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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**PERSONAL PROPERTY SECURITIES (CORPORATIONS AND OTHER
AMENDMENTS) BILL 2010**

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Honourable Robert McClelland MP)

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1. OUTLINE

- 1.1 The Personal Property Securities (Corporations and Other Amendments) Bill 2010 (the Bill) contains three schedules:
- a. Schedule 1: *Corporations Act 2001*;
 - b. Schedule 2: *Personal Property Securities Act 2009*; and
 - c. Schedule 3: Amendment of other Acts.

Schedule 1

- 1.2 Schedule 1 makes changes to *Corporations Act 2001*(Cth) to align it with the Personal Property Securities Act 2009 ('PPS Act'). Schedule 1 would:
- a. amend terminology used in the Corporations Act to apply the functional approach of the PPS Act to those sections of the Corporations Act that deal with charges;

Currently, only transactions which create charges or mortgages are security agreements under the Corporations Act. But the PPS Act uses a functional approach of treating alike transactions which have the same effect of securing the payment or performance of an obligation. These security interests would, therefore, also be included as *PPSA security interests* in the Corporations Act.
 - b. extend the Corporations Act concept of property to include *PPSA retention of title property*;
 - c. replace Chapter 2K (Registration of company charges) because the PPS Act provides for the registration of security interests in personal property but retain provisions equivalent to sections 266 and 267 in Chapter 2K (which provide that charges are void against an administrator or liquidator in certain circumstances);
 - d. apply appropriate transitional and application provisions; and
 - e. change references to floating and fixed charges to circulating and non-circulating charges respectively but with the intention of maintaining existing rights, for example, employee preferences under CA, section 561.

Schedule 2

- 1.3 Schedule 2 would amend the PPS Act to simplify the transitional provisions.
- 1.4 Schedule 2 would also make the PPS Act consistent with existing State and Territory provisions on the enforcement of security interests in agricultural products (Chapter 6).

Schedule 3

- 1.5 Schedule 3 would make minor consequential amendments to other Commonwealth legislation (Chapter 7).

2. FINANCIAL IMPACT STATEMENT

- 2.1 The Bill will not have a financial impact on the operations of Government

3. FORMAL CLAUSES

Clause 1 – Short title

3.1 The Short title of the Bill is defined here.

Clause 2 – Commencement

3.2 This clause provides for the commencement of the various proposed amendments. More details are provided in the notes on items.

Clause 3 – Schedules

3.3 The amendments made to legislation by the Bill are set out in three Schedules.

SCHEDULE 1

4. AMENDING TERMINOLOGY TO INCORPORATE THE FUNCTIONAL APPROACH

- 4.1 Under existing Personal Property Securities and Corporations law, transactions creating security interests are treated differently depending on the legal form of the transaction concerned. However, under the functional approach of the PPS Act, they will all be treated as security transactions where they perform the same function of securing payment or performance of an obligation.
- 4.2 The existing terminology of the CA, including *charges, mortgages, liens, pledges and floating charges* and *fixed charges* is based on the form of the transaction which creates the security interest. Schedule 1 would therefore, where appropriate, replace this terminology with terminology based on the functional approach of the PPS Act.
- 4.3 To harmonise the CA and the PPS Act:
- a. all references to *charge* and *chargee* would be replaced with *security interest* and *secured party* (items 28-39 and 42-84);
 - b. all references to *mortgage* and mortgagee would be replaced with *security interest* and *secured party* (items 116-124);
 - c. all references to *floating charges* would be replaced with *circulating security interests* and *fixed charges* with *non-circulating security interests* (items 86-87 and 89-100);
 - d. all references to *security* would be replaced with *security interests* (items 101-114);
 - e. all references to *chargee, lienee* and *pledgee (or holder of lien or pledge)* would be replaced with *secured party* and all references to *charge, lien and pledge* with *security interest* (items 125-134, and 136-137);
- 4.4 Schedule 1 would also introduce the concepts described in paragraphs 4.5–4.9 below.
- 4.5 A new omnibus concept of *security interest* (items 9-10) would include the concept of *PPSA security interests* (items 4 and 10) in personal property together with the existing CA concepts of *charges, mortgages, liens and pledges*; (items 56; 85; 115 and 143-5 replace *charge* with *security interest*).

Example: Under subsection 442CB(1), an administrator only has a duty to act reasonably in exercising a power of sale over property that is subject to a pledge or a lien. This obligation to act reasonably would be extended to all secured property (item 135).

Example: Under subsection 443F(2), an administrator's lien has priority over any charges in so far as the administrator's indemnity has priority over the debts. This priority would be extended to all secured property (items 138-139).

4.6 A new omnibus concept of *secured creditor* (items 7 and 10) which would include *PPSA secured creditors* under the PPS Act and secured creditors under the Corporations Act;

4.7 A new omnibus concept of *secured party* (items 8 and 10) which would include *PPSA secured parties* and the existing concepts of *chargees, mortgagees, lienees and pledgees* in the Corporations Act as they apply to property to which the PPS Act does not apply (items 148-151 replace *chargee* with *secured party*);

Example: The disqualification of mortgagees under section 448C, would apply to all secured parties and not only to mortgagees (item 117).

4.8 A new omnibus concept of circulating security interest (items 1 and 10) which would include the PPS Act concept of *circulating security interest* together with the existing CA concept of floating charge;

Example: Under section 442B, administrators would continue to have the power to treat property, subject to a non-circulating security interest (previously a fixed charge), as subject to a circulating security interest (previously a floating charge) (item 88).

4.9 A new omnibus concept of *possessory security interest* (items 9–10) which would include *PPSA security interests* perfected by possession or control together with the existing concepts of liens and pledges in the Corporations Act.

Example: Where the company is under administration and the administrator is entitled to dispose of the property, the pledgee, lienee or secured party in possession or control (*possessory secured parties*) would all have to allow potential purchasers to inspect the property (items 133-134).

Example: Where the company is under administration and the pledgee, lienee or secured party in possession or control (*possessory secured parties*) have possession of the property, they would all be permitted to continue in possession of the property (item 156).

Example: The rules for the distribution of proceeds would be the same for all *possessory security interests* where the original property was subject to a lien, a pledge or a security interest perfected by possession or control (items 136-137).

Example: Section 441JA currently makes provision for the sale of property subject to a lien or pledge. Section 441JA would be replaced with proposed section 441EA which refers to the sale of property subject to *possessory security interests* (proposed section 441EA would also amend the

Corporations Act in line with the PPS Act to remove the requirement that the security interest can only be enforced if there is no higher-priority security interest in the same property) (items 40-41).

5. EXTENDING THE CA CONCEPT OF PROPERTY TO INCLUDE *PPSA RETENTION OF TITLE PROPERTY*

- 5.1 The PPS Act concept of security interests includes transactions where the secured party, not the grantor, retains title over the property. This includes:
- a. agreements to sell subject to retention of title;
 - b. romalpa clause agreements;
 - c. conditional sale agreements;
 - d. hire-purchase agreements; and
 - e. leases and consignments that secure the payment or performance of an obligation.
- 5.2 Some transactions which do not secure the payment or performance of an obligation, but which have that effect, are deemed to be security interest under the PPS Act. These include:
- a. commercial consignments; and
 - b. leases and bailments of greater than one year (or ninety days in the case of serial numbered goods) (i.e. PPS leases).
- 5.3 In order to align the Corporations Act with the PPS Act, property subject to these new *PPSA security interests* would be included in the Corporations Act as *PPSA retention of title property* (items 3 and 10) (the existing definition of *lease* in the Corporations Act would, however, exclude *PPSA security interests* (item 2) except in subsection 419(1) (item 151).
- 5.4 The Corporations Act currently defines retention of title clause property. This definition would be retained to account for any existing retention of title property but qualified to exclude *PPSA retention of title property* (items 3 and 10).
- 5.5 Therefore, there would be two classes of retention of title property:
- a. *PPSA retention of title property* (which includes most personal property that is subject to a retention of title clause) (items 3 and 10); and
 - b. *Retention of title clause property* as defined in the Corporations Act (to the extent that it is not *PPSA retention of title property*). This could include retention of title property:
 - i) that is not personal property within the meaning of the PPS Act;

- ii) where the retention of title clause does not secure payment or performance of an obligation; or
 - iii) where the relevant property interest is excluded by PPS Act, section
- 5.6 In those cases where it would not prejudice existing rights, *property of the company* for the purposes of the Corporations Act would include *PPSA retention of title property* so that *PPSA retention of title secured parties* could enforce their security interests as secured parties.
- 5.7 CA, Part 5.2 would not apply to *PPSA retention of title property* and therefore under subsection 419A(1), a controller would not be liable for *PPSA retention of title property* (item 152).
- 5.8 A secured party with a security interest over substantially the whole of the property would be able to appoint an administrator to enforce their security interest (CA, section 436C) (item 142, definition of enforce, item 154, definition of property in Part 5.3).
- 5.9 CA, subsection 441A(3) enables a chargee or receiver with a charge in the whole or substantially the whole of the property to enforce the charge. Property in this context would include *PPSA retention of title property* and where a company is under administration, the chargee with a charge over the whole or substantially the whole of a company's property could enforce the security interest before or after the decision period (items 140-141, definition of decision period, item 154, definition of property in Part 5.3).
- 5.10 Where an administrator incurs debts in the exercise of his or her duties, the administrator is personally liable for the debts (CA, section 443A), and this would include for property hired, leased, used or occupied that gives rise to *PPSA security interests* (item 162).
- 5.11 An administrator may only withdraw from security agreements, entered into prior to the administration, where the property is owned or leased from another person (CA, section 443B) but this would exclude property giving rise to *PPSA retention of title security interests* (items 164-165). An administrator would therefore only be able to withdraw from transactions involving true operational leases or real property.
- 5.12 Currently, under the CA, sections 443D-E, an administrator is indemnified and has a lien over all property of the company for debts arising during the administration. The administrator's lien would not have priority over *PPSA retention of title* because it is not company property (items 162-165). In future, an administrator would be indemnified out of, and have a lien over, all property of the company including unperfected *PPSA retention of title property* but excluding non-PPSA retention of title property (item 166).
- 5.13 CA, subsection 444D(1) provides that a deed of company arrangement binds secured creditors but that this does not affect their rights to realise their collateral

except to the extent that they voted for the deed and the deed stops them doing so. In future, *PPSA retention of title property holders* would be subject to CA, section 444D(2) and would therefore be able to deal in the *PPSA retention of title property* unless they voted in favour of a deed of company arrangement which prevents them from dealing in the property (items 167-8).

- 5.14 However, there would be circumstances where it would be important to preserve existing rights by not including *PPSA retention of title property* within the definition of *company property*. Where a company is insolvent and the property of the company is insufficient to meet the payment of unsecured creditors, employee entitlements would have preference over floating charges (CA, section 561). If *PPSA retention of title property* were included as company property, it would be subordinate to employee preferences and *PPSA retention of title property* holders would lose their property. Therefore, *property of the company* would exclude *PPSA retention of title property* in this context.
- 5.15 In the following situations, *property of the company* would only include *PPSA retention of title property* where those security interests are vested in the company through either PPS Act, sections 267 or 267A or proposed section 588FL (items 171, 174 182).
- 5.16 Where a company is being wound up, a person cannot proceed against the company's property (CA, section 471B). This would include *PPSA retention of title property* vested in the company (item 171).
- 5.17 In determining the remuneration for a liquidator, the Court is required to take into account, among other things, the value and nature of the property which the liquidator was required to deal with (CA, section 473(10)). This would include *PPSA retention of title property* vested in the company (item 171).
- 5.18 When a company is being wound up, the liquidator is required to take custody of the property to which the company is entitled (CA, section 474). This would include *PPSA retention of title property* vested in the company (item 172).
- 5.19 The liquidator can commission a report on the affairs of the company (CA, section 53) and property of the company (CA, section 475(8)). This would include *PPSA retention of title property* vested in the company (item 171).
- 5.20 The powers of the liquidator include selling or disposing of property and doing all things necessary for the winding up of the company and distributing its property (CA, section 477). This would include *PPSA retention of title property* (item 171).
- 5.21 After the Court orders a company to be wound up, the liquidator must collect the company's property (CA, section 478). The Court may also require a person to deliver property, (item 171), to which the company is prima facie entitled, to the liquidator (CA, section 483). This would include *PPSA retention of title property* vested in the company (item 171).

- 5.22 Where the property is insufficient to satisfy all creditors, the Court may make an order on the priority of payments from the property (CA, section 485(3)). This would include *PPSA retention of title property* vested in the company (item 171).
- 5.23 In reviewing the liquidator's remuneration, the Court must take into account, the value and nature of the property, dealt with by the liquidator (CA, section 504(2)). This would include *PPSA retention of title property* vested in the company (item 174).

6. REPEAL CHAPTER 2K (REGISTRATION OF COMPANY CHARGES) BUT RETAIN THE EFFECT OF SECTIONS 266 AND 267

- 6.1 Most charges currently subject to the registration requirements of Chapter 2K would be covered by the PPS Act. These existing charges would be migrated to the PPS Register to be established by the PPS Act and in future such charges would be registered on the PPS Register. Chapter 2K would be repealed (item 18) and consequential amendments would be made throughout the Corporations Act (items 11–17 and 19–27) with effect from the time the PPS Act comes into effect (expected to be May 2011).
- 6.2 Although Chapter 2K would be repealed, section 266 would be retained to prevent security interests being granted fraudulently with knowledge of an imminent administration, liquidation or deed of company arrangement and to avoid property falling into the trustee's or administrator's estate or being claimed by unsecured creditors.
- 6.3 For security interests entered into after the commencement time, the proposed section 588FL (item 183) would replace section 266. Section 588FL would provide that where a company is being wound up, an administrator appointed, or a deed of company arrangement executed:
- a. any *PPSA security interest* which was not continuously perfected for six months prior to that event; or
 - b. any *PPSA security interest* not continuously perfected at 20 days (or a later day ordered by the Court) after the agreement was made until the day the winding up or the administration begins, would vest in the company and the secured party would be unable to enforce the security agreement (item 183).
- 6.4 Despite the operation of proposed new provisions replacing sections 266 and 267, a transferee of property which was subject to a security interest to which the new provisions apply, would take the property free of the security interest provided that they had no knowledge of the security interest (item 54). However, the onus of proving this lack of knowledge would be with the transferee. This reversal of onus is required because the relevant matters requiring proof would usually be within the knowledge of the transferee and it would be unduly onerous to require the secured party to prove the transferee's state of mind. This provision would protect bona fide purchasers for value and render ineffective fraudulent transactions designed to frustrate payments to creditors.
- 6.5 Proposed section 588FL would vary section 266, which requires that a security interest be registered within 45 days of being created or registered within 6 months of the administration, liquidation, or deed of company arrangement. Section 588FL(2) would instead provide that when a company is being wound up, an administrator appointed, or a deed of company arrangement executed (the critical

time), any *PPSA security interest* which was perfected, registered or enforceable against a third party after the latest of:

- a. six months before the critical time; or
- b. 20 days after the security agreement came into force;
- c. a later time ordered by the Court under proposed section 588FM;

would vest in the company (item 183, proposed section 588FL(4)). Proposed section 588FL(4) would only apply if a security interest is perfected at the specified times by registration and it would not apply if the security interest is perfected by possession, control or temporary perfection (even if the security interest is also perfected by registration).

Example:

CompanyA grants FinanceA a security interest in its *all present and after acquired property*. FinanceA registers its security interest 15 days after the creation of the security interest. CompanyA becomes insolvent 30 days after the security interest is granted. FinanceA would retain their security interest, because FinanceA registered the security interest within the required 20 day period.

Example:

CompanyA grants FinanceA a security interest in its *all present and after acquired property*. FinanceA registers its security interest 25 days after the creation of the security interest. CompanyA becomes insolvent 30 days after the security interest is granted. The security interest would vest in CompanyA because FinanceA did not register the security interest within the required 20 day period or within the six month period prior to the critical time.

Example:

CompanyA grants FinanceA a security interest in its *all present and after acquired property*. FinanceA registers its security interest 25 days after the creation of the security interest. CompanyA becomes insolvent eight months after the security interest is granted. FinanceA would retain its security interest because it registered its security interests prior to the six month period before the critical time.

Example:

CompanyA grants FinanceA a security interest in its *all present and after acquired property*. FinanceA registers its security interest 15 days after the creation of the security interest. CompanyA becomes insolvent 5 months and 25 days after the security interest is granted. The security interest would not vest in CompanyA because FinanceA registered the security

interest within the required 20 day period (despite the fact that the registration was also made within 6 months before the insolvency).

- 6.6 If the law of another jurisdiction governs the enforceability of the security interest, and also provides for its registration, proposed subsection 588FL(3) would provide that the *PPS Act security interest* would vest in the company where the perfection, registration or enforceability against third parties occurs after the latest of:
- a. six months before the critical time; or
 - b. 20 days after the security agreement came into force;
 - c. a later time ordered by the Court under proposed section 588FM.
- 6.7 As deemed security interests (transfers of accounts and chattel paper; PPS leases and commercial consignments) are not true security interests, it would operate unfairly to subject them to the rule in proposed subsection 588FL(4) and they are therefore excluded from this rule by proposed section 588FN) (item 183). Subordinated debts (turnover trusts) would also be excluded from this rule (proposed subsection 588FN(2)).
- 6.8 Proposed subsection 588FL(4) would also not apply if the secured party agreed to the transfer of the collateral and the *PPSA security interest* is perfected at the end of 5 business days after the transfer or where the secured party did not agree to the transfer, the *PPSA security interest* was continuously perfected until 5 business days after the day the secured party acquired the knowledge required to perfect their interest by registration (item 183, proposed subsection 588FN(3)).
- 6.9 Under PPS Act, section 266, an unperfected security interest will vest in the grantor and as a result, property that is currently exempt from liquidation would, if subject to an unperfected security interest, vest in the company and be available for distribution to unsecured creditors. The property could, however, subsequently be transferred free of the *PPSA security interest*, provided that the transferee provides new value for the property and has no actual or constructive knowledge of the winding up, deed of company arrangement or administration (item 183, proposed subsection 588FL(5)).
- 6.10 Existing section 267, which prevents the enforcement of a security interest granted by a company to a person associated with the company within six months after the granting of the interest, would be replaced by proposed section 588FP (item 183). The new provision would be designed to prevent a company granting security interests to persons associated with the company (which would enable those persons to appoint receivers and take control) and would apply to *PPSA security interests* and other charges to which section 267 currently applies.
- 6.11 Proposed section 588FP retains CA, section 267. Where a security interest was granted to an officer of a company and associated persons and the secured party purports to take steps to enforce the security interest, within six months after the security interest is created, without the leave of the Court, then the security interest would be void. The *six month period after the security agreement* refers to six

months after the time the security agreement is made and not to six months after the attachment of the security interest.

- 6.12 This would not affect the title of a transferee who takes the personal property for value and without actual or constructive knowledge of the seller's security interest. Proposed section 588FN provides that a transferee of property, which was subject to a security interest in proposed sections 588FL and FM, takes the property free of the security interest provided that they had no knowledge of the security interest.
- 6.13 Proposed section 588FN would place the evidential burden on the defendant, who acquires property subject to a security interest under proposed sections 588FL and 588FM, to prove that the defendant had no actual or constructive knowledge of the matters set out in proposed sections 588FL and 588FM. The reason for reversing the onus is that the matters requiring proof would usually be peculiarly within the knowledge of the defendant and it would be unduly onerous to require the plaintiff to prove the state of the defendant's knowledge (item 183, proposed subsection 588FL(6)). This provision is intended to protect bona fide purchasers for value while ensuring that fraudulent transactions designed to frustrate the payment of funds to creditors are void.

7. APPROPRIATE TRANSITIONAL AND APPLICATION ARRANGEMENTS

- 7.1 Schedule 1 would commence when the PPS Register starts to operate (that is, when the PPS Act starts to apply). Because most amendments require the alignment of existing categories of security interests in the Corporations Act and related concepts to the PPS Act, they would only apply to *PPSA security interests* that arise under agreements made after the new PPS Act scheme starts to operate.
- 7.2 Transitional provisions would be enacted to retain certain aspects of the registration scheme for existing registrable charges. At the commencement time, the ASIC Register would be closed to further registrations. However, ASIC would be required to retain existing records on its Register for seven years after the commencement time. This would enable chargees, lienees and pledgees of registrable charges to continue to obtain information relating to their charges, liens or pledges.
- 7.3 The repeal of CA, Chapter 2K (item 17) would not immediately apply to registrable charges under the CA (except to the extent necessary to close the CA register to new registrations, and to limit the effect of CA, section 266 (the voiding of registrable charges)). Despite the repeal of Chapter 2K, the following provisions would continue to apply after the commencement time for a period of seven years (item 187, proposed section 1502):
- a. CA, subsection 265(1), in relation to registrable charges entered on the Register before the commencement time (item 186, definition of commencement time);
 - b. CA, subsection 266(4), in relation to notices that are required to be lodged before the commencement time;
 - c. CA, section 272, in relation to registrable charges entered on the Register before the commencement time;
 - d. CA, section 274, in relation to registrable charges arising before the commencement time;
 - e. the existing exemptions from CA, sections 266 and 267 would continue to apply.
- 7.4 The priority rules for existing registrable charges would apply indefinitely (item 187, proposed section 1506).
- 7.5 It is also proposed that registrable charges, notified before the commencement time (including provisional charges), would be migrated across to the PPS Register and (as transitional security interests) would retain the priority they had prior to migration.

- 7.6 Registrable charges not notified before the commencement time, could be registered anytime on the PPS Register (but would have priority dating to that day), unless they obtain a Court order under CA, section 274 to retain their pre-commencement time priority (item 187, proposed section 1502).
- 7.7 CA, subsection 266(4) would continue to apply to registrable charges which became void under CA, section 266 before the commencement time. This would maintain the existing rights of secured creditors to apply to a court for relief and a declaration that the registrable charge never was void (item 187, proposed section 1504).

8. MAINTAIN EXISTING RIGHTS

- 8.1 Schedule 1 would maintain the status quo in a number of respects.
- 8.2 Firstly, Schedule 1 would amend CA, section 283BG and 283CD to exclude borrowers and guarantors respectively from the obligation to report to the Trustees on charges they create while under administration (items 146 and 147).
- 8.3 Schedule 1 would retain the restrictions on the exercise of third party rights under administration (items 156; 158-159).
- 8.4 PPS Act, s 140 specifies the order for the distribution of proceeds when enforcing security interests. Several provisions of the Corporations Act require certain payments to be made out of property that is subject to security interests. For example, CA, section 433 provides that a receiver who is appointed on behalf of the holders of debentures of a company that are secured by a floating charge, and who takes possession or control of property of the company that is secured by the floating charge, must pay certain debts in priority to any claim for debentures and CA, section 1311 makes it an offence for the receiver not to do so. Therefore, PPS Act, section 140 would not apply when a receiver has been appointed to property of the company (see PPS Act, section 116).
- 8.5 CA, section 443E provides that an administrator's right of indemnity under CA, section 443D has priority over certain debts of the company secured by a floating charge on property of the company. CA, section 443F provides that the administrator's indemnity is secured by a lien and that the lien has priority over a charge to the extent that the right of indemnity has priority over debts secured by the charge. It is proposed that the Minister would make a declaration under PPS Act, section 73(3) determining that the administrator's lien has priority over a security interest to the extent that the right of indemnity has priority over debts secured by the security interest.
- 8.6 CA, section 561 provides that if the property of a company available to pay unsecured creditors is insufficient to make certain payments, then the payment of those amounts must be made in priority to floating charges. PPS Act, section 254 provides that laws which are capable of operating concurrently with the PPS Act may do so. While the PPS Act, section 140 sets out the order for distributing proceeds to those with interests in the property, persons entitled to payments under CA, section 561 do not have interests in the property. Therefore, CA, section 561 and PPS Act, section 140 are capable of operating concurrently, because CA section 561 requires certain payments to be made before the property is put towards those with interests in the property.

SCHEDULE 2

9. PERSONAL PROPERTY SECURITIES ACT 2009

Amendment of section 3

Items 1-3

- 9.1 Items 1-3 are amendments to the Guide to the PPS Act. They describe changes made to the PPS Act by other items. In particular, item 1 describes a change made by item 38 (includes the additional requirement for perfection of enforceability against third parties); item 2 the change made by item 79 (removes the reference to assignment of interests for greater accuracy); and item 3 describes a change made by item 92 (specifies the registration commencement time which is now known because the PPS Act has received Royal Assent).
- 9.2 The rationale for these changes is discussed in the individual items below.

Amendment of section 6(2)(c)

Item 4

- 9.3 Section 6(2) of the PPS Act identifies when the PPS Act will apply to a security interest in intangible property. Subsection 6(2)(c) provides that the PPS Act applies to a security interest in intangible property if the intangible property is an assignment of an account or chattel paper.
- 9.4 Item 4 would clarify that the intangible property is the *interest of a transferee* under a transfer of an account or chattel paper, and not the assignment of the account or chattel paper.

Amendment of section 8(1)(f)(v)

Item 5

- 9.5 The PPS Act does not apply to certain interests, one of which is a transfer of an interest or claim in, or under, a contract of annuity or policy of insurance. This reflects exclusions found in both the New Zealand and Saskatchewan PPS Acts.
- 9.6 However, section 31(1)(b) provides that proceeds can include a right to an insurance payment or other payment as indemnity or compensation for loss of, or damage to, the collateral (or proceeds of collateral).
- 9.7 This amendment would maintain the general exclusion of insurance policies from the PPS Act but include insurance payments that are proceeds under the PPS Act.
- 9.8 Without this amendment, it would be possible for a secured party's security interest to become worthless when the collateral is destroyed. If the security interest were not able to attach to the resulting insurance payment as proceeds, the secured party

would be left without an interest in the insured property. Allowing the secured party's security interest to attach to the insurance payout allows them to maintain a security interest in an asset that has a substantially similar value. This would be consistent with the policy behind the general exclusion on insurance policies because permitting the security interest to continue in the insurance payment as proceeds is not the same as permitting a security interest in the insurance proceeds as original collateral.

Example: A bank takes a security interest in a car which has been insured by its owner. The car is written off after being involved in an accident. The owner receives the right to an insurance payment as a result. Because the right to the insurance payout is a right as compensation for the loss of the car, it would be included as proceeds under the PPS Act and the bank would have a security interest in the right to the insurance payment as proceeds of its security interest in the car. In effect, the bank's security interest in the car is replaced by a security interest in the payment. As a result, the bank is placed in a substantially similar position to the one in which it was prior to the car being written off.

Amendment of section 237

Items 6, 7, 8 and 9

9.9 See the discussion under item 79.

Amendment of subsection 8(1)(f)(x)

Item 10

9.10 Subsection 8(1)(f)(x) provides that the Act does not apply to an assignment of the beneficial interest in an account where, after the assignment, the assignee holds the account on trust for the assignor ('trust-back' exclusion).

9.11 The Personal Property Securities Bill 2008 (Exposure Draft) defined an *account* to mean a monetary obligation. The definition of *account* in the PPS Act was narrowed without a corresponding change to subsection 8(1)(f)(x) to retain the broader exclusion from the Act.

9.12 This amendment would reinstate the effect that subsection 8(1)(f)(x) had in the Exposure Draft.

Water Rights

Items 11 and 14

9.13 Subsection 8(1)(i) provides that the PPS Act does not apply to *a right, entitlement or authority, whether or not exclusive, that is granted by or under the general law or a law of the Commonwealth, a State or a Territory in relation to the control, use or flow of water.*

- 9.14 Item 14 proposes to define a *right* in relation to the *control, use or flow of water* as including a *right that a person has against another person to receive (or otherwise gain access to) water*.
- 9.15 This amendment would ensure that the Act would not apply to rights held in water that are derived from contract. This commonly occurs where an intermediary such as an operator of irrigation infrastructure has the licence to the water and is responsible for distributing it to producers.
- 9.16 Item 11 includes a note which refers to the substantive amendment.
- 9.17 This amendment is intended to ensure that the PPS Act would not apply to any rights in water regardless of the source or basis of those rights.

Pawnbrokers, Superannuation and Commonwealth Debt Acts

Items 12 and 14

- 9.18 Items 12 and 14 would insert subsections 8(1)(ja) and 8(6) to exclude certain security interests taken by pawnbrokers from the PPS Act. Pawnbrokers are extensively regulated by State and Territory legislation. The amendments would exclude security interests taken by regulated pawnbrokers from the PPS Act, provided a security interest is taken in the ordinary course of the pawnbroker's business as a pawnbroker, is taken in accordance with State and Territory legislation and the market value of the obligation secured and the market value of the collateral is less than the threshold established by section 47 of the PPS Act for low-value consumer transactions. The pawnbroker would have to believe that the market value of the collateral is less than this threshold. The property could also not be of a kind that the regulations require or allow to be described by serial number (for example, motor vehicles and watercraft).
- 9.19 Item 12 would also insert subsection 8(1)(jb), which would exclude members' interests in superannuation entities from the PPS Act:
- a. as members of a superannuation fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); or
 - b. as members of an approved deposit fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); or
 - c. as holders of retirement savings accounts (within the meaning of the *Retirement Savings Accounts Act 1997*); or
 - d. in accounts kept under the *Small Superannuation Accounts Act 1995* in the name of the person; or
 - e. as holders of superannuation annuities (within the meaning of the *Income Tax Assessment Act 1997*).

- 9.20 The exclusion implements the Government's retirement income policy, which prevents holders of interests in superannuation funds from using those interests as security for loans and other obligations not related to retirement income.
- 9.21 Item 12 would also insert subsection 8(1)(jc), which would clarify that the PPS Act would not apply to charges created by section 6 of the *Commonwealth Inscribed Stock Act 1911* or section 5 of the *Loans Redemption and Conversion Act 1921*. These provisions create charges over the Consolidated Revenue Fund which secure payment of Treasury bonds and other Commonwealth debt instruments.

Amendment of section 237

Item 13

- 9.22 See the discussion under item 79.

Amendment of section 10 – definition of description

Items 15 and 76

- 9.23 Subsection 10(b) currently provides that a description which identifies a class of personal property is a description of that class for the purposes of the Act.
- 9.24 This amendment responds to stakeholder concerns that, for example, a description of *fruit* would not be sufficient to describe oranges. This amendment clarifies that a description may identify a class of personal property by identifying a larger class of personal property that includes the class. This would make it clear that a more general collateral description such as *fruit* would be sufficient to describe a more specific class of collateral such as oranges.
- 9.25 Item 76 adds a note to section 151 which explains how this definition of description would work in the context of section 151.

Definition of Financial Product

Item 16

- 9.26 Section 10 currently provides that the term *financial product* has the same meaning as it has in the Corporations Act. This amendment would maintain that reference for the purposes of the definition of *investment instrument*.
- 9.27 However, the term *financial product* is also used in relation to intermediated securities.
- 9.28 This amendment would have the effect that, for the purposes of the definition of *intermediated security* at section 15 of the PPS Act, a *financial product* is any of the following (or an interest in any of them):
- a. shares;
 - b. bonds;

- c. any other financial instrument; or
- d. any other financial asset.

9.29 This definition is based on the definitions used in the Geneva Securities Convention, which is also known as the UNIDROIT Convention on Substantive Rules for Intermediated Securities.

Definition of *grantor*

Item 17

9.30 This item amends the definition of *grantor* by omitting the reference to ownership of personal property as distinct from an *interest* in the property. The reference to ownership is redundant and could cause confusion because an *interest* in the property also includes a full ownership interest. The amendment would also make the definition consistent with the definition of *debtor* at section 2(1) of the *Personal Property Security Act 1993* (Saskatchewan).

Amendment of section 10 - Definition of Intellectual Property

Item 18

9.31 Section 10 currently defines intellectual property by reference to Australian legislation. However, this definition does not allow for intellectual property that arises under similar legislation in other countries to fall within the definition. As a result, the PPS Act applies to intellectual property differently depending on whether it is granted by Australian or foreign legislation.

9.32 This amendment would clarify that a right under a law of a foreign country that corresponds to one mentioned in the definition is also to be defined as intellectual property. This change would mean that the PPS Act is consistent in its application to intellectual property, wherever it originates.

Intermediated Security

Items 19 to 23

9.33 The amendments made by these items are consequential on the amendment to the definition of *intermediated security* proposed by item 34.

Definition of *livestock*

Items 24 and 36

9.34 Item 24 amends the definition of *livestock* to make it clear that *livestock* includes the products of livestock. For example, a reference to *livestock* would also include a reference to wool while still on the sheep's back. This means that *livestock in the PPS Act* would include a security interest in a product of the livestock even if the security interest was not held in the complete animal.

- 9.35 Item 36 inserts a note to section 19 of the PPS Act that is consequential to this amendment.

Amendment of section 10 - Definition of Negotiable Instrument

Item 25

- 9.36 Section 10 currently defines *negotiable instrument* to include a range of instruments, as follows:
- a. a bill of exchange (within the meaning of the *Bills of Exchange Act 1909*); or
 - b. a cheque (within the meaning of the *Cheques Act 1986*); or
 - c. a promissory note (within the meaning of section 89 of the *Bills of Exchange Act 1909*).
- 9.37 This item extends the definition with the effect that dematerialised negotiable instruments (that is, instruments that are evidenced by an electronic record) would fall within the definition. The proposed extended definition of negotiability is consistent with the approach taken by the UNCITRAL Legislative Guide on Secured Transactions.

Definition of *new value*

Item 26

- 9.38 This item amends the definition of *new value* with the qualification *owed to the person providing the value*. The effect of this amendment is that *new value* would not include the refinancing of a loan from an existing lender. *New value* would continue to include any financing provided by a lender to a borrower in order to refinance an existing loan from another lender.

Definition of *registration time*

Item 28

- 9.39 Item 28 amends the definition of *registration time* as a result of the amendment to the transitional provisions at item 123.

Intermediated security

Item 29

- 9.40 The amendment made by this item is a result of the amendment to the definition of *intermediated security* proposed by item 34.

Enforcement provisions - agricultural products

Items 30 and 31

- 9.41 Items 30 and 31 are a result of the amendment to the provisions on enforcement over agricultural products at item 72.

Amendment of section 12

Item 32

- 9.42 Section 12 provides for the definition of security interest. In particular, subsection 12(4) currently provides that an account debtor, in relation to an account or chattel paper, may take a security interest in the account or chattel paper and subsection 12(4A) provides that an ADI may take a security interest in an ADI account that is kept with the ADI.
- 9.43 The amendment proposed by item 32 would establish a general principle for which subsections 12(4) and 12(4A) are specific examples.

Definition of *PPS lease*

Item 33

- 9.44 Section 13 sets out the meaning of *PPS lease*, which includes certain bailments of goods. The current subsection 13(3) provides that section 13 only applies to a bailment if the bailor provides value for the bailment to the bailee.
- 9.45 A bailment is the delivery of tangible personal property to another party who acquires possession of it. A bailment does not transfer ownership rights and the bailor has the right to take possession at any time or in accordance with the terms of the bailment.
- 9.46 This item repeals the requirement that the bailor must provide value for the bailment to the bailee and includes the requirement that the bailee (not the bailor) must provide the value. This change reflects the typical bailment situation as one in which the person who obtains possession of the property (the bailee) provides the value. Under item 25, a bailment would only be a *PPS lease* under section 13 if the bailee provides value but it would not be necessary for the bailee to provide the value to the bailor (the bailee and bailor could agree that the bailee provide value to another person).

Intermediated securities

Item 34

- 9.47 Section 15 currently deals with investment entitlements and a number of related terms. This terminology is, however, different from that used in other parts of the world to describe the same thing. In particular, work undertaken by the Hague

Conference (to develop the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary) and UNIDROIT (to develop the Convention on Substantive Rules regarding Intermediated Securities) relies on terminology such as *intermediated securities* and *intermediary*.

- 9.48 This item amends the PPS Act so that the language used in relation to *intermediated securities* is consistent with that used in other countries and in international law.
- 9.49 A number of consequential changes have been made to the PPS Act as a result of this change. These include items 19-23 and 29 (which add and repeal definitions in Section 10), item 55 (which alters the wording in section 77(3)) as well as the bulk amendments (items 101-121).
- 9.50 This item amends the definition of *intermediary* to ensure that only persons holding an Australian financial services license, an Australian clearing and settlement facility licence or a license issued by a foreign jurisdiction permitting them, in the course of business or other regular activities, to maintain securities on the behalf of themselves and/or others could be an intermediary under the PPS Act. This clarifies and broadens the application of the PPS Act to *intermediated securities* to include foreign licensed intermediaries.

PPS leases

Item 35

- 9.51 The PPS Act provides that a security interest that is a *PPS lease* (subsection 12(3)) may be a bailment (subsection 13(1)). Subsection 19(5) does not currently establish when a grantor has rights in goods that are bailed to the grantor. Item 35 would clarify that a grantor has rights in goods that are bailed to the grantor when the grantor obtains possession of the goods for the purposes of subsection 19(2)(a). This would extend the rule that currently applies to leases, to bailments.

Definition of *livestock*

Item 36

- 9.52 The amendment made by this item is consequential on the amendment to the definition of *livestock* proposed by item 24.

Written security agreements

Item 37

- 9.53 Section 20 of the PPS Act sets out when a security interest is enforceable against a third party in respect of particular collateral. Subsection 20(2)(a) provides that a written security agreement will be enforceable against a third party if it is adopted or accepted by the grantor by an act specified in the writing that is done with the intention of adopting or accepting the writing.

- 9.54 The requirement for the writing to specify exactly what must be done can be an onerous one, especially for small and medium businesses. This item permits a grantor to accept a security agreement by performing an act (or omission) that, while not specified in the writing, reasonably appears to be done with the intention of adopting or accepting the writing. The amendment also makes it clear that whether the person intended to adopt or accept the writing is to be assessed objectively.
- 9.55 The item also recognises that in certain circumstances, an omission could be taken to constitute adoption or acceptance of an agreement.

Requirements for perfection

Item 38

- 9.56 Section 20 of the PPS Act sets out when a security interest is enforceable against third parties. Section 21 sets out when a security interest is perfected. The current requirements for perfection are that a security interest has both attached and that the secured party has control or possession of the collateral, or made a registration in relation to the security interest. However, section 21 currently does not require that the security interest be enforceable against third parties.
- 9.57 Item 38 would add a new requirement that a security interest must be enforceable against third parties before it is perfected. This would provide greater certainty in the grantor's insolvency, because a security agreement would generally need to be evidenced in writing signed or adopted by the grantor to survive the grantor's insolvency.

Control of an ADI account

Items 39 and 48

- 9.58 Subsection 21(2)(c)(i) currently allows any secured party to control an ADI account. Item 39 would have the effect that only an ADI with whom the account is held would be able to perfect a security interest in the ADI account by control. All other secured parties would have to register in order to perfect a security interest in an ADI account. The practical effect of this change is that a secured party that has a security interest in an ADI account would not need to incur the expense of perfecting by control in order to ensure they maintain their first priority as against other secured parties. Rather, the ordinary principle of first to register would apply (subject to the interest of the ADI with whom the ADI account is held).
- 9.59 The ADI with whom the account is held would be able to perfect a security interest in an ADI account by control. The ADI would therefore have the highest priority (because perfection by control would also have a higher priority than perfection by registration). This means that the ADI would not be vulnerable to other secured parties claiming the ADI account, so that the ADI account would be available to the

ADI for prudential regulation purposes. Allowing the ADI to perfect the security interest by control, and obtain the highest priority would also be consistent with the ADI's right of set-off and combination of accounts in relation to the ADI account.

- 9.60 Item 48 (the Guide to Part 2.6 - Priority between security interests) also includes a paragraph that explains the effect if this change.

Amendment of sections 24(5)(b) and (d)

Item 40

- 9.61 The rationale for this change is discussed under item 79.

Amendment of section 26 - control of intermediated securities

Item 41

- 9.62 Under subsection 21(2)(c), security interests over certain classes of property can be perfected by *control*. Section 26 sets out when a secured party has *control* of an intermediated security that is credited to an intermediated securities account. Item 41 would replace section 26 with a new section conferring *control* of an intermediated security on the secured party where there is an effective agreement between various parties or if the intermediated security account is maintained.
- 9.63 This item would allow a secured party to have control of an intermediated security where the secured party is also registered as the holder of the intermediated security. In such a situation, the secured party would not need an agreement with the grantor and the intermediary in order to exercise effective control of the instrument. This approach would be consistent with the treatment of investment instruments in section 27, whereby investment instruments could be *controlled* by the controller registered as the owner, by possession or by agreement. It would also be consistent with the approach to security interests in intermediated securities set out in the Geneva Securities Convention.
- 9.64 The current section 26 provides that for an agreement to be effective, it must be between the secured party, the grantor and the intermediary. However, it is also possible for a secured party to exercise practical control of an intermediated security if there is an agreement between the grantor and the intermediary, or between the grantor and the secured party of which the intermediary has notice. The new section 26 would provide that such agreements will also be effective to give a secured party *control* of an intermediated security for the purposes of the PPS Act.
- 9.65 This item also reflects the change in terminology from *investment entitlements* to *intermediated securities*. This change would be consistent with the amendment to the definitions in section 15 and with the bulk amendments made in items 101-121.
- 9.66 This amendment would ensure that the reference to an intermediary in subsection 26(2)(a)(iii) includes a person prescribed under the subsection 26(3) regulations

where that intermediary is an intermediary under subsection 15(2)(b). Consequently, a subsection 26(2)(a)(iii) notice could be provided to someone other than the subsection 15(2)(b) intermediary where the person is prescribed in accordance with the section 26(3) regulations.

- 9.67 This item would also establish a regulation-making power for prescribing people and classes of people in accordance with subsection 15(2)(b).

Amendment of subsection 32(1)(a)

Item 42

- 9.68 Subsection 32(1)(a) provides that a security interest will continue in collateral if the collateral gives rise to proceeds, unless the secured party authorised a dealing giving rise to proceeds. This currently means that any authorised dealing in collateral, even a short-term lease, would extinguish a security interest. This limits the extent to which a secured party would allow a grantor to deal with the property.
- 9.69 The item would provide that a dealing in collateral which gives rise to proceeds would only extinguish a security interest if the secured party has agreed that the dealing would extinguish the security interest. This change draws a distinction between *a dealing with* and *a disposal of* the collateral.
- 9.70 This amendment would minimise the risk that a secured party would have their security interest extinguished simply because they authorised a grantor to deal with the collateral and would therefore allow grantors more freedom to deal with collateral. A disposal of collateral where there is express or implicit authorisation from the secured party would continue to be an exception to the rule that the security interest continues in the collateral.

Amendment of section 44

Items 43 and 44

- 9.71 Section 44 allows a person to take an item of personal property free of any security interests where that collateral can be, but is not, registered by serial number. Currently, a person will not take this property free of a security interest where a person has actual knowledge that the sale or lease is a breach of the relevant security agreement. This test is a complicated and potentially uncertain one.
- 9.72 Item 43 would modify the test in section 44 to make it consistent with the test in subsection 43(2) for taking free of an unperfected security interest. The amended test would allow a person to take the property free of a security interest unless they were a party to the transaction that created or provided for the security interest. This would minimise the number of different tests in the PPS Act. The narrower exception is also appropriate given the relative ease with which security interests in serial-numbered goods can be registered.
- 9.73 Under the amended test, it would not be necessary to determine the actual knowledge of the buyer or lessee as item 44 would repeal subsection 44(3).

Amendment of section 51

Item 45

- 9.74 Item 45 would clarify that the rule in subsection 51(1) would not apply when the transferee, but not any other party, has actual or constructive knowledge that crediting the interest in the financial product would constitute a breach of the security agreement.

Amendment of subsection 52(1)

Items 46 and 47

- 9.75 Subsection 52(1) determines when a buyer or lessee takes personal property free of a temporarily perfected security interest and it currently exempts security interests perfected by section 322. The amendments made to the transitional provisions have included section 322 within section 321 and a corresponding change has been made to section 321.

Amendment of section 54

Item 48

- 9.76 This item makes an amendment to the Guide to Part 2.6 that is consequential to the amendment discussed at item 39.

Amendment of section 54

Item 49

- 9.77 Section 54 is the Guide to Part 2.6 (Priority between security interests). Section 54 currently only provides a general example of the kinds of priority interests governed by Division 6.
- 9.78 The amendment to the Guide would set out in a clearer fashion what priorities the Division regulates. It would refer to all potential competing priorities and not just by way of example as is currently the case.

Amendment of section 57

Item 50

- 9.79 Section 57 provides a super-priority for security interests that are currently perfected by control. Subsection 33(2) provides for the continuous perfection of proceeds of collateral subject to a security interest for 5 business days after the dealing giving rise to the proceeds. However, the security interest in the proceeds does not currently retain the super-priority conferred on the security interest perfected by control.

- 9.80 This item amends section 57 so that a security interest in proceeds of original collateral that was perfected by control when the collateral gave rise to proceeds, would have priority over any other security interest in the proceeds except a security interest in the proceeds as original collateral perfected by control.

Amendment of sections 62 and 63

Items 51

- 9.81 Sections 62 and 63 set out the rules that regulate the priority of competing purchase money security interests (PMSIs) and the priority of PMSIs against other security interests.
- 9.82 Section 62 of the PPS Act sets out the priority rules applicable to a perfected PMSI as against a perfected security interest in the same collateral. Subsection 62(3)(b) currently provides that a PMSI in personal property other than inventory will have priority if it is perfected by registration before the end of 10 business days after the grantor obtains possession of the goods or, for other property, the day the interest attaches to the property. This item would extend the deadline for registration to 15 days, allowing secured parties more time to register and still maintain priority. This amendment recognises that a secured party will not always know precisely when a grantor has obtained possession of goods, or when their security interest has attached to the property.
- 9.83 Section 63 sets out the priority rules applicable to competing PMSIs. Subsection 63(c) currently provides that a PMSI in collateral that are goods, and not inventory, has priority if the security interest is perfected before the end of 10 business days after the day the grantor, or another person at the request of the grantor, obtains possession of the collateral. This item would extend the deadline for registration to 15 days, allowing secured parties more time to register and still maintain priority. This change is consistent with the amendment to subsection 62(3)(b).
- 9.84 Subsection 63(d) provides that a PMSI in collateral that are not goods, and not inventory, has priority if the security interest is perfected before the end of 10 business days after the day the priority interest attaches to the collateral. This item extends the deadline for registration to 15 days, allowing secured parties more time to register and still maintain priority. This change is consistent with the amendments to subsections 62(3)(b) and 63(c).

Amendment of section 64

Item 52

- 9.85 Section 64 sets out when a non-PMSI in an account as original collateral (the *priority interest*) has priority of over a PMSI in the account as proceeds of inventory. Subsection 64(1)(b) currently provides that priority interests have priority where the secured party holding the priority interest gives notice to each secured party holding a PMSI in the account and the notice is given at least 5 business days before the earlier of the registration day and the day the priority interest attaches to the account.

- 9.86 This item amends subsection 64(1)(b) by substituting *5 business days* with *15 business days*. This amendment would give other secured parties more time to protect their security interest by altering the terms of trade for future inventory finance that would become subordinate to the priority interest.

Amendment of subsection 64(3)

Items 53 and 54

- 9.87 Section 64 deals with the priority competition between an inventory financier and an accounts financier and confers priority in an account on the accounts financier.
- 9.88 The amendment would confer the same priority on the inventory financier, over the new value provided by the accounts financier, as it had in the account as proceeds of inventory. This would compensate the inventory financier for their loss of priority over the security interest in the account.
- 9.89 The amendment would also ensure that the transferee's interest in the new value would not be a security interest unless it is a security interest apart from PPS Act, section 12. It would also ensure that section 64 does not operate to confer priority on the accounts financier over the new value which they provide.
- 9.90 This section would also enable the inventory financier to use subsection 120(1)(a) (enforcement against an account) to enforce its security interest.

Example: A manufacturer supplies inventory to a wholesaler on a purchase money security interest basis and registers this security interest. The wholesaler sells the inventory on terms to a retailer and as a result the inventory financier has a PMSI in the accounts that arise. The wholesaler then sells the accounts for new value to a factor (the accounts financier) who does all that is necessary to have priority in the accounts over the inventory financier. However, the inventory financier would have first priority over the new value that the accounts financier provided.

Priority of interests

Items 55- 56

- 9.91 Section 68 deals with the priority competition that arises when two different grantors grant security interests in the same collateral to different secured parties. This could arise where a grantor sells property to another person, despite the fact that it is subject to a security interest, who then grants a security interest in that property to a secured party of their own. Section 68(2) describes when the buyer's secured party would have priority and subsection 68(2)(c) provides an exception to that rule based on the buyer's (transferee's) knowledge. The section currently suggests that the buyer acquires the security interest which is illogical and does not achieve the intended policy outcome.

- 9.92 This amendment would clarify that the buyer (transferee) must acquire the collateral without actual or constructive knowledge that the acquisition constitutes a breach of the security agreement that provides for the transferor granted interest.
- 9.93 Subsection 68(2)(d) sets out one of the conditions for when a transferee-granted pre-condition has priority. Item 56 would clarify that the qualification of *but only to the extent of the advance or obligation* should qualify the whole subsection 68(2) and not just subsection 68(2)(d).

Amendment of section 71

Item 57

- 9.94 The rationale for this change is discussed under item 79

Amendment of section 72

Item 58

- 9.95 Section 72 sets out when the interest of a holder of a negotiable document of title has priority over a perfected security interest in the same document of title. Subsection 72(b)(ii) provides that a holder who has actual or constructive knowledge of the security interest will not take priority under section 72. This item would amend subsection 72(b)(ii) by replacing *negotiable instrument* with *document of title*. This would rectify the inconsistency in the current section and clarify that section 72 applies to negotiable documents of title.

Amendment of section 77(3)

Item 59 and 60

- 9.96 This item is an amendment that is consequential to the amendment made at item 34.

Amendment of subsection 77(4)

Item 62

- 9.97 Subsection 77(4) deals with the relationship between sections 77, 239 and 240. However, the reference to 240(3) is not consistent with the reference to 239(2) and would be replaced with a reference to sections 240(4) and (5).

Amendment of Heading to Part 2.7 and section 78

Items 63 and 64

- 9.98 See the discussion under item 79.

Amendment of section 83

Item 65

- 9.99 The changes to the Guide to this part are consequential to amendments made by items 66-68.

Amendment of sections 84A-86

Items 66-68

- 9.100 The Bill would clarify the ability of a security interest to be created in crops and livestock.
- 9.101 Item 66 would create section 84A which would provide that a security interest could attach to crops while the crops are still growing. Similarly it would provide that a security interest could attach to the products of livestock before they became proceeds (for example, wool derived from livestock or semen extracted for breeding purposes).
- 9.102 These provisions would clarify that a security interest could be held in the crops and livestock as distinct from the land or animal from which these products are derived. Accordingly a financier could take a security interest in the wool without taking a security interest in the livestock from which it is derived.
- 9.103 Items 67 and 68 would amend sections 85 and 86 respectively to extend the special priority rules relating to crops and livestock contained in those sections to also cover security interests held in the proceeds of crops and livestock.

Amendment of section 108

Item 69

- 9.104 Item 69 makes an amendment to the Guide to Part 4.2 to add that Part 4.2 contains provisions on the rules relating to enforcement of security interests in crops and livestock.

Amendment of subsection 109(5)(b)

Item 70

- 9.105 Section 126 allows a secured party to seize collateral by taking apparent possession. Subsection 115(4) currently allows consumers to contract out of section 126 where the collateral is predominantly used for *personal, domestic or household purposes*. This option to contract out of the provision does not provide sufficient protection for consumers and therefore, items 70, 72 and 75 would amend the PPS Act to make it impossible to take apparent possession of consumer property.
- 9.106 Subsection 109(5) sets out which of the enforcement provisions do not apply in relation to collateral that is used by a grantor *predominantly for personal, domestic*

or household purposes. Item 70 would include a new subsection 109(5)(ba), which would ensure that section 126 would not apply to collateral that is used by a grantor *predominantly for personal, domestic or household purposes.*

- 9.107 Since section 126 would no longer apply to consumer property, subsection 115(4), which allows the parties to contract out of section 126, would be redundant. Item 66 repeals subsection 115(4).
- 9.108 As a result of the amendment made by item 70, section 126 would not apply to consumer property. Item 75 inserts a note that draws attention to this amendment and refers to subsection 109(5)(ba).

Amendment of subsection 115(1)(p)

Item 71

- 9.109 Item 72 would amend section 115 of the PPS Act to provide that the parties to a security agreement in which a security interest was granted in crops or livestock could contract out the rights of seizure and disposal provided in the proposed Division 6 of Part 4.3.

Amendment of section 115(4)

Item 72

- 9.110 This item makes an amendment to the PPS Act that is consequential to that discussed at item 70.

Amendment of section 116

Item 73

- 9.111 Section 116 provides that the enforcement provisions do not apply in relation to property in the hands of a receiver, a receiver and manager, or a controller. The effect of this provision is to disapply the enforcement provisions where the grantor is an individual. It would still be possible for a receiver or a receiver and manager to be appointed to the property of an individual, by order of the Court or in accordance with a security agreement.
- 9.112 This item would amend section 116 by adding subsection 3, which would apply the enforcement provisions where the grantor is an individual. The enforcement provisions would not apply to non-individuals.

Amendment of section 122

Item 74

- 9.113 This amendment would clarify the Guide to Part 4.3 (Seizure and Disposal or Retention of Collateral) by including additional information as to what a secured party must or may do when retaining or disposing of collateral.

Amendment of section 126

Item 75

9.114 See Item 70.

Amendment of subsection 135(4)

Item 76

9.115 Section 135 provides that where a secured party proposes to retain collateral, they must give notice to certain parties. This item would amend section 135 to provide that the notice must (not may) be given in the approved form. The retention of collateral by a secured party can be significant for the grantor and it is appropriate that any notice be set out in the approved form.

9.116 The operation of subsection 135(4) would be tempered by section 25C of the *Acts Interpretation Act 1901*, which provides that where an Act prescribes a form, then, unless the contrary intention appears, strict compliance with the form is not required and substantial compliance is sufficient. Accordingly, substantial compliance with the approved form would be sufficient compliance.

Amendment of section 136

Item 77

9.117 Section 136 sets out the effect of the retention of collateral by a secured party on their obligation, on other secured parties and on other security interests in the collateral. However, it does not presently provide that the obligation owed to the secured party will be extinguished as a result of the retention of the collateral. Further, while it does provide that the secured party takes the collateral free of the security interests of lower ranked secured creditors, it is silent on whether the obligations secured or payments owed to the lower ranked secured parties are extinguished.

9.118 This item would clarify that the obligations secured or payments owed to the lower ranked secured parties are not extinguished even if their security interests in the collateral are ineffective against the retaining secured party. It would also clarify that the debt or other obligation owed to the secured party, who retains the collateral, is extinguished as a result of the retention (even if that debt or obligation is secured against other collateral that is not retained by the secured party).

Amendment of sections 138A-138C

Item 78

9.119 Under the PPS Act, a secured party is able to seize collateral and exercise various rights to recover the outstanding amount due if the debtor is in default under the security agreement. An amendment to the enforcement provisions would ensure

the PPS Act maintains secured parties' rights where the security interest is held in crops or livestock.

- 9.120 The proposed amendments would ensure that a secured party enforcing a security interest in crops, livestock or fish has a right to do what is necessary to recover the collateral, including entering the land where the collateral is located and dealing with the crops or livestock as necessary.
- 9.121 Accordingly, proposed section 138B would provide that a secured party seizing crops could take possession of the crops or cut, gather or harvest the crops. This provision would authorise the secured party to enter the land or water source on which the crops were located or were growing. This power to enter would however be limited by the grantor's rights to enter the land or water source.
- 9.122 The provision would also permit the secured party to dispose of or retain of the crops in accordance with Divisions 2, 3, 4 and 5 of Chapter 4 (Enforcement).
- 9.123 Proposed section 138C would provide that a secured party seizing livestock could take possession of the livestock or its proceeds. It would also allow the secured party to slaughter the livestock or extract the proceeds, such as by shearing the wool on the livestock.

Amendment of section 139

Item 79

- 9.124 Section 139 provides a Guide to the operation of the rules applying after enforcement (Part 4.4). Section 111 provides that all rights, duties and obligations that arise under the enforcement provisions must be exercised or discharged honestly and in a commercially reasonable manner. Item 79 would amend the Guide in section 139 to reinforce that section 111 applies to rights duties and obligations arising under Part 4.4.

Amendment of section 140

Item 80

- 9.125 Section 140 provides for the order in which amounts received from enforcement action are to be distributed. This order of distribution relates to those parties that are owed an obligation secured by an interest in the collateral, not the general order of distribution to all parties generally. This general order of distribution is provided for by other legislation which can operate concurrently with the PPS Act, as provided for by section 254 of the PPS Act.
- 9.126 This item would clarify that, where there is a Commonwealth, State or Territory law that requires the secured party to apply the property towards another obligation before the obligations referred to in subsection 140(2), that other law would have effect. However, this would not be the case where the other law refers to an

obligation that is secured by a security interest in the collateral. This means that the PPS Act would regulate the order of payments in relation to secured obligations but that other legislation would regulate the priority of interests secured by a security interest and other interests.

Amendment of section 141

Item 81

9.127 Section 141 allows a secured party who is entitled to dispose of, or retain, collateral under sections 128 or 134 to take certain steps to reflect the transfer of title resulting from the disposal or retention. The section currently allows the secured party to take any steps that the grantor could take to reflect the transfer of title. This item would amend section 141 to allow the enforcing secured party to take any steps that the person whose title is extinguished could take. This change acknowledges that the grantor may not have title to the collateral, which may instead lie with another secured party (for example, the grantor may hold property subject to a retention of title clause).

Amendment of section 151

Item 82

9.128 See discussion under item 15.

Amendment of subsection 174(2)(c)

Item 83

9.129 Section 174 sets out what may be stated in a search result and the use of a search result as evidence in a court or tribunal. The section does not oblige the Registrar to make available any particular written search result in the appropriate form. Subsection 174(2)(c) provides that the order of certain events mentioned in subsection 174(2)(b) may be stated in relation to two or more registrations. However, it is possible that a number of these events may have occurred in relation to a single registration. This amendment would provide that a search result could state the time any relevant events occurred in relation to one or more, instead of two or more, registrations.

Amendment of subsection 178(3)

Item 84

9.130 Section 178 sets out the process for a person with an interest in collateral described in a registration to give a written amendment demand to the secured party. Subsection 178(3) currently provides that a secured party must not require payment for compliance with an amendment demand in relation to collateral that is consumer property, and is designed to provide protection to consumers. Consumer property is defined in section 10 of the PPS Act as *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.

- 9.131 This item would amend subsection 178(3) by replacing the reference to *consumer property* with a test of whether the grantor uses, or intends to use at the time the security interest attaches, collateral predominantly for personal, domestic or household purposes. The effect would be to give equal protection to consumers who use or intend to occasionally use collateral for business purposes.

Amendment of section 237

Item 85

- 9.132 Section 237 provides that a security agreement may not provide for an Australian law to govern, amongst others, an assignment of an account or chattel paper. However, the definition of security interest in subsection 12(3)(a) refers to a transfer of an account or chattel paper, not an assignment.
- 9.133 This item would substitute *assignment* with *transfer* to ensure consistency. Similar changes would also be made by items 6-9 (subsection 8(1)(f)); item 13 (subsection 8(4)); item 40 (subsection 24(5)(b) and (d)); item 57 (note to subsection 71(1)) and items 63-64 (the headings to Part 2.7 and section 78).

Amendment of subsection 239(3)

Item 86

- 9.134 This amendment would make the conflict of law rule for intellectual property more consistent with the conflict of law rule that applies to other kinds of intangible property. Currently, all issues relating to a security interest in intellectual property or an intellectual property licence are governed by the law of the jurisdiction under which the property or licence is granted.
- 9.135 This amendment would mean that the law governing security interests would generally be the law that applies in the location of the grantor. However, the law of the location of the intellectual property would apply to transfers of intellectual property. This would provide greater certainty for secured parties taking a security interest in all of the grantor's property, and for persons taking a transfer of intellectual property.

Amendment of section 241

Items 87 and 88

- 9.136 Subsections 241(1)-(2) provide that the validity and perfection of an interest in proceeds, other than proceeds that are an account, is governed by the law of the jurisdiction that governed the validity and perfection of the security interest in the collateral that gave rise to the proceeds. Section 239 provides that a transfer of an account is governed by the law of the location of the grantor. As currently drafted, all proceeds that are accounts are within the exclusion, and not merely proceeds that are accounts that arise from the transfer of the collateral.

9.137 This item would clarify that the only accounts (that are proceeds) that should be exempt from the general rule in section 241 are those that **do not** arise from a dealing with the collateral. This amendment would mean that accounts that do arise from a dealing with the collateral would be governed by the same law as originally governed the security interest. It would only be other accounts that would be governed by the rules in section 239. This would facilitate transfers of accounts while protecting the interests of the secured party who should not be subject to a different law merely because an item of collateral has been sold and the proceeds, in the form of an account, become governed by a different law

Example: A secured party has a security interest in an apple. The grantor sells the apple on credit. The receivable owed to the grantor is an account. The security interest extends to the account as proceeds arising from a dealing in the collateral that gave rise to the proceeds. The security interest in the account should be governed by the same law that governs the security interest in the apple.

Amendment of section 242

Items 89-91

9.138 These items divide Part 7.3 into two Divisions and have no substantive effect.

Amendment of section 252A and 252B

Item 104

9.139 Part 7.3 deals with the Constitutional operation of the PPS Act. This item inserts two sections that seek to remove any doubt about the constitutionality of the PPS Act.

9.140 The proposed section 252A would clarify that the PPS Act will not operate in such a way as to give preference to a state (or part of a state) over another state (or part of another state). Section 260 which currently provides for a similar outcome is repealed by item 106.

9.141 The proposed section 252B establishes that a provision of the PPS Act would not apply where it would have the effect of providing for an acquisition of property otherwise than on just terms.

Amendment of subsection 254(2)(h)

Item 105

9.142 Section 254 deals with the concurrent operation of the PPS Act with a number of different Acts. A note following subsection 254(2)(h) provides a list of sections of the PPS Act that expressly allow for certain concurrent operation of State and Territory laws.

- 9.143 This amendment inserts another section into this list to clarify that the order of distribution provided for by section 140 (discussed above at item 80) is another section of the PPS Act that expressly allows for the concurrent operation of State and Territory laws.

Amendment of section 260

Item 106

- 9.144 This item is dealt with at item 104.

Amendment of section 267

Items 107, 108 and 109

- 9.145 Sections 267-269 set out when an unperfected security interest will vest in a grantor. The sections operate in conjunction with other provisions in the CA and the *Bankruptcy Act 1966* (Cth). The Corporations Act provides that certain unregistered charges are void as against the liquidator (section 266-267).
- 9.146 Item 107 amends Note 2 to draw attention to the interaction between section 267 of the PPS Act and sections 266-267 of the Corporations Act.
- 9.147 Item 108 amends Note 2 to draw attention to the interaction between section 267 of the PPS Act and Division 2A of Part 5.7B of the Corporations Act (Vesting of PPSA security interests if not continuously perfected), included by item 179 of Schedule 1. This item would commence at the registration commencement time.
- 9.148 Item 109 brings the note into line with the standard note used for this purpose of the PPS Act.

Amendment of subsection 267(2)

Item 110

- 9.149 Subsection 267(2) provides that a security interest vests in the grantor immediately before an event (such as the winding up of the company or other events such as those listed in subsection 267(1)(a) if the security interest is unperfected at a particular time (as provided for by subsection 267(1)(b)). However, it is possible for a security interest to be created and/or attach after the event referred to in the section. The current effect of the PPS Act is that a security interest that attaches after the event would not vest in accordance with the section. However, a security interest that attaches after the event should also vest in the grantor if it is unperfected by a registration made before the event listed in subsection 267(1).
- 9.150 This amendment would have the effect that an unperfected security interest that attaches to the collateral after the event referred to in subsection 267(1)(a), in accordance with a security agreement made before that event, would vest in the grantor in the same way that security interests that attach before the relevant time.

9.151 Subsection 267A(2) would be included to protect an innocent purchaser of the collateral and would offer them the same protection as is offered purchasers under the vesting rule in subsection 267(3).

Amendment of subsection 268(1)

Item 111

9.152 This item updates a reference in subsection 268(1) as a consequence of the changes made under item 110.

Item 112

9.153 Section 268 provides that certain security interests are unaffected by the vesting rules contained in section 267. Section 238 is a choice of law rule that provides that the perfection, and the effect of perfection or non-perfection, of a security interest in goods is governed by the law of the jurisdiction in which the goods are located at that time. The effect of this amendment is to clarify that the vesting rule is a rule that relates to the effect of non-perfection by expressly providing that the vesting rule does not apply to *a security interest for which perfection, and the effect of perfection or non-perfection, is governed by the law of a foreign jurisdiction*. This means that when goods are located overseas at the vesting time, they would not be subject to the vesting rules in sections 267 and 267A.

Amendment of section 269

Item 113, 114 and 115

9.154 The amendments in items 113 and 114 are consequential on the inclusion of the new section 267A.

9.155 The amendment in item 115 is consequential to the amendment of subsection 267(1)(b) in the PPS (Consequential Amendments) Act to refer to *times* rather than *days* in that subsection.

10. TRANSITIONAL PROVISIONS

General

- 10.1 The Bill would make amendments to the Transitional Provisions in Chapter 9 of the PPS Act.
- 10.2 The PPS Act provides for the transition from current law governing security interests to the PPS Act. The PPS Act would apply to security interests existing before the PPS Act comes into force subject to the transitional provisions.
- 10.3 The *registration commencement time* is a key event in the transitional provisions. It is the time at which the PPS Act and the PPS Register takes practical effect. The PPS Act makes provision for the registration commencement time to be determined by the Minister. If the Minister did not make a determination, the *registration commencement time* would be the start of the first day of the month that is 26 months after the month in which the PPS Act is given Royal Assent (section 306).

Example:

The PSS Act received Royal Assent on 14 December 2009, the migration time would be the start of 1 January 2012 and the registration commencement time would be the start of 1 February 2012. If the Minister determined that the migration time would instead be 1 March 2010, the Minister may also determine an earlier time for the registration commencement time to occur but that time must be after 28 March 2010.

Transitional security agreements

Item 118

- 10.4 A security agreement would be a *transitional security agreement* if the security agreement was in force immediately before the registration commencement time and the agreement continues in force at and after that time

Enforceability of transitional security agreements

Item 119

- 10.5 Item 119 proposes the substitution of a new section 311 making it clear that, for the purposes of the PPS Act, a transitional security interests would be enforceable against third parties if it would have been enforceable before the registration commencement time.

Intellectual property

Item 120

- 10.6 Item 120 would substitute a new section 106 to ensure that it only applies in relation to security interests in intellectual property licences created by security agreements entered into at or after the registration commencement time.

Transitional application of the PPS Act

Item 121

- 10.7 A key outcome of the transitional provisions would be to ensure that the rights held by a party prior to the registration commencement time are not prejudiced by the transition to the PPS scheme.
- 10.8 This preservation of rights would be achieved by the transitional provisions through the attachment rule (proposed section 320), the perfection rule (proposed section 321) and the priority rules of the PPS Act.
- 10.9 The attachment rule provides that a transitional security interest in collateral would be taken to have attached to the collateral immediately before the registration commencement time (proposed section 320).
- 10.10 Similarly, the perfection rule (proposed section 321) would provide that a transitional security interest in collateral would be taken to have been perfected from immediately before the registration commencement time until the earliest of the following times:
- a. the migration of the transitional security interest;
 - b. the preparatory registration of the transitional security interest;
 - c. the amendment of a registration relating to a transitional security interest;
 - d. the perfection of the transitional security interest under the PPS Act, or
 - e. the end of the 24th month after the registration commencement time (proposed subsection 321(2)).
- 10.11 The period between immediately prior to the registration commencement time and the earlier of the events listed in proposed subsection 321(2) is a period of temporary perfection. During this period, two transitional security interests would have the same priority time for the purposes of subsection 55(4) of the PPS Act. They would therefore have the same priority under the priority rules established by the PPS Act and would have the priority among themselves that they had immediately before the registration commencement time, as if the PPS Act had not been enacted (proposed section 322).
- 10.12 If none of the events listed in proposed subsection 321(2) occurs and the 24th month following the registration commencement time expires, the transitional security interest would lose its temporary perfection and become an unperfected security interest. As an unperfected security interest, it would be subordinate to a perfected security interest in the same collateral (subsection 55(3)). If both security interests are unperfected, priority would be determined in accordance with the order of attachment of the security interests (subsection 55(2)).
- 10.13 If both security interests are transitional security interests, they would both be taken to have attached immediately before the registration commencement time

(proposed section 320). Proposed section 322 would then apply so that they would have the priority among themselves that they had immediately before the registration commencement time and as if the PPS Act had not been enacted.

- 10.14 If the other security interest is not a transitional security interest, the transitional security interest would have priority, because it would have an earlier attachment time (see proposed section 320) for the purposes of subsection 55(2) of the PPS Act.

Example:

BankB has a security interest in a car owned by GrantA. This security interest was registered on the NSW Register of Encumbered Vehicles and is migrated across to the PPS Register as a migrated security interest. BankB's security interest would be taken to be perfected from immediately before the registration commencement time.

Example:

GrantA is a fruit packer. On 30 August 2009 FinanceA lends GrantA \$5,000 and takes a security interest in GrantA's packing machine. There is no Register on which FinanceA can register its interest in the machine. On 1 May 2010, the new PPS Register commences. On 14 May 2010, FinanceB lends GrantA \$10,000 and takes a security interest in the same machine. FinanceB registers its interest on the PPS Register on the same day. On 15 July 2010, GrantA becomes insolvent. The priority between FinanceA and FinanceB comes to be determined. FinanceA's interest would be a transitional security interest and temporarily perfected by the Bill, for a period starting immediately before 1 May 2010, up until 31 May 2012. FinanceA's interest in GrantA's machine would therefore have priority over FinanceB's interest, even though FinanceA's interest is unregistered.

Amendment of section 333

Item 122 and 123

- 10.15 These items amend section 333 to provide that if the PPS Registrar does not believe a migrated transitional security interest would have ended at a particular time (proposed subsection 333(4)), the end time for the registration does not need to be included on the PPS Register (proposed subsection 333(3)(a)).

Amendment of section 336

Item 124

- 10.16 Item 124 would substitute a new section 336 on the preparatory registration of transitional security interests.

- 10.17 The migration provisions in the Bill would allow a non-migrated transitional security interest to be registered between the migration time and the registration commencement time (proposed section 336). This type of registration is referred to as a *preparatory registration* in the Bill.
- 10.18 At any stage between the migration time and the registration commencement time a secured party could apply for a preparatory registration (proposed section 336(1)). The Registrar would only be able to accept the application if he/ she were satisfied on reasonable grounds that a transitional security interest would attach to the collateral and that it is operationally practicable for the Registrar to register the financing statement (proposed section 336(2)).
- 10.19 A secured party that registers their security interest during this time would receive the same protection under the PPS Act as a secured party who registers their security interest within the 24 month temporary perfection period. The time of registration of a preparatory registration would be the registration commencement time (proposed section 336(5)).

Amendment of section 336

Item 125

- 10.20 Item 125 would include a new section 337 to determine what constitutes an effective registration of a transitional security interest.
- 10.21 The Registrar would be able to determine that registrations of transitional security interests are effective despite defects that would otherwise render them ineffective under the PPS Act (proposed section 337). This provision is necessary because some transitional registers do not include information that would be required on the PPS Register. In the case of other transitional security interests, the Registrar may decide that secured parties should be given an opportunity to correct certain details of the registration where they have perfected their interest.

Example:

State vehicle registers do not include information about the grantor of an interest. The PPS Act would enable the Registrar to determine that a migrated State vehicle registration, for a vehicle that is commercial property, is not ineffective merely because a search of the PPS Register, by reference only to the individual or corporate details of the grantor in respect of the collateral, is not capable of returning the relevant registration.

- 10.22 A registration on the PPS Register would be ineffective because of a defect if, and only if, there is a seriously misleading defect in the data or there is a specified defect (sections 164-165).
- 10.23 Once the times specified in proposed section 337(4) have lapsed, the registration would become ineffective unless the registration was amended to correct the defect before the relevant time lapses.

Concept of *control* in inventory and accounts

Items 126- 132

- 10.24 Items 126-132 clarify the concept of *control* in relation to inventory and accounts.
- 10.25 Item 128 includes general rules to determine when a secured party has control of personal property. Proposed section 341(1A) would provide three tests for whether a secured party has control of personal property.
- 10.26 The first test would provide that a secured party has *control* of property if they have *control* within the ordinary meaning of *control*. This is intended to be a reference to general law concepts of control.
- 10.27 The second test would provide that a secured party has control of property if they have control within the meaning of Part 2.3 of the PPS Act.
- 10.28 The third test would provide that a secured party would have control of inventory or an account if either of the first or second tests applied or if subsection 341(1), (2), (3) or (4) applied.
- 10.29 Items 126 and 127 would include guidance notes to subsection 340(2) and (5) referring to these general control rules.
- 10.30 Items 129 to 132 would amend section 341, consequential to the general control rules, to clarify that the general control rules apply to determine whether particular personal property is a circulating asset.

Referral provisions

- 10.31 Items 92-103 would provide an additional method for a State to become a *referring State* for the purposes of the PPS Act.
- 10.32 As an alternative to referral in subsection 244(1)(a) of the PPS Act, a State would be able to adopt the PPS Act as amended by this Bill (subsection 244(8)) and refer power to the Commonwealth to make subsequent amendments to the PPS Act.
- 10.33 Existing referrals of power would not be affected by these amendments. In addition, the existing power for States to refer the PPS Act after its enactment (in addition to the pre-enactment referrals that have been made) would be retained.
- 10.34 These amendments reflect an approach recently agreed by the Commonwealth and States for the National Consumer Credit Protection legislation.

Items 133-153

- 10.35 These items replace references to *investment entitlements* with references to *intermediated securities*

SCHEDULE 3

11. AMENDMENT OF OTHER ACTS

Amendment of *Designs Act 2003*

Item 1

- 11.1 This item would amend the definition of a *PPS Act security interest* in section 5 of the Designs Act. A *PPS Act security interest* would be a security interest to which the PPS Act applies other than a transitional security interest within the meaning of the PPS Act.
- 11.2 This amendment would replace the definition of *PPS security interest* inserted by Item 1 of Schedule 2 of the *Personal Property Securities (Consequential Amendments) Act 2009* (PPS (Consequential Amendments) Act) and commence immediately after that definition takes effect.

Amendment of *Fisheries Management Act 1991*

Item 2

- 11.3 This item would amend the definition of a *PPS Act security interest* in section 4(1) of the Fisheries Management Act. A *PPSA security interest* would be a security interest to which the PPS Act applies other than a transitional security interest within the meaning of the PPS Act.
- 11.4 This amendment would replace the definition of *PPS security interest* inserted by Item 1 of Schedule 1 of the PPS (Consequential Amendments) Act) and commences immediately after that definition takes effect.

Amendment of *Navigation Act 1912*

Item 5

- 11.5 This item would amend the definition of a *PPSA security interest* in section 6(1) of the Navigation Act. A *PPSA security interest* would be a security interest to which the PPS Act applies other than a transitional security interest within the meaning of the Act.
- 11.6 This amendment would replace the definition of *PPS security interest* inserted by Item 6 of Schedule 3 of the PPS (Consequential Amendments) Act and commence immediately after that definition takes effect.

Amendment of *Patents Act 1990*

Item 16

- 11.7 This item would amend the definition of a *PPSA security interest*, listed as an expression in section 3 and defined in the Dictionary in Schedule 1 of the Patents

Act. A PPSA security interest would be a security interest to which the PPS Act applies other than a transitional security interest within the meaning of that Act.

- 11.8 This amendment would replace the definition of *PPSA security interest* inserted by Item 14 of Schedule 2 of the PPS (Consequential Amendments) Act and this would commence immediately after that definition takes effect.

Amendment of PPS Act (Consequential Amendments) Act 2009

Item 17

- 11.9 This item would repeal item 17 of the PPS (Consequential Amendments) Act because it would be redundant as a result of the amendment to the definition of *PPS Act security interest* in the Fisheries Management Act in item 2. This item would commence immediately after the commencement of item 17.

Amendment of Proceeds of Crime Act 2002

Items 18 – 28

- 11.10 This item would make various amendments to the Proceeds of Crime Act to ensure consistency in its operation with the PPS Act.
- 11.11 Sections 142, 169 302, 302C and 307 of the Proceeds of Crime Act provide that amounts owing to the Commonwealth related to action to recover proceeds of crime are secured by a charge.
- 11.12 The amendments would apply subsection 73(2) of the PPS Act to these charges. This would ensure that the priority between a charge created under the Proceeds of Crime Act and a security interest in the same property is determined in accordance with the Proceeds of Crime Act after the registration commencement time. The amendments clarify that PPSA, subsection 73(2) does not apply to Proceeds of Crime Act charges over real property.
- 11.13 Sections 133, 143 and 170 of the Proceeds of Crime Act provide for the Commonwealth Director of Public Prosecutions to register charges created under the Proceeds of Crime Act. The amendments would ensure that the Director's power to register is properly aligned with the PPS Act which provides for regulations to be made to enable charges created under the Proceeds of Crime Act (among other things) to be registered on the PPS Register (section 148(c)). Related amendments to section 338 of the Proceeds of Crime Act would ensure that the definition of *registration authority* is broad enough to include the Registrar of Personal Property Securities.

Amendment of Torres Strait Fisheries Act 1984

Item 29

- 11.14 This item would amend the definition of a *PPSA security interest* in section 3(1) of the Torres Strait Fisheries Act. A *PPSA security interest* would be a security

interest to which the PPS Act applies other than a transitional security interest within the meaning of the Act.

- 11.15 This amendment would replace the definition of *PPSA security interest* inserted by Item 19 of Schedule 1 of the PPS (Consequential Amendments) Act and commence immediately after that definition takes effect.

Amendment of *Trade Marks Act 1995*

Item 30

- 11.16 This item would amend the definition of a *PPSA security interest* in section 6 of the Trade Marks Act. A *PPSA security interest* would be a security interest to which the PPS Act applies other than a transitional security interest within the meaning of the Act.
- 11.17 This amendment would replace the definition of *PPS security interest* inserted by Item 18 of Schedule 2 of the PPS (Consequential Amendments) Act and commence immediately after that definition takes effect.

Amendment of *Mutual Assistance in Criminal Matters Act 1987*

Items 3 & 4

- 11.18 These items make amendments to the Mutual Assistance in Criminal Matters Act to clarify how it operates in relation to the PPS Act.
- 11.19 Section 35J of the Mutual Assistance in Criminal Matters Act provides that amounts owing to the Commonwealth by virtue of certain foreign actions to recover proceeds of crime are secured by a charge.
- 11.20 Item 3 would apply subsection 73(2) of the PPS Act to charges created by section 35J. This would ensure that the priority between a charge created under section 35J and a security interest in the same property is determined in accordance with the Mutual Assistance in Criminal Matters Act after the PPS Act registration commencement time. The amendments are clarify that subsection 73(2) would not apply to charges over real property.
- 11.21 Section 35L of the Mutual Assistance in Criminal Matters Act provides for the Commonwealth Director of Public Prosecutions to register charges created under section 35J. Item 4 would amend section 35L to ensure that it is aligned with the PPS Act regulation-making power to include these charges on the PPS Register (subsection 148(c) of the PPS Act).

Amendment of *Offshore Petroleum and Greenhouse Gas Storage Act 2006*

Item 6

- 11.22 The OPGGS Act makes reference to *charges* and *debentures* under Chapter 2K of the Corporations Act. The Bill would repeal Chapter 2K and therefore this item

would delete the definition of *charge* as it is defined by reference to Chapter 2K of the Corporations Act.

Item 7

- 11.23 This item would delete the definition of *debenture* which is defined by reference to Chapter 2K of the Corporations Act. In future, *debenture*, would have its ordinary meaning. The effect this might have on the registration of dealings would be dealt with by a transitional provision (item 15) clarifying that the new definition would only apply to dealings that occur after the commencement of the amendment, that is after the registration commencement time.

Item 15

- 11.24 Because sections 468 and 520 (which refer to dealings which form part of the issue of a series of debentures) would be retained but *debenture* would be undefined, *debenture* in these provisions would have its ordinary meaning. This item would clarify that the new definition of *debenture* will only occur at the registration commencement time (the amendments to the Corporations Act will also occur at this time).

Item 8, 11 and 14

- 11.25 These items would repeal subsections 489(5)-(6); 499(5)-(6); 540(5) and 549(5) which specify that the registration of dealings which create charges require the documents specified under section 263 of the Corporations Act. The lodgement of applications will now be governed by the OPGGS Regulations.

Item 10 and 13

- 11.26 This item would repeal subsections 490(2)(d) and 500(2)(d), which require that the registration of charges and provisional charges in respect of referable titles, are to be made to the responsible Commonwealth Minister.
- 11.27 These amendments would only provide consequential amendments to the repeal of Chapter 2K in Schedule 1 and would not affect the existing requirements in the OPGGS Act for the validity of dealings.