

Schedule 3—Dealings in collateral

Personal Property Securities Act 2009

Item 1 – Section 10 (definition of *accession*)

1. Item 1 repeals and substitutes the definition of ‘accession’ in section 10 of the *Personal Property Securities Act 2009* (the PPS Act). Goods are an accession to other goods if they are installed in, or affixed to, the other goods unless both lots of goods are required or permitted by the Personal Property Security Regulations 2023 (the Regulations) to be described by serial number, or if they can be categorised as processed or commingled goods instead.
2. The definition is not intended to, nor does it, change the scope of this section. It is intended to ensure that there is no overlap between the application of special rules for either accessions, processed goods or commingled goods.
3. The note to the definition directs the reader to new section 99 for processed or commingled goods.

Item 2 – Section 10

4. Item 2 repeals the definitions of ‘account debtor’ and ‘advance’ in section 10 of the PPS Act.

Definition of account debtor

5. The definition of account debtor will be repealed from section 10.
6. The definition is not required because the meaning of the term is clear in the context of the PPS Act.

Definition of advance

7. The PPS Act refers in a number of places to ‘advances’ being secured by a security agreement. It is more correct, however, to say that a security agreement secures the ‘repayment’ of an advance, not the provision of the advance. The term ‘advance’ does not fully capture all the types of payment or other obligations that could be secured by a security agreement.
8. References to ‘advance’ will be changed throughout the PPS Act to ‘payment’ or ‘other obligations’ or both, as appropriate. The definition of ‘advance’ is therefore no longer necessary, and can be deleted.

Item 3 – Section 10 (definition of *commingled*)

9. Item 3 repeals and substitutes the definition of ‘commingled’ in section 10 of the PPS Act with a signpost to new section 99.
10. The definition of ‘commingled’ is relocated to new section 99 which provides a more comprehensive definition of the term to provide further clarity. See Item 86 of this Schedule for information regarding the definition of commingled.

Item 4 – Section 10 (definition of *constructive knowledge*)

11. Item 4 repeals the definition of ‘constructive knowledge’ in section 10 of the PPS Act. This will be amended to refer to ‘knowledge’ as a whole as defined by the definition of knowledge in Item 5 of this Schedule.
12. The amendment means that only a single ‘knowledge’ test will be used throughout the PPS Act. The definition of knowledge will capture both ‘constructive knowledge’ and ‘actual knowledge’.

Item 5 – Section 10

13. Item 5 inserts the definitions of ‘dealing’, ‘disposal’ and ‘knowledge’ into the PPS Act.

Definition of dealing

14. The term ‘dealing’ is used to provide more consistent terminology throughout the PPS Act. Currently, the PPS Act uses a number of different terms when describing a dealing in collateral. While the majority of provisions in the PPS Act refer to a ‘transfer’, various other sections also use the terms ‘dealing’, ‘disposal’ and ‘transfer’ of collateral interchangeably and it may be unclear how these terms relate to one another.
15. The definition for ‘dealing’ is intended to be a broad term capturing any activity that occurs with collateral. The definition is not exhaustive and each use of the term ‘dealing’ throughout the PPS Act must be read in the context of its own provision.

Definition of disposal

16. The term ‘disposal’ is used in the context of the PPS Act’s enforcement provisions. The definition clarifies that disposal of collateral is not confined to sale of the property but also includes disposal through lease or licence.

Definition of ‘knowledge’

17. Item 5 inserts a definition for ‘knowledge’ in section 10 of the PPS Act.
18. The definition of ‘knowledge’ now addresses both actual and constructive knowledge and applies to all of the taking free rules and other parts of the PPS Act (for example the definition of commercial consignment).
19. The amendment is intended to reduce the complexity of, and provide greater consistency to, the PPS Act.

Item 6 – Section 10 (definition of *motor vehicle*)

20. Item 6 repeals the definition of motor vehicle. This should be read in conjunction with Item 8 of this Schedule which provides a definition for ‘vehicle’ and ‘VIN’ which replace the current definition of motor vehicle.
21. The current definition of motor vehicle in section 1.7 of the Personal Property Securities Regulations 2010 (the PPS Regulations) is overly complex, particularly when determining which types of collateral are registered under the ‘motor vehicle’ or the ‘Other Goods’ collateral classes.
22. Chassis and manufacturer’s numbers (which are referenced in the definition of motor vehicle) are not unique, and therefore may cause confusion on the PPS Register.

23. Repealing the definition of ‘motor vehicle’ and using the definition for ‘vehicle’ is more intuitive because it allows the definition to capture goods with a VIN that do not have a motor (see Item 8 below).
24. As a result of this change consequential changes are made throughout the PPS Act to replacing the term ‘motor vehicle’ with the term ‘vehicle’ (see Item 99 of this Schedule).

Item 7 – Section 10 (definition of *negotiable instrument*)

25. Item 7 repeals the definition of ‘negotiable instrument’ in section 10 of the PPS Act and substitutes it with a definition which aligns with its general law meaning.
26. The current definition of ‘negotiable instrument’ in section 10 is broader than the general law definition because it includes ‘writing that evidences a right to payment of currency if the writing is transferred by delivery with any necessary endorsement or assignment’ and ‘letters of credit’.
27. The definition at Item 7 also provides that a negotiable instrument does not include (i) the creation or transfer of a right to payment in connection with interests in land, if the writing evidencing the creation or transfer does not specifically identify that land, or (ii) a document of title, or (iii) an intermediated security. This is consistent with the current definition.
28. The PPS Act will still be able to apply to letters of credit and the other types of personal property that will no longer be captured by the definition. However, they will no longer be subject to the specific rules that apply to negotiable instruments. This is aimed to reduce the PPS Act’s complexity and align terms with their general law meaning.

Item 8 – Section 10

Definition of non-purchase money security interest

29. Item 8 inserts a definition for a ‘non-purchase money security interest’ into section 10. This definition is necessary because the PPS Act differentiates between purchase money security interests and non-purchase money security interests in certain circumstances (for example in sections 62 and 63, as substituted by Item 62 of this Schedule).
30. Item 8 also inserts a note directing the reader to section 14 of the PPS Act for a definition of purchase money security interest.

Definition of priority time

31. Item 8 inserts a signpost in section 10 to the definition of priority time under section 55A of the PPS Act (see Item 58 of this Schedule).

Definition of processed

32. Item 8 inserts a signpost in section 10 to the definition of processed under section 99 of the PPS Act.

Definition of recovered goods security interest

33. Item 8 inserts a signpost in section 10 to the definition of recovered goods under section 38 of the PPS Act.

Definition of vehicle

34. Item 8 inserts a definition for ‘vehicle’ in section 10. This definition is intended to replace the current definition of ‘motor vehicle’ in section 10 (which will be repealed by Item 6 of this Schedule). Item 8 provides that a ‘vehicle’ is a good that has a Vehicle Identification Number (VIN). A note directs readers to the definition of VIN.
35. The current definition of motor vehicle in section 1.7 of the PPS Regulations is overly complex, particularly when determining which types of collateral are registered under the current collateral class of ‘motor vehicle’ or the ‘Other Goods’ collateral class. Chassis and manufacturer’s numbers (which are referenced in the definition of motor vehicle) are not unique, and therefore may cause confusion on the PPS Register.
36. The definition for ‘vehicle’ is more intuitive because it allows the definition to capture goods with a VIN that do not have a motor (for example a trailer).
37. As a result of this change consequential changes are made throughout the PPS Act by replacing the term ‘motor vehicle’ with the term ‘vehicle’ (see Item 99 of this Schedule).

Definition of VIN

38. Item 8 inserts definition of VIN (Vehicle Identification Number) into section 10. This definition should be read with the definition of Vehicle.
39. The definition provides that a VIN is the identification number allocated to a road vehicle within the meaning of the *Road Vehicle Standards Act 2018*, in accordance with the national road vehicle standards under that Act.

Item 9 – After section 10

Section 10A – References to secured parties, grantors, debtors etc.

40. Item 9 inserts new section 10A clarifying that a reference to a person in the PPS Act as a secured party, grantor, debtor or any other description of a person is taken to only be a reference to the person in that capacity. This definition clarifies that a reference to a person in a particular capacity in the PPS Act does not encompass a reference to that person when not in that capacity.
41. For example, in the case of a grantor, current sections 62 and 63 do not clearly explain how the registration timeframes are to be determined if the grantor has possession of the collateral in some other capacity before the goods become subject to a PMSI. This could happen, for example, if a farmer takes possession of some machinery for testing purposes before then agreeing to buy it (and finance it under a secured loan or lease). The definition inserted by Item 9 will allow the timeframe to be determined by reference to the time at which the grantor first possesses the goods in its capacity as grantor. While it may have taken possession before then, it would have done so in a different capacity and should not count for the purposes of determining timeframes.

Item 10 – Subsections 14(1), (2) and (2A)

42. Item 10 repeals subsections 14(1), (2) and (2A) and amends the definition of a purchase money security interest (PMSI).

PPS Lease and commercial consignment

43. Currently subsection 14(1) defines what constitutes a PMSI. The definition does not clearly cover a lease that is an in-substance security interest but not a PPS lease, or a consignment that is an in-substance security interest but not a commercial consignment.

Item 10 inserts a substituted definition which clarifies that a PMSI captures all leases or consignments that give rise to a security interest, irrespective of whether they are a PPS lease or a commercial consignment. This amendment ensures that subsection 14(1) captures all leases or consignments that give rise to a security interest, whether or not they are a PPS lease or a commercial consignment.

Sale and leaseback transactions

44. Item 10 inserts new subsection 14(1A) into the PPS Act. New subsection 14(1A) will allow for a PMSI to arise in a sale and lease back arrangement provided that the PMSI secured party pays the purchase price for the collateral directly to the supplier.
45. Paragraph 14(2)(a) currently provides that a PMSI does not include an interest acquired under a sale and lease back transaction. It excludes sale and lease back arrangements from being a PMSI because no new asset is being added to the grantor's asset pool under a sale and lease back arrangement. Rather, an existing asset is being taken out of the pool and then returned to it.
46. In some sale and leaseback transactions, however, a secured party will be prepared to finance new collateral but will require the grantor to purchase the collateral in the first instance and then sell it to the secured party. The secured party then buys the collateral from the grantor and leases it back to the grantor. There may also be reasonable commercial reasons why a grantor would need to acquire an asset before passing the title to the PMSI financier. For example, in circumstances where the grantor imports the asset.
47. If the secured party pays the purchase price for the collateral directly to the supplier, allowing the transaction to qualify as a PMSI will not disadvantage existing secured parties. For this reason, the insertion of subsection 14(1A) allows a sale and lease back transaction to be a PMSI if the purchase price for the collateral never passes through the hands of the grantor.
48. This should be read in conjunction with new subsections 14(5) and 14(7) (Items 11 and 12 of this Schedule).

Exceptions

49. Item 10 repeals and substitutes subsection 14(2) to provide that security interests in investment instruments, intermediated securities, monetary obligations or negotiable instruments cannot be PMSIs.
50. New subsection 14(2) does not replicate current exceptions to PMSIs contained within paragraph 14(2)(c) and subsection 14(2A) which exclude security interests in collateral intended to be used predominantly for personal, domestic or household purposes from being classed a PMSI unless it is described by serial number.
51. New subsection 14(2) applies to all collateral, regardless its intended use. This recognises that the 'new value' policy rationale underpinning PMSIs (which allows a financier to take a security interest in the collateral they help finance) should apply to all collateral, regardless of its intended use.

Item 11 – Subsection 14(5)

52. Item 11 repeals and substitutes subsection 14(5) of the PPS Act which provides that a renewed PMSI does not lose its status as a PMSI as a result of refinancing, consolidation or restructure.
53. New subsection 14(5) clarifies that a security interest that replaces a PMSI is also capable of being a PMSI. This provides a type of ‘rollover’ protection even where a security interest changes. The amendment clarifies the operation of the provision and ensures that a PMSI holder does not need to use administratively inefficient methods, such as transferring a secured loan to another party, to retain the PMSI status. The amendment does not adversely affect other secured parties because it simply replaces one PMSI with another.
54. Item 11 should be read in conjunction with Item 58 of this Schedule which provides timing requirements for when the grantor obtains possession for the purposes of a replacement PMSI.

Item 12 – At the end of Subsection 14(7)

55. Item 12 adds paragraph 14(7)(c) into the PPS Act.
56. New paragraph 14(7)(c) is added to clarify that subsection 14(7) also covers obligations of a debtor which are incurred as a result of refinancing, consolidation, renewal or restructure of an obligation mentioned in paragraph 14(7)(a) or (b), regardless of whether the secured party remains the same.

Item 13 – After subsection 14(7)

57. Item 13 inserts subsections 14(7A) and (7B) into the PPS Act.
58. The subsections clarify that a PMSI held in items of inventory can be cross collateralised such that the PMSI holder does not need to demonstrate which of the individual items of inventory remains unpaid (unless that collateral must be described by serial number).
59. The definition of PMSI in section 14 provides that a security interest in collateral will only be a PMSI to the extent that it secures (broadly) the payment of the purchase price for the collateral.
60. The effect of this definition is that in a competition between security interests a PMSI holder must be able to demonstrate how much of the security obligation remains unpaid and which of the goods the security interest is attached to. This can be difficult if the goods supplied by a PMSI holder are not separately identifiable (for example where two or more deliveries are of identical products).
61. Subsection 14(7A) clarifies that a secured party is able to claim PMSI status over all the goods they have supplied that are still held by the buyer (that is, where a secured party holds a PMSI or has held a PMSI) without needing to demonstrate which of the particular deliveries remain unpaid.
62. Subsection 14(7B) provides that subsection 14(7A) will not apply to items of inventory that are required by the Regulations to be described by serial number (as those items will, necessarily, be separately identifiable).

Item 14 – At the end of section 14

63. Item 14 inserts a note at the end of section 14 which signposts to readers that further rules relating to the priority of PMSIs can be found in Division 3 of Part 2.6 of the PPS Act.

Item 15 – Section 16

64. Item 15 amends section 16.
65. The amendment removes the words ‘and assigning’ in the reference to Part 2.7 in the guide to Chapter 2–General rules relating to security interests, because the PPS Act no longer refers to assignments.
66. The PPS Act no longer uses the term ‘assignment’ because an assignment is a subset of a transfer and has a similar meaning. The amendment is not intended to, nor does it, change the scope of this section and provides for more consistent terminology throughout the PPS Act.

Item 16 – Section 30

67. Item 16 amends the Guide to Part 2.4 in section 30 to clarify that a security interest in collateral which is dealt with remains attached to the collateral and also attaches to any proceeds arising from the dealing.

Item 17 – Paragraph 31(3)(a)

68. Item 17 repeals and substitutes paragraph 31(3)(a).
69. The substituted paragraph 31(3)(a) refers to a grantor’s ‘rights in’ rather than an ‘interest in’ collateral. In the context of the grant of a security interest, the PPS Act uses the expression ‘interest in’ collateral to refer to the interest of the secured party under the security interest, not the interest in the collateral that the grantor needs to have in order to be able to grant the security interest in the first place.
70. Use of the word ‘rights’ aligns the section with the terminology used when describing attachment in section 19 (as amended by Schedule 1).

Power to transfer rights

71. Item 17 also repeals subparagraph 31(3)(a)(ii) which provides that personal property is proceeds only if a grantor has the power to transfer rights in proceeds to the secured party. The phrase ‘power to transfer rights’ is not necessary as a grantor with rights in proceeds will also have the power to transfer rights in the proceeds. As the words perform no function, the deletion will improve the usability of the PPS Act.

Item 18 – After Subsection 31(3)

72. Item 18 inserts subsection 31(3A).
73. This subsection clarifies that the grantor referred to in substituted paragraph 31(3)(a) is the original grantor of the security interest, not a person who subsequently becomes the grantor as a result of the collateral being transferred to it (as described by paragraph (e) of the definition of grantor).

Example:

74. The following example illustrates the need for subsection 31(3A):

A secured party has a security interest in a grantor’s vehicle. The grantor sells the vehicle to a buyer without the secured party’s consent. The buyer cannot rely on the taking free rules, so the security interest remains attached to the vehicle. The buyer later exchanges the vehicle for a caravan.

75. The effect of substituted section 31(3)(a) can be understood in two ways. First, it can be understood to mean that the security interest does not attach to the caravan, even though the caravan derives from a dealing in the vehicle, because the grantor does not have an interest in the caravan. Read in this way, the section is designed to prevent an increase of proceeds claims, and limit the extent to which third parties could be prejudiced by the fact it will not be apparent from the PPS Register that a secured party holds a security interest in the caravan.
76. The provision can however be viewed in a different way. It is clear from other provisions in the PPS Act that a transfer of collateral subject to a security interest could result in the transferee becoming the grantor of that security interest for the purposes of the PPS Act. In the example the buyer of the vehicle becomes the grantor of the security interest in the vehicle in place of the original grantor. Seen that way, the security interest would attach to the caravan, as proceeds of the vehicle, because the buyer, who is now the grantor, has an interest in it the caravan.
77. Clarifying that substituted paragraph 31(3)(a) does not apply to grantors through transfer removes a risk of undiscoverable security interests. In the example, this is the risk that the buyer might sell the caravan to another person, who would be unable to discover the existence of the security interest, and so unwittingly might not acquire clear title.

Item 19 – Subsection 32(1)

78. Item 19 repeals and substitutes subsection 32(1) of the PPS Act which provides rules for the continuation of attachment of security interests in collateral and proceeds.

Remains attached to

79. The current subsection 32(1) is uncertain in its language because it states ‘the security interest continues in the collateral’ while the rest of the PPS Act states that a security interest is ‘attached to’ the collateral. There is no clear reason for the difference in terminology and, as such substituted paragraph 32(1)(a) provides that the ‘security interest remains attached to’, rather than continues in the collateral. This amendment is made to clarify the paragraph and align the language throughout the PPS Act.

Attachment of security interest where dealing does not give rise to proceeds

80. Subsection 32(1) currently only applies where the dealing of collateral gives rise to proceeds. There may, however, be situations where the dealing does not give rise to proceeds, for example where a grantor disposes of the collateral by gifting the collateral, or in satisfaction of a pre-existing debt. A security interest should be able to remain attached to the collateral even if it is dealt with in a way that does not give rise to proceeds, despite the fact that section 32 is silent on the point.
81. Substituted subsection 32(1) will be amended to address this. The section is split into two distinct parts which can separately apply:
- paragraph 32(1)(a), which addresses the consequences of a dealing with collateral (whether or not the dealing gives rise to proceeds), and
 - paragraph 32(1)(b), which deals with a situation where collateral gives rise to proceeds (whether or not as the result of a dealing).

Agreement that the security interest remains attached to collateral after disposal

82. Current subparagraph 32(1)(a)(i) suggests that a security interest in collateral will not ‘continue’ if the collateral is disposed of where the secured party has expressly or

impliedly authorised the disposal. This could lead to an unintended interpretation that a secured party is unable to provide consent to a disposal and have its security interest remain attached to the collateral after disposal.

83. Substituted paragraph 32(1)(a) states that a security interest will remain attached unless the secured party consents to the collateral being taken free of the security interest. This means that the default position is for a security interest to remain attached to the collateral, unless the secured party expressly or impliedly agrees it can be taken free by a third party.

Expressly or impliedly

84. Subsection 32(1) of the PPS Act currently refers to the secured party ‘expressly or impliedly’ agreeing with a party to a dealing which could take the collateral free of the security interests. The term ‘expressly or impliedly’ has been removed from the substituted subsection for consistency with existing references in the PPS Act to agreement or authority which are not qualified as being ‘express or implied’. This is not intended to change the meaning of the subsection nor is it intended to be any different with existing references in the PPS Act to agreement or authority that is not qualified as being ‘express or implied’.

Disposal

85. The amendment to the subsection also replaces the term ‘disposal’ with the term ‘dealing’ in line with Item 5 of this Schedule.

Item 20 – Subsection 32(2)

86. Item 20 amends subsection 32(2) of the PPS Act by:

- limiting the application of the rule in relation to proceeds, to proceeds that arise as a result of a transfer of the collateral (rather than proceeds that arise in other ways), and
- removing the exception to investment instruments and intermediated securities.

Enforcing against proceeds that arise as a result of a transfer of collateral

87. Current subsection 32(2) is intended to prevent a secured party from gaining a windfall benefit by pursuing both the collateral and the proceeds. The amount that the secured party can recover is capped at the market value of the collateral immediately before the collateral gave rise to the proceeds.
88. The subsection reflects that this will only apply where a secured party enforces its interest against both the collateral and proceeds that arise as a result of the transfer of the collateral. It will not apply where a secured party enforces against both collateral and proceeds generated by the collateral in another way. For example, if a secured party has a security interest over shares in a company, it can enforce its security interest against both the shares and any dividends paid on those shares, without being subject to the restriction in this section. Of course, the secured party can only recover its secured amount once.

Removal of exception of investment instruments and intermediated securities

89. Current subsection 32(1) provides an exception for investment instruments and intermediated securities.

90. The removal of the exception means a secured party will be able to enforce against these types of collateral and their proceeds as it will with other collateral.

Item 21– Subsection 32(3)

91. Item 21 repeals subsection 32(3) of the PPS Act.

92. Subsection 32(3) states that subsection 32(2) does not apply where the transferee has actual or constructive knowledge that the transfer was in breach of the secured party's security agreement. This rule adds unnecessary complexity to section 32 and is therefore repealed.

Item 22 – Subsection 32(5)

93. Item 22 repeals and substitutes subsection 32(5) which provides for the priority of proceeds.

94. The amendment provides that the priority time for proceeds of collateral is the same as the priority time for the original collateral. This Item should be read in conjunction with the definition of priority time inserted at section 55A (Item 58 of this Schedule).

Item 23– Subsection 34(1) (heading)

95. Item 23 repeals and substitutes the heading to subsection 34(1) to align the heading with amendments made to subsection 34(1) by Item 24 of this Schedule.

Item 24 – Subsection 34(1)

96. Item 24 amends subsection 34(1) by replacing the phrase 'the security interest' with 'that security interest'.

97. The amendment clarifies that section 34 is applicable to the security interest in relation to the original collateral, not in relation to the proceeds of the collateral.

Item 25 – Paragraph 34(1)(b)

98. Item 25 amends paragraph 34(1)(b) by inserting the words 'in the collateral' after 'security interest'.

99. The amendment clarifies that when collateral is transferred, the security interest is deemed to be temporarily perfected only over the original collateral only and not over the proceeds.

Item 26 – Subparagraph 34(1)(c)(ii)

100. Item 26 removes the words 'actual or constructive' because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both 'actual and constructive' knowledge.

Item 27 – Sections 37 and 38

101. Item 27 amends sections 37 and 38.

102. The amendments clarify that the sections only apply in circumstances where the security interest ceases to be attached to the goods as a result of being taken free.

Section 37 – Recovered goods – reattachment of security interest

103. Current section 37 provides for the reattachment of a prior security interest where the goods that were leased or sold (and where the transferee takes free from the existing security interest) are returned to the grantor or debtor. The section assumes that any sale or lease will allow the buyer or lessee to take free of a security interest in order for the security interest to ‘detach’. While that will be the case for a sale, it will not necessarily be the case for a lease. Rather, the security interest may simply become subject to the lease, and the secured party will only be able to enforce its security interest in a manner that does not disturb the lessee’s right under the lease.
104. Substituted section 37 clarifies that the section will only apply where a sale or lease of the goods causes the security interest to cease be attached to the goods and those goods are later returned to or repossessed by the grantor.
105. Under the PPS Act, a lease of property that gives rise to a security interest in the property should be treated as a transfer of the property, on the basis that the lease gives the lessee/grantor rights in the property as if they were the owner. It is therefore appropriate that the taking free rule causes the security interest to detach (in the same way as it would for a sale), so that it could then re-attach under section 37 in the circumstances contemplated by the section.
106. Substituted section 37 is also redrafted to remove reference to ‘chattel paper’ which is no longer referred to in the PPS Act (See Item 27 of Schedule 1).

Section 38 – Recovered goods – third party finance

107. Substituted section 38 is redrafted to remove reference to ‘chattel paper’ which is no longer referred to in the PPS Act (See Item 27 of Schedule 1), and to allow it to apply appropriately for all security interests in an account of the types described in the section, not just security interests by way of transfer.
108. The section also amends the period of temporary perfection provided under subsection 38(4) from 5 business days to 10 business days.

Item 28 – Section 41

Section 41 – Guide to this Part

109. Item 28 repeals and substitutes the Guide to Part 2.5 of the PPS Act.
110. The substituted Guide is updated to include additions to the ‘taking free rules’ in Part 2.5, including taking free rules for debts, negotiable instruments and negotiable documents of title.
111. The PPS Act currently characterises the taking free rules for the above three types of collateral as ‘priority rules’ whereas they properly operate as taking free rules. This should be read in conjunction with Item 47 of this Schedule.

Item 29 – Paragraph 42(b)

112. Item 29 amends paragraph 42(b) to remove the exception in relation to sections 50 and 51 of the PPS Act (investment instruments and intermediated securities respectively).
113. Competitions between security interests should all be regulated by the priority rules in the PPS Act, not the taking free rules. For that reason, Item 29 amends paragraph 42(b) so that the rule in the paragraph applies to sections 50 and 51 as well.

Item 30 – Paragraph 42(b) (note)

114. Item 30 is a consequential amendment to Item 49 of this Schedule and repeals the note after paragraph 42(b) as it is no longer needed.

Item 31 – Subsection 43(1)

115. Item 31 amends subsection 43(1) to refer to ‘new value’ rather than just ‘value’.

116. Subsection 43(1) provides the main rule for taking property free of unperfected security interests.

117. Currently, there are two definitions relating to value in the PPS Act: ‘value’ and ‘new value’. The taking free rules provide that a person is able to take an interest in collateral free of a security interest if they provide either ‘value’ or ‘new value’. The difference between the two definitions is that ‘value’ can include an antecedent debt or liability, whereas ‘new value’ does not include value provided to reduce an existing debt or liability. The terms are not consistently used throughout the taking free rules.

118. The effect of this amendment will mean that a buyer or lessee of property will only be able to take that property free of an unperfected security interest if the buyer or lessee provides ‘new value’.

119. The new value provided by the person who acquires the interest need only to be sufficient consideration to support a contract. It does not need to reflect the market value of the interest being acquired, and may only be a nominal amount.

120. The amendment will allow for the term ‘new value’ to be used consistently throughout the taking free rules.

Item 32 – Subsection 43(2)

121. Item 32 repeals and substitutes subsection 43(2) which provides an exception to the main taking free rule in subsection 43(1).

122. The substituted subsection 43(3) provides a knowledge qualifier that a buyer or lessee cannot take the property free of a security interest if it has knowledge (as defined by Item 5 of this Schedule) of a security interest.

123. This expands the protection offered by this section for a secured party, so that a buyer or lessee cannot take property free of an unperfected security interest if they have knowledge of it.

Item 33 – Subsection 44(1)

124. Item 33 inserts the words ‘for new value’ into subsection 44(1). This subsection provides the main rule for taking personal property free of a security interest where the personal property must be described by serial number in a registration but the serial number is incorrect or missing.

125. Unlike other taking free rules in the PPS Act the subsection does not currently include a value qualifier for a buyer or lessor to be able to take personal property free of a security interest.

126. The amendment means that a buyer or lessee must provide new value to take property free of a security interest under this rule.

127. For an explanation of new value see Item 31 of this Schedule.

Item 34 – Subsection 44(2)

128. Item 34 repeals and substitutes subsection 44(2) which provides an exception to the taking free rule for serial numbered property provided in subsection 44(1).
129. The subsection currently provides that a person cannot take property free under this rule if:
- it holds the property as inventory, in its own right or on behalf of another party, or
 - the security interest was created by a transaction to which the buyer or lessee seeking to take free is a party.
130. This substituted subsection replaces the current text with a knowledge qualifier, so that a buyer or lessee cannot take the property free of a security interest if it has knowledge of the security interest, unless the property is of a kind prescribed by the Regulations for the purposes of the subsection (see Item 5 of this Schedule for the definition of knowledge).
131. It is not readily apparent why this taking free rule should not be available for a person who buys or leases property as inventory. The substituted section removes references to inventory. This will expand the range of buyers and lessees who will be able to take advantage of this rule.
132. The inclusion of the knowledge qualifier will expand the protection offered by this subsection to secured parties, as a buyer or lessee cannot take property free of a security interest under this taking free rule if they have knowledge of the security interest.

Item 35 – Section 45 (heading)

133. Item 35 amends the heading to section 45 to remove the word ‘motor’.
134. The PPS Act no longer refers to motor vehicles, and only refers to vehicles as defined. The definition of motor vehicle has been replaced by ‘vehicle’ and ‘VIN’ by Items 6 and 8 of this Schedule

Item 36 – Subsection 45(1)

135. Item 36 repeals and substitutes subsection 45(1) of the PPS Act which provides a taking free rule for motor vehicles.

Definition of Vehicle

136. The amendment makes a number of changes to this subsection arising from the repeal of the definition of motor vehicle. The definition of motor vehicle has been replaced by ‘vehicle’ and ‘VIN’ by Items 6 and 8 of this Schedule.

Definition of VIN

137. The term ‘serial number’ will be replaced with ‘VIN’ (vehicle identification number) because registration against vehicles will now be identified by their VIN, not by serial number (see Item 8 of this Schedule for the definition of VIN).
138. Current paragraph 45(1)(a) (which provides that a motor vehicle may or must be described by serial number) is not replicated under new subsection 45(1) because vehicles will no longer be described by serial number, and the requirement for a VIN is contained in the definition of ‘vehicle’ (see Item 6 of this Schedule).

Item 37 – Paragraph 45(2)(c)

139. Item 37 repeals paragraph 45(2)(c) which provides an exception to the taking free rule in subsection 45(1) where the buyer or lessee holds a motor vehicle as inventory.
140. It is not readily apparent why the taking free rule should not apply to inventory. The deletion of the paragraph will allow a buyer or lessee that holds a vehicle as inventory to rely on this taking free rule.

Item 38 – Paragraph 45(2)(d)

141. Item 38 removes the words ‘actual or constructive’ because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Item 39 – Subsection 45(3)

142. Item 39 repeals and substitutes subsection 45(3) of the PPS Act which provides a taking free rule for motor vehicles sold or leased by a prescribed person.

Definition of Vehicle

143. The amendment makes a number of changes to this subsection arising from the repeal of the definition of motor vehicle. The definition of motor vehicle has been replaced by ‘vehicle’ and ‘VIN’ by Items 6 and 8 of this Schedule.

Definition of VIN

144. The term ‘serial number’ will be replaced with ‘VIN’ (vehicle identification number) because registration against vehicles will now be identified by their VIN, not by serial number (see Item 8 of this Schedule for the definition of VIN).
145. Current paragraph 45(3)(a) (which provides that a motor vehicle may or must be described by serial number) is not replicated under substituted subsection 45(3) because vehicles will no longer be described by serial number, and the requirement for a VIN is contained in the definition of ‘vehicle’ (see Item 6 of this Schedule).

Item 40 – Paragraph 45(4)(c)

146. Item 40 repeals paragraph 45(4)(c) which provides an exception to the taking free rule in subsection 45(3) where the buyer or lessee holds the motor vehicle as inventory.
147. It is not readily apparent why the taking free rule should not apply to inventory. The deletion of the paragraph will allow a buyer or lessee that holds the vehicle as inventory to rely on this taking free rule.

Item 41 – Paragraph 45(4)(d)

148. Item 41 removes the words ‘actual or constructive’ because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Item 42 – Subsection 46(1)

149. Item 42 amends subsection 46(1) to refer to ‘new value’.
150. Section 46 provides the rules for taking property free of security interests if the property is sold or leased by the seller or lessor in the ordinary course of its business. Subsection 46(1) provides the main rule for this taking free rule.

151. For an explanation of new value see Item 31 of this Schedule.

Item 43 – Subsection 46(2)

152. Item 43 repeals and substitutes subsection 46(2). Substituted subsection 46(2) removes an exception to the taking free rule in subsection 46(1) where the buyer or lessee holds the personal property as inventory.

153. It is not readily apparent why the taking free rule should not apply to inventory. The removal of the exception for inventory will allow a buyer or lessee that holds the property as inventory to rely on the taking free rule.

Item 44 – Subsection 47(1)

154. Item 44 amends subsection 47(1) to remove the words ‘market value (worked out at the time each part of the total new value is given)’.

155. The amendment simplifies the language of the subsection and clarifies that the value assessment only needs to be made once when the agreement to buy or lease is entered into rather than each time part of the consideration is paid.

Item 45 – Paragraph 47(1)(b)

156. Item 45 amends paragraph 47(1)(b) to substitute the words ‘has been prescribed’ with ‘is prescribed’ by the Regulations. The amendment is made to remove any misconception that a previous amount greater than \$5,000 prescribed by the Regulations may be used for the purposes of this section.

Item 46 – Paragraphs 47(2)(b) and (c)

157. Item 46 repeals and substitutes subsections 47(2)(b) and (c).

Paragraph 47(2)(b)

158. Paragraph 47(2)(b) currently provides that the taking free rule in subsection 47(1) is not applicable if the buyer or lessee has actual or constructive knowledge that the sale or lease of the personal property constitutes a breach of the security agreement that provides for the security interest. Item 46 amends this paragraph to refer to a buyer or lessee having knowledge of the security interest.

Definition of knowledge

159. Item 46 removes the words ‘actual or constructive’ from paragraph 47(2)(b) because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Knowledge of security interest

160. Item 46 amends the knowledge qualifier in paragraph 47(2)(b) from knowledge of a breach of the security agreement, to knowledge of a security interest. This is because it is unlikely that a buyer or lessor of personal property would know the contents of a grantor’s security agreement with a secured party unless they are a party to the agreement. The knowledge qualifier as currently provided is, therefore, unlikely to be met.

161. The test states that a buyer cannot take free if they have knowledge of the security interest generally. This protects secured parties from new buyers or lessees who have knowledge of their security interest but still purchase or lease the personal property.

Paragraph 47(2)(c)

162. Substituted paragraph 47(2)(c) increases the threshold dollar amount for the paragraph from \$5,000 to \$10,000.

163. Substituted paragraph 47(2)(c) amends the exception contained in the paragraph, so that a buyer or lessee will now not take free if the market value of the personal property (used predominantly for personal, domestic or household purposes) is *more* than \$10,000 (or a greater amount prescribed by the Regulations).

164. The paragraph provides a higher dollar amount than that found in paragraph 47(1)(a) to protect a party that might find a bargain because second hand goods are typically sold below their market value. This is intended to provide a buffer for a party to take free collateral that may have a market value between \$5,000-\$10,000.

Item 47 – Section 48

165. Item 47 repeals and substitutes section 48 of the PPS Act.

Section 48 – Taking currency free of security interest

166. Item 47 redrafts section 48 which provides the main rule for taking currency free of a security interest. It splits the section into two segments (main rule and exceptions) to align with the structure of other sections containing taking free rules.

167. The knowledge qualifier is also amended by new subsection 48(2). The current knowledge qualifier provides that a person cannot take currency free of a security interest if they have actual or constructive knowledge of the security interest. This is amended in substituted subsection 48(2) to provide that the taking free rule does not apply if the person takes the currency with knowledge (as defined by Item 5 of this Schedule) that it would constitute a breach of the security interest.

168. For example, a person dealing with a business may be aware that the business has given security over its assets to its bank or other financier. Given the fungible nature of currency, however, the person should be entitled to assume that the business has the authority of its financier to receive and give out currency, so that it can conduct its business. The person should be able to take currency from the business free of the security interest, unless it knows that the security agreement prohibits this.

Section 48A – Taking payment of a debt by EFT etc. free of security interest

169. Item 47 inserts a new section 48A.

170. Section 48A relocates current section 69 of the PPS Act. This inserted section is intended to reframe the current priority rule in section 69 as a taking free rule.

171. This provision is being moved to Part 2.5 of the PPS Act because it is more akin to a taking free rule rather than a priority rule. A priority rule determines the hierarchy of claims between secured creditors, whereas the policy intention behind this section is to allow person to be paid from funds despite any security interest attached to them.

172. The relocation of this section makes the PPS Act more internally consistent, and easier to navigate.

173. Subsection 48A(3) removes the words ‘actual or constructive’ from the knowledge qualifier which is an exception to current section 69. This is because the definition of knowledge encompasses both ‘actual and constructive’ knowledge (see Item 20 of this Schedule). The subsection inserts a knowledge requirement with a higher threshold. The taking free rule will not apply if someone has knowledge of a breach of a security interest, this differs to other similar exceptions which only require knowledge of the security interest itself. For example, a person dealing with a business may be aware that the business has given security over its assets to its bank or other financier. Given the fungible nature of currency, however, the person should be entitled to assume that the business has the authority of its financier to receive and give out currency, so that it can conduct its business. The person should be able to take currency from the business free of the security interest, unless it knows that the security agreement prohibits this.

Section 48B – Taking negotiable instrument free of security interests

174. Item 47 also inserts a new section 48B.

175. Section 48B relocates current section 70 of the PPS Act. This section is intended to reframe the current priority rule in section 70 as a taking free rule in Part 2.5.

176. This provision is being moved to Part 2.5 of the PPS Act because properly operates as a taking free rule than a priority rule. A priority rule determines the hierarchy of payments between creditors, whereas the policy intention behind this section is to allow an acquirer of a negotiable instrument to take the negotiable instrument free of a security interest if they provide new value and take possession of the instrument.

177. The relocation of this section makes the PPS Act more internally consistent, and easier to navigate.

New Value

178. The new section 48B amends current section 70 by stating that the party wishing to take the negotiable instrument free of a security interest must provide new value for the negotiable instrument.

Exception

179. The exceptions to current section 70(2) are also amended by in subsection 48B(2).

180. This removes the words ‘actual or constructive’ from current subsection 70(2) as amended in subsection 48B(2) because the definition of knowledge encompasses both ‘actual and constructive’ knowledge (see Item 5 of this schedule for the definition of knowledge).

181. Current paragraph 70(2)(b) provides two knowledge exceptions to the negotiable instrument taking free rule, one based on taking free in the ordinary course of business (where the party acquiring the interest did so with no actual or constructive knowledge that the acquisition constitutes a breach) and the second in any other case (where the party acquiring the interest did so without actual or constructive knowledge of the security interest). These knowledge exceptions are aligned in subsection 48B(2) to provide that an acquiring party cannot take the negotiable instrument free of the security interest if it has knowledge that the acquisition constitutes a breach of the security agreement that provides for the security interest.

182. The reference to a person being able to take control of a negotiable instrument is removed from current paragraph 70(2)(c) as amended by subsection 48B(3). This is because a security interest over a negotiable instrument will be incapable of being

perfected by control (see Item 47 of this Schedule). Given that security interests over negotiable instruments will no longer be capable of being perfected by control, this reference is unnecessary.

Section 48C – Taking negotiable document of title free of security interest

183. Item 47 also inserts a new section 48C.
184. Section 48C relocates current section 72 of the PPS Act. This amendment is intended to reframe the current priority rule in section 72 as a taking free rule in Part 2.5.
185. This provision is being moved to Part 2.5 of the PPS Act because properly operates as a taking free rule than a priority rule. A priority rule determines the hierarchy of payments between creditors, whereas the policy intention behind this section is to allow an acquirer of a negotiable document of title to take the negotiable document of title free from a security interest if it provides new value and takes possession of the negotiable document of title.
186. The relocation of this section makes the PPS Act more internally consistent, and easier to navigate.

New Value

187. The new subsection 48C(1) amends current section subsection 72(a) by stating that the party wishing to take the negotiable instrument free of a security interest must provide new value for the negotiable instrument.
188. For an explanation of new value see Item 31 of this Schedule.

Exception

189. The exceptions to current subsection 72(b) are also amended by new subsection 48C(2).
190. This removes the words ‘actual or constructive’ from current subsection 70(b) as amended in new subsection 48C(2) because the definition of knowledge encompasses both ‘actual and constructive’ knowledge (see Item 5 of this schedule for the definition of knowledge).
191. Current paragraph 72(b) provides two knowledge exceptions to the negotiable document of title taking free rule, one based on taking free in the ordinary course of business (where the party acquiring the interest did so with no actual or constructive knowledge that the acquisition constitutes a breach) and the second in any other case (where the party acquiring the interest did so without actual or constructive knowledge of the security interest). These knowledge exceptions are aligned in subsection 48C(2) to provide that an acquiring party cannot take the negotiable document of title free of the security interest if it has knowledge that the acquisition constitutes a breach of the security agreement that provides for the security interest.

Item 48 – Section 49

192. Item 48 amends section 49 to substitute the words ‘prescribed financial market (within the meaning of the *Corporations Act 2001*)’ with ‘financial market prescribed by Regulations made for the purposes of this section’.
193. The amendment is intended to widen the scope of section 49 to cover acquisitions in the ordinary course of trading on comparable overseas exchanges, so it can cover security

interests in investment instruments and intermediated securities that are traded internationally.

Item 49 – Sections 50 and 51

Section 50 – Taking investment instrument or intermediated security free of security interest in an off market dealing

194. Item 49 repeals and substitutes current sections 50 (taking investment instrument free of a security interest) and 51 (taking an intermediated security free of a security interest) with a single new section 50 which provides a taking free rule for purchases of investment instruments or intermediated securities that are not made in the ordinary course of trading on a prescribed financial market.
195. Market-traded investment instruments and intermediated securities are covered by section 49 (as amended by Item 48 of this Schedule).

Perfection by control

196. Item 19 of Schedule 2 amends the requirements for perfection of a security interest in an investment instrument that involves a transfer on the issuer's books. Specifically, Item 85 of Schedule 2 repeals current subsection 24(6) which provides a method for perfection of a security interest in an investment instrument by possession.
197. Item 20 of Schedule 2 then amends sections 26 and 27 to align the mechanism for perfecting security interests in investment instruments and intermediated securities by control.
198. Aligned mechanisms for control as outlined in Items 19 and 20 of Schedule 2 means there is no longer a need to differentiate between a purchaser for value and a transferee for value as currently provided for in subsections 50(1) and 51(1). As a result, they are merged into the one section.

Non-consensual transactions

199. The single section is also wider in scope as it is no longer limited to consensual transactions. This way new section 50 can be used in the context of takeovers, compulsory acquisitions, transfers of shares under section 444GA of the Corporations Act and procedures listed in section 7.1 of the PPS Regulations.

Definition of purchaser

200. The new section 50 will also remove the definition of a purchaser. The definition will be repealed to:
- clarify that the section only applies to secured party-buyer disputes (secured party-secured party disputes are dealt with by the priority rules within the PPS Act), and
 - allow the section to apply to non-consensual transactions (see subheading 'Non-consensual transactions' above).

Knowledge qualifiers

201. New section 50 also removes the knowledge qualifiers contained within current sections 50 and 51. The knowledge qualifiers are no longer required because of amendments made to the control mechanisms under sections 26 and 27 (see Items 19 and

20 of Schedule 2). The control test for an intermediated security or investment instrument provides that the property cannot be dealt with without the consent of a secured party. Removing the knowledge requirement from this section removes the risk of duplicating the test.

202. Subsection 50(3) provides a positive knowledge qualifier exception that a buyer does not take an investment instrument or intermediated security free of a security interest if they have bought it with knowledge of the security interest.

Item 50 – Subsection 52(1)

203. Item 50 amends section 52(1) (which provides a taking free rule for personal property where the security interest is temporarily perfected) to broaden the application of the provision by replacing the phrase ‘the proceeds of personal property, or of goods or a negotiable document of title, takes the proceeds, goods or document’ with ‘personal property takes the personal property’.

204. The limitation of the taking free rule to collateral that is ‘proceeds, goods or a negotiable document of title’ is inconsistent with section 34 (which provides what might be temporarily perfected) because it is not limited to only that property. The effect of this amendment is that a party that provides new value for any personal property will be able to take that personal property free of a temporarily perfected security interest.

205. Referring to personal property more generally in this section is more appropriate and ensures consistency with section 34.

Item 51 – Subsection 52(2)

206. Item 51 amends subsection 52(2) which provides an exception to the taking free rule in subsection 52(1).

207. Current paragraph 52(2) provides two timing provisions for ‘actual’ knowledge exceptions to the taking free rule contained in subsection 52(1).

208. This Item replaces the concept of ‘actual knowledge’ in current subsection 52(2) with the concept of ‘knowledge’, because the definition of knowledge encompasses both ‘actual and constructive’ knowledge (see Item 5 of this schedule for the definition of knowledge).

209. The amendment to subsection 52(2) removes timing provisions contained in the current subsection.

210. The amendment is intended to allow any buyer or lessee, irrespective of whether the collateral is used for personal, domestic or household purposes, to rely on subsection 52(1) unless they had knowledge of the security interest when buying or leasing the personal property.

Item 52 – Section 53

211. Item 52 repeals section 53 of the PPS Act.

212. Section 53 attempts to subrogate the rights of the secured party to the rights of a transferor in circumstances where collateral is transferred free of the secured party’s security interest.

213. It is unclear what the section adds to section 32. The right to receive payment of the purchase price for the transferred personal property will be proceeds of the personal property under section 31, and the secured party will acquire an interest in the right to

receive the purchase price because its security interest will attach to the right as proceeds, under paragraph 32(1)(b).

214. Repealing section 53 will simplify the PPS Act.

Item 53 – Section 54

215. Item 53 amends the Guide in section 54.

216. The amendment removes all references to Division 5 of Part 2.6 of the PPS Act. This division is no longer needed as the priority rules contained within it have been reframed as taking free rules and moved to Part 2.5 of the PPS Act as outlined in Item 47 of this Schedule.

Item 54 – Subsection 55(2)

217. Item 54 amends subsection 55(2) to provide that priority between two unperfected security interests that attach to collateral at the same time is to be determined by the order in which the security agreements were entered into.

218. The amendment clarifies that the timing of the entering into the security agreements will determine priority in circumstances where the security interests attached to the collateral at the same time.

Item 55 – Subsection 55(4)

219. Item 55 amends subsection 55(4) to remove the reference to subsection 55(5) because this subsection is being repealed.

Item 56 – Subsections 55(5) and (6)

220. Item 56 repeals subsections 55(5) and (6) which provide definitions for priority time in section 55.

221. The subsections will be repealed because a definition for ‘priority time’ will be inserted by Item 58 of this Schedule at new section 55A and is intended to replace the current definitions in subsections 55(5) and (6).

Item 57 – Section 55 (note)

222. Item 57 repeals the note from section 55 because the note is replicated in new section 55A which is being inserted by Item 58 of this Schedule.

Item 58 – After section 55

223. Item 58 inserts new sections 55A and 55B into the PPS Act.

Section 55A – Meaning of *priority time*

224. Section 55A provides a definition for ‘priority time’. New subsection 55A(1) specifies that a priority time will be the earliest of the registration time of the security interest or the time the security interest is perfected.

Registration time

225. A secured party is able to obtain a priority time for a security interest that is earlier than the time at which the security interest is perfected, by virtue of new paragraph 55A(1)(a). This is because a secured party is able to register a financing statement in

relation to the security interest on the PPS Register if it believes on reasonable grounds that it will become a secured party in relation to collateral (see section 151 of the PPS Act).

226. The definition of registration time is provided under sections 160-163 of the PPS Act.

Perfection

227. New paragraph 55A(1)(b) provides that the priority time for a security interest will otherwise be the time the security interest is perfected.

Continuous Perfection

228. New subsection 55A(2) provides a continuous perfection qualifying provision for priority time. A time will only be a priority time for a security interest if, once the security interest becomes perfected, the security interest remains continuously perfected.

229. The effect of new subsection 55A(2) is that a security interest loses its priority if it becomes unperfected at any time after it has been perfected. If a security interest which becomes unperfected, is re-perfected, its new priority time will be from the date of the re-perfection.

Section 55B – When is priority determined?

230. New section 55B provides a rule for when priority will be determined.

The PPS Act is currently silent on when priority in a dispute should be determined. Section 55B clarifies that the priority between security interests in the same collateral will be determined at each time that proceeds of that item of collateral become available for distribution as a result of any party's security interest in that item.

Item 59 – Subsections 57(2) and (2A)

Priority – perfection by control

231. Item 59 repeals and substitutes subsection 57(2) to clarify where more than one security interest is perfected by control at the same time, that priority should be determined by the order in which the interests were perfected by control or, if they were perfected at the same time, the order in which the secured parties put in place mechanisms to enable them to take control of the collateral.

232. Current section 57(2) provides that the priority between security interests in the same collateral perfected by control is decided by which party took control first. The current provision is silent where control may have been taken at the same time (for example where a grantor acquires the collateral after both secured parties have put their control mechanisms in place).

233. The amendment will provide clearer guidance when determining disputes for security interests perfected by control.

Proceeds – perfection by control

234. Item 59 also repeals subsection 57(2A).

235. Subsection 57(2A) deals with priority in relation to proceeds of collateral under a security interest that is perfected by control.

236. It is unclear what the subsection is attempting to achieve. The rules in relation to perfection contained in Part 2.2 and Part 2.4 of Chapter 2 of the PPS Act adequately deal with the priority competition referred to in section 57(2A).

Item 60 – Sections 58 and 59

Priority of secured obligations

237. Item 60 substitutes section 58 to clarify that a security interest has the same priority for all amounts and obligations secured by it, whether they arise before or after the security interest itself arises.

238. The intention of the current and new wording remains the same. However, the current wording in section 58 does not explicitly state this and raises doubt by negative implication over whether the security interest can cover future obligations. This amendment explicitly removes this doubt.

Definition of advance and future advance

239. Substituted section 58 no longer refers to ‘advances’ or ‘future advances’. The definition of advance will be repealed by Item 2 of this Schedule. The definition of future advance will be repealed by Item 15 of Schedule 4.

240. References to ‘advance’ and ‘future advance’ are changed throughout the PPS Act to payment or other obligations (or both), whichever suits the section it refers to. In this case, the reference to advance is replaced by a reference to ‘obligations’.

Circular priority systems

241. Item 60 also repeals section 59.

242. The repeal of this section means that the default priority rules in section 55 will apply and provide guidance for determining which security interest comes first, where there is a circular priority situation for which the PPS Act does not otherwise provide a solution.

Item 61 – Section 61

243. Item 61 repeals and substitutes section 61 of the PPS Act.

Section 61 – Priority in accordance with priority agreement between secured parties

244. Current section 61 allows for a ‘subordination’ agreement between secured parties. The term is imported from the equivalent Canadian and New Zealand Acts; however, it is more commonly understood in Australia as a ‘priority’ agreement where one secured party agrees that its prior-ranking security interest is to rank behind another security interest over the same property.

245. The concept of ‘subordination’ in section 61 and other relevant provisions is changed to refer to ‘priority’.

246. Item 61 also adds paragraph 61(2)(c) to subsection 61(2). Subsection 61(2) provides clarification of the effect of a priority agreement. Paragraph 61(2)(c) clarifies that a priority agreement between parties does not affect the rights of any other person with an interest in the collateral (other than those mentioned in paragraph (b)). The effect of this is that the agreement will only affect the rights between the secured parties who are parties to the agreement, according to the terms of the agreement.

247. The amendment will bring the PPS Act in line with commonly understood Australian legal parlance.

Item 62 – Sections 62 and 63

248. Item 62 repeals and substitutes sections 62 and 63 of the PPS Act. These sections provide rules for competitions between PMSIs and non-PMSIs (current section 62) and competitions between two PMSIs (current section 63).

249. For reasons similar to those outlined in Item 10 of Schedule 1, the amendment will provide greater certainty and clarity for PMSI holders.

Section 62 - Priority for perfected purchase money security interests over other perfected security interests

Main rule

250. Section 62 is split into different timing requirements for registering financing statements for PMSIs in inventory and personal property other than inventory. The section will be amended by Item 62 to provide a singular unified timeframe of 15 business days to register a financing statement for a PMSI for personal property, regardless of whether that personal property is inventory or not.

251. The distinction in procedural requirements for inventory and non-inventory derives from the Canadian PPSAs. Under those Acts, however, the PMSI financier also needs to send a notice to prior-registered secured parties, to alert them to the fact that it will be taking a PMSI over the grantor's inventory. The PMSI financier must send them the notice before the grantor obtains possession of the inventory, so that the prior secured party is warned in advance that it will not have priority over the new inventory and has an opportunity to decide whether or not to advance further funds against it. The requirement in current section 62 of the PPS Act that the PMSI financier also register before the grantor obtains possession is related to this.

252. Given that section 62 does not require the PMSI financier to send notices to prior secured parties, there is no need to distinguishing between inventory and non-inventory in the Australian PPS Act.

When main rule applies

253. Subsection 62(2) is substantially amended by this Item.

254. The amended subsection clarifies when a PMSI must be perfected by registration in order to obtain the benefit of the priority rule in subsection 62(1). The subsection provides specific timing rules for PMSIs that arise under PPS leases.

255. The rule provides that a PMSI must be perfected by registration before the end of 15 business days after whichever of the following days applies:

- For goods which are not goods subject to a PPS lease, the day the grantor or a person at the request of the grantor obtains possession of the goods. This applies to all types of goods, whether or not they are inventory.
- For goods subject to a PMSI that arises under a PPS lease the later of:
 - the day on which the lease becomes a PPS lease in accordance with new subsection 13(2) inserted by Item 11 of Schedule 1, or

- the day the lessee or a person at the request of the lessee, obtains possession of the goods. A lessee may obtain possession of goods under a PPS lease after a PPS lease is entered into. This clarifies that a PMSI must be perfected by registration within 15 days after the lessee receives possession of the goods, if the possession occurs after the commencement of the lease.
- For any other property (i.e. property which is not goods), on the day the PMSI attaches to the property.

256. The requirement under paragraph 62(3)(c) of the current PPS Act to indicate a PMSI in a registration is not replicated. Under the current requirement, a party is required to ‘tick’ the PMSI box when making a registration. The consequences of not doing so could render a registration ineffective.

257. Paragraph 63(3)(c) is not replicated in new subsection 62(2) meaning that a PMSI is no longer required to be identified as a PMSI in accordance with Item 7 of section 153.

258. This amendment in conjunction with Item 7 of section 153 (which will be repealed by Item 22 of Schedule 5) will remove a point of confusion for registrants registering PMSIs and further streamlines the process of registration.

259. The PMSI check box serves little utility for prior secured parties and does not provide any use for future secured parties or for a transferee of collateral, because their priority position will not be affected by whether or not a prior security interest is a PMSI.

Replacement purchase money security interest

260. Subsection 62(3) is inserted to provide a priority rule for replacement purchase money security interests which arise in accordance with subsection 14(5) (as amended by Item 11 of this Schedule). This subsection outlines the timing requirements for a replacement PMSI to enable it to have the same priority as the PMSI it replaces.

261. Under paragraph 62(3)(a), a replacement PMSI that replaces a PMSI in goods (but does not arise under a PPS lease) has effect from the day the grantor first has possession of the collateral as grantor under the replacement PMSI. This replacement PMSI has the same priority as the PMSI it replaces provided the original PMSI met the requirements of subsection 62(2) for perfection.

262. Under new paragraph 62(3)(b), a replacement PMSI relating to a lease of goods, has effect from the day the grantor becomes the lessee under the replacement lease. This replacement PMSI has the same priority as the PMSI it replaces provided the original PMSI met the requirements of paragraph 62(2)(b) for perfection.

263. For a replacement PMSI relating to any other property, new paragraph 62(3)(c) has effect from the day the replacement PMSI attaches to the property. This replacement PMSI has the same priority as the PMSI it replaces provided the original PMSI met the requirements of paragraph 62(2)(c) for perfection.

264. Note 1 under new subsection 62(3) cross refer to the rule regarding priority of replacement PMSIs under new section 63A, see Item 62 of this Schedule.

265. Note 2 states the time periods in new section 62 can be extended by a court in accordance with section 293.

266. Note 3 states the section is subject to the rule for priority of security interests perfected by control under section 57.

Section 63 - Priority for purchase money security interests – sellers, lessors and consignors

267. Section 63 is inserted by Item 62.

268. The subsection provides a priority rule for a contest between competing PMSIs where one of the secured parties is a seller, lessor or consignor. The rule clarifies that a perfected PMSI (priority PMSI) granted in collateral or its proceeds to a seller, lessor or consignor has priority over another perfected PMSI over the same collateral or proceeds to any other person (competing PMSI) provided that the priority PMSI has been perfected by registration in accordance with the requirements under new subsections 62(2) and (3).

269. The note in new section 63 states the time periods in new section 62 can be extended by a court in accordance with section 293.

Capacity of grantor in sections 62 and 63

270. The reference to ‘grantor’ in sections 62 and 63 is clarified by the insertion of section 10A at Item 9 of this Schedule which provides that references throughout the PPS Act to secured parties, grantors, debtors or any description of a person is taken to be a reference to the person in that capacity.

271. Applying new section 10A to sections 62 and 63 clarifies that the timeframe for a PMSI is determined by reference to the time at which the grantor first possesses the goods in its capacity as grantor under that PMSI. If the grantor has prior possession of the property in another capacity, this will not impact on the operation of the timing requirement in sections 62 and 63.

272. The reason for this amendment is that might otherwise not be possible for a secured party to benefit from the priority rules in sections 62 and 63 if a grantor happened to have previously had possession of the collateral in another capacity.

Section 63A - Priority of replacement purchase money security interests

273. Item 62 inserts a new section 63A, which provides that a replacement PMSI under section 14(5) has the same priority as the PMSI it replaces, subject to sections 62 and 63.

Item 63 – Section 64 (heading)

274. Item 63 repeals the heading to section 64 and substitutes it with ‘Priority for non-purchase money security interests in accounts’, as this better reflects the amendments which will be made to section 64 by this Schedule.

Item 64 – Subsections 64 (1) and (2)

275. Item 64 repeals and substitutes subsections 64(1) and (2).

276. Section 64 provides a mechanism that can allow an account financier to take priority over purchase money security interests, despite the rule in section 62. While current section 64 allows an account financier to take priority over PMSIs it does not appear to allow the account financier to take priority over earlier security interests held by the same secured party which are not PMSIs. This Item amends section 64 to allow an account financier to take priority over all purchase money security interests and other security interests granted to the same secured party, in certain circumstances to which the section will apply.

Item 65 – Subsection 64(3)

277. Item 65 amends subsection 64(3) of the PPS Act.

278. The amendment substitutes the words ‘is subordinate to’ with ‘has a lower priority than’. This is because the term ‘priority’ is more consistent with the terminology of the PPS Act and with Australian market terminology in this context. This is not intended to, nor does it, change the scope of these sections and provides for more consistent terminology throughout the PPS Act.

Item 66 – Paragraph 64(3)(a)

279. Item 66 amends paragraph 64(3)(a) to refer to the rules that are now located in subsection 64(1A) instead of subsection 64(1).

Item 67 – Paragraph 68(2)(c)

280. Item 67 removes the words ‘actual or constructive’ from paragraph 47(2)(b) because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Item 68 – Paragraph 68(2)(d)

281. Item 68 removes the word ‘an advance made, or an obligation incurred, by the transferee’s secured party’ from paragraph 68(2)(d) of the PPS Act and substitutes this with ‘an obligation to make a payment, or any other obligation, incurred by the transferee’.

282. The definition of advance will be repealed by Item 2 of this Schedule.

283. References to ‘advance’ are changed throughout the PPS Act to payment or other obligations (or both), whichever suits the section it refers to. In this case, the reference to advance is replaced by a reference to ‘payment or any other obligation’.

284. The amendment is made because the definition of ‘advance’ is not comprehensive enough, as opposed to ‘payment and other obligations’. A security interest secures a borrower’s obligation to repay an advance (with interest, etc) rather than the advance itself. In security agreements, generally it is customary to say that obligations, not advances, are secured. The amendment is made to reflect this and to follow the formulation used elsewhere in the PPS Act that distinguishes between payment obligations and other obligations.

Item 69 – Paragraph 68(2)(d)

285. Item 69 removes the word ‘advance’ from the last line of paragraph 68(2)(d) of the PPS Act, and replaces this with ‘payment or other obligation’.

286. The definition of advance will be repealed by Item 2 of this Schedule.

287. References to ‘advance’ are changed throughout the PPS Act to payment or other obligations (or both), whichever suits the section it refers to. In this case, the reference to advance is replaced by a reference to ‘secured obligations’ because the definition of ‘advance’ is not comprehensive enough. A security interest secures a borrower’s obligation to repay an advance (with interest, etc) rather than the advance itself. In security agreements, generally it is customary to say that obligations, not advances, are secured. The amendment is made to reflect this and to follow the formulation used elsewhere in the PPS Act that distinguishes between payment obligations and other obligations.

Item 70 – Subsection 68(3)

288. Item 70 repeals “(priority of advances)” and substitutes “(priority of secured obligations)” in paragraph 68(3).

Item 71 – Division 5 of Part 2.6

289. Item 71 repeals Division 5 of Part 2.6.

290. This division is no longer needed as the priority rules contained within it have been reframed as taking free rules and moved to Part 2.5 of the PPS Act as outlined in Item 58 of this Schedule.

Item 72 – Subsection 74(1)

291. Item 72 repeals and substitutes subsection 74(1).

292. The amendment tightens the test for when an execution creditor’s interests can rank ahead of security interests in collateral. The execution creditor will have priority if, at the time covered by subsection 74(4):

- there is either no registration in respect of the security interest, or even if there is a registration, there is no security agreement providing for the security interest that covers the collateral; and
- the security interest is not perfected.

293. The above two tests remove the risk that a secured party who had appropriately registered an ALLPAAP financing statement could rank behind an execution creditor in circumstances where the grantor acquires collateral after an execution creditor’s writ is issued. A secured party with a registered ALLPAAP has already taken all steps that it could to perfect its security interest in after acquired property and should not be disadvantaged by this section.

Item 73 – Paragraph 74(4)(a)

294. Item 73 repeals and substitutes paragraph 74(4)(a).

295. The amendment substitutes the words 'by the execution creditor or by another person on behalf of the execution creditor' with 'under a process of execution'. The new language better accommodates the way in which judgements are typically executed against property in Australia, because the property under an Australian execution process is not seized by the execution creditor, but by a sheriff, and the sheriff does not seize the property 'on behalf of the execution creditor', but as an officer of the court.

Item 74 – Paragraphs 76(3)(a) and (b)

296. Item 74 repeals and substitutes paragraphs 76(3)(a) and (b).

297. The amendment replaces the phrase ‘while the goods are in the possession of the person’ with ‘before the recovery time within the meaning of section 37 or 38’. The wording of current paragraphs 76(3)(a) and (b) overlooked circumstances where the priority interest may have been granted before the buyer or lessee took possession.

298. Section 76 provides priority rules for competing security interests over collateral that was taken free by sale or lease from the grantor and which has been returned to the grantor and the security interest is reattached by application of sections 37 or 38.

299. The amendment gives priority to the secured party if their security interest is perfected prior to return or repossession of goods, rather than requiring that the security interest be perfected while the purchaser-grantor has possession. The amendment will better achieve the intended policy objective of the section and give secured parties greater certainty.

Item 75 – Part 2.7

Part 2.7—Restrictions on some dealings in collateral

Division 1—Introduction

300. Item 75 repeals and substitutes Part 2.7 of the PPS Act.
301. The amendments restructure Part 2.7 to provide separate divisions for different types of collateral. The restructure is designed to make the Part easier to follow.

Section 78 – Guide to this part

302. New Division 1 is inserted to provide an updated guide to Part 2.7. The revised guide provides an overview of what will be located in Part 2.7 of this chapter and clarifies that Part 2.7 focusses on dealings prohibited by security agreements and account contracts.

Division 2—Dealings in collateral generally

Section 79 – Dealings prohibited by security arrangements

303. New Division 2 inserts a new section 79, making a number of changes to the rule that a transfer of collateral can be effective despite a prohibition of the transfer in a security agreement.

Scope

304. New subsection 79(1) widens the scope of current section 79 to include a dealing which creates a new security interest in the collateral as well as the transfer of collateral.
305. Widening the scope of the section to allow it to also apply to the creation of further security interests in the collateral will allow the section to better reflect its underlying policy.
306. Subsection 79(1) allows the PPS Act to override a contractual prohibition on granting further security interests. This ensures that a secured party cannot argue that later security interests or transfers of the collateral were ineffective (and therefore could not defeat its security interest) because the terms of its security agreement had prohibited them.

Dealing not prevented

307. Subsection 79(2) clarifies that a dealing is not prevented for the purposes of the PPS Act, if a security agreement prohibits that dealing or declares the dealing to be a default.
308. Subsection 79(3) provides that a dealing does not prejudice the rights of the secured party under the security agreement. This includes the right to treat the dealing as a failure to perform a contractual obligation.

Division 3—Dealings in accounts

309. New Division 3 provides restrictions on dealings in accounts and specific rights associated with dealing in accounts. The Division is separated into sections which provide rules for restrictions in account contracts, restrictions on secured party rights in dealings in accounts, and protection of the rights of the account debtor.
310. The Division removes references to chattel paper. The concept of chattel paper is repealed from the PPS Act by Part 3 and Item 23 of Schedule 1.

Section 80 – Scope of this Division

311. New Section 80 provides the scope for the division.
312. While the Division is based on current sections 80 and 81 of the PPS Act, the scope of the new sections within the Division is expanded to include both the transfer of an account and any other dealing in the account if the dealing results in the creation of a security interest in the account. This differs from current section 80 and 81 which only provide rules for the transfer of an account.

Section 81 – Restrictions in account contracts

Scope

313. New section 81 rephrases and simplifies how the current section 81 is structured however, it retains a similar meaning.
314. The section applies where an account is the proceeds of inventory or arises from the granting of a right or providing a service in the ordinary course of a business.
315. The section continues to exclude construction contracts, however is expanded to include financial services contracts.

Effect of restrictions

316. Subsection 81(2) provides that a dealing in an account is not prevented even if a term in the account contract prohibits it.
317. Subsection 81(3) provides that a term of the account contract which restricts or prohibits a dealing is unenforceable against any person other than the account creditor.
318. The new section also removes the requirement that the rule only apply in relation to transfers for ‘currency due or to become due’. Under the PPS Act, ‘currency’ means notes or coins. This is too limiting in the context of section 81 which should encompass all transfers, not just transfers for currency.
319. Subsection 81(4) clarifies that the account debtor will still be entitled to any rights they may have for damages for breach of the account contract.

Section 81A – Dealings in accounts – restrictions on rights of secured party

320. Current section 80 is relocated to new section 81A.
321. New section 81A replicates the provisions in current section 80 apart from subsections (7) and (8) which are now moved and modified in new section 81B (see below).

Section 81B – Dealings in accounts – protection of rights of account debtor

322. New section 81B inserts an additional protection for an account debtor for the purposes of the PPS Act. Despite a dealing not being prohibited under the PPS Act, a dealing will not be effective to the extent that would make the performance of the account contract more onerous than if the dealing had not occurred.
323. The PPS Act currently includes protections for the transferor and transferee of an account to ensure any modification of an account contract does not materially adversely affect them (see Item 1 of Schedule 4 under subheading ‘Section 144 - Enforcement of security interests in accounts’). The new subsection 81B(6) provides the account debtor with protection from the consequences of a dealing in the account.
324. New subsections 81B(3) and (4) are based on the notice provisions required under the enforcement provisions in current section 120 of the PPS Act which will be moved by Item 1 of Schedule 4 under subheading ‘Section 144 - Enforcement of security interests in accounts’.

Item 76 – Section 87

325. Item 76 amends section 87 of the PPS Act.
326. Item 76 substitutes the term ‘continues in’ with ‘remains attached to’. In the term ‘continues in’ is inconsistent with the rest of the terminology used in the PPS Act.
327. This amendment is made to clarify the paragraph and align the language throughout the PPS Act.

Item 77 – Section 87

328. Item 77 amends section 87 of the PPS Act.
329. The amendment substitutes the words ‘subordinate to’ with ‘have a lower priority than’. This is because the term ‘priority’ is more consistent with the terminology of the PPS Act and with Australian market terminology in this context. This is not intended to, nor does it, change the scope of these sections and provides for more consistent terminology throughout the PPS Act.

Item 78 – Section 88 (heading)

330. Item 78 amends the heading to section 88 to better reflect the content of the section.

Item 79 – Section 88

331. Item 79 amends sections 88 of the PPS Act.
332. Item 79 substitutes the term ‘continues in’ with ‘remains attached to’. The term ‘continues in’ has been removed to achieve consistent terminology throughout the PPS Act.

Item 80 – Paragraph 90(a)

333. Item 80 amends paragraph 90(a) of the PPS Act.
334. The amendment replaces the word ‘after’ with ‘at or after the time’ in paragraph 90(a) to allow a person who acquires an interest in the whole at the same time as the goods become an accession to benefit from the priority rule, as opposed to only those that acquire the whole after the good becomes an accession.

Item 81 – After Paragraph 90(a)

335. Item 81 inserts a note after paragraph 90(a).

336. The note provides additional information on the operation of paragraph 90(a).

Item 82 – Paragraph 90(b)

337. Item 82 repeals paragraph 90(b).

338. The amendment arises because an assignee of a person with an interest in the whole (under paragraph (b)) will necessarily be acquiring an interest in the whole (under paragraph (a)), and therefore paragraph 90(a) is sufficient to capture this situation. This repeal is not intended to, nor does it, change the scope of this section.

Item 83 – Paragraph 90(c)

339. Item 83 repeals and substitutes paragraph 90(c) of the PPS Act.

340. Paragraph 90(c) is amended in the following ways:

Definition of advance

341. The definition of advance will be repealed by Item 2 of this Schedule.

342. References to ‘advance’ are changed throughout the PPS Act to payment or other obligations (or both), whichever suits the section it refers to. In this case, the reference to advance (first appearing) is replaced by a reference to ‘payment or the performance of any other obligation’. The reference to advance (second appearing) is replaced by ‘payment or other obligation’.

343. The amendment is made because the definition of ‘advance’ is not comprehensive enough. A security interest secures a borrower’s obligation to repay an advance (with interest, etc) rather than the advance itself. In security agreements, generally it is customary to say that obligations, not advances, are secured. The amendment is made to reflect this and to follow the formulation used elsewhere in the PPS

344. Act that distinguishes between payment obligations and other obligations.

At or after the time

345. The amendment replaces the word ‘after’ with ‘at or after the time’ in paragraph 90(c) to allow a person who acquires an interest in the whole at the same time as the goods become an accession to benefit from the priority rule, as opposed to only those that acquire the whole after the good becomes an accession.

Minor amendments

346. The amendment makes some other minor drafting changes to the current paragraph.

Item 84 – Paragraph 90(d)

347. Item 84 amends paragraph 90(d).

348. The amendment replaces the word ‘after’ with ‘at or after the time’ in paragraph 90(d) to allow a person who acquires an interest in the whole at the same time as the goods become an accession to benefit from the priority rule, as opposed to only those that acquire the whole after the good becomes an accession.

Item 85 – Sections 91 and 96

349. Item 85 amends sections 91 and 96 of the PPS Act.

350. The amendment substitutes the words ‘subordinate to’ with ‘have a lower priority than’. This is because the term ‘priority’ is more consistent with the terminology of the PPS Act and with Australian market terminology in this context. This is not intended to, nor does it, change the scope of these sections and provides for more consistent terminology throughout the PPS Act.

Part 3.4—Processed and commingled goods

Item 86—Part 3.4

351. Item 86 repeals and substitutes Part 3.4 of the PPS Act.

352. Part 3.4 is restructured to separate the priority and enforcement rules for ‘processed’ and ‘commingled’ goods. Currently, the same priority and enforcement rules apply to both ‘processed’ and ‘commingled’ goods which can lead to unfair outcomes particularly for the secured party.

353. The current rules are designed primarily with ‘processed’ goods in mind in that they limit the amount a secured party has priority over to the value of the goods on the day they were ‘processed’ or ‘commingled’. Processed goods are incapable of being separated from the bulk whereas commingled goods are capable of being separated after being mixed.

354. The current rules can disadvantage a secured party that holds a security interest in ‘commingled’ goods, given ‘commingled’ goods can be separated out from the bulk they were mixed with.

Product or Mass

355. In making a distinction between processed goods and commingled goods, Part 3.4 uses different terminology to describe the result of goods being processed or commingled.

356. Goods which are processed will result in a ‘product’. As such references to a product throughout this Part are taken to be a result of processing goods.

357. Goods which have been commingled with other goods will result in a ‘mass’. As such references to a mass throughout this Part are taken to be a result of the commingling of goods.

Guide

358. The guide in new section 98 provides the structure of Part 3.4.

359. The guide provides an overview of the definitions for both ‘processed’ and ‘commingled’ goods and clarifies that other general rules (such as the default priority rules) will still apply to ‘processed’ and ‘commingled’ goods if not dealt with in this Part.

Section 99 – Meaning of *processed* and *commingled* goods

360. New Part 3.4 inserts definitions for both ‘processed’ and ‘commingled’ goods.

Definition of processed goods

361. The current PPS Act does not have a definition of ‘processed’ goods. The definition in subsection 99(1) clarifies that goods are ‘processed’ if they are manufactured, processed or assembled into a product and the identity of the goods is lost in the product.
362. The definition provides that processed goods are manufactured, processed or assembled into a product (as opposed to the definition of commingled at subsection 99(2) which provides that goods are mixed with other goods into a mass).
363. Examples are provided under subsection 99(1) to illustrate what could constitute processed goods.
364. Subsection 99(3) provides a standard for when the identity of a good is lost in the product. This provides that the identity of goods is lost if it is not commercially practical to restore the goods to their original states.

Definition of commingled goods

365. Subsection 99(2) provides a definition for commingled goods. The definition provides that goods are commingled if they are mixed with other goods into a mass and their identity is lost in the mass.
366. Subsection 99(3) provides a standard for when the identity of goods is lost in the mass. This provides that the identity of goods is lost if it is not commercially practical to restore the goods to their original state.

Section 100 – Processed and commingled goods—attachment

367. The new section 100 reframes the current section 99 of the PPS Act which provides for a continuation of security interests in processed or commingled goods. Current section 99 does not make a distinction between the rules for processed and commingled goods.
368. The reframing of section 99 in new section 100 aligns with other amendments that have replaced the phrase ‘continues in’ with ‘remains attached to’.
369. The concept of ‘continuation’ of attachment is reframed throughout the PPS Act to security interests ‘remaining’ attached to goods. The language of a security interest ‘continuing’ in collateral/goods is uncertain because the rest of the PPS Act refers to a security interests ‘remaining attached’ to the collateral/good. There is no clear reason for the difference in terminology in this and other sections. As a result, section 100 provides that the ‘security interest remains’ attached, rather than continues in the product or mass. This amendment is made it align the language throughout the PPS Act.

Processed goods - attachment

370. New subsection 100(1) clarifies that a security interest that is attached to goods which are then processed into a product remain attached to the final product.
371. New subsection 100(3) clarifies that a PMSI in goods which are processed into a product remains a PMSI.

Commingled goods - attachment

372. Subsection 100(2) provides an attachment rule for goods that are commingled into a mass. This rule provides that where a secured party has an interest in goods which are commingled into a mass, the security interest will remain attached to the grantor’s share of that mass.
373. A security interest in goods which are commingled into mass will remain attached to the grantor’s share of the mass because a secured party will be able to enforce against that

share (i.e. against part of the mass rather than all of it). This option is not available for processed goods.

374. For example, where a person has a security interest in a grantor's wheat and that wheat is commingled with other wheat into a mass, that person's security interest in the wheat will remain attached to the grantor's proportionate share of the wheat. If the grantor's portion of the wheat is 50% of the mass, the security interest attaches to that 50% share of the mass.
375. Note that this may not always be the same physical amount of goods. For example, if a grantor's grain is commingled with other grain such that it forms 50% of the grain in the silo and rats eat half of the entire mass, a secured party will only be able to enforce against 50% of the grain remaining in the silo.
376. New subsection 100(3) clarifies that a PMSI in goods which are commingled into a mass remains a PMSI.

Section 101 – Processed and commingled goods—perfection of security interest

377. New section 101 rephrases current section 100 which provides rules for perfecting security interests in commingled or processed goods.
378. New section 101 provides a distinction between perfection of a security interest in goods processed into a product and goods commingled into a mass.
379. The section provides for a type of automatic perfection for goods that have a perfected security interest attached to them when they are processed into a product or commingled in a mass.
380. If there is a perfected security interest in goods which are processed into a product the security interest will also be perfected over the product.
381. If there is a perfected security interest in goods which are commingled into a mass the security interest will also be perfected over the grantor's share of the mass.
382. The note added beneath this section alerts readers that the taking free rules will continue to apply even where goods are processed or commingled.

Section 102 - Priority and enforcement of a security interest in 'processed' goods

383. Section 102 provides a priority and enforcement rule for security interests in processed goods.

Priority

384. Priority of security interests in processed goods ought to be the same as if the input goods had not been processed at all. The priority will be determined by the general rules for priority between security interests in Part 2.6 of this Chapter.

Maximum amount recoverable

385. The amount recoverable when a secured party is enforcing their security interest in processed goods is capped at the market value of their input goods at the time they were processed. If there were multiple security interests over the same item of input goods, the cap applies to all of them collectively. This is intended to stop secured parties gaining a windfall benefit by enforcing their security interest against the more valuable processed goods.

Section 103 - Priority and enforcement of a security interest in 'commingled' goods

386. Section 103 provides a priority and enforcement rule for security interests in commingled goods.

Priority

387. Priority of security interests in the same goods that are commingled into a mass have the same priority between each other as if the goods had not been commingled at all. The priority will be determined by the general rules for priority between security interests in Part 2.6 of this Chapter.

Maximum amount recoverable

388. The amount recoverable when a secured party is enforcing their security interest in commingled goods is capped at the value of the grantor's proportion of the commingled goods. Unlike the corresponding rule for processed goods in section 102, this allows the secured party to take advantage of any fluctuations in value in the commingled goods. The secured party is able to share in changes in the value of commingled goods as a whole, relative to the grantor's share of the mass.

389. The rule for 'commingled' goods in the new section 103 will provide fairer outcomes for secured parties.

Item 87 – Subsection 111(2)

390. Item 87 removes the word 'actual' because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both 'actual and constructive' knowledge.

Item 88 – Paragraph 166(2)(c)

391. Item 88 removes the words 'actual or constructive' because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both 'actual and constructive' knowledge.

Item 89 - Subsection 172(2) (table item 6, column headed "Purpose", paragraph (a))

392. Item 89 amends paragraph (a) of item 6 of the column headed 'Purpose' in the table contained at subsection 172(2).

393. Subsection 172(2) provides a list of permitted searches on the PPS Register by reference to grantor details where the grantor is an individual. Item 6 paragraph (a) of the table is intended to allow a person who is considering whether to acquire an interest in the property to search against the individual grantor details. The current formulation to search paragraph (a) of Item 6 is too narrow because it limits the purpose of the search to if 'the property is to be purchased or dealt with by the person'. A person ought to be able to search the PPS Register when considering whether to acquire an interest before committing to purchase or deal with the property.

394. The paragraph is further amended to state that a person is considering acquiring 'an interest' in the property because they may not be considering acquiring the whole of the property.

Item 90 – Paragraphs 267(3)(b) and 267A(2)(b)

395. Item 90 removes the words 'actual or constructive' because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both 'actual and constructive' knowledge.

Item 91 – Section 295

396. Item 91 removes the reference to the definition of constructive knowledge from section 295 because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Item 92 – Section 297

397. Item 92 repeals section 297 which defines constructive knowledge.

398. The definition of constructive knowledge is repealed because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Item 93 – Section 298 (heading)

399. Item 93 removes the words ‘actual or constructive’ from the heading of section 298 because the definition of ‘knowledge’ (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Item 94 – Subsections 298(1) and (2)

400. Item 94 removes the words ‘actual or constructive’ from subsections 298(1) and (2) because the definition of ‘knowledge’ (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Item 95 – Section 299 (heading)

401. Item 95 removes the words ‘actual or constructive knowledge’ from the heading of section 299 because the definition of ‘knowledge’ (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Item 96 – Paragraphs 299(2)(a) and (b)

402. Item 96 removes the words ‘actual or constructive’ from paragraphs 299(2)(a) and (b) because the definition of ‘knowledge’ (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Item 97 – Section 300

403. Item 97 removes the words ‘actual or constructive’ from section 300 because the definition of knowledge (as inserted by Item 5 of this Schedule) encompasses both ‘actual and constructive’ knowledge.

Item 98 – Subsection 322(1) (note 1)

404. Item 98 amends the note in subsection 322(1) to refer to the new section 55A which provides a definition of the term ‘priority time’ (as inserted by Item 58 of this Schedule).

Item 99 – Amendments of listed provisions – motor vehicles

405. Item 99 provides a list of amendments to remove the word ‘motor’ wherever it occurs in the PPS Act.

406. The definition of motor vehicle has been repealed by Item 6 of this Schedule. A definition of ‘vehicle’ is inserted by Item 30 of this Schedule. The removal of the word ‘motor’ wherever occurring throughout the PPS Act will align the sections which currently refer to motor vehicles with the definition of vehicle.