

# EXPOSURE DRAFT

2008

The Parliament of the  
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

<b>EXPOSURE DRAFT (10/11/2008)</b>
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## **Personal Property Securities Bill 2008**

**No.     , 2008**

*(Attorney-General)*

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



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# EXPOSURE DRAFT

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

3     The Parliament of Australia enacts:

4     **Chapter 1—Preliminary**

5     **Part 1.1—Preliminary**  
6

7     <sup>^1</sup> **Short title**

8                     This Act may be cited as the *Personal Property Securities Act*  
9                     2008.

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Chapter 1 Preliminary

Part 1.1 Preliminary

Section ^2

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1     **^2 Commencement**

2                   (1) Each provision of this Act specified in column 1 of the table  
3                   commences, or is taken to have commenced, in accordance with  
4                   column 2 of the table. Any other statement in column 2 has effect  
5                   according to its terms.

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<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		

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7                   Note:        This table relates only to the provisions of this Act as originally  
8                   passed by both Houses of the Parliament and assented to. It will not be  
9                   expanded to deal with provisions inserted in this Act after assent.

10                   (2) Column 3 of the table contains additional information that is not  
11                   part of this Act. Information in this column may be added to or  
12                   edited in any published version of this Act.

13     **^3 Act to bind the Crown**

14                   This Act binds the Crown in each of its capacities.

15     **^4 External Territories**

16                   (1) This Act extends to such external Territories (if any) as are  
17                   prescribed by the regulations for the purposes of this section.

18                   (2) Without limiting subsection (1), if an external Territory is  
19                   prescribed for the purposes of this section, regulations prescribing  
20                   the external Territory may provide that:

- 1 (a) only some of the provisions of this Act apply in the external  
2 Territory; and  
3 (b) provisions that apply in the external Territory only apply in  
4 specified circumstances.
- 5 (3) If:  
6 (a) an external Territory is prescribed by the regulations for the  
7 purposes of this section; and  
8 (b) in a provision of this Act that applies (either generally or in  
9 particular circumstances) in the external Territory there is a  
10 reference to “Australia” or a reference to a term the definition  
11 of which includes a reference to “Australia”;  
12 then, unless the contrary intention appears, the reference to  
13 “Australia” in that provision as so applying, or in that definition as  
14 applying for the purposes of that provision as so applying, includes  
15 a reference to that external Territory.
- 16 (4) To avoid doubt, this section applies despite paragraph 17(a) of the  
17 *Acts Interpretation Act 1901* (definition of *Australia*).

## 18 **^5 Application of Act not affected by secured party having title to** 19 **collateral**

20 The fact that title to collateral is in a secured party rather than a  
21 grantor does not affect the application of any provision of this Act  
22 relating to rights, obligations and remedies.

## 23 **^6 Application of Act to interests**

- 24 (1) This Act does not apply to any of the following interests (except as  
25 provided by subsection (2)):  
26 (a) the interest of a seller who has shipped tangible property to a  
27 purchaser under a negotiable bill of lading (however  
28 described) to the order of:  
29 (i) the seller; or  
30 (ii) another person on behalf of the seller;  
31 unless the parties have otherwise evidenced an intention to  
32 provide for a security interest in the tangible property;  
33 (b) a lien, charge, or any other interest in personal property, that  
34 is created, arises or is provided for under a law of the

# EXPOSURE DRAFT

## Section ^6

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- 1 Commonwealth (other than this Act), a State or a Territory,  
2 unless the person who owns the property in which the interest  
3 is granted agrees to the interest;
- 4 (c) a lien, charge, or any other interest in personal property, that  
5 is created, arises or is provided for by operation of the  
6 general law;
- 7 (d) any right of set-off or right of combination of accounts;
- 8 (e) any right or interest held by a person, or any interest provided  
9 for by any transaction, under any of the following:
- 10 (i) an approved netting arrangement;
- 11 (ii) a market netting contract;
- 12 (iii) a close-out netting contract;
- 13 as defined in section 5 of the *Payment Systems and Netting*  
14 *Act 1998*;
- 15 (f) an interest provided for by any of the following transactions:
- 16 (i) the creation or transfer of an interest in land;
- 17 (ii) the creation of an interest in a right to payment, or the  
18 creation or transfer (including a successive transfer) of a  
19 right to payment, in connection with an interest in land  
20 where the writing evidencing the creation or transfer  
21 specifically identifies the land, and only that land;
- 22 (iii) a transfer of an unearned right to payment under a  
23 contract to a person who is to perform the transferor's  
24 obligations under the contract (or the obligations of any  
25 other person from whom the rights have previously been  
26 transferred);
- 27 (iv) a transfer of present or future remuneration (including  
28 wages, salary, commission, allowances or bonuses)  
29 payable to an individual as an employee or a contractor;
- 30 (v) a transfer of an interest or claim in, or under, a contract  
31 of annuity or policy of insurance;
- 32 (vi) an assignment of an account made solely to facilitate the  
33 collection of the account;
- 34 (vii) an assignment of an account or negotiable instrument to  
35 satisfy (either wholly or partly) a pre-existing  
36 indebtedness;
- 37 (viii) a sale of an account or chattel paper as part of a sale of  
38 business, unless the seller remains in apparent control

- 1 (within the ordinary meaning of that term) of the  
2 business after the sale;
- 3 (ix) a transfer of personal property (the *original property*) to  
4 a transferee, if the transferee is obliged to transfer to the  
5 transferor personal property that is fungible with the  
6 original property;
- 7 (x) if there is personal property that is fungible with a kind  
8 of personal property—a transfer of personal property  
9 (the *original property*) of that kind to a transferee, if the  
10 transferee is obliged to transfer to the transferor a cash  
11 equivalent of all of the original property, or a cash  
12 equivalent of part of the original property together with  
13 personal property that is fungible with the original  
14 property;
- 15 (g) the following interests in property created under the  
16 *Bankruptcy Act 1966*:
- 17 (i) the interest of the Official Trustee or a registered trustee  
18 who has taken control (within the meaning of section 50  
19 of that Act) of a debtor or grantor’s property under that  
20 section;
- 21 (ii) the interest of the Official Trustee or a registered trustee  
22 in property of a debtor or grantor that has vested in the  
23 Official Trustee or the registered trustee under  
24 section 58 of that Act;
- 25 (iii) a charge created under section 139ZN of that Act;
- 26 (iv) a charge created under section 139ZR of that Act;
- 27 (v) an interest created under a personal insolvency  
28 agreement under Part X of that Act;
- 29 (h) a trust over some or all of an amount provided by way of  
30 financial accommodation, where the person to whom the  
31 financial accommodation is provided is required to use the  
32 amount in accordance with a condition under which the  
33 financial accommodation is provided;
- 34 (i) a tradeable water right, or a water access entitlement, within  
35 the meaning of the *Water Act 2007*;
- 36 (j) an interest in tangible property that is affixed to land;
- 37 (k) an interest of a kind prescribed by the regulations for the  
38 purposes of this section.

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Chapter 1 Preliminary

Part 1.1 Preliminary

Section ^6

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1 (2) The following table has effect:

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<b>Provisions of this Act that apply to interests mentioned in subsection (1)</b>		
<b>Item</b>	<b>Despite subsection (1), this provision ...</b>	<b>applies in relation to this interest mentioned in subsection (1) ...</b>
1	section ^120	(a) a lien, charge or other interest in personal property of a kind described in paragraph (1)(b) or (c); and (b) an interest provided for by a transaction described in subparagraph (1)(f)(ii).
2	section ^125	a right of set-off (see paragraph (1)(d)).
3	sections ^156 and ^157	the creation or transfer of an interest in land (see subparagraph (1)(f)(i)).
4	paragraph ^177(2)(a)	a lien, charge or other interest in personal property of a kind described in paragraphs (1)(b) and (c).
5	section ^187	a lien, charge or other interest in personal property of a kind described in paragraph (1)(b) or (c).

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

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## Part 1.2—Constitutional operation of Act

2

### Division 1—General constitutional basis

3

#### ^7 Constitutional basis for this Act

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##### *Operation in a referring State*

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(1) It is the Commonwealth Parliament's intention that this Act should operate in a referring State to the extent that it can in accordance with:

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(a) the legislative powers that the Commonwealth Parliament has under section 51 of the Constitution (other than paragraph 51(xxxvii)); and

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(b) the legislative powers that the Commonwealth Parliament has in respect of matters to which this Act relates because those matters are referred to it by the Parliament of the referring State under paragraph 51(xxxvii) of the Constitution.

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Note 1: The State reference fully supplements the Commonwealth Parliament's other powers by referring the matters to the Commonwealth Parliament to the extent to which they are not otherwise included in the legislative powers of the Commonwealth Parliament.

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Note 2: For the meaning of *referring State*, see section ^8.

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##### *Operation in a non-referring State*

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(2) It is the Commonwealth Parliament's intention that this Act should operate in a non-referring State to the extent that it can in accordance with the Commonwealth Parliament's legislative powers under section 51 of the Constitution (other than paragraph 51(xxxvii)), including (but not limited to) the powers relating to the matters mentioned in Division 2.

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##### *Operation in a Territory*

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(3) It is the Commonwealth Parliament's intention that this Act should operate in a Territory to the extent that it can in accordance with the Commonwealth Parliament's legislative powers under:

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## Chapter 1 Preliminary

### Part 1.2 Constitutional operation of Act

#### Division 1 General constitutional basis

#### Section ^8

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- 1 (a) section 122 of the Constitution; and  
2 (b) section 51 of the Constitution (other than paragraph  
3 51(xxxvii)).

4 Note: This Act only extends to an external Territory if regulations are made  
5 to provide for that extension (see section ^4).

- 6 (4) Despite subsection 22(3) of the *Acts Interpretation Act 1901*, this  
7 Act as applying in a Territory is a law of the Commonwealth.

#### 8 *Operation outside Australia*

- 9 (5) It is the Commonwealth Parliament's intention that this Act should  
10 operate outside Australia to the extent that it can in accordance  
11 with the Commonwealth Parliament's legislative powers under:  
12 (a) paragraph 51(xxix) of the Constitution; and  
13 (b) the other legislative powers that the Commonwealth  
14 Parliament has under section 51 of the Constitution (other  
15 than paragraph 51(xxxvii)).

#### 16 ^8 **Meaning of *referring State***

##### 17 *General meaning*

- 18 (1) For the purposes of this Act, a State is a ***referring State*** if the  
19 Parliament of the State has, before the day this Act receives the  
20 Royal Assent, referred the matters covered by subsections (2) and  
21 (3) to the Parliament of the Commonwealth for the purposes of  
22 paragraph 51(xxxvii) of the Constitution:  
23 (a) if and to the extent that the matters are not otherwise included  
24 in the legislative powers of the Parliament of the  
25 Commonwealth (otherwise than by a reference under  
26 paragraph 51(xxxvii) of the Constitution); and  
27 (b) if and to the extent that the matters are included in the  
28 legislative powers of the Parliament of the State.

29 Note: Subsection (5) provides for when a State stops being a ***referring State***.



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1 *Initial reference*

2 (2) This subsection covers the matters to which the referred provisions  
3 relate, to the extent of making laws with respect to those matters by  
4 including the referred provisions in the initial PPS Act.

5 *Amendment reference*

6 (3) This subsection covers the referred PPS matters (as described in  
7 section ^9), to the extent of making laws with respect to those  
8 matters by making express amendments of this Act.

9 *When a State remains, and stops, being a referring State*

10 (4) A State is a referring State even if a law of the State provides that  
11 the reference to the Commonwealth Parliament of any of the  
12 matters covered by subsections (2) and (3) is to terminate in  
13 particular circumstances.

14 (5) A State stops being a *referring State* if a reference by the State of  
15 any of the matters covered by subsections (2) and (3) terminates.

16 *Terms used in this section*

17 (6) In this section:

18 *express amendment* of this Act:

19 (a) means the direct amendment of this Act by another Act  
20 (whether by the insertion, omission, repeal, substitution or  
21 relocation of words or matter, and including the insertion or  
22 substitution of new substantive matter); but

23 (b) does not include the enactment (by an Act) of a provision that  
24 has, or will have, substantive effect otherwise than as part of  
25 the text of this Act.

26 *initial PPS Act* means this Act as originally enacted.

27 *referred provisions* means the initial PPS Act, to the extent to  
28 which it deals with matters that are included in the legislative  
29 powers of the Parliaments of the States.

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**Chapter 1** Preliminary

**Part 1.2** Constitutional operation of Act

**Division 1** General constitutional basis

Section ^9

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1     **^9 Referred PPS matters**

2     *[To match descriptions in State referral Bills.]*

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Preliminary Chapter 1

Constitutional operation of Act Part 1.2

Constitutional basis in a non-referring State Division 2

Section ^10

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2 **Division 2—Constitutional basis in a non-referring State**

3 **^10 Non-referring State operation—general**

4 *Operation*

5 (1) This Act operates in a non-referring State in relation to a security  
6 interest, or another interest, in personal property:

7 (a) while the interest in the personal property is covered by any  
8 of the following:

9 (i) section ^11 (which deals with persons);

10 (ii) section ^12 (which deals with activities);

11 (iii) section ^13 (which deals with interests); and

12 (b) without limiting paragraph (a), to the extent that Chapter 5  
13 (Personal Property Securities Register) applies in relation to  
14 the personal property under section ^14.

15 (2) To avoid doubt, subsection (1) applies to a non-referring State at a  
16 particular time even if no State is a referring State at that time.

17 *Constitutional meaning of terms*

18 (3) A word or phrase used in this Division that is used in the  
19 Constitution has the same meaning as it has in the Constitution.

20 Note: Other parts of speech and grammatical forms of such words and  
21 phrases have a corresponding meaning (see section 18A of the *Acts*  
22 *Interpretation Act 1901*). For example, “bankruptcy” is used in  
23 paragraph 51(xvii) of the Constitution, so “bankrupt” has a  
24 corresponding meaning in this Division.

25 **^11 Non-referring State operation—persons**

26 (1) This Act operates in a non-referring State, in relation to a security  
27 interest in personal property, while:

28 (a) the obligation secured by the security interest is owed by or  
29 to a person covered by subsection (3); or

30 (b) the grantor of the security interest is a person covered by  
31 subsection (3).

# EXPOSURE DRAFT

Chapter 1 Preliminary

Part 1.2 Constitutional operation of Act

Division 2 Constitutional basis in a non-referring State

## Section ^12

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1 (2) This Act operates in a non-referring State, in relation to an interest  
2 (other than a security interest) in personal property, while the  
3 interest is held by a person covered by subsection (3).

4 (3) This subsection covers the following persons:

5 (a) a bankrupt or an insolvent;

6 (b) an Official Receiver of the estate of a bankrupt, or a  
7 registered trustee of a bankrupt, within the meaning of the  
8 *Bankruptcy Act 1966*;

9 (c) a constitutional corporation;

10 (d) the Commonwealth, or an agency of the Commonwealth.

### 11 **^12 Non-referring State operation—activities**

12 (1) This Act operates in a non-referring State in relation to a security  
13 interest, or another interest, in personal property, if the interest  
14 arises in the course of any of the following activities:

15 (a) trade or commerce with other countries, or among the States;

16 (b) activities undertaken by a constitutional corporation;

17 (c) banking, other than State banking;

18 (d) State banking extending beyond the limits of the State  
19 concerned;

20 (e) insurance, other than State insurance;

21 (f) State insurance extending beyond the limits of the State  
22 concerned;

23 (g) using postal, telegraphic, telephonic, or other like services;

24 (h) supplying goods or services to the Commonwealth, or an  
25 agency of the Commonwealth;

26 (i) conduct by the Commonwealth, or an agency of the  
27 Commonwealth;

28 (j) an activity related to a fishery in Australian waters beyond  
29 territorial limits.

30 (2) However, this Act stops operating under subsection (1) in a  
31 non-referring State in relation to a security interest, or another  
32 interest, in personal property, if, after the interest arises:

33 (a) the interest is dealt with; and

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1 (b) that dealing is not in the course of an activity to which  
2 subsection (1) applies.

3 (3) Subsection (2) does not limit the operation of this Act in a  
4 non-referring State otherwise than under this section.

## 5 **^13 Non-referring State operation—interests**

### 6 *General rule*

- 7 (1) This Act operates in a non-referring State in relation to a security  
8 interest, or another interest, in personal property, if the interest  
9 includes an interest in any of the following:
- 10 (a) a constitutional corporation;
  - 11 (b) money borrowed on the public credit of the Commonwealth;
  - 12 (c) an ADI account, other than an ADI account relating to State  
13 banking;
  - 14 (d) an ADI account that relates to State banking extending  
15 beyond the limits of the State concerned;
  - 16 (e) a policy of insurance, other than State insurance;
  - 17 (f) a policy of State insurance extending beyond the limits of the  
18 State concerned;
  - 19 (g) a bill of exchange or a promissory note;
  - 20 (h) copyright, a patent of an invention or design, or a trade mark;
  - 21 (i) a facility that provides postal, telegraphic, telephonic or other  
22 like services;
  - 23 (j) a fishery in Australian waters beyond territorial limits;
  - 24 (k) a lighthouse, lightship, beacon or buoy.

### 25 *Constitutional interests exclusively—severable operation*

- 26 (2) Without limiting subsection (1), this Act also has the effect it  
27 would have if this Act operated in a non-referring State in relation  
28 to a security interest, or another interest, in personal property, to  
29 the extent only that the interest were in any of the things mentioned  
30 in that subsection.

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**Chapter 1** Preliminary

**Part 1.2** Constitutional operation of Act

**Division 2** Constitutional basis in a non-referring State

Section ^14

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1     **^14 Non-referring State operation—inclusion of data in register**

2                     Chapter 5 of this Act (Personal Property Securities Register)  
3                     operates in a non-referring State in relation to personal property.

1

2 **Division 3—Relationship with other laws**

3 **Subdivision A—Concurrent operation**

4 **^15 Concurrent operation—general rule**

5 (1) This Act is not intended to exclude or limit the operation of any of  
6 the following laws (a *concurrent law*), to the extent that the law is  
7 capable of operating concurrently with this Act:

- 8 (a) a law of the Commonwealth (other than this Act);  
9 (b) a law of a State or Territory;  
10 (c) the general law.

11 (2) Without limiting subsection (1), this Act is not intended to exclude  
12 or limit the concurrent operation of a concurrent law, to the extent  
13 that the law has the effect of:

- 14 (a) subject to sections ^22 and ^25, requiring or enabling a  
15 person to register a security interest (within the meaning of  
16 section ^22); or

17 Note 1: Section ^22 provides that a failure to register the security interest  
18 under the law does not limit the effect of the security interest or a  
19 security agreement for the security interest.

20 Note 2: Section ^25 provides that to the extent that the law would restrict  
21 or otherwise affect the operation of section ^61 (attachment) or  
22 ^64 (perfection) of this Act the operation of the law is excluded.

- 23 (b) subject to section ^23, requiring or enabling a person to  
24 register the assignment of a security interest (within the  
25 meaning of that section); or

26 Note: Section ^23 provides that a failure to register the assignment  
27 under the law does not limit the effect of the assignment, the  
28 security interest or a security agreement for the security interest.

- 29 (c) subject to section ^24, requiring a security agreement for a  
30 security interest, or for an assignment of a security interest  
31 (within the meaning of that section) to be in a particular  
32 form, or to be witnessed or executed in a particular way; or

33 Note: Section ^24 provides that a failure to comply with such a  
34 requirement does not limit the effect of the security agreement,  
35 the security interest or the assignment.

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## Chapter 1 Preliminary

### Part 1.2 Constitutional operation of Act

#### Division 3 Relationship with other laws

##### Section ^15

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- 1 (d) providing for whether a matter or other thing that is created,  
2 arises or is provided for under the concurrent law constitutes  
3 personal property; or  
4 (e) prohibiting or limiting a person creating, acquiring or dealing  
5 with collateral or a security interest in collateral; or  
6 (f) without limiting paragraph (e):  
7 (i) prohibiting or limiting the right of a person to hold,  
8 transfer or assign a security interest in personal  
9 property; or  
10 (ii) imposing limitations or additional obligations or  
11 requirements in relation to the enforcement of a security  
12 interest in personal property; or  
13 (g) operating to extinguish (however described) a security  
14 interest in circumstances other than those provided by an  
15 extinguishment provision of this Act; or  
16 (h) providing for or in relation to a matter in a way that is  
17 expressly allowed by or under this Act.

18 Note: The following provisions of this Act expressly allow for the  
19 operation (or the limited operation) of State and Territory laws:

- 20 (a) section ^150 (which deals with rights and remedies of debtors  
21 and secured parties);  
22 (b) section ^158 (relationship with Consumer Credit Code);  
23 (c) section ^236 (entitlement to damages for breach of duties or  
24 obligations);  
25 (d) subsections ^238(5) and (6) (secured party to provide certain  
26 information relating to security interest);  
27 (e) section ^247 (service or giving of notices);  
28 (f) subsection ^260(2) (appeals from decisions of courts with respect  
29 to PPS matters).

30 (3) To avoid doubt, this section does not apply to a law of a State or  
31 Territory, or the general law, to the extent that there is a direct  
32 inconsistency between this Act and that law.

33 Note: Section ^20 also deals with the relationship between this Act and  
34 certain other laws in relation to the matters covered by  
35 paragraphs (2)(e) and (f) of this section.



1 **^16 Concurrent operation—regulations may resolve inconsistency**

2 (1) The regulations may:

- 3 (a) provide that a provision of this Act (or an instrument made  
4 under this Act) does not apply to a matter that is dealt with by  
5 a law (the *specified law*) of the Commonwealth, a State or a  
6 Territory specified by the regulations; or  
7 (b) modify the operation of this Act (or an instrument made  
8 under this Act) so that no inconsistency arises between the  
9 operation of a provision of this Act or the instrument and the  
10 operation of a law (the *specified law*) of the Commonwealth,  
11 a State, or a Territory specified by the regulations.

12 (2) Without limiting subsection (1), regulations made for the purposes  
13 of that subsection may provide that a provision of this Act (or an  
14 instrument made under this Act):

15 (a) does not apply to:

- 16 (i) a specified person; or  
17 (ii) a specified body; or  
18 (iii) specified circumstances; or  
19 (iv) a specified person or body, in specified circumstances;  
20 or

21 (b) does not prohibit an act to the extent to which the prohibition  
22 would otherwise give rise to an inconsistency with the  
23 specified law; or

24 (c) does not require a person to do an act to the extent to which  
25 the requirement would otherwise give rise to an  
26 inconsistency with the specified law; or

27 (d) does not authorise a person to do an act to the extent to which  
28 the conferral of that authority on the person would otherwise  
29 give rise to an inconsistency with the specified law; or

30 (e) does not impose an obligation on a person to the extent to  
31 which complying with that obligation would require the  
32 person to not comply with an obligation imposed on the  
33 person under the specified law; or

34 (f) authorises a person to do something for the purposes of this  
35 Act (or an instrument made under this Act) that the person:

- 36 (i) is authorised to do under the specified law; and
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## Chapter 1 Preliminary

### Part 1.2 Constitutional operation of Act

#### Division 3 Relationship with other laws

##### Section ^17

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1 (ii) would not otherwise be authorised to do under this Act  
2 (or the instrument); or

3 (g) will be taken to be satisfied if the specified law is satisfied.

4 (3) This section does not apply in relation to the following provisions:

5 (a) paragraph (b) of the definition of *personal property* in  
6 section ^26;

7 (a) subsection ^40(2).

8 Note: Certain rights, entitlements and authorities under Commonwealth,  
9 State and Territory law, as declared by the relevant law, are excluded  
10 from the definitions of *personal property* (in section ^26) and *licence*  
11 (in section ^40).

##### 12 **^17 Act to operate without constitutional preference to States**

13 This Act is not intended to operate to the extent (if any) to which  
14 the operation would give, or result in the giving of, preference  
15 (within the meaning of section 99 of the Constitution) to one State  
16 or part of a State over another State or part of a State.

##### 17 **Subdivision B—When other laws prevail**

##### 18 **^18 When other laws prevail—certain other Commonwealth Acts**

19 If there is any inconsistency between this Act and one of the  
20 following Acts (the *other Act*), the other Act prevails to the extent  
21 of the inconsistency:

22 (a) the *Payment Systems and Netting Act 1998*;

23 (b) the *Cheques Act 1986*;

24 (c) the *Bills of Exchange Act 1909*.

##### 25 **^19 When other laws prevail—security agreements**

###### 26 *Scope*

27 (1) This section sets out restrictions on the extent to which a security  
28 agreement is effective according to its terms under section ^58.

###### 29 *Operation of other laws dealing with security agreements*

30 (2) Section ^58 is subject to each of the following laws:

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- 1 (a) a law of the Commonwealth (other than this Act);  
2 (b) a law of a State or a Territory;  
3 (c) the general law.

- 4 (3) However, a law mentioned in subsection (2) does not apply:  
5 (a) to the extent (if any) to which the operation of the law is  
6 affected by sections ^22, ^23, ^24 and ^25 of this Act; and  
7 (b) to the extent (if any) prescribed by the regulations.

8 Note: The sections mentioned provide as follows:

- 9 (a) section ^22 provides that a failure to register a security interest  
10 under a law (other than this Act) mentioned in paragraph (2)(a)  
11 of this section does not limit the effect of the security interest or a  
12 security agreement for the security interest;
- 13 (b) section ^23 provides that a failure to register the assignment of a  
14 security interest under such a law does not limit the effect of the  
15 assignment, the security interest or a security agreement for the  
16 security interest;
- 17 (c) section ^24 provides that a failure to comply with certain formal  
18 requirements in relation to a security agreement for a security  
19 interest (or an assignment of a security interest) does not limit the  
20 effect of the security agreement, the security interest or the  
21 assignment.
- 22 (d) section ^25 provides that to the extent that the law would restrict  
23 or otherwise affect the operation of section ^61 (attachment) or  
24 ^64 (perfection) of this Act the operation of the law is excluded.

## 25 ^20 When other laws prevail—collateral and security interests

### 26 *Scope*

- 27 (1) This section applies if a law covered by subsection (2) has any of  
28 the following effects (an *excluded operation*):  
29 (a) prohibiting or limiting a person creating, acquiring or dealing  
30 with collateral or a security interest in collateral;  
31 (b) without limiting paragraph (a):  
32 (i) prohibiting or limiting the right of a person to hold,  
33 transfer or assign a security interest in personal  
34 property; or

# EXPOSURE DRAFT

Chapter 1 Preliminary

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Division 3 Relationship with other laws

## Section ^21

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1 (ii) imposing limitations or additional obligations or  
2 requirements in relation to the enforcement of a security  
3 interest in personal property.

- 4 (2) This subsection covers the following laws:
- 5 (a) a law of the Commonwealth (other than this Act, or an  
6 instrument made under this Act);
  - 7 (b) a law of a referring State (but only while the State is a  
8 referring State);
  - 9 (c) a law of a Territory;
  - 10 (d) the general law.

### 11 *Operation of this Act excluded by other laws*

- 12 (3) This Act (apart from Subdivision C), and any instrument made  
13 under this Act, does not apply in relation to the excluded operation  
14 to the extent to which there would (apart from this section) be a  
15 direct inconsistency between this Act (or the instrument) and the  
16 relevant law covered by subsection (2).

17 Note: Subdivision C (sections ^22, ^23, ^24 and ^25) restricts the operation  
18 of State and Territory laws in certain respects, for example by  
19 preventing formal requirements under those laws from affecting the  
20 validity of security interests.

### 21 *Regulations under this Act may affect excluded operation*

- 22 (4) Subsection (3) does not apply to the excluded operation to the  
23 extent (if any) prescribed by the regulations.

## 24 **^21 When other laws prevail—exclusion by referring State law**

### 25 *Scope*

- 26 (1) This section applies if a law of a referring State, or of a Territory,  
27 declares a matter to be an excluded matter for the purposes of this  
28 section in relation to:
- 29 (a) the whole of this Act (or an instrument made under this Act);  
30 or
  - 31 (b) a specified provision of this Act (or an instrument made  
32 under this Act); or

# EXPOSURE DRAFT

- 1 (c) this Act (or an instrument made under this Act), other than a  
2 specified provision; or  
3 (d) this Act (or an instrument made under this Act), otherwise  
4 than to a specified extent.

5 *Matters excluded by declaration*

- 6 (2) This Act, and any instrument made under this Act, does not apply  
7 in relation to the excluded matter to the extent provided by the  
8 declaration.

9 *Regulations under this Act may affect operation of declaration*

- 10 (3) Subsection (2) does not apply to the declaration to the extent (if  
11 any) prescribed by the regulations.

12 **Subdivision C—When other laws do not prevail**

13 **^22 When other laws do not prevail—registration requirements**

14 *Scope*

- 15 (1) This section applies if a law (the *applicable law*) of a State or  
16 Territory has the effect of requiring or enabling a person to register  
17 a security interest.

18 Example: A law of a State or Territory may have this effect by requiring a  
19 person to register any interest acquired by the person in a motor  
20 vehicle including, but not limited to, a security interest.

- 21 (2) For the purposes of this section, a person *registers a security*  
22 *interest* under an applicable law if, under (or in accordance with)  
23 that law, the person registers, or otherwise discloses, any of the  
24 following:  
25 (a) the security interest;  
26 (b) a security agreement providing for the security interest;  
27 (c) collateral covered (or to be covered) by the security interest.

28 *Failure to register under applicable law*

- 29 (3) A failure to register the security interest under the applicable law  
30 does not:

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## Section ^23

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- 1 (a) affect the validity, priority or enforceability of the security  
2 interest, or a security agreement providing for the security  
3 interest; or  
4 (b) otherwise limit the effect of the security interest, or a security  
5 agreement providing for the security interest.

6 Note: In other respects this Act is not intended to exclude or limit the  
7 concurrent operation of the applicable law (see section ^15).

## 8 **^23 When other laws do not prevail—assignment requirements**

### 9 *Scope*

- 10 (1) This section applies if a law (the *applicable law*) of a State or  
11 Territory has the effect of requiring or enabling a person to register  
12 the assignment of a security interest.
- 13 (2) For the purposes of this section, a person *registers the assignment*  
14 *of a security interest* under an applicable law if, under (or in  
15 accordance with) that law, the person registers, or otherwise  
16 discloses, any of the following in relation to a security interest that  
17 is (or is to be) assigned, however the assignment is described in  
18 that law:
- 19 (a) the assignment;  
20 (b) a security agreement providing for the assignment;  
21 (c) collateral covered (or to be covered) by the security interest.
- 22 (3) An assignment of a security interest mentioned in this section  
23 includes (but is not limited to) the following, however described in  
24 the applicable law:
- 25 (a) the transfer of the security interest;  
26 (b) the creation of the security interest;  
27 (c) the devolution of the security interest from a deceased person  
28 to another person upon the death of the deceased.

### 29 *Failure to register under applicable law*

- 30 (4) A failure to register the assignment of the security interest under  
31 the applicable law does not:
- 32 (a) affect the validity of the assignment; or

# EXPOSURE DRAFT

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Constitutional operation of Act Part 1.2

Relationship with other laws Division 3

Section ^24

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- 1 (b) affect the validity, priority or enforceability of the security  
2 interest, or of a security agreement providing for the security  
3 interest; or  
4 (c) otherwise limit the effect of the assignment, the security  
5 interest or of a security agreement providing for the security  
6 interest.

7 Note: In other respects this Act is not intended to exclude or limit the  
8 concurrent operation of the applicable law (see section ^15).

9 **^24 When other laws do not prevail—formal requirements relating**  
10 **to agreements**

11 *Scope*

- 12 (1) This section applies if a law (the *applicable law*) of a State or  
13 Territory:  
14 (a) relates (whether expressly or by implication) to a security  
15 agreement for a security interest in collateral, or for an  
16 assignment (however described) of a security interest in  
17 collateral; and  
18 (b) has the effect of requiring the security agreement:  
19 (i) to be in a particular form; or  
20 (ii) to be witnessed or executed in a particular way; and  
21 (c) is prescribed by regulations made for the purposes of this  
22 section.

23 Example: A law of a State or Territory requires a security agreement to be in a  
24 particular form if the law requires the instrument evidencing the  
25 agreement to use a particular form of words, or to be executed on  
26 paper of a particular sort.

- 27 (2) An assignment of a security interest mentioned in this section  
28 includes (but is not limited to) the following, however described in  
29 the applicable law:  
30 (a) the transfer of the security interest;  
31 (b) the giving of the security interest;  
32 (c) the devolution of the security interest from a deceased person  
33 to another person upon the death of the deceased.

# EXPOSURE DRAFT

Chapter 1 Preliminary

Part 1.2 Constitutional operation of Act

Division 3 Relationship with other laws

Section ^25

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*Failure to comply with formal requirement under applicable law*

- (3) Without limiting section ^22 or ^23, a failure to comply with the requirement under the applicable law does not:
- (a) affect the validity or enforceability of the security agreement; or
  - (b) affect the validity, priority or enforceability of the security interest; or
  - (c) affect the validity of the assignment (if relevant); or
  - (d) otherwise limit the effect of the security agreement, the security interest or the assignment (if relevant).

Note: In other respects this Act is not intended to exclude or limit the concurrent operation of the applicable law (see section ^15).

## **^25 When other laws do not prevail—attachment and perfection of security interests**

To the extent that a law of a State or Territory would have the effect of restricting or otherwise affecting the operation of the following provisions, the operation of the law is excluded by force of this section:

- (a) section ^61 (when a security interest attaches to personal property);
- (b) section ^64 (how a security interest is perfected).

Example: If a law of a State or Territory would have the effect of requiring a security interest to be registered under the law before it is taken to attach, or to be perfected, under this Act, the operation of the law is excluded by force of this section.



1

## 2 Part 1.3—Interpretation

2

### 3 Division 1—Definitions

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#### 4 ^26 Definitions

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In this Act:

6

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

7

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9

*accession* has the meaning given by section ^34.

10

*account* has the meaning given by section ^35.

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*account agreement* has the meaning given by section ^54.

12

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

13

14

*account holder* has the meaning given by section ^54.

15

*add*: collateral is *added* to a registration if the registration is amended with the effect of describing the collateral.

16

17

Note: For the meaning of *description*, see section ^37.

18

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

19

20

*ADI account* means an account that is held with an ADI.

21

*advance* means:

22

(a) the payment of currency, the provision of credit or the giving of value; or

23

24

(b) any liability of a debtor to pay interest, credit costs or other charges or costs in connection with:

25

26

(i) an advance (within the meaning of paragraph (a)); or

27

(ii) enforcement expenditure or costs in relation to the enforcement of a security interest in collateral.

28

# EXPOSURE DRAFT

Chapter 1 Preliminary

Part 1.3 Interpretation

Division 1 Definitions

Section ^26

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- 1                    *after-acquired property* has the meaning given by section ^59.
- 2                    *agency* includes an authority or instrumentality.
- 3                    *amendment* of a registration of collateral includes an amendment  
4 to end the effective registration of the collateral.
- 5                    *amendment demand* has the meaning given by section ^207.
- 6                    *amendment notice* has the meaning given by section ^209.
- 7                    *amendment time* of a registration has the meaning given by section  
8 ^205.
- 9                    *approved form* has the meaning given by section ^274.
- 10                   *attaches* has the meaning given by section ^61.
- 11                   *Australia* has a meaning affected by subsection ^4(3).
- 12                   *bankruptcy* has the same meaning as in paragraph 51(xvii) of the  
13 Constitution.
- 14                   Note:            Other parts of speech and grammatical forms of “bankruptcy” (for  
15                   example, “bankrupt”) have a corresponding meaning (see section 18A  
16                   of the *Acts Interpretation Act 1901*).
- 17                   *business day* means a day other than:
- 18                   (a) a Saturday or a Sunday; or
- 19                   (b) a day which is a public holiday for the whole of:
- 20                          (i) any State; or
- 21                          (ii) the Australian Capital Territory; or
- 22                          (iii) the Northern Territory; or
- 23                   (c) a day that falls between Christmas Day and New Years Day;  
24                   or
- 25                   (d) a day on which the Registrar has refused access to the  
26                   register, or otherwise suspended the operation of the register,  
27                   in whole or in part (see subsection ^186(4)); or
- 28                   (e) a day that is prescribed by the regulations for the purposes of  
29                   this definition.
- 30                   *carrying on* an enterprise has the meaning given by section 41 of  
31                   the *A New Tax System (Australian Business Number) Act 1999*.

1            ***chattel paper*** has the meaning given by section ^36.

2            ***circulating asset*** has the meaning given by section ^51.

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

5            ***collateral***:

6            (a) means personal property to which a security interest is  
7 attached; and

8            (b) in relation to a registration, or an amendment of a  
9 registration—includes personal property described by the  
10 registration (whether or not a security interest is attached to  
11 the property).

12            Note: Section ^194 authorises the registration of personal property as  
13 collateral before or after a security agreement is made covering  
14 the property, or a security interest has attached to the property.

15            ***commercial consignment*** means a consignment if:

16            (a) the consignor retains an interest in tangible property that the  
17 consignor delivers to the consignee; and

18            (b) the consignor delivers the tangible property to the consignee  
19 for the purpose of sale, lease or other disposal; and

20            (c) the consignor and the consignee both deal in tangible  
21 property of that kind in the ordinary course of business;

22 but does not include an agreement under which tangible property is  
23 delivered to an auctioneer for the purpose of sale.

24            ***commercial property*** means personal property other than consumer  
25 property.

26            ***commingled***: tangible property that is ***commingled*** includes  
27 tangible property that is mixed with tangible property of the same  
28 kind.

29            ***company*** means:

30            (a) a company registered under Part 2A.2 or Part 5B.1 of the  
31 *Corporations Act 2001*; or

32            (b) a registrable body (within the meaning of that Act) that is  
33 registered under Division 1 or 2 of Part 5B.2 of that Act.

# EXPOSURE DRAFT

Chapter 1 Preliminary

Part 1.3 Interpretation

Division 1 Definitions

Section ^26

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

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

7                    **continuously perfected** has the meaning given by section ^65.

8                    **control:**

- 9                    (a) in relation to an investment instrument—has the meaning  
10                    given by section ^45; or  
11                    (b) in relation to an ADI account—has the meaning given by  
12                    section ^46; or  
13                    (c) in relation to a right that is evidenced by a letter of credit—  
14                    has a meaning affected by section ^47; or  
15                    (d) in relation to an investment entitlement—has the meaning  
16                    given by section ^48; or  
17                    (e) in relation to a negotiable instrument that is not evidenced by  
18                    a certificate—has the meaning given by section ^49; or  
19                    (f) in relation to an account that is not an ADI account but is the  
20                    proceeds of inventory—has a meaning affected by section  
21                    ^52; or  
22                    (g) in relation to inventory—has a meaning affected by section  
23                    ^53.

24                    **controllable property** means any of the following:

- 25                    (a) an investment instrument;  
26                    (b) an ADI account;  
27                    (c) a right evidenced by a letter of credit that states that the letter  
28                    of credit must be presented on claiming payment or requiring  
29                    the performance of an obligation;  
30                    (d) an investment entitlement;  
31                    (e) a negotiable instrument that is not evidenced by a certificate.

32                    **crops** means crops (whether matured or not and whether naturally  
33                    grown or planted) and includes the following:

# EXPOSURE DRAFT

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Interpretation Part 1.3

Definitions Division 1

Section ^26

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- 1 (a) wheat, maize, canola, sorghum, barley, oats, lucerne, grass  
2 (whether for hay or grain), cotton, tobacco, rice, soy,  
3 sugar-cane and any other kind of agricultural produce;  
4 (b) oranges, grapes (whether as fruit or for wine or spirits) and  
5 any other kind of fruit or horticultural produce;  
6 (c) trees (but only if they are personal property).

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

9 **current asset** has the meaning given by section ^51.

10 **debtor** means:

- 11 (a) a person who owes payment or performance of an obligation  
12 that is secured by a security interest in personal property  
13 (whether or not the person is also the grantor of the security  
14 interest); or  
15 (b) a transferee of, or successor to, an obligation mentioned in  
16 paragraph (a).

17 **debtor-initiated payment** has the meaning given by section ^116.

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

20 **description** has the meaning given by section ^37.

21 Note 1: Other parts of speech and grammatical forms of “description” (for  
22 example, “described”) have a corresponding meaning (see section 18A  
23 of the *Acts Interpretation Act 1901*).

24 Note 2: Descriptions of tangible property include related descriptions of  
25 intellectual property and intellectual property licences in certain  
26 circumstances (see section ^38).

27 **details** about a person means details about the person that are  
28 prescribed by the regulations.

29 **disposition** of an investment entitlement means:

- 30 (a) any transfer of title (whether outright or as part of a  
31 transaction that attaches a security interest to the investment  
32 entitlement); or

# EXPOSURE DRAFT

Chapter 1 Preliminary

Part 1.3 Interpretation

Division 1 Definitions

Section ^26

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1 (b) any grant of a security interest in the investment entitlement,  
2 (regardless of the way in which the security interest is  
3 attached or perfected).

4 ***document of title*** means a negotiable document of title or a  
5 non-negotiable document of title.

6 ***effective***: the registration of collateral is ***effective*** if it is effective  
7 under Part 5.4.

8 ***enforcement expenditure or costs***, in relation to the enforcement  
9 of a security interest in collateral, means advances made,  
10 expenditure made, or costs incurred, by the secured party:

11 (a) in the case of a disposal of the collateral—for the protection  
12 (including by insuring), maintenance, preservation or repair  
13 of the collateral after the secured party seizes the collateral  
14 and until its disposal; or

15 (b) in the case of collateral that is used in a business—for the  
16 purposes of carrying on the business; or

17 (c) in any other case—for the enforcement of the security  
18 interest in the collateral.

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

21 ***execution creditor*** means a creditor who has recovered judgment  
22 and issued execution against a grantor.

23 ***extinguishment provision*** means any of the following provisions:

24 (a) section ^68 (when proceeds are covered by a security  
25 interest);

26 (b) sections ^85 to ^94 (various situations in which property is  
27 acquired free of security interests);

28 (c) section ^171 (disposing of collateral free of interests);

29 (d) section ^174 (retaining collateral free of interests).

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

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

32 ***financial product*** has the meaning given by the *Corporations Act*  
33 *2001*.

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***fish:***

- (a) means marine, estuarine or freshwater fish, or other aquatic animal life, at any stage of their life history (whether alive or dead); and
  - (b) includes oysters and other aquatic molluscs, crustaceans, echinoderms, beachworms and other aquatic polychaetes;
- but does not include any fish prescribed by the regulations for the purposes of this definition.

***foreign jurisdiction*** has the meaning given by section ^80.

***future advance*** has the meaning given by section ^60.

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

***grantor*** means:

- (a) a person who has an interest (or right) in personal property to which a security interest is attached (whether or not the person owes payment or performance of an obligation secured by the security interest); or
- (b) a person who receives tangible property under a commercial consignment; or
- (c) a lessee under a PPS lease; or
- (d) a transferor of an account or chattel paper; or
- (e) a transferee of, or successor to, the interest of a person mentioned in paragraphs (a) to (d); or
- (f) in relation to a registration, or an amendment of a registration:
  - (i) a person registered in the registration as a grantor; or
  - (ii) a person mentioned in paragraphs (a) to (e).

***initial registration time*** of a registration has the meaning given by item 5 of the table in section ^191.

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

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

# EXPOSURE DRAFT

Chapter 1 Preliminary

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Division 1 Definitions

Section ^26

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

- 3                    (a) tangible property;  
4                    (b) chattel paper;  
5                    (c) a document of title;  
6                    (d) an investment instrument;  
7                    (e) an investment entitlement;  
8                    (f) currency;  
9                    (g) a negotiable instrument.

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

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

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

34                   ***inventory*** means personal property (whether tangible property or  
35                   intangible property) in which a person has an interest if, in the



- 1 course or furtherance, to any degree, of an enterprise to which an  
2 ABN has been allocated, the property:
- 3 (a) is held by the person for sale or lease; or
  - 4 (b) has been held by the person for sale or lease, and is leased by  
5 the person as lessor; or
  - 6 (c) is provided by the person under a contract for services; or
  - 7 (d) is held by the person as raw materials or as work in progress;  
8 or
  - 9 (e) is held, used or consumed, as materials, by the person.

10 **investment entitlement** has the meaning given by section ^54.

11 **investment entitlement account** has the meaning given by section  
12 ^54.

13 **investment entitlement intermediary** has the meaning given by  
14 section ^54.

15 **investment instrument** has the meaning given by section ^39.

16 **knowledge**, in the following provisions, has a meaning affected by  
17 section ^56:

- 18 (a) subsection ^68(5) (when proceeds are covered by security  
19 interest);
- 20 (b) section ^73 (temporary perfection);
- 21 (c) sections ^88, ^89, ^90, ^91, ^92 and ^93 (extinguishment  
22 provisions);
- 23 (d) subsection ^115(4) and sections ^117, ^118 and ^119  
24 (priorities);
- 25 (e) section ^200 (temporary continuation of defective  
26 registration);
- 27 (f) section ^233 (void security interests).

28 Note: Section ^55 deals with knowledge in relation to bodies corporate and  
29 other entities.

30 **land** includes all estates and interests, whether freehold or chattel,  
31 in real property (but does not include tangible property that is  
32 affixed to land).

33 **land law** has the meaning given by section ^157.

# EXPOSURE DRAFT

Chapter 1 Preliminary

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Division 1 Definitions

Section ^26

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- 1                    **law** of the Commonwealth, a State or a Territory means:
- 2                    (a) an Act of the Commonwealth, the State or the Territory; or
- 3                    (b) an instrument made under such an Act.
- 4                    **licence** has the meaning given by section ^40.
- 5                    **livestock** includes:
- 6                    (a) sheep, goats, cattle, horses, swine, poultry, alpacas, llamas,
- 7                    ostriches, fish or other animals; and
- 8                    (b) the unborn young of livestock.
- 9                    **located**, in relation to collateral, has the meaning given by section
- 10                    ^83.
- 11                    **lower court** has the meaning given by section ^263.
- 12                    **matter** includes act, omission, body, person and thing.
- 13                    **migrated security interest** has the meaning given by section ^301.
- 14                    **migration time** has the meaning given by section ^276.
- 15                    **minerals** means minerals (including hydrocarbons) in any form,
- 16                    whether solid, liquid or gaseous and whether organic or inorganic.
- 17                    **modification** includes addition, omission and substitution.
- 18                    **motor vehicle** has the meaning given by the regulations.
- 19                    **negotiable document of title** means a writing issued by or
- 20                    addressed to a bailee:
- 21                    (a) that covers tangible property in the bailee's possession that is
- 22                    identified or is a fungible portion of an identified mass; and
- 23                    (b) in which it is stated that the tangible property identified in it
- 24                    will be delivered to:
- 25                    (i) a named person (but not only to the named person) or
- 26                    the transferee of that person; or
- 27                    (ii) the order of a named person; or
- 28                    (iii) the bearer.
- 29                    **negotiable instrument** has the meaning given by section ^41.

# EXPOSURE DRAFT

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

3            **non-negotiable document of title** means a writing issued by or  
4            addressed to a bailee:

- 5            (a) that covers tangible property in the bailee's possession that is  
6            identified or is a fungible portion of an identified mass; and  
7            (b) in which it is stated that the tangible property identified in it  
8            will be delivered to a named person (and only to the named  
9            person).

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

11           Note:        For the meaning of *referring State*, see section ^8.

12           **notice of objection** has the meaning given by section ^175.

13           **omit**: collateral is *omitted* from a registration if the registration is  
14           amended with the effect that it no longer describes the collateral.

15           Note:        For the meaning of *description*, see section ^37.

16           **perfected** has the meaning given by section ^64.

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

- 18           (a) land; or  
19           (b) a right, entitlement or authority that is:  
20                (i) granted by a law of the Commonwealth, a State or a  
21                Territory; and  
22                (ii) declared by that law not to be personal property for the  
23                purposes of this Act.

24           Note 1:    This Act does not apply in relation to an interest in tangible  
25           property that is affixed to land (see paragraph ^6(1)(j)).

26           Note 2:    A right, entitlement or authority to which paragraph (b) applies is  
27           not a licence for the purposes of this Act (see subsection ^40(2)).

28           **possession**:

- 29           (a) in relation to a negotiable instrument (other than a negotiable  
30           instrument evidenced by an electronic record)—has the  
31           meaning given by subsection ^43(4); or  
32           (b) in relation to chattel paper that is evidenced by an electronic  
33           record—has the meaning given by subsection ^43(5); or

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1 (c) in relation to an investment instrument that is evidenced by a  
2 certificate—has the meaning given by section ^44; or

3 (d) in any case—has a meaning affected by subsections ^43(1),  
4 (2) and (3).

5 **PPS Account** means the Personal Property Securities Account  
6 (which is established by section ^183).

7 **PPS lease** (short for Personal Property Securities lease) has the  
8 meaning given by section ^31.

9 **PPS matter** (short for Personal Property Securities matter) has the  
10 meaning given by section ^259.

11 **predominantly**: personal property is intended to be used  
12 **predominantly** for personal, domestic or household purposes if:

13 (a) the personal property:

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

15 (ii) is intended to be used for other purposes as well, but is  
16 intended to be most used for personal, domestic or  
17 household purposes; and

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

19 **present liability** means a liability:

20 (a) that has arisen; and

21 (b) whose extent or amount is fixed or capable of being  
22 ascertained;

23 whether or not the liability is immediately due to be met.

24 **present value** has the meaning given by section ^30.

25 **proceeds** has the meaning given by section ^42.

26 **provides**: a security agreement **provides** for a security interest if:

27 (a) the security interest is created by the security agreement; or

28 (b) the security interest arises under the security agreement; or

29 (c) the security agreement otherwise provides for the security  
30 interest.

31 **purchase money collateral** has the meaning given by section ^32.

1            ***purchase money obligation*** has the meaning given by section ^32.

2            ***purchase money security interest*** has the meaning given by  
3            section ^32.

4            ***quoted security*** has the meaning given by section 9 of the  
5            *Corporations Act 2001*.

6            ***receiving court*** has the meaning given by section ^262.

7            ***referring State*** has the meaning given by section ^8.

8            ***register*** means the Personal Property Securities Register  
9            established under section ^186.

10           ***registered***: collateral is ***registered*** at a particular time if:

11           (a) a registration of the collateral is effective at that time (under  
12           Part 5.4); and

13           (b) the registration describes the collateral at that time.

14           Note:        For the meaning of ***description***, see section ^37.

15           ***registered with a serial number***: collateral is ***registered with a***  
16           ***serial number*** only if a search of the register by reference only to  
17           the serial number of the collateral is capable of disclosing the  
18           registration of the collateral.

19           Note:        ***Serial number*** is defined in this section as a serial number by which  
20           the regulations require, or permit, collateral to be described in a  
21           registration.

22           ***Registrar*** means the Registrar of Personal Property Securities.

23           ***registration*** means a registration of collateral under any of the  
24           following sections:

25           (a) section ^189 (registration on application to the Registrar);

26           (b) section ^302 (registration at Registrar's initiative of  
27           authorised migrated interests);

28           (c) section ^306 (preparatory registration for collateral secured  
29           by transitional security interests).

30           ***registration commencement time*** has the meaning given by section  
31           ^277.

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1            **registration time**, for collateral described in a registration, has the  
2            meaning given by:

- 3            (a) section ^193; or  
4            (b) section ^306 (preparatory registration for collateral secured  
5            by transitional security interests).

6            **relevant investment entitlement intermediary** has the meaning  
7            given by section ^54.

8            **relevant superior court** has the meaning given by section ^263.

9            **secured party**:

- 10           (a) means a person who holds a security interest for the person's  
11           own benefit or for the benefit of another person (or both); and  
12           (b) if the holders of the obligations issued, guaranteed, or  
13           provided for, under a security agreement are represented by a  
14           trustee as the holder of the security interest—includes the  
15           trustee; and  
16           (c) in relation to a registration, or an amendment of a  
17           registration—includes a person registered as a secured party  
18           in the registration.

19           **security agreement** means:

- 20           (a) an agreement that provides for a security interest, or writing  
21           evidencing such an agreement; or  
22           (b) an act by which a security interest is created, arises or is  
23           provided for, or writing evidencing such an act.

24           Examples: A security interest may be created, arise or be provided for by the  
25           following (or a transaction that includes the following):

- 26           (a) a contract;  
27           (b) the execution of a deed;  
28           (c) a declaration of a trust.

29           **security interest** has the meaning given by section ^28.

30           **security interest in crops** has the meaning given by section ^128.

31           **security trust instrument** has the meaning given by section ^208.

1            **serial number**, in relation to collateral, means a serial number by  
2            which the regulations require, or permit, the collateral to be  
3            described in a registration.

4            Note:        Collateral is **registered with a serial number** (as defined by this  
5                       section) only if a search of the register by reference only to the serial  
6                       number of the collateral is capable of disclosing the registration of the  
7                       collateral.

8            **signed** by a person includes:

- 9                       (a) writing (including a symbol) executed or otherwise adopted  
10                      by the person; and  
11                      (b) writing wholly or partly encrypted, or otherwise processed,  
12                      by the person;

13            if the person intended to both identify the person and adopt, or  
14            accept, the writing.

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

19            **superior court** has the meaning given by section ^263.

20            **tangible property** means goods, including the following:

- 21                      (a) crops;  
22                      (b) livestock;  
23                      (c) trees that are personal property;  
24                      (d) wool;  
25                      (e) minerals that are personal property;  
26                      (f) satellites and other space objects;  
27            but does not include any of the following:  
28                      (g) chattel paper;  
29                      (h) a document of title;  
30                      (i) an investment instrument;  
31                      (j) an investment entitlement;  
32                      (k) currency;  
33                      (l) a negotiable instrument.

34            Note:        Minerals includes hydrocarbons (for the meaning of **minerals**, see this  
35                       section).

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- 1                    **temporary perfection provision** means any of the following  
2                    sections:
- 3                    (a) section ^70 (proceeds not covered by registered description);
  - 4                    (b) section ^73 (after transfer);
  - 5                    (c) sections ^75, ^76 or ^77 (while collateral not in possession);
  - 6                    (d) section ^79 (account or chattel paper in returned tangible  
7                    property);
  - 8                    (e) section ^81 (collateral moved to Australia);
  - 9                    (f) section ^290 (non-migrated security interests).
- 10                   **term deposit** means a deposit made with an ADI that matures on a  
11                   particular date (whether or not the ADI can be required to repay the  
12                   deposit before that date).
- 13                   **this Act** includes the regulations.
- 14                   **time of execution** has the meaning given by section ^121.
- 15                   **transfer matter** has the meaning given by section ^262.
- 16                   **transferring court** has the meaning given by section ^262.
- 17                   **transitional register** has the meaning given by section ^299.
- 18                   **transitional security agreement** has the meaning given by section  
19                   ^278.
- 20                   **transitional security interest** has the meaning given by section  
21                   ^279.
- 22                   **undistributed amount** has the meaning given by section ^178.
- 23                   **value** means consideration that is sufficient to support a contract  
24                   (including a reduction or discharge of an earlier debt or liability).
- 25                   **verifiable event** has the meaning given by section ^220.
- 26                   **verification statement** has the meaning given by section ^220.
- 27                   **wool** means the natural fibre from any livestock that produce fleece  
28                   that can be shorn (such as sheep, goats, alpacas and llamas).
- 29                   **writing** includes:



- 1 (a) the recording of words or data in any way (including  
2 electronically), if, at the time the recording was made, it was  
3 reasonable to expect that the words or data would be readily  
4 accessible so as to be useable for subsequent reference; and  
5 (b) the display, or other representation, of words or data by any  
6 form of communication (including electronic), if:  
7 (i) the display or representation is recorded in any way  
8 (including electronically); and  
9 (ii) at the time the recording was made, it was reasonable to  
10 expect that the words or data would be readily  
11 accessible so as to be useable for subsequent reference.

12 **^27 Application of the *Acts Interpretation Act 1901***

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

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1

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## Division 2—Provisions relating to security interests

3

### ^28 Meaning of *security interest*

4

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

5

6

7

8

9

Note 1: For security interests in relation to which this Act operates, see Part 1.2.

10

11

Note 2: For interests in relation to which this Act does not apply, see section ^6.

12

13

(2) For example, a *security interest* includes an interest or right in relation to personal property provided by any of the following transactions that, in substance, secures payment or performance of an obligation:

14

15

16

17

(a) a fixed charge;

18

(b) a floating charge;

19

(c) a chattel mortgage;

20

(d) a conditional sale agreement (including an agreement to sell subject to retention of title);

21

22

(e) a hire purchase agreement;

23

(f) a pledge;

24

(g) a trust receipt;

25

(h) a consignment (whether or not a commercial consignment);

26

(i) a lease of tangible property (whether or not a PPS lease);

27

Note: For whether a lease, in substance, secures payment or performance of an obligation, see section ^30.

28

29

(j) an assignment;

30

(k) a transfer of title.

31

32

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

33

- 1 (a) interests or rights of a transferee in a transfer of an account or  
2 chattel paper;  
3 (b) interests or rights of a lessor or bailor under a PPS lease;  
4 (c) interests or rights of a consignor under a commercial  
5 consignment.
- 6 (4) A *security interest* does not include:  
7 (a) a licence; or  
8 (b) an interest or right of a kind prescribed by the regulations for  
9 the purposes of this section.
- 10 (5) A person who is obligated under an account may take a security  
11 interest in the account under which that person is obligated.

## 12 ^29 Postponement or subordination of security interests

- 13 A security interest is not created only by an agreement or  
14 undertaking to do either of the following:  
15 (a) to postpone or subordinate a person's right to payment or  
16 performance of all or any part of a debtor's obligation, to  
17 another person's right to payment or performance of all or  
18 any part of another of the debtor's obligations;  
19 (b) to postpone or subordinate all or any part of a secured party's  
20 rights under a security agreement, to all or any part of  
21 another secured party's rights under another security  
22 agreement with the same grantor.

## 23 ^30 Whether leases secure payment or performance of obligations

### 24 *General rule*

- 25 (1) For the purposes of this Act, whether a lease of personal property  
26 in substance secures payment or performance of an obligation is  
27 determined by the facts of each case.

28 Note: Paragraph ^28(2)(i) provides that if a lease secures the payment or  
29 performance of an obligation, the lease is a security interest for the  
30 purposes of this Act.

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1                    *Particular leases that secure payment or performance of an*  
2                    *obligation*

3                    (2) However, a lease of personal property is taken, in substance, to  
4                    secure payment or performance of an obligation if it provides that:

5                    (a) the value the lessee is to provide to the lessor for the right to  
6                    possession and use of the leased property is an obligation for  
7                    the term of the lease not subject to termination by the lessee;  
8                    and

9                    (b) one of the following applies:

10                    (i) the original term of the lease is equal to or greater than  
11                    the remaining economic life of the leased property;

12                    (ii) the lessee is bound to renew the lease for the remaining  
13                    economic life of the leased property, or is bound to  
14                    become the owner of the leased property;

15                    (iii) the lessee has an option to renew the lease for the  
16                    remaining economic life of the leased property for no  
17                    additional value, or nominal additional value, upon  
18                    compliance with the lease agreement;

19                    (iv) the lessee has an option to become the owner of the  
20                    leased property for no additional value, or nominal  
21                    additional value, upon compliance with the lease  
22                    agreement.

23                    *Leases that do not secure payment or performance of an obligation*

24                    (3) A lease of personal property does not secure payment or  
25                    performance of an obligation merely because it provides that:

26                    (a) the present value the lessee is obligated to provide to the  
27                    lessor for the right to possession and use of the leased  
28                    property is substantially equal to or is greater than the fair  
29                    market value of the leased property at the time the lease is  
30                    entered into; or

31                    (b) the lessee assumes risk of loss of the leased property, or  
32                    agrees to pay taxes, insurance, filing, recording, or  
33                    registration fees, or service or maintenance costs, with  
34                    respect to the leased property; or

35                    (c) the lessee has an option to renew the lease or to become the  
36                    owner of the leased property; or

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- 1 (d) the lessee has an option to renew the lease for a fixed rent  
2 that is equal to or greater than the reasonably predictable fair  
3 market rent for the use of the leased property for the term of  
4 the renewal at the time the option is to be performed; or  
5 (e) the lessee has an option to become the owner of the leased  
6 property for a fixed price that is equal to or greater than the  
7 reasonably predictable fair market value of the goods at the  
8 time the option is to be performed.

9 *Nominal value*

- 10 (4) For the purposes of this section, value (or additional value) for an  
11 option to renew a lease, or to become the owner of leased property,  
12 is not nominal if:  
13 (a) for an option to renew a lease—when the option is granted to  
14 the lessee, the rent is stated to be the fair market rent for the  
15 use of the goods for the term of the renewal, determined at  
16 the time the option is to be performed; or  
17 (b) for an option to become the owner of leased property—when  
18 the option is granted to the lessee, the value is stated to be the  
19 fair market value of the goods, determined at the time the  
20 option is to be performed.
- 21 (5) For the purposes of this section, value (or additional value) for an  
22 option to renew a lease, or to become the owner of leased property,  
23 is nominal if it is less than the lessee's reasonably predictable cost  
24 of performing under the lease agreement if the option is not  
25 exercised.

26 *Reasonably predictable*

- 27 (6) For the purposes of this section, whether a thing in relation to a  
28 lease is reasonably predictable is to be determined by reference to  
29 the facts and circumstances at the time the lease is entered into.

30 *Remaining economic life of leased property*

- 31 (7) For the purposes of this section, the remaining economic life of  
32 leased property is to be determined by reference to the facts and  
33 circumstances at the time the lease is entered into.

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1

*Present value*

2

(8) In this Act:

3

***present value***: the ***present value*** that a lessee is obligated to pay a lessor for the right to possession and use of leased property at a particular day is the amount, as at that day, of one or more sums payable in the future, discounted to that day in accordance with subsection (9).

4

5

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(9) The discount is:

9

(a) determined by the interest rate specified by the parties, if the rate is not manifestly unreasonable at the time the transaction is entered into; or

10

11

12

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14

(b) in any other case, determined by a commercially reasonable rate that takes into account the facts and circumstances of the case at the time the lease was entered into.

15

### **^31 Meaning of *PPS lease***

16

(1) In this Act:

17

***PPS lease*** means a lease or bailment of tangible property:

18

(a) for a term of more than one year; or

19

(b) for an indefinite term (even if the lease or bailment is determinable by one or both of the parties within a year of entering into the lease or bailment); or

20

21

22

(c) for a term of up to one year that is automatically renewable, or that is renewable at the option of one of the parties, for one or more terms if the total of all the terms might exceed one year; or

23

24

25

26

(d) for a term of up to one year, in a case in which the lessee or bailee, with the consent of the lessor or bailor, retains uninterrupted (or substantially uninterrupted) possession of the leased or bailed property for a period of more than one year after the day the lessee or bailee first acquired possession of the property (but not until the lessee's or bailee's possession extends for more than one year); or

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

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

28 *Bailments for value only*

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

## 31 ^32 Meaning of *purchase money security interest*

- 32 (1) A *purchase money security interest* means any of the following  
33 interests:

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- 1 (a) a security interest taken in collateral by a seller to the extent  
2 that it secures the obligation to pay all or part of the  
3 collateral's purchase price;
- 4 (b) a security interest taken in collateral by a person who gives  
5 value for the purpose of enabling the grantor to acquire an  
6 interest in, or to acquire the use of, the collateral, to the  
7 extent that the value is applied to acquire the last-mentioned  
8 interest;
- 9 (c) an interest of a lessor or bailor of tangible property under a  
10 PPS lease;
- 11 (d) an interest of a consignor who delivers tangible property to a  
12 consignee under a commercial consignment.

13 Note: Section ^33 deals with persons who have a purchase money security  
14 interest in proceeds of inventory which is subordinated under section  
15 ^111.

- 16 (2) However, a *purchase money security interest* does not include an  
17 interest acquired under a transaction of sale and lease back to the  
18 seller.
- 19 (3) If a security interest in collateral secures purchase money  
20 obligations and obligations that are not purchase money  
21 obligations, the security interest is a purchase money security  
22 interest only to the extent that it secures the purchase money  
23 obligations.
- 24 (4) If a security interest is granted in purchase money collateral and  
25 collateral that is not purchase money collateral, the security interest  
26 is a purchase money security interest only to the extent that it is  
27 granted in the purchase money collateral.
- 28 (5) A purchase money security interest does not lose its status as such  
29 only because the purchase money obligation is renewed,  
30 refinanced, consolidated or restructured (whether or not by the  
31 same secured party).
- 32 (6) In any transaction, if the extent to which a security interest is a  
33 purchase money security interest depends on the application of a  
34 payment to a particular obligation, the payment must be applied:  
35 (a) in accordance with any method of application to which the  
36 parties agree; or



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- 1 (b) if the parties do not agree on a method—in accordance with  
2 any intention of the debtor manifested at or before the time of  
3 the payment; or  
4 (c) if neither paragraph (a) nor (b) applies—in the following  
5 order:  
6 (i) to obligations that are not secured, in the order in which  
7 those obligations were incurred;  
8 (ii) to obligations that are secured, but not by purchase  
9 money security interests, in the order in which those  
10 obligations were incurred;  
11 (iii) to obligations that are secured by purchase money  
12 security interests, in the order in which those obligations  
13 were incurred.

14 (7) In this Act:

15 *purchase money collateral* means personal property that secures a  
16 purchase money obligation incurred with respect to that property.

17 *purchase money obligation* means an obligation of a debtor  
18 incurred:

- 19 (a) as all or part of the price of the collateral; or  
20 (b) for value given to enable the grantor to acquire an interest in,  
21 or to acquire the use of, the collateral (provided the value is  
22 so acquired or used).

## 23 ^33 Purchase money security interests in proceeds of inventory

24 (1) This section applies if:

- 25 (a) a person has a purchase money security interest in proceeds  
26 of inventory; and  
27 (b) the purchase money security interest is subordinate to another  
28 interest under section ^111.

29 (2) For the purposes of this Act:

- 30 (a) the person is taken to have a purchase money security interest  
31 in both the proceeds of the inventory and in the new value  
32 referred to in paragraph ^111(2)(c) or (3)(c) (as the case  
33 requires); and

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- 1 (b) the purchase money security interest in the new value is  
2 taken to be perfected by the registration that perfected the  
3 purchase money security interest in the proceeds.

1

2 **Division 3—Provisions relating to personal property**

3 **^34 Meaning of *accession***

4 In this Act, an *accession* to tangible property (the *improved*  
5 *property*) means other tangible property that is installed in, or  
6 affixed to, the improved property, but only if the separate identities  
7 of the improved property and the other tangible property are lost at  
8 the time the other tangible property is installed in, or affixed to, the  
9 improved property.

10 Example: An aircraft engine that is routinely moved between aircraft frames is  
11 not an accession to a particular aircraft frame, because the engine does  
12 not lose its separate identity when it is affixed to an aircraft frame.

13 **^35 Meaning of *account***

14 (1) In this Act:

15 *account* means a monetary obligation.

16 (2) A monetary obligation is an *account* whether or not the obligation  
17 has been earned by performance.

18 (3) If money owed under a monetary obligation is payable in  
19 Australia, the monetary obligation is an *account* whether or not the  
20 person who owes the money is located in Australia.

21 (4) However, *account* does not include the following:

- 22 (a) a negotiable instrument;
- 23 (b) an investment instrument;
- 24 (c) chattel paper;
- 25 (d) an investment entitlement.

26 **^36 Meaning of *chattel paper***

27 (1) In this Act:

28 *chattel paper* means one or more writings that evidence:

- 29 (a) a monetary obligation; and
- 30 (b) either or both of the following:

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## Section ^37

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- 1 (i) a security interest in, or lease of, specific tangible  
2 property, or specific tangible property and accessions to  
3 the specific tangible property (even if the description of  
4 the tangible property (and accessions) is taken to  
5 include a description of intellectual property, or an  
6 intellectual property licence, under section ^38);  
7 (ii) a security interest in specific intellectual property or a  
8 specific intellectual property licence.

- 9 (2) However, *chattel paper* does not include the following:  
10 (a) a negotiable instrument;  
11 (b) an investment instrument;  
12 (c) an investment entitlement;  
13 (d) a document of title.

### 14 ^37 Meaning of *description* of personal property

15 In this Act:

16 *description* of personal property (including collateral and  
17 proceeds) means:

- 18 (a) in the case of a particular item of personal property—a  
19 description that identifies the item, or that identifies a class to  
20 which the item belongs; or  
21 (b) in the case of a class of personal property—a description that  
22 identifies the class.

23 Note 1: Other parts of speech and grammatical forms of “description” (for  
24 example, “described”) have a corresponding meaning (see section 18A  
25 of the *Acts Interpretation Act 1901*).

26 Note 2: Descriptions of tangible property include related descriptions of  
27 intellectual property and intellectual property licences in certain  
28 circumstances (see section ^38).

### 29 ^38 Description of tangible property includes description of 30 intellectual property rights

31 *Scope*

- 32 (1) This section applies if:

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Section ^39

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- 1 (a) a registration of collateral that is tangible property perfects a  
2 security interest in the property that is provided for by a  
3 security agreement; and  
4 (b) the exercise by the secured party of rights arising under the  
5 security agreement necessarily involves an exercise of  
6 intellectual property rights (including rights exercisable  
7 under an intellectual property licence); and  
8 (c) the payment or obligation secured by the security interest is  
9 (in addition) secured by a security interest that is attached to  
10 the intellectual property rights.

11 *Description of tangible property taken to include a description of*  
12 *intellectual property rights*

- 13 (2) For the purposes of this Act, the following descriptions are taken to  
14 include a description of the intellectual property rights, or of the  
15 intellectual property licence required to exercise those rights:  
16 (a) a description of the tangible property in the security  
17 agreement;  
18 (b) the registered description of the tangible property;  
19 (c) a description of the tangible property included in a notice  
20 under this Act.  
21 (3) Subsection (2) applies subject to a contrary intention in the security  
22 agreement, registration or notice.

## 23 ^39 Meaning of *investment instrument*

- 24 (1) In this Act:

25 *investment instrument* means any of the following financial  
26 products:

- 27 (a) a share in, or a debenture (within the meaning of the  
28 *Corporations Act 2001*) of, a body;  
29 (b) a debenture (within the meaning of the *Corporations Act*  
30 *2001*), stock or bond issued or proposed to be issued by a  
31 government;  
32 (c) a derivative (within the meaning of Chapter 7 of the  
33 *Corporations Act 2001*);

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## Section ^40

---

- 1 (d) a foreign exchange contract that is not a derivative (within  
2 the meaning of Chapter 7 of the *Corporations Act 2001*);  
3 (e) an assignable option to have an allotment of an investment  
4 instrument (apart from this paragraph) made to the holder of  
5 the option;  
6 (f) an interest in, or unit in an interest in, a managed investment  
7 scheme (within the meaning of the *Corporations Act 2001*);  
8 (g) a unit in a share in a body;  
9 (h) a financial product that is traded on a financial market that is:  
10 (i) operated in accordance with an Australian market  
11 licence (within the meaning of the *Corporations Act*  
12 *2001*); or  
13 (ii) exempt from the operation of Part 7.2 of the  
14 *Corporations Act 2001*;  
15 (i) any other financial product that is prescribed by the  
16 regulations;  
17 (j) any financial product that consists of a combination of any 2  
18 or more of the financial products mentioned in paragraphs (a)  
19 to (i).
- 20 (2) However, ***investment instrument*** does not include the following:  
21 (a) a negotiable instrument;  
22 (b) an investment entitlement;  
23 (c) a document of title;  
24 (d) the creation or transfer (including a successive transfer) of a  
25 right to payment in connection with interests in land where  
26 the writing evidencing the creation or transfer does not  
27 specifically identify only that land.

## 28 ^40 Meaning of *licence*

29 (1) In this Act:

30 ***licence*** means:

- 31 (a) a right, entitlement or authority to do either or both of the  
32 following:  
33 (i) to manufacture, produce, sell, transport or otherwise  
34 deal with personal property;  
35 (ii) to provide services; or
-

- 1 (b) an intellectual property licence; or  
2 (c) a right, entitlement or authority granted by a law of the  
3 Commonwealth, a State or a Territory to exploit or use a  
4 resource;  
5 that is transferable by the licensee (whether or not the right,  
6 entitlement, authority or licence is exclusive, and whether or not a  
7 transfer is restricted or requires the licensor's consent).

- 8 (2) However, *licence* does not include a right, entitlement or authority  
9 that is:  
10 (a) granted by a law of the Commonwealth, a State or a  
11 Territory; and  
12 (b) declared by that law not to be personal property for the  
13 purposes of this Act.

14 Note: A right, entitlement or authority to which subsection (2) applies is not  
15 personal property for the purposes of this Act (for the meaning of  
16 *personal property*, see section ^26).

## 17 ^41 Meaning of *negotiable instrument*

- 18 (1) In this Act:

19 *negotiable instrument* means:

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

- 31 (2) However, *negotiable instrument* does not include the following:  
32 (a) an investment entitlement;  
33 (b) a document of title;  
34 (c) the creation or transfer (including a successive transfer) of a  
35 right to payment in connection with interests in land where

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---

1 the writing evidencing the creation or transfer does not  
2 specifically identify only that land.

## 3 **^42 Meaning of *proceeds***

4 (1) In this Act:

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

- 8 (a) personal property that is derived directly or indirectly from a  
9 dealing with the collateral (or proceeds of the collateral);
- 10 (b) a right to an insurance payment or other payment as  
11 indemnity or compensation for loss of or damage to the  
12 collateral (or proceeds of the collateral);
- 13 (c) a payment made in total or partial discharge or redemption of  
14 the collateral (or proceeds of the collateral), if the collateral  
15 (or proceeds) consists of any of the following:
- 16 (i) chattel paper;
- 17 (ii) intangible property;
- 18 (iii) an investment instrument;
- 19 (iv) an investment entitlement;
- 20 (v) a negotiable instrument;
- 21 (d) if the collateral is an investment instrument or investment  
22 entitlement, any of the following:
- 23 (i) rights arising out of the collateral;
- 24 (ii) property collected on the collateral;
- 25 (iii) property distributed on account of the collateral.

26 Note: In section ^166 (disposal of collateral by a secured party) proceeds has  
27 its ordinary meaning, so this definition does not apply.

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

29 (2) However, the definition in subsection (1) applies to personal  
30 property only if:

- 31 (a) either:
- 32 (i) the grantor has an interest in the collateral; or



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- 1 (ii) the grantor has the power to transfer rights in the  
2 collateral to the secured party (or to a person nominated  
3 by the secured party); and  
4 (b) in a case in which the grantor has an interest in the  
5 collateral—the interest in the personal property does not arise  
6 because of the application of an amount or proceeds under  
7 paragraph ^177(2)(e) (distribution of proceeds received by  
8 secured party).

9 *Livestock*

- 10 (3) Livestock are not the *proceeds* of collateral merely because they  
11 are the unborn young, or the offspring, of livestock that are  
12 collateral.

# EXPOSURE DRAFT

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Division 4 Possession, and control of controllable property

Section ^43

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## Division 4—Possession, and control of controllable property

3

4

### ^43 Possession

5

*Possession by one party exclusive of possession by others*

6

(1) A secured party cannot have **possession** of personal property if the property is in the actual or apparent possession of the grantor or debtor, or another person on behalf of the grantor or debtor.

7

8

9

(2) A grantor or debtor cannot have **possession** of personal property if the property is in the actual or apparent possession of the secured party, or another person on behalf of the secured party.

10

11

12

*Timing rule for possession of tangible property transported by common carrier*

13

14

(3) A grantor or debtor, or another person at the request of the grantor or debtor, to whom tangible property is transported by a common carrier acquires possession of the property only when the earlier of the following occurs:

15

16

17

18

(a) the grantor or debtor, or another person at the request of the grantor or debtor, actually acquires possession of the property;

19

20

21

(b) the grantor or debtor, or another person at the request of the grantor or debtor, acquires possession of a document of title to the property.

22

23

24

*Meaning of possession for certain negotiable instruments*

25

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

26

27

28

29

Note: For possession of investment instruments, see section ^44.

1                    *Meaning of possession for chattel paper that is evidenced*  
2                    *electronically*

- 3                    (5) A secured party has *possession* of chattel paper that is evidenced  
4                    by an electronic record if, and only if:
- 5                    (a) a single authoritative copy of the record exists which is  
6                    unique, identifiable and unalterable (except as set out below);  
7                    and
  - 8                    (b) the authoritative copy identifies the secured party as the  
9                    assignee of the record; and
  - 10                   (c) the authoritative copy is communicated to, and maintained  
11                   by, the secured party or the secured party's agent; and
  - 12                   (d) copies or revisions of the record that change the assignee of  
13                   the authoritative copy can be made only with the  
14                   participation of the secured party; and
  - 15                   (e) each copy of the authoritative copy (or any copy of such a  
16                   copy) is readily identifiable as a copy that is not the  
17                   authoritative copy; and
  - 18                   (f) any revision of the authoritative copy is readily identifiable  
19                   as an authorised or unauthorised copy.

## 20                   **^44 Possession of investment instruments**

21                   Despite subsection ^43(1), a person (the *possessor*) has *possession*  
22                   of an investment instrument that is evidenced by a certificate if,  
23                   and only if:

- 24                   (a) the certificate specifies the person who is entitled to the  
25                   investment instrument; and
- 26                   (b) a transfer of the investment instrument may be registered on  
27                   books maintained for that purpose by or on behalf of the  
28                   issuer (or the certificate states that a transfer of the  
29                   instrument may be so registered); and
- 30                   (c) any of the following applies:
  - 31                   (i) the possessor has possession of the certificate;
  - 32                   (ii) another person (other than the grantor or the debtor) has  
33                   possession of the certificate on behalf of the possessor;
  - 34                   (iii) the registered owner (who is not the grantor or debtor)  
35                   of the investment instrument acknowledges in writing

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Section ^45

---

1 that he, she or it has possession of the investment  
2 instrument on behalf of the possessor.

## 3 **^45 Control of investment instruments**

### 4 *Control of any investment instrument*

5 (1) A person has **control** of an investment instrument (whether or not  
6 the instrument is evidenced by a certificate) if the issuer registers  
7 the person (who is not the debtor or the grantor) as the registered  
8 owner of the instrument.

### 9 *Control of investment instruments evidenced by certificates*

10 (2) A person (the **controller**) has **control** of an investment instrument  
11 that is evidenced by a certificate if:  
12 (a) the controller has possession of the instrument; and  
13 (b) the controller (or a person who has agreed to act on the  
14 instructions of the controller) is able to:  
15 (i) transfer the instrument to the controller, or to another  
16 person; or  
17 (ii) otherwise deal with the instrument.

### 18 *Control of investment instruments not evidenced by certificates*

19 (3) A person (the **controller**) has **control** of an investment instrument  
20 that is not evidenced by a certificate if:  
21 (a) there is an agreement in force between the controller and the  
22 grantor; and  
23 (b) the agreement has the effect that the controller (or a person  
24 who has agreed to act on the instructions of the controller) is  
25 able to initiate or control sending instructions by which the  
26 investment instrument could be transferred or otherwise dealt  
27 with.  
28 (4) A person (the **controller**) has **control** of an investment instrument  
29 that is not evidenced by a certificate if:  
30 (a) either:

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

## 20 ^46 Control of an ADI account

- 21 (1) A secured party has *control* of an ADI account with an ADI if:  
22 (a) any one or more of the following applies:  
23 (i) the secured party is the ADI;  
24 (ii) the secured party is able to direct disposition of the  
25 funds from the account without further consent by the  
26 grantor;  
27 (iii) the secured party becomes the ADI's customer with  
28 respect to the account; and  
29 (b) except if subparagraph (a)(i) applies—depositing an amount  
30 in the ADI account does not result in any person coming  
31 under a present liability to pay:  
32 (i) the debtor; or  
33 (ii) if the debtor is a body corporate—a related body  
34 corporate (within the meaning of the *Corporations Act*  
35 *2001*).

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Section ^47

---

- 1 (2) A secured party has control under subsection (1) even if the grantor  
2 retains the right to direct the disposition of funds from the account.
- 3 (3) To avoid doubt, this section applies in relation to:  
4 (a) perfecting a security interest by control; and  
5 (b) determining whether personal property is a circulating asset  
6 under section ^51.
- 7 (4) Subsection (1) does not limit the ways in which a secured party has  
8 control of an ADI account.

9 **^47 Control of a letter of credit**

10 A secured party does not have *control* of a right evidenced by a  
11 letter of credit, to the extent of any right to payment or  
12 performance of an obligation by the issuer or a nominated person,  
13 unless the issuer or nominated person has consented to assigning  
14 the proceeds of the letter of credit to the secured party.

15 **^48 Control of investment entitlements**

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

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- 1 (2) For the purposes of this section, a secured party has *control* of an  
2 investment entitlement even if the account holder of the account to  
3 which the investment instrument is credited (who might be the  
4 grantor) retains the right:  
5 (a) to make substitutions for the instrument; or  
6 (b) to originate instructions to the issuer; or  
7 (c) to otherwise deal with the instrument.

8 **^49 Control of uncertificated negotiable instruments**

- 9 (1) A secured party has *control* of a negotiable instrument that is not  
10 evidenced by a certificate if, and only if:  
11 (a) the instrument is able to be transferred in accordance with the  
12 operating rules of a clearing and settlement facility; and  
13 (b) there is an agreement in force under which the secured party  
14 (or a person who has agreed to act on the instructions of the  
15 secured party) controls the sending of some or all electronic  
16 messages or other electronic communications by which the  
17 instrument could be transferred.
- 18 (2) For the purposes of subsection (1), a secured party has control of a  
19 negotiable instrument even if the registered owner (who might be  
20 the grantor) retains the right:  
21 (a) to make substitutions for the instrument; or  
22 (b) to originate instructions to the issuer; or  
23 (c) to otherwise deal with the instrument.

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Division 5 References to charges and fixed and floating charges

Section ^50

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## **Division 5—References to charges and fixed and floating charges**

3

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### **^50 References to charges and fixed and floating charges**

5

(1) This section applies in relation to a reference to a charge, a fixed charge, or a floating charge, over property in a law of the Commonwealth, or in a security agreement, but only to the extent that:

6

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(a) the charge referred to has attached to personal property; and

10

(b) title to the personal property to which the charge has attached is in the grantor.

11

12

(2) This section does not apply in relation to:

13

(a) paragraphs ^28(2)(a) and (b), and subsection ^61(3), of this Act; or

14

15

(b) a reference to a charge, a fixed charge, or a floating charge, if:

16

17

(i) the charge referred to is a security interest that is

18

provided for by a transfer of an account or chattel paper;

19

and

20

(ii) that security interest is perfected.

21

(3) A reference to a charge over property is taken to be a reference to a security interest that has attached to:

22

23

(a) a circulating asset; or

24

(b) personal property that is not a circulating asset.

25

(4) A reference to a floating charge over property is taken to be a reference to a security interest that has attached to a circulating asset.

26

27

28

(5) A reference to a fixed charge over property is taken to be a reference to a security interest that has attached to personal property that is not a circulating asset.

29

30



1     **^51 Meaning of *circulating asset***

2             (1) For the purposes of this Act, if a grantor grants a security interest  
3             in personal property to a secured party, the personal property is a  
4             ***circulating asset*** if:

5                 (a) the personal property is a current asset (unless subsection (2)  
6                 or (3) applies); or

7                 (b) in any other case—the secured party has given the grantor  
8                 express or implied authority for any transfer of the personal  
9                 property to be made, in the ordinary course of the grantor’s  
10                business, free of the security interest.

11            Note:     For the meaning of ***current asset***, see subsection (5).

12             (2) Despite paragraph (1)(a), a current asset is not a ***circulating asset***  
13             if:

14                 (a) the secured party has registered a collateral description in  
15                 relation to the grantor that discloses, in accordance with the  
16                 regulations, that the secured party has control of the current  
17                 asset; and

18                 (b) the secured party has control of the current asset.

19            Note:     For the meaning of ***control*** in relation to an ADI account, an account  
20                        that is proceeds of inventory, and inventory, see sections ^46, ^52 and  
21                        ^53 respectively.

22             (3) Despite subsection (1), a current asset is not a ***circulating asset*** if:

23                 (a) the personal property is tangible property; and

24                 (b) the security interest is perfected by possession.

25             (4) For the purposes of paragraph (1)(b), personal property is not a  
26             ***circulating asset*** merely because the secured party has given  
27             express authority to transfer specific personal property, or a  
28             specific class of personal property, free of a security interest.

29             (5) In this Act:

30                ***current asset*** means any one of the following:

31                   (a) currency;

32                   (b) a negotiable instrument;

33                   (c) an ADI account (other than a term deposit);

34                   (d) inventory;

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Division 5 References to charges and fixed and floating charges

## Section ^52

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- 1 (e) an account (other than a term deposit) that is the proceeds of  
2 inventory;
- 3 (f) an account that arises from granting a right, or providing  
4 services, in the ordinary course of a business of granting  
5 rights or providing services of that kind (whether or not the  
6 account debtor is the person to whom the right is granted or  
7 the services are provided).
- 8 Example: An account that is credit card receivable is a current asset under  
9 paragraph (f).

### 10 ^52 Control of a non-ADI account that is the proceeds of inventory

- 11 (1) For the purposes of determining whether an account is a circulating  
12 asset under section ^51, a secured party has *control* of the  
13 following kinds of accounts (the *non-ADI account*) in the  
14 circumstances set out in subsections (2) and (3):
- 15 (a) an account:  
16 (i) that is not an ADI account; but  
17 (ii) that is the proceeds of inventory;
- 18 (b) an account mentioned in paragraph (f) of the definition of  
19 *current asset* in subsection ^51(5).

20 Note: Section ^46 sets out when a secured party has control of an ADI  
21 account.

22 *Control of ADI accounts into which amounts paid in discharge of*  
23 *non-ADI account*

- 24 (2) The secured party has *control* of the non-ADI account if:
- 25 (a) the secured party, and the person to whom the non-ADI  
26 account is owed, have agreed in writing that amounts paid in  
27 discharge of the non-ADI account must be deposited to a  
28 specified ADI account; and
- 29 (b) the usual practice is for such amounts to be so deposited; and
- 30 (c) the secured party controls the ADI account; and
- 31 (d) depositing any such amounts in the specified ADI account  
32 does not result in any person coming under a present liability  
33 to pay:  
34 (i) the person to whom the non-ADI account is owed; or

# EXPOSURE DRAFT

Preliminary Chapter 1

Interpretation Part 1.3

References to charges and fixed and floating charges Division 5

Section ^53

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- 1 (ii) if the person to whom the non-ADI account is owed is a  
2 body corporate—a related body corporate (within the  
3 meaning of the *Corporations Act 2001*).

4 *Control by transferee of account*

- 5 (3) If the secured party is a transferee of the non-ADI account, the  
6 secured party has **control** of the non-ADI account if payment by  
7 the account debtor to the secured party would discharge the  
8 obligation of the account debtor under subsection ^125(8) to the  
9 extent of the payment.

10 *This section does not limit when a person has control*

- 11 (4) This section does not limit when a secured party has control of an  
12 account for the purposes of determining whether an asset is a  
13 circulating asset under section ^51.

## 14 ^53 Control of inventory

- 15 (1) For the purposes of determining whether inventory is a circulating  
16 asset under section ^51, a secured party has **control** of inventory if:  
17 (a) the secured party and the grantor have agreed in writing that  
18 the grantor:  
19 (i) will specifically appropriate the inventory to the  
20 security interest; and  
21 (ii) will not remove any specifically appropriated inventory  
22 without previously obtaining the specific and express  
23 authority of the secured party to do so; and  
24 (b) the grantor's usual practice is to comply with the agreement.
- 25 (2) This section does not limit when a secured party has control of  
26 inventory for the purposes of determining whether inventory is a  
27 circulating asset under section ^51.

# EXPOSURE DRAFT

Chapter 1 Preliminary

Part 1.3 Interpretation

Division 6 Investment entitlements

Section ^54

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1

## 2 **Division 6—Investment entitlements**

### 3 **^54 Meaning of *investment entitlement* and related terms**

#### 4 *Meaning of investment entitlement*

- 5 (1) An ***investment entitlement*** is the rights of an account holder of an  
6 investment entitlement account that result from crediting an  
7 interest in a financial product to the account.

#### 8 *Meaning of investment entitlement intermediary*

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

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

17 *Meaning of terms related to investment entitlements*

- 18 (7) In this Act:

19 **account agreement** for an investment entitlement account means  
20 the agreement:

- 21 (a) that governs the account; and  
22 (b) that is between the account holder of the account and:  
23 (i) the investment entitlement intermediary that maintains  
24 the account; or  
25 (ii) in the case of an account maintained by a CS facility  
26 licence holder—a person whose participation in the  
27 relevant CS facility enables the account holder to hold  
28 investment entitlements in the facility.

29 **account holder** of an investment entitlement account means the  
30 person in whose name the investment entitlement intermediary  
31 maintains the account.

32 **investment entitlement account** means:

- 33 (a) an account to which interests in financial products may be  
34 credited or debited; or

# EXPOSURE DRAFT

Chapter 1 Preliminary

Part 1.3 Interpretation

Division 6 Investment entitlements

Section 54

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1 (b) in the case of an account maintained by a CS facility licence  
2 holder—writing that records holdings and transfers  
3 maintained by the CS facility licence holder in the course of  
4 operating the facility.

5 *relevant investment entitlement intermediary*, in relation to an  
6 investment entitlement account, means the investment entitlement  
7 intermediary who maintains the account.

1

2 **Division 7—Knowledge requirements**

3 **^55 Knowledge requirements in relation to entities**

4 (1) If it is necessary to establish that a body corporate has knowledge  
5 of a particular circumstance, it is sufficient to show:

- 6 (a) that a director, employee or agent of the body corporate,  
7 being a director, employee or agent who is responsible for  
8 acting on behalf of the body corporate in relation to such  
9 circumstances, had that knowledge; or  
10 (b) that both of the following apply:  
11 (i) the circumstance is communicated to a director,  
12 employee or agent of the body corporate;  
13 (ii) if the director, employee or agent had exercised  
14 reasonable care, the circumstance would have been  
15 brought to the attention of a director, employee or agent  
16 of the body corporate who is responsible for acting on  
17 behalf of the body corporate in relation to such  
18 circumstances.

19 Note: For other provisions relating to knowledge, see section ^56.

20 (2) If it is necessary to establish that a person other than a body  
21 corporate has knowledge of a particular circumstance, it is  
22 sufficient to show:

- 23 (a) that an employee or agent of the person, being an employee  
24 or agent who is responsible for acting on behalf of the person  
25 in relation to such circumstances, had that knowledge; or  
26 (b) that both of the following apply:  
27 (i) the circumstance is communicated to an employee or  
28 agent of the person;  
29 (ii) if the employee or agent had exercised reasonable care,  
30 the circumstance would have been brought to the  
31 attention of an employee or agent of the person who is  
32 responsible for acting on behalf of the person in relation  
33 to such circumstances.

34 (3) Paragraphs (1)(b) and (2)(b) do not require a person to bring  
35 information to the attention of another person unless:

# EXPOSURE DRAFT

Chapter 1 Preliminary

Part 1.3 Interpretation

Division 7 Knowledge requirements

## Section ^56

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- 1 (a) doing so is part of the person's regular duties; or  
2 (b) the person has reason to know both of the following:  
3 (i) the transaction to which the circumstance relates;  
4 (ii) that the transaction would be materially affected by the  
5 information.

### 6 **^56 Knowledge of circumstances for purposes of certain sections**

- 7 (1) This section applies for the purposes of the following provisions:  
8 (a) subsection ^68(5) (when proceeds are covered by security  
9 interest);  
10 (b) section ^73 (temporary perfection after transfer);  
11 (c) sections ^88, ^89, ^90, ^91, ^92 and ^93 (extinguishment  
12 provisions);  
13 (d) sections ^115, ^117, ^118 and ^119 (priorities);  
14 (e) section ^200 (temporary continuation of defective  
15 registration);  
16 (f) section ^233 (void security interests).
- 17 (2) A person (the *first person*) has knowledge of a circumstance if:  
18 (a) the first person has actual knowledge of the circumstance; or  
19 (b) the first person would have had actual knowledge of the  
20 circumstance if the first person had:  
21 (i) made the inquiries that would ordinarily have been  
22 made by an honest and prudent person in the first  
23 person's situation; or  
24 (ii) made the inquiries that would be made by an honest and  
25 prudent person with the first person's actual knowledge  
26 in the first person's situation.

27 Note: See also section ^273 (presumptions of knowledge in transfers  
28 between related entities).

### 29 **^57 Information in the register does not constitute constructive** 30 **notice**

31 A person does not have notice or knowledge about the existence or  
32 contents of a registration merely because the information is  
33 available for search in the register.



1

## Chapter 2—General rules relating to security interests

3

4

### Part 2.1—Security interests: general principles

5

#### Division 1—Rules about security agreements

6

##### **^58 Effectiveness of security agreement**

7

A security agreement is effective according to its terms.

8

Note: However, a security agreement may be subject to a law of the Commonwealth (including this Act), a State or a Territory, or to the general law (see section ^19).

9

10

11

##### **^59 Security interests in after-acquired property**

12

- (1) A security agreement may provide for security interests in after-acquired property.

13

14

Note: Section ^67 deals with the attachment of security interests in after-acquired property.

15

16

- (2) In this Act:

17

*after-acquired property*, in relation to a security agreement to which a grantor is party, means personal property acquired by the grantor after the agreement is made.

18

19

20

##### **^60 Security interests in future advances**

21

*Meaning of future advance*

22

- (1) In this Act:

23

*future advance*, in relation to a security interest provided for by a security agreement, means:

24

25

- (a) the payment of currency, the provision of credit, the giving of value or the performance of an obligation, secured by the security interest, and occurring after the security agreement has been assented to in writing or has otherwise arisen

26

27

28

# EXPOSURE DRAFT

**Chapter 2** General rules relating to security interests

**Part 2.1** Security interests: general principles

**Division 1** Rules about security agreements

## Section ^60

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- 1 (whether or not the currency, credit or value is provided or  
2 given under an obligation); or  
3 (b) enforcement expenditure or costs in relation to the  
4 enforcement of the security interest.

### 5 *Security agreements—general*

- 6 (2) A security agreement may secure future advances.

7 Note: For priority of future advances, see section ^107.

### 8 *Security for reasonable enforcement expenditure or costs*

- 9 (3) For the purposes of this Act, a security interest provided for by a  
10 security agreement is taken to secure (as future advances)  
11 reasonable enforcement expenditure or costs in relation to the  
12 enforcement of the security interest.

- 13 (4) However, subsection (3) does not apply to a security interest  
14 provided for by a security agreement if the security agreement  
15 provides expressly for the security interest to secure (as future  
16 advances) any enforcement expenditure or costs in relation to the  
17 enforcement of the security interest.

1

2 **Division 2—Attachment of security interests**

3 **^61 When a security interest attaches to personal property**

4 *Attachment rule*

- 5 (1) A security interest *attaches* to personal property, in relation to a  
6 particular interest (or right) in the property, when:  
7 (a) either:  
8 (i) the grantor has the interest (or right) in the property; or  
9 (ii) the grantor has the power to transfer rights in the  
10 interest (or right) in the property to the secured party (or  
11 a person nominated by the secured party); and  
12 (b) either:  
13 (i) value is given by the secured party for the security  
14 interest; or  
15 (ii) the grantor does an act by which the security interest in  
16 the interest (or right) in the property is created, arises or  
17 is provided for.

18 *Time of attachment*

- 19 (2) If the parties to a security agreement agree, in a security  
20 agreement, that a security interest is to attach at a time later than  
21 provided under subsection (1):  
22 (a) subsection (1) does not apply; and  
23 (b) the security interest *attaches* at the time specified in the  
24 agreement.
- 25 (3) To avoid doubt, a reference in a security agreement to a floating  
26 charge is not a reference to an agreement that the security interest  
27 created by the floating charge attaches at a time later than provided  
28 under subsection (1).

# EXPOSURE DRAFT

**Chapter 2** General rules relating to security interests

**Part 2.1** Security interests: general principles

**Division 2** Attachment of security interests

Section ^62

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1                                    *Tangible property leased, consigned or sold under a conditional*  
2                                    *sale agreement*

3                                    (4) Subsection (5) applies if a transaction occurs by which personal  
4                                    property that is tangible property is:

5                                    (a) leased to a grantor; or

6                                    (b) consigned to a grantor; or

7                                    (c) sold to a grantor under a conditional sale agreement  
8                                    (including an agreement to sell subject to retention of title).

9                                    (5) For the purposes of subparagraph (1)(a)(i), the grantor has an  
10                                    interest (or right) in the personal property when the grantor obtains  
11                                    possession of the property because of the transaction.

## 12                                    **^62 Enforceability of security interests against grantors**

13                                    A security interest is enforceable against a grantor in respect of  
14                                    particular personal property only if the security interest has  
15                                    attached to the personal property.

1

2

## **Division 3—Enforceability of security interests against third parties**

3

4

### **^63 Enforceability of security interests against third parties**

5

#### *General rules*

6

(1) A security interest is enforceable against a third party in respect of particular personal property only if the security interest is attached to the personal property.

7

8

9

(2) In addition, a security interest is enforceable against a third party in respect of particular personal property only if:

10

11

(a) the personal property is:

12

(i) in the possession of the secured party, or another person on behalf of the secured party; or

13

14

(ii) for controllable property—in the possession or control of the secured party, or another person on behalf of the secured party; or

15

16

17

(b) a security agreement that provides for the security interest covers the personal property in accordance with subsection (3); or

18

19

20

(c) subsection ^76(4) or ^77(4) applies to the personal property.

21

Note 1: For possession and control of controllable property, see Division 4 of Part 1.3.

22

23

Note 2: Section ^76 deals with the return of tangible property or negotiable documents of title in tangible property by the secured party's bailee to the grantor or debtor for the purposes of certain transactions.

24

25

26

Note 3: Section ^77 deals with the return of negotiable instruments and investment instruments to the grantor or debtor for the purposes of certain transactions.

27

28

29

#### *Written security agreements*

30

(3) A security agreement covers personal property in accordance with this subsection if:

31

32

(a) the security agreement is evidenced by writing, signed by the grantor; and

33

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.1 Security interests: general principles

Division 3 Enforceability of security interests against third parties

## Section ^63

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- 1 (b) the writing evidencing the agreement contains:  
2 (i) a description of the particular personal property, subject  
3 to subsections (4) and (5); or  
4 (ii) a statement that a security interest is taken in all of the  
5 grantor's present and after-acquired property; or  
6 (iii) a statement that a security interest is taken in all of the  
7 grantor's present and after-acquired property except for  
8 personal property (other than the particular personal  
9 property) described in the writing.

10 Note 1: A security agreement is evidenced in writing, or signed, even if it is  
11 evidenced or signed by electronic means (for the meanings of *signed*  
12 and *writing*, see section ^26).

13 Note 2: A description of personal property must identify collateral by  
14 reference to a particular item of personal property or its class (for the  
15 meaning of *description*, see section ^37).

16 Note 3: Descriptions of tangible property include related descriptions of  
17 intellectual property and intellectual property licences in certain  
18 circumstances (see section ^38).

### 19 *Personal property descriptions—consumer property, equipment* 20 *and inventory*

21 (4) If particular personal property is described using the term  
22 “consumer property”, “commercial property” or “equipment” in  
23 the writing evidencing a security agreement, subparagraph (3)(b)(i)  
24 is satisfied only if the personal property is more particularly  
25 described, in addition, by reference to item or class.

26 (5) If particular personal property is described using the term  
27 “inventory” in the writing evidencing a security agreement,  
28 subparagraph (3)(b)(i) is satisfied only while the personal property  
29 is held or leased by the grantor as inventory.

### 30 *Proceeds*

31 (6) If personal property covered by a security agreement gives rise to  
32 proceeds, the enforceability of the security interest provided for by  
33 the agreement against a third party is not affected by whether any  
34 writing evidencing the agreement contains a description of, or  
35 reference to, the proceeds.

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Security interests: general principles **Part 2.1**

Enforceability of security interests against third parties **Division 3**

Section ^63

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1 Note: Section ^68 deals with whether a security interest in collateral attaches  
2 to proceeds of the collateral.

3 *Enforceability in respect of different parts of personal property*

4 (7) To avoid doubt, a security interest may be enforceable against a  
5 third party in respect of particular personal property even though  
6 the security interest is not enforceable against a third party in  
7 respect of other personal property to which the security interest has  
8 attached.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.1 Security interests: general principles

Division 4 Perfection of security interests

Section ^64

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1

## 2 **Division 4—Perfection of security interests**

### 3 **^64 How a security interest is perfected**

- 4 (1) A security interest in particular collateral is *perfected* if:
- 5 (a) the security interest is attached to the collateral; and
- 6 (b) subsection (2) applies.
- 7 (2) This subsection applies if:
- 8 (a) for any collateral (including controllable property):
- 9 (i) the secured party, or another person on behalf of the
- 10 secured party, has possession of the collateral (other
- 11 than possession as a result of seizure or repossession);
- 12 or
- 13 (ii) the collateral is registered; or
- 14 (iii) the security interest is temporarily perfected by force of
- 15 a temporary perfection provision, or perfected in
- 16 accordance with section ^69 or ^74; or
- 17 (b) for collateral that is controllable property—the secured party,
- 18 or another person on behalf of the secured party, has control
- 19 of the collateral.
- 20 Note: For what constitutes possession and control of controllable property,
- 21 see Division 4 of Part 1.3.
- 22 (3) A security interest may be perfected regardless of the order in
- 23 which attachment and any step mentioned in subsection (2) occurs.

### 24 **^65 How a security interest is continuously perfected**

- 25 (1) For the purposes of this Act, a security interest is *continuously*
- 26 *perfected* after a particular time if the security interest is, after that
- 27 time, perfected under this Act at all times.
- 28 (2) A security interest may be continuously perfected after a particular
- 29 time even if, after that time, it is perfected in 2 or more different
- 30 ways:
- 31 (a) at any particular time; or
- 32 (b) at different times.



# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Security interests: general principles **Part 2.1**

Perfection of security interests **Division 4**

Section ^66

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

3                   (a) by possession and by a registration;

4                   (b) by 2 different registrations (see subsection ^66(2)).

## 5           **^66 Multiple security interests and multiple registrations**

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

7                   (2) A single security interest may be perfected by one or more  
8 registrations.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.2 Attachment and perfection: particular situations

Division 1 After-acquired property

Section ^67

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1

2 **Part 2.2—Attachment and perfection: particular**  
3 **situations**

4 **Division 1—After-acquired property**

5 **^67 Attachment of security interests in after-acquired property**

6 *General rule*

7 (1) If a security agreement provides for a security interest in  
8 after-acquired property, the security interest attaches without  
9 specific appropriation by the grantor, except as provided by  
10 subsection (2).

11 Note: Section ^59 allows security agreements to provide for security  
12 interests in after-acquired property.

13 *Exception for personal, domestic or household use etc.*

14 (2) However, the security interest attaches to after-acquired property  
15 only with specific appropriation by the grantor if:

16 (a) the after-acquired property is of a kind prescribed by the  
17 regulations; or

18 (b) the security interest is covered by subsection (3).

19 (3) A security interest is covered by this subsection if:

20 (a) at the time the after-acquired property was acquired, the  
21 grantor intended to use the property predominantly for  
22 personal, domestic or household purposes; and

23 (b) none of the following apply:

24 (i) the security interest is a purchase money security  
25 interest;

26 (ii) the security agreement provides for a security interest in  
27 tangible property and any future accession to the  
28 property, and the after-acquired property is an accession  
29 to the property;

30 (iii) the after-acquired property replaces property to which  
31 the security agreement relates.

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**  
Attachment and perfection: particular situations **Part 2.2**  
After-acquired property **Division 1**

Section ^67

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- 1                    *Declarations of intention not to use property for personal,*  
2                    *domestic or household purposes*
- 3                    (4) Paragraph (3)(a) is presumed (in the absence of evidence to the  
4                    contrary) not to be satisfied in relation to after-acquired property if,  
5                    before the property is acquired, the grantor:
- 6                        (a) declares in writing that the grantor does not intend to use the  
7                                property predominantly for personal, domestic or household  
8                                purposes; or
- 9                        (b) makes a declaration that is effective for the purposes of  
10                               section 11 or 150 of the Consumer Credit Code of a State or  
11                               Territory in relation to a credit contract, or lease, entered into  
12                               to obtain the use of the property.
- 13                    (5) Subsection (4) does not limit the ways in which paragraph (3)(a)  
14                    may not be satisfied.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.2 Attachment and perfection: particular situations

Division 2 Proceeds

Section ^68

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1

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## Division 2—Proceeds

3

### ^68 Proceeds—when covered by security interest

4

#### *Scope*

5

- (1) This section applies to a security interest in collateral if the collateral gives rise to proceeds (by being dealt with or otherwise).

6

7

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

8

9

- (2) The security interest:

10

(a) continues in the collateral, subject to subsection (3); and

11

(b) whether or not the security interest continues in the collateral under paragraph (a)—attaches to the proceeds, unless the security agreement provides otherwise.

12

13

14

#### *Security interest in collateral does not continue if secured party gives express or implied authority for transfer*

15

16

- (3) However, the security interest does not continue in the collateral if:

17

(a) a dealing includes the transfer of the collateral; and

18

(b) the transfer of the collateral gives rise to the proceeds; and

19

(c) the secured party gives express or implied authority for the transfer to be made free of the security interest.

20

21

Note: This section is an extinguishment provision because of this subsection (for which provisions are *extinguishment provisions*, see section ^26). A transferee can also acquire an interest in the collateral free of the security interest because of the operation of an extinguishment provision other than this section.

22

23

24

25

26

#### *Enforcement of security interest against collateral and proceeds*

27

- (4) If the secured party enforces a security interest against both collateral and the proceeds of the collateral, the amount secured by a security interest in the collateral is limited to the market value of the collateral immediately before the collateral gave rise to the proceeds.

28

29

30

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# EXPOSURE DRAFT

## Section ^69

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1 Note: Subsection ^63(6) relates to the enforceability of a security interest  
2 against a third party in relation to proceeds.

3 (5) However, subsection (4) does not apply if, at the time of the  
4 transfer of the collateral, the transferee knew that the transfer was  
5 in breach of a security agreement that provides for the security  
6 interest in the collateral.

7 Note: See section ^56 in relation to knowledge.

8 (6) To avoid doubt, subsection (4) does not affect any right the secured  
9 party may have to recover the amount secured without enforcing  
10 the security interest.

### 11 **^69 Proceeds—perfection when covered by registered description** 12 **etc.**

#### 13 *Scope*

- 14 (1) This section applies if:
- 15 (a) collateral gives rise to proceeds at a particular time (the  
16 *proceeds time*); and
  - 17 (b) immediately before the proceeds time, a security interest that  
18 is perfected by registration is attached to the collateral; and
  - 19 (c) the security interest attaches to the proceeds under section  
20 ^68.

#### 21 *Security interest is perfected by registration*

- 22 (2) At the proceeds time, the security interest in the proceeds is  
23 perfected by the registration if:
- 24 (a) the registration contains a description of the proceeds that  
25 would be sufficient for registration of original collateral of  
26 the same class; or
  - 27 (b) the proceeds are of a class that is covered by the registered  
28 description of the collateral.

#### 29 *Security interest is perfected otherwise*

- 30 (3) At the proceeds time, the security interest in the proceeds is  
31 perfected by force of this subsection if:
- 32 (a) the proceeds are in the form of currency; or

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.2 Attachment and perfection: particular situations

Division 2 Proceeds

## Section ^70

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- 1 (b) the proceeds consist of a right to an insurance payment or any  
2 other payment as indemnity or compensation for loss or  
3 damage to the collateral or proceeds.

### 4 **^70 Proceeds—perfection when not covered by registered 5 description etc.**

#### 6 *Scope*

- 7 (1) This section applies if:  
8 (a) collateral gives rise to proceeds at a particular time (the  
9 *proceeds time*); and  
10 (b) immediately before the proceeds time, a perfected security  
11 interest is attached to the collateral; and  
12 (c) the security interest attaches to the proceeds under section  
13 ^68; and  
14 (d) the security interest in the proceeds is not perfected under  
15 section ^69.

#### 16 *Security interest is temporarily perfected for 5 business days*

- 17 (2) The security interest in the proceeds is temporarily perfected for  
18 the period starting at the proceeds time and ending at the end of 5  
19 business days after the day the proceeds time occurs.

#### 20 *Security interest becomes unperfected after 5 business days*

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

### 25 **^71 Proceeds—timing of perfection**

#### 26 *Scope*

- 27 (1) This section applies if:  
28 (a) at a particular time:  
29 (i) a security interest in collateral is perfected; and

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**  
Attachment and perfection: particular situations **Part 2.2**  
Proceeds **Division 2**

Section ^71

---

- 1 (ii) a security interest in proceeds of the collateral is  
2 perfected; and  
3 (iii) the security interest in the proceeds has been  
4 continuously perfected since it first became perfected;  
5 and  
6 (b) the security interest in the collateral has, at that time, been  
7 continuously perfected since an earlier time (the *collateral*  
8 *perfection time*).

9 *Timing rule*

- 10 (2) For the purposes of this Act, the security interest in the proceeds is  
11 taken to have been continuously perfected since the collateral  
12 perfection time.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.2 Attachment and perfection: particular situations

Division 3 Transferred collateral

Section ^72

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1

2

## Division 3—Transferred collateral

3

### **^72 Transferred collateral—post-transfer attachment, advances and obligations**

4

5

#### *Scope*

6

(1) This section applies if:

7

(a) a person (the *transferor*) transfers collateral to another person (the *transferee*); and

8

9

(b) the transferee acquires an interest in the collateral at a particular time (the *transfer time*); and

10

11

(c) immediately before the transfer time, a security interest is attached to the collateral; and

12

13

(d) the transferee does not acquire the interest in the collateral free of the security interest.

14

15

#### *Security interest continues to be attached*

16

(2) At the transfer time, the security interest continues to be attached to the collateral.

17

18

#### *Security interest continues to be secured advances etc.*

19

(3) At and after the transfer time, the security interest continues to secure advances made by, or the performance of obligations incurred by, the original secured party to the transferor after the transfer time.

20

21

22

23

### **^73 Transferred collateral—temporary perfection after transfer**

24

#### *Scope*

25

(1) This section applies if:

26

(a) a person transfers collateral to another person (the *transferee*); and

27

28

(b) the transferee acquires an interest in the collateral at a particular time (the *transfer time*); and

29



# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**  
Attachment and perfection: particular situations **Part 2.2**  
Transferred collateral **Division 3**

Section ^73

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- 1 (c) immediately before the transfer time:  
2 (i) a security interest held by a secured party (the *original*  
3 *secured party*) is attached to the collateral; and  
4 (ii) the security interest is perfected by registration, or by a  
5 previous operation of subsection (2); and  
6 (d) the transferee does not acquire the interest in the collateral  
7 free of the security interest.

8 *Security interest is temporarily perfected*

- 9 (2) The security interest is temporarily perfected for the period starting  
10 at the transfer time and ending at the earliest of the following  
11 times:  
12 (a) the end time for the registration (as registered immediately  
13 before the transfer time);  
14 (b) the end of the month that is 24 months after the transfer time;  
15 (c) if a person (other than the original secured party) takes  
16 another security interest in the collateral, and the other  
17 security interest becomes perfected at the transfer time or  
18 afterwards:  
19 (i) in a case in which the original secured party consented  
20 to the transfer—the end of 5 business days after the day  
21 the transfer time occurs; or  
22 (ii) in a case in which the original secured party otherwise  
23 acquires the knowledge required to perfect the original  
24 secured party's interest by registration (or to re-perfect  
25 the interest by an amendment of a registration)—the end  
26 of 5 business days after the day the original secured  
27 party acquires the knowledge.

28 Note: See section ^56 in relation to knowledge. The knowledge required is  
29 the knowledge of the transferee's (the new grantor's) details. Unless  
30 these are registered, the original secured party's registration may be  
31 defective under section ^199.

32 *Security interest becomes unperfected*

- 33 (3) However, the security interest becomes unperfected immediately  
34 after the earliest time mentioned in subsection (2), unless, at or  
35 before that time, the security interest is perfected otherwise than  
36 under subsection (2).

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.2 Attachment and perfection: particular situations

Division 4 Tangible property possessed by bailee

Section ^74

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1

2

## Division 4—Tangible property possessed by bailee

3

### **^74 Tangible property possessed by bailee—perfection of security interest**

4

5

(1) A security interest in tangible property in the possession of a bailee (other than the grantor or the debtor) is perfected if:

6

7

(a) the security interest is attached to the property; and

8

(b) any of the following applies:

9

(i) the security interest is perfected by registration, as provided by section ^64;

10

11

(ii) the security interest is perfected by possession, as provided by section ^64, because the bailee possesses the property on behalf of the secured party;

12

13

14

(iii) the bailee issues a document of title to the property (whether negotiable or non-negotiable) in the name of the secured party;

15

16

17

(iv) the bailee issues a negotiable document of title to the property, and the secured party has a perfected security interest in the document.

18

19

20

(2) Subsection (1) applies regardless of the order in which attachment and any step mentioned in paragraph (1)(b) occurs.

21

22

Note: Section ^76 provides for the temporary perfection of security interests in tangible property possessed by a bailee, or negotiable documents of title to tangible property, if the property or documents are returned to the grantor or debtor.

23

24

25

26

### **^75 Tangible property possessed by bailee—temporary perfection while negotiable document of title in transit**

27

28

*Scope*

29

(1) This section applies if:

30

(a) a secured party has a security interest in tangible property in the possession of a bailee (other than the grantor or the debtor); and

31

32

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**  
Attachment and perfection: particular situations **Part 2.2**  
Tangible property possessed by bailee **Division 4**

## Section ^76

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- 1 (b) the bailee issues a negotiable document of title to the  
2 property; and  
3 (c) before the end of 5 business days after the day of issue of the  
4 negotiable document of title, the secured party perfects a  
5 security interest in the document by taking possession of the  
6 document.

7 Note: Under subparagraph ^74(1)(b)(iv), the secured party may perfect a  
8 security interest in the tangible property by perfecting a security  
9 interest in a negotiable document of title to the property issued by the  
10 bailee.

### 11 *Security interest is temporarily perfected*

- 12 (2) The security interest in the tangible property is temporarily  
13 perfected for the period starting at the time of issue of the  
14 negotiable document of title and ending at the time the secured  
15 party takes possession of the document.

### 16 *Security interest becomes unperfected*

- 17 (3) However, the security interest in the tangible property becomes  
18 unperfected at the end of the period mentioned in subsection (2),  
19 unless the security interest is perfected otherwise than under  
20 subsection (2) before the end of the period.

## 21 **^76 Tangible property possessed by bailee—return to grantor or** 22 **debtor for dealing etc.**

### 23 *Scope*

- 24 (1) This section applies if:  
25 (a) a secured party has a security interest in tangible property in  
26 the possession of a bailee (other than the grantor or the  
27 debtor); and  
28 (b) the security interest in the tangible property is perfected:  
29 (i) under subparagraph ^74(1)(b)(ii), by the bailee's  
30 possession of the property on behalf of the secured  
31 party; or  
32 (ii) under subparagraph ^74(1)(b)(iv), by the secured  
33 party's possession of a negotiable document of title  
34 issued by the bailee; and

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.2 Attachment and perfection: particular situations

Division 4 Tangible property possessed by bailee

## Section ^76

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- 1 (c) possession of the tangible property or document is given to  
2 the grantor or the debtor at a particular time (the *action time*)  
3 for the purpose of an action covered by subsection (5) in  
4 relation to the tangible property.

5 *Security interest is temporarily perfected for 5 business days*

- 6 (2) The security interest in the tangible property or document (as the  
7 case may be) is temporarily perfected for the period starting at the  
8 action time and ending at the end of 5 business days after the day  
9 the action time occurs.

10 *Security interest becomes unperfected after 5 business days*

- 11 (3) However, the security interest in the tangible property or document  
12 (as the case may be) becomes unperfected at the end of the period  
13 mentioned in subsection (2), unless the security interest is  
14 perfected otherwise than under subsection (2) before the end of the  
15 period.

16 *Security agreement enforceable against third parties*

- 17 (4) During the period mentioned in subsection (2), the security interest  
18 in the tangible property, or in the document, is enforceable against  
19 a third party in respect of the tangible property or document.

20 Note: Section ^63 provides for what is necessary at other times for a security  
21 interest in the tangible property or document to be enforceable against  
22 a third party.

23 *Actions covered*

- 24 (5) For the purposes of paragraph (1)(c), the following actions in  
25 relation to the tangible property are covered by this subsection:  
26 (a) sale;  
27 (b) exchange;  
28 (c) any other action in preparation for sale or exchange,  
29 including (but not limited to) the following:  
30 (i) loading;  
31 (ii) unloading;  
32 (iii) storing;  
33 (iv) shipping;

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Attachment and perfection: particular situations **Part 2.2**

Tangible property possessed by bailee **Division 4**

Section ^76

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- 1 (v) manufacturing;
- 2 (vi) processing;
- 3 (vii) packaging.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.2 Attachment and perfection: particular situations

Division 5 Collateral returned to grantor or debtor: negotiable instruments and investment instruments

Section ^77

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1

2

## **Division 5—Collateral returned to grantor or debtor: negotiable instruments and investment instruments**

3

4

5

### **^77 Negotiable instruments and investment instruments—return to grantor or debtor for dealing etc.**

6

7

#### *Scope*

8

- (1) This section applies to a security interest in a negotiable instrument or an investment instrument if:

9

10

- (a) the security interest is perfected by possession or control; and

11

- (b) the secured party gives possession or control of the instrument to the grantor or the debtor at a later time (the

12

13

*action time*) for the purpose of an action covered by subsection (5).

14

15

#### *Security interest is temporarily perfected for 5 business days*

16

- (2) The security interest in the instrument is temporarily perfected for the period starting at the action time and ending at the end of 5 business days after the day the action time occurs.

17

18

19

#### *Security interest becomes unperfected after 5 business days*

20

- (3) However, the security interest in the instrument becomes unperfected at the end of the period mentioned in subsection (2), unless the security interest in the instrument is perfected otherwise than under subsection (2) before the end of the period.

21

22

23

24

#### *Security agreement enforceable against third parties*

25

- (4) During the period mentioned in subsection (2), the security interest in the instrument is enforceable against a third party in respect of the instrument.

26

27

28

Note: Section ^63 provides for what is necessary at other times for a security interest in the instrument to be enforceable against a third party.

29

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Attachment and perfection: particular situations **Part 2.2**

Collateral returned to grantor or debtor: negotiable instruments and investment instruments **Division 5**

Section ^77

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1

*Actions covered*

2

(5) For the purposes of subsection (1), the following actions in relation to a negotiable instrument or an investment instrument are covered by this subsection:

3

4

5

(a) sale;

6

(b) exchange;

7

(c) presentation;

8

(d) collection;

9

(e) renewal;

10

(f) registration (other than under this Act) for the purposes of a transfer.

11

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.2 Attachment and perfection: particular situations

Division 6 Collateral returned to grantor: tangible property returned following sale or lease

Section ^78

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1

2

## **Division 6—Collateral returned to grantor: tangible property returned following sale or lease**

3

4

### **^78 Returned tangible property—security interest**

5

#### *Scope*

6

(1) This section applies if:

7

(a) a security interest has attached to tangible property; and

8

(b) a person acquires an interest (other than a security interest) in the tangible property from the grantor in relation to the security interest; and

9

10

11

(c) because of the operation of an extinguishment provision, the person acquires the interest in the tangible property free of the security interest; and

12

13

14

(d) at a particular time (the *possession time*), the tangible property comes into the possession of the grantor, or of a transferee of chattel paper created by the acquisition, in any of the following circumstances:

15

16

17

18

(i) the contract of acquisition is rescinded;

19

(ii) the transferee seizes the tangible property in the exercise of a right in enforcing a security agreement;

20

21

(iii) the grantor repossesses the tangible property in the exercise of a right in enforcing the contract of acquisition;

22

23

24

(iv) if the interest acquired by the person is a leasehold interest—the lease expires or is rescinded;

25

26

(v) any other circumstances prescribed by the regulations.

27

#### *Security interest reattaches after return etc.*

28

(2) At the possession time, the security interest reattaches to the tangible property if the obligation secured remains unpaid or unperformed.

29

30

31

Note: Section ^123 deals with the priority of a security interest that reattaches under this section.

32



# EXPOSURE DRAFT

General rules relating to security interests Chapter 2

Attachment and perfection: particular situations Part 2.2

Collateral returned to grantor: tangible property returned following sale or lease

Division 6

Section ^79

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*Perfection of security interest*

- 1
- 2 (3) The perfection of the security interest, and the time of registration
- 3 or perfection of the security interest, are to be determined as if the
- 4 interest in the tangible property had not been acquired, if:
- 5 (a) the security interest reattaches to the tangible property under
- 6 subsection (2); and
- 7 (b) the security interest was perfected by registration
- 8 immediately before the time of the acquisition; and
- 9 (c) the registration is effective at the possession time.

10 **^79 Account or chattel paper in returned tangible property—**

11 **security interest**

12 *Scope*

- 13 (1) This section applies if:
- 14 (a) a person acquires an interest (other than a security interest) in
- 15 tangible property from another person (the *transferor*); and
- 16 (b) the acquisition creates an account or chattel paper; and
- 17 (c) the transferor transfers the account or chattel paper to a third
- 18 person (the *transferee*); and
- 19 (d) at a particular time (the *possession time*), the tangible
- 20 property comes into the possession of the transferor, or of the
- 21 transferee, in any of the following circumstances:
- 22 (i) the contract of acquisition is rescinded;
- 23 (ii) the transferee seizes the tangible property in the exercise
- 24 of a right in enforcing a security agreement;
- 25 (iii) the transferor repossesses the tangible property in the
- 26 exercise of a right in enforcing the contract of
- 27 acquisition;
- 28 (iv) if the interest acquired by the person is a leasehold
- 29 interest—the lease expires or is rescinded;
- 30 (v) any other circumstances prescribed by the regulations.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.2 Attachment and perfection: particular situations

Division 6 Collateral returned to grantor: tangible property returned following sale or lease

## Section ^79

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### *Deemed tangible property security interest*

- (2) The transferee is taken to have a security interest (the ***tangible property security interest***) in the tangible property that secures the payment of:
- (a) if the acquisition of the tangible property creates an account—the amount required to discharge the account; or
  - (b) if the acquisition of the tangible property creates chattel paper—the amount of the monetary obligation comprised in the chattel paper.
- (3) The tangible property security interest attaches to the tangible property at the possession time.

### *Tangible property security interest temporarily perfected for 5 business days*

- (4) If the transferee has a security interest in the account or chattel paper that is perfected by possession or registration at the possession time, the tangible property security interest is temporarily perfected for the period starting at the possession time and ending at the end of 5 business days after the day the possession time occurs.

### *Tangible property security interest becomes unperfected after 5 business days*

- (5) However, the tangible property security interest becomes unperfected at the end of the period mentioned in subsection (4), unless the tangible property security interest is perfected otherwise than under subsection (4) before the end of the period.

Note: Section ^123 deals with the priority of a tangible property security interest.

1

## 2 **Division 7—Collateral moved to Australia**

### 3 **^80 Scope of this Division**

4

This Division applies if:

5

(a) collateral has been located in a jurisdiction (the *foreign jurisdiction*) outside Australia; and

6

7

(b) the collateral is moved out of the foreign jurisdiction, and becomes located in Australia; and

8

9

(c) immediately before the collateral became located in Australia, a security interest was attached to the collateral (within the meaning of this Act); and

10

11

12

(d) at the time the collateral becomes located in Australia, that security interest continues to be attached to the collateral.

13

14

Note: Section ^83 deals with when collateral is located in a particular jurisdiction.

15

16

### 16 **^81 Collateral moved to Australia—temporary perfection after move**

17

18

*Temporary perfection after move to Australia*

19

(1) The security interest in the collateral is temporarily perfected for the period:

20

21

(a) starting at the time the property becomes located in Australia; and

22

23

(b) ending:

24

(i) if the security interest was not perfected under the law of the foreign jurisdiction (or if the law of the foreign jurisdiction does not provide for the perfection of security interests)—at the end of 5 business days after the day the property becomes located in Australia; or

25

26

27

28

29

(ii) if the security interest was perfected under the law of the foreign jurisdiction—at the time to which subsection (2) applies.

30

31

32

(2) This subsection applies to the earliest of the following times:

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.2 Attachment and perfection: particular situations

Division 7 Collateral moved to Australia

## Section ^82

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- 1 (a) the end of 56 days after the day the collateral becomes  
2 located in Australia;  
3 (b) the end of 5 business days after the day the secured party has  
4 actual knowledge that the collateral has become located in  
5 Australia;  
6 (c) the end of the day the security interest stops being perfected  
7 under the law of the foreign jurisdiction.

8 *Security interest becomes unperfected*

- 9 (3) However, the security interest in the collateral becomes  
10 unperfected at the end of the period mentioned in subsection (1),  
11 and is taken never to have been temporarily perfected, unless the  
12 security interest is perfected (in accordance with this Act)  
13 otherwise than under subsection (1) before the end of the period.

## 14 **^82 Collateral moved to Australia—effect of previous perfection**

15 *Scope*

- 16 (1) This section applies if:  
17 (a) the security interest was perfected under the law of the  
18 foreign jurisdiction immediately before the collateral became  
19 located in Australia; and  
20 (b) the security interest is perfected in accordance with this Act,  
21 otherwise than under subsection ^81(1), at a particular time  
22 (the *PPSA perfection time*) before the end of the period  
23 mentioned in that subsection.

24 *Time when security interest taken to be perfected*

- 25 (2) After the PPSA perfection time, while the security interest is  
26 continuously perfected, the security interest is taken to have been  
27 continuously perfected from the time the security interest was  
28 perfected under the law of the foreign jurisdiction.

1     **^83 Collateral moved to Australia—location of collateral**

2                     *General rule*

3             (1) Unless this section provides otherwise, for the purposes of this Act,  
4             collateral (including chattel paper, an investment instrument and a  
5             negotiable instrument) is **located** in the particular jurisdiction  
6             (whether the jurisdiction of Australia or a foreign jurisdiction) in  
7             which the collateral is situated.

8                     *Chattel paper evidenced by electronic record*

9             (2) Chattel paper that is evidenced by an electronic record is **located** in  
10            the jurisdiction whose law governs the chattel paper.

11                    *Investment instruments not evidenced by certificate*

12            (3) An investment instrument that is not evidenced by a certificate is  
13            **located** in the jurisdiction in which the issuer is situated.

14                    *Negotiable instruments evidenced by electronic record*

15            (4) A negotiable instrument that is evidenced by an electronic record is  
16            **located** in the jurisdiction whose law governs the negotiable  
17            instrument.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.3 Acquiring personal property free of security interests

Division 1 Acquiring personal property free of security interests

Section ^84

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1

2

## Part 2.3—Acquiring personal property free of security interests

3

4

### Division 1—Acquiring personal property free of security interests

5

6

#### ^84 Scope of this Division

7

- (1) This Division sets out when a person (the *transferee*) acquires an interest (the *transferee's interest*) (other than a security interest) in personal property free of a security interest in the property.

8

9

10

Note 1: Other provisions that are relevant include the following:

11

- (a) section ^56 (knowledge requirements);

12

- (b) sections ^78 and ^79 (reattachment of security interests and granting of security interest in returned property);

13

14

- (c) Division 2 of this Part (rights of a secured party and transferee on acquiring personal property free of security interests and acquiring intellectual property free of security interests);

15

16

17

- (d) sections ^272 (onus of proof) and ^273 (presumption in the case of related entities).

18

19

Note 2: Other provisions under which personal property can be acquired free of security interests include section ^68 (proceeds) and sections ^171 and ^174 (enforcement).

20

21

22

- (2) This Division applies:

23

- (a) whether the security interest attaches to the personal property as original collateral or as proceeds; and

24

25

- (b) except in sections ^85 and ^93—whether the security interest is perfected or not.

26

27

#### ^85 Acquiring personal property free of unperfected security interest

28

29

- (1) The transferee acquires the transferee's interest free of the security interest if:

30

31

- (a) the transferee acquires the transferee's interest by purchase or lease; and

32

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Acquiring personal property free of security interests **Part 2.3**

Acquiring personal property free of security interests **Division 1**

Section ^86

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- 1 (b) the security interest is unperfected immediately before the  
2 acquisition of the transferee's interest; and  
3 (c) the transferee is not a party to the transaction that provides  
4 for the security interest; and  
5 (d) the transferee acquires the transferee's interest for new value.  
6 (2) Paragraph (1)(c) does not apply in relation to personal property of  
7 a kind prescribed by the regulations for the purposes of this  
8 section.

9 **^86 Acquiring personal property free of security interest if serial**  
10 **number incorrect or missing**

- 11 (1) The transferee acquires the transferee's interest free of the security  
12 interest if:  
13 (a) the transferee acquires the transferee's interest by purchase or  
14 lease; and  
15 (b) the regulations provide that the property may, or must, be  
16 described by serial number; and  
17 (c) the transferee does not hold the property:  
18 (i) as inventory; or  
19 (ii) on behalf of a person who would hold the property as  
20 inventory; and  
21 (d) searching the register, immediately before the transferee's  
22 interest is acquired, by reference only to the serial number of  
23 the property would not disclose a registration that perfected  
24 the security interest; and  
25 (e) at the time mentioned in section ^96, the transferee has no  
26 actual knowledge that the acquisition constitutes a breach of  
27 the security agreement that provides for the security interest;  
28 and  
29 (f) the transferee acquires the transferee's interest for new value.  
30 (2) Paragraph (1)(e) does not apply in relation to personal property of  
31 a kind prescribed by the regulations for the purposes of this  
32 section.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.3 Acquiring personal property free of security interests

Division 1 Acquiring personal property free of security interests

Section ^87

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1     **^87 Acquiring personal property free of security interest in**  
2             **ordinary course of business**

3             The transferee acquires the transferee's interest free of the security  
4             interest if:

- 5             (a) the transferee acquires the transferee's interest by purchase or  
6             lease; and  
7             (b) the security interest is granted by the person (the *transferor*)  
8             from whom the transferee acquires the transferee's interest;  
9             and  
10            (c) the transferee acquires the transferee's interest in the property  
11            in the ordinary course of the transferor's business of dealing  
12            with property of that kind; and  
13            (d) at the time the transferee acquires the transferee's interest,  
14            the transferee has no actual knowledge that the acquisition  
15            constitutes a breach of the security agreement that provides  
16            for the security interest.

17     **^88 Acquiring personal property free of security interest in**  
18             **personal, domestic or household property**

19            (1) The transferee acquires the transferee's interest free of the security  
20            interest if:

- 21            (a) the transferee acquires the transferee's interest by purchase or  
22            lease; and  
23            (b) at the time of acquiring the transferee's interest, the  
24            transferee intends to use the personal property predominantly  
25            for personal, domestic or household purposes; and  
26            (c) the market value (worked out at the time each part of the total  
27            new value is given) of the total new value given for the  
28            transferee's interest is not more than:  
29            (i) \$5,000; or  
30            (ii) if a greater amount has been prescribed by regulations  
31            for the purposes of this section—that amount; and  
32            (d) the property is not required nor allowed by the regulations to  
33            be described by serial number; and  
34            (e) the transferee acquires the transferee's interest for new value;  
35            and



# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Acquiring personal property free of security interests **Part 2.3**

Acquiring personal property free of security interests **Division 1**

Section ^89

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1 (f) at the time new value is first given, the transferee has no  
2 knowledge of the security interest.

3 Note: See section ^56 in relation to knowledge.

4 (2) However, the transferee does not acquire the transferee's interest  
5 free of the security interest if, at the time of making the contract  
6 providing for the acquisition of the interest:

7 (a) the market value of the transferee's interest is more than:

8 (i) \$5,000; or

9 (ii) if a greater amount has been prescribed by regulations  
10 for the purposes of this section—that amount; and

11 (b) the transferee believes that the market value of the  
12 transferee's interest is more than:

13 (i) \$5,000; or

14 (ii) if a greater amount has been prescribed by regulations  
15 for the purposes of this section—that amount.

## 16 **^89 Acquiring personal property free of security interest in** 17 **currency**

18 The transferee acquires the transferee's interest free of the security  
19 interest if:

20 (a) the personal property is currency; and

21 (b) at the time of acquiring the currency, the transferee has no  
22 knowledge of the security interest.

23 Note: See section ^56 in relation to knowledge.

## 24 **^90 Acquiring personal property free of security interest in** 25 **investment instrument**

26 The transferee acquires the transferee's interest free of the security  
27 interest if:

28 (a) the personal property is an investment instrument; and

29 (b) the transferee's interest is acquired by a consensual  
30 transaction; and

31 (c) unless the transferee's interest is a security interest—the  
32 transferee acquires the transferee's interest for value; and

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.3 Acquiring personal property free of security interests

Division 1 Acquiring personal property free of security interests

## Section ^91

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- 1 (d) at the time of acquiring the interest, the transferee has no  
2 knowledge that the acquisition constitutes a breach of the  
3 security agreement that provides for the security interest; and  
4 (e) the transferee takes possession or control of the investment  
5 instrument.

6 Note: See section ^56 in relation to knowledge.

### 7 **^91 Acquiring personal property free of security interest in** 8 **investment entitlement**

9 The transferee acquires the transferee's interest free of the security  
10 interest if:

- 11 (a) the personal property is an investment entitlement; and  
12 (b) the transferee's interest is acquired as a result of a credit to a  
13 financial account; and  
14 (c) the credit of the investment entitlement is made in  
15 accordance with a consensual transaction; and  
16 (d) at the time of acquiring the interest, the account holder of the  
17 account has no knowledge that crediting the investment  
18 entitlement to the account constitutes a breach of a security  
19 agreement that provides for a security interest in any  
20 investment entitlement or investment instrument; and  
21 (e) the transferee acquires the transferee's interest for value.

22 Note: See section ^56 in relation to knowledge.

### 23 **^92 Acquiring personal property free of security interest in motor** 24 **vehicle**

25 *Incorrect or missing serial number*

- 26 (1) The transferee acquires the transferee's interest free of the security  
27 interest if:  
28 (a) the transferee acquires the transferee's interest by purchasing  
29 or leasing the transferee's interest; and  
30 (b) the personal property is a motor vehicle of a kind prescribed  
31 by the regulations for the purposes of this section; and  
32 (c) the regulations provide that the property may, or must, be  
33 described by serial number; and

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Acquiring personal property free of security interests **Part 2.3**

Acquiring personal property free of security interests **Division 1**

Section ^92

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- 1 (d) searching the register, immediately before the transferee's  
2 interest is acquired or on the previous day, by reference only  
3 to the serial number of the vehicle would not disclose a  
4 registration that perfected the security interest; and  
5 (e) the secured party is not in possession of the vehicle  
6 immediately before the transferee's interest is acquired; and  
7 (f) the transferee's interest is acquired from:  
8 (i) the person who granted the security interest; or  
9 (ii) if the person who granted the security interest has lost  
10 the right to possess the vehicle, or is estopped from  
11 asserting an interest in the vehicle—another person who  
12 is in possession of the vehicle; and  
13 (g) the transferee does not acquire the transferee's interest at a  
14 sale held by or on behalf of an execution creditor; and  
15 (h) at the time new value is first given for the transferee's  
16 interest, the transferee has no knowledge of the security  
17 interest; and  
18 (i) the transferee acquires the transferee's interest for new value.

19 Note: See section ^56 in relation to knowledge.

## 20 *Acquisition from prescribed persons*

- 21 (2) The transferee acquires the transferee's interest free of the security  
22 interest if:  
23 (a) the personal property is a motor vehicle of a kind prescribed  
24 by the regulations for the purposes of this section; and  
25 (b) the regulations provide that the property may, or must, be  
26 described by serial number; and  
27 (c) the transferee does not hold the property:  
28 (i) as inventory; or  
29 (ii) on behalf of a person who would hold the property as  
30 inventory; and  
31 (d) the person from whom the transferee's interest is acquired is  
32 in a class of persons prescribed by the regulations for the  
33 purposes of this subsection; and  
34 (e) the secured party is not in possession of the vehicle  
35 immediately before the transferee's interest is acquired; and

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.3 Acquiring personal property free of security interests

Division 1 Acquiring personal property free of security interests

## Section ^93

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- 1 (f) the transferee does not acquire the transferee's interest at a  
2 sale held by or on behalf of an execution creditor; and  
3 (g) at the time new value is first given for the transferee's  
4 interest, the transferee has no knowledge that the acquisition  
5 constitutes a breach of the security agreement that provides  
6 for the security interest; and  
7 (h) the transferee acquires the transferee's interest for new value.

8 Note: See section ^56 in relation to knowledge.

### 9 **^93 Acquiring personal property free of temporarily perfected** 10 **security interest in property**

11 The transferee acquires the transferee's interest free of the security  
12 interest if:

- 13 (a) the transferee acquires the transferee's interest by purchasing  
14 or leasing the transferee's interest; and  
15 (b) the security interest is in proceeds, tangible property or a  
16 negotiable document of title; and  
17 (c) the security interest is temporarily perfected under subsection  
18 ^70(2) or ^76(2) immediately before the transferee's interest  
19 is acquired; and  
20 (d) at the time mentioned in section ^96, the transferee has no  
21 knowledge of the security interest; and  
22 (e) the transferee acquires the transferee's interest for new value.

23 Note: See section ^56 in relation to knowledge.

### 24 **^94 When a non-constitutional security interest becomes a** 25 **constitutional security interest**

- 26 (1) This section applies if:  
27 (a) this Act does not operate in relation to the security interest at  
28 a particular time; and  
29 (b) if this Act had operated in relation to the security interest at  
30 that time, the transferee would have acquired the transferee's  
31 interest free of the security interest because of the operation  
32 of an extinguishment provision (other than this section); and  
33 (c) this Act begins to operate in relation to the security interest.

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Acquiring personal property free of security interests **Part 2.3**

Acquiring personal property free of security interests **Division 1**

Section ^95

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- 1 (2) The transferee is taken to have acquired the transferee's interest  
2 free of the security interest at the time this Act begins to operate in  
3 relation to the security interest.

4 **^95 Extinguishment provisions do not apply to non-constitutional**  
5 **security interests**

6 The transferee does not acquire the transferee's interest free of the  
7 security interest because of the operation of an extinguishment  
8 provision if this Act does not operate in relation to the security  
9 interest.

10 Note: For security interests in relation to which this Act operates, see  
11 Part 1.2.

12 **^96 Time that knowledge of security interest etc. is required**

13 For the purposes of sections ^86 and ^93, the time is:

- 14 (a) if, at the time of acquiring the transferee's interest, the  
15 transferee intends to use the personal property predominantly  
16 for personal, domestic or household purposes—at the time  
17 new value is first given for the transferee's interest; or  
18 (b) otherwise—at the time the transferee acquires the transferee's  
19 interest.

20 **^97 Relationship between provisions of this Division**

21 To avoid doubt, the transferee acquires the transferee's interest free  
22 of the security interest because of the operation of this Division if  
23 the transferee acquires the transferee's interest free of the security  
24 interest under any one of the provisions in this Division.

25 Example: A person acquires a motor vehicle free of a security interest under  
26 section ^86 even if the person does not acquire the motor free of the  
27 security interest under section ^92.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.3 Acquiring personal property free of security interests

Division 2 Other provisions relating to acquiring personal property free of security interests

Section ^98

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## Division 2—Other provisions relating to acquiring personal property free of security interests

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### ^98 Rights of secured party and transferee on acquiring personal property free of security interests

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6

(1) This section applies if:

7

(a) a person (the *transferee*) acquires an interest in personal property from another person (the *transferor*); and

8

9

(b) as a result, the transferee acquires the interest in the personal property, or an accession to the property, free of a secured party's security interest because of the operation of Division 1 of this Part.

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#### *Rights of secured party*

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

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#### *Rights of transferee*

19

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

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### ^99 Acquiring intellectual property free of security interests

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If a person acquires tangible property (or an accession) free of a security interest because of the operation of an extinguishment provision, then the person also acquires any intellectual property, or intellectual property licence, relating to the tangible property (or the accession) free of any security interest that is taken, by the operation of section ^38, to have been granted in the intellectual property or licence.

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Note: Descriptions of tangible property in security agreements, registrations and notices are taken to include related descriptions of intellectual

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# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Acquiring personal property free of security interests **Part 2.3**

Other provisions relating to acquiring personal property free of security interests

**Division 2**

Section ^99

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property and intellectual property licences in certain circumstances  
(see section ^38).

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.4 Priority between security interests

Division 1 Priority of security interests generally

Section ^100

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1

## 2 **Part 2.4—Priority between security interests**

### 3 **Division 1—Priority of security interests generally**

#### 4 **^100 Priority of security interests in same collateral when Act** 5 **provides no other way of determining priority**

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

9 Note: For other rules about priorities, see the following:

- 10 (a) Chapter 3 (agricultural interests, accessions and commingling);  
11 (b) Part 7.3 (transitional application of this Act).

12 *Perfected security interest has priority over unperfected security*  
13 *interest*

14 (2) A perfected security interest in collateral has priority over an  
15 unperfected security interest in the same collateral.

16 *Perfection by control*

17 (3) A security interest in collateral that is currently perfected by  
18 control has priority over a security interest in the same collateral  
19 that is currently perfected by another means.

20 Note: Only security interests in controllable property can be perfected by  
21 control (see paragraph ^64(2)(b)).

22 (4) Priority between 2 or more security interests in collateral that are  
23 currently perfected by control is to be determined by the order in  
24 which the interests were perfected by control (where the perfection  
25 by control has been continuous).

26 *Priority for perfection in other ways*

27 (5) Priority between 2 or more security interests in collateral that are  
28 currently perfected, but not by control, is to be determined by the  
29 order in which the priority time (see subsection (6)) for each  
30 security interest occurs.



# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Priority between security interests **Part 2.4**

Priority of security interests generally **Division 1**

Section ^101

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- 1 (6) For the purposes of subsection (5), the *priority time* for a security  
2 interest in collateral is, subject to subsection (7), the earliest of the  
3 following times to occur in relation to the security interest:  
4 (a) the registration time for the relevant registration;  
5 (b) the time the secured party, or another person on behalf of the  
6 secured party, first takes possession or control of the  
7 collateral;  
8 (c) the time the security interest is temporarily perfected by force  
9 of a temporary perfection provision, or perfected in  
10 accordance with section ^69 or ^74.

- 11 (7) A time is a *priority time* for a security interest only if, once the  
12 security interest is perfected at or after that time, the security  
13 interest remains continuously perfected.

14 *Priority between unperfected security interests*

- 15 (8) Priority between unperfected security interests in the same  
16 collateral is to be determined by the order of attachment of the  
17 security interests.

18 **^101 Priority rules and intervening security interests**

19 *Scope*

- 20 (1) This section applies if:  
21 (a) a security interest (the *first security interest*) has priority  
22 under this Part over another security interest (regardless of  
23 whether the other security interest exists), including priority  
24 under this section; and  
25 (b) the other security interest has priority over a third security  
26 interest (the *last security interest*), including priority under  
27 this section.

28 *Priority between first and last security interests*

- 29 (2) The first security interest has priority over the last security interest.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.4 Priority between security interests

Division 1 Priority of security interests generally

Section ^102

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1     **^102 Priority of proceeds**

- 2             (1) For the purposes of this Part, if a security interest in collateral  
3             attaches to proceeds of the collateral under paragraph ^68(2)(b):  
4                 (a) the priority of the security interest in the proceeds at the time  
5                 the proceeds arise is taken to be the priority of the security  
6                 interest in the collateral at that time; and  
7                 (b) the time of attachment of a security interest in proceeds of  
8                 collateral is taken to be the time of attachment of the security  
9                 interest in the collateral; and  
10                (c) the time of possession or control of proceeds of collateral is  
11                taken to be the time of possession or control of the collateral.

12             Note 1:     The time of perfection of a security interest in proceeds is dealt with  
13                         in section ^71.

14             Note 2:     Division 2 of Part 2.2 deals with attachment and perfection of  
15                         proceeds.

- 16             (2) However, subsection (1) does not affect the operation of section  
17             ^69 or ^70.

18     **^103 Priority between constitutional and non-constitutional security**  
19     **interests**

20             A security interest in collateral in relation to which this Act  
21             operates has priority over a security interest in the collateral in  
22             relation to which, under Part 1.2, this Act does not operate.

23     **^104 Transfer of security interests does not affect priority**

24             If the whole or a part of a security interest in collateral is  
25             transferred, the transferred interest or part has the same priority  
26             immediately after the transfer as the interest had immediately  
27             before the transfer.

28             Note:        Division 4 deals with transfer of collateral.

29     **^105 Voluntary subordination of security interests**

- 30             (1) A secured party may (in a security agreement or otherwise)  
31             subordinate the secured party's security interest in collateral to any  
32             other interest in the collateral.

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Priority between security interests **Part 2.4**

Priority of security interests generally **Division 1**

Section ^106

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- 1                   (2) An agreement to subordinate a security interest:  
2                    (a) is effective according to its terms between the parties; and  
3                    (b) may be enforced by a third party if the third party is the  
4                    person, or one of a class of persons, for whose benefit the  
5                    agreement is intended.

6                   **^106 Acquiring personal property free of security interests**

7                    This Part does not apply in relation to a security interest in personal  
8                    property if a person acquires an interest in the personal property  
9                    free of the security interest.

# EXPOSURE DRAFT

**Chapter 2** General rules relating to security interests

**Part 2.4** Priority between security interests

**Division 2** Priority of advances

Section ^107

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1

2 **Division 2—Priority of advances**

3 **^107 Priority of advances**

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

8 Note: This section is subject to section ^115 (transfers of collateral).

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Priority between security interests **Part 2.4**

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

Section ^108

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1

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

3 **Subdivision A—When purchase money security interests take**  
4 **priority over other security interests**

5 **^108 Application of this Subdivision**

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

11 (2) However, this Subdivision does not apply if either or both of the  
12 interests are in controllable property and are currently perfected by  
13 control.

14 Note: If either or both of the interests are in controllable property and are  
15 currently perfected by control, then subsections ^100(3) and (4) apply.

16 **^109 Priority of purchase money security interest in inventory**

- 17 (1) The purchase money security interest has priority if:  
18 (a) the interest is in inventory; and  
19 (b) the purchase money security interest is perfected by  
20 registration at the time:  
21 (i) for inventory that is tangible property—the grantor, or  
22 another person on behalf of the grantor, obtains  
23 possession of the inventory; or  
24 (ii) for inventory that is intangible property—the purchase  
25 money security interest attaches to the inventory; and  
26 (c) a notice is given to all other secured parties who,  
27 immediately before the inventory is registered, have a  
28 registration describing the inventory; and  
29 (d) the notice is given in accordance with subsection (3); and  
30 (e) the notice was given before the time mentioned in  
31 paragraph (b).

32 Note 1: This section is subject to section ^111 (non-proceeds security interests  
33 in an account) and section ^118 (chattel paper).

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.4 Priority between security interests

Division 3 Priority of purchase money security interests

## Section ^110

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1 Note 2: See section ^37 for the meaning of a *description* of personal property.

2 (2) A notice is not required to be given in accordance with  
3 paragraph (1)(c):

4 (a) in relation to inventory of a class prescribed by the  
5 regulations (if any); or

6 (b) to persons of a class prescribed by the regulations (if any); or

7 (c) in circumstances prescribed by the regulations (if any).

8 (3) A notice is given in accordance with this subsection if:

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

10 (b) the notice:

11 (i) states that a specified person expects to acquire the  
12 purchase money security interest in the inventory; and

13 (ii) contains a description of the inventory; and

14 (iii) sets out the effect of subsection (1).

### 15 **^110 Priority of purchase money security interest in non-inventory** 16 **personal property**

17 The purchase money security interest has priority if:

18 (a) the interest is in personal property other than inventory; and

19 (b) the purchase money security interest is perfected by  
20 registration before the end of 5 business days after whichever  
21 of the following days applies:

22 (i) for tangible property—the day the grantor, or another  
23 person on behalf of the grantor, obtains possession of  
24 the property;

25 (ii) for intangible property—the day the security interest  
26 attaches to the property.

27 Note: The period mentioned in paragraph (b) may be extended under section  
28 ^257.

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Priority between security interests **Part 2.4**

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

Section ^111

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1 **Subdivision B—When other security interests in inventory take**  
2 **priority over purchase money security interests**

3 **^111 Non-proceeds security interest in an account**

- 4 (1) This section sets out when a perfected security interest (the *priority*  
5 *interest*), granted by a grantor in collateral, that is not a purchase  
6 money security interest, has priority over a perfected purchase  
7 money security interest that is granted by the same grantor in the  
8 same collateral.

9 Note: This section is subject to section ^118 (chattel paper).

10 *Priority over purchase money security interest that is perfected etc.*  
11 *later*

- 12 (2) The priority interest in the collateral has priority if:  
13 (a) the collateral is an account:  
14 (i) that is not an ADI account; and  
15 (ii) that is proceeds of inventory; and  
16 (b) the priority interest is in the collateral as original collateral  
17 (not as proceeds of collateral); and  
18 (c) the person who holds the priority interest has provided new  
19 value for the interest; and  
20 (d) the priority interest is perfected by registration; and  
21 (e) the registration time for the relevant registration relating to  
22 the priority interest occurs before the earlier of the following  
23 times:  
24 (i) the time at which the purchase money security interest  
25 is perfected;  
26 (ii) the registration time for the relevant registration relating  
27 to the purchase money security interest.

28 Note: The person whose purchase money security interest is subordinate is  
29 taken, under section ^33, to have a purchase money security interest in  
30 the new value as well.

31 *Priority over purchase money security interest that is perfected etc.*  
32 *earlier*

- 33 (3) The priority interest in the collateral has priority if:
-

# EXPOSURE DRAFT

**Chapter 2** General rules relating to security interests

**Part 2.4** Priority between security interests

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

## Section ^111

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- 1 (a) the collateral is an account:  
2 (i) that is not an ADI account; and  
3 (ii) that is proceeds of inventory; and  
4 (b) the priority interest is in the collateral as original collateral  
5 (not as proceeds of collateral); and  
6 (c) the person who holds the priority interest has provided new  
7 value for the interest; and  
8 (d) the priority interest is perfected by registration; and  
9 (e) all of the following apply:  
10 (i) the condition in paragraph (2)(e) is not met;  
11 (ii) the secured party holding the priority interest gives a  
12 notice in accordance with subsection (4) to each secured  
13 party holding a purchase money security interest in the  
14 collateral that is registered at the time the priority  
15 interest is perfected by registration;  
16 (iii) the notice is given at least 5 business days before the  
17 earlier of the day the collateral is registered or the day  
18 the priority interest attaches to the collateral.

19 Note: The person whose purchase money security interest is subordinate is  
20 taken, under section ^33, to have a purchase money security interest in  
21 the new value as well.

- 22 (4) A notice is given in accordance with this subsection if:  
23 (a) the notice is in the approved form; or  
24 (b) the notice:  
25 (i) contains a description of the inventory to which the  
26 notice relates; and  
27 (ii) sets out the effect of subsection (3).

28 *Section overrides section ^109*

- 29 (5) This section applies despite section ^109.



# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Priority between security interests **Part 2.4**

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

Section ^112

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1 **Subdivision C—Priority between competing purchase money**  
2 **security interests**

3 **^112 Priority between competing purchase money security interests**  
4 **in collateral**

5 *Interest granted to seller, lessor or consignor*

- 6 (1) A perfected purchase money security interest (the *priority interest*)  
7 that is granted by a grantor in collateral to a seller, lessor or  
8 consignor of the collateral has priority over any other perfected  
9 purchase money security interest that is granted by the same  
10 grantor in the same collateral if the priority interest is perfected:  
11 (a) for collateral that is inventory and tangible property—at the  
12 time the grantor, or another person on behalf of the grantor,  
13 obtains possession of the collateral; or  
14 (b) for collateral that is inventory and intangible property—at the  
15 time the priority interest attaches to the collateral; or  
16 (c) in any other case—before the end of 5 business days after the  
17 day the grantor, or another person on behalf of the grantor,  
18 obtains possession of the collateral.

19 Note: The period mentioned in paragraph (1)(c) may be extended under  
20 section ^257.

- 21 (2) However, subsection (1) does not apply in the case of controllable  
22 property if either (or both) interests are currently perfected by  
23 control.

24 Note: If an interest in controllable property is currently perfected by control,  
25 then subsections ^100(3) and (4) apply.

26 *Interest not granted to seller, lessor or consignor*

- 27 (3) To avoid doubt, priority between purchase money security interests  
28 that are granted by the same grantor in the same collateral to  
29 persons who are not sellers, lessors or consignors is to be  
30 determined in accordance with section ^100.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.4 Priority between security interests

Division 4 Priority of security interests in transferred collateral

Section ^113

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## Division 4—Priority of security interests in transferred collateral

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### ^113 Application of this Division

5

#### *Transfer of collateral*

6

(1) This Division sets out the priority between two security interests (a transferor-granted interest and a transferee-granted interest) if:

7

8

(a) a grantor transfers collateral (the *transferred collateral*) to a transferee; and

9

10

(b) immediately before the transfer, a security interest (the *transferor-granted interest*) is attached to the collateral; and

11

12

(c) the transferee grants (whether before or after the transfer) a security interest (the *transferee-granted interest*) in the transferred collateral; and

13

14

15

(d) in the case of transferred collateral that is controllable property—neither the transferor-granted interest nor the transferee-granted interest is currently perfected by control.

16

17

18

Note 1: If an interest in controllable property is currently perfected by control, then subsections ^100(3) and (4) apply.

19

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Note 2: For attachment and perfection in relation to transferred collateral, see Division 3 of Part 2.2.

21

22

Note 3: For a grantor's rights in relation to transferring collateral, see section ^124.

23

24

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

25

26

27

### ^114 Priority when collateral registered with a serial number

28

(1) If the transferor-granted interest is in collateral that is registered with a serial number, the transferor-granted interest has priority over the transferee-granted interest.

29

30

31

Note: For the meaning of *registered with a serial number*, see section ^26.

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Priority between security interests **Part 2.4**

Priority of security interests in transferred collateral **Division 4**

Section ^115

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- 1 (2) If the transferee-granted interest is in collateral that is registered  
2 with a serial number, but the transferor-granted interest is not, the  
3 transferee-granted interest has priority over the transferor-granted  
4 interest.

## 5 **^115 Priority when collateral not registered with a serial number**

- 6 (1) If the transferor-granted interest and the transferee-granted interest  
7 are in collateral that is not registered with a serial number, the  
8 interests have the priority given by this section.

9 Note: For the meaning of *registered with a serial number*, see section ^26.

### 10 *Continuously perfected transferor-granted interest*

- 11 (2) The transferor-granted interest has priority if:  
12 (a) it was perfected immediately before the transfer; and  
13 (b) it has been continuously perfected since the transfer.

### 14 *Priority if there is a break in perfection of the transferor-granted* 15 *interest*

- 16 (3) The transferor-granted interest in the transferred collateral has  
17 priority (except as mentioned in subsection (4)) if:  
18 (a) the interest was perfected by registration immediately before  
19 the transfer; and  
20 (b) the interest becomes unperfected; and

21 Note: See subsection ^73(3) for one situation in which a security  
22 interest may become unperfected following a transfer of  
23 collateral.

- 24 (c) the interest is later re-perfected; and  
25 (d) a notice is given (whether before or after the interest is  
26 re-perfected as mentioned in paragraph (c)) to all other  
27 secured parties who have a registration that describes the  
28 transferred collateral; and  
29 (e) the notice is given in accordance with subsection (6); and  
30 (f) the interest has been continuously perfected since it was  
31 perfected as mentioned in paragraph (c).

- 32 (4) However, the transferee-granted interest has priority if:

# EXPOSURE DRAFT

**Chapter 2** General rules relating to security interests

**Part 2.4** Priority between security interests

**Division 4** Priority of security interests in transferred collateral

## Section ^115

---

- 1 (a) subsection (3) applies in relation to the transferor-granted  
2 interest; and
- 3 (b) the transferee-granted interest is perfected immediately  
4 before the transferor-granted security is re-perfected as  
5 mentioned in paragraph (3)(c); and
- 6 (c) the transferee acquires the transferee-granted interest without  
7 knowledge that the acquisition constitutes a breach of the  
8 security agreement that provides for the transferor-granted  
9 interest; and
- 10 (d) the transferee-granted interest secures performance of an  
11 advance made, or an obligation incurred, by the transferee's  
12 secured party before:
- 13 (i) the transferor-granted interest is re-perfected as  
14 mentioned in paragraph (3)(c); and
- 15 (ii) the notice is given under paragraph (3)(d);  
16 but only to the extent of the advance or obligation.
- 17 Note 1: If the priority between a transferor-granted security and a  
18 transferee-granted security is not covered by this section, then section  
19 ^100 applies.
- 20 Note 2: See section ^56 in relation to knowledge.
- 21 (5) Subsection (4) applies despite section ^107 (priority of future  
22 advances).
- 23 (6) A notice is given in accordance with this subsection if:  
24 (a) the notice is in the approved form; or  
25 (b) the notice:  
26 (i) states that the secured party expects to perfect a security  
27 interest in the transferred collateral; and  
28 (ii) contains a description of the transferred collateral; and  
29 (iii) sets out the effect of subsections (3) and (4).

# EXPOSURE DRAFT

General rules relating to security interests Chapter 2

Priority between security interests Part 2.4

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

Section ^116

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1

2

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

3

4

5

### **^116 Priority of creditor who receives payment of debt**

6

- (1) The interest of a creditor who receives payment of a debt owing by a debtor through a debtor-initiated payment has priority over a security interest (whether perfected or unperfected) in:

7

8

9

(a) the funds paid; and

10

(b) the intangible that was the source of the payment; and

11

(c) a negotiable instrument used to effect the payment.

12

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

13

14

- (2) Subsection (1) does not apply if, at the time of the payment, the creditor had actual knowledge that the payment was made in breach of the security agreement that provides for the security interest.

15

16

17

18

- (3) In this Act:

19

***debtor-initiated payment*** means a payment made by the debtor through the use of:

20

21

(a) an electronic funds transfer; or

22

(b) a debit, transfer order, authorisation, or similar written payment mechanism executed by the debtor when the payment was made; or

23

24

25

(c) a negotiable instrument.

26

### **^117 Priority of person who acquires a negotiable instrument or an interest in a negotiable instrument**

27

28

- (1) This section applies if, by a consensual transaction, a person acquires an interest (the ***interest of the person in the negotiable instrument***) consisting of:

29

30

31

(a) a negotiable instrument; or

32

(b) an interest in a negotiable instrument.

---

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.4 Priority between security interests

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

## Section ^118

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

15 Note: See section ^56 in relation to knowledge.

## 16 ^118 Priority of person who acquires chattel paper or an interest in 17 chattel paper

- 18 (1) This section applies if:  
19 (a) a person acquires an interest (the *interest of the person in the*  
20 *chattel paper*) consisting of:  
21 (i) chattel paper; or  
22 (ii) an interest in chattel paper; and  
23 (b) the interest is acquired:  
24 (i) by a consensual transaction; and  
25 (ii) in the ordinary course of the person's business of  
26 acquiring interests of that kind; and  
27 (iii) for new value.

28 Note: For rights relating to the assignment of chattel paper, see section ^125.

- 29 (2) The interest of the person in the chattel paper has priority over the  
30 following security interests in the chattel paper:  
31 (a) if the person took possession of the chattel paper without  
32 knowledge of a perfected security interest in the chattel  
33 paper—the perfected security interest;  
34 (b) in any case—a security interest that has attached to proceeds  
35 of inventory as original collateral.

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Priority between security interests **Part 2.4**

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

## Section ^119

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1 Note: See section ^56 in relation to knowledge.

2 (3) This section applies despite sections ^109 and ^111.

### 3 **^119 Priority of holder of negotiable document of title**

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

6 (a) the holder gave value for the document of title; and

7 (b) the holder:

8 (i) in the case of a holder who acquired the document of  
9 title in the ordinary course of the holder's business of  
10 acquiring documents of title of that kind—acquired the  
11 interest without knowledge that the acquisition  
12 constitutes a breach of the security agreement that  
13 provides for the security interest; or

14 (ii) otherwise—acquired the negotiable instrument without  
15 knowledge of the security interest.

16 Note: See section ^56 in relation to knowledge.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.4 Priority between security interests

Division 6 Priority of other interests

Section ^120

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1

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

### 3 **^120 Priority between security interests and other interests**

4

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

5

(1) An interest (the ***priority interest***) in collateral has priority over a security interest in the collateral if:

6

7

(a) the priority interest arises (by being created, arising or being provided for):

8

9

(i) under a law of the Commonwealth, a State or a Territory, unless the person who owns the collateral in which the priority interest is granted agrees to the interest; or

10

11

12

13

(ii) by operation of the general law; and

14

15

(b) the priority interest arises in relation to providing goods or services in the ordinary course of business; and

16

17

(c) the person who holds the priority interest provided those goods or services; and

18

19

20

(d) no law of the Commonwealth, a State or a Territory provides for the priority between the priority interest and the security interest; and

21

22

23

24

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

25

26

Note: The priority interest might be an interest to which this Act would otherwise not apply (see subsection ^6(2)).

27

*Priority interests specified by law*

28

29

(2) An interest (the ***priority interest***) in collateral has priority over a security interest in the collateral if:

30

31

32

(a) the priority interest arises (by being created, arising or being provided for) under a law of the Commonwealth, a State or a Territory; and



# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Priority between security interests **Part 2.4**

Priority of other interests **Division 6**

## Section ^121

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- 1 (b) a law (the *priority law*) of whichever of the following kinds  
2 is applicable provides that this subsection applies to interests  
3 of the same kind as the priority interest:  
4 (i) in the case of a priority interest that arises under a law  
5 of the Commonwealth—a legislative instrument under  
6 subsection (3), or another law of the Commonwealth;  
7 (ii) in the case of a priority interest that arises under a law  
8 of a State or Territory—a law of that State or Territory;  
9 and  
10 (c) the priority interest arises after the priority law is made or  
11 enacted; and  
12 (d) if the priority law states that this paragraph applies in relation  
13 to such priority interests—the person who holds the priority  
14 interest acquired the interest without actual knowledge that  
15 the acquisition constitutes a breach of the security agreement  
16 that provides for the security interest.

17 Note: The priority interest might be an interest to which this Act would  
18 otherwise not apply (see subsection ^6(2)).

- 19 (3) The Minister may make a legislative instrument for the purposes of  
20 subsection (2).

### 21 *Rights to payment in connection with specifically identified land*

- 22 (4) An interest (the *priority interest*) in collateral has priority over a  
23 security interest in the collateral if the priority interest is an interest  
24 of a kind mentioned in subparagraph ^6(f)(ii).

## 25 **^121 Execution creditor has priority over unperfected security** 26 **interest**

- 27 (1) The interest of an execution creditor in collateral has priority over  
28 any security interest in the same collateral that is not perfected at  
29 the time of execution (even if such a security interest is later  
30 perfected).  
31 (2) To avoid doubt, an execution creditor does not include a landlord  
32 who exercises a right of distress.  
33 (3) This section applies despite any other section in this Part.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.4 Priority between security interests

Division 6 Priority of other interests

Section ^122

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1                    *Meaning of time of execution*

2                    (4) In this Act:

3                    **time of execution**, in relation to an execution creditor, means:

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

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

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

10                    (ii) a garnishee order is made in relation to the execution  
11                    creditor.

## 12                    ^122 Priority of security interests held by ADIs

13                    A perfected security interest, held by an ADI, in an ADI account  
14                    with the ADI has priority over any other perfected security interest  
15                    in the account, other than a security interest that is perfected by  
16                    control in accordance with subparagraph ^46(1)(a)(ii).

17                    Note 1:     A security interest that is held by an ADI in an ADI account is  
18                    perfected by control (see subparagraph ^46(1)(a)(i)).

19                    Note 2:     This provision does not affect any right of set-off the grantor might  
20                    have in relation to the account (see paragraph ^6(1)(d)).

## 21                    ^123 Priority of security interests in returned tangible property

22                    *Security interest held by transferee*

23                    (1) A perfected security interest in tangible property that has  
24                    reattached to the property under subsection ^78(2) has priority over  
25                    a security interest in the property that is granted by the operation of  
26                    subsection ^79(2) to a transferee of an account.

27                    Note:        Section ^78 deals with security interests that reattach when tangible  
28                    property is returned. Section ^79 grants a security interest in an  
29                    account or chattel paper when tangible property is returned.

30                    (2) A security interest in tangible property that is granted by the  
31                    operation of subsection ^79(2) to a transferee of chattel paper has  
32                    priority over the following perfected security interests:

# EXPOSURE DRAFT

General rules relating to security interests **Chapter 2**

Priority between security interests **Part 2.4**

Priority of other interests **Division 6**

Section ^123

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- 1 (a) a perfected security interest in the property that is granted by  
2 the operation of subsection ^79(2) to a transferee of an  
3 account;  
4 (b) if the transferee takes possession of the chattel paper in the  
5 ordinary course of business of acquiring chattel paper of that  
6 kind and for new value:  
7 (i) a perfected security interest in the property that has  
8 reattached under subsection ^78(2); or  
9 (ii) a perfected security interest in the property as  
10 after-acquired property that attaches when the property  
11 comes into the possession of the grantor or transferee in  
12 the circumstances mentioned in paragraph ^78(1)(d).

13 *Security interest granted by buyer or lessee*

- 14 (3) A security interest (the **priority interest**) in tangible property that is  
15 granted by a person who acquires an interest in the property has  
16 priority over a security interest in the property that reattaches under  
17 section ^78, or is granted by the operation of section ^79, if:  
18 (a) the priority interest attaches while the property is in the  
19 possession of the person; and  
20 (b) immediately before the possession time (referred to in  
21 paragraph ^78(1)(d) or ^79(1)(d)), the priority interest is  
22 perfected.

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.5 Transfer and assignment of rights in collateral

Section ^124

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## Part 2.5—Transfer and assignment of rights in collateral

3

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### ^124 Transfer of grantor's rights in collateral

6

(1) This section applies if the rights of a grantor in collateral would be able to be transferred (including by sale, by creating a security interest or under proceedings to enforce a judgment) but for a provision in an agreement (whether or not a security agreement) prohibiting the transfer or declaring the transfer to be a default.

7

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11

(2) The rights of the grantor in the collateral may be transferred:

12

(a) by consent between the grantor and the transferee; or

13

(b) by operation of law;

14

despite the provision in the agreement.

15

Note: See section ^68 in relation to security interests in proceeds that arise as a result of a transfer.

16

17

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

18

19

20

21

### ^125 Rights on transfer of account or chattel paper—general

22

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

23

24

(a) the terms of the contract between the account debtor and the transferor, and any defence, remedy or claim under the general law arising from the contract; and

25

26

27

(b) any other defence or claim of the account debtor against the transferor (including a defence by way of a right of set-off) that accrues before the first time when payment by an account debtor to the transferor no longer discharges the obligation of the account debtor under subsection (8) to the extent of the payment.

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# EXPOSURE DRAFT

- 1 (2) Subsection (1) does not apply if the account debtor makes an  
2 enforceable agreement not to assert defences to claims arising out  
3 of the contract.
- 4 (3) Unless the account debtor has otherwise agreed, a modification of,  
5 or substitution for, the contract between the account debtor and the  
6 transferor is effective against the transferee (including a secured  
7 party or a receiver) if:
- 8 (a) the account debtor and the transferor have acted honestly in  
9 modifying or substituting the contract; and
- 10 (b) the manner in which the modification or the substitution is  
11 made is commercially reasonable; and
- 12 (c) the modification or substitution does not have a material  
13 adverse effect on:
- 14 (i) the transferee's rights under the contract; or  
15 (ii) the transferor's ability to perform the contract.
- 16 Note: For the meaning of *modification*, see section ^26.
- 17 (4) Subsection (3) applies:
- 18 (a) to the extent that a transferred right to payment arising out of  
19 the contract has not been fully earned by performance; and
- 20 (b) even if there has been notice of the transfer to the account  
21 debtor.
- 22 (5) If a contract has been modified or substituted in the manner  
23 described in subsection (3), the transferee obtains rights that  
24 correspond to the rights of the transferor under the contract as  
25 modified or substituted.
- 26 (6) Nothing in subsections (3) to (5) affects the validity of a term in a  
27 transfer agreement that provides that a modification or substitution  
28 mentioned in subsection (3) is a breach of contract by the  
29 transferor.
- 30 (7) If collateral that is intangible property or chattel paper is  
31 transferred, the account debtor may continue to make payments  
32 under the contract to the transferor:
- 33 (a) until the account debtor receives a notice that:
- 34 (i) states that the amount payable or to become payable  
35 under the contract has been transferred; and

# EXPOSURE DRAFT

Chapter 2 General rules relating to security interests

Part 2.5 Transfer and assignment of rights in collateral

## Section ^126

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- 1 (ii) states that payment is to be made to the transferee; and  
2 (iii) identifies the contract under which the amount payable  
3 is to become payable; or  
4 (b) after receiving a notice under paragraph (a) (other than a  
5 notice from the transferor), if:  
6 (i) the account debtor requests the transferee to provide  
7 proof of the transfer; and  
8 (ii) the transferee fails to provide proof before the end of 5  
9 business days after the day of the request.
- 10 (8) Payment by an account debtor to a transferee in accordance with a  
11 notice under paragraph (7)(a) (including in the circumstances  
12 described in paragraph (7)(b)) discharges the obligation of the  
13 account debtor to the extent of the payment.

### **^126 Rights on transfer of account or chattel paper—certain contractual restrictions**

#### *Scope*

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

#### *Statutory restriction on contracts*

- 30
- 31 (2) The term in the contract:  
32 (a) is binding on the transferor, but only to the extent of making  
33 the transferor liable in damages for breach of contract; and

1 (b) is unenforceable against third parties.

2 **^127 Security interests in intellectual property licences**

3 (1) If:

4 (a) a security interest is granted in an intellectual property  
5 licence; and

6 (b) the intellectual property in which the licence is granted is  
7 later transferred; and

8 (c) the licensee of the intellectual property licence continues to  
9 hold the licence after the transfer;

10 the security agreement that provides for the security interest binds  
11 every successor in title to the licensor of the intellectual property  
12 licence to the same extent as the security agreement was binding  
13 on the licensor.

14 (2) If:

15 (a) a security interest is granted in a sub-licence granted under an  
16 intellectual property licence; and

17 (b) the intellectual property licence under which the sub-licence  
18 is granted is later transferred; and

19 (c) the licensee of the sub-licence continues to hold the  
20 sub-licence after the transfer;

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

# EXPOSURE DRAFT

Chapter 3 Specific rules relating to agricultural interests, accessions and commingling  
Part 3.1 Agricultural interests

Section ^128

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1

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## Chapter 3—Specific rules relating to agricultural interests, accessions and commingling

3

4

5

### Part 3.1—Agricultural interests

6

7

#### **^128 Meaning of *security interest in crops***

8

9

(1) A *security interest in crops* is a security interest in the crops while growing and afterwards when cut or separated from the soil.

10

11

12

13

(2) For the purposes of determining whether a security interest in crops cut or separated from the soil exists, it does not matter whether the crops are stored on the land where the crops were grown or on any other land or premises.

14

15

Note: For rules relating to the priority of security interests in crops, see section ^130.

16

17

#### **^129 Relationship between security interest in crops and interest in land**

18

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

19

20

21

22

23

24

- (1) A security interest in crops does not prejudicially affect the rights of a lessor or mortgagee of land on which the crops are growing if:
- (a) those rights existed at the time the security interest was created; and
  - (b) the lessor or mortgagee has not consented in writing to the creation of the security interest.

25

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

26

27

28

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



# EXPOSURE DRAFT

1     **^130 Priority of crops**

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

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

14     **^131 Priority of livestock**

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

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

# EXPOSURE DRAFT

**Chapter 3** Specific rules relating to agricultural interests, accessions and commingling

**Part 3.2** Accessions

**Division 1** Continuation of security interests in accessions

Section ^132

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1

2 **Part 3.2—Accessions**

3 **Division 1—Continuation of security interests in accessions**

4 **^132 Continuation of security interests in accessions**

5 A security interest in tangible property that becomes an accession  
6 to other tangible property continues in the accession.

7 Note: However, a person might acquire an interest in the accession free of  
8 the security interest because of the operation of an extinguishment  
9 provision.

# EXPOSURE DRAFT

Specific rules relating to agricultural interests, accessions and commingling **Chapter 3**

Accessions **Part 3.2**

Priority of security interests in accessions **Division 2**

Section ^133

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1

2 **Division 2—Priority of security interests in accessions**

3 **^133 Scope of this Division**

4 This Division sets out the priority between an interest (whether or  
5 not a security interest) in tangible property (the *improved property*)  
6 and a security interest in an accession to the improved property.

7 **^134 General rule that interest in accession has priority**

8 The security interest in the accession has priority if the interest in  
9 the improved property does not otherwise have priority under this  
10 Division.

11 **^135 Accession installed or affixed before acquisition of interest in  
12 improved property**

13 The interest in the improved property has priority if:

- 14 (a) the accession is installed in, or affixed to, the improved  
15 property; and  
16 (b) after that, a person acquires the interest in the improved  
17 property for new value; and  
18 (c) if the interest in the improved property is a security interest,  
19 the security interest was perfected immediately after the  
20 person acquired the security interest in the improved  
21 property, and has been continuously perfected ever since; and  
22 (d) immediately before the interest in the improved property is  
23 acquired:  
24 (i) the security interest in the accession had attached to the  
25 accession; and  
26 (ii) the security interest in the accession was unperfected;  
27 and  
28 (e) the person who holds the interest in the improved property  
29 acquired the interest without actual knowledge that the  
30 acquisition of the interest in the improved property  
31 constitutes a breach of the security agreement that provides  
32 for the security interest in the accession; and

# EXPOSURE DRAFT

Chapter 3 Specific rules relating to agricultural interests, accessions and commingling

Part 3.2 Accessions

Division 2 Priority of security interests in accessions

## Section ^136

---

- 1 (f) the person who holds the interest in the improved property is  
2 not prevented from asserting priority under section ^137.

3 **^136 Accession installed or affixed after acquisition of interest in**  
4 **improved property**

5 The interest in the improved property has priority if:

- 6 (a) a person acquires the interest in the improved property for  
7 new value; and  
8 (b) after that, the accession is installed in, or affixed to, the  
9 improved property; and  
10 (c) immediately after the accession is installed or affixed, the  
11 security interest is not attached to the accession; and  
12 (d) the person who holds the interest in the improved property is  
13 not prevented from asserting priority under section ^137.

14 **^137 When person with interest in improved property is prevented**  
15 **from asserting priority**

16 For the purposes of sections ^135 and ^136, a person is prevented  
17 from asserting priority over an interest in an accession to improved  
18 property if:

- 19 (a) the person consents in writing to a security interest in the  
20 accession; or  
21 (b) the person disclaims in writing an interest in the accession; or  
22 (c) the person enters into a written contract under which another  
23 person is entitled to remove the accession; or  
24 (d) the person is not (apart from this section) entitled to prevent  
25 the grantor from removing the accession.

# EXPOSURE DRAFT

1

2

## **Part 3.3—Commingling**

3

4

### **^138 Continuation of security interests in tangible property that becomes commingled etc.**

5

6

(1) If tangible property:

7

(a) is manufactured, processed, assembled or commingled; and

8

(b) as a result of undergoing a process mentioned in

9

paragraph (a), the property becomes part of a product or mass

10

so that the property's identity is lost in the product or mass;

11

a security interest in the property continues in the product or mass.

12

Note 1: However, a person might acquire an interest in the product or mass

13

free of the security interest because of the operation of an

14

extinguishment provision.

15

Note 2: For priority rules in relation to security interests in a product or mass,

16

see Part 2.4.

17

(2) Without limiting paragraph (1)(b), the identity of tangible property

18

that is manufactured, processed, assembled or commingled is lost

19

in a product or mass if it is not commercially practical to restore

20

the property to its original state.

21

### **^139 Security interest in tangible property that becomes commingled etc.**

22

23

(1) For the purposes of this Act:

24

(a) the method of perfection of a security interest in tangible

25

property that continues in a product or mass under section

26

^138 is taken to be the method by which the security interest

27

in the tangible property was perfected; and

28

(b) the time a security interest in tangible property that continues

29

in a product or mass under section ^138 attaches is taken to

30

be the time the security interest in the tangible property

31

attached; and

32

(c) the time of perfection of a security interest in tangible

33

property that continues in a product or mass under section

# EXPOSURE DRAFT

Chapter 3 Specific rules relating to agricultural interests, accessions and commingling

Part 3.3 Commingling

## Section ^140

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1                                   ^138 is taken to be the time the security interest in the  
2                                   tangible property was perfected; and  
3                                   (d) the time a person obtains possession of a product or mass, in  
4                                   which a security interest in tangible property is continued  
5                                   under section ^138, is taken to be the time the person  
6                                   obtained possession of the tangible property.

7                                   (2) However, subsection (1) does not affect the operation of section  
8                                   ^73 (temporary perfection after transfer).

9                                   (3) For the purposes of section ^100, a security interest in tangible  
10                                   property that continues in a product or mass is taken to have been  
11                                   granted in the same collateral as a security interest that is granted  
12                                   in the product or mass.

### 13                                   **^140 Limit on value of obligation secured by an interest in tangible** 14                                   **property that becomes commingled etc.**

15                                   For the purposes of this Act, the value (at a particular time) of the  
16                                   obligation secured by a security interest in tangible property that  
17                                   continues in a product or mass under section ^138 does not exceed  
18                                   the lesser of the following values:

- 19                                   (a) the value of the obligation at the particular time;  
20                                   (b) the market value of the tangible property immediately before  
21                                   the tangible property continues in the product or mass.

# EXPOSURE DRAFT

1

2 **Part 3.4—General provisions: priority and**  
3 **enforcement**  
4

5 **^141 Part 2.4 does not apply in relation to commingled etc. property**

6 (1) This section applies despite Part 2.4 (priorities).

7 (2) For the purposes of Chapter 4 (enforcement), 2 or more security  
8 interests that are continued in the same product or mass under  
9 section ^138 are taken to have the same priority as each other if:

10 (a) at least 2 of the security interests were originally granted in  
11 different tangible property; and

12 (b) each security interest is a security interest of one of the kinds  
13 referred to in subsection (3); and

14 (c) each security interest is of the same kind as each of the other  
15 security interests that are to be taken, under this section, to  
16 have the same priority.

17 Note: A security interest that is continued in a product or mass is enforced in  
18 accordance with this Part and Chapter 4.

19 (3) For the purposes of paragraph (2)(b), the kinds of security interests  
20 are the following:

21 (a) a perfected purchase money security interest granted to a  
22 seller, lessor or consignor;

23 (b) a perfected purchase money security interest that is not  
24 granted to a seller, lessor or consignor;

25 (c) a perfected security interest that is not a purchase money  
26 security interest;

27 (d) an unperfected security interest.

28 (4) To avoid doubt, subsection (2) applies in relation to all of the  
29 security interests:

30 (a) that are continued in the same product or mass; and

31 (b) that satisfy paragraphs (2)(b) and (c);

32 (even if 2 of the security interests were granted in the same  
33 tangible property).

# EXPOSURE DRAFT

Chapter 3 Specific rules relating to agricultural interests, accessions and commingling

Part 3.4 General provisions: priority and enforcement

Section ^142

---

## ^142 Application of section ^177

(1) This section applies if:

- (a) a secured party has a security interest that is taken to have the same priority as one or more other security interests under section ^141; and
- (b) an amount or proceeds of collateral are received by or on behalf of the secured party (whether or not under section ^159 or ^166).

(2) Instead of applying the amount or proceeds in accordance with paragraph ^177(2)(c), the amount or proceeds must be applied equally towards:

- (a) other obligations to the secured party that are secured by the security interest in the collateral as mentioned in that paragraph; and
- (b) the obligations secured by each security interest that is taken to have the same priority as the security interest of the secured party.

Note: If there are insufficient proceeds, see section ^143.

(3) This section does not otherwise affect the operation of section ^177.

## ^143 Value of obligations if insufficient proceeds

*Application of this section*

(1) This section applies if:

- (a) security interests (the *equal security interests*) that are continued in a product or mass are taken to have the same priority as each other under subsection ^141(2); and
- (b) a secured party distributes an amount or proceeds of the product or mass under section ^177; and
- (c) there is an insufficient amount or there are insufficient proceeds to discharge the obligations secured by the equal security interests.



# EXPOSURE DRAFT

1 *Value of obligations secured by interests of the same kind*

- 2 (2) The value of the obligation secured by an equal security interest is  
3 calculated using the following formula:

4 
$$\frac{\text{Market value of the relevant property immediately before the relevant time}}{\text{Total market value of all the relevant property in relation to all equal security interests immediately before the relevant time}} \times \text{Amount of proceeds remaining for distribution}$$

5 where:

6 ***amount of proceeds remaining for distribution*** means the amount  
7 of proceeds of the product or mass, or the tangible property, (as the  
8 case requires) that remains to be distributed under section ^177.

9 ***relevant property***, in relation to an equal security interest, is the  
10 particular tangible property whose manufacture, processing,  
11 assembling or commingling results in the product or mass in which  
12 the equal security interest is continued.

13 ***relevant time***, in relation to relevant property, means the time  
14 immediately before the relevant property is manufactured,  
15 processed, assembled or commingled.

16 **^144 Secured party who is entitled to seize property may remove it**

- 17 (1) This section applies if:
- 18 (a) a secured party has an interest in collateral that is an  
19 accession to tangible property (the ***property to which the***  
20 ***collateral is affixed***); and
- 21 (b) the secured party does not have an interest in the property to  
22 which the collateral is affixed; and
- 23 (c) the secured party is entitled under section ^161 to seize the  
24 collateral.
- 25 (2) A secured party who proposes to seize collateral under section  
26 ^161 may remove the collateral from the property to which the  
27 collateral is affixed.

# EXPOSURE DRAFT

Chapter 3 Specific rules relating to agricultural interests, accessions and commingling

Part 3.4 General provisions: priority and enforcement

## Section ^145

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- 1 Note 1: Chapter 4 includes rules relating to the disposal and retention of  
2 collateral after seizure.
- 3 Note 2: A person may be prevented from removing collateral under section  
4 ^146.
- 5 Note 3: There are limitations on the manner in which a secured party removes  
6 property (see section ^147).
- 7 (3) A secured party who removes collateral in accordance with this  
8 Part is taken to have seized the collateral under section ^161.
- 9 (4) For the purposes of determining whether a secured party has an  
10 interest in property to which collateral is affixed, disregard any  
11 right the secured party has to remove the collateral from the  
12 property.
- 13 (5) This section does not affect the operation of section ^164.

### 14 **^145 Secured party must give notice of removal of collateral**

- 15 (1) A secured party who proposes to remove collateral under section  
16 ^144 must (unless subsection (5), (6) or (7) or section ^182  
17 applies) give a notice to each of the following persons in  
18 accordance with subsections (2) and (3):
- 19 (a) the grantor;
- 20 (b) a secured party with a security interest in the collateral that  
21 has a higher priority.
- 22 (2) The secured party must give a notice to a person:
- 23 (a) at least 10 business days before the day the collateral is  
24 removed; or
- 25 (b) if the person has given a written notice to the secured party  
26 specifying a shorter period to apply for the purposes of this  
27 section—before the end of that period.
- 28 (3) A notice must:
- 29 (a) contain the name of the secured party giving the notice; and
- 30 (b) contain a description of the collateral and of the property to  
31 which the collateral is affixed; and
- 32 (c) state that the secured party proposes to take action under  
33 section ^144, on or before:

# EXPOSURE DRAFT

- 1 (i) a specified day that is at least 10 business days after the  
2 day the notice is given; or  
3 (ii) if the secured party has given a written notice to the  
4 person specifying a shorter period to apply for the  
5 purposes of this section—before the end of that period;  
6 and  
7 (d) state the address to which a notice may be given under  
8 paragraph ^146(c); and  
9 (e) contain any other matter required by the regulations for the  
10 purposes of this subsection.

11 (4) The notice may be given in the approved form.

12 *When notice is not required*

13 (5) The secured party is not required to give a notice to a person under  
14 subsection (1) if, after the debtor defaults, the person gives written  
15 consent to the secured party to remove the collateral without  
16 receiving a notice.

17 (6) The secured party is not required to give a notice to any person  
18 under subsection (1) if:

- 19 (a) the secured party believes on reasonable grounds that the  
20 secured party was induced to enter into the relevant security  
21 agreement by fraud on the part of the debtor or the grantor; or  
22 (b) the collateral might perish before the end of 10 business days  
23 after the day the notice is given; or  
24 (c) the secured party believes on reasonable grounds that the  
25 collateral will decline substantially in value if it is not  
26 removed immediately after the day the notice is given; or  
27 (d) the cost of care and storage of the collateral is  
28 disproportionately large in relation to its value.

29 (7) A person is not entitled to a notice under subsection (1) only  
30 because:

- 31 (a) the person has an interest in collateral (the *other collateral*);  
32 and  
33 (b) the other collateral is affixed to, or installed in, the property  
34 to which the collateral is affixed.

# EXPOSURE DRAFT

Chapter 3 Specific rules relating to agricultural interests, accessions and commingling

Part 3.4 General provisions: priority and enforcement

## Section ^146

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1     **^146 When person must not remove collateral**

- 2             A secured party who proposes to remove collateral under section  
3             ^144 must not do so if, before the collateral is removed:
- 4             (a) the obligation secured by the security interest in the collateral  
5             is performed; or
- 6             (b) the secured party is paid the lesser of the following amounts:
- 7                 (i) the amount of the payment required to satisfy the  
8                 obligation secured by the security interest;
- 9                 (ii) the market value of the collateral at the time of  
10                payment, if the collateral were to be removed from the  
11                property to which it is affixed; or
- 12            (c) another secured party with a security interest:
- 13                (i) in the collateral; or
- 14                (ii) in the property to which the collateral is affixed;  
15                that has a higher priority under this Act gives the secured  
16                party a written notice prohibiting the removal of the  
17                collateral.

18     **^147 Secured party must not damage property to which collateral is**  
19     **affixed when removing collateral**

- 20            (1) A secured party that has a right to remove collateral under section  
21            ^144 must remove the collateral from the property to which the  
22            collateral is affixed:
- 23                (a) in a manner that causes no greater damage to that property; or  
24                (b) that puts the person in possession of that property to no  
25                greater inconvenience;
- 26            than is necessarily incidental to the removal of the collateral.

27            *Reimbursement for damage*

- 28            (2) A person (other than the grantor) who has, at the time collateral is  
29            affixed (or installed), an interest in the property to which the  
30            collateral is affixed is entitled to reasonable compensation for any  
31            loss or damage caused to the person as a result of the removal of  
32            the collateral.
- 33            (3) Compensation is not payable under subsection (2):

# EXPOSURE DRAFT

- 1 (a) for a reduction in the value of the property to which the  
2 collateral is affixed caused by the absence of the collateral; or  
3 (b) for any costs incurred in replacing the collateral.
- 4 (4) A person (other than the grantor) who has, at the time collateral is  
5 affixed (or installed), an interest in the property to which the  
6 collateral is affixed may refuse permission to remove the collateral  
7 until the secured party has given adequate security for the  
8 compensation.
- 9 (5) To avoid doubt, compensation is payable under subsection (2) even  
10 if a secured party removes collateral in accordance with  
11 subsection (1).

12 **^148 Secured party may apply to court for order in respect of**  
13 **removal of collateral**

- 14 (1) A person (other than the grantor) with an interest in collateral, or  
15 an interest in property to which collateral is affixed, may apply to a  
16 court for an order under this section.
- 17 Note: For which courts have jurisdiction, and for transfers between courts,  
18 see Part 6.6.
- 19 (2) On application by a person under subsection (1), the court may  
20 make any of the following orders if the court is satisfied that it is  
21 reasonable in the circumstances:
- 22 (a) an order postponing the removal of the collateral;  
23 (b) an order stating the amount payable for the purposes of  
24 paragraph ^146(b);  
25 (c) an order determining who is entitled to compensation under  
26 subsection ^147(2);  
27 (d) an order determining the amount of compensation to which a  
28 person is entitled under subsection ^147(2);  
29 (e) an order authorising the removal of the collateral without a  
30 person's permission or security being given under subsection  
31 ^147(4);  
32 (f) an order stating the amount and kind of security to be given  
33 under subsection ^147(4);  
34 (g) an order stating to whom the security is to be given under  
35 subsection ^147(4).

# EXPOSURE DRAFT

**Chapter 3** Specific rules relating to agricultural interests, accessions and commingling

**Part 3.4** General provisions: priority and enforcement

## Section ^148

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- 1                   (3) A court may impose any conditions it thinks proper in an order  
2                   under subsection (2).
- 3                   (4) The court may make any other orders it thinks proper for the  
4                   purpose of giving effect to an order under subsection (2).

1

## Chapter 4—Enforcement of security interests

2

3

### Part 4.1—General rules

4

5

#### **^149 Application of this Chapter**

6

*Security interests to which this Chapter does not apply*

7

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

8

9

(a) a transfer of an account or chattel paper that does not secure payment or performance of an obligation;

10

11

(b) a PPS lease that does not secure payment or performance of an obligation;

12

13

(c) a commercial consignment that does not secure payment or performance of an obligation.

14

15

*Chapter does not apply to security interests in investment instruments or investment entitlements that are perfected by possession or control*

16

17

18

- (2) This Chapter does not apply in relation to a person who has perfected a security interest in:

19

20

(a) an investment instrument by taking possession or control of the instrument; or

21

22

(b) an investment entitlement by taking control of the entitlement.

23

24

- (3) To avoid doubt, subsection (2) applies whether the person has perfected the security interest only by possession or control, or by another method as well.

25

26

27

*Sections that do not apply to household property*

28

- (4) The following sections do not apply in relation to collateral that is used by a grantor predominantly for personal, domestic or household purposes:

29

30

(a) sections ^156 and ^157 (relationship with land laws);

31

# EXPOSURE DRAFT

## Chapter 4 Enforcement of security interests

### Part 4.1 General rules

#### Section ^150

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- 1 (b) section ^159 (enforcement of liquid assets);
- 2 (c) paragraph ^166(2)(b) (disposal of collateral by lease);
- 3 (d) section ^167 (disposal by purchase);
- 4 (e) section ^172 (retention of collateral).

#### 5 **^150 Rights and remedies**

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

- 10 (a) the debtor;
- 11 (b) the grantor;
- 12 (c) a secured party.

#### 13 **^151 Rights and remedies under this Part**

14 (1) In exercising rights and remedies provided by this Part, a secured  
15 party may deal with collateral only to the same extent as the  
16 grantor would be entitled to so deal with the collateral.

17 (2) However, subsection (1) does not apply:

- 18 (a) if the secured party had title to the collateral immediately  
19 before starting to exercise any right or remedy provided by  
20 this Part; or
- 21 (b) if:
  - 22 (i) the security interest is an interest (or right), in relation to  
23 personal property, to which subsection ^28(3) applies;  
24 and
  - 25 (ii) the transaction that provides for the security interest  
26 does not, in substance, secure payment or performance  
27 of an obligation; or

28 Note: Subsection ^28(3) applies in relation to a transfer of an account  
29 or chattel paper, a PPS lease or a commercial consignment.

- 30 (c) to the extent that it would otherwise prevent the secured party  
31 from dealing with the collateral by way of transfer because a  
32 transfer by the grantor would be prohibited or declared to be  
33 a default under an agreement (whether or not a security  
34 agreement).



1 Note: See section ^124 (transfer of grantor's rights in collateral).

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

7 **^152 Recovering judgment or issuing execution does not extinguish**  
8 **a security interest in collateral**

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

12 **^153 Rights and remedies under this Chapter are cumulative**

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

14 **^154 Contracting out of enforcement provisions**

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

- 17 (1) The parties to a security agreement that provides for a security  
18 interest in collateral that is not used predominantly for personal,  
19 domestic or household purposes may contract out of the following  
20 provisions in relation to the collateral (to the extent, if any,  
21 mentioned):  
22 (a) section ^144 (secured party entitled to seize property may  
23 remove it);  
24 (b) section ^145 (notice of removal of accession), to the extent  
25 that it requires the secured party to give a notice to the  
26 grantor;  
27 (c) section ^146 (when person must not remove accession);  
28 (d) section ^156 (relationship with land laws);  
29 (e) section ^157 (proceeding as if personal property were land),  
30 to the extent that it allows a secured party to give a notice to  
31 the grantor;  
32 (f) section ^159 (enforcement of liquid assets);

# EXPOSURE DRAFT

## Chapter 4 Enforcement of security interests

### Part 4.1 General rules

#### Section ^154

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- 1 (g) subsection ^160(4) (enforcement of liquid assets—notice to  
2 grantor);
- 3 (h) section ^161 (right to seize collateral);
- 4 (i) section ^163 (obligation to dispose of or retain collateral);
- 5 (j) section ^164 (apparent possession);
- 6 (k) section ^166 (secured party may dispose of collateral);
- 7 (l) section ^167 (disposal by purchase);
- 8 (m) section ^168 (notice of disposal), to the extent that it requires  
9 the secured party to give a notice to the grantor;
- 10 (n) paragraph ^170(3)(d) (contents of statement of account after  
11 disposal);
- 12 (o) subsection ^170(4) (statement of account if no disposal);
- 13 (p) subsection ^172(1) (retention of collateral);
- 14 (q) section ^173 (notice of retention);
- 15 (r) section ^180 (redemption of collateral);
- 16 (s) section ^181 (reinstatement of security agreement).
- 17 (2) However, if parties to a security agreement contract out of a  
18 provision, the provision continues to the extent that it gives rights  
19 to, and imposes obligations in relation to, persons who are not  
20 parties to the security agreement.
- 21 Example: Parties to a security agreement contract out of the right to seize  
22 property under section ^161. A secured party who is not a party to the  
23 security agreement may seize the property under section ^161.
- 24 (3) Despite subsection (2), if parties to a security agreement contract  
25 out of section ^180 (redemption of collateral), the provision does  
26 not give any person (whether or not the person is a party to the  
27 agreement) a right to redeem collateral under section ^180.
- 28 *Collateral that is used predominantly for personal, domestic or*  
29 *household purposes*
- 30 (4) The parties to a security agreement that provides for a security  
31 interest in collateral that is used predominantly for personal,  
32 domestic or household purposes may contract out of section ^164  
33 (apparent possession) in relation to the collateral.

1 *Contracts between persons other than the grantor*

2 (5) A person (including a secured party, but not including the grantor)  
3 who is entitled to receive a notice from a secured party under one  
4 or more provisions in this Chapter may contract with the secured  
5 party out of one or more of those provisions.

6 (6) 2 secured parties may contract out of the right of one of the secured  
7 parties to receive an amount under subsection ^165(6) (payment of  
8 enforcing party's costs) from the other secured party.

9 **^155 Relationship between this Chapter and the *Corporations Act***  
10 ***2001***

11 This Chapter does not apply in relation to property while a person  
12 is a receiver, a receiver and manager or a controller of the property,  
13 within the meaning of Part 5.2 of the *Corporations Act 2001*.

14 **^156 Relationship with land laws**

15 (1) This section applies if:

16 (a) the same obligation is secured by:

17 (i) a security interest in personal property to which this Act  
18 applies; and

19 (ii) an interest in land; and

20 (b) either:

21 (i) the secured party's security interest in the personal  
22 property has the highest priority; or

23 (ii) every other secured party with a security interest in the  
24 personal property that has a higher priority has agreed in  
25 writing to the secured party's making a decision under  
26 this section.

27 Note 1: This section does not apply in relation to collateral that is used  
28 predominantly for personal, domestic or household purposes (see  
29 subsection ^149(4)).

30 Note 2: The interest referred to in this subsection might be an interest to which  
31 this Act would otherwise not apply (see subsection ^6(2)).

32 (2) The secured party may make a decision:

# EXPOSURE DRAFT

## Section ^157

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- 1 (a) to proceed under this Chapter in relation to the personal  
2 property; or  
3 (b) to proceed as if the personal property were land.
- 4 (3) In making a decision under subsection (2), the secured party must  
5 act reasonably and only take into account the following matters:  
6 (a) the respective values of the personal property and the land;  
7 (b) whether there is any connection between, and the nature of  
8 any connection between, the personal property and the land;  
9 (c) whether the land and the personal property are both located  
10 in the same State or Territory;  
11 (d) such other matters as are relevant to the efficient enforcement  
12 of the security interest and the interest in the land.

### 13 *Proceeding under this Chapter*

- 14 (4) Proceeding under this Chapter in relation to personal property does  
15 not limit the secured party's rights, remedies and duties with  
16 respect to the land.

## 17 **^157 Proceeding as if personal property were land**

### 18 *Scope*

- 19 (1) This section applies if:  
20 (a) the secured party decides under section ^156 to proceed as if  
21 the personal property were land; and  
22 (b) unless section ^182 applies, the secured party gives a notice  
23 in accordance with subsection (2) to the following persons:  
24 (i) the grantor;  
25 (ii) a secured party with a security interest in the personal  
26 property that is perfected immediately before the  
27 decision under section ^156;  
28 (iii) any person who, by the time the secured party gives the  
29 notice, has notified the secured party in writing that the  
30 person claims an interest in the personal property.
- 31 (2) A notice is given in accordance with this subsection if:  
32 (a) the notice is in the approved form; or

- 1 (b) the notice:  
2 (i) contains a description of the personal property to which  
3 the notice relates; and  
4 (ii) sets out the effect of this section.

5 *Application of land law of State or Territory*

- 6 (3) Subject to this section, the provisions, as in force from time to  
7 time, of the land law of the State or Territory in which the land is  
8 located apply, by force of this section, as if the personal property  
9 were land.

10 Note: For example, the secured party has the same rights, remedies and  
11 duties under that land law in relation to the personal property as the  
12 secured party has in relation to the land.

- 13 (4) The regulations may make modifications of a provision of a land  
14 law that is applied by force of subsection (3) in order to facilitate  
15 the application of the provision to personal property.

16 Note: For the meaning of *modification*, see section ^26.

17 *Relationship between this Act and applied land law*

- 18 (5) Despite any provision of a land law applied by force of  
19 subsection (3), section ^177 (distribution of proceeds) and this  
20 section apply to the personal property. Otherwise, this Chapter  
21 does not apply to the personal property.

- 22 (6) In addition:

- 23 (a) the decision of the secured party (the *first secured party*) to  
24 proceed as if the personal property were land does not limit  
25 the rights of any other secured party (the *other secured*  
26 *party*) who has a security interest in the personal property  
27 (whether granted before or after the security interest  
28 mentioned in paragraph ^156(1)(a)); and  
29 (b) the other secured party has standing in proceedings taken by  
30 (or on behalf of) the first secured party in accordance with  
31 paragraph ^156(2)(b); and  
32 (c) the other secured party may apply to a court in relation to the  
33 land for the conduct of a judicially supervised sale under  
34 paragraph ^156(2)(b); and

## Section ^158

---

1 (d) the court may grant the application.

2 Note: For which courts have jurisdiction, and for transfers between courts,  
3 see Part 6.6.

4 *Exercise of powers etc. under applied land law*

5 (7) The Minister may make an arrangement with the appropriate  
6 Minister of a State in relation to the exercise or performance of a  
7 power, duty or function (not being a power, duty or function  
8 involving the exercise of judicial power) by an authority of the  
9 State under the provisions of a land law applied by force of  
10 subsection (3).

11 (8) If such an arrangement is in force, the power, duty or function may  
12 or must, as the case may be, be exercised or performed  
13 accordingly.

14 (9) The Minister may arrange with the appropriate Minister of a State  
15 for the variation or revocation of an arrangement made under this  
16 section in relation to the State.

17 *Meaning of land law*

18 (10) In this Act:

19 *land law* means those provisions of a law of a State or Territory, or  
20 of the general law, that relate to the enforcement of an interest in  
21 land that secures an obligation.

## 22 **^158 Relationship with the Consumer Credit Code**

23 (1) This Chapter applies in relation to a security interest in collateral to  
24 which the Consumer Credit Code of a State or Territory applies.

25 (2) The regulations may provide that a specified provision of this  
26 Chapter is taken to have been complied with in specified  
27 circumstances if a specified provision of the Consumer Credit  
28 Code of a State or Territory has been complied with in those  
29 circumstances.

1

2

3

## Part 4.2—Enforcement of liquid assets

4

### **^159 Enforcement of liquid assets**

5

(1) This section applies if:

6

(a) an obligation (the *secured obligation*) is secured by a security interest in collateral in the form of one of the following:

7

8

9

(i) an account;

10

(ii) chattel paper;

11

(iii) an investment instrument or investment entitlement that provides an obligation to pay the grantor;

12

13

(iv) a negotiable instrument; and

14

(b) one or more persons owe an amount to the grantor on the collateral; and

15

16

(c) the debtor defaults on the secured obligation.

17

18

19

Note: This section does not apply in relation to collateral that is used predominantly for personal, domestic or household purposes (see subsection ^149(4)).

20

#### *Rights of secured party*

21

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

22

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

23

24

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

25

(ii) is in the approved form;

26

(b) seize any proceeds of the collateral to which the secured party is entitled under section ^68.

27

28

29

Note: A secured party might be prevented from taking action under this subsection by a higher priority party (see subsection ^160(3)).

30

31

32

33

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

(a) the day the notice is received; or

# EXPOSURE DRAFT

## Chapter 4 Enforcement of security interests

### Part 4.2 Enforcement of liquid assets

#### Section ^160

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- 1 (b) the day the amount becomes due and payable.
- 2 (4) The secured party must apply any amount received under  
3 paragraph (2)(b) or subsection (3) towards the secured obligation.
- 4 (5) If any amount is received under paragraph (2)(b) and  
5 subsection (3) in the form of currency, then the amount must be  
6 distributed in accordance with section ^177.

#### 7 **^160 Notice to higher priority parties and grantor**

##### 8 *Notice to higher priority parties*

- 9 (1) Unless section ^182 applies, a secured party (the **enforcing party**)  
10 who proposes to take action under subsection ^159(2) in relation to  
11 a security interest in collateral must give a written notice to any  
12 other secured party (a **higher priority party**) with a security interest  
13 in the collateral that has a higher priority.
- 14 (2) The notice must:
- 15 (a) contain the name of the secured party giving the notice; and  
16 (b) contain a description of the collateral; and  
17 (c) state that the enforcing party proposes to take action under  
18 paragraph ^159(2)(a) or (b), as the case requires; and  
19 (d) state the address to which a notice may be given under  
20 subsection (3); and  
21 (e) be given to each higher priority party:
- 22 (i) at least 10 business days before the day the action is to  
23 be taken; or  
24 (ii) if a higher priority party has given a written notice to  
25 the enforcing party specifying a shorter period to apply  
26 for the purposes of this subsection—before the end of  
27 that period.
- 28 (3) A higher priority party who is given a notice under subsection (1)  
29 may, before any action is taken under subsection ^159(2), give a  
30 written notice to the enforcing party informing the enforcing party  
31 of the higher priority party's proposal to take action under that  
32 subsection. If the higher priority party gives such a notice, the  
33 enforcing party is not entitled to take action under that subsection.



# EXPOSURE DRAFT

Enforcement of security interests **Chapter 4**

Enforcement of liquid assets **Part 4.2**

Section ^160

---

1

*Notice to grantor*

2

(4) A secured party must give a written notice to the grantor of any action the secured party takes in accordance with subsection ^159(2).

3

4

5

(5) The notice under subsection (4) must be given:

6

(a) before the end of 5 business days after the day the action is taken; or

7

8

(b) if the grantor has given a written notice to the secured party specifying a shorter period to apply for the purposes of this subsection—before the end of that period.

9

10

# EXPOSURE DRAFT

Chapter 4 Enforcement of security interests

Part 4.3 Seizure and disposal or retention of collateral

Division 1 Seizing collateral

Section ^161

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1

2

## Part 4.3—Seizure and disposal or retention of collateral

3

4

### Division 1—Seizing collateral

5

#### ^161 Secured party may seize collateral

6

- (1) A secured party may seize collateral, by any method permitted by law, if the debtor is in default under the security agreement.

7

8

Note: For seizure of accessions, see sections ^144 to ^148.

9

- (2) For the purposes of this Chapter, a secured party seizes intangible property by giving a notice to:

10

11

(a) the grantor; and

12

(b) if the intangible property is a licence—either:

13

(i) the licensor; or

14

(ii) the licensor's successor.

15

- (3) A secured party who seizes collateral under this section does not perfect the secured party's security interest in the collateral.

16

17

#### ^162 Secured party who has perfected a security interest in collateral by possession or control

18

19

- (1) This section applies if:

20

(a) a secured party has perfected a security interest in collateral by possession or control of the collateral; and

21

22

(b) the debtor is in default under the security agreement.

23

- (2) A secured party may seize the collateral under section ^161 by giving a notice to:

24

25

(a) the grantor; and

26

(b) if the collateral is a licence—either:

27

(i) the licensor; or

28

(ii) the licensor's successor.

- 1 (3) To avoid doubt, this section applies whether the secured party has  
2 perfected the security interest only by possession or control, or by  
3 another method as well.

## 4 **^163 Obligation to dispose of or retain collateral**

- 5 (1) A secured party who seizes collateral under section ^161 must:  
6 (a) dispose of the collateral in accordance with Division 2; or  
7 (b) retain the collateral in accordance with Division 3.
- 8 (2) Before disposing of or retaining the collateral, the secured party is,  
9 subject to the security agreement that covers the collateral, entitled  
10 to a reasonable period in which:  
11 (a) to secure, store and value the collateral; and  
12 (b) to determine how to deal with the collateral.
- 13 (3) The secured party may delay disposing of, or retaining, the whole  
14 or part of the collateral beyond the reasonable period mentioned in  
15 subsection (2). However, the delay must:  
16 (a) if the security agreement providing for the security interest  
17 allows the secured party to delay disposing of, or retaining,  
18 the collateral—be in accordance with the security agreement;  
19 or  
20 (b) otherwise—be reasonable in the circumstances, having  
21 regard to the interests of the debtor, the grantor, other secured  
22 parties or other parties with an interest in the collateral.

## 23 **^164 Apparent possession of collateral**

- 24 (1) If:  
25 (a) collateral cannot be readily moved from a grantor's premises,  
26 or from the premises of an agent of a grantor; or  
27 (b) adequate storage facilities are not readily available for  
28 collateral;  
29 a secured party may seize the collateral under section ^161 by  
30 taking apparent possession of the collateral.
- 31 (2) A secured party who takes apparent possession of collateral may  
32 dispose of the collateral under section ^166 on the grantor's or  
33 agent's premises. However, the secured party must not cause the

# EXPOSURE DRAFT

## Chapter 4 Enforcement of security interests

### Part 4.3 Seizure and disposal or retention of collateral

#### Division 1 Seizing collateral

#### Section ^165

---

1 grantor or agent any greater cost or inconvenience than is  
2 necessarily incidental to the disposal.

3 (3) To avoid doubt, a secured party who takes apparent possession of  
4 collateral in accordance with this section does not perfect the  
5 secured party's security interest in the collateral.

#### 6 **^165 Seizure by higher priority parties—notice**

##### 7 *Scope*

8 (1) This section applies if at any time while collateral is seized by a  
9 secured party (the *enforcing party*), whether under section ^161 or  
10 otherwise, for the purposes of enforcement, another secured party  
11 (the *higher priority party*) has a security interest in the collateral  
12 that has a higher priority under this Act.

##### 13 *Notice requiring enforcing party to give possession of collateral to* 14 *higher priority party*

15 (2) The higher priority party may give a written notice to the enforcing  
16 party, requiring the enforcing party to give the higher priority party  
17 possession of the seized collateral.

18 Note: If a person has a perfected security interest in the collateral that ranks  
19 higher than that of the secured party, and the person does not give a  
20 notice under this section, the person retains a security interest in the  
21 collateral.

22 (3) However, the higher priority party must not give a notice to the  
23 enforcing party under subsection (2) unless the higher priority  
24 party would be entitled to seize the collateral (in the higher priority  
25 party's own right) in accordance with a security agreement, had the  
26 enforcing party not first seized the collateral.

27 (4) An enforcing party who is given a notice under subsection (2) must  
28 comply with the notice before the end of the following period:

29 (a) the period of 5 business days after the day the notice is  
30 received;

31 (b) such further period as is reasonable in the circumstances.

32 Note: The period may be extended under section ^257.

# EXPOSURE DRAFT

1 (5) A higher priority party who is given possession of collateral under  
2 this section is taken to have complied with the requirements of  
3 subsection ^161(2) (notice of seizure) in relation to the seizure of  
4 the collateral.

5 *Payment of enforcing party's costs*

6 (6) A higher priority party who is given possession of collateral under  
7 this section must, subject to subsections (7) and (8), pay the  
8 enforcing party the amount of any enforcement expenditure or  
9 costs made or incurred by the enforcing party, in relation to the  
10 enforcement of the security interest in the collateral.

11 (7) A higher priority party must pay an amount under subsection (6)  
12 only to the extent that, before the higher priority party disposes of  
13 the collateral, the enforcing party gives the higher priority party  
14 evidence showing that the enforcing party incurred the amount.

15 (8) The amount payable under subsection (6) is the lesser of the  
16 following amounts:

- 17 (a) the amount mentioned in the subsection;
- 18 (b) the amount of any proceeds from the higher priority party's  
19 disposal of the collateral, after deducting any enforcement  
20 expenditure or costs of the higher priority party of a kind  
21 mentioned in that subsection.

22 Note: 2 secured parties can contract out of this provision (see subsection  
23 ^154(6)).

24 (9) A higher priority party must pay an amount under subsection (6)  
25 before the end of 20 business days after the day the higher priority  
26 party disposes of the collateral.

27 Note: The period may be extended under section ^257.

28 (10) The amount under subsection (6) is a debt due to the enforcing  
29 party.

30 (11) The enforcing party may apply to a court to recover the amount of  
31 the debt, and the court may grant the application.

32 Note: For which courts have jurisdiction, and for transfers between courts,  
33 see Part 6.6.

# EXPOSURE DRAFT

Chapter 4 Enforcement of security interests

Part 4.3 Seizure and disposal or retention of collateral

Division 2 Disposing of collateral (including by purchasing collateral)

Section ^166

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1

2

## **Division 2—Disposing of collateral (including by purchasing collateral)**

3

4

### **^166 Secured party may dispose of collateral**

5

- (1) A secured party may dispose of collateral if the secured party has seized the collateral in the exercise of a right to seize the collateral under the security agreement upon default by the debtor (whether under section ^161 or otherwise).

6

7

8

9

Note 1: A secured party may dispose of collateral by purchasing the collateral (see section ^167).

10

11

Note 2: The person who acquires the collateral as a result of the disposal does so free of certain security interests (see section ^171).

12

13

Note 3: The secured party may act as agent for the grantor in transferring title (see section ^179).

14

15

#### *Method of disposal*

16

- (2) A secured party may dispose of collateral under this section:

17

(a) by private or public sale (including auction or closed tender);

18

or

19

(b) if the collateral is commercial property, and the security agreement so provides—by lease; or

20

21

(c) if the collateral is intellectual property—by licence.

22

Note 1: A different rule applies in relation to disposal by purchase (see subsection ^167(3)).

23

24

Note 2: Paragraph (2)(b) does not apply in relation to collateral that is used predominantly for personal, domestic or household purposes (see subsection ^149(4)).

25

26

27

- (3) For the purposes of this Act, if collateral is disposed of by lease or licence, the disposal occurs at the time the lease or licence is entered into.

28

29

30

- (4) The power to dispose of collateral by a lease or licence must be exercised in accordance with the terms and conditions of the security agreement.

31

32

# EXPOSURE DRAFT

Enforcement of security interests Chapter 4

Seizure and disposal or retention of collateral Part 4.3

Disposing of collateral (including by purchasing collateral) Division 2

Section ^167

---

1 (5) A disposal under this section may be of the whole or part of the  
2 collateral.

3 *Disposal of licences*

4 (6) The power to dispose of a licence must be exercised subject to:  
5 (a) the terms and conditions of the licence; and  
6 (b) any applicable law of the Commonwealth, a State or a  
7 Territory.

8 (7) The secured party must apply any proceeds (within the ordinary  
9 meaning of that term) of a disposal under this section, received by  
10 or on behalf of the secured party, in accordance with section ^177.

11 Note: A security interest does not continue, under section ^68, in proceeds  
12 received by or on behalf of a secured party under this section (see  
13 subsections ^42(2) and (3)).

14 **^167 Disposal by purchase**

15 (1) A secured party may, under subsection ^166(1), dispose of  
16 collateral that is commercial property by purchasing the collateral.

17 Note: This section does not apply in relation to collateral that is used  
18 predominantly for personal, domestic or household purposes (see  
19 subsection ^149(4)).

20 (2) However, the secured party may dispose of the collateral by  
21 purchasing it only if:  
22 (a) the secured party gives a notice under section ^168 stating  
23 that the secured party proposes to purchase the collateral; and  
24 (b) no notice of objection is given to the secured party in  
25 accordance with subsection ^175(2).

26 (3) Despite subsection ^166(2) and section ^169, a secured party may  
27 purchase collateral only:  
28 (a) by public sale (including auction or closed tender); and  
29 (b) by paying at least the market value at the time of the  
30 purchase.

31 Note: Section ^272 deals with the onus of proving matters under this  
32 subsection.

# EXPOSURE DRAFT

Chapter 4 Enforcement of security interests

Part 4.3 Seizure and disposal or retention of collateral

Division 2 Disposing of collateral (including by purchasing collateral)

Section ^168

---

1     **^168 Notice of disposal of collateral**

2             (1) Unless subsection (6) of this section or section ^182 applies, a  
3             secured party who proposes to dispose of collateral (whether or not  
4             under section ^166) must give a notice, in accordance with  
5             subsections (2) and (3) of this section, to:

- 6                 (a) the grantor; and  
7                 (b) any other secured party with a security interest in the  
8                 collateral that has a higher priority.

9             (2) The secured party must give the notices at least 5 business days  
10             before the day the collateral is disposed of.

11            (3) A notice must:

- 12                 (a) contain the name of the secured party giving the notice; and  
13                 (b) contain a description of the collateral; and  
14                 (c) state that the secured party proposes to dispose of the  
15                 collateral, unless an obligation is performed, or an amount is  
16                 paid, to satisfy the obligation secured by the security interest  
17                 in the collateral, on or before the day specified in accordance  
18                 with subsection (4); and  
19                 (d) state that the notice is given for the purposes of this Act; and  
20                 (e) if the secured party is proposing to dispose of the collateral  
21                 by purchase:  
22                         (i) contain details of rights of objection under Division 4;  
23                         and  
24                         (ii) contain the address to which a notice may be given  
25                         under section ^175; and  
26                 (f) contain any other matter required by the regulations for the  
27                 purposes of this subsection.

28            (4) For the purposes of paragraph (3)(c), the day specified in a notice  
29            given to a person:

- 30                 (a) must be at least 10 business days after the day the notice is  
31                 given; or  
32                 (b) if the person has given a written notice to the secured party  
33                 specifying a shorter period to apply for the purposes of this  
34                 section—before the end of that period.

35            (5) The notice may be given in the approved form.



# EXPOSURE DRAFT

Enforcement of security interests **Chapter 4**

Seizure and disposal or retention of collateral **Part 4.3**

Disposing of collateral (including by purchasing collateral) **Division 2**

Section ^169

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1 *When notice is not required*

2 (6) The secured party is not required to give a notice to any person  
3 under subsection (1) if:

- 4 (a) the secured party believes on reasonable grounds that the  
5 secured party was induced to enter into the relevant security  
6 agreement by fraud on the part of the debtor or the grantor; or  
7 (b) the secured party believes on reasonable grounds that the  
8 collateral might perish before the end of 10 business days  
9 after the day the collateral is seized; or  
10 (c) the secured party believes on reasonable grounds that there  
11 will be a material decline in the value of the collateral if it is  
12 not disposed of immediately after the day the collateral is  
13 seized; or  
14 (d) the secured party believes on reasonable grounds that the cost  
15 of care and storage of the collateral is disproportionately  
16 large in relation to its value; or  
17 (e) the collateral is foreign currency; or  
18 (f) the collateral is to be disposed of in accordance with the  
19 operating rules of a clearing and settlement facility.

20 **^169 Duty of secured party disposing of collateral to obtain market**  
21 **value**

22 A secured party who disposes of collateral under section ^166  
23 (other than by purchasing the collateral) owes a duty, to any person  
24 (including the debtor and the grantor) who has an interest in the  
25 collateral immediately before the disposal, to exercise all  
26 reasonable care:

- 27 (a) if the collateral has a market value at the time of disposal—to  
28 obtain at least that market value; or  
29 (b) otherwise—to obtain the best price that is reasonably  
30 obtainable at the time of disposal, having regard to the  
31 circumstances existing at that time.

32 Note: A different rule applies in relation to disposal by purchase (see  
33 subsection ^167(3)).

# EXPOSURE DRAFT

Chapter 4 Enforcement of security interests

Part 4.3 Seizure and disposal or retention of collateral

Division 2 Disposing of collateral (including by purchasing collateral)

Section ^170

---

1     **^170 Secured party to give statement of account**

2                     *Statement of account following disposal*

3             (1) Unless section ^182 applies, a secured party must, on request by a  
4                 person mentioned in subsection ^168(1), or the debtor, give the  
5                 person (or debtor) a written statement of account, if the secured  
6                 party disposes of collateral under section ^166 (including by  
7                 purchasing the collateral in accordance with section ^167).

8             (2) A statement of account under subsection (1) must be given to a  
9                 person before the end of:

10                 (a) the period of 20 business days after the day the person

11                     requests the statement; or

12                 (b) such further period as is reasonable in the circumstances.

13             Note:         The period may be extended under section ^257.

14             (3) A statement of account under subsection (1) must show:

15                 (a) in the case of a disposal by a lease or licence—the total  
16                     amount received, and expected to be received, during the  
17                     period:

18                     (i) beginning when the secured party seized the collateral;

19                         and

20                     (ii) ending at the end of the lease or licence; and

21                 (b) in any other case—the total amount received from the  
22                     disposal of the collateral (or in the case of disposal by  
23                     purchase, paid by the secured party) during the period:

24                     (i) beginning when the secured party seized the collateral;

25                         and

26                     (ii) ending at the time of the disposal of the collateral; and

27                 (c) the amount of enforcement expenditure or costs relating to  
28                     the disposal; and

29                 (d) any amounts paid to other secured parties; and

30                 (e) the balance owing by the secured party to the grantor, or by  
31                     the debtor to the secured party, as the case may be.

# EXPOSURE DRAFT

Enforcement of security interests Chapter 4

Seizure and disposal or retention of collateral Part 4.3

Disposing of collateral (including by purchasing collateral) Division 2

Section ^171

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1

## *Statement of account if no disposal*

2

(4) A secured party who has not disposed of collateral before the end of 6 months after the day the collateral is seized must, in accordance with subsections (5) and (6), give a written statement of account for each period of 6 months after seizing the collateral, until the collateral is disposed of.

3

4

5

6

7

(5) The statement of account for a 6 month period must be given to a person referred to in subsection ^168(1), or the debtor, if the person (including the debtor) requests the statement for that period.

8

9

10

(6) A statement of account under subsection (4) must be given to a person before the end of:

11

12

(a) the period of 20 business days after the day the person requests the statement; or

13

14

(b) such further period as is reasonable in the circumstances.

15

Note: The period may be extended under section ^257.

16

(7) A statement of account under subsection (4) must:

17

(a) state that the secured party has not disposed of the collateral; and

18

19

(b) show the total amount received in relation to the collateral during the period:

20

21

(i) beginning when the secured party seized the collateral;

22

and

23

(ii) ending at the time the statement is given; and

24

(c) show the amount of enforcement expenditure or costs

25

relating to the retention of the collateral before the disposal.

26

## **^171 Disposing of collateral free of interests**

27

(1) If collateral has been disposed of under section ^166 (including by a secured party purchasing the collateral), a person acquires the collateral as a result of the disposal free of all of the following interests in the collateral:

28

29

30

(a) the interest of the grantor;

31

32

(b) the security interest of the secured party who disposed of the collateral;

33

# EXPOSURE DRAFT

**Chapter 4** Enforcement of security interests

**Part 4.3** Seizure and disposal or retention of collateral

**Division 2** Disposing of collateral (including by purchasing collateral)

Section ^171

---

1 (c) all security interests that have a lower priority than the  
2 security interest of that secured party.

3 Note: If a person has a perfected security interest in the collateral that ranks  
4 higher than that of the secured party, the person retains a security  
5 interest in the collateral.

6 (2) Subsection (1) applies in relation to a disposal of collateral (other  
7 than a disposal by a secured party purchasing the collateral) even if  
8 the requirements of this Chapter have not been complied with.

1

2 **Division 3—Retaining collateral**

3 **^172 Proposal of secured party to retain collateral**

4 (1) A secured party may retain collateral if the secured party has  
5 seized the collateral in the exercise of a right to seize the collateral  
6 under the security agreement upon default by the debtor (whether  
7 under section ^161 or otherwise).

8 Note 1: This section does not apply in relation to collateral that is used  
9 predominantly for personal, domestic or household purposes (see  
10 subsection ^149(4)).

11 Note 2: The secured party may act as agent for the grantor in transferring title  
12 (see section ^179).

13 (2) However, the secured party may retain the collateral only if:  
14 (a) the secured party gives a notice under section ^173 to retain  
15 the collateral; and  
16 (b) no notice of objection is given to the secured party in  
17 accordance with subsection ^175(2).

18 **^173 Notice of retention of collateral**

19 (1) A secured party (the *retaining party*) who proposes to retain  
20 collateral under section ^172 must (unless section ^182 applies)  
21 give a notice of the proposal, in accordance with subsections (2)  
22 and (3) of this section, to:

23 (a) the grantor; and

24 (b) if the security interest of the retaining party is not a purchase  
25 money security interest—a secured party who, at the time the  
26 retaining party gives the notice, has a registration describing  
27 the collateral; and

28 (c) if the security interest of the retaining party is a purchase  
29 money security interest—a secured party who the retaining  
30 party has priority over under section ^109, ^110 or ^112, but  
31 only if, at the time the retaining party gives the notice, the  
32 secured party has a registration describing the collateral.

33 (2) The secured party must give a notice to a person:

# EXPOSURE DRAFT

## Chapter 4 Enforcement of security interests

### Part 4.3 Seizure and disposal or retention of collateral

#### Division 3 Retaining collateral

#### Section ^174

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- 1 (a) at least 10 business days before the day the first steps are  
2 taken to retain the collateral; or  
3 (b) if the person has given a written notice to the secured party  
4 specifying a shorter period to apply for the purposes of this  
5 section—before the end of that period.
- 6 (3) A notice must:
- 7 (a) contain the name of the secured party giving the notice; and  
8 (b) contain a description of the collateral; and  
9 (c) state that the secured party proposes to retain the collateral,  
10 unless an obligation is performed, or an amount is paid, as  
11 mentioned in paragraph (d), on or before a specified day  
12 (being a day that is at least 10 business days after the day the  
13 notice is given); and  
14 (d) state the obligation to be performed, or the amount of the  
15 payment required, before the day specified in accordance  
16 with paragraph (c), to satisfy the obligation secured by the  
17 security interest in the collateral; and  
18 (e) contain details of rights of objection under Division 4; and  
19 (f) contain the address to which a notice may be given under  
20 section ^175; and  
21 (g) contain any other matter required by the regulations for the  
22 purposes of this subsection.
- 23 (4) The notice may be given in the approved form.

#### 24 **^174 Retaining collateral free of interests**

25 *Retaining collateral free of interests if notices have been given in*  
26 *accordance with section ^173*

- 27 (1) If:
- 28 (a) a secured party gives one or more notices in accordance with  
29 section ^173 to retain collateral; and  
30 (b) no notice of objection is given to the secured party in  
31 accordance with subsection ^175(2);  
32 then, at the end of the day specified in accordance with paragraph  
33 ^173(3)(c), the secured party is entitled to take steps to have title to  
34 the collateral pass to the secured party.

# EXPOSURE DRAFT

- 1 (2) At the time the title to the collateral passes to the secured party, the  
2 secured party acquires the collateral free of all of the following  
3 interests in the collateral:  
4 (a) the interest of the grantor;  
5 (b) the security interest of the secured party to whom title passes;  
6 (c) all security interests that have a lower priority than the  
7 security interest of that secured party.

8 *Acquiring collateral that has been retained free of interests if*  
9 *notices have not been given in accordance with section ^173*

- 10 (3) A person acquires collateral free of the interests referred to in  
11 subsection (2) if:  
12 (a) a secured party is required to give one or more notices in  
13 relation to the collateral in accordance with section ^173; and  
14 (b) the secured party has not done so; and  
15 (c) the person acquires the collateral from the secured party for  
16 new value; and  
17 (d) the person has no actual knowledge that the requirements of  
18 section ^173 have not been complied with.
- 19 (4) Subsection (3) applies in relation to a security interest referred to in  
20 paragraph (2)(c) whether or not a registration relating to the  
21 security interest has been removed from the Register.

# EXPOSURE DRAFT

Chapter 4 Enforcement of security interests

Part 4.3 Seizure and disposal or retention of collateral

Division 4 Objection to purchase or retention

Section ^175

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1

2

## Division 4—Objection to purchase or retention

3

### ^175 Persons entitled to notice may object to proposal

4

(1) This section applies if:

5

(a) a person is entitled to a notice under section ^168 or ^173;  
and

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(b) a secured party gives the person one of the following notices:

8

(i) a notice under section ^168 that the secured party  
proposes to purchase collateral;

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(ii) a notice under section ^173 that the secured party  
proposes to retain collateral.

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(2) The person may give the secured party a notice (the *notice of objection*) objecting to the purchase or retention before the end of the day specified in accordance with paragraph ^168(4) or ^173(3)(c).

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Note: The secured party may request the person to provide proof of the person's interest under section ^176.

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(3) The secured party must sell or lease the collateral in accordance with section ^166 if the secured party is given a notice of objection in accordance with subsection (2).

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### ^176 Person making objection may be requested by secured party to prove interest

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(1) A secured party who, in accordance with subsection ^175(2), is given a notice of objection by a person (other than the grantor) may request the person to provide proof of that person's interest.

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(2) The notice of objection is taken not to have been given by the person in accordance with subsection ^175(2) if the person does not provide proof of the person's interest before the end of 10 business days after the day the secured party's request is made.

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Note: The period may be extended under section ^257.



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## Part 4.4—Common rules relating to enforcement

4

### **^177 Distribution of proceeds received by secured party**

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(1) This section applies if any amount, personal property or proceeds of collateral is received by or on behalf of a secured party as a result of enforcing a security interest in collateral (whether or not under section ^159 or ^166).

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(2) The amount, personal property or proceeds must be applied in the following order:

(a) obligations to persons holding interests or security interests in the collateral that have a higher priority (whether under this Act or otherwise) than the interest of the secured party;

Note: The interests referred to in this paragraph might be interests to which this Act would otherwise not apply (see subsection ^6(2)).

(b) enforcement expenditure or costs, in relation to the enforcement of the security interest, that are secured by the security interest (as future advances);

(c) obligations to the secured party that are secured by the security interest in the collateral;

(d) obligations to persons holding interests or security interests in the collateral that have a lower priority (whether under this Act or otherwise) than the interest of the secured party;

(e) obligations to the grantor.

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Note 1: Sections ^142 and ^143 affect the operation of this section in relation to commingled property.

Note 2: For the meaning of *enforcement expenditure or costs*, see section ^26.

Note 3: Section ^60 deals with when enforcement expenditure or costs are secured as future advances under a security agreement.

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(3) An amount, personal property or proceeds must be applied against security interests to which paragraph (2)(a) or (d) applies in the order of their priority (whether under this Act or otherwise).

# EXPOSURE DRAFT

## Chapter 4 Enforcement of security interests

### Part 4.4 Common rules relating to enforcement

#### Section ^178

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- 1 (4) This section applies in relation to a security interest in collateral  
2 even if a person acquires the collateral free of the security interest  
3 under section ^171.
- 4 (5) An amount paid, or personal property or proceeds applied, in  
5 accordance with subsection (2) discharges an obligation secured by  
6 an interest in the collateral to the extent of the amount paid or the  
7 value of the proceeds or property applied.
- 8 (6) To avoid doubt, any amount paid by the higher priority party to an  
9 enforcing party in accordance with section ^165 is, for the  
10 purposes of this section, a cost incurred by the higher priority party  
11 for the enforcement of the security interest in the collateral.
- 12 (7) A secured party is not liable to an action, suit or proceeding in  
13 relation to an application of proceeds in accordance with this  
14 section if:  
15 (a) the secured party applied the proceeds honestly; and  
16 (b) the secured party applied the proceeds in a commercially  
17 reasonable manner.

#### **^178 Commonwealth to hold amount or proceeds if distribution unable to be made**

##### *Scope*

- 21 (1) This section applies if a secured party:  
22 (a) is not able to determine the order of application of an amount  
23 or proceeds (the ***undistributed amount***) under subsection  
24 ^177(2); or  
25 (b) after making reasonable inquiries, is not able to find a person  
26 to whom a particular amount (the ***undistributed amount***)  
27 must be paid under that subsection; or  
28 (c) is not able to determine the amount (the ***undistributed***  
29 ***amount***) of a particular payment to be made under that  
30 subsection.

##### *Payment to the Commonwealth*

- 31  
32 (2) The secured party must pay the undistributed amount to the  
33 Commonwealth.

1 Note: The undistributed amount is credited to the PPS Account (see section  
2 ^184).

3 *Payment by the Commonwealth*

- 4 (3) The Commonwealth must pay to a person an amount equal to all or  
5 a proportion of the undistributed amount if, and only if:  
6 (a) on application by the person, a court orders the payment; or  
7 (b) all parties with an interest in the collateral consent in writing  
8 to the payment; or  
9 (c) the Registrar believes on reasonable grounds that:  
10 (i) a court would make an order mentioned in paragraph (a)  
11 on application by the person; and  
12 (ii) it is not commercially practicable or reasonable for the  
13 person to make such an application.

14 Note: For which courts have jurisdiction, and for transfers between courts,  
15 see Part 6.6.

- 16 (4) In addition, if the Commonwealth pays an amount to a person  
17 under subsection (3), the Commonwealth must pay the person an  
18 amount of interest if:  
19 (a) in the case mentioned in paragraph (3)(a)—the court so  
20 orders; or  
21 (b) in the case mentioned in paragraph (3)(b)—the parties so  
22 consent; or  
23 (c) in the case mentioned in paragraph (3)(c)—the Registrar  
24 considers it to be appropriate.

25 Note: The payment is made from the PPS Account (see section ^185).

26 **^179 Secured party may take steps to reflect transfer of title**

27 A secured party who is entitled to dispose of, or retain, collateral  
28 under section ^166 or ^172 may take any steps necessary to reflect  
29 the transfer of title resulting from the disposal or retention, if the  
30 grantor could take those steps to reflect a transfer of title to the  
31 collateral.

# EXPOSURE DRAFT

## Section ^180

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1     **^180 Entitled persons may redeem collateral**

- 2             (1) At any time before a secured party disposes of collateral under  
3             section ^166, a person who is entitled to receive a notice under  
4             subsection ^168(1), or the debtor, may redeem the collateral:  
5                 (a) by paying the amounts required to discharge the obligations,  
6                 or by performing the obligations, secured by security  
7                 interests in the collateral; and  
8                 (b) by paying the amount of any enforcement expenditure or  
9                 costs, in relation to the enforcement of the security interest,  
10                the payment of which is secured (as future advances) by the  
11                security interest.
- 12             (2) However, a person must not redeem collateral under subsection (1)  
13             if the person agrees in writing after the default not to do so.
- 14             (3) The debtor's right to redeem the collateral has priority over any  
15             other person's right to redeem the collateral.

16     **^181 Entitled persons may reinstate security agreement**

- 17             (1) At any time before a secured party disposes of or retains collateral  
18             (whether or not under this Chapter), a person may reinstate the  
19             security agreement by:  
20                 (a) paying the following amounts:  
21                     (i) amounts in arrears (disregarding amounts in arrears as a  
22                     result of an acceleration clause in the security  
23                     agreement);  
24                     (ii) the amount of any enforcement expenditure or costs, in  
25                     relation to the enforcement of the security interest, the  
26                     payment of which is secured (as future advances) by the  
27                     security interest; and  
28                 (b) remedying any other default as a result of which the secured  
29                 party proposes to dispose of, or retain, the collateral.
- 30             (2) A security agreement may be reinstated only once during the  
31             period in which the security agreement is in force.

1 **^182 When a removal notice is not required**

2 A secured party is not required to give a notice to a person under  
3 section ^145, ^157, ^160, ^168, ^170 or ^173, if:

- 4 (a) after having made reasonable attempts, the secured party has  
5 failed to locate the person; or  
6 (b) for the grantor—after the debtor defaults, the grantor waives  
7 in writing the person’s right to receive the notice; or  
8 (c) for a person other than the grantor—the person waives (at  
9 any time) in writing the person’s right to receive the notice;  
10 or  
11 (d) in any case—on an ex parte application in relation to the  
12 person, a court is satisfied that a notice is not required for any  
13 other reason.

14 Note: For which courts have jurisdiction, and for transfers between courts,  
15 see Part 6.6.

# EXPOSURE DRAFT

Chapter 4 Enforcement of security interests

Part 4.5 Personal Property Securities Account

Section ^183

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## Part 4.5—Personal Property Securities Account

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### **^183 The Personal Property Securities Account**

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(1) The Personal Property Securities Account (the *PPS Account*) is established by this section.

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(2) The PPS Account is a Special Account for the purposes of the *Financial Management and Accountability Act 1997*.

8

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### **^184 Personal Property Securities Account—credits**

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There must be credited to the PPS Account amounts equal to the following:

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(a) undistributed amounts paid to the Commonwealth under section ^178 (Commonwealth to hold amount or proceeds if distribution unable to be made);

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(b) interest (if any) earned on the undistributed amounts.

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Note: An Appropriation Act may contain a provision to the effect that, if any of the purposes of a Special Account (such as the PPS Account) is a purpose that is covered by an item in the Appropriation Act (whether or not the item expressly refers to the Special Account), then amounts may be debited against the appropriation for that item and credited to that Special Account.

22

### **^185 Personal Property Securities Account—purpose**

23

The purpose of the PPS Account is to discharge the liability of the Commonwealth, under section ^178, to pay to a person an undistributed amount, or a proportion of an undistributed amount, together with interest.

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1  
2 **Chapter 5—Personal Property Securities**  
3 **Register**

4 **Part 5.1—Establishment of the register**  
5

6 **^186 Personal Property Securities Register**

- 7 (1) The Registrar must establish and maintain a register to be known  
8 as the Personal Property Securities Register.
- 9 (2) The Registrar may keep the register in any form that he or she  
10 considers appropriate.
- 11 (3) The Registrar must ensure that the register is operated at all times,  
12 except:  
13 (a) while access is refused, or its operation is suspended, under  
14 subsection (4); or  
15 (b) in other circumstances prescribed by the regulations.
- 16 (4) If the Registrar considers that it is not practical to provide access to  
17 the register, the Registrar may:  
18 (a) refuse access to the register; or  
19 (b) otherwise suspend the operation of the register, in whole or in  
20 part.
- 21 (5) If the Registrar refuses access to the register, or otherwise suspends  
22 the operation of the register, in whole or in part, under  
23 subsection (4), the Registrar must publish notice of that fact:  
24 (a) in a way prescribed by the regulations; or  
25 (b) if regulations are not made for the purposes of  
26 paragraph (a)—in the Gazette.

27 **^187 What the register contains**

28 The register is to contain the following data:

- 29 (a) data in registrations;

## Section ^188

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- 1 (b) data (if any) prescribed by the regulations in relation to  
2 registrations, or possible registrations;  
3 (c) data (if any) in relation to interests in personal property, other  
4 than security interests, that are prescribed by the regulations.
- 5 Note: Interests in personal property that are prescribed by the regulations  
6 might be interests to which this Act would otherwise not apply (see  
7 subsection ^6(2)).

### 8 **^188 Registration of data other than data in registrations**

- 9 The regulations may apply this Chapter in relation to data  
10 mentioned in paragraph ^187(b) or (c), with any modifications that  
11 are necessary or desirable, to provide for the following:  
12 (a) the inclusion of the data in the register;  
13 (b) the giving of verification statements and notices (under  
14 Part 5.8);  
15 (c) the circumstances in which the registration of the data is  
16 effective for the purposes of this Act or the regulations;  
17 (d) the amendment of the data in the register;  
18 (e) the removal of the data from the register;  
19 (f) the provision of access to the data;  
20 (g) the imposition of fees (under section ^230);  
21 (h) the approval of forms (under section ^274);  
22 (i) anything else in relation to the registration of the data.
- 23 Note: For the meaning of *modification*, see section ^26.



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## Part 5.2—Registration: application and contents

4

### **^189 Registration—application**

5

(1) A person may apply to the Registrar for a *registration* (or registrations) of personal property as collateral.

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(2) The Registrar must give effect to each registration applied for in accordance with the application (subject to sections ^191 and ^192), but only if:

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(a) the application is in the approved form; and

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(b) the fee determined under subsection ^230(1) for the application has been paid to the Commonwealth, unless arrangements for its payment have been made in accordance with a determination for the purposes of subsection ^230(2); and

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(c) the Registrar is not satisfied that the application is:

17

(i) frivolous or vexatious; or

18

(ii) made in contravention of section ^190 (security interests in personal property); and

19

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(d) the registration would not be prohibited by the regulations.

21

Note 1: Section ^194 authorises the registration of personal property as collateral before or after a security agreement is made covering the property, or a security interest has attached to the property.

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Note 2: After registration, the Registrar must give a verification statement to each secured party (see section ^221).

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Note 3: Application may be made to the Administrative Appeals Tribunal for the review of the Registrar's decision under this subsection to refuse to give effect to a registration (see section ^231).

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### **^190 Registration—security interests in personal property**

30

(1) A person must not apply for a registration of personal property as collateral unless the person believes on reasonable grounds that a security interest in the property is, or will be, held by a person (who may or may not be the applicant) stated in the application to be a secured party.

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## Section ^191

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1 Note: Section ^272 deals with the onus of proving matters under this  
2 subsection.

3 (2) For the purposes of section ^236 (but without limiting that  
4 section):

5 (a) compliance with subsection (1) is taken to be an obligation  
6 imposed on a person who seeks to apply for a registration of  
7 personal property; and

8 (b) any person with an interest in the personal property is taken  
9 to be a person to whom that obligation is owed; and

10 (c) a contravention of subsection (1) is taken to be a failure to  
11 discharge that obligation.

12 Note: Section ^236 gives a right to recover damages for any loss or damage  
13 in relation to such a failure.

14 (3) However, if a person applies for a registration of personal property  
15 in contravention of subsection (1), and the property is registered  
16 accordingly, the contravention does not affect the validity or  
17 effectiveness of the registration.

### 18 ^191 Registration—contents

19 A registration consists of the data required by the following table  
20 in relation to the collateral covered (or to be covered) by a security  
21 interest.

22 Note 1: Some of the data will be supplied by the applicant for registration (in  
23 the approved form). Some of the data (for example, the initial  
24 registration time and amendment times) will be supplied by the  
25 operation of the registration system.

26 Note 2: After registration, the Registrar must give a verification statement to  
27 each secured party (see section ^221).

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#### Registration—contents

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Item	Data about ...	Details of data required
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1	The secured party	The details, in relation to each secured party, of: (a) the secured party; or (b) a person nominated by the secured party who has authority to act on behalf of the secured party.
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Note: Subsection ^192(1) allows for the inclusion of  
more than one secured party.

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# EXPOSURE DRAFT

## Section ^191

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### Registration—contents

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Item	Data about ...	Details of data required
2	The grantor	<p>Each grantor's details, unless the collateral is:</p> <ul style="list-style-type: none"><li>(a) consumer property; and</li><li>(b) required by the regulations to be described by a serial number.</li></ul> <p>Note: Subsection ^192(1) allows for the inclusion of more than one grantor.</p>
3	Giving of notices	<p>The following:</p> <ul style="list-style-type: none"><li>(a) an address (including an email address or fax number) for the giving of notices to the secured party (or secured parties) relating to the registration;</li><li>(b) if a secured party applies to register an identifier for the giving of notices to the secured party (or secured parties)—details of the identifier.</li></ul> <p>Note: For identifiers, see section ^251.</p>
4	The collateral and proceeds	<p>A collateral description in accordance with all of the following rules:</p> <ul style="list-style-type: none"><li>(a) the collateral must be described as one of the following:<ul style="list-style-type: none"><li>(i) consumer property;</li><li>(ii) commercial property;</li></ul></li><li>(b) the collateral must be described by serial number, if required by the regulations;</li><li>(c) the collateral must belong to a single class of collateral prescribed by the regulations;</li><li>(d) if proceeds are described—the proceeds must be described in accordance with the regulations.</li></ul> <p>Note 1: In addition, collateral may be described by serial number if allowed by regulations made for the purposes of item 9 of this table (see subsection ^192(4)).</p> <p>Note 2: 2 or more types of collateral that belong to different classes prescribed by the regulations must be registered in separate registrations. However, 2 or more registrations can be effected through a single application (see subsection ^189(1)).</p> <p>Note 3: Descriptions of collateral that is tangible property</p>

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# EXPOSURE DRAFT

## Section ^191

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### Registration—contents

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Item	Data about ...	Details of data required
		are taken to include related descriptions of intellectual property and intellectual property licences in certain circumstances (see section ^38). Note 4: Sections ^68, ^69, ^70 and ^71 deal with the attachment and perfection of security interests in proceeds. Section ^102 deals with the priority of security interests in proceeds.
5	The registration time	The registration time (the <i>initial registration time</i> ) for the initial registration of the collateral described in the registration. Note: If the registration is amended to add collateral, the added collateral may have a later registration time (see section ^193).
6	The end time for registration	Whichever of the following is applicable, in relation to all the collateral described in the registration: (a) for collateral other than consumer property or property described by serial number: (i) no stated end time; or (ii) an end time for the registration no later than the end of the day 25 years (the <i>default registration period</i> ) after the initial registration time; or (iii) if the registration is amended to include or change (but not omit) an end time—an amended end time for the registration no later than the end of the day 25 years (the <i>default registration period</i> ) after the amendment time for that amendment (or the latest such amendment, if there has been more than one); (b) for consumer property, or property described by serial number: (i) an end time for the registration no later than the end of the day 7 years (the <i>default registration period</i> ) after the initial registration time; or (ii) if the registration is amended to change the end time—an amended end time for the registration no later than the end of the day 7 years (the <i>default registration period</i> ) after

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# EXPOSURE DRAFT

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**Registration—contents**

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Item	Data about ...	Details of data required
		the amendment time for that amendment (or the latest such amendment, if there has been more than one).  Note: See subsections ^192(2) and (3) for when a default registration period may apply.
7	Subordination	If a security interest in respect of the collateral (or part of the collateral) has been subordinated by the secured party, and the secured party applies to register details of the subordination—details of the subordination, in accordance with the regulations (if any).
8	Amendments	The following: (a) each amendment time for the registration; (b) the details of each amendment of the registration.  Note: An amendment may end the effective registration of collateral (for the meaning of <i>amendment</i> , see section ^26).
9	Any matter prescribed by the regulations	Details of the matter prescribed by the regulations (see subsection ^192(4)).

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1 **^192 Registration—other matters**

2 *Multiple secured parties and grantors*

- 3 (1) A registration may include either or both of the following (but only  
4 in relation to the whole of the registered collateral):  
5 (a) 2 or more secured parties;  
6 (b) 2 or more grantors.

7 *Default end time*

- 8 (2) Subsection (3) applies to an application for the registration of  
9 collateral (or for an amendment of a registration to include or  
10 change an end time for the collateral) if the application:  
11 (a) for any collateral—states an end time that does not comply  
12 with item 6 of the table in section ^191 (including an end

## Section ^192

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- 1                                   time that is before the initial registration time or amendment  
2                                   time); or  
3                                   (b) for collateral that is consumer property, or property described  
4                                   by serial number—does not state an end time.
- 5                                   (3) The end time to be stated in the register in response to the  
6                                   application is the end of the day that ends the relevant default  
7                                   registration period under item 6 of the table in section ^191.

### 8                                   *Prescribed details*

- 9                                   (4) If a matter is prescribed by the regulations for the purposes of  
10                                   item 9 of the table in section ^191:  
11                                   (a) details about the matter may be prescribed for the purposes of  
12                                   the item even if some other details about the matter are  
13                                   covered by another item in the table; and  
14                                   (b) the regulations may require or authorise details of the matter  
15                                   to be included in the register.

### 16                                   *Defects*

- 17                                   (5) Section ^191 and this section do not limit section ^198 (defects in  
18                                   registration).

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## Part 5.3—Registration: timing

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### **^193 Registration time—general**

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(1) Collateral described in a registration, and any proceeds of that collateral, start to be registered in relation to a particular secured party at the moment (the *registration time*) when a description of the collateral in that registration becomes available for search in the register in relation to that secured party.

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(2) If a registration is amended to add collateral, the additional collateral, and any proceeds of that collateral, start to be registered in relation to a particular secured party at the moment (the *registration time*) when a description of the additional collateral in that registration becomes available for search in the register in relation to that secured party.

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Note 1: A written search result is evidence of the registration of collateral and when it is registered (see section ^229).

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Note 2: See Part 5.4 for when a registration stops being effective. A registration may stop being effective even if it is available for search on the register (for example, because of a defect—see section ^198).

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Note 3: If 2 or more registrations describe the same collateral in relation to the same secured party, there may be different registration times for the collateral in relation to each of the registrations.

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### **^194 Registration time—security agreements and interests**

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Personal property may be registered as collateral before or after:

- (a) a security agreement is made describing the property; or
- (b) a security interest has attached to the property.

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### **^195 Registration time—transfers**

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Collateral may be registered to reflect the transfer of a security interest, or of collateral, before or after the transfer.

Section ^196

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## Part 5.4—Effective registration

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### **^196 End of effective registration—general rule**

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- (1) The registration of collateral described in a particular registration, in relation to a secured party, is effective from the registration time for the description of the collateral in that registration until the earliest of the following times:

- (a) the end time (if any) registered for that registration;
- (b) if that registration is amended to omit the collateral—the amendment time;
- (c) the moment when the description of the collateral in that registration stops being available for search in the register in relation to that secured party.

Note 1: For the registration time for collateral, see section ^193.

Note 2: The end time may be changed by registering an amendment (see section ^204).

- (2) This section is subject to sections ^198, ^199 and ^200 (defects in registration).

### **^197 End of effective registration—failure to pay maintenance fee**

21

#### *Scope*

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- (1) This section applies in relation to a secured party's registration of collateral if the Minister has determined a fee to maintain a registration under subsection ^230(1).
- (2) If an end time is registered for the registration, this section does not apply at or after the end time.

#### *Notice to pay fee*

- (3) The Registrar may give the secured party a written notice requiring the secured party to pay the determined fee stated in the notice to maintain the registration for a period (the *maintenance period*) stated in the notice.



- 1 (4) If an end time is registered for the registration, the maintenance  
2 period must end no later than the end time.
- 3 (5) The notice must include a statement of:
- 4 (a) a time (the *payment time*), no earlier than 28 days after the  
5 notice is given, before which the determined fee must be paid  
6 to prevent the amendment of the registration to end the  
7 effective registration of the collateral; and
- 8 (b) the effect, under subsection (6), of failure to pay the  
9 determined fee.

10 *Failure to pay fee—end of effective registration*

- 11 (6) If the determined fee is not paid before the payment time, the  
12 Registrar may amend the registration to end the effective  
13 registration of the collateral.

14 Note 1: The Registrar must give a verification statement to each secured party  
15 in relation to an amendment of a registration under subsection (6) (see  
16 section ^221).

17 Note 2: Application may be made to the Administrative Appeals Tribunal for  
18 the review of the Registrar's decision under subsection (6) to amend a  
19 registration (see section ^231).

20 Note 3: A fee payable under this section is only payable once in relation to  
21 any particular time covered by a maintenance period (see subsection  
22 ^230(3)).

23 **^198 Defects in registration**

- 24 (1) The registration of collateral described in a particular registration is  
25 ineffective because of a defect in the register if, and only if,  
26 subsection (2) applies.
- 27 (2) The registration is ineffective if there exists:
- 28 (a) a seriously misleading defect in any data relating to the  
29 registration; or
- 30 (b) a defect mentioned in section ^199.
- 31 (3) In order to establish that a defect is seriously misleading, it is not  
32 necessary to prove that any person was actually misled by it.

## Section ^199

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- 1 (4) The registration of particular collateral described in a registration is  
2 not ineffective only because the registration of other collateral  
3 described in the same registration is ineffective.

### 4 **^199 Ineffective registration—particular defects**

5 Without limiting paragraph ^198(2)(a), the registration of collateral  
6 described in a particular registration is ineffective if:

- 7 (a) in a case in which the collateral is required by the regulations  
8 to be described by serial number in the register:
- 9 (i) if the grantor's details are also required to be  
10 registered—no search of the register by reference only  
11 to the grantor's details is capable of disclosing the  
12 registration; and
  - 13 (ii) in any case—no search of the register by reference only  
14 to the serial number of the collateral is capable of  
15 disclosing the registration; or
- 16 (b) in any other case—no search of the register by reference only  
17 to the grantor's details is capable of disclosing the  
18 registration; or
- 19 (c) in any case—there is a defect in the data related to the  
20 registration that is prescribed by the regulations.

### 21 **^200 Registration continues despite certain defects**

#### 22 *Scope*

- 23 (1) This section applies if:
- 24 (a) one of the following defects in a particular registration arises  
25 at a particular time (the *defect time*):
    - 26 (i) a defect mentioned in subparagraph ^199(a)(i) or  
27 paragraph ^199(b), other than a defect resulting from a  
28 change of the grantor in relation to the registered  
29 collateral; and
    - 30 (ii) a defect mentioned in subparagraph ^199(a)(ii) or  
31 paragraph ^199(c);

32 Note: A change of the grantor may occur if the registered collateral is  
33 transferred. In this case, the secured party's security interest may  
34 be temporarily perfected for a certain period (see section ^73).

- 1 (b) the defect does not arise only because of an irregularity,  
2 omission or error in an application for that registration or for  
3 an amendment of that registration.

4 *Registration is temporarily unaffected by the defect*

- 5 (2) Despite sections ^198 and ^199, the defect does not make the  
6 registration ineffective for the period starting at the defect time and  
7 ending at the earliest of the following times:

- 8 (a) the end time for the registration (as registered immediately  
9 before the defect time);  
10 (b) the end of the month that is 60 months after the defect time;  
11 (c) the end of 5 business days after the day the secured party  
12 acquires knowledge of the defect.

13 Note 1: The period mentioned in paragraph (2)(c) may be extended under  
14 section ^257.

15 Note 2: See section ^56 in relation to knowledge.

16 *Registration becomes ineffective*

- 17 (3) However, the registration becomes ineffective under sections ^198  
18 and ^199 because of the defect immediately after the earliest time  
19 mentioned in subsection (2), unless, at or before that time, the  
20 registration is amended to correct the defect.

Section ^201

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## Part 5.5—Amendment of registration: general

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### **^201 Registration amendments—situations in which register may be amended**

6

The Registrar may amend the register:

7

(a) under section ^202, on an application by a secured party (including an application required under section ^206); or

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9

(b) under section ^210, following an amendment demand and an administrative process; or

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(c) under section ^213, following an amendment demand and a judicial process; or

12

13

(d) under section ^219, to correct an error or omission made by the Registrar.

14

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### **^202 Registration amendments—application by secured party**

16

(1) A person registered as a secured party in a registration may apply to the Registrar for an amendment (or amendments) of the registration.

17

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19

(2) The Registrar must amend the registration in accordance with the application, but only if:

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21

(a) the amendment is authorised under sections ^204 and ^205; and

22

23

(b) the application is in the approved form; and

24

25

(c) the fee determined under subsection ^230(1) for the application has been paid to the Commonwealth, unless arrangements for its payment have been made in accordance with a determination for the purposes of subsection ^230(2); and

26

27

28

(d) the Registrar is not satisfied that the application is:

29

30

(i) frivolous or vexatious; or

31

(ii) made in contravention of section ^203 (security interests in personal property); and

32

1 (e) the registration, as amended, would not be prohibited by  
2 regulations made for the purposes of paragraph ^189(2)(d).

3 Note 1: See subsection ^230(4) for the recovery of unpaid fees.

4 Note 2: The Registrar must give a verification statement to each secured party  
5 in relation to the amendment (or amendments) of a registration (see  
6 section ^221).

7 Note 3: Application may be made to the Administrative Appeals Tribunal for  
8 the review of the Registrar's decision under this subsection to refuse  
9 to amend a registration (see section ^231).

## 10 **^203 Registration amendments—security interests in personal** 11 **property**

12 (1) A person must not apply for an amendment of a registration of  
13 personal property under section ^202 unless the person believes on  
14 reasonable grounds that a security interest in the property has been,  
15 or will be, granted to a person (who may or may not be the  
16 applicant):

17 (a) registered as a secured party in the registration; or

18 (b) stated in the application to be a secured party;

19 Note: Section ^272 deals with the onus of proving matters under this  
20 subsection.

21 (2) For the purposes of section ^236 (but without limiting that  
22 section):

23 (a) compliance with subsection (1) is taken to be an obligation  
24 imposed on a person who seeks to apply for an amendment of  
25 a registration of personal property; and

26 (b) any person with an interest in the personal property is taken  
27 to be a person to whom the obligation is owed; and

28 (c) a contravention of subsection (1) is taken to be a failure to  
29 discharge that obligation.

30 Note: Section ^236 gives a right to recover damages for any loss or damage  
31 incurred in relation to such a failure.

32 (3) However, if a person applies for an amendment of a registration of  
33 personal property in contravention of subsection (1), and the  
34 amendment is registered accordingly, the contravention does not  
35 affect the validity or effectiveness of the registration.

# EXPOSURE DRAFT

## Section ^204

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1 **^204 Registration amendments—authorised amendments**

2 The following table sets out which amendments of a registration  
3 are authorised for the purposes of this Act.

4 Note: After the register is amended, the Registrar must give a verification  
5 statement to each secured party (see section ^221).

6

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### Registration amendments—authorised amendments

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Item	Registered data about ...	Details of amendments authorised
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1	The secured party	The registration may be amended to add or omit, or to change the details of: (a) a secured party; or (b) a person nominated by a secured party who has authority to act on behalf of the secured party.
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Note: A registration may include 2 or more secured parties (see subsection ^192(1)).

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2	The grantor	The registration may be amended: (a) to add or omit a grantor; or (b) to change a grantor's details.
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Note: A registration may include 2 or more grantors (see subsection ^192(1)).

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3	Giving of notices	The registration may be amended to add, omit or change the following: (a) an address (including an email address or fax number) for the giving of notices to the secured party (or secured parties) relating to the registration; (b) an identifier for the giving of notices to the secured party (or secured parties).
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Note: For identifiers, see also section ^251.

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4	The collateral and proceeds	The collateral description may be amended in any of the following ways: (a) to add or omit collateral; (b) to otherwise change the collateral description, other than any change to the prescribed class registered for the collateral for the purposes of paragraph (c) of item 4 of the table in section ^191;
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# EXPOSURE DRAFT

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**Registration amendments—authorised amendments**

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Item	Registered data about ...	Details of amendments authorised
		(c) to add or omit proceeds; (d) to otherwise change the description of proceeds.
5	The end time for registration	The registration may be amended to substitute a different end time, if the substituted end time: (a) is at or after the amendment time for the substitution; and (b) applies to all collateral described in the registration.  Note 1: If the registration is amended to add collateral, the same end time must apply (after the amendment) to all the collateral described in the registration, including the added collateral (see item 6 of the table in section ^191).  Note 2: For other rules about the registration of end times, see item 6 of the table in section ^191, and subsections ^192(2) and (3).
6	Subordination	The registration may be amended to add, omit or change details of a subordination.
7	Any matter prescribed by this Act or the regulations	The registration may be amended as authorised by this Act or the regulations.

---

## ^205 Registration amendments—other matters

### *Registration rules under sections ^191 and ^192*

(1) A registration cannot be amended if:

- (a) the registration (as amended) would not comply with sections ^191 and ^192; or
- (b) the registration is ineffective because of either of the following sections:
  - (i) section ^196 (end time has passed or collateral has been omitted, or is unavailable for search);
  - (ii) section ^197 (secured party fails to pay maintenance fee).

## Section ^206

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### *Time of effect*

2

- (2) An amendment of a registration takes effect at the moment (the ***amendment time***) when the amended registration becomes available for search in the register.

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### *Prescribed details*

6

- (3) Details about a matter may be prescribed for the purposes of item 7 of the table in section ^204 even if some other details about the matter are covered by another item in the table.

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## **^206 Registration amendments—requirement to end registration of certain property**

10

11

### *Scope*

12

- (1) This section applies in relation to a registration if:

13

- (a) collateral described in the registration is:

14

- (i) used, or intended to be used, predominantly for personal, domestic or household purposes; or

15

16

- (ii) registered with a serial number; and

17

- (b) a security interest in the collateral that was perfected by the registration becomes unperfected at a particular time (the ***unperfection time***); and

18

19

- (c) the end time for the registration is a time more than 5

20

21

business days after the day the unperfection time occurs.

22

### *Requirement to omit collateral or end effective registration*

23

- (2) The secured party must, before the end of 5 business days after the day the unperfection time occurs, apply for an amendment of the registration under section ^202 to omit the collateral, or to end its effective registration.

24

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Note 1: The period may be extended under section ^257.

28

Note 2: If the secured party fails to discharge the obligation under this section, an action for damages may be available under section ^236.

29

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Note 3: For general rules about registration amendments, see sections ^204 and ^205.

31



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## 2 **Part 5.6—Amendment of registration: amendment** 3 **demands**

### 4 **Division 1—Demand for amendment**

#### 5 **^207 Amendment demands**

6 A person with an interest (other than a security interest) in  
7 collateral described in a registration may give a demand (an  
8 ***amendment demand***), in writing, to the secured party for an  
9 amendment of the registration that is authorised by the following  
10 table.

11 Note: If the secured party does not comply with the amendment demand, the  
12 demand may be enforced under Division 2 (administrative process) or  
13 Division 3 (judicial process).

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#### **Authorised amendments**

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<b>Item</b>	<b>When amendment is authorised</b>	<b>What amendment is authorised</b>
1	No collateral described in the registration secures any obligation (including a payment) owed by a debtor to the secured party.	Amendment to end effective registration of the collateral.
2	The particular collateral in which the person has an interest does not secure any obligation (including a payment) owed by a debtor to the secured party.	Amendment to omit the collateral.

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# EXPOSURE DRAFT

Chapter 5 Personal Property Securities Register

Part 5.6 Amendment of registration: amendment demands

Division 2 Amendment demands: administrative process

Section ^208

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2

## Division 2—Amendment demands: administrative process

3

### ^208 Scope of Division

4

(1) This Division applies if:

5

(a) a secured party is given an amendment demand; and

6

(b) the secured party has not applied for an amendment of the registration in compliance with the demand before the end of 5 business days after the day the demand is given to the secured party; and

7

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(c) the security agreement, if any, providing for the security interest in respect of the collateral is not a security trust instrument; and

11

12

13

(d) there are no proceedings currently before a court (including a court of appeal), in relation to an application under section ^212, that relate to the amendment demanded.

14

15

16

(2) This Division stops applying in the following situations:

17

(a) the registration is amended in accordance with the amendment demand;

18

19

(b) proceedings come before a court (including a court of appeal), in relation to an application under section ^212, that relate to the amendment demanded.

20

21

22

(3) In this Act:

23

***security trust instrument*** means an instrument or other document:

24

(a) by which a person issues or guarantees, or provides for the issue or guarantee of, an obligation secured by a security interest; and

25

26

27

(b) in which another person is appointed as trustee for the person to whom the obligation secured by the security interest is owed.

28

29

1     **^209 Administrative process—amendment notices**

2                     *Amendment notice given by Registrar*

- 3             (1) The Registrar may give the secured party a notice (an ***amendment***  
4                 ***notice***), in accordance with subsection (5), of the amendment  
5                 demanded.

6                     *At the initiative of the Registrar*

- 7             (2) An amendment notice may be given at the initiative of the  
8                 Registrar, if the Registrar suspects on reasonable grounds that the  
9                 amendment demanded is authorised under section ^207.

10                    *In response to a statement by the person who gave the amendment*  
11                    *demand*

- 12             (3) The person who gave the amendment demand to the secured party  
13                 may give a statement in writing to the Registrar:  
14                 (a) stating the amendment demanded; and  
15                 (b) including anything else prescribed by the regulations.

16             Note:        The provision of false or misleading information in the statement may  
17                            be an offence against Part 7.4 of the *Criminal Code*.

- 18             (4) An amendment notice must be given in response to a statement  
19                 under subsection (3), as soon as practicable after the statement is  
20                 given (unless an amendment notice has already been given at the  
21                 initiative of the Registrar).

22                     *Amendment notices*

- 23             (5) An amendment notice is given in accordance with this subsection  
24                 if:  
25                 (a) the notice is in the approved form; or  
26                 (b) the notice:  
27                         (i) states the amendment demanded; and  
28                         (ii) invites the secured party to submit a response to the  
29                                 amendment demand in writing to the Registrar before  
30                                 the end of 5 business days after the day the notice is  
31                                 given (or an extended period approved by the  
32                                 Registrar); and

# EXPOSURE DRAFT

Chapter 5 Personal Property Securities Register

Part 5.6 Amendment of registration: amendment demands

Division 2 Amendment demands: administrative process

## Section ^210

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- 1 (iii) sets out the effect of section ^210 (amendment of  
2 registration); and  
3 (iv) if a statement is given under subsection (3)—includes a  
4 copy of the statement.

5 Note: The provision of false or misleading information in any response to  
6 the invitation may be an offence against Part 7.4 of the *Criminal*  
7 *Code*.

## 8 **^210 Administrative process—registration amendments**

### 9 *Scope*

- 10 (1) This section applies if an amendment notice is given to a secured  
11 party under section ^209.

### 12 *Amendment of registration*

- 13 (2) After the end of the period covered by subsection (4), the Registrar  
14 must amend the registration in accordance with the amendment  
15 demand, unless the Registrar suspects on reasonable grounds that  
16 the amendment is not authorised under section ^207.

- 17 (3) However, the Registrar may amend the registration before the end  
18 of the period covered by subsection (4) if:

- 19 (a) the secured party has responded to the invitation in the  
20 amendment notice; and  
21 (b) the Registrar has no reason to believe that the secured party  
22 intends to give a further response.

- 23 (4) The period covered by this subsection is:

- 24 (a) 5 business days after the day the amendment notice is given  
25 to the secured party; or  
26 (b) a longer period approved by the Registrar (in relation to the  
27 particular amendment demand, or to a class of amendment  
28 demands) after the amendment notice is given to the secured  
29 party.

- 30 (5) In making a decision to amend, or to refuse to amend, the  
31 registration, the Registrar must consider:

- 32 (a) the response (if any) of the secured party to the invitation in  
33 the amendment notice; and
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# EXPOSURE DRAFT

Personal Property Securities Register **Chapter 5**

Amendment of registration: amendment demands **Part 5.6**

Amendment demands: administrative process **Division 2**

Section ^210

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(b) any other relevant information.

- Note 1: The provision of false or misleading information in any response to the invitation may be an offence against Part 7.4 of the *Criminal Code*.
- Note 2: For general rules about registration amendments, see sections ^204 and ^205.
- Note 3: If the register is amended, the Registrar must give a verification statement to each secured party (see section ^221).
- Note 4: Application may be made to the Administrative Appeals Tribunal for the review of the Registrar's decision under subsection (1) to amend, or to refuse to amend, a registration (see section ^231).
- Note 5: If, before the Registrar makes a decision under subsection (1), proceedings come before a court as provided by section ^212 in relation to the amendment demanded, this section stops applying (see subsection ^208(2)).

# EXPOSURE DRAFT

Chapter 5 Personal Property Securities Register

Part 5.6 Amendment of registration: amendment demands

Division 3 Amendment demands: judicial process

Section ^211

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## **Division 3—Amendment demands: judicial process**

3

### **^211 Scope of Division**

4

This Division applies if:

5

(a) a secured party is given an amendment demand; and

6

(b) the secured party has not applied for an amendment of the registration in compliance with the demand before the end of 5 business days after the day the demand is given to the secured party.

7

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Note: The period may be extended under section ^257.

11

### **^212 Judicial process—procedure**

12

(1) The following persons may apply to a court for an order under section ^213 in relation to the registration:

13

14

(a) the secured party;

15

(b) the person who gave the amendment demand.

16

17

18

(2) A person with an interest (including a security interest) in the collateral described in the registration has the right to appear before the court on an application under subsection (1).

19

Note 1: The Registrar also has the power to intervene in the proceeding (see section ^270).

20

21

Note 2: For which courts have jurisdiction, and for transfers between courts, see Part 6.6.

22

23

### **^213 Judicial process—registration amendments**

24

(1) On an application under section ^212, a court may make the following orders:

25

26

(a) if the court considers the amendment demanded to be authorised under section ^207 (subject to sections ^204 and ^205)—an order for the Registrar to amend the registration;

27

28

29

(b) if the court does not consider the amendment demanded to be so authorised—an order restraining the Registrar from amending the registration.

30

31

# EXPOSURE DRAFT

Personal Property Securities Register **Chapter 5**

Amendment of registration: amendment demands **Part 5.6**

Amendment demands: judicial process **Division 3**

Section ^213

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- 1 (2) The court may impose any conditions it thinks proper in an order  
2 under subsection (1).
- 3 (3) The court may make any other orders it thinks proper for the  
4 purpose of giving effect to an order under subsection (1).
- 5 (4) The Registrar must comply with a court order under subsection (1)  
6 to amend a registration as soon as reasonably practicable after  
7 receiving the order.
- 8 Note 1: For general rules about registration amendments, see sections ^204  
9 and ^205.
- 10 Note 2: If the register is amended, the Registrar must give a verification  
11 statement to each secured party (see section ^221).

# EXPOSURE DRAFT

Chapter 5 Personal Property Securities Register

Part 5.6 Amendment of registration: amendment demands

Division 4 General

Section ^214

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1

2 **Division 4—General**

3 **^214 No payment for compliance with demand**

4 (1) A secured party must not require payment for compliance with an  
5 amendment demand.

6 (2) Subsection (1) does not apply in relation to a fee for compliance  
7 with an amendment demand if:

8 (a) the collateral to which the demand relates is described in the  
9 relevant registration as inventory or commercial property;

10 and

11 (b) the person giving the demand agrees in writing to pay the fee.



1

2 **Part 5.7—Removal of data and correction of**  
3 **registration errors**

4 **Division 1—Removal of data**

5 **^215 Removal of data—general grounds**

6 The Registrar may remove data (including an entire registration)  
7 from the register if the Registrar is satisfied that:

- 8 (a) the data is frivolous or vexatious; or  
9 (b) the registration of the data is prohibited by regulations made  
10 for the purposes of paragraph ^189(2)(d).

11 Note 1: After the data is removed, the Registrar must give a verification  
12 statement to each secured party (see section ^221).

13 Note 2: Application may be made to the Administrative Appeals Tribunal for  
14 the review of the Registrar's decision under this section to remove  
15 data from the register (see section ^231).

16 **^216 Removal of data—old data**

17 (1) This section applies in relation to a registration if the registration of  
18 any of the collateral described in the registration has been  
19 ineffective under section ^196 for 7 years or more.

20 (2) The Registrar may remove data in the registration (including the  
21 entire registration) from the register to reflect the fact that the  
22 registration of the collateral is ineffective.

23 Note: After the data is removed, the Registrar must give a verification  
24 statement to each secured party (see section ^221).

25 **^217 Incorrectly removed data—restoration**

26 The Registrar may restore data to the register (including an entire  
27 registration) if it appears to the Registrar that the data was  
28 incorrectly removed from the register.

29 Note: After the data is restored, the Registrar must give a verification  
30 statement to each secured party (see section ^221).

# EXPOSURE DRAFT

Chapter 5 Personal Property Securities Register

Part 5.7 Removal of data and correction of registration errors

Division 1 Removal of data

Section ^218

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1 **^218 Registrar may keep a record of removed data**

2                   The removal of data from the register under this Part does not  
3                   prevent the Registrar from keeping a record of the removed data in  
4                   whatever form the Registrar considers appropriate.

# EXPOSURE DRAFT

Personal Property Securities Register **Chapter 5**

Removal of data and correction of registration errors **Part 5.7**

Correction of registration errors **Division 2**

Section ^219

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1

2 **Division 2—Correction of registration errors**

3 **^219 Correction of registration errors**

4 The Registrar may amend a registration to correct an error or  
5 omission made by the Registrar.

6 Note 1: For general rules about registration amendments, see sections ^204  
7 and ^205.

8 Note 2: After the registration is amended, the Registrar must give a  
9 verification statement to each secured party (see section ^221).

10 Note 3: Application may be made to the Administrative Appeals Tribunal for  
11 the review of the Registrar's decision under this section to amend a  
12 registration (see section ^231).

Section ^220

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## Part 5.8—Verification of events

3

4

### **^220 Meanings of *verification statement* and *verifiable event***

5

In this Act:

6

***verification statement*** means a written statement in the approved form:

7

8

(a) verifying any of the following events (each of which is a ***verifiable event***):

9

10

(i) a new registration;

11

(ii) the amendment of a registration;

12

(iii) the removal or restoration, under section ^215, ^216 or ^217, of data registered in a registration (including an entire registration); and

13

14

15

(b) including other data (if any) approved by the Registrar for that form in relation to the verifiable event, a secured party, a grantor, or collateral.

16

17

18

### **^221 Verification statements—to be given to secured parties etc.**

19

#### *Interested persons*

20

(1) For the purposes of this section, each of the following is an interested person in relation to a verifiable event concerning a registration:

21

22

23

(a) a person registered as a secured party in the registration immediately before the time of the verifiable event;

24

25

(b) a person registered as a secured party in the registration immediately after the time of the verifiable event.

26

27

#### *Giving of verification statements*

28

(2) The Registrar must ensure that a verification statement in relation to a verifiable event concerning a registration is given to each interested person.

29

30

1 Note: This section does not apply in relation to a verifiable event if the  
2 Registrar publishes a verification statement in relation to the event  
3 under section ^224.

4 (3) The Registrar must ensure that the verification statement is given  
5 to each interested person as soon as reasonably practicable after the  
6 time of the verifiable event.

7 (4) A single verification statement may be given in relation to 2 or  
8 more verifiable events, if:

9 (a) there is at least one interested person in common in relation  
10 to all the events; and

11 (b) the statement is given to each interested person in relation to  
12 each event; and

13 (c) subsection (3) is satisfied in relation to each event.

14 (5) If a verifiable event consists of an amendment of a registration to  
15 change an address (including an email address or a fax number) for  
16 the giving of notices to a secured party, the Registrar must ensure  
17 that the verification statement in relation to the event is given to the  
18 secured party at both the previously registered address and the  
19 address as changed.

## 20 **^222 Verification statements—if person no longer registered as** 21 **secured party**

### 22 *Scope*

23 (1) This section applies in relation to an interested person mentioned in  
24 subsection ^221(1) if the interested person is no longer registered  
25 as a secured party.

26 Note: This section does not apply in relation to a verifiable event if the  
27 Registrar publishes a verification statement in relation to the event  
28 under section ^224.

### 29 *Application of section ^249 (giving of notices to secured parties)*

30 (2) Section ^249 applies to the giving (under section ^221) of a  
31 verification statement to the interested person as if the interested  
32 person was still registered, with the address for the service of  
33 notices as specified in the registration immediately before the  
34 interested person stopped being registered as a secured party.

## Section ^223

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1 Note: Section ^249 provides for notices or documents to be given to a  
2 registered secured party at the address specified in a registration for  
3 the giving of notices.

### 4 **^223 Verification statements—notice to be given to grantors etc.**

#### 5 *Scope*

6 (1) This section applies if a person (the *statement holder*) is, under  
7 section ^221, given a verification statement in relation to a  
8 verifiable event (or events) concerning a registration.

9 Note: This section does not apply in relation to a verifiable event if the  
10 Registrar publishes a verification statement in relation to the event  
11 under section ^224.

#### 12 *Interested persons*

13 (2) For the purposes of this section, each of the following is an  
14 interested person in relation to a verifiable event concerning a  
15 registration:

- 16 (a) a person registered as a grantor in the registration  
17 immediately before the time of the verifiable event;  
18 (b) a person registered as a grantor in the registration  
19 immediately after the time of the verifiable event.

#### 20 *Statement holder to give notice to interested persons*

21 (3) The statement holder must ensure that a notice of the statement, in  
22 the approved form, is given to each interested person in relation to  
23 each event.

24 (4) Without limiting subsection (3), the approved form for notice of a  
25 verification statement:

- 26 (a) may authorise specified data in the verification statement not  
27 to be included in the notice; but  
28 (b) must otherwise require the data in the verification statement  
29 to be included in the notice.

30 (5) The statement holder must ensure that the notice is given to each  
31 interested person as soon as reasonably practicable after the time of  
32 the verifiable event (or, if there is more than one verifiable event,  
33 the latest verifiable event).

1                    *Exception—waiver by interested person of right to receive notice*

- 2                    (6) However, subsections (3) to (5) do not apply in relation to an  
3 interested person if:
- 4                    (a) the collateral to which a verifiable event relates is  
5                    (immediately before or after the event) described in the  
6 registration as inventory or commercial property; and
  - 7                    (b) the person is an interested person in relation to that verifiable  
8 event; and
  - 9                    (c) the person has, in writing, waived the right under this section  
10 to receive a notice in relation to verifiable events to which  
11 paragraph (a) applies.

12                    Note:            If a statement holder fails to discharge an obligation under this  
13 section, an action for damages may be available under section ^236.

## 14                    **^224 Verification statements—publication as alternative to notice**

15                    *Scope*

- 16                    (1) This section applies if:
- 17                    (a) a number of verifiable events occur; and
  - 18                    (b) the verifiable events affect a number of persons registered as  
19 secured parties (whether before or after the events); and
  - 20                    (c) the Registrar considers that it would be inconvenient for  
21 verification statements to be given to each registered (or  
22 formerly registered) secured party.

23                    *Publication of verification statement*

- 24                    (2) The Registrar may publish, in a way prescribed by the regulations,  
25 a single verification statement in relation to all the verifiable  
26 events.
- 27                    (3) Sections ^221, ^222 and ^223 do not apply in relation to a  
28 verifiable event if the Registrar publishes a verification statement  
29 in relation to the event under subsection (2).

Section ^225

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## Part 5.9—Searching the register

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### ^225 Search—general

5

(1) A person may apply to the Registrar to search the register for data.

6

(2) The Registrar must:

7

(a) give the person access to the register to search for the data, in accordance with the application; and

8

9

(b) if, in the application, the person requests a written search result in relation to the data—ensure that the person is able to obtain a written search result in relation to the data, in the appropriate form under section ^229.

10

11

12

13

(3) However, the Registrar must give the person access to the register to search for the data only if:

14

15

(a) the search is authorised under sections ^226 and ^227; and

16

(b) the application is in the approved form; and

17

(c) the fee determined under subsection ^230(1) for the application has been paid to the Commonwealth, unless arrangements for its payment have been made in accordance with a determination for the purposes of subsection ^230(2); and

18

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(d) access to the data is not prohibited by the regulations.

23

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Note: Application may be made to the Administrative Appeals Tribunal for the review of the Registrar's decision under this section to refuse to give a person access to the register to search for data (see section ^231).

27

### ^226 Search—criteria

28

(1) A person may search the register by reference to the following criteria:

29

30

(a) a secured party's details;

31

(b) a grantor's details;

32

(c) a serial number by which collateral may (or must) be described in the register;

33



- 1 (d) any other criteria prescribed by the regulations.
- 2 (2) The Registrar must ensure that the way in which the results of a
- 3 search are worked out in response to an application for search is
- 4 determined in accordance with any regulations made for the
- 5 purposes of this section.

6 **<sup>^</sup>227 Search—who may search, and for what purpose**

- 7 (1) A person mentioned in an item in the following table may search
- 8 the register for the purpose specified in the item, in relation to:
- 9 (a) the time of the search; or
- 10 (b) any earlier nominated time.
- 11

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**Who may search the register, and for what purpose**

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Item	Person who may search	Purpose
1	A person (the <i>first person</i> ), or another person with that person's consent	To disclose any registration in which the first person is registered as a grantor or a secured party.
2	A secured party in relation to a registration	A purpose that relates to a security interest attached to collateral described in the registration.
3	A grantor in relation to a registration	A purpose that relates to a security interest attached to the collateral described in the registration.
4	A person	To disclose any registration in which the person is registered as a secured party.
5	A person	To disclose whether collateral to which a security interest is attached is described in a registration.
6	A person	To disclose whether or not personal property is described in a registration, if: (a) the property is to be purchased or dealt with by the person; or (b) the person has an interest in the property.
7	A person	To establish whether to provide

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# EXPOSURE DRAFT

Section ^227

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**Who may search the register, and for what purpose**

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<b>Item</b>	<b>Person who may search</b>	<b>Purpose</b>
		credit to, or obtain a guarantee or an indemnity from, a person named in the search application or a person with an interest in the personal property described in the application.
8	A person	To establish whether to provide credit to, or obtain a guarantee or an indemnity from, a body corporate related (within the meaning of the <i>Corporations Act 2001</i> ) to a body corporate named in the search application or to a body corporate with an interest in the personal property described in the application.
9	A person	To establish whether to provide credit to, or obtain a guarantee or an indemnity from, an associate (within the meaning of section 11 or subsection 12(2) of the <i>Corporations Act 2001</i> ) of a body corporate named in the search application or of a body corporate with an interest in the personal property described in the application.
10	A person	To establish whether to invest in, with, or through, a person named in the search application.
11	A person	To establish whether to invest in, with, or through, a body corporate related (within the meaning of the <i>Corporations Act 2001</i> ) to a body corporate named in the search application or to a body corporate with an interest in the personal property described in the application.

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# EXPOSURE DRAFT

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**Who may search the register, and for what purpose**

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Item	Person who may search	Purpose
12	A person	To establish whether to invest in, with, or through, an associate (within the meaning of section 11 or subsection 12(2) of the <i>Corporations Act 2001</i> ) of a body corporate named in the search application or of a body corporate with an interest in the personal property described in the application.
13	The Registrar	A purpose that relates to the administration of this Act.
14	An external administrator of a person, within the meaning of the <i>Payment Systems and Netting Act 1998</i>	A purpose that relates to the external administration of the person.
15	An Official Receiver in Bankruptcy within the meaning of the <i>Bankruptcy Act 1966</i>	A purpose that relates to the exercise of a power, or the performance of a function, of that Official Receiver in Bankruptcy.
16	The legal personal representative of an individual (including a deceased individual)	A purpose that relates to the exercise of a power, or the performance of a function, as legal personal representative.
17	A government entity within the meaning of the <i>A New Tax System (Australian Business Number) Act 1999</i>	A purpose that relates to the exercise of a power, or the performance of a function, of that entity, unless the purpose is covered by another purpose listed in this table.
18	A government entity within the meaning of the <i>A New Tax System (Australian Business Number) Act 1999</i>	A purpose that relates to the maintenance of the law, including the prevention, detection, investigation or prosecution of contraventions of laws (whether the penalty for contravention is criminal or civil).
19	The holder of a lien or charge, or a creditor	A purpose that relates to the enforcement of the lien or charge, or that creditor's rights, as the case

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Section ^228

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**Who may search the register, and for what purpose**

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<b>Item</b>	<b>Person who may search</b>	<b>Purpose</b>
		may be.
20	A bailiff, or sheriff, of a court of the Commonwealth, a State or a Territory	A purpose that relates to the enforcement of a court order or warrant.
21	A person	To advise another person in connection with any of the purposes referred to in this table.

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- 1 (2) A person mentioned in an item in the table must not do either of  
2 the following otherwise than for the purpose specified in the item:  
3 (a) search the register;  
4 (b) use data obtained as a result of searching the register (unless  
5 the data has been lawfully obtained from another source).

- 6 (3) For the purposes of section ^236:  
7 (a) compliance with subsection (2) is taken to be an obligation  
8 imposed on a person who seeks to search the register, or to  
9 use the data; and  
10 (b) if the person seeks to search the register by reference to a  
11 secured party's or a grantor's details, or to use data that  
12 includes those details, the obligation is taken to be owed to  
13 the secured party or grantor (as the case may be); and  
14 (c) a contravention of subsection (2) is taken to be a failure to  
15 discharge that obligation.

16 Note: Section ^236 gives a right to recover damages for any loss or damage  
17 in relation to such a failure.

18 **^228 Search—interference with privacy**

19 *Scope*

- 20 (1) This section applies if:  
21 (a) an agency or an organisation, within the meaning of the  
22 *Privacy Act 1988*, obtains access to the register and searches  
23 the register for data (whether or not the access is obtained as  
24 a result of an application under section ^225); and

1 (b) as a result of the search, the agency or organisation obtains  
2 personal information about an individual within the meaning  
3 of that Act.

4 Note: Organisations may be individuals (or certain other types of entity) (see  
5 section 6C of the *Privacy Act 1988*).

6 *Unauthorised search or use of personal information is an*  
7 *interference with privacy*

- 8 (2) If the search, or the use of the personal information, is  
9 unauthorised under subsection (3) or (4), the search or use  
10 constitutes an act or practice involving interference with the  
11 privacy of the individual for the purposes of:  
12 (a) in relation to a search, or the use of personal information, by  
13 an agency—section 13 of the *Privacy Act 1988*; and  
14 (b) in relation to a search, or the use of personal information, by  
15 an organisation—section 13A of that Act.
- 16 (3) A search is unauthorised if:  
17 (a) the search is not authorised under section ^226; or  
18 (b) the search is prohibited under subsection ^227(2); or  
19 (c) access to the data for such a search is prohibited by  
20 regulations made for the purposes of paragraph ^225(3)(d).
- 21 (4) The use of the personal information is unauthorised (unless the  
22 data has been lawfully obtained from another source) if:  
23 (a) the search is not authorised under section ^226; or  
24 (b) the search, or the use of the personal information, is  
25 prohibited under subsection ^227(2); or  
26 (c) access to the data for such a search is prohibited by  
27 regulations made for the purposes of paragraph ^225(3)(d).

28 *Complaints under the Privacy Act 1988*

- 29 (5) The individual may complain to the Privacy Commissioner if he or  
30 she believes that the search, or the use of the personal information,  
31 may be an interference with the privacy of the individual because  
32 of subsection (2).
- 33 (6) The Registrar may complain to the Privacy Commissioner if the  
34 Registrar believes that the search, or the use of the personal

## Section ^229

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1 information, may be an interference with the privacy of the  
2 individual because of subsection (2).

3 (7) If a complaint is made under subsection (5) or (6), Part V of the  
4 *Privacy Act 1988* applies, with such modifications as  
5 circumstances require, as if the complaint were an IPP complaint  
6 (within the meaning of that Act) made under section 36 of that Act.

### 7 **^229 Search—written search results and evidence etc.**

#### 8 *Search result as evidence*

- 9 (1) A written search result in the appropriate form (see subsection (3))  
10 is admissible as evidence in a court or tribunal and is, in the  
11 absence of evidence to the contrary, proof of the matters stated in  
12 the search result.
- 13 (2) Without limiting subsection (1), the matters that may be stated in a  
14 search result include the following:
- 15 (a) the registered description of collateral at a particular time;
  - 16 (b) the initial registration time, the amendment times (if any) and  
17 the end time for a registration;
  - 18 (c) in relation to 2 or more registrations—the order of any of the  
19 times mentioned in paragraph (b) for all the registrations.

#### 20 *Appropriate form of search result*

- 21 (3) A search result is in the *appropriate form* if:
- 22 (a) it purports to be issued by the Registrar in the approved form;  
23 or
  - 24 (b) it purports to be issued by one of the following:
    - 25 (i) an officer or agency of the Commonwealth determined  
26 by the Registrar;
    - 27 (ii) an officer or agency, of a State or Territory, determined  
28 by the Registrar; or
  - 29 (c) it purports to be:
    - 30 (i) issued by a person prescribed by the regulations; and
    - 31 (ii) if the Registrar approves a form for the purposes of this  
32 subparagraph—in the approved form.

1 (4) The Registrar may include, or may authorise to be included, in a  
2 search result, any data determined by the Registrar in relation to a  
3 secured party, a grantor, or collateral.

4 *Evidence of transient electronic communications etc.*

5 (5) If a search result is covered by paragraph (b) of the definition of  
6 **writing** in section ^26, evidence of the search result may be given  
7 by the production of a recording of the search result mentioned in  
8 that paragraph.

9 *Instruments of approval*

10 (6) The Registrar may, by instrument, determine an officer or agency  
11 for the purposes of subparagraph (3)(b)(i) or (ii).

12 (7) The Registrar may, by legislative instrument, determine data for  
13 the purposes of subsection (4).

Section ^230

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## Part 5.10—Fees, administrative review and annual reports

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### ^230 Registration and search fees

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(1) The Minister may, by legislative instrument, determine the amounts of one or more of the following:

7

8

(a) fees for applications for a registration (or registrations), under section ^189;

9

10

(b) fees to maintain registrations for maintenance periods stated in notices under section ^197;

11

12

(c) fees for applications for an amendment (or amendments) of a registration, under section ^202;

13

14

(d) fees for applications to search the register, under section ^225.

15

16

(2) The Minister may, by a legislative instrument made under subsection (1), determine arrangements for the payment of fees under the instrument.

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(3) A fee to maintain a registration (determined under paragraph (1)(b)) is only payable once under section ^197 in relation to any particular time covered by a maintenance period stated in a notice given under that section.

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(4) The fees determined under subsection (1) must not be such as to amount to taxation.

24

25

(5) The amount of a fee, except a fee to maintain a registration (determined under paragraph (1)(b)), is a debt due to the Commonwealth, and may be recovered by the Commonwealth by application to a court.

26

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Note 1: If a fee to maintain a registration of collateral is not paid within a period stated in a notice under section ^197, the Registrar may end the effective registration of the collateral.

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Note 2: For which courts have jurisdiction, and for transfers between courts, see Part 6.6.

33



1 **^231 Review of decisions**

2 An application may be made to the Administrative Appeals  
3 Tribunal for review of the following decisions made by the  
4 Registrar:

- 5 (a) a decision to refuse to give effect to an application for a  
6 registration, under subsection ^189(2);  
7 (b) a decision to amend a registration to end the effective  
8 registration of the registered collateral, under subsection  
9 ^197(6);  
10 (c) a decision to refuse to amend a registration in response to an  
11 application by a secured party, under subsection ^202(2);  
12 (d) a decision to amend a registration following an amendment  
13 demand, under subsection ^210(2);  
14 (e) a decision to refuse to amend a registration following an  
15 amendment demand, under subsection ^210(2);  
16 (f) a decision to remove data from the register, under section  
17 ^215;  
18 (g) a decision to amend a registration to correct an error or  
19 omission made by the Registrar, under section ^219;  
20 (h) a decision to refuse to give a person access to the register to  
21 search for data, under section ^225.

22 **^232 Annual reports**

- 23 (1) The Registrar must, as soon as practicable after the end of each  
24 financial year, prepare and give to the Minister, for presentation to  
25 the Parliament, a report on the operation of this Act during that  
26 financial year.

27 Note: See also section 34C of the *Acts Interpretation Act 1901*, which  
28 contains extra rules about annual reports.

- 29 (2) The Registrar must include in the report:  
30 (a) details of each occasion on which access to the register was  
31 refused, or the operation of the register was otherwise  
32 suspended, during the financial year; and  
33 (b) any information necessary to demonstrate that fees  
34 determined under subsection ^230(1) do not amount to  
35 taxation.

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## Chapter 6—Miscellaneous

### Part 6.1—Vesting of certain unperfected security interests

#### **^233 When certain unperfected security interests vest in the grantor**

##### *Scope*

- (1) This section applies if:
  - (a) any of the following events occurs:
    - (i) an order is made, or a resolution is passed, for the winding up of a body corporate;
    - (ii) an administrator of a company is appointed under section 436A, 436B or 436C of the *Corporations Act 2001*;
    - (iii) a company executes a deed of company arrangement;
    - (iv) a sequestration order is made against a person (the **bankrupt**) under the *Bankruptcy Act 1966*;
    - (v) a person (the **bankrupt**) becomes a bankrupt by force of section 55, 56E or 57 of the *Bankruptcy Act 1966*; and
  - (b) a security interest granted by the body corporate, company or person is unperfected on whichever of the following days applies:
    - (i) in the case of a company or body corporate that is being wound up—the day the winding up began (whether under section 513A or 513B of the *Corporations Act 2001*, under that section as it is applied by force of a law of a State or Territory, or otherwise);
    - (ii) in the case of any other company or body corporate—the section 513C day as described in that section of that Act (including as described in that section as it is applied by force of a law of a State or Territory, or otherwise);
    - (iii) in the case of a bankrupt—the date of the bankruptcy (within the meaning of the *Bankruptcy Act 1966*).

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1 Note 1: For the meaning of *company*, see section ^26.

2 Note 2: A security interest might also be void under sections 263 and 264 of  
3 the *Corporations Act 2001*.

4 *Security interest vested in grantor*

5 (2) The security interest held by the secured party vests in the grantor  
6 immediately before the event mentioned in paragraph (1)(a)  
7 occurs, unless the security interest is unaffected as mentioned in  
8 subsection (3).

9 *Unaffected security interests*

10 (3) The following security interests are unaffected under this  
11 subsection:

- 12 (a) a security interest provided for by a transfer of an account  
13 that does not secure payment or performance of an  
14 obligation;
- 15 (b) a senior creditor's security interest covered by subsection (4);
- 16 (c) a security interest of a lessor or bailor under a PPS lease, but  
17 only if:
- 18 (i) the lease does not secure payment or performance of an  
19 obligation (see section ^30); and
- 20 (ii) paragraph (e) of the definition of *PPS lease* in  
21 subsection ^31(1) applies to the lease; and
- 22 (iii) none of paragraphs (a) to (d) of the definition of *PPS*  
23 *lease* in subsection ^31(1) applies to the lease.

24 Example: A PPS lease of tangible property is covered by paragraph (c) if  
25 the property leased:

- 26 (a) does not secure payment or performance of an obligation; and
- 27 (b) may or must be described by serial number in accordance with  
28 the regulations; and
- 29 (c) is for a term of between 90 days and 1 year.

30 (4) This subsection covers a security interest held by a person (the  
31 *senior creditor*) under a contract if all of the following conditions  
32 are met:

- 33 (a) a debtor owes a payment of money, or the performance of an  
34 obligation, to the senior creditor;

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- 1 (b) the debtor also owes a payment of money, or the performance  
2 of an obligation, to another person (the *subordinated*  
3 *creditor*);
- 4 (c) any of the following events occurs:
- 5 (i) an order is made, or a resolution is passed, for the  
6 winding up of the debtor;
- 7 (ii) an administrator of the debtor is appointed under  
8 section 436A, 436B or 436C of the *Corporations Act*  
9 *2001*;
- 10 (iii) the debtor executes a deed of company arrangement;
- 11 (iv) a sequestration order is made against the debtor under  
12 the *Bankruptcy Act 1966*;
- 13 (v) the debtor becomes a bankrupt by force of section 55,  
14 56E or 57 of the *Bankruptcy Act 1966*;
- 15 (d) either:
- 16 (i) the debtor's trustee in bankruptcy, administrator or  
17 liquidator (as the case requires) distributes personal  
18 property to the subordinated creditor; or
- 19 (ii) the subordinated debtor holds personal property as a  
20 result of enforcing a security agreement with the debtor;
- 21 (e) the security interest held under the contract secures an ADI  
22 account;
- 23 (f) the contract includes both of the following terms:
- 24 (i) a term that postpones or subordinates the debtor's  
25 obligation to the subordinated creditor, to the debtor's  
26 obligation to the senior creditor;
- 27 (ii) a term that requires the subordinated creditor to hold the  
28 ADI account, to the value of the amount the debtor  
29 owes to the senior creditor, on trust for the senior  
30 creditor.

31 *Title of person acquired for new value without knowledge*

- 32 (5) Subsection (2) does not affect the title of a person to personal  
33 property if:
- 34 (a) the person acquires the personal property for new value from  
35 a secured party, from a person on behalf of a secured party,  
36 or from a receiver in the exercise of powers:

- 1 (i) conferred by the security agreement that provides for  
2 the security interest; or  
3 (ii) implied by the general law; and  
4 (b) at the time the person acquires the property, the person has  
5 no knowledge of the following (as the case requires):  
6 (i) the filing of an application for an order to wind up the  
7 company;  
8 (ii) the passing of a resolution to wind up the company;  
9 (iii) the appointment of an administrator of the company  
10 under section 436A, 436B or 436C of the *Corporations*  
11 *Act 2001*;  
12 (iv) the execution of a deed of company arrangement by the  
13 company.

14 Note: Section ^272 deals with the onus of proving matters, and section ^56  
15 deals with knowledge, in relation to paragraph (3)(b).

## 16 **^234 Certain lessors or consignors entitled to damages**

- 17 (1) This section applies if:  
18 (a) the security interest held by one of the following persons is  
19 vested in the grantor under section ^233:  
20 (i) a lessor or bailor under a PPS lease;  
21 (ii) a consignor under a commercial consignment; and  
22 (b) the lease, bailment or consignment did not (immediately  
23 before the security interest was so vested) secure payment or  
24 performance of an obligation.
- 25 (2) The lessor, bailor or consignor:  
26 (a) is taken to have suffered damage immediately before the  
27 event mentioned in paragraph ^233(1)(a) (when the security  
28 interest was vested in the grantor); and  
29 (b) may recover an amount of compensation from the grantor  
30 equal to the greater of the following amounts:  
31 (i) the amount determined in accordance with the lease,  
32 bailment or consignment;  
33 (ii) the sum of the market value of the leased, bailed or  
34 consigned property immediately before the day referred  
35 to in paragraph ^233(1)(b), and the amount of any other

# EXPOSURE DRAFT

Chapter 6 Miscellaneous

Part 6.1 Vesting of certain unperfected security interests

Section ^234

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1 damage or loss resulting from the termination of the  
2 lease, bailment or consignment.  
3 Note: The lessor, bailor or consignor may be able to prove the amount of  
4 compensation in proceedings related to the bankruptcy or winding-up  
5 of the secured party.

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## **Part 6.2—Exercise and discharge of rights, duties and obligations**

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### **^235 Rights and duties to be exercised honestly and in a commercially reasonable manner**

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(1) All rights, duties and obligations that arise under a security  
agreement or this Act must be exercised or discharged:

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(a) honestly; and

10

(b) in a commercially reasonable manner.

11

(2) A person does not act dishonestly merely because the person acts  
with actual knowledge of the interest of some other person.

12

13

### **^236 Entitlement to damages for breach of duties or obligations**

14

(1) If a person fails to discharge any duty or obligation imposed on the  
person by this Act:

15

16

(a) the person to whom the duty or obligation is owed; and

17

(b) any other person who can reasonably be expected to rely on  
performance of the duty or obligation;

18

has a right to recover damages for any loss or damage that was  
reasonably foreseeable as likely to result from the failure.

19

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21

(2) Nothing in subsection (1) limits or affects any liability that a  
person may incur under any of the following:

22

23

(a) a law of the Commonwealth, a State or a Territory;

24

(b) the general law.

25

### **^237 Liability for damages**

26

Despite section ^236, none of the following persons is liable to an  
action, suit or proceeding for damages for, or in respect of,  
anything done honestly, or honestly omitted to be done, in the  
exercise, or purported exercise, of any power conferred by this Act  
or the regulations:

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(a) the Commonwealth;

# EXPOSURE DRAFT

Chapter 6 Miscellaneous

Part 6.2 Exercise and discharge of rights, duties and obligations

Section ^237

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- 1 (b) the Registrar, or a delegate of the Registrar;
- 2 (c) the Minister;
- 3 (d) a member of the Registrar's staff;
- 4 (e) a person who is acting as a member of the Registrar's staff;
- 5 (f) a person who is authorised to perform or exercise a function
- 6 or power of, or on behalf of, the Registrar.



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## Part 6.3—Provision of information relating to security interest

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### ^238 Secured party to provide certain information relating to security interest

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#### *Requests for information*

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(1) An interested person mentioned in subsection (9) may request a secured party who holds a security interest in collateral to send or make available to any specified person (including the interested person) any of the following:

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(2) A request made under subsection (1) must specify an address to which the information requested under that subsection must be sent or at which the information must be made available.

(3) A request made in accordance with paragraph (1)(b), (c) or (d) must not specify a day later than 20 business days after the day the request is made.

# EXPOSURE DRAFT

## Chapter 6 Miscellaneous

### Part 6.3 Provision of information relating to security interest

#### Section ^238

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1 Note: The period may be extended under section ^257.

#### 2 *Compliance with request*

3 (4) Subject to subsections (5) and (6), a person who receives a request  
4 made under subsection (1) must respond to the request.

5 Note 1: A person who receives a request but who no longer has a security  
6 interest in collateral responds to the request in accordance with section  
7 ^239.

8 Note 2: Section ^240 deals with the time for responding to a request.

9 Note 3: A person who responds to a request might be prevented from denying  
10 the accuracy etc. of information provided (see section ^246).

11 (5) A secured party is not required to respond to a request made under  
12 subsection (1) if the information requested under that subsection  
13 must be, or has already been, made available to the person who  
14 made the request, under any of the following:

- 15 (a) a law of the Commonwealth, a State or a Territory;
- 16 (b) the general law.

17 (6) A secured party is not required to respond to a request made under  
18 subsection (1) if:

- 19 (a) subject to subsection (7), the secured party and the debtor  
20 have agreed (the *confidentiality agreement*) in writing that  
21 neither the secured party nor the debtor will disclose  
22 information of the kind mentioned in subsection (1); or
- 23 (b) the response would contravene any of the following:
  - 24 (i) a law of the Commonwealth, a State or a Territory;
  - 25 (ii) the general law; or
- 26 (c) the response would disclose information that is protected  
27 against disclosure by a duty of confidence.

28 (7) Paragraph (6)(a) does not apply if:

- 29 (a) the confidentiality agreement is made after the security  
30 agreement that provides for the security interest is made; or
- 31 (b) at the time the request is received, the debtor is in default  
32 under the security agreement; or
- 33 (c) the debtor, in writing, authorises the disclosure of the  
34 information; or

1 (d) the grantor requests the secured party to give the information  
2 to the grantor.

3 (8) If:

4 (a) a request is made in accordance with paragraph (1)(c); and

5 (b) the secured party claims a security interest provided for by a  
6 security agreement in any of the following:

7 (i) all of the grantor's present and after-acquired property;

8 (ii) all of the grantor's present and after-acquired property  
9 except for an item or class of personal property  
10 described in the security agreement;

11 (iii) all of a specified class of personal property of the  
12 grantor;

13 the secured party may indicate this instead of approving or  
14 correcting the itemised list of property.

15 *Interested persons*

16 (9) For the purposes of this section, the following persons are  
17 interested persons:

18 (a) the grantor in relation to the collateral in which the security  
19 interest is granted;

20 (b) a person with another security interest in the collateral  
21 mentioned in paragraph (a);

22 (c) an execution creditor with an interest in the collateral;

23 (d) an authorised representative of any of the above.

24 (10) A secured party who receives a request made under subsection (1)  
25 that purports to be made by an interested person may act as if the  
26 person is entitled to make the request, unless the secured party has  
27 actual knowledge that the person is not entitled to make it.

28 **^239 Obligation to disclose successor in security interest when**  
29 **request made**

30 (1) This section applies if:

31 (a) a person makes a request under subsection ^238(1); and

# EXPOSURE DRAFT

Chapter 6 Miscellaneous

Part 6.3 Provision of information relating to security interest

## Section ^240

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1 (b) the person (the *previously secured party*) to whom the  
2 request was made no longer has a security interest in the  
3 collateral.

4 (2) The previously secured party must respond to the request by  
5 sending, or making available, to the person making the request the  
6 name and address of:

7 (a) the immediate successor in interest; and

8 (b) the latest successor in interest (if known).

9 Note: Section ^240 deals with the time for responding to a request.

### 10 **^240 Time for responding to a request**

11 (1) A person who must respond to a request made under section ^238  
12 must respond to the request before the end of 10 business days  
13 after the day the request is received.

14 (2) Subsection (1) does not apply if the person has been exempted  
15 from responding to the request, or the time for responding to the  
16 request has been extended, under section ^241.

17 Note: The time for responding to a request may also be affected by  
18 subsection ^242(5) or section ^244.

### 19 **^241 Application to court for exemption or extension of time to** 20 **respond to requests**

21 (1) A person who must respond to a request (including by providing  
22 information under subsection ^239(2)) made under section ^238  
23 may apply to a court for an order:

24 (a) exempting the person (either wholly or partly) from  
25 responding to the request; or

26 (b) extending the time for responding to the request.

27 Note: For which courts have jurisdiction, and for transfers between courts,  
28 see Part 6.6.

29 (2) On application by the person for an order under paragraph (1)(a),  
30 the court may make the order if it is satisfied that, in the  
31 circumstances, it would be unreasonable for the person to respond  
32 to the request.

- 1 (3) On application by the person for an order under paragraph (1)(b),  
2 the court may make the order if it is satisfied that, in the  
3 circumstances, it would be unreasonable for the person to respond  
4 to the request:  
5 (a) within the time allowed under section ^240; or  
6 (b) within the time (if any) ordered by a court under section  
7 ^244.

8 **^242 Persons may recover costs arising from request**

- 9 (1) A person who must respond to a request made under section ^238  
10 may charge the person making the request a fee for providing  
11 information in response to the request.
- 12 (2) A fee imposed under subsection (1) must not:  
13 (a) exceed the reasonable marginal costs of providing the  
14 information; or  
15 (b) be such as to amount to taxation.
- 16 Note: Section ^272 deals with the onus of proving matters under this  
17 subsection.
- 18 (3) Despite subsection (1), a grantor mentioned in paragraph  
19 ^238(9)(a), or the grantor's authorised representative, who has  
20 requested information under section ^238 is entitled to be provided  
21 information free of charge unless:  
22 (a) that information has already been provided to the grantor or  
23 the authorised representative in response to a request made  
24 under section ^238; and  
25 (b) that request was made within the previous 6 months.
- 26 Note: Section ^272 deals with the onus of proving matters under this  
27 subsection.
- 28 (4) The grantor or the authorised representative is also entitled to be  
29 provided information free of charge, despite subsection (3), if there  
30 has been a material change in the information since the information  
31 was last provided to the grantor or the authorised representative.
- 32 Note: Section ^272 deals with the onus of proving matters under this  
33 subsection.

# EXPOSURE DRAFT

## Section ^243

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- 1 (5) A person is not required to provide information in response to a  
2 request made under section ^238 if:  
3 (a) the person imposes a fee under subsection (1) for providing  
4 the information; and  
5 (b) the fee has not been paid; and  
6 (c) an order under section ^244 that the person charge a nil  
7 amount, or provide the information free of charge, has not  
8 been made.

### 9 **^243 Application to court for response to request etc.**

- 10 (1) A person who makes a request under section ^238 may apply to a  
11 court for an order under this section if the person who must  
12 respond to the request has:  
13 (a) not responded to the request:  
14 (i) within the time specified in section ^240; or  
15 (ii) within the time ordered by the court under subsection  
16 ^241(3) or section ^244; or  
17 (b) provided an incomplete or incorrect response; or  
18 (c) refused to respond to the request because of subsection  
19 ^238(5) or (6).

20 Note: For which courts have jurisdiction, and for transfers between courts,  
21 see Part 6.6.

- 22 (2) On application, the court may make an order requiring the person  
23 who received the request to:  
24 (a) respond to the request within a specified period; or  
25 (b) provide a complete and correct response within a specified  
26 period.

### 27 **^244 Application to court in relation to costs charged**

- 28 (1) A person (the *interested person*) who has requested information  
29 under section ^238 may apply to a court for an order if:  
30 (a) the person who must respond to the request imposes a fee  
31 under subsection ^242(1) for providing the information; and  
32 (b) the interested person:  
33 (i) believes that the fee exceeds the reasonable marginal  
34 costs of providing the information; or

# EXPOSURE DRAFT

- 1 (ii) if the interested person is a grantor or the grantor's  
2 authorised representative—believes that the information  
3 has not already been provided to the grantor or the  
4 authorised representative in response to a request made  
5 under section ^238 within the previous 6 months; or  
6 (iii) if the interested person is a grantor or the grantor's  
7 authorised representative—believes that there has been  
8 a material change in the information since the  
9 information was last provided to the grantor or the  
10 authorised representative.

11 Note: For which courts have jurisdiction, and for transfers between courts,  
12 see Part 6.6.

- 13 (2) If the court is satisfied that the fee imposed under subsection  
14 ^242(1) exceeds the reasonable marginal costs of providing the  
15 information, the court may, on application by the interested person,  
16 make an order:  
17 (a) stating an amount (including a nil amount) that is to be  
18 imposed as a fee; and  
19 (b) stating a time within which the request must be responded to  
20 after the fee has been paid.

21 Note: Section ^272 deals with the onus of proving matters under this  
22 subsection.

- 23 (3) If the court is satisfied that:  
24 (a) the information has not already been provided to the grantor  
25 or the grantor's authorised representative in response to a  
26 request made under section ^238 within the previous 6  
27 months; or  
28 (b) there has been a material change in the information since the  
29 information was last provided to the grantor or the authorised  
30 representative;  
31 the court may, on application by the interested person, make an  
32 order:  
33 (c) that the information be provided to the grantor, or the  
34 authorised representative, free of charge; and  
35 (d) stating a time within which the request must be responded to.

36 Note: Section ^272 deals with the onus of proving matters under this  
37 subsection.

# EXPOSURE DRAFT

## Section ^245

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1                                    *Consequential orders*

2                                    (4) If the court makes an order under this section, it may also make  
3                                    any other consequential orders that it considers appropriate.

### 4                                    **^245 Consequences of not complying with court order**

5                                    If a person fails to comply with a court order made under section  
6                                    ^243 or ^244, the court may, on the application of the person who  
7                                    made the request under section ^238:

8                                    (a) make an order extinguishing the security interest to which the  
9                                    request relates, together with an order directing the Registrar  
10                                    to amend the registration to which the security interest  
11                                    relates:

12                                    (i) if the only collateral described by the registration is the  
13                                    collateral secured by the security interest—to end the  
14                                    effective registration of the collateral; or

15                                    (ii) if the registration describes collateral other than the  
16                                    collateral secured by the security interest—to omit the  
17                                    collateral that is secured by the security interest; or

18                                    (b) make such other orders as the court thinks necessary to  
19                                    ensure compliance with the request.

### 20                                    **^246 Estoppels against persons who respond to a request**

21                                    (1) For the purposes of this Act, a person who responds to a request  
22                                    made under section ^238 is prevented from denying any of the  
23                                    things mentioned in subsection (2) of this section to any of the  
24                                    following persons to the extent that that person relies on the  
25                                    response:

26                                    (a) the person who makes the request;

27                                    (b) any other person who the person who responds to the request  
28                                    actually knows will rely on the response.

29                                    (2) For the purposes of subsection (1), a person is prevented from  
30                                    denying the following things:

31                                    (a) that a copy of a security agreement provided in response to a  
32                                    request made in accordance with paragraph ^238(1)(a) is a  
33                                    true copy of the security agreement;



# EXPOSURE DRAFT

Miscellaneous **Chapter 6**

Provision of information relating to security interest **Part 6.3**

Section ^246

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- 1 (b) if the person corrected information in response to a request  
2 made in accordance with paragraph ^238(1)(b), (c) or (d):  
3 (i) the accuracy of information provided in response to the  
4 request before the correction; or  
5 (ii) the accuracy of the information provided in response to  
6 the request.

# EXPOSURE DRAFT

Chapter 6 Miscellaneous

Part 6.4 Giving of notices, etc.

Section ^247

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## Part 6.4—Giving of notices, etc.

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### **^247 Application of this Part**

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This Part does not apply to notices or other documents served or given:

6

7

(a) in, or for the purposes of, any proceedings in a court or a tribunal of the Commonwealth or a State or Territory; or

8

9

(b) in accordance with a procedure specified in a security agreement for serving or giving notices or other documents.

10

11

### **^248 Notices etc. must be given in writing**

12

A notice or any other document required or permitted to be given to any person for the purposes of this Act must be in writing.

13

14

### **^249 Method of giving notices etc. to persons registered as secured parties**

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(1) A notice or document required or permitted to be given, for the purposes of this Act, to a person registered as a secured party must be given to the person, by one of the following methods, at the address specified in the registration for the giving of notices to the person:

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(a) leaving it at the address;

22

(b) sending it to the address by pre-paid post;

23

(c) sending it to the address by fax or by email.

24

Note: For the giving of verification statements by the Registrar, see sections ^221 and ^222.

25

26

(2) This section has effect despite section 28A of the *Acts Interpretation Act 1901* and section 9 of the *Electronic Transactions Act 1999*.

27

28

1 **^250 Method of giving of notices etc. where more than one person is**  
2 **registered as a secured party**

- 3 (1) This section applies if:  
4 (a) a registration includes 2 or more secured parties; and  
5 (b) a notice or document is required or permitted to be given to  
6 each of the secured parties.
- 7 (2) The notice or document may be given to each of the secured parties  
8 by giving a single notice in accordance with section ^249.

9 **^251 Notices etc. must be given to persons registered as secured**  
10 **parties using identifier**

11 Despite anything in this Part, a notice or document is, for the  
12 purposes of this Act, taken not to have been given to a person  
13 registered as a secured party if:

- 14 (a) the Registrar approves a manner of including an identifier in  
15 a notice or document; and  
16 (b) an identifier is specified in the registration for the giving of  
17 notices to the person; and  
18 (c) the notice or document does not include the identifier in the  
19 manner approved by the Registrar.

20 **^252 Method of giving notices etc. to deceased persons**

21 If a notice or document is required or permitted to be given to a  
22 person for the purposes of this Act and the person is deceased, a  
23 copy of the notice or document must be given to:

- 24 (a) the legal personal representative of the deceased; or  
25 (b) on application by the person giving the notice, such person as  
26 a court directs.

27 Note: For which courts have jurisdiction, and for transfers between courts,  
28 see Part 6.6.

29 **^253 Court may make order concerning giving of notices, etc.**

- 30 (1) Despite anything in this Part, if a notice or other document is  
31 required or permitted by this Act to be given to a person, a court

# EXPOSURE DRAFT

## Section ^254

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- 1 may, on application by a person who is required or permitted to  
2 give the notice or document, make an order:  
3 (a) directing that the notice or document be given in any manner  
4 specified by the court; or  
5 (b) dispensing with any requirement to give the notice or  
6 document, either unconditionally or subject to conditions.

7 Note: For which courts have jurisdiction, and for transfers between courts,  
8 see Part 6.6.

- 9 (2) In considering whether to make an order under subsection (1), the  
10 court must have regard to the following matters:  
11 (a) the efficient administration of this Act;  
12 (b) any other matter that the court considers relevant.

### 13 **^254 Giving notices or documents by fax**

- 14 (1) A notice or document given by fax is, in the absence of proof to the  
15 contrary:  
16 (a) presumed to have been given if the sender's fax machine has  
17 generated a record of the transmission of the notice or  
18 document to the fax machine of the recipient; and  
19 (b) presumed to have been received at the time specified in the  
20 record.  
21 (2) This section has effect despite section 14 of the *Electronic*  
22 *Transactions Act 1999*.

### 23 **^255 Giving notices or documents by email**

- 24 (1) A notice or document given by email is, in the absence of proof to  
25 the contrary, presumed to have been given if the person giving the  
26 notice or document proves that the notice or document was  
27 transmitted by computer system to the email address provided by  
28 the person to whom the notice is intended to be given.  
29 Example: Examples of such proof are:  
30 (a) an email acknowledgment received by the person giving a notice  
31 indicating that the email was successfully transmitted; and  
32 (b) a copy of the email sent by the person giving a notice that  
33 displays the email address provided by the person to whom the  
34 notice is intended to be given.

1 (2) This section has effect despite any provision of the *Electronic*  
2 *Transactions Act 1999*.

3 **^256 Formal defect not to invalidate notice**

4 A notice purportedly given under this Act is not invalid as a result  
5 of a formal defect or an irregularity, unless:

6 (a) a person applies to a court objecting on that ground; and

7 (b) the court is satisfied that substantial injustice has been caused  
8 by the defect or irregularity; and

9 (c) the court is satisfied that the injustice cannot be remedied by  
10 an order of the court.

# EXPOSURE DRAFT

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## Part 6.5—Timing requirements

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### **^257 Applications for extension of time**

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(1) On application, a court may make an order extending the number of business days in a period specified in the following provisions if the court is satisfied that it is just and equitable to do so:

(a) paragraph ^110(b) (perfection of purchase money security interests);

(b) paragraph ^112(1)(c) (perfection of purchase money security interests);

(c) subsection ^165(4) (compliance with notice from higher priority party);

(d) subsection ^165(9) (payment of amount by higher priority party);

(e) paragraphs ^170(2)(a) and (6)(a) (giving statements of account);

(f) subsection ^176(2) (giving proof of interest);

(g) paragraph ^200(2)(c) (when defect makes registration ineffective);

(h) subsection ^206(2) (application for amendment of registration);

(i) paragraph ^211(b) (application for amendment after demand);

(j) subsection ^238(3) (information required by request).

(2) The court may make the order even if the period has ended.

(3) In making an order to extend a period under subsection (1), the court must take into account the following:

(a) whether the need to extend the period arises as a result of an accident, inadvertence or some other sufficient cause;

(b) whether extending the period would prejudice the position of any other secured parties or other creditors;

(c) whether any person has acted, or not acted, in reliance on the period having ended.

1 **^258 References to time in this Act**

2 (1) In this Act, a reference to a particular time is a reference to that  
3 time by legal time in the Australian Capital Territory.

4 (2) To avoid doubt, a reference to a particular time includes a  
5 reference to a particular time by reference to the end of period.

# EXPOSURE DRAFT

Chapter 6 Miscellaneous

Part 6.6 Jurisdiction of courts

Division 1 Scope

Section ^259

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## 2 **Part 6.6—Jurisdiction of courts**

### 3 **Division 1—Scope**

#### 4 **^259 Operation of Part**

5 (1) This Part deals with the jurisdiction of a court in respect of a matter  
6 (a *PPS matter*):

7 (a) arising under a provision of this Act authorising an  
8 application to be made to a court; or

9 (b) otherwise arising in relation to this Act, other than a matter in  
10 respect of which the Federal Court or the Federal Magistrates  
11 Court has jurisdiction under the *Administrative Decisions*  
12 *(Judicial Review) Act 1977*; or

13 (c) otherwise arising in relation to a security agreement or a  
14 security interest.

15 (2) This Part operates to the exclusion of:

16 (a) the *Jurisdiction of Courts (Cross-vesting) Act 1987*; and

17 (b) section 39B of the *Judiciary Act 1903*.

18 (3) This Part does not limit the operation of the provisions of the  
19 *Judiciary Act 1903* other than section 39B.

20 (4) Without limiting subsection (3), this Part does not limit the  
21 operation of subsection 39(2) of the *Judiciary Act 1903* in relation  
22 to matters arising under this Act.

23 (5) Nothing in this Part affects any other jurisdiction of any court.

24 Note 1: This Act may not operate in a State in relation to certain security  
25 interests (see Part 1.2).

26 Note 2: This Act only extends to an external Territory if regulations are made  
27 to provide for that extension (see section ^4).



# EXPOSURE DRAFT

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## **Division 2—Conferral of jurisdiction**

3

### **^260 Jurisdiction of courts and cross-jurisdictional appeals**

4

(1) Jurisdiction is conferred on a court mentioned in an item in the following table with respect to a PPS matter, subject to the limits on the court's jurisdiction (if any) specified in the item:

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#### **Jurisdiction of courts**

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<b>Item</b>	<b>Court on which jurisdiction is conferred</b>	<b>Limits of jurisdiction</b>
1	The Federal Court	No specified limits.
2	The Federal Magistrates Court	The court does not have jurisdiction to award an amount for loss or damage that exceeds: (a) \$750,000; or (b) if another amount is prescribed by the regulations—that other amount.
3	A superior court, or lower court, of a State or Territory	The court's general jurisdictional limits, including (but not limited to) limits as to locality and subject matter.
4	The Family Court	No specified limits.

8

(2) Unless expressly provided by a law of the Commonwealth, a State or a Territory, an appeal with respect to a PPS matter does not lie from a decision of a court mentioned in an item in the following table to the other courts mentioned in the item:

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#### **Cross-jurisdictional appeals**

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<b>Item</b>	<b>Court from which appeal does not lie</b>	<b>Courts to which appeal does not lie</b>
1	The Federal Court	(a) a court of a State; (b) a court of a Territory; (c) the Family Court;

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# EXPOSURE DRAFT

Chapter 6 Miscellaneous

Part 6.6 Jurisdiction of courts

Division 2 Conferral of jurisdiction

Section ^260

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**Cross-jurisdictional appeals**

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<b>Item</b>	<b>Court from which appeal does not lie</b>	<b>Courts to which appeal does not lie</b>
		(d) the Federal Magistrates Court.
2	The Federal Magistrates Court	(a) a court of a State; (b) a court of a Territory.
3	A court of a State (other than a State Family Court)	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of another State; (d) a court of a Territory; (e) the Family Court; (f) a State Family Court of the same State.
4	A court of the Australian Capital Territory	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of a State; (d) a court of another Territory; (e) the Family Court.
5	A court of the Northern Territory	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of a State; (d) a court of another Territory; (e) the Family Court.
6	A court of an external Territory	(a) the Federal Magistrates Court; (b) a court of a State; (c) a court of another Territory (whether internal or external); (d) the Family Court.
7	The Family Court	(a) the Federal Court; (b) the Federal Magistrates Court; (c) a court of a State; (d) a court of a Territory.
8	A State Family Court	(a) the Federal Court; (b) the Federal Magistrates Court; (c) the Supreme Court of the same

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# EXPOSURE DRAFT

Miscellaneous **Chapter 6**  
Jurisdiction of courts **Part 6.6**  
Conferral of jurisdiction **Division 2**

Section ^261

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## Cross-jurisdictional appeals

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Item	Court from which appeal does not lie	Courts to which appeal does not lie
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State;

(d) a court of another State;

(e) a court of a Territory.

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1 **^261 Courts to act in aid of each other**

2 All of the following must severally act in aid of, and be auxiliary  
3 to, each other in PPS matters:

4 (a) courts on which jurisdiction is conferred under this Part;

5 (b) officers of, or under the control of, those courts.

# EXPOSURE DRAFT

Chapter 6 Miscellaneous

Part 6.6 Jurisdiction of courts

Division 3 Transfers between courts

Section ^262

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1

## 2 **Division 3—Transfers between courts**

### 3 **^262 Transfers—application of Division**

#### 4 *Scope of Division*

- 5 (1) This Division applies if all the following conditions are satisfied:
- 6 (a) a proceeding with respect to a PPS matter is pending, or has
- 7 come, before a court (the *transferring court*) on which
- 8 jurisdiction is conferred under this Part in relation to the
- 9 matter;
- 10 (b) jurisdiction is also conferred on another court (the *receiving*
- 11 *court*) under this Part with respect to either of the following
- 12 (the *transfer matter*):
- 13 (i) the entire proceeding;
- 14 (ii) an application in the proceeding;
- 15 (c) the receiving court has the power to grant the remedies
- 16 sought before the transferring court in relation to the transfer
- 17 matter.

#### 18 *Transfers to which other legislation applies*

- 19 (2) This Division does not apply to a transfer between the courts
- 20 mentioned in an item in the following table, except as provided by
- 21 paragraph ^263(2)(b):
- 22

---

#### **Transfers to which other legislation applies**

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<b>Item</b>	<b>Transferring court</b>	<b>Receiving court</b>
1	The Federal Court	The Federal Magistrates Court.
2	The Family Court	The Federal Magistrates Court.
3	The Federal Magistrates Court	The Federal Court or the Family Court.

---

- 23 Note 1: Paragraph ^263(2)(b) gives the Federal Magistrates Court the power
- 24 to transfer a matter to the Federal Court with a recommendation that
- 25 the Federal Court transfer the matter to a superior court other than the
- 26 Federal Court.
-

- 1 Note 2: Transfers mentioned in the table are covered by other legislation as  
2 follows:
- 3 (a) for a transfer mentioned in item 1—section 32AB of the *Federal*  
4 *Court of Australia Act 1976*;
- 5 (b) for a transfer mentioned in item 2—sections 33A to 33C of the  
6 *Family Law Act 1975*;
- 7 (c) for a transfer mentioned in item 3—section 39 of the *Federal*  
8 *Magistrates Act 1999*.

## 9 **^263 Transfers—exercise of transfer power**

### 10 *General rule*

- 11 (1) If section ^264 (which deals with the criteria for transfers) is  
12 satisfied, the transferring court may transfer to the receiving court:
- 13 (a) the transfer matter; and  
14 (b) if the transferring court considers it necessary or  
15 convenient—any related application (or all related  
16 applications) in the proceeding.

### 17 *Cross-jurisdictional transfers between lower courts and superior* 18 *courts*

- 19 (2) However, if the transferring court is a lower court, and the  
20 transferring court considers that section ^264 is satisfied in relation  
21 to the transfer of a matter mentioned in subsection (1) of this  
22 section to a receiving court that is a superior court other than the  
23 relevant superior court:
- 24 (a) the transferring court does not have the power to transfer the  
25 matter to that receiving court; but  
26 (b) the transferring court may:  
27 (i) transfer the matter to the relevant superior court; and  
28 (ii) give the relevant superior court a recommendation that  
29 the matter be transferred to that receiving court by the  
30 relevant superior court.

- 31 (3) In this Act:

### 32 *lower court* means:

- 33 (a) the Federal Magistrates Court; or

# EXPOSURE DRAFT

Chapter 6 Miscellaneous

Part 6.6 Jurisdiction of courts

Division 3 Transfers between courts

Section ^264

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1 (b) a court of a State or Territory that is not a superior court.

2 *relevant superior court*, in relation to a lower court, means:

3 (a) if the lower court is the Federal Magistrates Court—the  
4 Federal Court; or

5 (b) if the lower court is a court of a State or Territory—the  
6 Supreme Court of the State or Territory.

7 *superior court* means:

8 (a) the Federal Court; or

9 (b) a Supreme Court of a State or Territory; or

10 (c) the Family Court; or

11 (d) a State Family Court.

## 12 **^264 Transfers—criteria for transfer**

### 13 *General*

14 (1) The transferring court may make a transfer under section ^263 only  
15 if it appears to the transferring court, taking into account the  
16 considerations covered by subsection (2), that:

17 (a) the transfer matter arises out of, or is related to, another  
18 proceeding pending, or that has come, before a receiving  
19 court; or

20 (b) it is otherwise in the interests of justice that the transfer  
21 matter be determined by a receiving court.

### 22 *Relevant considerations*

23 (2) The considerations covered by this subsection include, but are not  
24 limited to, the following:

25 (a) the principal location, or place of business, of the parties in  
26 relation to the transfer matter;

27 (b) where the event (or events) that are the subject of the transfer  
28 matter took place;

29 (c) the desirability of related proceedings being heard in the  
30 same State or Territory;

31 (d) any relevant recommendation received under subsection  
32 ^263(2);

# EXPOSURE DRAFT

- 1 (e) the suitability (taking into account the considerations  
2 mentioned in paragraphs (a) to (d) and any other  
3 consideration) of having the transfer matter determined by  
4 the receiving court.

5 **^265 Transfers—how initiated**

- 6 A court may make a transfer under section ^263:  
7 (a) on the application of a party made at any stage; or  
8 (b) at the court's own initiative.

9 **^266 Transfers—documents and procedure**

- 10 If a transferring court transfers a proceeding or application to  
11 another court under section ^263:  
12 (a) the Registrar (or other proper officer) of the transferring court  
13 must give the Registrar (or other proper officer) of the other  
14 court all documents filed in the transferring court in respect  
15 of the proceeding or application, as the case may be; and  
16 (b) the other court must proceed as if:  
17 (i) the proceeding or application had been originally  
18 instituted or made in the other court; and  
19 (ii) the same proceedings had been taken in the other court  
20 as were taken in the transferring court.

21 **^267 Transfers—conduct of proceedings**

- 22 (1) Subject to any applicable rules of court, a court must, in dealing  
23 with a PPS matter transferred to the court under section ^263,  
24 apply rules of evidence and procedure that:  
25 (a) are applied in any superior court; and  
26 (b) the court considers appropriate to be applied in the  
27 circumstances.
- 28 (2) If a proceeding with respect to a PPS matter is transferred under  
29 section ^263 from a transferring court to another court, the other  
30 court must deal with the proceeding as if, subject to any order of  
31 the transferring court, the steps that had been taken for the  
32 purposes of the proceeding in the transferring court (including the

# EXPOSURE DRAFT

Chapter 6 Miscellaneous

Part 6.6 Jurisdiction of courts

Division 3 Transfers between courts

Section ^268

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1 making of an order), or similar steps, had been taken in the other  
2 court.

## 3 **^268 Transfers—entitlement to practise as barrister or solicitor**

### 4 *Scope*

5 (1) This section applies if a proceeding with respect to a PPS matter in  
6 a transferring court is transferred to another court under section  
7 ^263.

### 8 *Right to appear*

9 (2) A person who is entitled to practise as a legal practitioner (however  
10 described) in the transferring court has the same entitlements to  
11 practise in relation to the matters covered by subsection (3) in the  
12 other court that the person would have if the other court were a  
13 federal court exercising federal jurisdiction.

14 (3) This subsection covers the following matters:

- 15 (a) the PPS matter;
- 16 (b) any other proceeding out of which the PPS matter arises or to  
17 which the PPS matter is related, if the other proceeding is to  
18 be determined together with the PPS matter.

## 19 **^269 Transfers—limitation on appeals**

20 An appeal does not lie from a decision of a court:

- 21 (a) in relation to the transfer of a proceeding under section ^263;  
22 or
- 23 (b) as to which rules of evidence and procedure are to be applied  
24 under subsection ^267(1).



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## Part 6.7—Registrar's role in judicial proceedings

4

### **^270 Registrar's role—intervention in judicial proceedings**

5

(1) The Registrar may intervene in a proceeding in a court with respect to a PPS matter.

6

7

(2) If the Registrar intervenes in the proceeding:

8

(a) the Registrar is taken to be a party to the proceeding; and

9

(b) subject to this Act, the Registrar has all the rights, duties and liabilities of such a party; and

10

11

(c) without limiting paragraph (b), the Registrar may appear and be represented by a legal practitioner (however described).

12

13

### **^271 Registrar's role—initiation of judicial proceedings**

14

#### *Scope*

15

(1) This section applies if the Registrar considers it to be in the public interest for a person to bring and carry on a proceeding in a court for the recovery of damages with respect to a PPS matter.

16

17

18

#### *Initiation of proceedings by Registrar*

19

(2) The Registrar may cause the proceeding to be begun and carried on in the person's name.

20

21

(3) If the person is not a constitutional corporation, the Registrar must obtain the person's written consent to the exercise of the Registrar's power under subsection (2).

22

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# EXPOSURE DRAFT

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## Part 6.8—Onus of proof and related entities

4

### ^272 Onus of proof

5

In a proceeding in Australia under this Act, the onus of proving the following facts lies with the person asserting those facts:

6

7

(a) the fact that a security interest attaches to personal property;

8

(b) the fact that a security interest is perfected by registration;

9

(c) the fact that a person acquires personal property free of a security interest, except in relation to sections ^85 and ^88;

10

11

(d) the fact that a person acquires personal property free of a security interest under subsection ^88(1);

12

13

(e) the fact that a person does not acquire personal property free of a security interest under subsection ^88(2);

14

15

(f) the fact that a person who purchases collateral pays at least the market value of the collateral at the time of the purchase (see paragraph ^167(3)(b));

16

17

18

(g) the fact that an applicant for the registration of personal property as collateral believes on reasonable grounds that a security interest in the property has been, or will be, granted to a person stated in the application to be the secured party (see subsection ^190(1));

19

20

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22

(h) the fact that an applicant for the amendment of a registration of personal property believes on reasonable grounds that a security interest in the property has been, or will be, granted to a person:

23

24

25

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27

(i) registered as a secured party in the registration; or

28

(ii) stated in the application to be the secured party;

29

(see subsection ^203(1));

30

31

(i) the fact that a person acquires personal property without knowledge referred to in paragraph ^233(3)(b);

32

33

34

(j) the fact that a fee referred to in subsection ^242(1) does not exceed the reasonable marginal costs of providing information (see subsection ^242(2));

35

36

(k) the fact that information has been provided to a grantor or the grantor's authorised representative in response to a request

- 1 made under section ^238 and made within the previous 6  
2 months (see subsection ^242(3));  
3 (l) the fact that there has not been a material change in  
4 information provided to a grantor or the grantor's authorised  
5 representative since the information was last provided to the  
6 grantor or the authorised representative (see subsection  
7 ^242(4)).

8 **^273 Presumption in cases of related entities etc.**

- 9 (1) This section applies if:  
10 (a) a person (the *transferee*) acquires an interest in personal  
11 property from another person (the *transferor*); and  
12 (b) any of the following applies:  
13 (i) the transferee is a member of the same household as the  
14 transferor;  
15 (ii) the transferee is an associated entity (within the  
16 meaning of the *Corporations Act 2001*) of the  
17 transferor, or the transferor is an associated entity of the  
18 transferee;  
19 (iii) the transferee is a director or officer (within the  
20 meaning of that Act) of the transferor, or the transferor  
21 is a director or officer of the transferee.
- 22 (2) For the purposes of this Act, the following is to be presumed,  
23 unless the contrary is shown beyond reasonable doubt:  
24 (a) the transferee had knowledge (including actual knowledge)  
25 that the acquisition constituted a breach of the security  
26 agreement that provides for a security interest in the personal  
27 property;  
28 (b) the transferee had knowledge (including actual knowledge)  
29 of a security interest in the personal property;  
30 (c) value was not given by the transferee for the interest  
31 acquired.

Section ^274

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## Part 6.9—Forms

3

4

### ^274 Approved forms

5

(1) This section applies if this Act requires or authorises something to be in the approved form.

6

7

(2) To be in the *approved form*, the thing must:

8

(a) be in writing in a form approved by the Registrar; and

9

(b) include the information, statements, explanations or other matters required by the form approved for the purposes of paragraph (a); and

10

11

12

(c) include any other material (including documents) required by that form.

13

14

Note: *Writing* may include the display or representation of words or data by any form of communication, if recorded in a certain way (see section ^26).

15

16

17

Example: Examples of forms that could be approved (see paragraph (2)(a)) are:

18

(a) an interactive form provided on the internet; and

19

(b) a communication exchange provided by an interactive voice recognition telephone system.

20

21

(3) The Registrar may, by instrument, approve a form for the purposes of paragraph (2)(a).

22

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## **Part 6.10—Regulations**

4

### **^275 Regulations**

5

The Governor-General may make regulations prescribing matters:

6

(a) required or permitted by this Act to be prescribed; or

7

(b) necessary or convenient to be prescribed for carrying out or

8

giving effect to this Act.

1

## Chapter 7—Transitional provisions

2

### Part 7.1—Key concepts

3

4

#### ^276 Meaning of *migration time*

5

6

(1) In this Act:

7

*migration time* is the start of the day (the *migration day*)  
determined under this section.

8

9

*Ministerial determination*

10

(2) The Minister may, by legislative instrument, determine a day as the  
migration day.

11

12

(3) The migration day must be 60 days or more after the day the  
determination is made under subsection (2).

13

14

*Amendment to provide for later migration day*

15

(4) The Minister may, by legislative instrument, amend a  
determination under subsection (2) to substitute a later day as the  
migration day.

16

17

18

Note: The Minister may amend a determination more than once after the  
initial determination is made (see subsection 33(1) of the *Acts*  
*Interpretation Act 1901*).

19

20

21

(5) A later day substituted by an amendment under subsection (4) must  
be 30 days or more after the day the amending instrument is made.

22

23

(6) An amending instrument under subsection (4) may only be made  
before the migration day (as at the time immediately before the  
amending instrument is made).

24

25

#### ^277 Meaning of *registration commencement time*

26

27

In this Act:

1                    **registration commencement time** means the start of the first day of  
2                    the second month after the month in which the migration time  
3                    occurs.

4                    Example: If the migration time were at the start of 15 November 2009, the  
5                    registration commencement time would be at the start of 1 January  
6                    2010.

7                    Note: For the meaning of *migration time*, see section ^276.

## 8                    ^278 Meaning of *transitional security agreement*

9                    In this Act:

10                   **transitional security agreement** means a security agreement, if:

11                   (a) the security agreement was in force immediately before the  
12                   registration commencement time; and

13                   (b) either:

14                   (i) in relation to the operation of this Act in a referring  
15                   State under Part 1.2 (Constitutional operation of Act)—  
16                   this Act would have operated in relation to a security  
17                   interest provided for by the security agreement, had this  
18                   Act been fully in force, and had that State been a  
19                   referring State, immediately before the registration  
20                   commencement time; or

21                   (ii) in relation to any other operation of this Act under  
22                   Part 1.2 (Constitutional operation of Act)—this Act  
23                   would have operated in relation to a security interest  
24                   provided for by the security agreement, had this Act  
25                   been fully in force immediately before the registration  
26                   commencement time.

## 27                   ^279 Meaning of *transitional security interest*

28                   In this Act:

29                   **transitional security interest** means a security interest in collateral  
30                   provided for by a transitional security agreement, if:

31                   (a) in the case of a security interest arising before the registration  
32                   commencement time—either:

33                   (i) in relation to the operation of this Act in a referring  
34                   State under Part 1.2 (Constitutional operation of Act)—





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## **Part 7.2—Initial application of this Act**

4

### **^280 Initial application of this Act—general**

5

(1) This Act applies in relation to the following:

6

(a) a security agreement made at or after the registration commencement time;

7

8

(b) a security interest (other than a transitional security interest) arising at or after the registration commencement time;

9

10

(c) a transitional security agreement;

11

(d) a transitional security interest (whether arising before, at or after the registration commencement time);

12

13

(e) an interest in personal property (other than a security interest) arising at or after the registration commencement time;

14

15

(f) an interest in personal property (other than a security interest), if data in relation to the interest is given to the Registrar as mentioned in section ^299 or ^300 (which deal with data in transitional registers).

16

17

18

19

(2) However, this Act applies in relation to the following subject to Part 7.3 (Transitional application of this Act):

20

21

(a) a transitional security agreement;

22

(b) a transitional security interest (whether the interest arises before, at or after the registration commencement time);

23

24

(c) an interest in personal property (other than a security interest), if data in relation to the interest is given to the Registrar as mentioned in section ^299 or ^300 (which deal with data in transitional registers).

25

26

27

28

Note: Data concerning interests mentioned in paragraphs (1)(f) and (2)(c) may be registered under section ^302 although the interests are not transitional security interests.

29

30

31

### **^281 Initial application of this Act—references to charges and fixed and floating charges**

32

33

Despite section ^280, Division 5 of Part 1.3 (references to charges and fixed and floating charges) applies only:

34

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## Section ^282

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- 1 (a) in the case of a reference to a charge, a fixed charge or a  
2 floating charge in a law of the Commonwealth (whether the  
3 law is made before, at or after the registration  
4 commencement time)—in relation to a security interest  
5 arising after the registration commencement time; or  
6 (b) in the case of a reference to a charge, a fixed charge or a  
7 floating charge in a security agreement—in relation to a  
8 security agreement made after the registration  
9 commencement time.

### 10 **^282 Initial application of this Act—enforceability of transitional** 11 **security interests against third parties**

12 Despite section ^63, a transitional security interest is enforceable  
13 against a third party in respect of particular personal property if it  
14 would have been so enforceable immediately before the  
15 registration commencement time.

### 16 **^283 Initial application of this Act—constitutional and** 17 **non-constitutional interests**

- 18 (1) Despite section ^280, section ^94 (when a non-constitutional  
19 security interest becomes a constitutional security interest) applies  
20 only in relation to security interests in collateral that arise after the  
21 registration commencement time.
- 22 (2) Despite section ^280, section ^103 (priority between  
23 non-constitutional security interests and constitutional security  
24 interests) applies only in relation to security interests in collateral,  
25 in relation to which this Act does not operate, that arise after the  
26 registration commencement time.

### 27 **^284 Initial application of this Act—priority between security** 28 **interests and other interests**

29 Despite section ^280, section ^120 (priority between security  
30 interests and other interests) applies in relation to an interest in  
31 collateral only if the interest is created, arises or is provided for  
32 under one of the following after the registration commencement  
33 time:

- 1 (a) a law of the Commonwealth, a State or a Territory;  
2 (b) the general law.

3 **^285 Initial application of this Act—enforcement of security**  
4 **interests**

5 Despite section ^280, section ^127 (security interests in intellectual  
6 property licences) applies only in relation to security interests in  
7 intellectual property licences that are made after the registration  
8 commencement time.

9 **^286 Initial application of this Act—enforcement of security**  
10 **interests**

11 Despite section ^280, Chapter 4 (enforcement of security interests)  
12 applies only in relation to security interests provided for by  
13 security agreements made after the registration commencement  
14 time.

# EXPOSURE DRAFT

Chapter 7 Transitional provisions

Part 7.3 Transitional application of this Act

Division 1 Priority on insolvency/bankruptcy or registration

Section ^287

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1

## 2 **Part 7.3—Transitional application of this Act**

### 3 **Division 1—Priority on insolvency/bankruptcy or** 4 **registration**

#### 5 **Subdivision A—Scope of Division**

##### 6 **^287 Scope of Division—insolvency/bankruptcy**

7 This Division applies to a transitional security interest in collateral  
8 if:

- 9 (a) the priority between the transitional security interest in the  
10 collateral and another security interest in the same collateral  
11 comes to be determined under this Act; and  
12 (b) that priority comes to be determined because of an  
13 insolvency or bankruptcy.

##### 14 **^288 Scope of Division—registration**

###### 15 *General*

- 16 (1) This Division also applies to a transitional security interest in  
17 collateral if subsection (2) or (3) is satisfied in relation to the  
18 transitional security interest in collateral and another security  
19 interest in the same collateral.

###### 20 *Non-migrated transitional security interests*

- 21 (2) This subsection is satisfied if:  
22 (a) collateral is covered by a transitional security agreement; and  
23 (b) the collateral is, or has been, registered in a registration  
24 before the end of the month that is 24 months after the  
25 registration commencement time (even if that registration has  
26 become ineffective or has been removed); and  
27 (c) that registration discloses that the collateral is covered by a  
28 transitional security agreement; and

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Transitional provisions **Chapter 7**

Transitional application of this Act **Part 7.3**

Priority on insolvency/bankruptcy or registration **Division 1**

Section ^289

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- 1 (d) a transitional security interest (other than a migrated security  
2 interest) in the collateral arises under the transitional security  
3 agreement (whether the interest arises before, at or after the  
4 registration time for the collateral); and  
5 (e) the priority between the transitional security interest in the  
6 collateral and another security interest in the same collateral  
7 comes to be determined under this Act.

8 *Migrated security interests*

- 9 (3) This subsection is satisfied if:  
10 (a) collateral is covered by a transitional security agreement; and  
11 (b) the collateral has been registered in a registration under  
12 section ^302 (even if that registration has become ineffective  
13 or has been removed); and  
14 (c) a transitional security interest in the collateral that is a  
15 migrated security interest has arisen under the transitional  
16 security agreement; and  
17 (d) the priority between the migrated security interest in the  
18 collateral and another security interest in the same collateral  
19 comes to be determined under this Act.

## 20 **Subdivision B—Attachment and perfection**

### 21 **^289 Priority on insolvency/bankruptcy or registration—attachment** 22 **rule**

23 The transitional security interest is taken to have attached to the  
24 collateral immediately before the registration commencement time.

### 25 **^290 Priority on insolvency/bankruptcy or registration—temporary** 26 **perfection rule (non-migrated security interests)**

27 *Transitional security interest temporarily perfected*

- 28 (1) Unless the transitional security interest is a migrated security  
29 interest, the interest is temporarily perfected for the period starting  
30 immediately before the registration commencement time and  
31 ending at the earlier of the following times:

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Chapter 7 Transitional provisions

Part 7.3 Transitional application of this Act

Division 1 Priority on insolvency/bankruptcy or registration

Section ^291

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- 1 (a) if the interest has been perfected apart from under this  
2 subsection—the time when the interest would stop being  
3 continuously perfected (whether under Part 5.4, or for any  
4 other reason) if it were not perfected under this subsection;  
5 (b) the end of the month that is 24 months after the registration  
6 commencement time.

7 *Transitional security interest becomes unperfected*

- 8 (2) However, if paragraph (1)(b) applies, the transitional security  
9 interest becomes unperfected at the time mentioned in  
10 paragraph (1)(b), unless the transitional security interest is  
11 perfected otherwise than under this section before that time.

12 **^291 Priority on insolvency/bankruptcy or registration—perfection**  
13 **by registration (migrated security interests)**

14 *Migrated security interests taken to be perfected by registration*

- 15 (1) If the transitional security interest is a migrated security interest,  
16 the interest is taken to be perfected by registration for the period  
17 starting immediately before the registration commencement time  
18 and ending at the earlier of the following times:  
19 (a) the time when the interest stops being continuously perfected  
20 (whether because the registration stops being effective under  
21 Part 5.4, or for any other reason);  
22 (b) the end time included in the registration under subsection  
23 ^302(3).

24 Note: A registration may stop being effective under Part 5.4 at the registered  
25 end time. The registration may be amended under Part 5.5 to change  
26 the registered end time.

27 *Migrated security interests becomes unperfected*

- 28 (2) However, the migrated security interest becomes unperfected at the  
29 end of the period mentioned in subsection (1), unless the migrated  
30 security interest is perfected otherwise than under this section  
31 before the end of that period.

# EXPOSURE DRAFT

Transitional provisions **Chapter 7**  
Transitional application of this Act **Part 7.3**  
Priority on insolvency/bankruptcy or registration **Division 1**

Section ^292

## Subdivision C—Priority between transitional security interests

### **^292 Priority on insolvency/bankruptcy or registration—between transitional security interests**

#### *Scope*

- (1) This section applies if the priority between 2 transitional security interests to which this Division applies comes to be determined under this Act in relation to the same collateral.

Note: For priority involving a transitional security interest to which this Division does not apply, see section ^294.

#### *During perfection period*

- (2) If the priority between 2 transitional security interests mentioned in an item in the following table comes to be determined under this Act during the period to which the item applies, the security interests have the priority between themselves that they would have had immediately before the registration commencement time if this Act had not been enacted:

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#### **Priority between transitional security interests during perfection period**

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<b>Item</b>	<b>Transitional security interests</b>	<b>Priority period</b>
1	2 transitional security interests (other than migrated security interests) in the same collateral	The shorter of the following periods: (a) the period mentioned in subsection ^290(1) for the first transitional security interest; (b) the period mentioned in subsection ^290(1) for the other transitional security interest.
2	A transitional security interest (other than a migrated security interest) and a migrated security interest in the same collateral	The shorter of the following periods: (a) the period mentioned in subsection ^290(1) for the transitional security interest that is not a migrated security interest; (b) the period mentioned in section subsection ^291(1) for the migrated security interest.

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# EXPOSURE DRAFT

Chapter 7 Transitional provisions

Part 7.3 Transitional application of this Act

Division 1 Priority on insolvency/bankruptcy or registration

Section ^293

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## Priority between transitional security interests during perfection period

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Item	Transitional security interests	Priority period
3	2 migrated security interests in the same collateral	The shorter of the following periods: (a) the period mentioned in subsection ^291(1) for the first migrated security interest; (b) the period mentioned in subsection ^291(1) for the other migrated security interest.

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1 Note: A migrated security interest is a type of transitional security interest  
2 (see section ^301).

3 *After perfection period*

4 (3) If the priority between 2 transitional security interests mentioned in  
5 an item in the table in subsection (2) comes to be determined under  
6 this Act at a time after the end of the period to which the item  
7 applies:

8 (a) the security interests have the priority between themselves  
9 that is determined under this Act (apart from this section);  
10 but

11 (b) if the application of paragraph (a) would not result in either  
12 security interest having priority over the other—the security  
13 interests have the priority between themselves that they  
14 would have had immediately before the registration  
15 commencement time if this Act had not been enacted.

16 **^293 Priority on insolvency/bankruptcy or registration—migrated**  
17 **security interests and acquisition of property**

18 *Scope*

19 (1) This section applies if:

20 (a) this Division applies to a migrated security interest by virtue  
21 only of subsection ^288(3) (migrated security interests); and

22 (b) the operation of this Division in relation to the determination  
23 of priority between the migrated security interest and another  
24 security interest (whatever the nature of the other security  
25 interest) in relation to the same collateral would result in an



# EXPOSURE DRAFT

Transitional provisions **Chapter 7**

Transitional application of this Act **Part 7.3**

Priority on insolvency/bankruptcy or registration **Division 1**

Section ^293

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1 acquisition of property from a person otherwise than on just  
2 terms.

3 *Priority as if this Act had not been enacted*

4 (2) The migrated security interest and the other security interest have  
5 the priority between themselves that they would have had  
6 immediately before the registration commencement time if this Act  
7 had not been enacted.

# EXPOSURE DRAFT

Chapter 7 Transitional provisions

Part 7.3 Transitional application of this Act

Division 2 Priority not on insolvency/bankruptcy or registration

Section ^294

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## **Division 2—Priority not on insolvency/bankruptcy or registration**

3

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### **^294 Priority not on insolvency/bankruptcy or registration—general rule**

5

6

#### *Scope*

7

(1) This section applies if:

8

(a) Division 1 does not apply to a transitional security interest in collateral; and

9

10

(b) the priority between the transitional security interest in the collateral and another security interest (the ***competing security interest***) in the same collateral comes to be determined under this Act.

11

12

13

14

Note: For when Division 1 applies to a transitional security interest, see sections ^287 and ^288.

15

16

(2) This section applies to a competing security interest:

17

(a) whether or not the competing security interest is a transitional security interest; and

18

19

(b) if the competing security interest is a transitional security interest—whether or not the competing security interest:

20

21

(i) is a migrated security interest; or

22

(ii) is a security interest to which Division 1 applies.

23

#### *Priority rule*

24

(3) The transitional security interest and the competing security interest in the collateral have the priority between themselves that they would have had immediately before the registration commencement time if this Act had not been enacted.

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# EXPOSURE DRAFT

Transitional provisions Chapter 7

Transitional application of this Act Part 7.3

Extinguishment and vesting of transitional security interests Division 3

Section ^295

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2 **Division 3—Extinguishment and vesting of transitional**  
3 **security interests**

4 **Subdivision A—Application to certain transitional security**  
5 **interests**

6 **^295 Application on insolvency/bankruptcy**

7 This Subdivision applies to a transitional security interest in  
8 collateral at a particular time (the *applicable time*) if, at the time, a  
9 secured party, grantor or debtor in relation to the security interest is  
10 insolvent or bankrupt.

11 **^296 Application on registration**

12 *General*

13 (1) This Subdivision also applies to a transitional security interest in  
14 collateral at a particular time (the *applicable time*) if subsection (2)  
15 or (3) is satisfied at that time.

16 *Non-migrated transitional security interests*

17 (2) This subsection is satisfied if:  
18 (a) collateral is covered by a transitional security agreement; and  
19 (b) the collateral is, or has been, registered in a registration (even  
20 if that registration has become ineffective or has been  
21 removed); and  
22 (c) that registration discloses (in accordance with regulations  
23 made for the purposes of item 9 of the table in section ^191)  
24 that the collateral is covered by a transitional security  
25 agreement; and  
26 (d) before the applicable time, a transitional security interest in  
27 the collateral arises under the transitional security agreement  
28 (whether the interest arises before, at or after the registration  
29 time for the collateral).

# EXPOSURE DRAFT

Chapter 7 Transitional provisions

Part 7.3 Transitional application of this Act

Division 3 Extinguishment and vesting of transitional security interests

Section ^297

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*Migrated security interests*

- (3) This subsection is satisfied if:
- (a) collateral is covered by a transitional security agreement; and
  - (b) the collateral is registered in a registration under section ^302; and
  - (c) a secured party applies for:
    - (i) a new registration for the collateral; or
    - (ii) an amendment of the registration that was made under section ^302; and
  - (d) as a result of the application, the Registrar has given effect to a new registration, or has amended the registration (as the case may be), even if the registration has since become ineffective or has been removed; and
  - (e) the registration mentioned in paragraph (d) discloses (in accordance with regulations made for the purposes of item 9 of the table in section ^191) that the collateral is covered by a transitional security agreement; and
  - (f) a transitional security interest in the collateral that is a migrated security interest has arisen under the transitional security agreement.

21 **Subdivision B—Extinguishment and vesting: transitional rules**

22 **^297 Rules relating to extinguishment of transitional security**  
23 **interests**

24 *If Subdivision A applies to a transitional security interest*

- 25 (1) If Subdivision A applies to a transitional security interest, an  
26 extinguishment provision (by force of which a person acquires  
27 collateral free of a security interest) applies to the transitional  
28 security interest in the collateral at the applicable time mentioned  
29 in section ^295 or ^296 (as the case requires).

30 Note: For the meaning of *extinguishment provision*, see section ^26.

# EXPOSURE DRAFT

Transitional provisions **Chapter 7**

Transitional application of this Act **Part 7.3**

Extinguishment and vesting of transitional security interests **Division 3**

Section ^298

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1 *If Subdivision A does not apply to a transitional security interest*

- 2 (2) If Subdivision A does not apply to a transitional security interest,  
3 any rules that would have applied in relation to the extinguishment  
4 of the interest immediately before the registration commencement  
5 time under a law of a State or a Territory, or the general law,  
6 continue to apply in relation to the extinguishment of the interest  
7 after that time as if this Act had not been enacted.

8 **^298 Certain unperfected transitional security interests**

9 *If Subdivision A applies to a transitional security interest*

- 10 (1) If Subdivision A applies to a transitional security interest, sections  
11 ^233 and ^234 apply to the transitional security interest in the  
12 collateral at the applicable time mentioned in section ^295 or ^296  
13 (as the case requires).

14 *If Subdivision A does not apply to a transitional security interest*

- 15 (2) Subsection (3) applies in the circumstances set out in paragraphs  
16 ^233(1)(a) and (b).
- 17 (3) If Subdivision A does not apply to a transitional security interest,  
18 any rules that would have applied in relation to the interest  
19 immediately before the registration commencement time in the  
20 circumstances set out in paragraph ^233(1)(a) under a law of a  
21 State or a Territory, or the general law, continue to apply in  
22 relation to the interest after that time as if this Act had not been  
23 enacted.

24 Note: Sections ^233 and ^234 provide for unperfected security interests to  
25 vest in the grantor in certain situations (described in paragraph  
26 ^233(1)(a)).

# EXPOSURE DRAFT

Chapter 7 Transitional provisions

Part 7.3 Transitional application of this Act

Division 4 Migration of personal property interests

Section ^299

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## 2 **Division 4—Migration of personal property interests**

### 3 **Subdivision A—General**

#### 4 **^299 Scope of Division**

5 This Division applies if, at or after the migration time and before  
6 the registration commencement time:

- 7 (a) an officer or agency of the Commonwealth, a State or a  
8 Territory gives the Registrar data, in relation to interests in  
9 personal property, that is held by the officer or agency in a  
10 register (a *transitional register*) maintained under a law of  
11 the Commonwealth, a State or a Territory; and  
12 (b) the data is given in the approved form; and  
13 (c) the Registrar accepts the data.

#### 14 **^300 Requirement for Commonwealth officers etc. to provide data**

15 Upon a written request by the Registrar at or after the migration  
16 time and before the registration commencement time, an officer of  
17 the Commonwealth, or the person in charge of an agency of the  
18 Commonwealth, must give the Registrar, in the approved form,  
19 data held by the officer or the agency in a transitional register.

#### 20 **^301 Meaning of *migrated security interest***

21 An interest in personal property is a *migrated security interest* in  
22 the personal property if all the following conditions are met in  
23 relation to the interest:

- 24 (a) it is a transitional security interest in the personal property;  
25 (b) data in a transitional register in relation to the interest is:  
26 (i) given to the Registrar as mentioned in section ^299 or  
27 ^300; and  
28 (ii) accepted by the Registrar;  
29 (c) it was registered in that transitional register immediately  
30 before the time the data was given to the Registrar;

- 1 (d) its registration in a transitional register was duly authorised  
2 by the law under which the register was maintained.

## 3 **Subdivision B—Registration**

### 4 **^302 Registration of authorised migrated interests**

#### 5 *Determination of registrable personal property*

- 6 (1) At or after the migration time, and before the registration  
7 commencement time, the Registrar may, by legislative instrument,  
8 determine a class of personal property to be registrable if:  
9 (a) data in a transitional register in relation to interests in  
10 personal property of that class is given to the Registrar as  
11 mentioned in section ^299 or ^300; and  
12 (b) interests in personal property of that class were registered in  
13 that transitional register immediately before the time the data  
14 was given to the Registrar.

#### 15 *Registration of determined personal property*

- 16 (2) The Registrar may register personal property in the determined  
17 class in a registration at or after the migration time, and before the  
18 registration commencement time.

19 Note: After registration, the Registrar must give a verification statement to  
20 each secured party (see section ^221).

#### 21 *Matters to be included in registered data*

- 22 (3) Without limiting any other matters that may be included in a  
23 registration under subsection (2), the Registrar must, in the  
24 registration:  
25 (a) include an end time for the effective registration of the  
26 personal property; and  
27 (b) include the details, in relation to each secured party, of:  
28 (i) the secured party; or  
29 (ii) a person nominated by the secured party who has  
30 authority to act on behalf of the secured party; and  
31 (c) disclose (in accordance with regulations made for the  
32 purposes of item 9 of the table in section ^191) that:

# EXPOSURE DRAFT

Chapter 7 Transitional provisions

Part 7.3 Transitional application of this Act

Division 4 Migration of personal property interests

## Section ^303

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- 1 (i) the personal property is covered by a transitional  
2 security agreement; and  
3 (ii) the transitional security agreement provides for a  
4 security interest that is a migrated security interest.
- 5 (4) The end time to be included under subsection (3) is the time at  
6 which, in the opinion of the Registrar, the registration of the  
7 interest in the personal property in the transitional register would  
8 have ended in accordance with the law under which the transitional  
9 register was maintained (as in force immediately before the  
10 migration time).

### 11 **^303 Removal of data**

#### 12 *Scope*

- 13 (1) This section applies if:  
14 (a) the Registrar has determined a class of personal property to  
15 be registrable under subsection ^302(1); and  
16 (b) the Registrar has registered data relating to personal property  
17 in the determined class in a registration under subsection  
18 ^302(2).

#### 19 *Removal of data*

- 20 (2) The Registrar may remove the data from the register after a time  
21 determined under subsection (3), if the Registrar is satisfied that:  
22 (a) the personal property is not, and is not intended to be, subject  
23 to a security interest; and  
24 (b) there is no reason to retain the data on the register.
- 25 (3) The Registrar may, by legislative instrument, determine a time for  
26 the purposes of subsection (2).

### 27 **^304 No requirement for notice of verification statement**

28 Section ^223 does not apply in relation to a verification statement  
29 that relates to a verifiable event consisting of new registration  
30 under section ^302, or the removal under section ^303, of data  
31 registered in a registration.



# EXPOSURE DRAFT

Transitional provisions **Chapter 7**

Transitional application of this Act **Part 7.3**

Migration of personal property interests **Division 4**

Section ^304

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Note: Section ^223 requires the holder of a verification statement to ensure that notice of the verification statement is given to certain persons.

# EXPOSURE DRAFT

Chapter 7 Transitional provisions

Part 7.3 Transitional application of this Act

Division 5 Preparatory registration for collateral secured by transitional security interests

Section ^305

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## **Division 5—Preparatory registration for collateral secured by transitional security interests**

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### **^305 Scope of Division**

5

This Division applies if, at or after the migration time, and before the registration commencement time:

6

7

(a) a person applies to the Registrar for the registration of collateral; and

8

9

(b) the application is in the approved form; and

10

(c) the Registrar is satisfied on reasonable grounds that, immediately before the registration commencement time, a transitional security interest will be:

11

12

13

(i) attached to the collateral; and

14

(ii) held by the person.

15

### **^306 Preparatory registration**

16

#### *Registration*

17

(1) The Registrar may register the collateral in a registration at or after the migration time, and before the registration commencement time.

18

19

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Note: After registration, the Registrar must give a verification statement to each secured party (see section ^221).

21

22

(2) The registration must disclose that the collateral is covered by a transitional security agreement.

23

24

(3) The **registration time** for the collateral is immediately before the registration commencement time.

25

26

Note: See Division 1 for other perfection and priority rules that apply to the transitional security interest.

27

28

#### *Application of Chapter 5 (Personal Property Securities Register)*

29

(4) Chapter 5 (Personal Property Securities Register) applies in relation to the registration of the collateral under this section.

30

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## **Division 6—Transitional security interests: registration defects**

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### **^307 Registration continues despite certain defects**

5

#### *Scope*

6

(1) This section applies if:

7

(a) collateral covered by a transitional security agreement is registered in a registration; and

8

9

(b) the registration of the collateral would not, apart from this section, be effective because of a defect (a **section ^199 defect**) mentioned in section ^199 that arises at a particular time (the **defect time**); and

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(c) the transitional security agreement has given rise to a transitional security interest; and

15

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17

(d) the Registrar determines that registrations in a particular class are effective despite section ^199 defects that are stated in the determination; and

18

19

(e) the determination applies to the registration mentioned in paragraph (a).

20

21

(2) The Registrar may, by legislative instrument, make a determination for the purposes of paragraph (1)(d).

22

#### *Registration temporarily unaffected by the defect*

23

(3) Despite sections ^198 and ^199, the section ^199 defect does not make the registration ineffective for the period starting at the defect time and ending at the following time:

24

25

26

(a) unless the transitional security interest is a migrated security interest—the end of the month that is 36 months after the end of the period mentioned in subsection ^290(1);

27

28

29

30

31

(b) if the transitional security interest is a migrated security interest—the end time included in the registration under subsection ^302(3).

# EXPOSURE DRAFT

**Chapter 7** Transitional provisions

**Part 7.3** Transitional application of this Act

**Division 6** Transitional security interests: registration defects

Section ^307

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*Registration becomes ineffective*

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(4) However, the registration becomes ineffective under sections ^198

3

and ^199 because of the defect immediately after the time

4

mentioned in subsection (3), unless, at or before that time, the

5

registration is amended to correct the defect.