are evidenced by a unique identifier issued under Commonwealth legislation, the serial number that will that unique identifier. This would affect registrations made pursuant to the:

- *Designs Act 2003*
- *Patents Act 1990*
- *Trade Marks Act 1999*, and
- *Plant Breeder's Rights Act 1994*.

Question

Comment is invited generally on these proposals.

Section ^203 – Ineffective registration—particular defects

171. It is the secured party's responsibility to ensure that the information registered on the PPS Register is accurate and complete. This policy approach has been adopted to promote the reliability of the data on the PPS Register. Pursuant to section ^203 a registration would be ineffective if there exists any of the following defects in the data related to the registration:

- if the collateral is required by the regulations to be described by serial number in the register—no search of the register by reference only to the actual serial number of the collateral is capable of disclosing that registration
- if the grantor holds the collateral in the course or furtherance of carrying on an enterprise to which an ABN has been allocated.
- if the collateral is not required by the regulations to be described by serial number in the register, no search of the register by reference only to the grantor's details is capable of disclosing that registration, and
- in any case—a defect prescribed by the regulations.

172. At this stage it is proposed that a regulation would **not** be made prescribing additional defects in a registration which would render the registration ineffective. The circumstances in which a registration would be ineffective that are listed in section ^203 are broad and are intended to cover all the circumstances where an individual searching the register will be incapable of identifying a secured interest in a piece of collateral.

Question

Are there other defects that should be prescribed in the regulations that should render a registration ineffective?

Section ^207 – Registration amendments-authorized amendments

173. Section ^207 contains a table setting out the amendments to a registration that would be authorised under the Bill. Table item 7 of the table makes provision for the regulations to prescribe additional amendments to be made to the registration.

174. This provision is to be read in conjunction with section ^195 which sets out the contents required of a collateral registration. Section ^207 provides the flexibility for to parties insert, remove or amend information included in a registration

175. At this stage, it is **not** proposed that the regulations would prescribe additional amendment to a registration that would be authorised for the purposes of section ^207. The amendments of registrations that are authorised under section ^207 are comprehensive and would most likely cover all the data that is registrable on the PPS Register pursuant to section ^195 (including any data registered pursuant to section ^195, table item 9).

Section ^212 – Demand to secured party for registration amendment

176. Section ^210 provides that a person with an interest (other than a security interest) in collateral described in a registration may give a demand, in writing, to the secured party for the amendment of the registration when:

- no collateral described in the registrations secures any obligation (including any payment) owed by a debtor to the secured party, and
- the particular collateral in which the person has an interest does not secure any obligation (including a payment) owed by a debtor to the secured party.

177. Under section ^212 the person giving the demand may give a statement in writing to the Registrar stating the amendment demanded and including anything else prescribed by the regulations. It is proposed that a regulation **would** be made pursuant to section ^212 prescribing certain matters to be included in the statement.

Content of enabling provision:
Section ^212 provides that the person giving the demand under section ^210 may give a statement in writing to the Registrar stating the amendment demanded and including anything else prescribed by the regulations.
Content of proposed regulation:
The regulations would prescribe that the following information is required to be set out in the statement to amend a registration: <ul style="list-style-type: none">• the unique identifier of the registration• the name of the person that is requesting the amendment• a description of the change demanded, as set out in the table in section ^210• a statement that either:

- no collateral described in the registration secures any obligation (including a payment) owed by a debtor to the secured party, or
- the particular collateral in which the person has an interest does not secure any obligation (including a payment) owed by the person to the secured party.

Rationale

178. It is important that the information contained in the statement to amend the registration pursuant to section ^212 of the Bill is comprehensive because of the consequences that flow from the removal of a registration from the PPS Register. It is therefore important that the Registrar is provided with sufficient information in the statement to make an informed decision whether to remove a registration or not.

179. An individual might become aware that there is a registration on the PPS Register against her or his name. This might happen because the person has applied for a secured loan, and the lender (having checked the register), has advised that the registration exists.

180. The individual may then seek to have the registration removed. The Bill contemplates that the individual might first approach the secured party to seek the removal of the registration (section ^210). When the secured party refuses to remove the registration the individual will be able to apply to PPS Registrar to have the registration removed (section ^212). The PPS Registrar will then send a notice to the secured party inviting it to indicate why the registration should not be removed. The PPS Registrar may be required to send notices to more than one secured party when there is more than one registration against the individual's name and date of birth. This may happen because there is another person with the same name and birthdate who has a registration against their name. If any one of the secured parties responds providing the PPS Registrar with reasonable grounds to suspect that the registration is required, the PPS Registrar will not remove the registration (section ^213(1)). Otherwise the PPS Registrar will remove the registration.

Question

Are there any other matters that should be contained in a statement to the Registrar under section ^212?

Section ^227 – Search-general

181. The PPS Register would be accessible for search purposes by direct online access 24 hours a day, 7 days per week. Under section ^227, the Registrar must give a person access to the PPS Register to search for the data only if:

- the search is authorised
- the application is in the approved form
- the fee has been paid, and
- access to the data is not prohibited by the regulations.

182. It is proposed that a regulation **would** be made prescribing where access to data on the PPS Register would be prohibited.

Content of enabling provision:

Section ^227 provides that the Registrar must give a person access to the PPS Register to search for data if, amongst other things, access to the data is not prohibited by the regulations.

Content of proposed regulation:

It is proposed that the regulations would prescribe that access to data on the PPS Register would be prohibited where:

1. an individual has applied to the PPS Registrar to have data withheld from a search result because:
 - a court has ordered that the data should be withheld from a search result
 - any other court order is in effect that provides a sufficient basis on which to withhold data from a search result, or
 - there are any other circumstances that provides a sufficient basis on which to withhold data from a search result; or
2. the PPS Registrar considers in all the circumstances that it would be appropriate to withhold data from a search result.

Rationale

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

Question

Are there any other circumstances where access to data on the PPS Register should be prohibited?

Section ^228 – Search-criteria

184. It is proposed that a regulation **would** be made pursuant to section ^228 prescribing additional criteria by which a person may search the PPS Register.

Content of enabling provision:

Section ^228 provides that a person may search the PPS Register by reference to the following criteria:

- a secured party's details
- a grantor's details

- a serial number by which collateral may (or must) be described in the register, and
- any other criteria prescribed by the regulations.

Content of proposed regulation:

In addition to the criteria listed in section ^228, the regulations would prescribe that a person may search the PPS Register by reference to the unique identifier of the registration.

Rationale

185. Allowing searches of the PPS Register by the unique identifier of the registration would ensure that PPS Register searches deliver meaningful results. In particular, it would mean that users avoid the need to examine multiple registrations involving material that is irrelevant to their requirements.

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

187. The PPS Register would be established in a way that allows a person to refine their search by reference to data entered. For example, a secured party would be able to search all their registrations, or all of their registrations that have an end date within the next four (4) weeks.

Question

Is there any criteria by which a person should be able to search the PPS Register?

Section ^231 – written search results and evidence, etc

188. It is proposed that a regulation **would** be made under section ^231.

Content of enabling provision:

Section ^231 provides that a search result of the PPS Register is in the appropriate form if, amongst other things, it purports to be issued by a person who is prescribed by the regulations and if the Registrar approves a form for the purposes of this subparagraph.

Content of proposed regulation:

It is proposed that the regulations would prescribe that written search result will be in the appropriate form if issued by an organisation approved by the Registrar.

Rationale

189. Organisations, other than the Registrar’s office, may have a business need to provide written search results to their customers/clients. For example, a State agency that currently provides a

package of information regarding the status of a motor vehicle (including a search result on whether any encumbrance exists in the motor vehicle) may wish to continue to provide that service following the commencement of the national PPS system. It is proposed that these organisations, which could be both private and public sector organisations, would enter into a B2G or G2G arrangement with the Registrar to, amongst other things, provide written search results.

PART 11 - MISCELLANEOUS

190. Part 11 of the Bill contains a number of miscellaneous provisions that deal with issues including:

- when security interests are void
- giving of notices, and
- the jurisdiction of courts under the Bill.

191. This Part also contains the general regulation making power in the Bill (section ^274). It is proposed that the general regulation making power would be relied upon to define in the regulations, amongst other things, boats and aircraft.

Section ^261 – Jurisdiction of courts and cross-jurisdictional appeals

192. Section ^261 provides a table of all courts that are conferred with jurisdiction to hear a personal property securities matter and the limit of the courts jurisdiction. Item 2 of the table confers jurisdiction on the Federal Magistrates Court (FMC) to hear a PPS matter and provides that the Court in exercising this jurisdiction may not award an amount greater than \$750,000 or if another amount is prescribed by the regulations, that other amount.

193. At this stage it is **not** proposed that an amount greater than \$750,000 would be prescribed in setting the jurisdiction of the FMC.

194. The FMC is one of a number of lower courts prescribed with jurisdiction to hear a PPS matter. Section ^261 also provides jurisdiction to a number of superior courts at the Federal level - the Federal Court and the Family Court.

195. The jurisdiction conferred on the lower courts (including the Federal Magistrates Court) is concurrent with those of the superior courts. A party may chose to initiate proceedings in a lower court where the amount in dispute falls within the jurisdictional limit of the lower court. If, however, a dispute is likely to result in the awarding of an amount exceeding \$750,000, the matter should be transferred to a superior court under section ^236 of the Bill.

196. The jurisdictional limit of \$750,000 has been set with reference to the Federal Magistrates Court's jurisdictional limit in matters under the *Trade Practices Act 1974*. This amount should cover most consumer collateral and may also cover collateral offered by small businesses. While this jurisdictional limit is unlikely to cover collateral offered in larger transactions, disputes arising in relation to large commercial transactions are likely to be referred to superior courts in the first instance.

Section ^274 - Regulations

197. Section ^274 is the general regulation making power in the Bill. It provides that the Governor-General may make regulations prescribing matters:

- required or permitted by this Act to be prescribed, or
- necessary or convenient to be prescribed for carrying out or giving effect to this Act.