



Law Council
OF AUSTRALIA

Business Law Section

PPSA Review Secretariat
Commercial and Administrative Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Via email: ppsareview@ag.gov.au

19 December 2014

Dear Sir or Madam,

Statutory Review of the *Personal Property Securities Act 2009 (Cth)* – response to consultation paper No. 4

Reference is made to consultation paper No. 4 issued on 10 November 2014.

This submission is made on behalf of Business Law Section of the Law Council of Australia (“BLS”). While the submission sets out responses to the specific queries raised in the consultation paper and is in the requested template form, this submission is in addition to the earlier submissions lodged by the BLS.

This submission has been assembled with the assistance of three of the specialist committees of the BLS - the Financial Services Committee, the Insolvency & Reconstruction Law Committee and the SME Business Law Committee. These committees are made up of senior legal practitioners working in their respective areas and also highly respected academics who have detailed and relevant experience in dealing with issues arising out of the Act across Australia and many of the practitioners in these committees deal with small businesses on a regular basis.

The BLS would be pleased to discuss any aspect of this submission. Please contact Greg Rodgers of the Insolvency & Reconstruction Committee (who is the Law Council's representative on the PPSA Stakeholder Forum) on 07 3009 9303 or the Chair of the BLS, John Keeves, on 08 8239 7119 if you would like to do so.

Yours faithfully

John Keeves, Chairman
Business Law Section

Enc.

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BLS

Review of the Personal Property Securities Act 2009

Consultation Response Template

Consultation Paper 4

Instructions:

Please use the form below to provide feedback with respect to the proposed recommendations and issues listed in each section of the form. Please refer and respond to the proposed recommendation or issue as set out in Consultation Paper 4. The heading and paragraph number of the relevant sections of the consultation paper are included to help guide you.

Please note your agreement or disagreement with the proposed recommendation by deleting either 'Yes' or 'No' where indicated. Comments can be provided in the box below each proposition. There is no word limit for comments but succinct responses clearly setting out the reasons for agreement or disagreement with the proposed recommendation will be of most use for the purposes of the review.

You may respond to as many or as few propositions as you wish.

Name:	Business Law Section
Organisation:	Law Council of Australia
Background/Expertise/Interest in PPSA Review:	Legal practitioners
Contact Details:	Greg Rodgers (greg.rodgers@rbglawyers.com.au ; (07) 3009 9300)

2.2.2 How the terms affect the registration of a financing statement

Proposed recommendation 4.1: *That the Act be amended as described in Section 2.2.2.*

Do you agree with the proposed recommendation?	Yes
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Comments:

While the requirement to distinguish between commercial and consumer property does complicate the registration process it is part of a scheme intended to address consumer protection and privacy concerns raised throughout the consultation process that preceded the enactment of the PPSA. We are not aware that these concerns, particularly as to privacy, have receded. If privacy concerns have in fact diminished and there is support for doing away with the existing distinction between consumer property and commercial property we would support the first proposal (ie that a registration not indicate whether collateral is consumer property or commercial property). We would also support the second proposal (for a maximum registration term of 7 years for registrations against individuals (whether for consumer or business purposes)). We would only support the third proposal (ie that a registration against serial-numbered property may not identify the grantor, if the grantor is an individual), if this would not prevent a secured party doing non-serial number registrations in respect of collateral that may be described by serial number and registrations against all of the assets of an individual/sole trader without having to register separately against serial numbered property. If this is not what is intended, the third proposal would, in our view, be a significant impediment to financing for sole traders.

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

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

Do you agree with the proposed recommendation?	Yes
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Comments:

2.3 The "inventory" question

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

Do you agree with the proposed recommendation?	Yes
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Comments:

2.4 The "control" question

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

Do you agree with the proposed recommendation? Yes

Comments:

2.5 The "subordinate" question

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

Do you agree with the proposed recommendation? Yes

Comments:

2.6 The collateral classes

Should a new collateral class be added to the Register, of "all present and after-acquired property relating to"?

Comments:

Yes, this would be very helpful in many circumstances including but not limited to those mentioned in the consultation paper.

2.6 The collateral classes

Do you agree that the collateral classes should be changed as suggested in Section 2.6.5? Do you have any alternative suggestions?

Comments:

We favour some rationalisation of the collateral classes but in our view the suggestion in 2.6.5 goes too far. For example, the separate categories of tangible serial numbered property should definitely remain (ie. motor vehicles, watercraft and aircraft), along with crops, livestock and other goods. We agree with the rationalisation of the classes/sub-classes for financial property and intangible property to accounts and other intangible property. These changes combined with a compulsory free text collateral description for all collateral except where a registration is made by serial number or one of the three ALLPAP options (assuming ALLPAP "related to" is adopted) would be the best approach in terms of balancing the competing interests of searchers and registrants.

The (non-Ontario) Canadian approach of simply requiring a description by item or kind would also be a viable option in our view.

2.6 The collateral classes

Do you have any practical experience of working with the Canadian and New Zealand systems for identifying collateral in a registration?

Comments:

Yes. The limited categories in Ontario are not sufficiently informative from a searcher's perspective. The classes in NZ and Australia help a searcher if they are looking to quickly identify interests in a particular class of collateral and assist registrants by giving them a list of collateral classes to choose from (albeit the current Australian list is too long and complicated for people not familiar with it).

The Canadian PPSAs (outside Ontario) rely on a collateral description by item or kind and this also works well and gives a high level of flexibility.

2.7.2 The legal effect of the free text field

Should the Act be amended to clarify the legal effect of the free text field?

Comments:

In our view the free text clearly does have a limiting effect if the description used is narrower than the whole collateral class nominated. However, there would be no harm in clarifying this along the lines of s46(2.1) in the Ontario PPSA.

2.7.3 Should the free text field be compulsory?

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.*

Do you agree with the proposed recommendation?

No

Comments:

If the PPSA continues to require an indication of collateral class(es) in the registration rather than adopting the (non-Ontario) Canadian approach, we think the New Zealand requirement for a further collateral description, but without being prescriptive about how this is done, would be appropriate.

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

Proposed recommendation 4.9: *That the Act not be amended to prohibit the practice described in Section 2.7.4.*

Do you agree with the proposed recommendation?

Yes

Comments:

We favour discouraging the practice described in section 2.7.4 and believe some of the changes to the registration process contemplated by the consultation paper should make that practice unnecessary.

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

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".*

Do you agree with the proposed recommendation? Yes

Comments:

2.8 The "PMSI" question

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

Comments:

As per our previous submissions (see response to consultation paper 2 – 6.8.3) we believe the requirement to indicate a PMSI in the registration should be repealed.

Banks and other financiers who hold security over all assets know there will be ROT and lease arrangements and can search to identify these and other potential PMSIs, regardless of whether the PMSI designation is included in a registration. Financiers use covenants in their security agreements to regulate permitted security interests including leases and ROT. Leases and ROT existed pre-PPSA and there was no notification or registration requirement favouring prior secured parties. There does not seem to be any compelling reason to require a specific PMSI designation in financing statements now that we have the PPSA.

2.9 Description of proceeds

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

Comments:

No change required.

2.10.4 How broad should the concept be?

(a) Should the categories of serial-numbered property be broadened? If so, how?

(b) Should the categories of serial-numbered property be reduced? If so, how?

(c) Does any change need to be made in relation to the use of patent application numbers (if patents continue to be a category of serial-numbered property)?

Comments:

- (a) No. Generally agree with the commentary in the consultation paper about maintaining the robustness of the register in relation to serial numbered property.
- (b) No. There is significant value for a purchaser or a financier of a purchaser being able to search by serial number given that this discloses security interests that may have been granted by persons other than the current possessor of the property. We are not in favour of narrowing the effect of s.44.
- (c) No, provided s588FL of the Corporations Act is repealed.

2.10.5 The registration period

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.*

Do you agree with the proposed recommendation? Yes

Comments:

Subject to our comments in response to proposed recommendation 4.1.

2.10.6.1 Motor-vehicles - breadth of the concept

*(a) Should the concept of "motor vehicle" under the Act more closely with its vernacular meaning?
(b) If not, should it be simplified in some other way? If so, how?*

Comments:

(a) No. There does not appear to be any compelling reason to make any changes. In the vast majority of cases it is perfectly clear whether something is or is not a motor vehicle. On the rare occasion when it is not clear appropriate precautions can be adopted.

(b) No.

2.10.6.2 The July 2014 amendment

Proposed recommendation 4.16: *That the Regulations be amended as described in Section 2.10.6.2.*

Do you agree with the proposed recommendation? Yes

Comments:

2.10.7 Aircraft

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.*

Do you agree with the proposed recommendation? Yes

Comments:

The rule should be the same as for other serial numbered property, ie. it should be optional not mandatory.

2.10.8 Intellectual property licences

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.*

Do you agree with the proposed recommendation? No

Comments:

No. There is no compelling case to make this change and the ability to search by serial number rather than grantor may be useful in some circumstances.

2.11.1.1 Individual grantors - the rules

Proposed recommendation 4.19: *Do you agree that financial institutions should use the same rules as others to identify grantors, rather than AML/CRF Act data?*

Comments:

Yes. We agree with the commentary in the consultation paper.

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

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.*

Do you agree with the proposed recommendation? Yes

Comments:

2.11.2 Body corporate grantors

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.*

Do you agree with the proposed recommendation? No

Comments:

We agree with the recommendation to use the company name under the law under which it is incorporated but not the number. Providing an option of name or number is likely to cause confusion and make the register less reliable.

2.11.3.2 The use of ABNs

Should the use of ABNs for trusts be discontinued?

Comments:

No. Enabling registration against the trust ABN is consistent with security being given directly over the trust assets. Such security may be enforced even if the trustee's right of indemnity against the trust fund is or becomes ineffective. An unsecured creditor of a trustee must rely on the trustee's right of indemnity to recover against trust assets, whereas a secured creditor can have direct access to those assets. Also, while a trust is not a legal entity, many non-lawyers do not appreciate this issue. To a commercial person a trust is often perceived to be the "entity" they are dealing with.

The ability to register against the trust ABN (despite the trust not being a legal entity per se) adds transparency to commercial arrangements involving trust assets. By allowing registration by reference to a trust's ABN will also give greater certainty in situations where the trustee of a trust is changed. In such a case, the ABN for the trust remains the same so the registration is maintained.

Most of the issues raised in the consultation paper are matters of due diligence and risk management that prudent secured parties should be considering regardless of the registration requirements (ie they are issues relevant to dealing with trustees generally not just in the context of registering security).

The difficulty for liquidators in this space is that sometimes they do not find out about a trust until well after being appointed to the company which is the trustee. They may only have the trustee company's ACN or own ABN to work with initially. So they do a search and if the secured party has done the right thing and registered against the ACN, then at least the liquidator knows there is some security over collateral. But if a secured party dealing with a corporate trustee has only registered against the trust's ABN and not the ACN of the corporate trustee (as it should) then when the liquidator searches, he or she does not find anything.

There are some companies that are trustees of multiple trusts, not just professional/public trustee companies as noted in the paper. The ability to limit security to the assets of a particular trust referable to its ABN is, in our view, very useful.

As noted in our earlier submissions, s73 of the PPSA should not enable a trustee's right of indemnity and lien to rank ahead of a secured party with direct security in the trust assets perfected by registration against the trust ABN. This is particularly important if a person/company is granting some securities in its personal capacity only, some in its capacity as trustee of a trust (but not its personal capacity) and some in both capacities.

Consideration could be given to whether a system can be introduced to include "grantor groups", in much the same way as secured party groups can be registered. That may allow a trust to be linked to the trustee, so that by doing a search, there will be some ability to cross reference.

While there are concerns over 'clogging' the register with too many registrations, many secured parties are still registering against both ACN of the corporate trustee and the trust's ABN, thereby taking a belt and braces approach.

2.11.3.3 The name of the trust

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

Do you agree with the proposed recommendation? Yes

Comments:

2.11.3.4 A trust that has both an ARSN and an ABN

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".*

Do you agree with the proposed recommendation? Yes

Comments:

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

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.*

Do you agree with the proposed recommendation? Yes

Comments:

2.11.4.2 Partnerships that do not have an ABN

Should a registration be made against a partnership's name (and not the individual partners) if the partnership does not have an ABN?

Comments:

Yes. This should be its name under the law of the jurisdiction in which it is formed.

2.11.5 Multiple grantors

Should the Act be amended to clarify when it is appropriate to include more than one person or entity in a registration as the grantor?

Comments:

No change necessary.

2.11.6 Foreign names, and exact vs close match searching

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.*

Do you agree with the proposed recommendation?

Yes

Comments:

2.12.1.2 The definition of a "secured party"

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

Do you agree with the proposed recommendation?

Yes

Comments:

2.12.1.3 The table in s 153(1)

Proposed recommendation 4.30: *That item 1(b) of the table in s 153(1) of the Act be amended as described in Section 2.12.1.3.*

Do you agree with the proposed recommendation?

Yes

Comments:

2.12.2 Multiple secured parties

Does the current process for including multiple secured parties in a registration need to be changed?

Comments:

No change required.

2.12.3 GONIs

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

Do you agree with the proposed recommendation?

Yes

Comments (including suggestions for the replacement term):

This is not a significant issue.

2.13.3 The registration period - What can be done?

Should the end-time rules be amended to provide that the maximum registration period for all registrations is seven years?

Comments:

No. This may be useful for individual grantors (see response to proposed recommendation 4.1) but is likely to be counterproductive in the context of long term supply arrangements and banking relationships.

Enabling registrations to be made against more than one of the specific (ie. non-ALLPAP) collateral classes would be the most useful measure to “de-clutter” the register.

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

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.*

Do you agree with the proposed recommendation? Yes

Comments:

We think this is the intention but there is no harm clarifying the issue as suggested.

3.3 When will a financing statement be ineffective?

Proposed recommendation 4.35: *That s 164(1) and 165 be amended as described in Section 3.3.*

Do you agree with the proposed recommendation? Yes

Comments:

3.4 What is "seriously misleading"?

*(a) Do you agree with the explanation of the term "seriously misleading" that is given in Section 3.4?
(b) Should the explanation be included as a definition in the Act?*

Comments:

- (a) Yes.
- (b) No. In our view this is unnecessary (the court had no difficulty with this issue in the Medica Radiology case). One objective of the review is to identify ways to streamline the Act, such an inclusion would be heading in the opposite direction.

4.2.2 Should s 151(1) be repealed?

(a) Should s 151(1) be repealed?

(b) Should s 151(1) be amended to only allow a registrant to register a financing statement against a grantor if it has the grantor's consent to do so?

Comments:

(a) No, for the reasons mentioned in the consultation paper.

(b) No. As a matter of practice many standard documents (including credit application forms) now include the grantor's consent to PPSR registration but we do not favour making this mandatory. The practice of obtaining consent helps satisfy the "reasonable grounds" requirement in s.151(1).

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

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.*

Do you agree with the proposed recommendation?

Yes

Comments:

4.2.4 How precisely must the registration describe the collateral?

Would it be appropriate for s 151(1) to provide that a registration must describe 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 the favour of the nominated secured party?

Comments:

No, this could stifle flexibility in relation to how the register is used. As noted above, we think the NZ approach of requiring a free text collateral description (without being prescriptive about it) is appropriate. From our observations market practice is quickly moving toward the inclusion of meaningful free text descriptions as both secured parties and grantors realise that this is in everyone's interest and "what goes around comes around". In short, the market will deal with it if participants are pointed in the right direction.

4.3.1 Advance registrations

Should the mechanism in ss 151(2) and (3) for removing advance registrations be retained? Should the timeframe of five business days be removed?

Comments:

Yes, to the first question, and the second question becomes redundant.

4.4.2 "Unperfected" security interests

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.*

Do you agree with the proposed recommendation? Yes

Comments:

4.4.2 Who may make an amendment demand?

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.*

Do you agree with the proposed recommendation? Yes

Comments:

4.4.3 Deemed security interests

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.*

Do you agree with the proposed recommendation? Yes

Comments:

It is arguable this amendment is not necessary but the issue could be clarified.

4.4.4 Changes to the collateral class

(a) Should s 178 be amended to require a secured party to make a fresh, narrower registration as required, and then release the previous, overly-broad one? Is this necessary to respond to an amendment demand?

(b) Should the functionality of the Register be amended 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?

Comments:

The second approach (b) is preferred, provided that collateral class (or classes) cannot be amended/replaced by a broader class or supplemented by additional classes (broadening the collateral coverage should be the subject of a fresh registration).

4.4.5.1 Security trust instruments**Proposed recommendation 4.45:** *That s 179(3) be deleted.*

Do you agree with the proposed recommendation? Yes

Comments:

Agree with the commentary in the consultation paper.

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

Do you agree with the proposed recommendation? Yes

Comments:

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

Do you agree with the proposed recommendation? Yes

Comments:

4.4.5.4 Should the whole "amendment demand" process be replaced?*(a) Should we adopt the NZ approach to amendment demands, for some or all grantors?**(b) If so, what time should be allowed for the secured party to obtain the necessary court order?*

Comments:

(a) Yes, for all grantors.

(b) 15 business days.

4.4.6 Contracting out of amendment demands*Should a secured party be prohibited from requiring its grantor to agree not to make an amendment demand?*

Comments:

Yes. The protection afforded to grantors by the amendment demand process is illusory if secured parties can simply include this in their omnibus contracting out clause. This is an important issue for counteracting abuse of the register (as referred to elsewhere in the consultation paper). Perhaps a grantor who makes an amendment demand when they are not entitled to do so should be liable for the secured party's costs in making its court application?

4.5 Expired registrations

Do Sections 4.2 and 4.4 sufficiently address the concern over removing expired registrations from the Register?

Comments:

Yes.

5.1 Modes of access to the Register

Are the current modes of access to the Register sufficient? If not, what are some suggestions of other methods?

Comments:

Yes.

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

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.*

Do you agree with the proposed recommendation?

Yes

Comments:

We agree with the view in the consultation paper. Requiring security agreements to be lodged would seriously undermine the flexibility of the register for secured parties, such as ROT suppliers, who may frequently enter into new security agreements with the grantor.

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

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

Do you agree with the proposed recommendation?

Yes

Comments:

5.4 Registering against multiple collateral classes

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.*

Do you agree with the proposed recommendation?

Yes

Comments:

This issue is one of the most important covered in the review of the PPSA. Recommending measures to overcome the inadequate functionality of the register should be the key priority for the review process.

5.5.1 The legal implications of linking registrations

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.*

Do you agree with the proposed recommendation? No

Comments:

The equivalent provision to s56 in the Canadian PPSAs (eg. s23(1) in the Saskatchewan PPSA) and in NZ (s42) is directed at confirming that a secured party may switch from one method of perfection, such as possession, to another, such as registration. Unlike s.56, the Canadian provision does not appear to sanction continuous perfection by a series of financing statements, the earliest priority time of which may not be discoverable by search. We think this is potentially problematic and could affect the reliability of the register. For example, if a security interest is perfected by registration and a new registration is made before the earlier registration is removed. There will be continuous perfection but no way of discovering the priority time of the first registration unless the two are linked together.

5.5.2 The mechanics of linking

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.*

Do you agree with the proposed recommendation? Yes

Comments:

5.6 Only one registration per asset?

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.*

Do you agree with the proposed recommendation? Yes

Comments:

5.7 Separate registers for leases?

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.*

Do you agree with the proposed recommendation? Yes

Comments:

Separate registers for different types of security interest would undermine the central philosophy behind the PPSA and be a big leap back into the past.

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

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.*

Do you agree with the proposed recommendation? Yes

Comments:

5.9.3 The timeframe for responses

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.*

Do you agree with the proposed recommendation? Yes

Comments:

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

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.*

Do you agree with the proposed recommendation? No

Comments:

The suggested list of the parts of a security agreement that would be disclosable is too narrow. Secured Parties are commonly including confidentiality clauses in documents that may include commercially sensitive information and also constitute a security agreement. The issue of confidentiality does not usually arise under standard form GSDs and SSDs, it is more of an issue in connection with joint venture agreements and supply contracts that include clauses that could constitute a security interest. However, if a confidentiality clause is included, disclosure is really only required in a default situation and this is as it should be.

5.9.5 The effect of a confidentiality agreement - the scope of s 275(6)(a)

(a) Should this section also apply to confidentiality agreements between the secured party and the grantor?

(b) Should a confidentiality agreement that obliges the grantor or debtor not to disclose information about the transaction but leaves the secured party free to make disclosures engage the exemption as well?

(c) Should s 275(6)(a) be amended to accommodate carve-outs of the type discussed in Section 5.9.5?

Comments:

- (a) Yes.
- (b) Yes.
- (c) Yes.

5.9.5 The effect of a confidentiality agreement - the qualifications in s 275(7)

(a) Should ss 275(7)(a) and (b) be deleted?

(b) Should ss 275(7)(c) and (d) be deleted?

(c) Can you explain why the wording of paragraphs (c) and (d) of s 275(6) is structured so differently?

Comments:

(a) No. Paragraph (b) is important as it enables access by insolvency practitioners (as receivers, administrators or liquidators) in a default scenario.

Paragraph (b) should also refer to the grantor's default (not just the debtor's default).

(b) No.

(c) The wording of (c) and (d) could be made more consistent.

5.9.6 Disclosure that is prevented by a duty of confidence

How can the circularity described in Section 5.9.6 be broken? Should the banker's duty of confidence prevail?

Comments:

The banker's duty of confidence should not prevail. Ultimately insolvency practitioners must be able to obtain copies of security agreement when the grantor is in default. Outside of insolvency the precise terms of the security interest are usually not very important to persons other than the parties to the security agreement. Releases, priority deeds and no interest letters can usually be arranged by prospective purchasers of collateral or other secured parties without the need to see each other's security agreements.

5.10 Layout of the Register

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.*

Do you agree with the proposed recommendation?

Yes

Comments:

5.11 Supporting functionalities

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.*

Do you agree with the proposed recommendation?

Yes

Comments:

5.12.1 Serial-numbered property that is consumer property

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 or not the grantor's details are included in the registration, on the basis described in Section 5.12.1.*

Do you agree with the proposed recommendation? Yes

Comments:

5.12.2 Registration events

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.*

Do you agree with the proposed recommendation? No

Comments:

No changes required. The existing arrangements are satisfactory.

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

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.*

Do you agree with the proposed recommendation? Yes

Comments:

We agree with the comments in the consultation paper.

5.13 Constructive notice of the contents of the Register

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.*

Do you agree with the proposed recommendation? Yes

Comments:

5.14 Residual references to the Register as a collateral register

Proposed recommendation 4.71: *That s 160 of the Act be amended as described in Section 5.14, and that corresponding simplifications be made where possible to other sections of the Act.*

Do you agree with the proposed recommendation? Yes

Comments:

5.15 Court power to rectify errors in registration?*Should the Act give Courts a general power to provide relief for errors in registrations?*

Do you agree with the proposed recommendation? No

Comments:

In our view the court and registrar should not have power to rectify mistakes made by the secured party or its agents to the extent it would or could adversely affect third party interests. While the consequence of making a mistake will be harsh we think this is necessary to protect the efficacy and reliability of the register.

5.16 Registrar's power to correct errors on the Register**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.*

Do you agree with the proposed recommendation? Yes

Comments:

See response to 5.15. The SFS Projects decision is most unfortunate.

5.17.2 Registrations migrated from the ASIC charges register**Proposed recommendation 4.74:** *That residual issues with registrations that were migrated from the ASIC charges register be addressed as described in Section 5.17.2.*

Do you agree with the proposed recommendation? Yes

Comments:

5.17.3 Registrations migrated from State and Territory motor vehicle or similar securities registers**Proposed recommendation 4.75:** *None at this stage, pending further consideration.*

Comments:

There have been instances of incorrect migration from State/Territory registers. One example involves securities (granted by foreign companies not registered with ASIC) that were registered on State/Territory bills of sale registers and migrated to the PPSR showing the grantor to be "an individual". A search of the foreign company by name revealed no registrations but a search of the migrated registration number did reveal the registration.

5.17.4 Registrar's power to amend the Register**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.*

Do you agree with the proposed recommendation? Yes

Comments:

6.1 Registrar's discretion to refuse to register a financing statement**Proposed recommendation 4.77:** *That ss 150(3)(c) and (d) be deleted.*

Do you agree with the proposed recommendation? Yes

Comments:

6.2 Amendment of the Register in accordance with a court order**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.*

Do you agree with the proposed recommendation? Yes

Comments:

6.3 Registrar's investigative powers**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.*

Do you agree with the proposed recommendation? Yes

Comments:

6.4 A business day calendar*Should concern over the term "business day" be addressed by requiring the Registrar to maintain a "business day calendar" on the Register's website? Should the definition be simplified? If so, how?*

Comments:

We don't think this is necessary.

6.5 Notices to secured parties that cannot be located**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.*

Do you agree with the proposed recommendation? Yes

Comments: