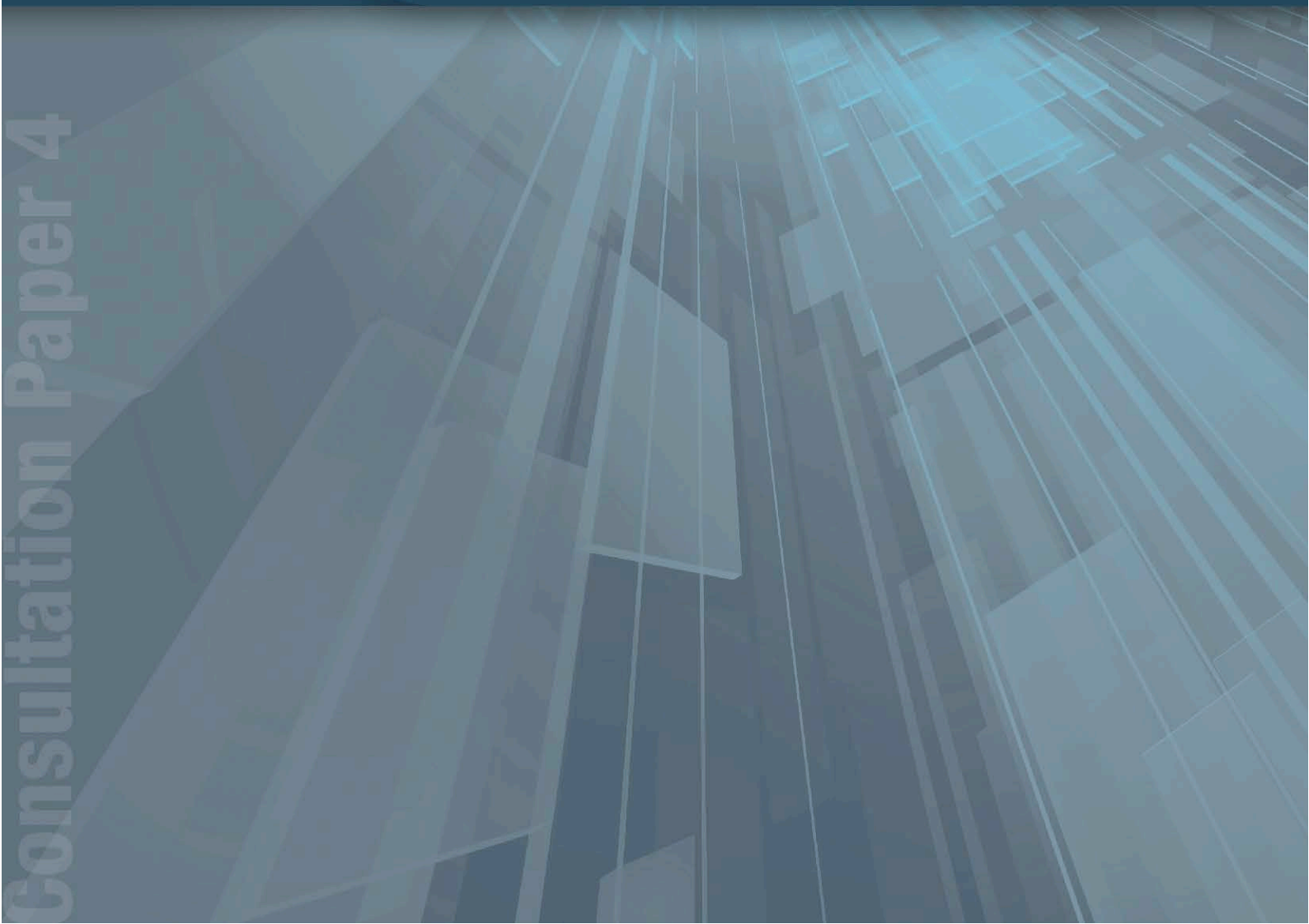
Review of the Personal Property Securities Act 2009

CONSULTATION PAPER 4

The register



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REVIEW OF THE PERSONAL PROPERTY SECURITIES ACT 2009

CONSULTATION PAPER NO. 4

1. INTRODUCTION

1.1 What this paper is about

This is the fourth of a series of consultation papers that are being released in connection with the review of the operation of the *Personal Property Securities Act 2009* (the **Act**) that is being conducted in accordance with s 343 of the Act. The consultation papers were foreshadowed in the *Interim Report on the Review of the Personal Property Securities Act 2009* dated 31 July 2014, available online at www.ag.gov.au/ppsareview.

This consultation paper considers issues regarding the Register.

Any change to the operating specifications of the Register will impose a cost burden on both Government and the private sector in the short term. This is because the software that drives the Register would need to be re-written to reflect the changes, and secured parties would need to amend their own systems and procedures to reflect the Register's revised functionalities. The potential for short-term costs will need to be taken into account when assessing the overall value of proposed changes.

Any change to the operating specifications of the Register would also need to be discussed fully with AFSA, to ensure that any consequential effects on the operation of the Register are taken fully into account.

1.2 Supporting materials

This paper uses abbreviated terms for concepts or documents that are referred to frequently. A glossary of these terms can be found in Annexure A.

The Interim Report set out a number of principles to guide the process of assessing the merits of proposed amendments to the Act. For convenience, a copy of those principles is set out in Annexure B.

2. The data fields in the Register

2.1 Making the Register simpler and more certain

A key theme from the submissions was that the Act and the Register are too complex.

The first three Consultation Papers focused on the operation of the Act. As the Interim Report observed, the Act deals with a complex area of law, and for that reason must itself necessarily be complex. Many submissions for the Interim Report argued however that the Act is more complex than it needs to be, and that the Act could be made much easier to work with. The first three Consultation Papers identified a number of ways in which the Act might be amended to make it simpler, and sought feedback on them.

Unlike the Act, which will be read for the most part by legal practitioners and experienced business people, many users of the Register will have no legal training, and no experience in working with complex legal concepts. This means that simplification is even more important for the Register than it is for the Act as a whole. The operation of the Register, and the rules that underpin it, need to be as simple and clear as possible, so that both registrants and searchers can use the Register effectively and with confidence. As the Interim Report[1] observed:

> Small businesses find the register daunting – full of jargon, and unfamiliar concepts. When registering a financing statement, the register asks them to answer questions that they cannot readily understand. Often they cannot even understand why the question is being asked. This leaves a registrant in the very unsatisfactory position of not knowing whether they have answered the questions accurately, or whether (despite their efforts) their registration is incorrect, leaving them unperfected and exposed.
>
> Similarly, a searcher of the register cannot always be confident that they are searching against the correct grantor details. Sometimes a search generates so many results, or such broad results, that the searcher is unable to properly assess what they mean.
>
> There is a potential for tension between these two sets of concerns, as any steps that are taken to make the process of registering a financing statement simpler and more certain could have the result that the information generated by a search becomes less useful to the searcher. It is nonetheless clear that much can and needs to be done to make the conduct of registrations and searches on the register simpler, more comprehensible and more certain.

Section 2 of this Consultation Paper identifies a number of steps that could be taken to achieve this, and invites comment on them.

2.2 "Consumer property" versus "commercial property"

2.2.1 The definitions

Item 4 of the table in s 153(1) of the Act requires that collateral be described in a registration as either "consumer property" or "commercial property".

The expression "consumer property" is defined in s 10 in this way:

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

Section 10 defines "commercial property" to be any personal property that is not consumer property.

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[1] Interim Report, page 27.

2.2.2 **How the terms affect the registration of a financing statement**

A registration against collateral that is consumer property is subject to two special rules. First, the end time for the registration cannot be more than seven years after the time at which it is registered.[2] Secondly, if the collateral is also serial-numbered property, then the registration can only describe the collateral (by its serial number), and may not identify the grantor at all.[3]

A number of submissions proposed that the distinction between consumer property and commercial property be removed from the Act. There are a number of reasons why this might be desirable.

- A registrant needs to understand the difference between the two concepts, and in particular the subtlety of the fact that collateral is not consumer property if it is held in the course or furtherance "to any degree" of carrying on a business that has an ABN. This makes the registration process more difficult, particularly for an unsophisticated user of the Register, and more uncertain.

- A registrant has no way of knowing what the grantor will in fact use the collateral for. It can of course ask the grantor, but the secured party is exposed if the grantor gives the wrong answer (whether through inadvertence or otherwise). Again, this produces risk and uncertainty for the secured party.

- It is not clear what the implications are, if a registration identifies collateral as consumer property when it was not, or vice versa. It is also not clear what the consequences are, if a registration was initially correct but later becomes incorrect because the grantor changes his or her use of the collateral. Again, this produces risk and uncertainty for the secured party.

- For these reasons, some secured parties take the view that the only clear way to protect themselves is to make two registrations – one against consumer property, and one against commercial property. This adds clutter to the Register.

This distinction between consumer property and commercial property for the purposes of registering a financing statement is unique to the Act, and does not appear in any of the Canadian PPSAs or the NZ PPSA. Under the Canadian PPSAs and the NZ PPSA, registrations against individual grantors can be made for the same length of time as registrations against other types of grantors, and an individual grantor's name can (indeed must) be included in the registration even if the collateral is serial-numbered property.

The purpose behind the distinction between the terms

The more restrictive registration rules for security interests over consumer property are clearly motivated by consumer protection considerations. The more limited duration for a registration protects consumers against having unnecessarily long-term registrations made against them, and the requirement that a grantor's name not be included if the collateral is serial-numbered property appears to be intended to protect their privacy. If the distinction between consumer property and commercial property is to be removed, then these reasons for including the distinction in the Act would need to be addressed in another way.

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[2] Item 5(b) of the table in s 153(1) of the Act.

[3] Item 2(a) of the table in s 153(1) of the Act.

The seven-year limit on the registration period

It is not clear how great the risk is that a secured party might want to make a registration against an individual for a period that significantly exceeds the expected term of the finance that it is providing.

If a secured party does make an unnecessarily long registration, the grantor is able to rely on mechanisms in the Act, such as s 169 and the amendment demand mechanisms in Part 5.6[4], to deal with this. The seven-year limit on the registration period for consumer property provides individual grantors with an additional layer of protection against overly-long registrations, but at this point I do not have any evidence before me that indicates whether this additional protection is needed.

If it is felt that a consumer does need to be protected by providing that the maximum term of a registration against the consumer is seven years, then an alternative might be to apply the requirement to all individual grantors, regardless of the use to which they are putting the collateral. It may be that only a relatively small proportion of financings to individuals would run for more than seven years, and if that is correct then making this change would not impose a significant additional burden on secured parties.

Serial-numbered property

I do not have any evidence before me that might substantiate how great the privacy concern would be if the grantor's details needed to be included in a registration against serial-numbered property that is consumer property. The Act already accepts that the grantor's details need to be included if serial-numbered property is commercial property (such as a tradesperson's utility vehicle). Section 172 of the Act also restricts who is allowed to search the Register against an individual, and for what purposes. For these sorts of reasons, it might be argued that it is unnecessary to provide that a security interest from an individual over serial-numbered property may only be registered against the serial number if the collateral is consumer property.

If the privacy concern is nonetheless thought to be sufficiently important, an alternative might be to provide that all registrations over serial-numbered property may only be made against the serial number if the grantor is an individual, regardless of the use to which the collateral will be put. It may be relatively uncommon for a secured party to take security over serial-numbered property from an individual and not register against the serial number, and if that is the case then this would not impose a material additional burden on secured parties. For similar reasons, it might not overly prejudice searchers either.

My preliminary view is that the rules should be simplified so that:

- a registration does not need to indicate whether the collateral is consumer property or commercial property;
- all registrations against individuals have a maximum term of seven years; and
- a registration against serial-numbered property may not identify the grantor, if the grantor is an individual.

Proposed recommendation 4.1: *That the Act be amended as described above.*

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[4] See Section 4 below.

2.2.3 Other uses of the terms "consumer property" and "commercial property"

The terms "consumer property" and "commercial property" are also used in a small number of other places in the Act. They are used, for example, in s 20(4) in the context of the rules for describing collateral in a security agreement. Consultation Paper No. 2[5] has already suggested that s 20(4) be deleted.

Apart from that, the term "consumer property" is only used in s 13(2)(c), and the term "commercial property" is only used in s 157(3)(a). It seems unnecessary to retain the definitions just for the purposes of these sections – for example, s 13(2)(c) could instead refer to a lease of property "predominantly for personal, domestic or household purposes", and s 157(3)(a) could instead apply to all individual grantors. The terms are also used in the Regulations, but similar types of changes could be made there as well.

If these changes were made, the definitions of consumer property and commercial property could be deleted entirely.

> **Proposed recommendation 4.2**: *That the definitions of "consumer property" and "commercial property" in s 10 of the Act be deleted.*

2.3 The "inventory" question

Item 8 of the table in s 153(1) of the Act states that a registration needs to include any details that are specified by the Regulations. Item 1 of the table in item 4.1 of Schedule 1 to the Regulations states that a registration for collateral that is commercial property must indicate "whether or not the collateral may include inventory". The item states that the purpose of this rule is to determine "whether collateral may include inventory, for Part 9.5 of the Act". Part 9.5 of the Act contains the rules that determine whether collateral is a "circulating asset". This suggests that the word "inventory" in this context has its general law meaning[6], not the specific meaning given to it in s 10 of the Act. However, this is not apparent from the Register itself.

A number of submissions recommended that this question be deleted from the Register, on the basis that it is confusing for registrants and does not serve any useful purpose.

I agree that it is difficult to see that much is achieved by requiring a registrant to answer this question. It might make it marginally easier for an insolvency practitioner to determine whether assets of an insolvent grantor could be circulating assets, but that seems to be a very modest benefit, when compared with the uncertainty and confusion that the question is otherwise causing for other users of the Register. I note also that the registration systems under the Canadian PPSAs and the NZ PPSA do not include a question along these lines.

In my view the Register would be easier to use, and the utility of the Register would not be materially compromised, if this question were deleted.

> **Proposed recommendation 4.3**: *That item 1 of the table in item 4.1 of Schedule 1 to the Regulations be deleted*.

2.4 The "control" question

Item 2 of the table in item 4.1 of Schedule 1 to the Regulations states that a registration against collateral that is commercial property must indicate "whether or not the collateral may be subject to control". The item states that the purpose of this

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5 Consultation Paper No. 2, Section 3.5.

6 By virtue of s 341(1B) of the Act.

requirement is to determine "whether collateral may be subject to control, for Part 9.5 of the Act".

The registration systems under the Canadian PPSAs and the NZ PPSA do not require this.

A number of submissions recommended that this question also be deleted from the Register. Again, they made the point that the question is confusing for registrants, and serves little or no useful purpose.

Similar to the position in relation to the "inventory" question (as discussed in the previous Section), I agree that it is difficult to see that the "control" question adds much value. Again, it may make it marginally easier for an insolvency practitioner who has been appointed to an insolvent company to determine what assets of the insolvent grantor might be circulating assets, but that benefit (if any) would seem to be outweighed by the confusion that this question causes for other users of the Register. In my view, the "control" question should also be removed from the Register.

> **Proposed recommendation 4.4**: *That item 2 of the table in item 4.1 of Schedule 1 to the Regulations be deleted*.

2.5 The "subordinate" question

Item 6 of the table in s 153(1) of the Act states that a registration may include an indication of whether the security interest is (or is to be) subordinated to any other security interest. The item makes it clear that this field in the Register is only optional, and does not need to be completed.

The registration systems under the Canadian PPSAs[7] and the NZ PPSA[8] include a similar (and similarly optional) field.

A number of submissions recommended that this field also be removed from the Register. They argued that it has little or no practical effect as between the secured parties involved in the subordination (or priority) arrangement, and has no impact on third parties. I am also advised by AFSA that as at 30 September 2014, the field had been completed in only 14,060 current registrations, out of a total of 6,041,644 current registrations[9] – that is, in approximately 0.23% of current registrations.

I agree that the "subordinate" field adds little if any value, and that removing it would make the Register easier to use.

> **Proposed recommendation 4.5**: *That item 6 of the table in s 153(1) be deleted*.

2.6 The collateral classes

2.6.1 The rules

Item 4(c) of the table in s 153(1) of the Act provides that the collateral covered by a financing statement "must belong to a single class of collateral prescribed by the regulations". Item 2.3(1) of Schedule 1 to the Regulations prescribes the following classes of collateral for this purpose:

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7 Eg Sask PPSA, s 45(6).

8 NZ PPS Regs, reg 8 and para 19 of Schedule 1.

9 Excluding migrated security interests.

(a) agriculture;

(b) aircraft;

(c) all present and after-acquired property;

(d) all present and after-acquired property, except:

(e) financial property;

(f) intangible property;

(g) motor vehicles;

(h) other goods;

(i) watercraft.

In practice, the Register breaks the classes "intangible property" and "financial property" down even further, in this way:

Financial property	Intangible property

• Chattel paper
• Currency
• Document of title
• Intermediated security
• Investment instrument
• Negotiable instrument
	• Account
	• General intangible
	• Intellectual property
	  • Circuit layout
	  • Copyright
	  • Design
	  • Patent
	  • Plant breeder's right
	  • Trade mark

If the collateral is an aircraft, or is other serial-numbered property that is consumer property, then it must be described by its serial number.[10] In all other cases, the registrant is not required to provide any specific description of the collateral, and only needs to indicate which class the collateral belongs to. The Register provides a free-text field for all collateral classes other than "all present and after-acquired property", but the free text field does not need to be completed, and can be left blank.

2.6.2 The approaches overseas

The rules for describing collateral in a financing statement under the Canadian PPSAs and the NZ PPSA fall into two broad categories. In New Zealand,[11] collateral must be assigned to one or more of these collateral types:

- goods: motor vehicles;
- goods: aircraft;
- goods: livestock;
- goods: crops;
- goods: other;
- documents of title;

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[10] Para 2.2(1)(a)(i) of Schedule 1 to the Regulations.

[11] NZ PPS Regs, para 8(1) of Schedule 1.

- chattel paper;
- investment securities;
- negotiable instruments;
- money;
- intangibles;
- all present and after-acquired property;
- all present and after-acquired property, except.

For all collateral types other than "all present and after-acquired property", a "further description" must also be provided.[12]

A similar architecture is in place in the Canadian province of Ontario. Under the Ont PPSA,[13] however, collateral is divided into only five categories:

- consumer goods;
- inventory;
- equipment;
- accounts;
- other.

A person making a registration under the Ont PPSA only needs to indicate which of these categories the collateral belongs to. There is a free text field in which the registrant may include a more specific description of the collateral, but unlike New Zealand this is only optional, and the field can be left blank.

The Canadian PPSA jurisdictions other than Ontario take a rather different approach[14]. The rules for the description of collateral in a registration in those jurisdictions are the same as the rules for describing collateral in a security agreement. In other words, the registration must simply describe the collateral. The description may be by reference to one or more of the types of collateral that are specified for this purpose, but does not need to be. Instead, collateral can be described:

- by item or kind;
- as all present and after-acquired property; or
- as all present and after-acquired property, except for excluded property (which must be described by item or kind).

Ontario is said to be moving to align its rules for collateral descriptions with these requirements.[15]

2.6.3 **The concerns**

The current rules under the Act and the Regulations for the description of collateral in a financing statement are unsatisfactory in a number of ways. First, it may not be clear what the correct collateral class is for a particular item of collateral (for example, whether particular goods are a "motor vehicle" or just "other goods", or whether an interest in a trust is "financial property" or "intangible property"). Where this is not clear, a registrant will be tempted to make two registrations, one against each class, to

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12 NZ PPS Regs, para 3(2) of Schedule 1.

13 *Minister's Order under the Personal Property Security Act* (Ont), clause 3(1)(f).

14 Eg *Personal Property Security Regulations* (Sask), reg 14(2).

15 Cuming Walsh & Wood, page 349. The review is looking into the reasons and timing for this.

ensure that one of the registrations is effective to perfect its security interest. This adds to the clutter on the Register.

To some extent, this may be an unavoidable feature of any registration system that relies on distinctions between collateral classes. The concern is exacerbated under the Act however by the number of classes, and by the technicality of the rules that distinguish between them.

Registrants have also been frustrated by the requirement in s 153(1) that the collateral covered by any one registration must belong to a single class. This can make it necessary for a secured party to register multiple separate financing statements for the one transaction. If a secured party takes security over a farming enterprise, for example, it is likely to need to register a separate financing statement against each of these collateral classes: agriculture; intangible property; motor vehicles; and other goods. Because a registrant will understandably want its registration process to be as simple (and inexpensive) as possible, this has let in part to the practice of secured parties instead registering financing statements against the single collateral class "allpap " or "allpap except", a practice which is discussed further in Section 2.7.4 below.

Similar issues affect searchers. A person who searches the Register to determine whether a particular item of personal property might be encumbered may need to take more than one class of collateral into account when analysing the search results, if it is not clear which class the property in question might belong to. Even if it is clear which class the property belongs to, the searcher will still need to examine any registrations that have been made against the "allpap" or "allpap, except" classes. Searchers can also be frustrated by the fact that a registration generally only needs to indicate the class to which collateral belongs, as the lack of a more specific description means that a person who is considering taking an interest in an item of property cannot just rely on search results to confirm whether the property may be subject to an existing security interest. Instead, the searcher needs to undertake further investigations.

2.6.4 **The submissions**

Submissions suggested a number of changes in response to these concerns. Some proposed that the number of collateral classes be reduced (although not all submissions were in favour of this suggestion). Other submissions proposed that a registrant be able to register against more than one class of collateral at the same time. Some said it should be mandatory for a registration to include more information about the collateral in the free text field. Some submissions suggested that a registration should be required to attach a copy of the security agreement.

One submission also made the point that it is not desirable that the Register include sub-categories of collateral class that are not provided for by the Regulations, and suggested that the Register and the Regulations be aligned with each other.

A number of submissions proposed that the Register incorporate a new class of collateral, called "all present and after-acquired property relating to". This collateral class could be used, for example, where a secured party takes security over all of the assets of a grantor in relation to a particular enterprise or activity – for example, if the grantor is giving security over the assets from time to time of a particular factory or at a particular location, or the assets from time to time of a particular trust.[16] This, in my view, is a very worthy proposal.

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[16] Trusts are discussed further in Section 2.11.3 below.

2.6.5 **How should proposals for change be assessed?**

These proposals for change would affect different stakeholders in different ways. For example, the proposal to reduce the number of classes of collateral would help a registrant when registering a financing statement, but could make a searcher's task of interpreting search results more difficult. The proposal that a registrant be required to provide particulars about the collateral in the free text field would help searchers, but would add to the work and risk involved for a person who is registering a financing statement.

The core purpose of the Register is to alert a person who is proposing to take an interest in another person's personal property to the fact that a secured party might have a competing interest in the property. The most complete way of fulfilling that purpose would be to require the secured party to include an exact description of its collateral in its financing statement, and to only register its financing statement after the security agreement had been entered into. This however would not be a desirable approach for stakeholders as a whole, and the rules for identifying collateral in a registration need to strike a balance between the competing needs and expectations of secured parties, searchers and grantors.

I do not have enough information at this point in time to propose recommendations on these difficult questions. To the extent that I have an inclination at this stage, it is to recommend that we retain the current approach of designating collateral classes (and not move to the majority Canadian model, which simply requires the registration to describe the collateral by item or kind), but that we reduce the number of collateral classes and make the distinctions between them more intuitive. For example, it might be possible to reduce the collateral classes down to these seven categories:

- serial-numbered property;
- other goods;
- accounts[17];
- other intangible property;
- all present and after-acquired property;
- all present and after-acquired property except;
- all present and after-acquired property relating to.

This would mean that the only difficult questions for a registrant were whether or not goods were serial-numbered property, and whether or not an intangible was an account.

As a counter-balance to this, a registrant could then be obliged to include more information about the collateral in the free text field. This is discussed in Section 2.7.

The review will be sourcing more information about the practical effects of the registration systems in Canada and New Zealand. In the meantime, I would be interested to hear views on these and any other proposals for finding the right balance between the interests of secured parties, searchers and grantors, and of any practical experience of working with the Canadian and New Zealand systems.

> **Proposed recommendation 4.6**: *None at this stage, pending further consideration.*

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[17] If this is needed for the purposes of s 64. See Consultation Paper No. 2, Section 6.9.4.

2.7 The free text field

2.7.1 Issues raised in submissions

Submissions made four types of comments in relation to the use of the free text field in a registration:

- that the legal effect of the field be clarified;
- that it be compulsory to use the field to provide a more complete description of the collateral;
- that the manner in which the field is used be limited, particularly for the "allpap except" collateral class; and
- that the field also be available for use where a registration is made against the "allpap" collateral class.

2.7.2 The legal effect of the free text field

The free text field is not referred to anywhere in the Act or the Regulations. This means that it does not have any express statutory effect.

This might suggest that a registration is not limited by any description of collateral that might be included in the free text field. For example, a registration against the collateral class "other goods" might be able to perfect a security interest over any "other goods", not just any goods that are described in the free text field.

This would however be a very counter-intuitive outcome, and there are good grounds for arguing that it is not correct. Even though the Act and the Regulations specify requirements for a registration, it does not necessarily follow that a more specific description of collateral on the Register has no legal effect. It could well be argued that a registration against the collateral class "other goods" that then describes a specific item of goods should be regarded as being only a registration against those specific goods (unless it is clear from the description that they are only examples, and not intended to limit the effect of the registration).

Even if the lack of statutory recognition of the free text field means that it does not technically limit the breadth of the registration, it is likely that a registration that was claimed to apply to a particular item of collateral would be "seriously misleading" under s 164 in relation to that item, if the free text field contained a description of collateral that did not include it.[18]

I do not have a view at this stage on whether it is necessary to amend the Act to clarify this. I would be interested to hear the views of others.

> **Proposed recommendation 4.7**: *None at this stage, pending further consideration.*

2.7.3 Should the free text field be compulsory?

The Register is not designed to be a definitive record of precisely what collateral is subject to a secured party's security interest. Rather, its function is to alert a searcher to the fact that particular personal property, or personal property of a particular type, may be subject to a secured party's security interest. If a searcher is alerted to the fact

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[18] See Section 3.4 below.

that an item of personal property may be subject to a security interest, then the searcher needs to use other tools (such as s 275 of the Act)[19] to make further enquiries.

The registration process is made easier for a registrant if it is not required to provide a detailed description of the collateral. This is particularly the case for advance registrations, when the registrant may not know precisely what the collateral will ultimately be. A registrant will have some incentive not to use a broader description than necessary, so that the secured party does not receive unnecessary requests for information under s 275, but a registrant will generally want to use description that errs on the broad side, to avoid the risk of inadvertently leaving collateral out. For repeat secured parties such as financial institutions or sellers of goods on retention-of-title terms, broad descriptions are also advantageous from a systems perspective, as they remove the need to prepare tailored descriptions for individual transactions.

From a searcher's perspective, however, the more detailed the description is the better, as a more detailed description makes it easier for the searcher to determine whether or not a registration could apply to particular collateral. This can reduce the need for the searcher to make follow-up enquiries.

A grantor will also not want a registration to be broader than necessary, as this could otherwise give searchers an impression that the grantor's assets were more heavily encumbered than was in fact the case.

How is a balance to be found between these competing perspectives? In Ontario, another system that uses collateral classes, the accompanying free text field is optional[20] (as is the case under the Act, at present). The NZ PPSA requires a registration to include a "further description", but does not describe how detailed that description needs to be.[21] A leading commentary on the NZ PPSA takes the view that the "further description" does not need to describe the collateral in detail, and can be quite generic (eg "computers").[22]

In my view, it would not be appropriate for the Act to mandate a specific level of detail for the description of collateral in a registration, particularly if this was to be a condition of what is required for a registration to be effective. A requirement of this type would be very difficult for a secured party to work with, particularly for advance registrations. It would also expose the secured party to additional risk, as its registration could be ineffective if the level of detail did not meet the mandated requirements.

I can see however that it is desirable to do something to curtail unnecessarily over-reaching registrations. I will return to this question below in the context of s 151 of the Act.[23]

> **Proposed recommendation 4.8**: *That the Act not be amended to oblige a registrant to include details of collateral in the free text field as a condition to making it an effective registration.*

2.7.4 What type of information should be allowed in the free text field?

A number of submissions discussed the practice that has developed of routinely registered a financing statement under the "allpap except" collateral class, and then

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19 See Section 5.9 below.

20 Cuming Walsh & Wood, pages 348 to 349.

21 NZ PPS Regs, para 8(2) of Schedule 1.

22 Gedye Cuming & Wood, page 459.

23 See Section 4.2 below.

describing the "except" so that the registration operates in effect to perfect a security interest over "all present and after-acquired property except property that the secured party does not have a security interest over". The submissions argued that this type of "except" description is uninformative and unhelpful, and should not be allowed. It was also suggested that this use of the collateral class does not comply with the Regulations, because the definition of "allpap except" in reg 1.8 requires that the excepted property be described "by item or class".

It is true that this type of description is not particularly informative, as it does not provide the reader with information that helps them to determine just what collateral might or might not be covered by the registration. It is however no less unhelpful than using the "allpap" collateral class to perfect a security interest that is over less than all the grantor's personal property, and it seems clear that this is permitted by the Act[24].

I am generally not in favour of recommending rules to ban specific practices, as they add to the complexity of the Act. This particular practice may also become less important if the Regulations are amended to provide for an "allpap relating to" class.[25] In any event, this practice is part of the broader issue of the extent to which registrants should be able to make overly broad registrations. I will return to this Section 4.2 below.

> **Proposed recommendation 4.9**: *That the Act not be amended to prohibit the practice described above.*

2.7.5 Should the free text field be available for the "allpap" class?

One submission suggested that the free text field should also be available for use with a registration against the collateral class "allpap".

It is not readily apparent to me why this would be helpful. If anything, it could cause confusion – if a security interest is over all a grantor's present and after-acquired property, it is not clear what a further description might need to say. I would be interested to hear the views of others on this.

> **Proposed recommendation 4.10**: *That the Register functionality not be amended to activate the free text field for a registration against the collateral class "allpap".*

2.8 The "PMSI" question

Item 7 of the table in s 153(a) of the Act requires a registration to indicate whether the security interest to which it relates is (or is to be) a PMSI to any extent.

This requirement, and the prospect that it might be removed, were discussed in Consultation Paper No. 2.[26]

One submission suggested that it be clarified that a registration that does not tick the PMSI box can nonetheless perfect a PMSI, but on the basis that the PMSI does not benefit from the super-priority afforded by s 62. The submission was concerned that

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[24] See, for example, Example 1 to s 151(1) of the Act. As I understand it, this use of the "allpap except" collateral class was developed to avoid an argument that the use of the "allpap" class could be seriously misleading because it is over-reaching, on the basis that a registration using this "allpap except" formulation was at least not claiming to be broader than the security interests that it in fact perfects. The formulation also makes it easier for a secured party to convince a grantor or incoming secured party that it does not need to amend its registration when it releases an item of collateral from its security.

[25] See Section 2.6.4.

[26] Consultation Paper No. 2, Section 6.8.3.

such a registration could be ineffective because of the requirements in s 153, or because it could be "seriously misleading" for the purposes of s 164.

I agree that a security interest that is a PMSI should be able to be perfected by a registration that does not tick the PMSI box, on the basis that it is then an "ordinary" security interest for priority purposes. The particular concerns identified above should however be addressed by the discussion in Section 3.4 below.

> **Proposed recommendation 4.11**: *None at this stage, pending further consideration*.

2.9 Description of proceeds

Item 4(d) of the table in s 153(1) of the Act provides that any description of proceeds in a registration must comply with the Regulations. Item 2.4 of Schedule 1 to the Regulations allows proceeds to be described in a way that identifies the particular proceeds, that identifies a class to which the proceeds belong, or that simply describes the proceeds as "all present and after-acquired property". The Register accommodates all of these options, but makes "all present and after-acquired property" the default choice.

These provisions were discussed in Consultation Paper No. 2.[27] One option raised in that discussion was that the Act be amended so that a security interest over proceeds is automatically perfected, if the security interest over the original collateral was perfected by registration. If that option is adopted, then it will no longer be necessary to separately describe the proceeds in the registration, and item 2.4 of Schedule 1 to the Regulations could be deleted.

> **Proposed recommendation 4.12**: *None at this stage, pending further consideration.*

2.10 Serial-numbered property

2.10.1 The provisions

Item 4(b) of the table in s 153(1) of the Act states that collateral may or must be described by serial number, if this is allowed or required by the Regulations. Item 2.2 of Schedule 1 to the Regulations identifies the following types of collateral as the ones that may or must be described by serial number in a registration:

- motor vehicles;
- aircraft;
- watercraft; and
- certain types of intellectual property (designs, patents, plant breeder's rights, trade marks, or licences over any of them).

2.10.2 Where is serial-numbered property referred to in the Act?

The concept of serial-numbered property is used in the Act in a number of ways.

- *Identification of the grantor*

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[27] Consultation Paper No. 2, Section 5.7.3.

If collateral is required by the Regulations to be described by serial number and is consumer property, then the registration may not include the grantor's details.[28]

- *Effectiveness of a registration*

If the Regulations state that collateral must be described in a registration by serial number, the registration will be defective if it does not.[29]

- *Registration period*

If collateral is described in a registration by serial number, the term of the registration cannot exceed seven years.[30]

- *Taking free rules*

The Act contains a number of taking free rules that are specific to serial-numbered property.[31] Some of the other taking free rules, in contrast, are qualified so that they do not apply to serial-numbered property, at least to some extent.[32]

- *Other references*

The Act also refers to serial-numbered property in a number of other provisions, in a more ancillary way.[33]

2.10.3 **Other jurisdictions**

The Canadian PPSAs and the NZ PPSA also have a concept of property that may or must be described by serial number in a registration. The concept in those jurisdictions is however much narrower than the term as used in the Act. In the majority of the Canadian PPSA jurisdictions, for example, the concept covers only goods such as motor vehicles, trailers, mobile homes, aircraft, boats and outboard motors.[34] In Ontario and Yukon, the concept applies only to motor vehicles.[35] In New Zealand, the term is limited to motor vehicles and aircraft.[36]

2.10.4 **How broad should the concept be?**

Should it be broader?

One submission suggested that the concept of serial-numbered property was too narrow, and should be broadened. This was proposed as a response to the risk faced by a secured financier of equipment if its grantor leases the equipment to another person under a lease that is a security interest but neglects to perfect its security interest in the leased goods. The risk faced by the secured party is that the lessee could become insolvent, so that the unperfected security interest under the lease then

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28 Item 2(a) of the table in s 153(1) of the Act.

29 Section 165(a) of the Act.

30 Item 5(b) of the table in s 153(1) of the Act.

31 Sections 44 and 45 of the Act.

32 Sections 46 and 47 of the Act.

33 Such as ss 8(6), 68, 165(a) and (b), and 171.

34 See Cuming Walsh & Wood, page 331.

35 See Cuming Walsh & Wood, page 331.

36 NZ PPS Regs, reg 3.

vests in the insolvent lessee. The suggestion in the submission, that the categories of serial-numbered property be expanded, was coupled with a suggestion that the secured financier in such a situation could register a financing statement against the serial number, and that this should be sufficient to perfect all "downstream" security interests over the equipment, at least for the purposes of preventing any downstream interest from vesting in an insolvent downstream grantor.

My view at this stage is that I am not in favour of extending the concept of serial-numbered property for the purposes of the Act generally. There are two reasons for this – one pragmatic, and one based on principle.

The pragmatic reason is that a serial-numbered system for identifying property needs to be manifestly robust, and able to provide each affected asset with a unique and verifiable number. This is best able to be achieved if the serial numbers are issued by or under the supervision of a Government body, and I expect that a serial number such as a manufacturer's bar code would not be sufficiently robust or unique for these purposes. It may also be difficult for the Register to accommodate a wide range of different types of serial number.

The reason based on principle is that an extension of the categories of serial-numbered property may advantage secured parties that want to be able to register against serial numbers, but would disadvantage other secured parties that do not. For example, it would expose those other secured parties to additional risk under s 44 of the Act (as that section currently stands). It would also increase the registration burden for secured parties where the grantor is an individual and the collateral is consumer property, because this would require the secured party to register against the serial number, whether or not it would otherwise have wanted to.

Should it be narrower?

Rather than extend the categories of serial-numbered property, it could be argued that the categories should instead be reduced, perhaps even so that the concept only applies to motor vehicles. I have already suggested in Consultation Paper No. 2 that it might be appropriate to limit the taking free rule in s 44 in this way.[37] That would bring s 44 into line with the taking free rule in s 45, and with the position in Ontario, Yukon and (to a lesser extent) New Zealand. If that change is made, then it is difficult to see what benefits flow from defining other types of collateral to be serial-numbered property, except potentially in relation to the "vesting on insolvency" risk under s 267 as discussed in Consultation Paper No. 3[38].

Patent serial numbers

Item 2.2(3)(f) of Schedule 1 to the Regulations contemplates that a registration against a patent may be identified by its patent application number, in the absence of a patent number issued by IP Australia. One submission suggested, however, that this is at best only a temporary protection for a secured party, because a different number is issued when the patent is issued. This means that it is not possible to make a lasting registration against a patent which is consumer property, or to avoid the effect of the taking free rule in s 44 of the Act, until the patent is issued. If the grantor of the security interest is a body corporate, the secured party also faces the risk that a registration made at that time could be outside the 20-business day period prescribed by s 588FL of the Corporations Act.

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[37] Consultation Paper No. 2, Section 5.4.2.1.3.

[38] See Consultation Paper No. 3, Section 3.4.2.

I suspect that this issue is unlikely to arise often in the context of consumer property. As far as security interests over commercial property are concerned, it may be that the secured party will simply need to remain vigilant, to ensure that it can make a fresh registration when the formal patent number is issued. Vigilance on the part of the secured party will of course not resolve the timing issue under s 588FL of the Corporations Act. That issue will go away, however, if s 588FL of the Corporations Act is deleted. See Consultation Paper No. 3.[39]

The issue would also be resolved if the concept of serial-numbered property is narrowed, as just discussed.

> **Proposed recommendation 4.13**: *None at this stage, pending further consideration.*

2.10.5 The registration period

The maximum possible registration period for a registration against serial-numbered property is seven years. It is not clear why this needs to be the case. It could be argued that a registration against serial-numbered property should be able to have the same registration period as for any other type of collateral, for the relevant type of grantor.

This issue may be overtaken by the discussion in Section 2.13 below. If that is not the case, then I am minded to recommend that a registration against serial-numbered property have a maximum period of seven years if the grantor is an individual, but that it otherwise be able to have the same registration period as a registration for any other type of collateral.

> **Proposed recommendation 4.14**: *That the table in s 153(1) of the Act be amended to provide that a registration against serial-numbered property have a maximum period of seven years if the grantor is an individual, but that it be able to have the same registration period as for any other collateral, in the case of any other type of grantor.*

2.10.6 Motor vehicles

2.10.6.1 Breadth of the concept

The definition of the term "motor vehicle" is found in reg 1.7 of the Regulations. It is as follows:

> (1) For the definition of motor vehicle in section 10 of the Act, personal property described in subregulation (2) or (3) is a motor vehicle.
>
> (2) The personal property:
>
> (a) is built to be propelled, wholly on land, by a motor that forms part of the property; and
>
> (b) is capable of a speed of at least 10 km/h; and
>
> (ba) has 1 or more motors that have a total power greater than 200 W; and
>
> (c) has any of the following:
>
> (i) a vehicle identification number;
>
> (ii) a chassis number;
>
> (iii) the manufacturer's number; and

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[39] Consultation Paper No. 3, Section 4.1.2.

(d) does not run on rails, tram lines or other fixed path.

(3) The personal property:

(a) is capable, when being towed by, or attached to, a motor vehicle, of travelling at a speed greater than 10km/h; and

(b) is a piece of machinery or equipment that is equipped with wheels and designed to be attached to, or towed by, a motor vehicle; and:

(c) has any of the following:

(i) a vehicle identification number;

(ii) a chassis number;

(iii) the manufacturer's number.

This is quite an elaborate definition. As I understand it, the language is a compilation of the corresponding definitions from the state and territory motor vehicle securities legislation that was replaced by the Act.

The boundaries of the definition are often unclear, in part because of its complexity. In response to industry concerns, the definition was amended with effect from 1 July this year so that personal property is only a motor vehicle if it is both capable of a speed of 10 kph and has motors with a total output over 200W (previously, property could be a motor vehicle if it satisfied either of these requirements).[40] Not all submissions were in favour of this amendment, although a number were. I do not have information before me to assess the effects of the change, and am not in a position to express a view on it.

Looking at the definition more generally, however, it must be asked why it needs to be so broad. The term "motor vehicle" is principally relevant as a category of serial-numbered property, including for the taking free rules in ss 44 and 45 of the Act. If it is accepted that the taking free rules in ss 44 and 45 are primarily consumer protection measures, then it could be asked whether the concept should be limited to motor vehicles in the everyday meaning of the term.

The current complexity of the definition makes it difficult at the fringes for a registrant to know whether to register a financing statement against the collateral class "motor vehicle" or "other goods". It is similarly difficult for a searcher to know which collateral class to search against. This technical complexity is undesirable, particularly as registrants and searchers are likely to be lay persons, with no legal training. I believe that it is worth exploring whether this complexity could be eliminated by finding a way to align the concept of "motor vehicle" under the Act more closely with its vernacular meaning.

Proposed recommendation 4.15: *None at this stage, pending further consideration.*

2.10.6.2 The July 2014 amendment

As the previous Section noted, the definition of "motor vehicle" was amended with effect from 1 July 2014 in a way that made the definition narrower than had previously been the case.

One submission expressed concern that an inadvertent effect of this amendment could be to cause some existing registrations to be ineffective. In particular, the submission argued that this could be the case if a secured party held security over personal property that was a motor vehicle as defined before 1 July, but which ceased to be a

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[40] Reg 1.7 of the Regulations, as in force before commencement of the *Personal Property Securities (Motor Vehicles) Regulation 2014*.

motor vehicle because of the change to the definition. If the secured party had perfected its security interest by registration against the collateral class "motor vehicle", that registration will have been effective to perfect the security interest until 1 July. From 1 July, however, the collateral will have become "other goods", and a registration made on or after 1 July would need to be made against that collateral class instead.

I am confident that the amendment to the definition of motor vehicle was not intended to make existing registrations defective. I agree with the submission, however, that it would be desirable to confirm this, perhaps in the Regulations themselves.

One consequence of the change to the definition of motor vehicle is that a person who searches the Register for security interests over an item of personal property that was previously within the collateral class "motor vehicle" but is now just "other goods" will need to conduct the search against both collateral classes. One possible response to this might be to require the secured party to make a replacement registration (that is, against the "other goods" collateral class) in order to re-perfect its security interest, within some transitional period. Rather than impose this burden on secured parties, however, my preference is to accept that searchers will need to conduct dual searches in these circumstances. This will become less of an issue with the passage of time.

> **Proposed recommendation 4.16**: *That the Regulations be amended as described above.*

2.10.7 Aircraft

Item 2.2(1)(b) of Schedule 1 to the Regulations states that an aircraft must be described by serial number, if it is commercial property.

Even if Government decides (despite the discussion in Section 2.10.4) that the concept of serial-numbered property should continue to apply to aircraft, it must be asked why a secured party should be required to include the serial number for an aircraft in a registration. This may not always be practicable. For example, if a company has given all-assets security to its bank and some time later acquires a corporate jet, the secured party's security over the aircraft will not be perfected by the registration, because the registration will be ineffective with respect to the aircraft under s 165(a).[41] It is not clear to me why this should be the case.

> **Proposed recommendation 4.17**: *If aircraft continues to be a class of serial-numbered property for the purposes of the Act, that item 2.2(1) of Schedule 1 to the Regulations be amended so that a registration to perfect a security interest over aircraft may include the aircraft's serial number, but is not required to.*

2.10.8 Intellectual property licences

Items 2.2(1)(a)(ii)(E) and (c)(iii)(E) of Schedule 1 to the Regulations provide that a licence of intellectual property that is serial-numbered property, is itself also serial-numbered property.

Even if Government decides (despite the discussion in Section 2.10.4) that the concept of serial-numbered property should continue to apply to certain types of intellectual property, it should be asked why the concept should extend to licences over such intellectual property as well. Licences may have been included because a licence to exploit intellectual property can be equivalent in a commercial sense to ownership of the intellectual property, if the licence is exclusive. The definition of serial-numbered

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[41] See Section 3.1 below.

property, however, captures not just exclusive licences, but applies to licences generally.

I would be interested to hear of any other explanations for this. If there is no compelling explanation, my inclination would be to limit the concept of serial-numbered property to the intellectual property itself, and not include licences as well.

> **Proposed recommendation 4.18**: *If Government decides to continue to apply the concept of serial-numbered property to certain types of intellectual property, that items 2.2(1)(a)(ii)(E) and (c)(iii)(E) of Schedule 1 to the Regulations be deleted.*

2.11 Grantor identifiers

2.11.1 Individual grantors

2.11.1.1 The rules

Item 2(b) of the table in s 153(1) of the Act provides that a financing statement with respect to a security interest that is granted by an individual needs to include the grantor's name and date of birth, evidenced in accordance with the Regulations.[42] Item 1.2 of Schedule 1 to the Regulations provides that a grantor's name and date of birth are to be taken from the following source:

- if the secured party has the information for the grantor in data held by the secured party because of the operation of the *Anti-Money Laundering and Counter-Terrorist Financing Act 2006* (the **AML/CTF Act**) – that data;
- if that option does not apply – the grantor's driver's licence, if they have one;
- if neither of the above options applies – the grantor's proof of identity or proof of age card, if they have one;
- if none of the above options applies – the grantor's Australian passport, if they have one;
- if none of the above options applies – the grantor's Australian visa, if they have one;
- if none of the above options applies – the grantor's non-Australian passport, if they have one; and
- in any other case – the grantor's birth certificate.

The Canadian PPSAs rely primarily on an individual grantor's birth certificate as the source of the grantor's details.[43] Under the NZ PPSA, an individual grantor's name can be sourced from:

> [any] official document such as a birth certificate, marriage certificate, certificate of New Zealand citizenship, passport, driver's licence, or other similar official document evidencing the name currently used by the [grantor].[44]

Article 9, in contrast, relies primarily on the grantor's driver's licence details.[45]

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[42] Unless the collateral is serial-numbered property that is consumer property.

[43] See Cuming Walsh & Wood, pages 341 to 344.

[44] NZ PPS Regs, reg 2(2). For a critique of this, see Gedye Cuming & Wood, para 150.7.

One difficulty faced by any system that records registrations against an individual's name is the fact that the individual may go by several versions of their name. He or she may be commonly known by a nickname, for example, or may not like their first name and use their middle name instead. If a grantor is married and has adopted their spouse's surname, they may still use their unmarried name for work purposes. These practical realities can lead to considerable confusion in the registration system, as a financing statement might be registered against a grantor under a version of the grantor's name that is not known to a searcher, making the financing statement effectively undiscoverable. It is for this reason that the Regulations specify an external reference point to determine the name that is to be used in a registration. In theory, this enables both registrants and searchers to use the same details.

Even with a single authoritative source for a grantor's details, the registration system is faced with the challenge of dealing with the fact that a grantor's name may change over time. For example, a grantor may change his or her name by registration,[46] either on marriage or for other reasons. The Act accommodates this to some extent, in s 166. Section 165(b) states that a registration becomes defective if it is no longer made against the grantor's current name (determined under the cascading options set out in the Regulations, as described above), but s 166 allows the secured party a period of up to 60 months to rectify the defect.

A searcher's ability to search for registrations against an individual grantor is compromised by the fact that secured parties with AML/CTF Act data (principally financial institutions) can use whatever details they have on file as their "current data" for the grantor, even if the grantor's name in that data was taken from a source that is different to the one that a searcher would use – for example, if a grantor has a driver's licence, but the financial institution's AML/CTF Act data was compiled using the grantor's passport or birth certificate. In addition, a third-party searcher will not know (and will have no way of knowing) what a financial institution's AML/CTF Act details are for a grantor, but as long as those details continue to be the "current data" in the financial institution's files, it appears that they may continue to be current for the purposes of s 165(b) (at least for that secured party), no matter how out-of-date they may be for other purposes. So if a financial institution has registered a financing statement against the grantor's name from its AML/CTF Act data, that registration may remain effective even if the grantor changes his or her name. If the grantor has a driver's licence with the new name, a searcher will have no way of finding the financial institution's registration, making it effectively undiscoverable.

I have no doubt that it is very convenient for financial institutions to be able to use their AML/CTF Act data to register financing statements against their customers, particularly if their IT systems automatically populate their registrations from that data. However, it does significantly erode the effectiveness of the Register as a whole if the heaviest users of the Register are able to use data for their registrations that can make those registrations invisible to other users. For that reason, I believe that we should consider whether financial institutions should be entitled to continue to use their AML/CTF Act data, or whether they should be required to use the other cascading options in item 1.2 of Schedule 1 to the Regulations instead. As a practical matter, this might mean that a financial institution would need to update its AML/CTF Act data by reference to its customer's driver's licence (for example) before it registers a new financing statement against the customer.

> **Proposed recommendation 4.19**: *None at this stage, pending further consideration.*

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[45] Article 9, § 9-503.

[46] For example, under the *Births, Deaths and Marriages Registration Act 1996* (Vic).

2.11.1.2 Is a driver's licence appropriate as the principal source of details for an individual grantor?

One submission queried whether an individual grantor's details should be sourced from a public register (such as the ASIC companies register, or the Electoral Roll), rather than a driver's licence or passport. It is not clear to me however that this would desirable, or particularly practical.

A substantial benefit of using a document such as a driver's licence or passport is that it contains not only the individual's name, but also their date of birth and photograph. The photograph makes it easier for a registrant or searcher to verify that the identification document belongs to the correct person. In contrast, the ASIC companies register[47] does not contain photographs, and the Electoral Roll contains neither photographs nor dates of birth. In any event, a public register may not be very practicable as a source of identification information for everyday transactions, as it is not readily accessible like a driver's licence or passport, which an individual can carry around with them.

I would be interested to hear the views of others on this.

> **Proposed recommendation 4.20**: *That items 3 to 8 of the table in item 1.2 of Schedule 1 to the Regulations not be amended.*

2.11.2 Body corporate grantors

Item 2(c) of the table in s 153(1) of the Act provides that a registration against a (non-individual) grantor needs to be made against the details prescribed by the Regulations. Item 1.3 of Schedule 1 to the Regulations contains a table that sets out a cascade of options that are to be used to source the correct details for a grantor that is a body corporate (if it is not acting as trustee of a trust with an ABN). Leaving migrated security interests to one side, if a body corporate grants security as responsible entity of a registered scheme that has an ARSN, the correct details are the ARSN. If that option does not apply and the body corporate has an ACN, then the appropriate details are the ACN. If the body corporate has no ACN but has an ARBN, then the ARBN should be used. Finally, if none of these options applies, then item 5 of the table says that the registration must be made against:

> Name of the body, as provided for in body's constitution or equivalent document.

One submission pointed out two difficulties with this. First, not all bodies corporate have a "constitution or equivalent document". This is apparently the case, for example, for companies incorporated in New Zealand.[48] This makes it difficult to know how to register against a New Zealand company that does not have an ARBN.

Secondly, even if a body corporate does have a constitution or equivalent document, it will not always be the case that its current name is "provided for" by that document. For example, the constitution could contain its original name,, but the name may have subsequently been changed in accordance with a procedure contained in the relevant companies legislation.

It is likely that any jurisdiction with legislation that provides for the creation of bodies corporate will also maintain a register of them. For this reason, the submission suggested it might be preferable to use the name or identifying company number for

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[47] The potential utility of the ASIC companies register also suffers from the fact that not all grantors are company directors.

[48] See s 26 of the *Companies Act 1993* (NZ).

the body corporate as recorded in that register. I can see merit in this suggestion, and am inclined to recommend it.

> **Proposed recommendation 4.21**: *That item 5 of the table in item 1.3 of Schedule 1 to the Regulations be amended to provide that the identifying details for a body corporate that is not captured by any of items 1 to 4 of the table be its name or identifying number under the law under which it is incorporated.*

2.11.3 Trusts

2.11.3.1 The rules

A trust is not a separate legal entity. Rather, a trust is a relationship, under which one person (the trustee) holds property for the benefit of one or more other persons (the beneficiaries).

Any liabilities incurred by a trustee are incurred by it personally. If a liability is permitted by the terms of the trust, then the trustee is generally able to meet the liability out of trust property, but the liability is nonetheless incurred by the trustee itself, and not just by "the trust".

Because a trust is not a separate legal entity, the legal position of the trustee, the beneficiaries and any creditors is very different to the legal position that applies where a separate legal entity is involved, such as a company.[49] Despite this, the Regulations treat a trust as if it were a separate entity, by requiring in some cases that a trust (rather than the trustee) be identified on the Register as the grantor when the trustee gives security over assets that it holds on trust.

The relevant rules are set out in item 1.5 of Schedule 1 to the Regulations. Those rules are not easy to track through, but the effect seems, in summary, to be this:

- If the trustee is a body corporate and the trust has an ABN – register against that ABN.
- If the trustee is a body corporate and the trust does not have an ABN – register against the body corporate's ACN (or other details under item 1.3 of Schedule 1 to the Regulations, as relevant).
- If the trustee is an individual – register against the individual's details under item 1.2 of Schedule 1 to the Act (as to which, see the previous Section).

Item 1.5 does not explain what grantor details should be used for a body politic that is trustee of the trust that does not have an ABN. This fact pattern is not likely to arise often in practice, but if it does, the solution is probably to default to the specific rules for bodies politic in item 1.6 of Schedule 1 to the Regulations.

Trusts are also treated separately for registration purposes under the Canadian PPSAs[50] and the NZ PPSA.[51] Under those regimes, the registration is made against the trust's name as set out in the document that establishes the trust.[52]

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[49] For a discussion of this in the context of commercial trusts, see N D'Angelo, *Commercial Trusts* (LexisNexis, 2014).

[50] Eg *Personal Property Security Regulations* (Sask), reg 11(4).

[51] NZ PPS Regs, para 7(h) of Schedule 1.

[52] Eg NZ PPS Regs, para 6(b) of Schedule 1.

2.11.3.2 **The use of ABNs**

The fact that a financing statement needs to be registered against a trust's ABN if the trustee is a body corporate produces a number of difficulties for both registrants and searchers. For example, it produces problems for registrants in these ways:

- A secured party may not be able to tell whether the grantor holds property in its own right or as trustee of a trust with an ABN. This can force the secured party to make multiple registrations, adding to the clutter on the Register.

- A grantor may initially hold collateral in its own right, but then declare that it holds the collateral on trust, and obtain an ABN for the trust.

- A grantor may initially hold collateral on trust for a trust that does not have an ABN, but later obtain one for the trust.

The fact that financing statements must be registered against a trust's ABN if the trustee is a body corporate can also produce difficulties for searchers. A person who wants to determine whether a particular asset of a body corporate could be subject to a security interest needs to know whether the body corporate holds the asset as trustee of a trust with an ABN, or has done so in the past, in order to know how to undertake the searches. This imposes a significant additional burden on searchers, and additional uncertainty.

The use of ABNs for trusts with a body corporate as trustee has simplified the Register for some grantors, in particular for professional trustee companies. The use of ABNs does however greatly complicate the registration system for everyone else. For this reason, it is worth considering whether the use of ABNs for trusts is desirable, or whether it should be discontinued. If it is discontinued, security interests over assets of a trust would then be perfected by registration against the trustee's details, whether the trustee is a body corporate or an individual.

As noted earlier in this consultation paper, some submissions suggested that a new collateral class be added to the Register, of "all present and after-acquired property relating to".[53] If this collateral class is added, it would then be open to professional trustee companies to require that any registrations in relation to a particular trust be registered against that collateral class, so that the "relating to" text could be used to identify the particular trust in question. This would go some way to softening the impact of this change, if it is made.

I would be interested to hear the views of others on this.

> **Proposed recommendation 4.22**: *None at this stage, pending further consideration.*

2.11.3.3 **The name of the trust**

One submission suggested that it be made mandatory to include the name of the trust in a registration, if the registration is being made against the trustee's details. The submission appeared to be suggesting that the name of the trust be included in the free text field, rather than as part of the formal identification of the grantor, although this was not clear.

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[53] See Section 2.6.4 above.

Making this mandatory would produce the same types of difficulties for registrants and searches as the current use of ABNs, as discussed above. It would have the further difficulty that the correct name of a trust could be unclear, or could change. For these reasons, at this stage I am not in favour of making this a mandatory requirement.

> **Proposed recommendation 4.23**: *That a registration relating to assets of a trust not be required to include the name of the trust.*

2.11.3.4 A trust that has both an ARSN and an ABN

One submission drew attention to the fact that it is not entirely clear what grantor details are to be used if the grantor is a body corporate which is the responsible entity of a registered scheme that has both an ARSN and an ABN.

The relevant provisions are items 1.3(1) and 1.5(1) of Schedule 1 to the Regulations. Item 1.3(1) says that the table in item 1.3 applies if the grantor is a body corporate that is a trustee and has an ARSN. Item 1.5(1) says that the table in item 1.5 applies if the grantor is:

> (a) a body corporate that is a trustee of a trust that:
>
> (i) has an ABN; and
>
> (ii) does not have an ARSN; or
>
> (b) any other trustee of a trust.

The confusion arises because it is not entirely clear what paragraph (b) means when it refers to any "other" trustee. It is referring to any trustee "other than a body corporate that is a trustee", or to any trustee "other than a body corporate that is a trustee of a trust that has an ABN but no ARSN"? If the second interpretation is correct, then both items 1.3 and 1.5 would apply if the body corporate is trustee of a trust that has both an ARSN and an ABN.

In my view the first interpretation is the better one, and paragraph (b) is referring to any trustee "other than a body corporate that is a trustee". On that interpretation, paragraph (a) applies to a trustee that is a body corporate, and paragraph (b) applies to a trustee that is not. If a body corporate is a trustee but paragraph (a) does not apply, then the registration rule is found elsewhere, ie in item 1.3 of the Schedule. I agree however that paragraph (b) could be amended to make this clearer.

This issue will go away, of course, if the rules are changed so that a registration cannot be made against a trust's ABN (see Section 2.11.3.2 above).

> **Proposed recommendation 4.24**: *If the Regulations continue to require that registrations be made against a trust's ABN, that item 1.5(1)(b) of Schedule 1 to the Regulations be amended to make it clear that it applies "to any trustee of a trust that is not a body corporate".*

2.11.4 Partnerships

2.11.4.1 The distinction between a partnership, and the partners in a partnership

A partnership is also not a separate legal entity, and the assets and liabilities of a partnership are assets and liabilities of the individual partners. Despite this, a partnership is treated by partnership law as being distinct in some respects from the individual partners. In particular, while the partners collectively own the partnership assets, an individual partner's share in the partnership does not give it title to specific property, but rather a right to a proportion of the net assets of the partnership after

partnership assets have been realised and all partnership liabilities have been met[54]. This distinction is also encountered frequently in financing transactions, in that the members of a partnership will often jointly grant security over the partnership assets, while at the same time each partner will separately grant security over its (individually held) net interest in the partnership.

The rules for registering a financing statement in relation to a partnership are set out in item 1.4 of Schedule 1 to the Regulations. The rules are somewhat convoluted, and while they recognise the distinction between the assets of a partnership and a partner's net interest in the partnership, the distinction could be dealt with more clearly.

One submission argued against the proposition that the rules for registering against partnerships and partners allow both sets of registrations to be conflated into one – that is, that it be possible to make a single registration against both the partnership (for the partnership assets) and the partners (for their respective net interests in the partnership) at the same time. I agree that it is preferable to keep those registrations separate.

> **Proposed recommendation 4.25**: *That the current distinction drawn in item 1.4 of Schedule 1 to the Regulations, between the assets of a partnership and a partner's net interest in the partnership, be maintained and clarified.*

2.11.4.2 Partnerships that do not have an ABN

Leaving migrated security interests to one side, item 1.4 of Schedule 1 of the Regulations provides that a financing statement in relation to a security interest granted by a partnership that has been allocated an ABN must be registered against the ABN.

If the partnership has not been allocated an ABN, then the item appears to assume that the partners are all natural persons, and requires the registration to be made against the details for the partners, as individuals, that are set out in item 1.2 of the Schedule. While the partners in a partnership will usually be individuals, this will not always be the case, even for partnerships that have not been allocated an ABN. In my view, item 1.4 of Schedule 1 should be amended to accommodate the prospect that the partners could be any of:

- an individual;
- a body corporate;
- a body corporate acting as trustee of a trust with an ABN;
- a body politic; or
- another partnership.

Item 1.4 could achieve this by simply saying that it applies if the grantor is a partnership, and then providing that the registration as against the partnership should be against the partnership's ABN if it has been allocated one, or otherwise against the relevant details of each partner.

The fact that item 1.4 relies on a partnership's ABN raises some of the same issues as for trusts, as discussed in the previous Section. Here, however, the main risk is that the partnership could acquire an ABN after a financing statement has been registered against the separate partners. I am not aware of any good solutions for this problem,

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[54] See Eg *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321, at page 327.

however, and it may be that a secured party will need to deal with this risk by monitoring the grantor.

One submission suggested that a registration should be made against a partnership's name (and not the individual partners) if the partnership has not been allocated an ABN. It may be very unlikely for a partnership based in Australia not to have been allocated an ABN. I expect however that it would be possible for a partnership based overseas to have assets in Australia but not to have been allocated an ABN, and it may not be practicable in such a case for the registration to be made against the names of all the partners. It would however be undesirable to prescribe different identification conventions for different types of partnerships that have not been allocated an ABN, based on criteria such as the size of the partnership or where it is based. It is also not entirely desirable to use a partnership's name for registration purposes where that name cannot be sourced from a public register, particularly because the unforgiving nature of our exact-match search system leaves no room for variations in spelling.

> **Proposed recommendation 4.26**: *None at this stage, pending further consideration.*

2.11.5 Multiple grantors

One submission noted that it is not clear when it is appropriate to include more than one person or entity in a registration as the grantor.

It seems clear that it is appropriate to include multiple persons or entities as grantor in a registration if they are joint owners of the collateral and are jointly giving the security. It is less clear that this is appropriate if each person or entity is giving separate security to the secured party, even if this is done as part of the same transaction. In this situation, it might be thought to be seriously misleading to use a single registration, a single registration might suggest that the security interest in question was only over jointly-held property.

> **Proposed recommendation 4.27**: *None at this stage, pending further consideration.*

2.11.6 Foreign names, and exact vs close match searching

The Register works only in the English language. It only accepts letters in the English alphabet (as well as numbers and a range of punctuation marks), and does not accept foreign characters, or even foreign versions of English letters (such as vowels with umlauts or accents, or consonants with tildes).

It is possible however that the rules for identifying a grantor will require that foreign characters be used. As an example, if an individual grantor does not have Australian identification documents, the rules in item 1.2 of Schedule 1 to the Regulations may require that the grantor's details be sourced from a non-Australian passport, and that passport may record the grantor's name using characters that are not part of the English alphabet. The same issue can arise for a foreign body corporate that is not registered in Australia, as the rules in item 1.3 of Schedule 1 to the Regulations will require that its name be entered in the form in which it is recorded in its constitution or equivalent document.

This presents registrants with a dilemma, as it means that it may simply not be possible to make an effective registration in these circumstances.

A similar issue can arise where the secured party itself is a foreign entity, as the Regulations apply largely the same rules for the identification of a secured party as they apply for the identification of the corresponding type of grantor.[55]

One solution could be to provide that a grantor's or secured party's details in such a situation can be entered as any reasonable transliteration of the foreign name. That could add to the burden for a searcher against a foreign grantor, but would at least make it possible for a registrant to register a valid financing statement in the first place.

If it were thought that this placed too great a burden on searchers, consideration could be given to making the search functionality on the Register more flexible. Currently, the Register uses an "exact match" search system, under which a search only produces a positive result if the searcher uses the same details in its search as the details that are entered on the Register. It might be easier for a searcher against a grantor with a foreign name to locate the relevant registrations if the search engine used a "close match" system instead – one that returned search results against both exactly the details entered in the search, and similar results as well.

All Canadian PPSA jurisdictions other than Ontario use a close-match system for their searches. 56 Ontario, in contrast, uses an exact-match system. The explanation that has been given for this is that Ontario has significantly larger economy than the other Canadian provinces, so that a close-match search system would produce too many search results.[57] That thinking might suggest that the current exact-match system is more appropriate for Australia as well.

New Zealand also uses an exact-match system, but overlays it with a "wild-card" search option. This option allows a searcher to widen a name search by replacing the third and subsequent letters of any of the name fields (first, middle or last name) with an asterisk (eg "Do* Dinosaur"). The search results will then include all debtors whose name in that field starts with those two letters, and whose name exactly matches the full words entered in the other name fields (eg Dorothy Dinosaur, Donald Dinosaur or Domingo Dinosaur).[58]

The rules that have been developed for identifying a grantor in a registration under the Act have reduced the need for the more flexible close-match searching, because they rely on official registration numbers (such as ACNs or ARBNs) for most corporate grantors, and a formal identification source (particularly a driver's licence) for most individual grantors. I do not believe that the residual circumstances that might benefit from close-match searching are sufficiently important to make it appropriate to change the entire search methodology from the current exact-match searching system.

I also do not think that the New Zealand wild-card option is the answer to the difficulty with foreign names. That option would help if the uncertainty in a transliteration was limited to one word and did not affect that word's first two letters, but would not help in other circumstances.

My view is that we should stay with exact-match searching, that a registrant should be able to transliterate foreign names, and that searchers should be left to undertake searches against each of the possible transliteration of a foreign name, in the relatively

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55 Except that the details do not need to include an individual secured party's date of birth – para 1.2(4) of Schedule 1 to the Regulations.

56 See Cuming Walsh & Wood, page 365.

57 Duggan & Brown, para 6.32.

58 I am indebted to Gedye Cuming & Wood, para 150.8, for this explanation of the New Zealand "wild-card" search option.

limited circumstances where this might be necessary. I would however be interested to hear whether others agree with this.

Proposed recommendation 4.28: *That:*

(a) the Register continue to use an exact-match methodology for searches; and

(b) the Regulations be amended to provide, in circumstances where a grantor's or secured party's name or other identification details would otherwise need to be entered on the Register in letters that are not accepted by the Register, that the registrant be able instead to use any reasonable transliteration of that name or other identifying details for the purposes of the registration.

2.12 Secured party details

2.12.1 Secured parties as representatives

2.12.1.1 The provisions

The details that need to be used in a registration to identify the secured party are the same as the details that need to be used to identify the corresponding type of grantor.[59] The Act acknowledges however that a person can be entered in the Register as secured party in a representative capacity – that is, that the person who is identified in the registration as the "secured party" may in fact hold the registration on behalf of others. This can be seen in two ways. First, it is apparent from paragraphs (a) and (b) of the definition of "secured party" in s 10:

secured party:

(a) means a person who holds a security interest for the person's own benefit or for the benefit of another person (or both); and

(b) if the holders of the obligations issued, guaranteed or provided for under a security agreement are represented by a trustee as the holder of the security interest-includes the trustee; and

(c) in relation to a registration with respect to a security interest-includes a person registered as a secured party in the registration.

It can also be seen in the way that s 153(1) describes what needs to be included in a financing statement, as item 1 of the table in s 153(1) states that the financing statement needs to include the prescribed details of either:

(a) the secured party; or

(b) a person nominated by the secured party who has authority to act on behalf of the secured party.

2.12.1.2 The definition of "secured party"

Paragraphs (a) and (b) of the definition of "secured party" in s 10 reflect the definition of "secured party" in the Canadian PPSAs[60] and the NZ PPSA.[61] It is however difficult to see what paragraph (b) adds to paragraph (a), as the trustee referred to in paragraph (b) would seem clearly to be holding the security interest either for itself or

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[59] Except that the details do not need to include an individual secured party's date of birth – para 1.2(4) of Schedule 1 to the Regulations.

[60] Eg Sask PPSA, s 2(1)(nn)

[61] NZ PPSA, s 16.

for the benefit of others, as described in paragraph (a). It seems to me that the definition could be simplified, without adverse effect, by deleting paragraph (b).

Proposed recommendation 4.29: *That paragraph (b) of the definition "secured party" in s 10 of the Act be deleted.*

2.12.1.3 The table in s 153(1)

Item 1(b) of the table in s 153(1) of the Act contemplates that a secured party can arrange for another person to be entered on the Register as the secured party, in its stead. There are two aspects of this that are worthy of discussion. First, it is desirable that this flexibility to be limited to secured parties who "nominate" the registered secured party before the registration is made. Otherwise, a new secured party could artificially improve its security position by nominating an already-registered secured party, rather than making its own (later) registration. Secondly, it is not clear what is encompassed by the requirement that the nominated person "[have] authority to act on behalf of the secured party". Common sense suggests that the nominated person that need only have the secured party's authority to act on its behalf in relation to matters affecting the registration, but that is not clear. In my view, it would make this aspect of the Act more comprehensible if item 1(b) were amended to clarify these matters, for example so that it reads as follows:

> (b) a person nominated by the secured party before the financing statement is registered, who has authority to act on behalf of the secured party in matters relating to the registration.

Proposed recommendation 4.30: *That item 1(b) of the table in s 153(1) of the Act be amended as described above.*

2.12.2 Multiple secured parties

One submission suggested that it be made easier to include multiple secured parties in a registration.

A registrant who wants to register a financing statement in favour of a secured party must create a Secured Party Group for the secured party, if the secured party does not already have one. A Secured Party Group can contain more than one secured party, so in that sense the Register already allows a registrant to include multiple secured parties in the one registration.

However, the register does not allow secured parties to be added or removed from a Secured Party Group once it has been established. If the secured parties under the relevant security interest change, then a new Secured Party Group needs to be created, and the registration needs to be transferred to that new Secured Party Group.

The submission did not explain how the process for including multiple secured parties in a registration should be simplified. The concern may have been the fact that the identity of secured parties in a Secured Party Group cannot be changed. Given the relative simplicity of the process involved in creating a new Secured Party Group and transferring the registration, though, it is not immediately clear to me that the current process needs to be changed. I would be interested to hear the views of others on this.

Proposed recommendation 4.31: *None at this stage, pending further consideration*.

2.12.3 **GONIs**

Item 3(b) of the table in s 153(1) of the Act contemplates that a registration can include an identifier for the giving of notices to the secured party. This "giving of notices identifier" is referred to on the Register, perhaps unsurprisingly, as the "GONI".

One submission suggested that a more intuitive or user-friendly term be used to make its purpose clearer, particularly for the benefit of occasional users of the Register. I can see merit in this, and would be pleased to receive suggestions.

> **Proposed recommendation 4.32**: *That the expression "GONI" on the Register be replaced with a term that more clearly indicates its purpose.*

2.13 **The registration period**

2.13.1 **Clutter on the Register**

A consistent theme through many of the submissions was that the Register is too cluttered, in that it is difficult to make sense of search results for a grantor because those search results contain information about so many registrations. A number of potential amendments, discussed elsewhere in this and the earlier consultation papers, will help to reduce the number of registrations on the Register. It is not clear however how much of an effect these proposals would have in aggregate.

2.13.2 **How significant is the problem?**

I am advised by AFSA that the Register contained a total of 8,305,528 current registrations as at 30 September 2014. Of those registrations, 1,332,152 had been migrated from earlier registers with no end time, and 819,407 had been migrated with an end time of seven years. Of the other registrations (ie registrations made by secured parties), 4,610,744 have an end time of seven years or less, 458,692 have an end time of between seven and 25 years, and 972,213 have no end time.

According to AFSA, the volume of registrations as against grantors can be broken down in this way:

Number of registrations	Number of grantors
1,000 or more	11
500 to 999	11
100 to 499	127
50 to 99	332
10 to 49	18,009
Less than 10	693,240

This data suggests that the "clutter" concern is limited to a relatively small number of grantors. That may change if transitional registrations are included, but I do not have that data at this time.

The review is also proposing to source comparative data from overseas jurisdictions. That material is not available at this time.

2.13.3 Should the maximum registration period be shortened, to help reduce the clutter?

2.13.3.1 The rules

Item 5 of the table in s 153(1) of the Act states that a registration against collateral that is neither consumer property nor serial-numbered property can have a duration of either a specified period of up to 25 years, or of an indefinite period. This is consistent with the approach taken in the Canadian PPSAs.[62] In contrast, the NZ PPSA imposes a maximum registration period, for all registrations, of five years (with an ability to extend the registration, for a further period of up to five years, before the current registration expires).[63]

2.13.3.2 Should there be a maximum registration period of seven years, for all registrations?

One partial solution to the clutter problem might be to amend the end-time rules to limit the registration period for all registrations to seven years, along the same lines as in New Zealand (except that the maximum period in New Zealand is only five years, rather than seven). A secured party would then need to renew its registration before the end of the seven-year period, if it wanted its registration to continue to be effective beyond that date.

This would not have an immediate impact on the volume of registrations on the Register, but would help to manage down the number of current registrations over time. It may also not help to remove the backlog of current "no end time" registrations, including in particular those registrations that were migrated on to the Register from the ASIC charges register.

Imposing a limitation of seven years would add to the administrative burden for secured parties that have long-term relationships with their grantors, such as manufacturers or distributors that sell goods on retention-of-title terms to long-standing customers. The review is proposing to explore the extent to which this has been an issue in New Zealand (as it operates under a similar system), but does not have any materials to hand on this question at this stage.

> **Proposed recommendation 4.33**: *None at this stage, pending further consideration.*

3. EFFECTIVE AND INEFFECTIVE REGISTRATIONS

3.1 The rules

When a registration is "effective"

Section 21 provides that a security interest in particular collateral is perfected if, among other options, a "registration" is "effective" with respect to the collateral.

A "registration" is defined in s 10 to be a "registered financing statement". A "financing statement" is defined in s 10 to be data that is registered pursuant to an application under s 150(1). Section 150(1) then provides (somewhat circularly) that a person may apply to the Registrar to register a financing statement with respect to a security interest.

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62 Eg *Personal Property Security Regulations* (Sask), reg 4(2).

63 NZ PPSA, s 153.

Section 153(1) states that a financing statement with respect to a security interest consists of data that "complies with" the table set out in that section.[64]

When a registration is "ineffective"

Section 164(1) provides that a registration with respect to a security interest that describes particular collateral will only be ineffective because of a defect if there exists:

(a) a seriously misleading defect in any data relating to the registration, other than a defect of a kind prescribed by the regulations; or

(b) a defect mentioned in section 165.

Section 165 says that a registration is defective if, broadly:

- it is required to identify the collateral by serial number, but does not contain the correct serial number;
- in other cases, it does not correctly identify the grantor;
- it indicates that a security interest is a PMSI, but the security interest is not a PMSI to any extent; or
- because of other matters prescribed by the Regulations.[65]

3.2 What are the consequences if a financing statement does not comply with the table in s 153(1)?

As just noted, s 153(1) suggests that data on the Register will only constitute a "financing statement with respect to a security interest" if the data complies with the table set out in the section. That could have the result that a registration is not effective, whether or not it is "seriously misleading" or otherwise engages s 165, if the data does not strictly comply with the requirements in the table. That could be the case, for example, if the details of the secured party are incorrect.

By way of contrast, the corresponding provision in the NZ PPSA merely states that the specified data "must be contained in the financing statement in order to register it".[66]

I do not expect the intention to have been that any error in the data in a registration would stop it from being a financing statement for the purposes of the Act. I think it would be helpful, however, to clarify that a set of data that is entered in the Register will be a financing statement for the purpose of the Act if the data populates the fields required by the table. Whether the data as so entered gives rise to an "effective" financing statement would then be determined by ss 164 and 165.

> **Proposed recommendation 4.34**: *That s 153(1) be amended to clarify that data entered on the Register will be a financing statement if the data populates the fields referred to in the table in that section, whether or not the data as so entered is accurate.*

3.3 When will a financing statement be ineffective?

A number of submissions observed that there is overlap between paragraphs (a) and (b) in s 164(1). By itself, this might not be problematic. However, s 166 provides

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64 The contents of that table are discussed in Section 2 above.

65 Currently, no other matters are prescribed.

66 NZ PPSA, s 142(1).

some qualifications to the operation of s 164(1)(b) but not to s 164(1)(a), so it is unclear what the outcome is, if a defect is covered by both ss 164(1)(a) and (b) and a qualification applies. Would the registration be ineffective because it is captured by s 164(1)(a), even though it is sheltered from s 164(1)(b) by the operation of s 166?

I do not believe this to have been the intention, but agree that it should be clarified. This could be done, for example, by reversing the order of paragraphs (a) and (b), and rewording current paragraph (a), along these lines:

(a) a defect mentioned in section 165; or

(b) any other defect in any data relating to the registration, other than a defect of a kind prescribed by the regulations, if the defect is seriously misleading.

The cross-reference in s 165 would of course then need to be updated as well.

Proposed recommendation 4.35: *That ss 164(1) and 165 be amended as described above.*

3.4 What is "seriously misleading"?

The Act does not provide any guidance on when a financing statement will be "seriously misleading" for the purposes of s 164(1). The Canadian PPSAs[67] and the NZ PPSA[68] also provide that a financing statement is ineffective if it is seriously misleading, but similarly do not define the term.

Case law in Canada has held that a defect in a financing statement with respect to a security interest or collateral will make the financing statement seriously misleading if the effect of the defect is that a searcher cannot find the financing statement, or the financing statement does not include the collateral in its collateral description.[69] An Australian court has recently come to a similar view.[70]

A number of submissions recommended that the Act clarify what it means for a financing statement to be seriously misleading. In particular, submissions were concerned to ensure that a financing statement would not be seriously misleading just because it did not identify the secured party correctly (for example, because the original secured party had transferred the security interest), or because it did not identify that it perfects a security interest that is a PMSI.

In my view, a defect in a financing statement with respect to a security interest over collateral should only make the financing statement "seriously misleading" if either:

- the effect of the defect is that a properly-formatted search would not disclose the registration; or
- the manner in which the financing statement describes the collateral would cause a searcher to form the view that the registration did not cover the item of collateral in question.[71]

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67 Eg Sask PPSA, s 43(6).

68 NZ PPSA, s 149.

69 See Cuming Walsh & Wood, pages 363 to 371.

70 *Future Revelation Ltd v Medica Radiology & Nuclear Medicine Pty Ltd* [2013] NSWSC 1741.

71 This would mean, for example, that a registration that includes a description of the collateral in the free text field would only perfect a security interest over that collateral. See Section 2.7.2 above.

I am however in two minds at this stage as to whether the Act should be amended to state this expressly.

Proposed recommendation 4.36: *None at this stage, pending further consideration.*

4. INAPPROPRIATE OR OVER-REACHING REGISTRATIONS

4.1 Introduction

A person is able as a practical matter to register a financing statement against another person without the other person's consent or even knowledge. However, a person will not want the Register to contain unnecessary or overly-broad registrations against their name or other details, as this could lead others into believing that the person's property was more heavily encumbered than was in fact the case.

The Act responds to this concern in a number of ways:

- First, the Act limits the circumstances in which a person is entitled to make a registration.
- Secondly, it contains rules that require a registrant to remove a registration if the transaction to which it was expected to apply does not eventuate.
- Thirdly, it requires a secured party to remove a registration with respect to certain types of collateral if the security interest "becomes unperfected".
- Finally, the Act contains mechanisms that enable a grantor in some circumstances to challenge a registration, and to require that a registration be removed or narrowed.

This Section 4 considers each of these mechanisms.

4.2 When should a person be entitled to register a financing statement?

4.2.1 The rule

Even though any person is able as a practical matter to make a registration against any other person, s 151(1) limits the circumstances in which it is proper for them to do so. That section provides as follows:

> (1) A person must not apply to register a financing statement, or a financing change statement, that describes collateral, unless the person believes on reasonable grounds that the person described in the statement as the secured party is, or will become, a secured party in relation to the collateral (otherwise than by virtue of the registration itself).
>
> Civil penalty:
>
> (a) for an individual—50 penalty units;
>
> (b) for a body corporate—250 penalty units.
>
> Note: See Part 6.3 (Civil penalty proceedings).
>
> Example 1: A person applies to register a financing statement that describes collateral as "all present and after-acquired property" of the grantor described in the statement. It is sufficient to comply with this subsection if the applicant believes on reasonable grounds that the secured party described in the statement will take a security interest in a particular class of items of personal property held (or later acquired) by the grantor (see paragraph (b) of the definition of ***description*** in section 10).
>
> Example 2: A person applies to register a financing statement that describes collateral as "fruit". It is sufficient to comply with this subsection if the applicant

> believes on reasonable grounds that the secured party described in the statement will take a security interest in apples (see paragraph (b) of the definition of ***description*** in section 10).

As can be seen from the quoted text, a breach of s 151(1) carries a civil penalty of 50 penalty units for an individual, and 250 penalty units for body corporate.

Section 151(1) raises two issues:

- How certain must it be that there is or will be a security interest?
- How precisely must the registration describe the collateral?

4.2.2 **Should s 151(1) be repealed?**

A number of submissions argued that s 151(1) should simply be repealed. They made the point that there is no equivalent to s 151(1) in any of the Canadian PPSAs or the NZ PPSA, and maintained that there is no need for it.

I am not currently convinced that there is no need for the section. While it has been suggested that the experience in Canada and New Zealand is that the risk of frivolous or vexatious registrations is low,[72] there have been a number of Canadian cases in which a person made an unnecessary registration against another party as a means of applying commercial pressure[73]. I have also been advised informally that vexatious registrations are not unknown in New Zealand.

It is also instructive to note that vexatious filings seem to be an unfortunate fact of life in the United States. There, it appears that it is not at all uncommon for a person to register a financing statement against another person for reasons that are entirely unrelated to a financing transaction.[74] Article 9 responds to these so-called "bogus" or "harassment" filings by allowing the debtor (ie grantor) to file an information statement that states that the financing statement should not have been filed, or is overly broad. That information statement becomes part of the financing statement (and so would presumably be revealed by a search), but does not alter the legal effect of the financing statement as filed.[75]

There has also already been one reported decision under the Act in relation to what appear to have been akin to harassment filings,[76] and I am aware of some anecdotal evidence that suggests that this was not an isolated example.

A further reason for retaining 151(1) is that it may also be able to be employed as a tool to deal with concerns that were expressed in submissions regarding the making of overly-broad registrations, as discussed in Section 4.2.4 below.

For these reasons, my inclination is to recommend that s 151(1) be retained.

Should a registration require the grantor's consent?

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72 See Duggan & Brown, para 6.42.

73 See *Myers v Blackman* 2014 ONSC 5226, and *MBNA Canada Bank v Luciani* 2011 ONSC 6347.

74 It appears in particular to have become a tool to harass or intimidate public officials, and corporations – see *State Strategies to Subvert Fraudulent Uniform Commercial Code (UCC) Filings*, available at www.nass.org/news-releases-and-statements.

75 Article 9, § 9-518.

76 *Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd* [2014] VSC 217.

As a potential alternative to s 151, one submission suggested that a registrant should only be allowed to register a financing statement against a grantor if it has the grantor's consent to do so.

The grantor's consent to registration is not required under the Canadian PPSAs or the NZ PPSA. The grantor's consent is required to a registration under Article 9, but that consent is deemed to have been given if the grantor enters into the relevant security agreement.[77]

This proposal has potential advantages and disadvantages. A potential advantage is that it would greatly reduce the prospect of a vexatious or inappropriate registration against a grantor. It would also eliminate the need for s 151(1). A potential disadvantage is that it could add to the administrative burden for secured parties that want to register a financing statement in advance of entering into a security agreement with the grantor.

> **Proposed recommendation 4.37**: *None at this stage, pending further consideration.*

4.2.3 How certain must it be that there is or will be a security interest?

Section 151(1) states that a person should only make a registration if they believe on reasonable grounds that the nominated secured party "is" or "will be" a secured party in relation to the described collateral – that is, that the nominated secured party holds or will hold a security interest over the collateral.

This language merges two distinct questions:

- whether the nominated secured party will enter into a transaction with the grantor; and
- whether that transaction will give rise to a security interest.

The breadth of the concept of a "security interest" was discussed in Consultation Paper No. 1.[78] It can be seen from that discussion that it will sometimes be unclear whether a particular transaction gives rise to a security interest for the purposes of the Act. Because of the adverse consequences that can flow for a secured party if it has a security interest but has not perfected it, a secured party will want to be able to register a financing statement in relation to a transaction if that transaction might give rise to a security interest, even if it is not certain that it does so.

It is not clear that s 151(1) currently permits this, as s 151(1) requires that the registrant reasonably consider that the nominated secured party "is" or "will be" a secured party – that is, that it has or will have a security interest over the collateral, not just that it "may have".

My anecdotal understanding is that secured parties generally take the view, in choosing between the prospect of being unperfected and the prospect of breaching s 151(1), that they regard s 151(1) as the lesser of two evils – that is, that secured parties are registering their financing statements, and hoping that s 151(1) does not apply. To my mind, though, this is not particularly satisfactory, and a secured party should be entitled to register a financing statement in circumstances where a transaction might give rise to a security interest, even if it is not clear that it does so, without being at risk of breaching s 151.

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[77] Article 9, § 9-509.

[78] Consultation Paper No. 1, Sections 2 and 3.

Taking this one step further, some submissions argued that s 151(1) is inconsistent with the fact that the Act permits advance registrations, as the section only allows a person to register a financing statement if they reasonably consider that the nominated secured party will enter into a transaction. If this is seen to be too restrictive, an alternative might be to provide that a person can register the financing statement if they reasonable consider that the nominated secured party "may" enter into the transaction. The registrant would then be under an obligation to remove the registration (under ss 151(2) and (3)) if the transaction did not eventuate. (See Section 4.3.1 below.)

I agree that the current formulation of s 151(1) is too restrictive, and suggest (if it is retained) that it be amended as set out below.

> **Proposed recommendation 4.38**: *That s 151(1) be amended, if it is retained, to provide that a person may register a financing statement if the person believes on reasonable grounds that the person described in the statement as the secured party is or may be, or may become, a secured party in relation to the collateral.*

4.2.4 How precisely must the registration describe the collateral?

It is clear that Act allows a person to use a broad description of collateral in a financing statement. This can be seen, for example, in the way that item 4 of the table in s 153(1) describes the manner in which a financing statement must describe the collateral. It can also be seen from the two examples that immediately follow s 151(1), as set out in Section 4.2.1 above.

A number of submissions expressed concern about this, and in particular about the fact that a registrant is not obliged to include any further description of the collateral in the free text field. They argued that this makes the Register very unhelpful for searchers.

This concern was discussed in Section 2.7.3 above. As discussed in that Section, I am not in favour of requiring a registrant to complete the free text field as a condition to the financing statement being effective for the purposes of the Act. It may be however that s 151(1) can be employed as an alternative mechanism to address this concern. While careful consideration would need to be given to the way in which the rule is expressed, it might be possible for s 151(1) to provide that a registrant may only make a registration if it describes the collateral in a manner that is no broader than is reasonably necessary to identify the collateral that the registrant reasonably believes is or may be subject to a security interest in favour of the nominated secured party.

An approach along these lines would allow a secured party to be confident that its security interest is perfected by registration, even if the description of collateral in the registration could be accused of being overly broad. If the description is broader than reasonably necessary, though, the registrant would be in breach of s 151(1) and so exposed to a civil penalty.

I would be interested to hear whether this might be an appropriate approach to addressing the concern regarding overly broad registrations.

> **Proposed recommendation 4.39**: *None at this stage, pending further consideration.*

4.3 When should a secured party be required to remove a registration at its own initiative?

4.3.1 Advance registrations

The Act allows a secured party to register a financing statement in advance of entering into a security agreement with the grantor.[79] Sections 151(2) and (3) provide some protection for a grantor against the adverse consequences of this, by requiring the registrant of such a financing statement to remove the registration within five business days if the nominated secured party does not in fact have a security interest from the grantor over the described collateral, and there are no (or no longer) any reasonable grounds for the belief described in s 151(1).

There is no corresponding provision in any of the Canadian PPSAs or the NZ PPSA. This reflects the fact that they also do not have an equivalent provision to s 151(1).

It might be thought that this mechanism is too prescriptive, particularly given the other mechanisms (discussed below) that allow a grantor to challenge a registration. It could also be argued however that the mechanism is an appropriate counter-balance to the right of a person to make an advance registration, particularly if the advance registration is made on a speculative basis.

One submission argued that the timeframe of five business days is too tight, and that it should be removed.

> **Proposed recommendation 4.40**: *None at this stage, pending further consideration*.

4.3.2 "Unperfected" security interests

Section 167 provides a further protection for a grantor if the collateral described in a registration is either:

- used or intended to be used predominantly for personal, domestic or household purposes; or
- registered with a serial number.

The section requires the secured party to remove the registration from the Register if, broadly, the security interest becomes "unperfected".

The Canadian PPSAs[80] and the NZ PPSA[81] contain a similar concept.

Section 167 raises a number of issues. First, it is not clear why it applies to any collateral that is registered by serial number. This section appears to be intended to be a consumer protection measure, but collateral will often be registered by serial number where the grantor is a body corporate or other commercial enterprise. Consumer protection issues are not relevant in those circumstances. It is also not clear how a secured party is expected to know whether collateral is used or intended to be used for personal, domestic or household purposes, or what happens if the grantor's actual use of the collateral changes over the term of the financing.

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[79] Section 161 of the Act.

[80] Eg Sask PPSA, s 50(2).

[81] NZ PPSA, s 161.

If s 167 is to be retained, it would simplify the Act if the section could simply apply to registrations against individuals. That would remove the need to determine how the individual was using or intending to use the collateral, and would mean that s 167 did not apply to other types of grantor just because a financing statement was registered against collateral's serial number.

Secondly, it is unclear what s 167 means when it refers to a security interest becoming "unperfected". It may be intended to refer to a situation where the secured party has released the collateral from its security (for example, because the financing has been repaid). If that is the case, though, it would be preferable for the section to say this, as there could be other circumstances in which a security interest in collateral becomes "unperfected" but it would not be appropriate to require the secured party to discharge its registration. As an example, a secured party's security interest in collateral becomes unperfected if the collateral is sold in a way that allows the buyer to take the collateral free of the security interest. The secured party would want to keep its registration in such a situation, however, because the secured party will need the registration to perfect the security interest that the secured party would instead have in the sale proceeds, under s 32.

> **Proposed recommendation 4.41**: *That s 167 be amended so that it applies (and applies only) to registrations against individuals (or to registrations against serial-numbered property that do not include the grantor's details because the grantor is an individual), and so that it only requires the secured party to remove a registration from the Register if it no longer has any security interest over any collateral that is perfected by the registration.*

4.4 Amendment demands

4.4.1 The rules

Section 178(1) provides that a person with an interest in collateral that is described in a registration may require the secured party (by means of an "**amendment demand**") to amend its registration in either of these ways:

Item	When amendment is authorised	What amendment is authorised
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 (including an amendment to remove the registration).
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.

A person who gives an amendment demand can then give a statement in relation to it to the Registrar, under s 180(3). If the person gives the statement to the Registrar in the prescribed manner, then s 180(4) has the effect that the Registrar must give an "amendment notice" to the secured party, inviting the secured party to respond to the amendment demand within five business days or any longer period approved by the Registrar. At the end of that period, the Registrar must then amend the registration in accordance with the amendment demand (under s 181(1)), unless the Registrar suspects on reasonable grounds (for example, as a result of information provided by the secured party in response to the amendment notice) that the amendment is not authorised by s 178.

Section 182 provides that a person who gives an amendment demand may instead apply to a court for an order that requires the registration to be amended. A secured

party may also apply to court for an order to prevent such an amendment from being made.

These mechanisms raise a number of questions.

4.4.2 Who may make an amendment demand?

Section 178 only allows an amendment demand to be made by a person with an interest in the collateral. If a security interest is registered against the serial number of serial-numbered property and the grantor then sells the collateral free of the security interest, however, the seller will want to be able to remove the registration against it (or against the serial-numbered property, if it was consumer property). On the current wording of s 178, though, it is not able to do so, because it no longer has an interest in the collateral. In my view, this should be corrected.

> **Proposed recommendation 4.42**: *That s 178(1) be amended to allow an amendment demand to be made by a person who is identified as the grantor in the registration, or was otherwise the grantor of the security interest to which the registration related.*

4.4.3 Deemed security interests

A number of submissions noted that s 178 allows a person to demand that a secured party amend or remove a registration if the collateral in question does not secure any obligation owed by a debtor to the secured party. They pointed out that this does not allow for the fact that a registration might perfect a security interest that does not secure an obligation – that is, if it is only a security interest because of the expanded meaning given to that term by s 12(3).

This appears to be a drafting error, and should be corrected.

> **Proposed recommendation 4.43**: *That s 178(1) be amended to accommodate the fact that a registration may perfect a security interest that does not secure an obligation because it is deemed to be a security interest by s 12(3) of the Act.*

4.4.4 Changes to the collateral classes

A number of submissions also pointed out that a secured party's capacity to respond to an amendment demand to omit particular collateral from a registration may be constrained by the functionalities of the Register, and in particular by the fact that the Register does not allow a secured party to amend a registration by changing the collateral class. As an example, if a secured party has registered a financing statement against the collateral class "allpap", it cannot respond to a request to amend its registration to omit particular collateral, because the Register will not allow the secured party to do this. The secured party could respond to the amendment demand by registering a new, narrower financing statement and then releasing the "allpap" registration, but it is not clear that s 178 can require the secured party to do so.

Some submissions proposed that the secured party be required to do just that – to make fresh, narrower registrations as required, and then to release the previous, overly–broad one. Another option would be to amend the functionality of the Register to allow a secured party to amend the collateral class in a registration from a broader class to a narrower (or to a number of narrower) classes.

I do not have a preference at this stage as between these solutions.

> **Proposed recommendation 4.44**: *None at this stage, pending further consideration.*

4.4.5 **Changes to the "amendment notice" process**

4.4.5.1 **Security trust instruments**

Section 179(3) states that Division 2 of Part 5.6 of the Act does not apply in relation to a security interest, if the security agreement is an instrument or other document:

> (a) by which a person issues or guarantees, or provides for the issue or guarantee of, an obligation secured by a security interest; and
>
> (b) in which another person is appointed as trustee for the person to whom the obligation secured by the security interest is owed.

It is not clear why the amendment notice process should not apply to a secured party just because it is a security trustee. There is admittedly a similar carve-out in the Canadian PPSAs[82] and the NZ PPSA[83], and the explanation that has been given is that it is not appropriate to expose the beneficiaries under a security trust arrangement to the risk that their trustee might negligently allow a registration to be removed.[84] It could also be argued, however, if investors have appointed a person to act as their trustee, that those investors, and not third parties, should bear the risk that their trustee might not do its job properly. There are many ways in which a security trustee could negligently do something that adversely affected its investors, and it is not clear to me why this particular risk should be isolated and dealt with in this way.

My inclination is to recommend that s 179(3) be deleted.

> **Proposed recommendation 4.45**: *That s 179(3) be deleted.*

4.4.5.2 **The contents of an "amendment statement"**

A person who gives a statement to the Registrar under s 180(3) (in order to trigger the obligation of the Registrar to give an amendment notice to the secured party under s 180(4)) must give the statement in the required form.

The required contents of the statement are set out in reg 5.9 of the Regulations. The list of requirements in reg 5.9 would be quite daunting for a person who is unfamiliar with the Act (as is likely to be the case for many grantors), and it would be valuable to explore whether the required contents could be simplified.

As an example, reg 5.9(g) requires the person to make the following statement:

> (g) that the security agreement providing for the security interest is not an instrument or other document:
>
> (i) by which a person issues or guarantees, or provides for the issue or guarantee of, an obligation secured by a security interest; or
>
> (ii) in which another person is appointed as trustee for the person to whom the obligation secured by the security interest is owed.

A person making the statement may not be in a position to know these matters. In any event, this language appears to have been included in reg 5.9 because of the existence

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82 Eg Sask PPSA, s 18(6).

83 NZ PPSA, s 164.

84 Gedye Cuming & Wood, para 164.1.

of s 179(3), and I have already suggested that s 179(3) should be deleted. For these reasons, my view is that reg 5.9(g) should be deleted as well.[85]

> **Proposed recommendation 4.46**: *That reg 5.9(g) of the Regulations be deleted, and that the balance of that regulation be simplified so that it is easier for users who are unfamiliar with the Act to understand what it requires.*

4.4.5.3 Terminating the Registrar's administrative process – when does a proceeding "come before a court"?

The provisions regarding amendment demands, the consequent giving of amendment notices by the Registrar and the Registrar's obligations in relation to amending registrations after it has given an amendment notice, are located in Subdivision A of Division 2 of Part 5.6 of the Act.

Section 179(2) says that this Subdivision stops applying in relation to an amendment demand if "proceedings come before a court" under s 182. The section does not explain however when proceedings will be regarded as having "come before a court" for this purpose. Proceedings could be regarded as having come before a court when an originating process is filed, or potentially only at some later point in time such as the hearing itself.

I expect the intention was that proceedings would "come before a court" for these purposes when a party files an originating process in relation to the matter with the court. It also makes sense, in my view, for the Registrar's administrative process to be switched off at that point in time, rather than later – it would be a waste of the Registrar's resources to continue the administrative process, as any further work undertaken by the Registrar would be rendered irrelevant in due course by the outcome of the court process.

> **Proposed recommendation 4.47**: *That it be made clear that a proceeding "comes before a court" for the purposes of s 179 when a party first files an originating process with the court.*

4.4.5.4 Should the whole "amendment demand" process be replaced?

A broader question is whether the Registrar's administrative decision-making process in relation to amendment demands should even be retained. The process effectively requires the Registrar to operate in a quasi-judicial capacity, on the basis of potentially very limited information. I am advised that the Registrar is being called on to issue amendment notices and to make decisions under s 181 very frequently – over the three months to 30 September 2014, for example, the Registrar received approximately one valid request per working day to issue an amendment notice. This is placing a considerable strain on the Registrar's resources.

The amendment notice process is arguably also not a particularly effective use of the Registrar's resources, as I am advised that most secured parties that receive an amendment notice either remove or amend the registration themselves as a result of receiving the amendment notice, or simply do not bother responding (in which case the Registrar is likely to remove or amend the registration). AFSA advises me that the outcome of the valid amendment notices issued over the three months to 30 September 2014 was that over 95% of the relevant registrations ended up being removed or amended.

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[85] As an aside, if reg 5.9(g) is retained, it should say "and" at the end of paragraph (g)(i), not "or". See Section 179(3).

That strain on the Registrar's resources becomes even more acute if the applicant or secured party wants to object to the Registrar's decision, because the secured party may decide, rather than taking the matter to court, to challenge the Registrar's decision before the Administrative Appeals Tribunal under s 191 of the Act. I am advised that this has led to the Registrar's legal representative cross-examining an applicant in proceedings to which the secured party was not even a party, and where the grantor and the secured party have been effectively conducting their commercial litigation through the Administrative Appeals Tribunal review process, via the office of the Registrar. The Registrar has made the point to me that while the Administrative Appeals Tribunal is an appropriate forum for reviewing administrative decisions that affect an individual, it is a less suitable forum for decisions that involve multiple parties and that determine the rights as between them.

The mechanisms under the NZ PPSA operate quite differently. In New Zealand the onus is reversed, in that a person who gives an amendment demand can themselves procure that the Register be amended in accordance with the demand, unless the secured party is able to produce a court order within 15 working days to the contrary.[86] Most of the Canadian PPSAs take a similar approach.[87]

This approach clearly favours the grantor over the person who is entered in a registration as the secured party. It would only be appropriate to consider this approach if it is clearly possible for a secured party to obtain an appropriate court order within the specified time frame. If this approach were otherwise thought to be appropriate, for example, it might be desirable to allow a secured party a longer period than 15 business days to respond, if that period were thought to be too short. One option might be to follow the approach that applies to an application for removal of a caveat under real property legislation, as that is more likely to be tailored to the practicalities of obtaining orders under our court system.[88]

As noted earlier, the Registrar's experience so far has been that almost all amendment demand processes end up with the registration in question being removed or amended in accordance with the amendment demand. This suggests that the practical outcome of reversing the onus in this way would not be as severe as might otherwise be thought to be the case. This approach would also help the grantors to defend themselves against bogus filings, as discussed in Section 4.2.2 above.

Another option might be to reserve the New Zealand approach for registrations against individuals or their serial-numbered property, and to require challenges to all other registrations to be taken to court. There may be other possible solutions as well.

> **Proposed recommendation 4.48**: *None at this stage, pending further consideration.*

4.4.6 Contracting out of amendment demands

One submission expressed concern at the fact that a secured party may require its grantor to agree not to make an amendment demand, and suggested that the Act be amended to prohibit this.

I am generally not in favour of prohibiting specific practices in the Act, unless there is a real need to do so.

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86 NZ PPSA, s 165.

87 Eg Sask PPSA, s 50(5).

88 That approach varies however as between jurisdictions. See for example s 90 of the *Transfer of Land Act 1958* (Vic), and s 74J of the *Real Property Act 1900* (NSW).

Proposed recommendation 4.49: *None at this stage, pending further consideration.*

4.5 Expired registrations

One submission said that more should be done to remove expired registrations from the Register.

A registration that reaches its end time is removed from the Register, in that a search for current registrations will no longer reveal it, so I anticipate that the submission is proposing that more be done to remove a registration from the Register if the security interest to which it relates has expired.

The Act already contains a number of mechanisms to remove registrations, as discussed in Sections 4.2 to 4.4 above. It may be that the proposed recommendations in those Sections will respond sufficiently to the concern expressed in the submission. I would be interested to hear, however, of any further proposals in relation to this.

Proposed recommendation 4.50: *None at this stage, pending further consideration*.

5. OTHER ISSUES RELATING TO THE REGISTER

5.1 Modes of access to the Register

The Register is maintained in electronic form, and is accessible over the internet on the Registrar's website at www.ppsr.gov.au. Large users of the Register are also able to access the Register via a direct business-to-government feed, by making appropriate arrangements with the Registrar. In addition to direct online access, registrants and searchers can also access the Register indirectly, via a third-party information provider or broker. Searchers can also undertake searches through the National Service Centre.

One submission suggested that the Registrar should make it possible for users to access the Register in other ways as well.

Initially, the Registrar also provided a facility for manual registrations through the National Service Centre. Only very limited use was made of this facility, however, as only 21 registrations were made over the first year of operations through the National Service Centre, out of a total of 1,446,308. I am advised that it was not evident from those registrations that the registrant would not have been capable of registering online, and the Registrar discontinued this service in July 2013. To date, the Registrar has not been asked to reconsider that decision.

The submission did not suggest how it should be possible to access the Register beyond the methods that are available at present. I would be interested to hear whether there are suggestions for this, or whether it is felt that the current modes of access are sufficient.

Proposed recommendation 4.51: *None at this stage, pending further consideration.*

5.2 Should a secured party be required to include a copy of its security agreement with its registration?

Some submissions suggested that it would improve the quality of the information on the Register if a registration were required to include a copy of the security agreement to which it relates. This would be consistent with the mechanisms for the registration of company charges that applied under the Corporations Act before the Act came into effect.

It is open to a secured party to include a copy of its security agreement as an attachment to its registration, if it so wishes. The Register is structured however as a "notice filing" system, in that it is simply designed to warn searchers that a grantor's personal property may be subject to a security interest, and not to provide a complete picture of what the security is, or what property it applies to. This approach is consistent with the regimes under all the Canadian PPSAs, the NZ PPSA and Article 9.

I am not in favour of changing that general approach, by making it mandatory for a registrant to include a copy of the relevant security agreement. There are several reasons for this. First, it would impose an additional burden on secured parties, as the obligation would be of little value to searchers unless the secured party was also obliged to file amendments to the security agreement over time, and to file new security agreements as they are entered into. Secondly, the copy of the security agreement as filed would not necessarily disclose exactly what collateral it covers (see the discussion of this in Consultation Paper No. 2),[89] so making a copy of the security agreement available to searchers may not help to inform them of exactly what personal property is subject to the security interest. Finally, a secured party may not want the commercial contents of its security agreement to be available for review by anyone who is entitled to undertake a search against the grantor.

I would however be interested to hear whether others are in support of this proposal.

> **Proposed recommendation 4.52**: *That the Act not be amended to require a secured party to file a copy of its security agreement as part of its registration.*

5.3 Should a registration be required to specify a maximum secured amount?

One submission also suggested that a financing statement be required to disclose a maximum amount secured, so that it would only take priority over otherwise-junior security interests up to that amount. This would again be consistent with the operation of the previous charges register under the Corporations Act, which allowed a registration of a charge to specify a "maximum prospective liability" for the charge.

There is no requirement along these lines in the Canadian PPSAs or the NZ PPSA.

The "maximum prospective liability" mechanism under the Corporations Act was something of a toothless tiger, as chargees routinely required the chargor to specify an amount that was several multiples of the amount that they expected to be secured. This was done principally to allow for contingencies. If a similar functionality were to be built into the Register, then I expect that the same practice would quickly develop under the Register as well. That could then make the Register misleading, as it would suggest that the affected grantor was in fact more deeply indebted to its secured parties than was actually the case. For these reasons, I do not propose to recommend this proposal. I would however be interested to hear whether others support it.

> **Proposed recommendation 4.53**: *That the Act not be amended to provide that a registration be required to specify a maximum amount secured.*

5.4 Registering against multiple collateral classes

As discussed in Section 2.6.1 above, item 4(c) of the table in s 153(1) of the Act requires that a financing statement relate to a single class of collateral. This means that it is not possible to register a single financing statement in relation to more than one class of collateral, and that a secured party must make separate registrations where more than one class of collateral is involved.

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[89] Consultation Paper No. 2, Section 3.4.

A number of submissions suggested that the rules for registering financing statements be amended to make it possible to register against a number of collateral classes at the same time, using a common free text field.

I see merit in this proposal. The practical need for this proposal may diminish if Government accepts the recommendation that the registration rules be amended to introduce a new "allpap relating to" collateral class (as to which, see Section 2.6.4 above). There may also be less need for this change if the number of collateral classes is reduced (again, see Section 2.6.4 above). Despite this, it seems to me that this would be a desirable functionality to incorporate into the Register.

> **Proposed recommendation 4.54**: *That item 4(c) of the table in s 153(1) of the Act, and the functionality of the Register, be amended to enable a registration to be made against a number of collateral classes at the same time using a common free text field.*

5.5 Linking of registrations

5.5.1 The legal implications of linking registrations

A number of submissions referred to the fact that the Register includes an "Earlier Registration Number" field that enables a registrant to indicate that its registration relates to an earlier registration. The purpose of this field is to allow for the possibility that a security interest might be perfected over time by more than one registration, and to enable a registrant to indicate to a searcher that a security interest's priority time may be earlier than the registration time for the current registration (because it runs from the registration time for the earlier registration that it replaced).

This ability to link registrations is not contemplated by the Act or the Regulations. As a matter of application of the Act, a security interest's priority time will run from the registration time of the first registration to perfect it, as long as it has been continuously perfected since that time, whether or not the secured party uses the linking functionality.

Some submissions suggested that the Act be amended to formalise the linking functionality, and to provide that a security interest will only be continuously perfected by a series of registrations over time if those registrations are "linked" on the Register. One submission took the opposite view, however, and suggested that it be confirmed in the Act or the Regulations that the linking functionality is for information only, and has no legal effect.

To my knowledge, a similar functionality is not available on the registers under the Canadian PPSAs or the NZ PPSA.

My inclination at this stage is not to recommend that the linking of registrations be elevated to a formal requirement for continuous perfection of a security interest. Even if this change were made, a searcher would not be able to assume with confidence that a security interest's priority time was the registration time of the earlier linked registration, as the security interest could have been perfected from an earlier time in some other way that is not apparent from the Register – for example by possession or control, or by being temporarily perfected by force of the Act. So if a searcher needs to determine a security interest's priority time, it will always need to undertake further investigations. I would also be concerned that the need to accurately link a registration to an earlier registration could be another trap for the unwary secured party, and add further complexity to the registration process.

I am however open to receiving further representations on this.

Proposed recommendation 4.55: *That the Act and the Regulations not be amended to provide that a security interest will only be continuously perfected by a series of registrations if those registrations are linked using the "Earlier Registration Number" field on the Register.*

5.5.2 The mechanics of linking

The "Earlier Registration Number" field on the Register currently allows only one earlier registration number to be entered in the field. As one submission noted, however, a secured party may want to link a new registration to a number of earlier registrations. I agree with the submission that it would be desirable for the Register to allow this.

Proposed recommendation 4.56: *That the Register be amended to allow multiple registration numbers to be entered in the "Earlier Registration Number" field on the Register.*

5.6 Only one registration per asset?

One submission suggested that it should only be necessary to make one registration per asset.

The Register operates principally as a grantor-focussed registration system. If a searcher wants to determine whether an asset could be encumbered, the searcher generally needs to determine who the grantor of such an encumbrance could be, and then search against that grantor's details.

The Register also operates in part as an asset-focussed registration system, for serial-numbered property. If a grantor is an individual and the collateral is both consumer and property and serial-numbered property, then the Register is solely an asset-focussed system, as a security interest can only be located by searching the serial number. In the case of other serial-numbered property, the Register straddles both approaches.

A system that only required one registration per asset would only be practicable for serial-numbered property. Such a system would also significantly cut across the basic premise of the Register as being primarily a grantor-focussed registration system, and would be likely to have substantial consequences for other aspects of the Act.

For these reasons, I do not believe that such a change would be appropriate. I would however be interested to hear whether others have a different view.

Proposed recommendation 4.57: *That the current structure of the Register as principally a grantor-based registration system be retained, and that it not be amended to allow one registration to perfect all security interests over an asset, regardless of the identity of the grantor.*

5.7 Separate registers for leases?

A number of submissions suggested that a separate register be maintained for certain types of security interests, such as leases.

It is not clear to me what this would achieve. Unless the Act is restructured so that the legal consequences for leases are different to the legal consequences for other types of security interests, I do not see what would be gained by recording them separately. I would however be interested to hear whether others can see any benefit in doing this.

Proposed recommendation 4.58: *That the Act not be amended to provide for separate registers for security interests that arise from different types of transactions.*

5.8 Should the Register be free?

One submission recommended that transactions on the Register be free of charge.

Section 190 of the Act provides that the responsible Minister can set fees for the purposes of the Act. Section 190(5) states that the fees may not be such as to amount to taxation.

The fees are set on a cost recovery basis, in that they enable Government over time to recover the cost of establishing, maintaining and upgrading the Register, as well as the cost of maintaining the Registrar's office and supporting arrangements.

It would clearly be attractive for users of the Register to be able to do so free of charge. If Government is not able to recover the costs of the Register and the Registrar from fees, however, then they would need to be funded from other sources.

This is not an issue on which it is appropriate for me to express a view. I will however refer the comment to Government for its consideration.

5.9 Requests for a secured party to provide information

5.9.1 The rules

It has been noted elsewhere in this paper that the Register does not necessarily provide a searcher with precise information about exactly what collateral might be subject to a secured party's security interest. Instead, the Register may only alert a searcher to the fact that a secured party may have a security interest over some of the collateral described in a registration. If a searcher wants to confirm whether or not a secured party has security over a particular item of collateral, the searcher needs to employ other means to do this.

Section 275 contains such a mechanism. It provides that certain "interested persons" may require a secured party to provide them with more information about the secured party's security, by:

- providing a copy of the security agreement;
- providing information about the amount secured; or
- responding to questions about the identity of the collateral.

Section 275 is not limited to security interests that are perfected by registration. However, s 275 is most likely to be relevant to security interests that are perfected in that way, so it is convenient to discuss the section here.

Not every person who searches the Register is entitled to request information from a secured party under s 275. The "interested persons" who can do so are limited by s 275(9) to:

(a) the grantor in relation to the collateral in which the security interest is granted;

(b) a person with another security interest in the collateral mentioned in paragraph (a);

(c) an auditor of a grantor mentioned in paragraph (a), if the grantor is a body corporate;

(d) an execution creditor with an interest in the collateral;

(e) an authorised representative of any of the above.

Even those "interested persons" do not have an unfettered right to require a secured party to respond to a request under the section. Section 275(6) provides, for example, that a secured party does not need to respond if:

(a) subject to subsection (7), the secured party and the debtor have agreed (the ***confidentiality agreement***) in writing that neither the secured party nor the debtor will disclose information of the kind mentioned in subsection (1); or

(b) the response would contravene any of the following:

(i) a law of the Commonwealth, a State or a Territory;

(ii) the general law; or

(c) the response would disclose information that is protected against disclosure by a duty of confidence.

Even if a secured party and debtor have entered into a confidentiality agreement in accordance with s 275(6)(a), s 275(7) states that the secured party will still be required to provide the requested information if:

(a) the confidentiality agreement is made after the security agreement that provides for the security interest is made; or

(b) at the time the request is received, the debtor is in default under the security agreement; or

(c) the debtor, in writing, authorises the disclosure of the information; or

(d) the grantor requests the secured party to give the information to the grantor; or

(e) the request is made by an auditor of the grantor, if the grantor is a body corporate.

There are similar provisions in most of the Canadian PPSAs[90] and the NZ PPSA.[91]

5.9.2 Should the range of "interested persons" be widened?

Some submissions suggested that the list of interested persons in s 275(9) was too narrow, and should be widened. One submission suggested that the list include personal representatives, prospective transferees and financiers. Another submission suggested that the list be expanded to transferees for value, and prospective execution creditors.

As I understand it, the list of interested persons in s 275(9) is deliberately limited to persons who already have an interest in the collateral, or are the grantor's auditors. A person who is considering whether to take an interest in collateral cannot use s 275 themselves. If they want the secured party to provide them with information, they must ask the grantor to make the request to the secured party instead. If a grantor makes a request under s 275, it can then specify the person's address to the secured party as the address to which the information is to be sent,[92] and procure that the secured party sends the information directly to the person in this way. A similar process is available under the Canadian PPSAs[93] and the NZ PPSA.[94]

Turning to the suggested additions to the list, I expect that a "personal representative" would be covered already by s 275(9)(e) as an "authorised representative", and that a

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90 Eg Sask PPSA, s 18.

91 NZ PPSA, s 177.

92 Under s 275(2).

93 Eg Sask PPSA, s 18(1).

94 NZ PPSA, s 177(1).

prospective transferee or financier would be able to arrange for the grantor to make the request for them.

I believe that a transferee for value is also covered already, albeit for a different reason. If collateral has been transferred subject to a security interest, then the transferee will become the grantor of the security interest for the purposes of the Act. This means that they will be able to make the request under s 275(9)(a).

A prospective execution creditor – a judgment creditor who is contemplating whether to seek execution against the judgment debtor's assets – is in a different position. As it does not yet have an interest in the collateral, it cannot make a request itself, and it is unlikely to be able to persuade the grantor to make the request on its behalf. Unless it has the information, however, it is unlikely to be able to determine what assets it can execute against.

A secured creditor would not want to be required to respond to a request for information from any unsecured creditor of its grantor. This is less of an issue however if the request may only be made by an unsecured creditor that has obtained a court order for payment of the amount it is owed. For this reason, I am inclined to recommend that the list of interested persons in s 275(9) be expanded to include a judgment creditor that is considering whether to enforce its judgment by seeking execution against property that is described in the secured party's registration.

> **Proposed recommendation 4.59**: *That the list of "interested persons" in s 275(9) be expanded to include a judgment creditor of a grantor that is considering whether to enforce its judgment by seeking execution against property that is described in the secured party's registration.*

5.9.3 The timeframe for responses

Section 277 says that a secured party must respond to a request for information under s 275 within 10 business days.

One submission argued that this timeframe is too generous, and that it can make it more difficult for a grantor to raise finance from a new financier because of the delay that it can add to the lending decision.

I can understand that an incoming financier might want to be able to receive the information in less than 10 business days. Equally, though, I can see that it might not be easy for an existing secured party to receive and respond to a request for information more quickly than that. I note that the NZ PPSA also allows a secured party 10 working days to provide a response.[95]

I am not persuaded at this stage that the period within which a secured party needs to respond to a request under s 275 should be shortened.

> **Proposed recommendation 4.60**: *That the period within which a secured party must respond to a request for information under s 275, as set out in s 277, remain 10 business days.*

5.9.4 Does a secured party need to provide an entire copy of the security agreement?

A security agreement will often contain much more than the grant of the security interest and a description of the collateral. It will commonly contain a range of other commercial matters as well, some of which may be confidential to the secured party.

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[95] NZ PPSA, s 178.

For this reason, a secured party may be reluctant to provide an entire copy of its security agreement in response to a request under s 275, and may want to provide only a redacted version.

One submission observed that some secured parties have responded to this concern by altering their documentation practices so that their security agreements contain only the bare bones required for such an agreement. The commercially-sensitive provisions are then included in a different document. That is indeed one way of dealing with this issue, but it is not a particularly satisfactory one – the Act is intended to facilitate secured finance rather than make it more complicated, and it is not desirable for the Act to force secured parties to adopt more convoluted lending practices than might otherwise need to be the case.

A number of submissions proposed that a secured party be allowed to redact (or black out) sensitive sections of the security agreement before it sends it off. It is not clear that this is permitted by s 275 at present, but it seems to me to be a sensible proposal. As I see it, the information that an "interested person" should be able to ascertain from reading the security agreement is:

- the identity of the grantor and the secured party;
- the identity of the collateral that is or could be subject to the security agreement; and
- the manner in which the amount secured is determined,

to the extent that these matters are in fact ascertainable from the security agreement. A secured party should be entitled to redact or black out any information that is not relevant to these matters.

> **Proposed recommendation 4.61**: *That s 275 be amended to provide that a secured party is only required to provide those parts of a security agreement that are relevant to ascertaining the identity of the grantor and the secured party, the identity of the collateral, and the amount secured.*

5.9.5 The effect of a confidentiality agreement

The scope of s 275(6)(a)

As noted in Section 5.9.1 above, s 275(6)(a) provides that a secured party does not need to make a disclosure under s 275 if (subject to some exceptions) the secured party and the debtor have agreed in writing that neither of them will disclose "information of the kind mentioned in [s 275(1)]".

This raises a number of questions. First, it is not clear why the provision is limited to confidentiality agreements between the secured party and the "debtor". It is equally likely (if not more so) that the secured party will have entered into a confidentiality agreement with the grantor (indeed, it may have included the confidentiality provisions in the security agreement itself), and a confidentiality agreement with the grantor should also be sufficient to engage the exemption.

Secondly, one submission pointed out that it is common for a confidentiality clause in a security agreement to oblige the grantor not to disclose information about the transaction, but to leave the secured party free to make disclosures itself if it so wishes. The clause may go on to say that while the secured party can disclose information to third parties, it is not obliged to. As one submission proposed, it is worth considering whether this type of confidentiality agreement should engage the exemption as well.

Thirdly, the same submission noted that even if a confidentiality clause does prohibit the secured party from disclosing information, it will usually contain some carve-outs. For example, such a clause would typically allow the secured party to disclose information if required to do so by law, or to its advisers. It is not clear that the language of s 275(6)(a) can currently accommodate carve-outs of this type. I agree however that it seems sensible to allow this.

> **Proposed recommendation 4.62**: *None at this stage, pending further consideration.*

The qualifications in s 275(7)

As noted in Section 5.9.1, s 275(7) says that a secured party cannot rely on the existence of a confidentiality agreement as grounds for not responding to a request for information under s 275(1) if:

(a) the confidentiality agreement is made after the security agreement that provides for the security interest is made; or

(b) at the time the request is received, the debtor is in default under the security agreement; or

(c) the debtor, in writing, authorises the disclosure of the information; or

(d) the grantor requests the secured party to give the information to the grantor; or

(e) the request is made by an auditor of the grantor, if the grantor is a body corporate.

This language raises a number of questions. First, it is difficult to see why paragraphs (a) and (b) have been included. Secondly, paragraphs (c) and (d) appear to proceed on the assumption that the confidentiality agreement will have been entered into for the benefit of the debtor or grantor, so that it should be open to them to waive the confidentiality and require the secured party to provide the information, if they so wish. It is not unlikely, however, that the secured party may have an interest in keeping the terms of the financing confidential, and that it (and not the debtor or grantor) will have required the confidentiality clause. It is difficult to see in such a situation why the debtor or grantor should be able to turn its back on the agreement it has struck with the secured party, and authorise the disclosure anyway.

Thirdly, even if it is thought appropriate to retain paragraphs (c) and (d) as a matter of principle, it is not clear why the wording of the two paragraphs is structured so differently. If they are intended to achieve similar outcomes, then it would remove a source of confusion if they were structured in the same way. Having said that though, it is also not clear why a debtor should be able to authorise the disclosure of information about the grantor or the collateral, rather than just information about the amount that the debtor itself owes.

> **Proposed recommendation 4.63**: *None at this stage, pending further consideration.*

5.9.6 Disclosure that is prevented by a duty of confidence

Section 275(6)(c) states that a secured party is not required to respond to a request under s 275(1) if the response would disclose information that is protected by a "duty of confidence".

It is likely that s 275(6)(c) is referring to a duty of confidence that arises by operation of law rather than contract, as duties of confidence that arise by contract are addressed by s 275(6)(a) (ie as confidentiality agreements).

One duty of confidence that arises by operation of law is the duty of confidence that bankers owe to their customers in relation to information about their accounts with the bank.[96] The duty of confidence extends to information about securities granted by the customer, so this might mean that a bank would not need to disclose information under s 275 in relation to a grantor that is the bank's customer (as would usually be the case).

A banker's duty of confidence is however subject to a number of qualifications. One such qualification is that disclosure is not prohibited if the disclosure is required by law.[97]

This produces a circular outcome for the purposes of s 275. Section 275 contains a legal requirement to disclose, but that requirement does not apply if it would require a breach of a duty of confidence. A bank has a duty of confidence not to disclose information, but that duty does not apply if a disclosure is required by law.

Where should the circularity be broken? My tentative view at this stage is the banker's duty of confidence should prevail.

> **Proposed recommendation 4.64**: *None at this stage, pending further consideration.*

5.10 Layout of the Register

A number of submissions commented that the layout of the Register, and the order and manner in which it presents its questions, could be made more intuitive and user-friendly.

A number of the recommendations considered in earlier parts of this paper would simplify the Register, and make it easier to use. I agree however with the submissions that the overall design of the Register should be approached from the perspective of the user, and particularly the unsophisticated user, so that the Register is as simple and easy to use as is possible.

Comments regarding the layout of the registrar's website also went beyond the operation of the Register itself, to include other aspects of the website such as the accessibility of related information regarding the Act and the Regulations. I am advised that AFSA already has a project under way to refresh the layout of the website generally, and that the relevant comments in the submissions will be taken into account in that process.

> **Proposed recommendation 4.65**: *That the layout of the Register, and the order and manner in which it asks questions of a registrant or a searcher, be reviewed in order to make them as simple and easy to use as possible, particularly from the perspective of an unsophisticated user.*

5.11 Supporting functionalities

A number of submissions made valuable suggestions regarding what might be called the supporting functionalities of the Register – aspects of the operation of the Register that do not derive from the language of the Act or the Regulations, but rather have been incorporated into the Register's capabilities in order to assist secured parties, particularly secured parties that are regular users of the Register. A number of those comments were quite technical in nature.

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[96] See *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.

[97] See the previous footnote.

AFSA is constantly reviewing proposals to enhance the supporting functionalities of the Register, in consultation with AFSA's consultative forums. AFSA assesses and prioritises proposals on the basis of a number of factors, including the level of net benefit that would flow from a proposal, relative to its complexity and implementation cost.

I am not well-placed to comment on the proposals of this nature that were included in the submissions. Instead, I have asked AFSA to incorporate them as appropriate into its planning processes, and to discuss them with AFSA's consultative forums as needed.

> **Proposed recommendation 4.66**: *That AFSA be asked to incorporate suggestions in the submissions that go to the supporting functionalities of the Register into its current planning processes, and to discuss them with AFSA's consultative forums, as appropriate.*

5.12 Verification statements

5.12.1 Serial-numbered property that is consumer property

The Act allows a registrant to register a financing statement in relation to a security interest without the grantor's knowledge or consent.

Section 156 of the Act provides that the Registrar must ensure that a notice of the registration of a financing statement or financing change statement (a "**verification statement**") is given to the person who is registered in the registration as the secured party. Section 157(1) then counters the fact that the registration could have been made without the grantor's knowledge or consent, by requiring the secured party to give a notice of the verification statement in the approved form (typically, by simply providing a copy of the verification statement itself) to "a person registered as the grantor in the registration".

A number of submissions pointed out that s 157 does not seem to accommodate a registration that is made against serial-numbered property that is consumer property, because s 153(1) requires that such a registration be made against the serial number only, and may not identify the grantor. In this situation, there is no "person registered as the grantor in the registration", with the apparent result that the secured party is not required to give the notice.

This appears to be an inadvertent gap. That gap could also widen somewhat, if the distinction between consumer property and commercial property is removed and the registration rules are amended so that any registration against serial-numbered property needs to be made against the serial number only, without the grantor's details, if the grantor is an individual.[98]

In my view, this gap should be closed. A person whose serial-numbered property is identified as collateral in a registration will be concerned to be made aware of the registration, whether or not their name also appears in the registration. The Act should be amended to accommodate this. If the secured party has already entered into the security agreement, it should give the notice to the grantor under the security agreement. If the secured party has not yet entered into the security agreement with the grantor, it should give the notice to the person who it anticipates will be the grantor (and then re-issue the notice when the security agreement has been entered into, if the actual grantor ends up being a different person).

> **Proposed recommendation 4.67**: *That s 157(1) be amended to require a secured party to give a notice of a verification statement to the grantor, whether*

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[98] See Section 2.10.4 above.

or not the grantor's details are included in the registration, on the basis described above.

5.12.2 **Registration events**

Sections 156 and 157 have the combined effect that a secured party must give notice of a verification statement to the grantor on the occurrence of a "registration event". This is defined in s 155(8) to be the registration of a financing statement or a financing change statement.

Section 10 defines a "financing change statement" to be "data amending a registered financing statement". This suggests that any change to the data in a financing statement could be a financing change statement, and so trigger an obligation to issue a notice of verification statement to the grantor, no matter how trivial the change might be.

One submission queried whether it should always be necessary to issue a notice of verification statement in response to a financing change statement. The submission suggested that a notice of verification statement should not be required where there is a bulk transfer of security interests from one secured party to another, presumably because of the administrative burden that would otherwise be involved in issuing the notices. The submission also suggested that the Registrar be able to issue a single verification statement in such a circumstance, rather than separate ones which each secured party would then need to send separately to each affected grantor.

I can see that it would be an unnecessary administrative burden to require a secured party to notify its grantor of minor changes to the registration that do not impact on the grantor (such as a change to the secured party's Secured Party Group, or its email address). I think it is important however that a grantor be notified of material changes to the registration, such as changes to the way in which it identifies the grantor, the secured party or the collateral, and that a secured party should not be exempted from the need to give notice of such a change just because it is part of a bulk dealing.

I am advised that the Register does already generate a bulk verification statement in relation to some bulk changes. I am also advised that AFSA is considering these issues as part of its current work on enhancing the Register.

> **Proposed recommendation 4.68**: *That the Act be amended to provide that a secured party is only required to give a notice of verification statement to the grantor in relation to a financing change statement, if the relevant change affects the way in which the registration identifies the grantor, the secured party or the collateral, but that the Act not be amended to exempt a secured party from the obligation to give a notice of verification statement just because it is part of a bulk transfer.*

5.12.3 **Should a notice of verification statement be optional for commercial transactions?**

Section 157(3) provides that a secured party does not need to provide its grantor with a notice of verification statement if the collateral is commercial property and the grantor has waived in writing its right to receive the notice. Secured parties routinely rely on this, and require their grantors to waive the right to receive the notice. This will generally not adversely affect grantors in commercial transactions, because they will be aware of the fact that the registration is being made.

One submission noted however that some grantors resist giving the waiver, and that this can lead to lengthy negotiations which either result in the grantor agreeing to give the waiver after all, or end up requiring the secured party to override its systems and

give the notice to the grantor. This was described in the submission as being an "untenable position". The submission suggested for this reason that the rule in s 157 be reversed for commercial property, and that the secured party not be obliged to give a notice of verification statement unless it has agreed with its grantor that it will do so.

I can understand why secured parties with highly-automated lending systems would want to avoid any transaction that did not fit into the system's standard parameters. Despite this, I am not in favour of this change. Most grantors will not be aware of the fact that they are entitled to receive a notice of verification statement, and so are unlikely to ask for it. The *de facto* effect of such a change would be that notices of verification statement would almost never be given. The proposal would also be difficult to implement fairly where a secured party registers a financing statement in advance of entering into a security agreement with the grantor, as the grantor in such a situation may genuinely not be aware of the registration, and will have no way of becoming aware of it unless the secured party gives it the notice of verification statement.

> **Proposed recommendation 4.69**: *That s 157 of the Act not be amended to provide that a secured party need only give a notice of verification statement to a grantor in relation to commercial property if it agrees with the grantor that it will do so.*

5.13 Constructive notice of the contents of the Register

Section 300 of the Act provides that a person is not deemed to be aware of the existence or contents of a registration, just because it is on the register. Section 300 says this:

> A person does not have notice, or actual or constructive knowledge, about the existence or contents of a registration merely because data in the registration is available for search in the register.

One submission expressed concern that a person could be taken to have constructive knowledge of the contents of the Register, despite s 300, if a prudent person in their position would have undertaken a search. While the submission did not explain the basis for the concern, it is likely to be based on the fact that s 300 only says that the existence of data on the Register does not automatically deem others to be aware of the data. The section appears to leave open the prospect that a person could be deemed to have knowledge of the contents of the Register on general legal principles.

One such principle is that a person may be taken to have knowledge of a matter if they wilfully and recklessly fail to make such enquiries as an honest and reasonable man would make.[99]

I am not satisfied that I should recommend that the Act be amended to overrule the general law principles in relation to constructive notice. Those principles are of general application, and have been developed by the courts as a means of striking a balance between the interests of a person who was in a position to make themselves aware of something but did not, and the interests of a third party who might be adversely affected by this. It is not clear to me that the general law principles should not apply to the Act in the same way as they do in other fields.

> **Proposed recommendation 4.70**: *That the Act not be amended to provide that a person should not be taken to have knowledge of the contents of the Register where the general law would hold otherwise.*

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[99] See *Baden Delvaux & Lecuit v Societe Generale pour Favoriser le Development du Commerce* [1992] 4 All ER 161; [1993] 1 WLR 509.

5.14 Residual references to the Register as a collateral register

Early drafts of the Act emphasised the character of the Register as a register of collateral, rather than a register of financing statements.[100] That approach was modified in later drafts, and then in the Act itself, but the Act still contains provisions that emphasise the collateral in a way that makes the drafting more complicated than it perhaps needs to be.

Section 160 of the Act appears to be such a provision. It says this:

> A description of collateral starts to be registered in a registration with respect to a security interest, in relation to a particular secured party, at the moment (the ***registration time***) when the description becomes available for search in the register in relation to that secured party.

Section 160 would be much easier to follow if it simply provided that a financing statement starts to be registered at the moment when data in the financing statement becomes available for search in the register. A formulation along these lines would also sit more comfortably with the language that is used, for example, in s 153.

This formulation would also remove the references in the current language to the identity of the secured party. Those references do not seem to be necessary, and can produce problems for a secured party under s 588FL of the Corporations Act if a security interest is transferred to a new secured party, as the financing statement would only be registered in relation to the new secured party when its name is included in the registration. That is likely to happen outside the 20 business day timeframe required by that section.[101]

The language of the Act as a whole could be simplified, if corresponding changes were also made to other relevant sections.

> **Proposed recommendation 4.71**: *That s 160 of the Act be amended as described above, and that corresponding simplifications be made where possible to other sections of the Act.*

5.15 Court power to rectify errors in registrations?

One submission suggested that the Act give courts a general power to provide relief for errors in a registration. The submission proposed this in response to the fact that the design of the Register and the complexity of the Act make it easy to make an error in a registration. The submission suggested that it would be appropriate to enable a court to order that a registration be corrected, or otherwise to deem a registration to be effective, if this could be done in a way that did not prejudice other parties.

It may be that the need for such powers will be reduced if the Act and the Register are simplified in the ways that have been discussed in this and the other consultation papers. It may also be unlikely that the options that would be open to a court to correct a registration in a way that did not prejudice third parties would be any different to the options available to the secured party itself, for example by registering a financing change statement or a fresh financing statement.

Care would need to be taken to ensure that the court did not order the Registrar to amend the Register in a way that the Register's functionality did not permit. Thought would also need to be given to the manner in which any court-ordered "deemed

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[100] See for example the *Personal Property Securities Bill 2008*, May 2008 Consultation Draft.

[101] This issue would go away, of course, if s 588FL of the Corporations Act is repealed. See Consultation Paper No. 3, Section 4.1.2.

effectiveness" of a registration could itself be recorded on the Register. For example, it might be desirable to amend the functionality of the Register to allow a "flag" to be entered against the affected registration, in order to draw a searcher's attention to the existence of the court order.

Proposed recommendation 4.72: *None at this stage, pending further consideration.*

5.16 Registrar's power to correct errors on the Register

Section 186 of the Act gives the Registrar a power to amend the Register by restoring data that had been incorrectly removed. Section 186 says this:

> (1) The Registrar may (at his or her initiative) register a financing change statement to restore data to the register (including an entire registration) if it appears to the Registrar that the data was incorrectly removed from the register under this Act.
>
> (2) If data is restored to the register under subsection (1), for the purposes of this Act the data is taken never to have been removed from the register.

The view taken by the Registrar (which also reflects my understanding) is that s 186 is intended to allow the Registrar to restore data that the Registrar himself or herself had removed incorrectly, for example pursuant to the Registrar's power to remove data under s 184 or 185. The Federal Court has however taken a more expansive view of s 186, as it held recently that a secured party can use that section to require the Registrar to restore a registration that the secured party itself (or more correctly, that a person acting on behalf of the secured party) had removed in error.[102]

In my view, the Registrar is not the appropriate person to adjudicate on questions such as whether a secured party has removed data in error, or whether it is appropriate to restore data in such a circumstance (given the effect that doing so could have on third parties). My view is that these are more appropriately matters for a court, and that s 186 should only deal with the restoration of data that had been removed from the Register in error by the Registrar himself or herself.

Proposed recommendation 4.73: *That s 186 be amended to make it clearer that it applies only to data that was removed from the Register by the Registrar*.

5.17 Residual issues with migrated security interests

5.17.1 The issues

The Register replaced a range of Commonwealth, State and Territory registers when the Act commenced practical operation at the registration commencement time on 30 January 2012. To assist with the commencement process, data from a number of those registers was migrated onto the Register, so that the security interests to which they related were perfected by registration from the registration commencement time. The mechanisms for this are set out in Division 6 of Part 9.4 of the Act.

Unsurprisingly, the data on the source registers did not always match all the requirements for registrations that are set out in the table in s 153(1). The Act and the Regulations address this in a number of ways. For example, the Regulations provide that the required details for the identification of a grantor or secured party for a migrated registration are the details that came from that register, whether or not they reflect the identification details that the Regulations require for other registrations.[103]

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102 *SFS Projects Australia Pty Ltd v Registrar of Personal Property Securities* [2014] FCA 846.

103 See item 1 of the table in each of paras 1.2 to 1.6 of Schedule 1 to the Regulations.

Section 337 also provides that the Registrar may determine that a migrated registration is effective for the purposes of the Act, even if it contains a defect that would otherwise cause it to be ineffective because of s 164 or 165, for a period of up to 5 years from the registration commencement time. The Registrar has made such a determination, under the *Personal Property Securities (Migrated Security Interests and Effective Registration) Determination 2011*. That determination states that a migrated registration will not be ineffective because of a defect, to the extent that the defect arises from the fact that the financing statement (as registered by the Registrar) included or omitted particular data. It will not protect a migrated registration however if the data on the source register was incorrect to start with.

The migration process itself also produced a number of challenges. Many registrations against companies were migrated from the ASIC charges register by reference to the company's ABN, rather than its ACN. AFSA has advised that this has since been corrected, by amending the data on the Register to use the company's ACN instead. Also, a small number of company charges from the ASIC charges register were registered on the Register against the company's name rather than against an ACN, apparently because the company in question was deregistered at the registration commencement time.

The challenges were not confined to the ASIC charges register. In particular, one submission pointed out that grantor names for registrations against motor vehicle serial numbers (ie the vehicle registration number, or VIN) may have been migrated from some State and Territory motor vehicle securities registers into the "organisation" field for the grantor's details, even where the original registration was in the name of an individual. The same submission suggested that some interests relating to yellow goods were migrated under a product identification number, rather than a prescribed serial number such as a VIN. While the effect of these sorts of transitional issues should diminish with time, it is clear from the submissions that they are still causing concern.

5.17.2 **Registrations migrated from the ASIC charges register**

AFSA has published a fact sheet to assist a searcher of the Register to determine how it might want to search against a corporate grantor.[104] The fact sheet suggests that a searcher might want to conduct multiple searches in the case of a grantor that is incorporated under the Corporations Act, against any or all of:

- the company's correct details (ie its ACN);
- alternative possible identifiers (such as an ARSN or ABN); and
- its name.

This has also become the customary market practice.

Submissions expressed concern that the Registrar is continuing to suggest that searchers consider making multiple searches in these circumstances, and in particular to consider making searches against a company's ABN, even though the initially incorrect migration of registrations to a company's ABN has been addressed. Submissions also suggested that steps be taken to deal with the "deregistered company" problem, particularly as it should represent only a relatively small number of registrations.

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[104] Available at www.ppsr.gov.au.

The "migration by ABN" problem

As noted earlier, the incorrect migration of charges from the ASIC charges register by reference to a company's ABN has been resolved, in that the registrations for migrated charges that were made against a company's ABN in the ABN field have been corrected, by removing the company's ABN from the ABN field and inserting its ACN into the ACN field instead. AFSA has advised me that it will also conduct a reconciliation of the Register against ASIC's records, for migrations that were made by inserting the chargor's details into the (correct) ACN field, to ensure that those details were in fact the company's ACN, and not part of its ABN instead. I am advised, once that reconciliation is complete, that AFSA will look to revise its guidance to searchers on this point.

The "deregistered grantor" problem

One submission proposed a solution to this problem. The submission suggested that the organisation name be matched to an ACN in ASIC's records, and that the Registrar then process a bulk data change to amend the relevant "deregistered grantor" registrations. The amendment would replace the organisation name with the matched ACN. This is a valuable suggestion, and should solve the problem. I understand that AFSA also agrees with this suggestion in principle, subject to confirming that it is technically possible to implement it.

> **Proposed recommendation 4.74**: *That residual issues with registrations that were migrated from the ASIC charges register be addressed as described above.*

5.17.3 Registrations migrated from State and Territory motor vehicle or similar securities registers

It was noted in Section 5.17.1 that one submission identified some residual issues with the manner in which data was migrated from some State and Territory registers. I was not aware that these were ongoing issues, and have asked AFSA to discuss them directly with the authors of that submission.

> **Proposed recommendation 4.75**: *None at this stage, pending further consideration.*

5.17.4 Registrar's power to amend the Register

One challenge that has faced the Registrar in dealing with issues affecting migrated registrations is that the Registrar has only limited powers to amend the Register. It would assist the Registrar to deal with challenges affecting migrated data if the Registrar had additional powers to improve the integrity of migrated data. This would enable the Registrar, for example, to implement the solution discussed in Section 5.17.2 above in relation to registrations that identify a deregistered company as the grantor.

> **Proposed recommendation 4.76**: *That the Act be amended to empower the Registrar to amend migrated data on the Register as the Registrar considers necessary to correct errors in the migration process.*

6. OTHER MATTERS AFFECTING THE REGISTRAR

6.1 Registrar's discretion to refuse to register a financing statement

Sections 150(3)(c) and (d) provide that the Registrar must register a financing statement or financing change statement if, among other things:

(c) the Registrar is not satisfied that the application is:

(i) frivolous, vexatious or offensive, or contrary to the public interest; or

(ii) made in contravention of section 151 (belief about security interest); and

(d) the registration would not be prohibited by the regulations.

The Register is a publicly-accessible, real-time register. The manner in which registrants can register a financing statement online makes it impracticable for the Registrar to exercise the power given to it to refuse a registration for these reasons. In my view, ss 150(3)(c) and (d) are not appropriate, and should be removed.

Proposed recommendation 4.77: *That ss 150(3)(c) and (d) be deleted.*

6.2 Amendment of the Register in accordance with a court order – procedural fairness

The Registrar may be required to amend or remove a registration by court order. The effect of s 184(1)(e)(ii), in conjunction with reg 5.10(2), is that the Registrar may remove data from the Register if the removal is required by a court order to be done urgently, and in this case the Registrar is not required to exercise procedural fairness. This is because s 184(1)(c) is not listed in s 191 as a provision that is subject to review by the Administrative Appeals Tribunal.

It is less clear whether the Registrar is required to exercise procedural fairness if he or she amends the Register in response to a court order that does not require the Registrar to act urgently. If the court order spells out exactly what needs to be done, of course, then this should not matter. If the court's directions are more general, however, and the Registrar could give effect to the order in more than one way, then it may be necessary for procedural fairness to be addressed.

It has been put to me that the Registrar should not be expected to exercise procedural fairness when giving effect to a court order, and instead that any issues as to the way in which the Registrar should implement a court order should be resolved as part of the legal proceedings that resulted in the court order, and so included in the terms of the court order itself. That would ensure that any disagreements between the parties as to the way in which the court's decision should be implemented would be resolved in a proper judicial forum, and that the court's wishes would be given proper effect.

If necessary, the Registrar should also be able to seek further directions from the court.

Proposed recommendation 4.78: *That the Act be amended to provide that the Registrar does not need to exercise procedural fairness when giving effect to a court order, and that the Registrar instead be able to seek further directions from the court before giving effect to the court's order.*

6.3 Registrar's investigative powers

Section 195A provides that the Registrar may conduct an investigation into any matter for the purpose of performing his or her functions. It has been suggested to me that it should be made clearer that this also allows the Registrar to conduct an investigation into a breach of the Act in order to pursue the enforcement of civil penalties. This would support the Registrar's power to apply to court under s 222 to require payment of a civil penalty by a person who has contravened a civil penalty provision. I agree that this would be a worthwhile clarification.

Proposed recommendation 4.79: *That s 195A be amended to confirm that the Registrar's power to conduct investigations extends to investigations that are conducted for the purpose of pursuing the enforcement of civil penalties.*

6.4 A business day calendar

The Act uses a concept of "business day" in a number of contexts. The term "business day" is defined in s 10 in this way:

> **business day** means a day other than:
>
> (a) a Saturday or a Sunday; or
>
> (b) a day which is a public holiday for the whole of:
>
> (i) any State; or
>
> (ii) the Australian Capital Territory; or
>
> (iii) the Northern Territory; or
>
> (c) a day that falls between Christmas Day and New Year's Day; or
>
> (d) a day on which the Registrar has refused access to the register, or otherwise suspended the operation of the register, in whole or in part (see subsection 147(5)); or
>
> (e) a day that is prescribed by the regulations for the purposes of this definition.

A number of submissions pointed out that this is a quite a complex definition. It was suggested that this concern could be addressed by requiring the Registrar to maintain a "business day calendar" on its website.

Another option would be to simplify the definition. One possibility might be to use the definition in the Corporations Act, which reads:

> **business day** means a day that is not a Saturday, a Sunday or a public holiday or bank holiday in the place concerned.

That definition would raise its own set of difficulties, however, for example because it would then be necessary to determine what the "place concerned" is on each occasion on which the definition is used. It could also have the result that time periods under the Act would become inconsistent, because of state or territory variations in public or bank holidays.

Another option might be to define the term by reference to days that are not public or bank holidays in one particular jurisdiction, eg Canberra. That would simplify the definition, but might not be attractive to some states or territories for parochial reasons.

> **Proposed recommendation 4.80**: *None at this stage, pending further consideration*.

6.5 Notices to secured parties that cannot be located

There are a number of situations in which the Act may require the Registrar to contact a secured party. For example, the Registrar may need to issue the secured party with an amendment notice under s 180 of the Act. This is not possible however if the Registrar has no valid contact details, for example in relation to migrated registrations where the migrated data does not include the necessary information.

It has been suggested to me that the Registrar should instead be able to issue a notice for the purposes of the Act by publishing the notice on the Registrar's website. That is clearly less desirable from the secured party's perspective than having the notice issued to the secured party directly, but would be preferable in my view to the Registrar not being able to issue the notice validly at all.

If a notice is issued by publication on the Registrar's website, then it would be appropriate to allow a longer notice period than the period that would otherwise apply,

so that the secured party has some opportunity to become aware of the notice in time to respond.

> **Proposed recommendation 4.81**: *That the Registrar be empowered to issue a notice to a secured party by publication on the Registrar's website, if the Registrar has no other valid notice details for a secured party, and that the associated notice period required by the Act be extended in these circumstances.*

ANNEXURE A

GLOSSARY

Act	*Personal Property Securities Act 2009*
allpap	The collateral class "all present and after-acquired property" as provided for by para 2.3(1)(c) of Schedule 1 to the Regulations.
allpap except	The collateral class "all present and after-acquired property, except" as provided for by para 2.3(1)(d) of Schedule 1 to the Regulations.
Article 9	Article 9 of the United States *Uniform Commercial Code*
Canadian PPSAs	*Personal Property Security Act*, RSA 2000, c P-7 (Alberta); *Personal Property Security Act*, RSBC 1996, c 359 (British Columbia); *Personal Property Security Act*, CCSM, c P35 (Manitoba); *Personal Property Security Act*, SNB 1993, c P-7.1 (New Brunswick); *Personal Security Property Act*, SNL 1998, c P-7.1 (Newfoundland and Labrador); *Personal Property Security Act*, SNWT 1994, c 8 (Northwest Territories); *Personal Property Security Act*, SNS 1995-1996, c 13 (Nova Scotia); *Personal Property Security Act*, SNWT 1994, c 8 (Nunavut); *Personal Property Security Act*, RSO 1990, c P.10 (Ontario); *Personal Property Security Act*, RSPEI 1988, c P-3.1 (Prince Edward Island); *Personal Property Security Act*, SS 1993, c P-6.2 (Saskatchewan); *Personal Property Security Act*, RSY 2002, c 169 (Yukon)
Cuming Walsh & Wood	R Cuming, C Walsh & R Wood, *Personal Property Security Law* (2nd ed) (Irwin Law, 2012)
Duggan & Brown	A Duggan & D Brown, *Australian Personal Property Securities Law* (LexisNexis, 2012)
Gedye Cuming & Wood	M Gedye, R Cuming & R Wood, *Personal Property Securities in New Zealand* (Brookers, 2002)
Gilmore	G Gilmore, *Security Interests in Personal Property* (Little, Brown, 1965)
Hague Securities Convention	Hague Conference *Convention for the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary*
Interim Report	*Interim Report on the Review of the Personal Property Securities Act 2009* dated 31 January 2014
National Credit Code	*National Consumer Credit Protection Act 2009*, Schedule 1
NZ Law Commission Report	New Zealand Law Commission, *A Personal Property Securities Act for New Zealand*, Report No. 8 (1989)

NZ PPSA	*Personal Property Securities Act 1999* (NZ)
NZ PPS Regs	*Personal Property Securities Regulations 2001* (NZ)
O'Donovan	J O'Donovan, *Personal Property Securities Law in Australia*, (Thomson Reuters, 2009)
Ontario PPSA	*Personal Property Securities Act* R.S.O. 1990, Chapter P.10 (Ontario)
PPS Intergovernmental Agreement	*Personal Property Securities Law Agreement 2008*, dated 2 October 2008
Register	The register established under s 147 of the Act
Registrar	The Registrar of Personal Property Securities appointed under Part 5.9 of the Act.
Regulations	*Personal Property Regulations 2010*
Replacement Explanatory Memorandum	Replacement Explanatory Memorandum, *Personal Property Securities Bill 2009*
Sask PPSA	*The Personal Property Security Act, 1993* (Saskatchewan)
Sask Law Reform Commission	Law Reform Commission of Saskatchewan, *Proposals for a Personal Property Security Act - Report to the Attorney General* (1977)
Serial-numbered property	Collateral that may or must be described by serial number in a registration
Understanding the Law of Secured Transactions	M Bridge, R Macdonald, R Simmons and C Walsh, *Formalism, Functionalism, and Understanding the Law of Secured Transactions* (1998-99) 44 McGill LJ 567
UNIDROIT Securities Convention	UNIDROIT *Convention on Substantive Rules for Intermediated Securities*
Widdup	L Widdup, *Personal Property Securities Act: A Conceptual Approach* (3rd ed) (LexisNexis, 2013)

ANNEXURE B

PRINCIPLES TO GUIDE THE ASSESSMENT OF PROPOSED AMENDMENTS

1. Overall objective

(a) The objective of the Act is to facilitate the creation and enforcement of security interests in personal property, and to provide rules to regulate their legal effect.

Commentary

*The rules for the **creation** of security interests should not attempt to prescribe the form that parties must use. Rather, the Act should simply identify the outcome that a transaction needs to achieve, if it is to create a security interest that is effective for the purposes of the Act, and otherwise leave it to the parties to choose how they want to document the arrangement between them.*

*The rules regarding the **legal effect** of a security interest should encompass the effectiveness of the security interest as against third parties such as other secured parties, buyers and lessees.*

*The rules regarding **enforcement** should be facilitative, in that they should not limit the enforcement remedies that the parties may agree to include in their transaction. Rather, the rules should provide a set of enforcement remedies that are available for a secured party to use in transactions where the security agreement itself does not contain enforcement mechanisms, or instead of contractually agreed remedies if the secured party prefers.*

The Act should also deal with appropriate ancillary matters, such as:

- *how to decide when the Act applies; and*
- *matters relating to the operation of the register.*

(b) The focus of the Act should be on interests that in substance secure obligations. When considering the extent to which the Act should also apply to interests in property that do not secure obligations, the following factors should be taken into account:

- whether the interest is of a type that is sufficiently common in or important to our economy that it is appropriate to consider extending the regime to include it; and
- whether the overall benefit of including the interest in the Act (or in chosen aspects of the Act) will outweigh any detriment from doing so.

Commentary

One of the key "mischiefs" that is the target of legislation such as the Act is the so-called "evil of apparent ownership" – the risk that a third party may be misled by the apparent owner of property into believing that the apparent owner can give the third party a better interest in the property than is actually possible. This risk can arise if the third party has no independent means to determine whether another person might already hold a conflicting interest in the property. The Act aims to reduce this risk, by providing that a secured party puts its security interest

at risk if it does not take steps that make it possible for a third party to learn of its existence. Those steps are referred to in the Act as "perfection".

There are many other types of circumstances, beyond the granting of security interests, in which a person can appear to have a greater interest in property than is actually the case. For example, a person may simply be in possession of another person's tangible property, either temporarily or on a long-term basis. A person may hold another person's intangible property as custodian, or as their nominee. It would not be practicable for the Act to deal comprehensively with all circumstances in which apparent ownership of property is divorced from its true ownership. This reality was acknowledged by the Law Reform Commission of Saskatchewan in its report "Proposals for a Saskatchewan Personal Property Security Act" in July 1977, in which it made the following observation:

> *It is totally unrealistic to attempt to bring within the scope of the Act every kind of transaction in which deception results from a separation of interest and appearance of interest. However, it is realistic to include in the registration and perfection system of the Act certain types of transactions which, because of their commercial importance, are likely to continue to produce significant disruption if left out.*

Rather than ignore other types of potentially-misleading transactions completely, however, the practice in jurisdictions that have legislation like the Act has been to include a subset of those other transactions within the legislation. In some jurisdictions (such as Saskatchewan), the selected subset consists of transactions which, as noted in the quotation above, are likely to produce significant disruption if they are left out, because of their commercial importance. In other jurisdictions, the selection has been adopted from predecessor legislation, without necessarily undertaking a full fresh scrutiny of whether the factors that led to that selection in the other jurisdiction were also relevant in the adopting jurisdiction.

When considering proposals to amend s 12(3), we should consider whether the proposed amendments would help to ensure that s 12(3) captures the appropriate types of interests, and only the appropriate types of interests.

2. Balance

The rules should strike an appropriate balance between the interests of secured parties, and the interests of third parties that take or may want to take a competing interest in collateral, such as:

- other secured parties; or
- buyers or lessees.

Commentary

This is the principle that is likely to inspire the most debate. Different market sectors will understandably want to ensure that their commercial positions remain as robust as possible under the Act. However, it will not always be possible to structure the rules in the Act in a way that provides all parties with the level of protection that they desire. Indeed, in many situations (such as the application of the priority or taking free rules), it may only be possible to protect one person at the expense of another. The rules need to find a balance between the legitimate expectations of the affected stakeholders.

3. Simplicity

Each rule should be expressed as simply as is possible without compromising the ability of the rule to achieve its purpose. It should be clear for each rule what the purpose of the rule is, and how that purpose fits with the overall purposes of the regime. The rules

should apply consistently, across all types of personal property and security interest, unless there are good reasons to the contrary (such as a desire to facilitate particular business practices or policy objectives). Taken as a whole, the rules should produce clear and predictable outcomes for business and other stakeholders.

Commentary

It is important to express rules as simply as is possible, so that it is as easy as possible for readers to understand what the rules mean, and how they can work with them.

Commerce, however, is complex. The Act needs to reflect and respond to that reality, and not stifle commercial creativity by imposing "one size fits all" requirements. Because the complexity of commercial life will necessarily require that there be corresponding complexity in the Act, it will be important to monitor the extent of that complexity, and to resist the urge to over-complicate the Act by providing exceptions or sub-rules to deal with particular fact patterns, or by including "avoidance of doubt" clarifications, unless they are truly necessary. As far as possible, potential uncertainties or complexities should be dealt with through careful formulation of the primary rules, rather than by means of exceptions or supplementary qualifications.

This is again a question of finding the right balance. We should resist the urge to over-complicate the Act, but also be mindful of the need, to quote Albert Einstein, to "make everything as simple as possible, but not simpler".

4. Comprehensiveness

The rules should be as all-embracing as possible. They should apply to all types of personal property and all types of security interest, unless there are clear policy reasons for an exception.

Commentary

This is a broader application of the "simplicity" principle. Carve-outs from the Act complicate the Act itself. They can also complicate outcomes for those who want to take an interest in the property, or to enter into a transaction, that is carved out. This is because excluding a type of property or transaction from the Act does not mean that the property or transaction can then operate free of any legal rules at all. Rather, it means that a different set of rules need to be identified and applied, and that could well result in increased complexity and uncertainty for those involved, rather than less.

5. Flexibility

The rules should be as flexible as possible. They should accommodate current market structures and business practices, but also be flexible enough to respond to changes to them. They should allow parties the freedom to structure their agreements as they see fit, unless there are policy reasons to the contrary (such as the need to protect consumers). They should include as few formal requirements as possible.

Commentary

Some care needs to be taken in the pursuit of this principle, as too much flexibility can degenerate into uncertainty. Also, while it is important that the Act not focus entirely on current market practices and conditions, and that it be able to accommodate new developments as well, the primary focus of the Act should be on ensuring that it produces appropriate and meaningful outcomes for Australian businesses and consumers today.

6. Transparency

The rules should aim to provide transparency in relation to the existence of security interests, through mechanisms that enable third parties to determine whether an item of a person's property may be subject to a security interest.

Commentary

This principle targets the "evil of apparent ownership" mentioned earlier. A key objective of the Act should be to provide mechanisms that make it possible for third parties to determine whether a security interest may exist over a particular item of property. This is the role performed by the three main modes of perfection under the Act – registration, possession and control.

A third party will however not always be able to detect whether an item of property is subject to a perfected security interest. For example, the Act provides for circumstances in which a security interest will be deemed to be perfected, either temporarily or permanently, in a manner that will not be apparent to third parties. It is also possible for a security interest to be perfected by control in a manner that is not visible to outsiders. And even registration provides no more than an indication that a security interest might be attached to property. Trade-offs of this kind are inevitable, given the need to balance the practicalities of the perfection process against the information needs of third parties. When assessing the mechanics of the various modes of perfection, however, it is important to remember why perfection is there, and to ask whether it is achieving its purpose.

7. Fit

The rules should be able to function in harmony with the balance of our law.

Commentary

The Act is not a self-contained set of rules that operate in isolation from the balance of our laws. Rather, the Act is just one component of our legal system generally, and needs to be able to function in harmony with it.

The Commonwealth Government has gone to considerably lengths to amend other legislation to adopt the terminology and concepts of the Act. State and Territory Governments have done this to a rather lesser degree.

The Act needs to be able to produce meaningful outcomes when interpreted and applied against the background of our laws generally. Other parts of Australia's commercial law framework, and the expectations that underpin that law, are very different to the laws and expectations that applied in the United States in the 1950s, when Article 9 was introduced. The same can be said (albeit to a lesser extent) in relation to the corresponding legislation in Canada and New Zealand. Terminology or structures that achieve meaningful outcomes in the overseas legislation may not work here. The drafting of the Act needs to take this reality into account.

This is clearly something of an aspirational set of targets. The complexity and innovativeness of the Australian economy, together with the inherent ambiguity of the English language, make any of these principles difficult if not impossible to realise in full. There is a degree of overlap between some of the principles, but others are in tension with each other, in that it may only be possible to pursue one principle in some circumstances if this is done at the expense of another. Where these conflicts do arise, they will need to be resolved by determining where the appropriate balance lies, looking back as needed to the over-arching objectives referred to in Part 6 of this report.