

CHAPTER 2

Overview of the exposure draft bill

2.1 This chapter provides background to the proposal and outlines key concepts and key components of the proposed bill.

Purpose and objectives of the exposure draft bill

2.2 In a legal sense *personal property* is any form of property that is not land or buildings (which is known as *real property* or less formally as *real estate*). Personal property includes tangible property such as motor vehicles, machinery, office furniture, currency, artworks and stock-in-trade. It also includes intangible property such as contract rights, uncertificated shares and intellectual property rights (for example, trademarks and patents).¹

2.3 A personal property security is created when a financier takes a legal interest in personal property as security for a loan or other obligation, or enters into a transaction that in substance involves the provision of secured finance.² Lending secured by personal security is a multi-billion dollar industry in Australia.³

2.4 The overall purpose of the draft bill is to rationalise the current arrangements which include more than 70 pieces of Commonwealth, State and Territory legislation and more than 40 different registers of security interests in personal property. The proposed scheme would be supported by a referral of legislative power by the States to the Commonwealth. The two Australian territories are also involved in developing the reform, but there is no constitutional requirement for them to refer any power to the Commonwealth in order to participate fully.

2.5 The exposure draft bill would establish rules for creating valid security interests as well as rules governing the priority of competing security interests. The draft bill also proposes an enforcement regime to supplement contractual arrangements and the establishment of a modern, technologically advanced register that would provide advance notice to the world of any prospective or actual security interests taken in personal property.⁴

2.6 One purpose of the draft bill is to nationally codify some aspects of the existing law. To achieve harmonisation of the laws in all jurisdictions in these areas of

1 Attorney-General's Department, *Submission 8*, p 17.

2 Attorney-General's Department, *Submission 8*, p 17.

3 Speech by Mr Ian Govey, Deputy Secretary, Attorney-General's Department, to the Personal Property Securities Consultative Group on 16 May 2008, p. 1.

4 Attorney-General's Department, *Submission 8*, pp 19 and 20.

the law there will necessarily be some changes, but philosophically the purpose of the reform in these areas is to capture the existing law and to devise a nationally consistent approach. In other areas a different purpose of the bill is to take the opportunity to substantively amend the existing law that is intended to apply nationally.

2.7 The scope and significance of the reform cannot easily be overstated. As a witness with extensive experience in the area explained:

It is a very significant commercial law reform. It is different from some of the other reforms that the financial sector has seen in the last 10 or 15 years, which have been more regulatory focused – for example, consumer credit legislation and the FSR legislation. This is more focusing on fundamental property and security rights and is intended to facilitate the transacting of business relating to those rights.⁵

2.8 And similarly that:

It is the most substantial reform in the area of law that I practise in, which is commercial banking...It will impact on almost every single transaction that I work on on a day-to-day basis.⁶

2.9 The Department has described the objectives underpinning the development of the content of the proposed bill as "the four c's". The "four c's" are illustrated in this discussion of the merit of the reform in which the Department argues in favour of the exposure draft bill because it:

...would create a PPS regime that would benefit individuals and consumers by delivering more certain, consistent, less complex and cheaper arrangements applying in relation to personal property securities [emphasis added].⁷

2.10 The extent to which these objectives have been met is considered further in this report.

Support for the reform

2.11 In its Revised Commentary, the Attorney-General's Department outlines the case for personal property securities reform as follows:

Current finance law is characterised by a complex network of regulation developed over time by Commonwealth, State and Territory parliaments and courts. It is built on artificial distinctions around the legal form of the security taken, the legal personality of the grantor and the nature and location of the collateral. There is now widespread recognition that such considerations are immaterial to the substance of secured transactions.

5 Mr Craig Wappett, Piper Alderman, *Committee Hansard*, 22 January 2009, p. 14.

6 Ms Angela Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, p. 26.

7 Attorney-General's Department, *Submission 8*, p. 20.

To meet the demands of a competitive economy, Australian finance law must be reorientated around the rights of parties to enforce their interests in personal property in the event of a debtor default. The essential concern should be about who gains priority where competing interests exist. The law should not be seized by concerns about whether a grantor is an individual or a company, whether the property is wool, contract rights or a motor vehicle, or the location of that property.

Australian finance law imposes unnecessary red tape on consumers and businesses. In some cases, a security interest must be registered in more than one jurisdiction and on multiple registers to be fully effective. Some registers are electronic, while others are paper-based. In other cases, there is no registration scheme to provide notice of personal property interests to prospective buyers and lenders. This situation is confusing and inefficient. It results in unnecessary compliance and transaction costs for all parties.⁸

2.12 On the other hand, there are some submitters who are not convinced that the types of amendments proposed in the reform are justified and argued strenuously for the scope of the changes to personal property securities law to be reconsidered. One such view was expressed in the combined submission of Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques:

...we do not think an approach akin to article 9 of the US Uniform Commercial Code (the basis of the Bill) is necessary to achieve [a single national register and uniform national law], and has considerable disadvantages, including rigidity and complexity. We think that Australia would have been better served if it had followed the UK example and rejected that approach, for all the reasons that persuaded the relevant authorities in the UK...⁹

2.13 Others also expressed views to a similar effect, including DLA Phillips Fox, the Australian Financial Markets Association and Mr David C. Turner, a Victorian barrister who has practiced extensively in relevant areas of law both in Australia and New Zealand.¹⁰

2.14 However, the committee also received evidence from a wide range of stakeholders that significant personal property securities reform along the lines proposed in the exposure draft bill is appropriate. An example of this is the evidence from the Consumer Action Law Centre that although in the Centre's view some improvements could be made:

...we are not opposed to the reforms being proposed by the bill. We actually support the idea of national personal property security laws and a

8 Attorney-General's Department, *Submission 8*, p. 18.

9 *Submission 30*, pp 3 and 4.

10 Mr David East representing DLA Phillips Fox, *Committee Hansard*, 22 January 2009 p. 41, Australian Financial Markets Association, *Submission 23*, p. 2, and Mr David C. Turner, *Submission 33*, p. 1.

register that makes that work more efficiently and laws that again create certainty and efficiency in that system.¹¹

2.15 Support for the reform was also articulated by the Australian Bankers' Association:

The association's view is quite a simple one: they are very supportive of the two-pronged PPS reform proposals –register and substantive law reform – and they are keen to see that delivered [on the basis] that there is reasonable time to ensure that we can implement it.¹²

2.16 Although there is considerable support for some reform of the personal property securities laws across Australia, perhaps unsurprisingly there is a range of views about what the exact content of the reform should be. There are some supporters of the draft bill as proposed;¹³ some supporters of the general approach that is being taken but who believe that there is still considerable work required to get the content right;¹⁴ and some submitters who agree with the idea of reform in this area but who contend that the approach being taken is incorrect.¹⁵

2.17 More detail about, and the implications of, these divergent views are considered in more detail in chapter three below.

The reform process

The legal framework and the proposed timing

2.18 To be nationally effective a PPS bill requires support from all Australian jurisdictions. This includes legal support such as a statutory referral of powers, as well as practical support such as the transfer of data from existing State and Territory registers. Commitment to the process has been obtained in principle – initially through the Standing Committee of Attorneys-General and most recently through the Council of Australian Government (COAG) when its Ministers signed an inter-governmental agreement on PPS reform.¹⁶

2.19 The planned implementation date for the commencement of the register is based on the COAG's commitment to implementing the scheme by May 2010.¹⁷

11 Ms Rich, *Committee Hansard*, 6 February 2009, p. 36.

12 Mr Gilbert, *Committee Hansard*, 22 January 2009, p. 56. Some additional examples of general support for the reform are found in the following submissions: Piper Alderman, *Submission 12*, p. 1; Australian Institute of Credit Management, *Submission 14*, p. 3 and Motor Trades Association of Australia, *Committee Hansard*, 6 February 2009, p. 38.

13 For example Craig Wappett of Piper Alderman, *Submission 12*.

14 Consumer Action Law Centre, *Submission 20*, p. 1.

15 Professor Anthony Duggan, *Submission 1*, pp 2 and 3.

16 Council of Australian Governments, *Communique*, 2 October 2008.

17 Dr James Popple, Attorney-General's Department, *Committee Hansard*, 6 February 2009, p. 59.

Because the scheme will be underpinned by a statutory referral of power from the States, at least one State needs to have referred power for the scheme to the Commonwealth through the passage of legislation in the relevant State parliament. The Department has advised the committee that once the text of the PPS bill has been finalised it is likely that New South Wales will be the lead State to introduce the referral legislation. To meet an implementation date of May 2010 the State legislation will need to be introduced in April and passed by September this year and the Commonwealth would then introduce and pass its legislation.¹⁸

2.20 Although it will be possible for the register to proceed with participation by only one State, obviously it will only be a national scheme with the benefit of a single register if all jurisdictions are involved. The view of some submitters is that even a referral of powers by all jurisdictions will not instil total confidence in the scheme because some State and Territory legislation could still operate in the area and because a jurisdiction can exclude matters from the operation of the scheme.¹⁹

Consultation

2.21 Since the project commenced in 2006 the Commonwealth Attorney-General's Department has undertaken considerable consultation and communication with affected stakeholders. An options paper was first released in April 2006 and national consultation took place. The Department has since issued three further discussion papers in November 2006, March 2007 and April 2007. The first exposure draft of the bill was released in May 2008.²⁰ After significant amendments the draft of the bill referred to the committee for inquiry was released in November 2008.²¹ The Department also convened a PPS Consultative Group 'to guide the reform process'. The PPS Consultative Group, which meets quarterly, comprises experts invited from industry, governments, consumer groups, legal practitioners and academia.²²

2.22 Different views about the content of the bill and the proposed timing of the project notwithstanding, there has been considerable stakeholder acknowledgement of the process and the Department's level of engagement with stakeholders, including by

18 Dr Popple and Mr Glenn, *Committee Hansard*, 6 February 2009, p. 61.

19 DLA Phillips Fox, *Submission 2*, pp 2 and 3.

20 Attorney-General's Department, *Submission 8*, p. 18. The primary documents and further information can be found on the Department's personal property securities website at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_personalpropertysecuritiesreform_Personalpropertysecurities.

21 Appendix B to the Attorney-General's Department submission summarises the key changes made to the bill between the May and November drafts, *Submission 8*, pp159 to 163. Ms Flannery, Clayton Utz, *Committee Hansard*, 22 January 2009, at p. 26 identified the changes between the drafts as being substantial.

22 Attorney-General's Department, *Submission 8*, p 18. A list of the participants can be found at *Additional Information*, Item 3 at: http://www.aph.gov.au/senate/committee/legcon_ctte/personal_property/add_info/index.htm.

those who are highly critical of the content of the reform itself. For example, the four law firms in their combined submission noted:

We appreciate the level of work and consultation that has so far gone into providing the draft legislation, and the readiness of representatives of the Attorney-General's Department to make themselves available and allow us to participate in the consultation process.²³

2.23 Although departmental staff are viewed by stakeholders as accessible and willing to consult, there remains considerable disquiet expressed by some submitters that - given the magnitude of the proposed reform - the process is being unnecessarily 'rushed through'²⁴ and that although "in the broad context there has been significant consultation, the complexity of the reform proposals is such that...sufficient stakeholder input has been obtained in relation to many...key issues."²⁵ The issue of the timing for implementation is considered in more detail in chapter 4 below.

International approaches to PPS

2.24 Over the years several international jurisdictions have undertaken significant legislative PPS reform. The United States of America introduced personal property securities reform in 1951 when the National Conference of Commissioners on Uniform State Laws and the American Law Institute promulgated the Uniform Commercial Code. The code was substantially amended in 1972 and 1998, and Article 9 of the Code is law in every US state.²⁶

2.25 Article 9 of the code relates to secured transactions.²⁷ Provinces in Canada started introducing their PPS reform based on Article 9 in 1967, in every province and territory with the exception of Quebec. The first province to introduce the reform was Ontario. On the whole, differences in PPS between the provinces is minimal, although the system used in Ontario is an exception.

23 Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30*, p. 4.

24 Ms Lang Thai, *Submission 29*, pp 1 and 2.

25 Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jacques, *Submission 30*, p. 2. Other examples of concern that the project is being rushed or the implementation target is too soon were also expressed by the Australian Financial Markets Association, *Submission 23*, p. 2 and the Australian Bankers' Association, *Submission 24*, pp 3 and 5.

26 Craig Wappett, Laurie Mayne, Professor Tony Duggan, *Review of the law on personal property securities An international comparison*, July 2006, p. 9. The paper can be found at [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(427A90835BD17F8C477D6585272A27DB\)~PPS+-+International+Comparison+Paper+-+July+2006.pdf/\\$file/PPS+-+International+Comparison+Paper+-+July+2006.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(427A90835BD17F8C477D6585272A27DB)~PPS+-+International+Comparison+Paper+-+July+2006.pdf/$file/PPS+-+International+Comparison+Paper+-+July+2006.pdf).

27 Craig Wappett, Laurie Mayne, Professor Tony Duggan, *Review of the law on personal property securities An international comparison*, July 2006, p. 9.

2.26 The philosophies, concepts and structure of the Canadian PPS reforms were very similar to those in Article 9, although there were significant differences in terms of drafting, policy on particular issues, and the design of the registration systems. The amendments to Article 9 which took place in 1998 served to accentuate the differences between the Canadian and American systems.

2.27 New Zealand introduced its reform in 2003 based primarily on the Canadian Saskatchewan legislation, but exercising a significantly different style.²⁸ All of these models are known as Article 9 style systems.

2.28 In the opinion of Wappett, Mayne and Duggan, in their paper on the historical development of PPS reform,

The general concepts and principles [of the systems under discussion[] are very similar but there are some significant differences in detail and drafting. Some of the differences are deliberate policy choices made by the respective legislatures, others have arisen for historical reasons and a few may be inadvertent... [E]conomic and market change has also played a role. Article 9 and the [PPS] legislation has not been static. As economies and markets have developed the legislation has evolved in response to these changes. Different jurisdictions have been faster than others to react to some market developments and policy decisions have meant that different jurisdictions have sometimes reacted in different ways.²⁹

2.29 The Department advises that all of the international models have been considered in detail and the approach proposed in the exposure draft bill is informed by each of them, though the Australian approach does not adhere closely to any of them.³⁰

2.30 The differences between the draft bill and its international counterparts are said to reflect issues raised by stakeholders, differences in the Australian consumer and commercial environment, advances in information technology, and drafting styles adopted to improve legal certainty and consistency with Australian drafting practices.³¹ However, several submitters are not persuaded that this is the case and are concerned that the draft bill would result in significant costs and unintended consequences.³²

28 Craig Wappett, Laurie Mayne, Professor Tony Duggan, *Review of the law on personal property securities An international comparison*, July 2006, p. 10.

29 Craig Wappett, Laurie Mayne, Professor Tony Duggan, *Review of the law on personal property securities An international comparison*, July 2006, p. 45..

30 Attorney-General's Department, *Submission 8*, p. 20.

31 Attorney-General's Department, *Submission 8*, p. 20.

32 For example, Independent Film and Television Alliance, *Submission 22*, p. 1; Mr Loxton, Allens Arthur Robinson, *Committee Hansard*, 23 January 2009, p. 33, and Mr Love, Australian Financial Markets Association, *Committee Hansard*, 22 January 2009, pp 7 and 8.

Key concepts

2.31 It has been noted that personal property securities law is a particularly difficult area³³ and a brief outline of the key concepts underpinning the proposed bill may assist those new to the subject.³⁴

2.32 *'in substance' approach* means that the proposed bill will deal with circumstances that are in substance security interests in personal property, regardless of the title, structure, jurisdiction, subject matter et cetera of the transaction. This is an important concept underpinning the proposed legislation as it is a departure (and improvement) on the existing approaches, which have developed over time and not in a cohesive way.

2.33 A *security interest* is any interest in personal property which is created by an agreement that secures the payment or performance of an obligation, without regard to the form of the transaction. A personal property security is created when a financier takes an interest in personal property as security for a loan or other obligation, or enters into a transaction that in substance involves the provision of secured finance. Well known (and relatively simple) examples of personal property securities include car loans and company charges.

2.34 *Attachment* describes the successful creation of a security interest in personal property that can be enforced against that personal property. Attachment is a prerequisite for creating an enforceable security interest in personal property. A security agreement which has not attached would create merely personal or contractual rights between the parties.

2.35 *Perfection* means that a security interest has *attached* to collateral and any further steps needed to make the security interest effective against third parties have been taken. Under the exposure draft bill a security interest may be perfected by possession, control, registration or temporary perfection (see next definition) or a combination of these methods. If it is necessary to determine priority between competing security interests a perfected security interest would always have priority over an unperfected security interest. Generally the methods of perfection rank in order of, first, *possession* (if possession is possible), then *control* (the legal ability to deal with the security even though you do not have physical possession. For example, the authority to transfer shares or the right to sell grain held in a silo by another person.) If the personal property involved in the transaction is such that possession or control is not possible, then *registration* will be the third ranking method of perfection.

33 Professor Anthony Duggan, *Submission 1*, p. 6.

34 This section is based on information in the Attorney-General's Department, *Submission No. 8*, pp 11 to 16.

2.36 *Temporary perfection* is a proposed feature of the exposure draft bill. The draft bill would provide automatic temporary protection to a secured party for a limited period. It would apply in a range of circumstances, for example, where collateral is moved to Australia, converted into proceeds, or transferred to another party. Its purpose is to allow parties a short period of time to update the register when circumstances in relation to the collateral change.

2.37 A *Purchase Money Security Interest (or PMSI – pronounced 'pimsey')* is a new type of security interest which can allow a subsequent financier to retain title to or have priority over particular collateral even though an earlier financier may have a perfected interest in the grantor's general collateral that would otherwise have priority. A PMSI is created if the perfected security interest meets certain criteria outlined in the bill, including giving notice of the later interest to the holder of the earlier security interest (clause 32 of the exposure draft bill).

2.38 *Deemed security interests* – it is proposed that some transactions that would not usually qualify as a 'personal property security interest' because the transaction does not secure payment or the performance of an obligation would be deemed to be security interests. Examples of this are the interests of a consignor under a commercial consignment, or the interests of a transferee in a transfer of accounts or chattel paper. The Department argues that deeming some transactions to be security interests assists with transparency, ensures that debtors cannot structure transactions to avoid the effect of the proposed bill and makes it possible to determine priority between these deemed security interests and other security interests (clause 28).³⁵

2.39 The Attorney-General's Department submission includes a longer glossary at pages 11 to 16 of its submission.³⁶

Structure of the proposed draft bill

2.40 A brief outline of the main areas of the draft bill, based on information in the Department's Revised Commentary, follows.³⁷ Given the length and complexity of the exposure draft bill and the relatively tight timeframe for this inquiry this outline does not refer to relevant provisions individually.

Constitutional application and relationship of the draft bill with other laws (proposed Chapter 1- Preliminary)

2.41 The draft bill would rely on various Commonwealth constitutional powers and the referral of power from the States. In the absence of a referral by a State the bill would still apply except as to transactions between solvent individuals.

35 Attorney-General's Department, *Submission No. 8*, p. 29.

36 Attorney-General's Department, *Submission No. 8*, pp 11 to 16.

37 Attorney-General's Department, *Submission No. 8*, pp 21 to 27.

2.42 The draft bill deals with its interaction with other laws, particularly conflicting State and Territory laws as well as the general law. The draft bill specifies circumstances under which other laws would prevail over it (such as taxation law) or limit the application of certain provisions. A State or Territory law would be able to expressly exclude a licence, right, entitlement or authority created by or under a State or Territory law from the application of the bill. The bill also specifies when other laws do not prevail over it, for example, in terms of registration requirements, formal requirements relating to agreements, assignment and the attachment and perfection of security interests.

Scope of the application of the bill (proposed Chapter 2- General rules relating to security interests)

2.43 The draft bill would apply to transactions involving personal property that secure payment or the performance of an obligation, apart from some limited exceptions. The draft bill would apply to tangible and intangible property as well as certain writings evidencing rights (such as documents of title, negotiable instruments and letters of credit).

2.44 At the request of the States, the draft bill would **not** apply to a tradeable water right or a water access entitlement within the meaning of the Commonwealth *Water Act 2007* or tangible property that is affixed to land, nor to fixtures. Provisions relating to statutory licences (such as licensing for taxi plates) can be activated or subsequently 'turned off' by individual States.

2.45 A security agreement would be effective according to its terms and would be enforceable between the parties upon attachment of a security interest in the collateral: that is, the essential elements for creating a security interest have been completed. The next step towards establishing priority against anyone else who may have an interest in the security is to 'perfect' the security interest. The methods of perfection that the draft bill proposes to recognise are possession, control, registration or temporary perfection (see the *Key Concepts* section above for information about these concepts). The draft bill contains special perfection rules dealing with security interests in negotiable instruments, investment instruments, returned property, crops and bailees (put simply, in this context a *bailee* is a person who holds possession of - or *bails* - tangible personal property for another person).

2.46 Where collateral is transferred or disposed of prior to enforcement, the draft bill would provide that a security interest continues in the transferred collateral as well as any proceeds of collateral.

Acquiring personal property free of security interests

2.47 The draft bill proposes to establish circumstances in which a security interest in personal property may be extinguished generally, as well as specifically for motor vehicles. This would mean that a third party could take personal property free of a security interest in certain circumstances, including purchasing an item in the ordinary course of business, a consumer item worth less than \$5000, money, an investment

instrument or an item that is serial numbered and a search of the proposed register would not have disclosed the registration (the Department says this is known as the 'day and a half rule').

2.48 The onus of proving an attachment or perfection or acquiring an interest free of a security interest, under the draft bill, would rest with the person asserting those facts. The draft bill would contain rebuttable presumptions that a purchaser who acquired an interest in property and was related to the seller, did not give value and had knowledge of the relevant security interest or breach of the security agreement.

Priorities between security interests in personal property

2.49 The draft bill proposes to establish general and specific rules for determining priority among competing security interests in the same property. The draft general rules would provide that a perfected interest has priority over an unperfected interest, and perfection by control has priority over perfection by other means (including registration on the proposed register). If these rules do not resolve claims by competing security interests then priority is basically in chronological order of perfection or the attachment of the security interests.

2.50 There are specific priority rules proposed for PMSIs which would give 'super-priority' so that the PMSI would generally prevail over other security interests provided that it is perfected by registration and relevant notice given to other secured parties. Priority for a later security interest in certain circumstances is the purpose of a PMSI.

2.51 The draft bill also intends to recognise the special nature of negotiable instruments, and documents of title and to introduce the legal concept of *chattel paper*, which is new in Australia. The draft bill would also deal with priority between security interests and other interests such as those held by an authorised deposit-taking institution (also known by the acronym ADI).

2.52 In chapter 3 the exposure draft bill proposes special rules for crops and livestock (giving priority to the giver of value for the purpose of growing, feeding or developing the crops or livestock) though a pre-existing interest in real property would not be prejudiced by these rules. Draft chapter 3 also contains priority rules for accessions (personal property installed in or affixed to another item of personal property such that it has lost its separate identity) and commingled goods (goods part of a product or mass that have lost its original identity such as ingredients in food or a consignment of grain added to a silo containing other grain).

Enforcement of security interests in personal property (proposed Chapter 4 – Enforcement of security interests)

2.53 The draft bill proposes to set out the processes for enforcing a security agreement following debtor default. It is intended that these would operate in conjunction with enforcement provisions in the Consumer Credit Code and security agreements between the parties. It would be provided that parties would be able to

contract out of a number of the enforcement provisions in the bill (though not in relation to consumer transactions).

2.54 In all cases of attempted enforcement a secured party would be required to observe notice requirements. A person entitled to receive notice of disposal (including the grantor) would have an opportunity to redeem the collateral. All remedies are subject to a duty on the enforcing party to act in a commercially reasonable manner. Where disposal occurs by sale the secured party would have an additional duty to obtain at least the market value of the good or the best price reasonably obtainable in the circumstances. A secured party may only purchase collateral at a public sale for the market price of the collateral.

Registration of security interests (proposed Chapter 5 – Personal Property Securities Register)

2.55 A key aspect of the draft bill is the proposal to provide for an online national Register of Personal Property Securities to be established and maintained by a Registrar of Personal Property Securities. It is intended that registrations would be made at the request of secured parties in anticipation of, or to reflect, a security agreement.

2.56 It is not proposed that the register operate as a register of title or validate a secured party's claim to a security interest. The Department describes the intended operation of a register as a 'noticeboard' because it puts subsequent lenders or purchasers on notice of a claim to a security interest. If a security interest is valid the register would also provide significant assistance in resolving competing claims of priority.

2.57 The bill is drafted on the basis that much of the detail for the register requirements will be contained in regulations. The Department has already made progress with this aspect of the project and has released an exposure draft of a number of likely regulations, including those relating to the register.

2.58 It is expected that a registration would include the following information: the secured party's details, the grantor's details, an address for service of notices on secured parties (usually an email address), a description of the collateral and proceeds including if it is consumer or commercial property, the period of registration, the existence of subordination agreements and any amendment details. Some property such as motor vehicles, boats and aircraft used for consumer purposes would have to be identified by a serial number.

2.59 A registration would be ineffective where it contains a seriously misleading error. Where the register is amended it is proposed that the registrar must send a verification statement to the secured party who will be under an obligation to send a copy to the grantor.

2.60 The draft bill would provide that the register can, for a fee, be searched for authorised purposes. The bill would prohibit searching the register or using data from

it for an unauthorised purpose. However, searchers would not be required to establish their identity before conducting a search. It is intended that the register would use an 'exact match' approach rather than a 'fuzzy match' or 'wildcard' approach. The Department contends that this appropriately balances the legitimate needs of users with the privacy needs of grantors. However, some significant concerns have been raised about possible personal safety issues arising from inadequate privacy protection. These are considered in chapter 5 below.

Implementing the new scheme (proposed Chapter 7 - Transitional provisions)

2.61 A major anticipated benefit of this project is the streamlining of numerous pieces of legislation from all Australian jurisdictions. Implementing it will involve significant transition from existing practices to the requirements of the proposed scheme. In general terms the Department states that the proposed transitional provisions would set up a legal framework to migrate data from existing registers to the proposed new register and would provide special priority rules for pre-existing security interests.

2.62 Under the proposed model a pre-existing security interest would need to be registered under the new system within 24 months to protect its priority position. This means that the register will not be fully effective until 2 years after its commencement (at which time the same requirements will apply to new and pre-existing secured lending transactions).

Regulations

2.63 The Department has issued proposed draft regulations for consideration and welcomes feedback on their content.³⁸ It has not been possible to consider the content of the draft regulations except generally in relation to the examination in Chapter 4 of the proposal for the national PPS register.

38 A copy of the draft regulations can be found at Item 2 on the Additional Information page of the Senate Legal and Constitutional Affairs website:
http://www.aph.gov.au/senate/committee/legcon_ctte/personal_property/add_info/index.htm

