

Schedule 4—Enforcement of security interests and insolvency of a grantor

Part 1—Main amendments

Personal Property Securities Act 2009

Part 4.1—Guide to this Chapter

1. Item 1 – Chapter 4 Item 1 repeals the entirety of Chapter 4 of the *Personal Properties Securities Act 2009* (the PPS Act) and replaces it with a new Chapter 4.
2. This Schedule 4 sets out the amendments that will be made to the chapter in comparison to the current Chapter 4.
3. Chapter 4 will be restructured to provide a more logical flow to aid user understanding of the chapter. This will assist in the practical application of Chapter 4, which provides a comprehensive set of rules by which a secured party can self-enforce their interest in collateral where there is a default under the terms of the security agreement.
4. Chapter 4 will be restructured to allow secured parties to ascertain:
 - whether Chapter 4 is relevant to their particular interest from the outset;
 - if Chapter 4 is relevant to their interest, which rights and remedies are open to the secured party;
 - the positive enforcement obligations all parties would have to comply with regardless of whether they choose to use the Chapter 4 enforcement provisions or not;
 - the provisions which cannot be contracted out of regardless of whether an enforcement action is being taken under Chapter 4 or not; and
 - the provisions that are compulsory if Chapter 4 is used.
5. Chapter 4 will also be restructured to provide a narrative structure which follows the process of enforcement. Chapter 4 will also group related provisions together. This is because the current Chapter 4 lacks structure and users of the chapter must refer to multiple different sections in order to understand their obligations. The restructure itself has no substantive effect on the provisions (other than the amendments made to the sections outlined below) and is intended to assist users of the PPS Act following the enforcement process to understand the rights, duties and obligations that arise when a secured party enforces their interest in personal property.
6. The explanatory material below provides an overview of where equivalent sections of the current sections in Chapter 4 are being relocated to or repealed. In instances where subsections are to be relocated, the material below provides a pinpoint reference to where subsections are being relocated to (details of specific amendments made to sections are provided under that section's heading below).

Section 107 – Guide to this Chapter

7. Section 107 will update the current guide to Chapter 4.

8. The guide references that certain security interests are excluded entirely from the Chapter. In addition to certain deemed security interests (see new section 109), Chapter 4 excludes security interests subject to the National Credit Code, and certain security interests in personal property of a corporation (see new section 109).
9. The guide also provides a summary of how Chapter 4 is to be applied to security interests, and where contracting out of the Chapter is not permitted (see new section 114).
10. The guide confirms that, apart from the PPS Act, the Chapter does not affect rights and remedies that the parties to a security agreement have against each other apart (for example, a right *in personam*).

Part 4.2—Scope of this Chapter: excluded security interests

11. The replaced heading to Part 4.2 reflects that it provides the scope of Chapter 4 and security interests which will be excluded from the application of the chapter.

Section 108 – Guide to this Part

12. The guide located at replacement section 108 provides an overview of which security interests are now excluded from the application of Chapter 4.

Section 109 - Security interests to which this Chapter does not apply

13. Replacement section 109 lists which security interests are excluded from Chapter 4. In doing so, it incorporates provisions regarding excluded security interests located throughout Chapter 4 of the current PPS Act into one stand-alone section.
14. The intended effect is to allow secured parties to ascertain quickly and easily whether their particular security interest is excluded without being required to familiarise themselves with the entirety of Chapter 4.

Deemed security interests

15. New subsection 109(1), for the most part, replicates the current section 109(1), however it does not replicate current paragraph 109(1)(b) (security interests that are incidental to security interests in current paragraph 109(1)(a), transfers of account or chattel paper that does not secure payment or performance of an obligation).
16. The concept of a ‘chattel paper’ will be removed from the PPS Act (see Part 3 of Schedule 1).

National Credit Code securities

17. New subsection 109(2) is inserted into section 109. This subsection provides that Chapter 4 does not apply to a security interest in personal property to which the NCC also applies. The NCC regulates consumer credit transactions, and generally speaking will apply to a security interest if the grantor (creditor) is an individual or body corporate, and the finance secured by the personal property is used predominantly for personal, domestic or household purposes.
18. The effect of this subsection is to:
 - repeal current section 119 of the PPS Act (which provided that the interests in the NCC could be enforced using chapter 4, with some exceptions);

- disapply the NCC from the enforcement provisions because they are regulated within the NCC and cause unnecessary confusion in the PPS Act; and
- remove the added complexity of current section 119, which allowed the *Personal Property Securities Regulations 2010* (the PPS Regulations) to specify that certain provisions under this chapter have been complied with in specified circumstances if a specified provision of the NCC has been complied with in those circumstances. The removal of this provision means that a secured party need only have regard to the NCC when enforcing interests to which that code applies.

Security interests in personal property subject to certain Corporations Act controllers

19. Subsections 109(3) and (4) will disapply the Chapter to security interests in personal property of a corporation where a person is a controller of property of a corporation as a receiver or receiver and manager under the Corporations Act. These new subsections effectively relocate current section 116 of the PPS Act into section 109.
20. Subsection 109(3) clarifies that the exemption only applies to controllers of property of a corporation. The chapter continues to apply to controllers of personal property of individuals (for example where an individual has granted a security interest that is now in the hands of a receiver or receiver and manager).
21. Note 1 under subsection 109(3) is intended to point users to Part 5.2 of the Corporations Act. The note provides that a security interest in personal property of a corporation in the hands of a receiver or receiver and manager is regulated by Part 5.2 of the Corporations Act.
22. Note 2 under subsection 109(3) clarifies that the exclusion in the subsection does not apply to a secured party that enforces its security interest by itself taking possession of the collateral.
23. Subsection 109(4) clarifies that the meaning of ‘controller’, ‘receiver’ and ‘receiver and manager’ has the same meaning as in the Corporations Act.
24. The effect of new subsections 109(3) and (4) is to clarify that the Corporations Act applies to security interests in personal property of a corporation where a person is a controller of the property as a receiver or a receiver and manager. This is because the Corporations Act provides specific rules for receivers and managers.

Pawnbroker securities

25. Subsection 109(5) will disapply Chapter 4 from security interests taken by pawnbrokers.
26. The PPS Act currently excludes pawnbroking interests entirely under section 8, however those interests will be included within the scope of the PPS Act by amendments made by Item 2 of Schedule 1. The exclusion regarding pawnbroker securities will be limited to the enforcement of those interests, which will continue to be subject to State and Territory regulation.
27. Enforcement of pawnbroking security interests are excluded from Chapter 4 provided they meet the prerequisites listed at subsection 109(5). Subsection 109(5) is based on current subsection 8(6) of the PPS Act. Pawnbrokers will not need to comply with Chapter 4 when enforcing their security interests if the prerequisites listed at paragraphs 109(5)(a)-(f) are met.

28. Even though new subsection 109(5) is based on the current subsection 8(6), the market value of the payment or other obligation secured by the interest will be increased from \$5,000 to \$10,000. This means that only payments or other obligations secured by the interests that have a market value of less than \$10,000 will be excluded from Chapter 4 (provided all other prerequisites are met). The value has been increased to align with section 47 of the PPS Act (for further information on section 47, see Items 44-46 of Schedule 3).
29. Replacement section 109 will not replicate the following exemptions contained within the current section 109:

Current paragraph 109(1)(b) – Incidental security interests - transfer of accounts

30. Current paragraph 109(1)(b) will not be replicated in replacement section 109. Current paragraph 109(1)(b) excludes a security interest that is ‘incidental’ to the transfer of account that does not secure payment or performance of an obligation. The transfer of an account can give rise to a deemed interest (already excluded by paragraph 109(1)(a) because the transfer does not secure payment or performance of an obligation), or a transfer of an account can be by way of security, in which case the interest is captured by Chapter 4. The amendment will remove a confusing and unnecessary provision.
31. There is no equivalent to the current paragraph 109(1)(b) in the Canadian or New Zealand PPSAs.

Property located outside of Australia

32. Current subsection 109(2) will not be replicated in replacement section 109. Current subsection 109(2) provides that Chapter 4 does not apply to a security interest in goods located outside Australia.
33. Even though it may be difficult to apply the PPS Act’s enforcement rules in another jurisdiction, this does not necessarily mean that the PPS Act should always disengage them. The PPS Act facilitates commercial secured-transactions, which may occur cross-border. The removal of this exemption acknowledges that there could be circumstances in which a secured party needs to rely on the PPS Act’s enforcement rules in another jurisdiction – for example, if the secured party has not also taken local security.
34. The effect of not replicating current subsection 109(2) is that Chapter 4 can now apply to security interests in goods that are located outside Australia (in accordance with any conflict of law provisions).

Personal, domestic or household property

35. The PPS Act currently provides a distinction for goods used predominantly for personal, domestic or household property (current subsection 109(5)). This distinction is not replicated in replacement section 109.
36. This subsection was inserted to provide a measure of consumer protection in the PPS Act for consistency with the National Credit Code (see below subheading National Credit Code (NCC)).
37. The NCC does not regulate a security interest over collateral, even if the collateral is used for personal, domestic or household purposes, if the security interest secures business finance. The NCC also does not apply if the secured party is not an individual or body corporate, even if the funds secured by the personal property are used predominantly for

personal domestic or household purposes. This subsection will not be replicated as it introduced new and complex restrictions on secured parties which were not present prior to commencement of the PPS Act.

38. The effect of this is that Chapter 4 is capable of applying to a security interest over collateral, even if the collateral is used for personal, domestic or household purposes (if the interest is not otherwise excluded from Chapter 4).

Subsections 109(3) and 109(4) – Investment instruments and intermediated securities

39. Current subsections 109(3) and (4) are moved to new section 143 (see new section 143 - market traded collateral).
40. Collateral that attracts special enforcement rules like ‘market traded collateral’ will be located together in new Part 4.4 (Special enforcement rules for certain types of collateral).

Part 4.3—Enforcement of security interests

Division 1—Introduction

Section 110 – Guide to this Part

41. Section 110 provides an updated guide to Part 4.3 of Chapter 4 of the PPS Act. The new guide provides an overview of the restructure for each division of Part 4.3. Relevantly, the guide points to the important enforcement rules that apply to all enforcement actions and cannot be excluded by contract, as set out in Division 2 of that part.

Section 111 – Meaning of *mandatory enforcement rule*

42. Section 111 sets out the provisions within Chapter 4 which are mandatory enforcement rules (i.e. rules that must be complied with for all collateral and all types of enforcement actions). Mandatory enforcement rules apply to the enforcement of all security interests, whether that interest is enforced following Chapter 4, according to the terms of the security agreement, or through other means. All of the provisions in Division 2 of Part 1 of Schedule 4 are mandatory enforcement rules, along with sections 131, 133, 134 and 135. See below specific sections for further information.

Division 2—General enforcement principles

43. Division 2 provides the general enforcement principles, which are mandatory enforcement rules. The Division relocates provisions which specify general enforcement principles into one comprehensive division.
44. If no amendment is being made to the sections in this Schedule, it is stated in that section's heading. Any amendments to be made to relocated sections are explained below in their respective headings.

Section 112 – Rights and remedies of parties to security agreements generally

45. Section 112 is based on the current section 110 of the PPS Act and is being relocated to ensure that all general enforcement principles are co-located in Division 2.
46. Section 112 confirms that the PPS Act does not derogate from the rights and remedies parties to a security agreement have against each other in relation to a default under the security agreement.
47. The section also adds a note to clarify that a secured party may have rights against a debtor if the proceeds of enforcement are insufficient to meet the secured obligations.

Section 113 – Rights and duties—honest and commercially reasonable exercise

48. Section 113 is based on current section 111 and provides that any enforcement action must be exercised in a commercially reasonable and honest manner. This is being relocated to ensure that all general enforcement principles are co-located in Division 2.
49. The reference in current subsection 111(2) to 'actual knowledge' will be amended to 'knowledge' in new subsection 113(2). This aligns the knowledge test in this subsection with the new definition of 'knowledge' in Items 4 and 5 of Schedule 3.

Section 114 – Contracting out of enforcement under this Chapter

50. Section 114 provides the ways in which parties may contract out of the application of Chapter 4. This section is broadly based on the current section 115 and is being relocated to ensure that all general enforcement principles are co-located in Division 2.
51. The section confirms that parties may not contract out of the mandatory enforcement rules (see section 111 above) and doing so in a security agreement would render that term void to the extent it purports to do so.

No contracting out—collateral intended to be used predominantly for personal, domestic or household purposes

52. Subsection 114(4) clarifies that if collateral is intended, at the time of entry into a security agreement, to be used predominantly for personal, domestic or household purposes, the parties may not contract out of any provision in Chapter 4. Chapter 4 must be complied with if collateral is intended to be used predominantly for personal, domestic or household purposes.
53. The intention to use the collateral predominantly for personal, domestic or household purposes must be formed at the time of entry into the security agreement and cannot arise after the security agreement is entered into. For example, if a grantor intends to use collateral for a business purpose and enters into a security agreement on that basis, it cannot then claim to use the collateral predominantly for personal, domestic or household purposes - even in circumstances where the collateral is in fact used predominantly for that purpose. This because parties ought to be able to ascertain whether the property is being used for that purpose at the outset of entering into a security agreement.

Contracting out – effect on third parties

54. Subsections 114(5)-(7) mirror the current subsections 115(2), (3) and (5) of the PPS Act.
55. These subsections provide that if parties to a security agreement contract out of certain provisions of the chapter, those provisions will continue to the extent that it gives rights or imposes obligations on persons who are not parties to the security agreement.
56. For example, where a grantor waives their right to a statement of account from the secured party under the terms of the security agreement, the rights of other parties with an interest in the collateral who are not a party to the security agreement will continue (for example another secured party with an interest in the collateral).

Section 115 – Dealing with collateral under this Chapter

57. Section 115 is based on current section 112 and is being relocated to ensure that all general enforcement principles are co-located in Division 2.
58. Section 115 provides that a secured party is able to deal with the collateral only to the extent that the grantor will be able to deal with the collateral. However, if the secured party had title to the collateral immediately before commencing enforcement under the chapter, the section will not apply.
59. Similarly, if the grantor is prohibited from dealing with the collateral under a security agreement because it would be deemed to be a default under that agreement, the section will not apply to a secured party.

60. Section 115 does not replicate current subsection 112(3) which, provided that a secured party may only be able to seize, purchase or dispose of a licence subject to the terms and conditions of the licence and any applicable law of the Commonwealth, State or Territory. For the avoidance of doubt, this remains the case, however, this concept is encompassed by section 115 as it is broad enough to encompass that scenario.

Section 116 – Effect of recovering judgment or issuing execution

61. New section 116 relocates current section 113 of the PPS Act to ensure that all general enforcement principles are co-located in Division 2.

62. Section 116 provides that the fact a secured party has recovered judgment, or issued execution, against a grantor in relation to collateral does not extinguish the security interest in the collateral.

Section 117 – Cumulative rights and remedies under this Chapter

63. New section 117 relocates current section 114 of the PPS Act to ensure that all general enforcement principles are co-located in Division 2.

64. Section 117 clarifies that the rights in Chapter 4 are cumulative.

Section 118 – Seizure by higher priority parties – notice

65. Section 118 is based on current section 127 of the PPS Act and is being relocated to section 118 to ensure that all general enforcement principles are co-located in Division 2. The below paragraphs highlight the difference between current section 127 and section 118.

66. Subsection 118(2) provides that a higher ranked secured party may give written notice to a lower ranked enforcing party requiring possession of the collateral. This is subject to the limitations in subsection 118(3).

67. Subsection 118(3) provides limitations on a higher ranked party providing notice requiring possession to a lower ranked enforcing party. A higher ranked party may only provide the notice if it was entitled to seize the collateral in its own right, had the enforcing party not first seized the collateral, and has not waived that right to the lower ranked enforcing party. In this way section 118 will not override a prior agreement between two secured parties.

68. Subsection 118(7) clarifies that a higher ranked secured party must pay an amount of reasonable expenses under subsection 118(6) when the lower ranked party provides evidence of those expenses. The higher priority party will only be required to pay those expenses if the lower ranked party provides this evidence *before* the higher priority party disposes of the collateral and any proceeds of the collateral sufficient to meet the expenses. This ensures that a higher ranked secured party will only pay reasonable expenses from the disposal or proceeds of the collateral, rather than out of its own pocket.

69. Subsection 118(12) clarifies the current position under the PPS Act that two secured parties are able to contract out of the right of one of the secured parties to receive payment of reasonable expenses. This is included at current paragraph 115(6) of the PPS Act but is being relocated to section 118 for greater efficacy.

Section 119 – Disposing of collateral free of interests

70. Section 119 relocates current section 133 of the PPS Act to ensure that all general enforcement principles are co-located within Division 2.
71. Section 119 provides that a third party that purchases the collateral as a result of an enforcing party's disposal takes the collateral free of all interests in the collateral except for security interests in the collateral that have a higher priority than the enforcing party.

Section 120 – Distribution of property received from enforcement

72. Section 120 is based on current section 140 of the PPS Act which is being relocated to ensure that all general enforcement principles are co-located within Division 2.
73. Section 120 is identical to current section 140 of the PPS Act with the exception of the following amendments:
 - the section will be amended to replace the words 'amount, personal property or proceeds' with 'property'. This does not change the effect of the section, and is made to remove the previously cumbersome word string; and
 - consequential amendments have been made throughout the section to reference other sections which have been relocated as a result of the redrafting of Chapter 4.

Division 3—Seizing collateral

74. Division 3 provides the rules for seizing collateral. The Division relocates provisions which relate to seizing collateral into one comprehensive division.
75. If no amendment is being made to the sections in this schedule, this is simply stated under that section's heading. Any amendments to be made to relocated sections are explained below their respective headings.

Section 121 – Seizing collateral – general rules

76. Section 121 is based on current subsections 123(1) and (4) of the PPS Act. These are being relocated to ensure that all rules relating to seizure of collateral are co-located within Division 3.
77. Current subsection 123(1) allows a secured party to seize collateral by any method permitted by law if the 'debtor was in default under the security agreement'. This will be amended to allow the secured party to seize collateral by any method permitted by law if 'there is a default under the security agreement'.
78. A security agreement will typically include default triggers that relate to the grantor and not to the debtor, as such the reference to a debtor being in default is too narrow – for example, if market circumstances change in a materially adverse way. This amendment confirms that a secured party should be able to seize collateral in accordance with the default provisions contained within the security agreement, not just those that relate to a debtor's default.
79. Current subsection 123(4) will not be replicated in new section 121. Current subsection 123(4) provides that a secured party who seizes collateral under this section does not perfect the secured party's security interest in the collateral. This subsection is

unnecessary because the rule already exists in section 21(2)(b) of the PPS Act. A note to that effect has been added under new section 121.

Section 122 – Seizing collateral – property other than goods

80. New section 122 is based on current subsections 123(2) and (3) and 124(2) of the PPS Act. These are being relocated into new section 122 to ensure that all rules relating to seizure of collateral are co-located within Division 3.

Collateral other than goods

81. Current subsections 123(2) and (3) provide rules for seizing ‘intangible property’. The words intangible property will be replaced by ‘collateral other than goods’ in new section 122. This will allow the section to be used for any collateral that is not goods.

82. The current formulation in subsections 123(2) and (3) applying to only ‘intangible property’ caused confusion because of the definition of intangible property. Section 10 of the PPS Act defines intangible property any personal property which is not:

- financial property;
- goods; or
- an intermediated security.

83. In the case of enforcement of security interests in financial property or intermediated securities it was not immediately clear how a secured party should enforce its interest. Removing the reference to ‘intangible property’ makes it clear that a secured party who has an interest in any property other than goods is able to seize that collateral under new section 122 by giving notice.

Licences

84. The seizure of licences will be included in new section 122 because it will fall within the scope of ‘property other than goods’.

85. Current subsection 124(2)(b) is being relocated to new paragraph 122(1)(b). Current subsection 124(2) provides how a secured party may seize licences where the secured party has perfected by possession or control. As licences are incapable of being perfected by possession or control it is not appropriate to refer to licences in current section 124 (which provides rules for seizing collateral perfected by possession or control).

Section 123 – Seizing collateral—perfection by possession or control

86. Section 123 is based on the current subsections 124(1) and (3) of the PPS Act which are being relocated to ensure that all rules relating to seizure of collateral are co-located within Division 3.

87. The section provides that a secured party is able to seize collateral perfected by possession or control by giving notice to the grantor, if there is a ‘default under the security agreement’ as opposed to the current formulation in section 124 of ‘the debtor’ being in default of the security agreement. This widens the application of the section because a security agreement will typically include default triggers that do not relate to the debtor, but rather to the grantor. A security agreement might also allow the secured party to enforce even if there is no default by either the debtor or the grantor – for example, if market circumstances change in a materially adverse way.

Section 124 – Seizing collateral—obligation to dispose or retain

88. New section 124 relocates current section 125 of the PPS Act to ensure that all rules relating to seizure of collateral are co-located within Division 3.
89. Only minor consequential amendments are made to references of other sections and divisions within section 124 arising from the reorganisation of Chapter 4.

Section 125 – Seizing collateral—taking apparent possession

90. New section 125 is based on current section 126 of the PPS Act which is being relocated to ensure that all rules relating to seizure of collateral are co-located within Division 3.
91. New section 125 does not replicate current subsection 126(3) which provided that a party who seizes collateral by taking apparent possession does not perfect its interest in the collateral. This is unnecessary because the rule already exists in section 21 of the PPS Act.

Division 4—Redeeming collateral and reinstating security agreement

92. New Division 4 provides rules about redemption of collateral or the reinstatement of security agreements before the secured party has disposed of the collateral. Division 4 groups all current sections regarding redemption of collateral and reinstatement of security agreements which were previously dispersed throughout Chapter 4.
93. Where sections have been relocated, their current section number is provided below. If no amendment has been made to the sections other than the relocation, this is simply stated under that section's heading. Any amendments to the sections are explained below their respective headings.

Section 126 – Redeeming collateral

94. New section 126 is based on current section 142 of the PPS Act and is being relocated to ensure that all rules relating to the redemption of collateral or reinstatement of security agreements are co-located within Division 4.

Subsection 126(1) - New redemption cut-off time

95. New subsection 126(1) alters the current cut-off time for redemption of collateral under section 142 (new section 128, see below for further information) and clarifies that the cut-off will apply where the secured party has exercised its right to retain the collateral. New subsections 126(1) and (2) provide that a grantor or any other person with a security interest in the collateral is able to redeem the collateral before the secured party disposes or has entered into a contract to dispose of the collateral, or becomes entitled to retain the collateral.
96. This differs from current subsection 142(1) which provides that a grantor, or any other person with a security interest in the collateral, may redeem the collateral from the secured party 'at any time before a secured party disposes of collateral'. This redemption cut-off time posed a particular issue for secured parties who had already committed to the disposal of the collateral, but have not yet disposed of it. The subsection is amended to provide an earlier cut-off time for the redemption of the collateral.

Section 127 – Reinstating security agreement

97. New section 127 is based on current section 143 of the PPS Act which provides an ability for parties to reinstate security agreements by paying amounts in arrears under the security agreement (disregarding any amounts in arrears as a result of an acceleration clause in the security agreement).

98. New section 127 differs from current section 143 of the PPS Act in the following ways:

Who may reinstate a security agreement?

99. Current subsection 143(2) provides that ‘a person’ may reinstate the security agreement by paying the amounts stated in current paragraphs 143(2)(a) and (b). This will be amended in new subsection 127(2) to provide that only ‘the grantor’ is able to reinstate the security agreement. This amendment will be made because only grantors should be able to decide whether they wish to reinstate and continue to be bound by the defaulted security agreement (as opposed to, for example, a debtor who is not the grantor under the security agreement - a debtor should not be able to force the grantor to become a party to the agreement against their wishes).

When is a grantor able to reinstate a security agreement?

100. Currently subsection 143(1) provides that the section applies ‘at any time before the secured party disposes or retains the collateral’. This has the effect that a security agreement will be able to be reinstated at any time prior to the secured party disposing or retaining the collateral, regardless of whether the secured party has committed to dispose of the collateral. This causes particular difficulty for secured party who may have entered into an agreement to dispose of the collateral to which the security agreement relates.

101. New subsection 127(1) will amend this to provide that the section applies before any of the following occur:

- The secured party disposes of the collateral;
- The secured party enters into a contract to dispose of the collateral; or
- The secured party becomes entitled to retain the collateral.

102. The effect of this amendment is that a grantor will only be able to reinstate the secured agreement before the secured party acts against the collateral (whether by disposal, committing to dispose or becoming entitled to retain the collateral).

Division 5—Disposing of collateral (including by purchasing collateral)

103. Division 5 provides rules about disposing of collateral, including by purchasing collateral. Division 5 groups all current sections regarding disposal of collateral which were previously dispersed throughout Chapter 4.

104. Where sections have been relocated, their current section number is provided below. If no amendment has been made to the sections other than the relocation, this is simply stated under that section’s heading. Any amendments to the sections are explained below their respective headings.

Section 128 – Disposing of collateral – general rule

105. New section 128 is based on current section 128 of the PPS Act. The section provides the general rule for disposal of collateral by a secured party after the collateral has been seized due to a default under the security agreement.
106. New section 128 differs from current section 128 in the following ways:

Default under security agreement

107. Current section 128 refers to a ‘default by the debtor’ which will be amended in new section 128 to refer to a ‘default under a security agreement’. This amendment is made throughout Chapter 4 and is made in section 128 to align the terminology throughout the chapter.
108. The reference to a debtor being in default is too narrow because a security agreement will typically include default triggers that do not relate to the debtor, but rather to the grantor. A security agreement may be enforced by the secured party even if there is no default by either the debtor or the grantor – for example, if market circumstances change in a materially adverse way.

Relocation of subsections 128(2)-(5)

109. Current subsections 128(2)-(5) are being relocated to new section 130 (see below heading ‘Section 130 – Disposing of collateral – methods of disposal’). These subsections are being relocated to new section 130 to ensure all rules regarding methods of disposal are co-located in one section, rather than being dispersed throughout the chapter.
110. Current subsection 128(6) will not be replicated in new section 128.

Removal of subsection 128(6)

111. Current subsection 128(6) provides that the power to dispose of a licence must be exercised subject to the terms and conditions of the licence and an applicable law of the Commonwealth, State or Territory. It is not replicated because the rule will be provided for by new subsection 115(1) (current subsection 112(1) of the PPS Act). This is not intended, nor does it, change the rules that a secured party must comply with in order to dispose of a licence.
112. New subsection 115(1) provides that a secured party is only able to deal with the collateral to the same extent that the grantor would be entitled to deal with the collateral. This remains the case for licences where a secured party can only dispose of the licence in to the same extent the grantor would be entitled to dispose of the licence.
113. For example, if the terms of a licence are governed by a particular law of the Commonwealth, State or Territory, the secured party will only be able to deal with that licence according to those terms. Similarly, the secured party will be obliged to follow the terms and conditions contained within a licence to the same extent the grantor would have had to.

Section 129 – Disposing of collateral – notice

114. New section 129 is based on current section 130 of the PPS Act. This section provides rules on what notices a secured party must give when disposing of property.

115. New subsection 129(1) is based on current subsection 130(1) of the PPS Act but makes the following amendments and clarifications:

- The removal of the words ‘on default by the debtor’ after ‘a secured party who proposes to dispose of collateral’. This amendment will be made to align the language of this section with other amendments to this chapter regarding a default under security agreements (for example, section 123 above). The removal of the term also recognises that a secured party utilising this section will only be doing so to enforce its security interest as a result of a default under a security agreement.
- New paragraph 129(1)(a) clarifies that a notice must be given to the grantor if the grantor has not waived their right in writing to receiving a notice regarding the disposal of collateral. This clarification is made to ease a reader’s understanding of the section.
- New paragraph 129(1)(b) clarifies that a secured party disposing of collateral must provide a notice to a higher-ranking secured party unless that secured party has waived its right to receive a notice under new subsection 114(7). This clarification is made to ease a reader’s understanding of the section.

116. New subsection 129(2) is based on current subsection 130(2) which provides rules about what must be contained in a notice from a secured party. The following amendments will be made to the subsection:

Calculation of amount to be paid under notice

117. New paragraph 129(2)(d) provides that a notice under this section must state the amount to be paid, or if that is not ascertainable, a method by which the amount is to be calculated. This will amend the current position under paragraph 130(2)(c) which provides that the notice must state that a secured party proposes to dispose of the collateral, unless an obligation is performed or an amount is paid to satisfy the obligation. This appeared to require that a secured party needs to state the amount that will be owing on the specified day. In the case of some security agreements, it will not be possible to say in advance exactly what the amounts will be on that future day (for example, if the security interest secures amounts owing under a derivative or if the interest rate fluctuates). New paragraph 129(2)(d) removes this uncertainty by requiring that the notice provide the amount to be paid or the manner in which the amount is to be calculated.

118. New subsection 129(5) is based on current subsection 130(5) which provides exemptions for when a secured party must give a notice. The new subsection will make the following amendments to the subsection:

Material decline in value of collateral before notice period

119. Current paragraphs 130(5)(b) and (c) will be replaced by new paragraph 129(5)(b). Current paragraphs 130(5)(b) and (c) respectively provide exemptions to providing a notice if the secured party believed on reasonable grounds that the collateral either might perish before the end of 10 business days, or there will be a material decline in the value of the collateral if it is not disposed of immediately.

120. It is not clear that current paragraph 130(5)(b) adds anything to paragraph 130(5)(c) and is therefore not replicated.

121. Current paragraph 130(5)(c) only applies if there would be a material decline in value if the collateral is not disposed of ‘immediately’. This could be too abrupt as the material decline in value might not occur ‘immediately’.
122. Accordingly, new paragraph 129(5)(b) provides an exemption to providing a notice if the secured party believes on reasonable grounds that there would be a material decline in the value of the collateral if it were disposed of after the end of the period that would apply if notice were given.

Exemption for collateral to be disposed of in accordance with the operating rules of a clearing and settlement facility

123. Current paragraph 130(5)(f), which provides an exemption for collateral disposed of in accordance with the operating rules of a clearing and settlement facility, will not be replicated in subsection 129(5).
124. This is because such collateral will be considered ‘market-traded collateral’ (e.g. shares traded on the ASX). Under new section 143, Chapter 4 will have limited application to ‘market-traded collateral’ to allow a secured party to trade in the market without having to comply with the procedures and time limits under Chapter 4.

Section 130 – Disposing of collateral – methods of disposal

125. New section 130 relocates all rules regarding the methods of disposal of collateral into one section.
126. The new section is primarily based on current section 128 of the PPS Act, but relocates subsections dealing with disposal by purchase (current section 129 of the PPS Act), and the power to transfer title (current section 141 of the PPS Act) into new section 130. These have been relocated to assist users of the PPS Act by ensuring that all rules regarding methods of disposal are contained within one section.
127. For rules regarding duty to obtain market value when disposing of property (whether by purchase or otherwise) see subheading ‘Section 131 – Disposing of collateral – requirement to obtain market value’ below.

Methods of disposal

128. New subsection 130(1) is based on current subsection 128(2) of the PPS Act which details the ways in which a secured party may dispose of collateral.

Leases or licences

129. New subsection 130(2) is based on current subsection 128(3) which provides a timing rule for when collateral is considered to be disposed of, if it is disposed by a lease or licence.
130. New subsection 130(3) is based on current subsection 128(4) of the PPS Act, which provides a rule that the power to dispose of collateral by lease or licence must be exercised in accordance with the terms and conditions of the security agreement.

Purchase of collateral by secured party

131. New subsection 130(4) amalgamates current subsections 129(1) and (3) of the PPS Act, which provides that a secured party may only purchase the collateral if the disposal of the collateral is by public sale. This amendment is intended only to clarify the current

position under the PPS Act that a disposal by purchase must occur by public sale. The new subsection also clarifies that a public sale includes an auction or closed tender, meaning a secured party can decide which method of public sale they wish to use.

132. The note to subsection 130(4) clarifies that section 296 deals with the onus of proving matters under this subsection.
133. Current paragraph 129(2)(a) of the PPS Act, which provides that a secured party must give a notice if they intend on disposing of the collateral by purchase, is not replicated in this provision. It is, however, encompassed in new subsection 129(1), which provides a universal rule that a notice must be provided when disposing of property whether by purchase or otherwise.
134. Current paragraph 129(2)(b), which provides an ability to the grantor or a higher ranked party to object to a purchase by collateral, will also not be replicated. It is unclear what would be gained by allowing a grantor or secured party to object to a disposal by purchase when the enforcing secured party already has a duty to obtain market value. The duty to obtain market value provides enough protection to the grantor or any higher ranked secured party.

Whole or part disposal

135. New subsection 130(5) is based on current subsection 128(5) which confirms that a secured party is able to dispose of the whole or part of the collateral.
136. The note to subsection 130(5) provides that the secured party must apply any property received from a disposal (whether under this Division or otherwise) in accordance with new section 120 (Distribution of proceeds received from enforcement).

Power to transfer title

137. New subsection 130(6) is based on current subsection 128(6) of the PPS Act which confirms that a secured party is entitled to take any steps necessary to reflect a transfer of title of the collateral resulting from the disposal.

Section 131 – Disposing of collateral – requirement to obtain market value

138. New section 131 is based on current section 131 of the PPS Act. However, it is redrafted to provide a single duty that applies to all disposals, owed by the secured party to any other person with a security interest in the collateral, to exercise all reasonable care to obtain market value, otherwise to obtain the best price that is reasonably obtainable at the time of disposal, having regard to the circumstances at the time.
139. Currently, the chapter seeks to draw a distinction between the duty to obtain market value in a situation where the secured party purchases the collateral, and where the secured party simply disposes of the collateral other than by purchasing it themselves. This distinction appears in the current PPS Act to provide that, where the secured party is the purchaser of collateral on disposal, the method of disposal needs to be by public sale to give best assurance of market value being obtained. This will now be achieved by new subsection 130(4) (see above). For this reason, the distinction will be removed in new section 131.
140. New subsection 131(2) is added to confirm that the requirement to obtain market value does not apply to collateral while the secured party is a controller of the collateral. This is because section 420A of the Corporations Act requires a controller exercising a

power of sale to obtain market value for the property sold. This reflects the overlap of Part 5.6 of the Corporations Act and Chapter 4 of the PPS Act when a controller is appointed to enforce a security interest in the property of a corporation.

141. New subsections 109(3) and (4) (see above) will disapply the chapter to security interests in personal property of a corporation where a person is a controller of property of a corporation as a receiver or receiver and manager. In these instances, Part 5.6 of the Corporations Act will apply.

Division 6—Retaining collateral

142. New Division 6 provides rules that the secured party must follow if they propose to enforce their interest by retaining the collateral. Division 6 groups all current sections regarding retaining collateral which were previously dispersed throughout Chapter 4.

143. Where sections have been relocated, their current section number is provided below. If no amendment has been made to the sections other than the relocation, this is simply stated below that section's heading. Any amendments to the sections are explained below their respective headings.

Section 132 – Retaining collateral—notice

144. New section 132 is based on current section 135 of the PPS Act which provides rules on the notice that must be given by the secured party if they propose to retain the collateral.

Distinction between PMSI and Non-PMSI security interest

145. Current subsection 135(1) provides who the secured party must give notice to if they propose to retain collateral, and provides different rules depending on whether the security interest of the retaining party is a 'purchase money security interest' or not. This distinction will be removed under new subsection 132(1) and replaced with a broad requirement that notice must be given to the grantor (as it does currently) and to any other secured party with a security interest in the collateral that is perfected by registration or possession.
146. The removal of the distinction between PMSI and non-PMSI security interests reflects the current position under the NZ PPS Act and means that a secured party intending to retain the collateral must provide notice of their intention to retain to any party who has perfected their interest under the PPS Act by registration or possession.
147. For completeness, it is not intended that the retention of collateral by a secured party will affect non-security interests of third parties. As such, a secured party will not need to notify such third parties of their intention to retain the collateral.

Default under the security agreement to be remedied

148. New subsection 132(3) is based on current subsection 135(3) of the PPS Act which provides what information must be included in a notice to retain collateral.
149. New subsection 132(3) provides that the notice must contain the name of the secured party giving the notice, a description of the collateral, and state that the secured party proposes to retain the collateral, unless an amount is paid, or another obligation is performed.

150. Under new subsections 132(3)(e) and (f), the notice must also contain details of rights of objection (under new section 133) and contain the address to which a notice of objection may be given. New subsection 132(3)(g) provides that the notice must contain any other matter prescribed by the PPS Regulations for the purposes of the section.

Calculation of amount to be paid

151. New subparagraph 132(3)(d)(i) clarifies that in the case of default due to non-payment of an amount, the notice must provide the amount to be paid or, if the amount cannot be specified, how the amount will be calculated. This amendment recognises that in the case of some security agreements it will not be possible to say in advance exactly what the amounts will be on that future day (for example, if the security interest secures amounts owing under a derivative or if the interest rate fluctuates).

Section 133 – Retaining collateral—objection

152. New section 133 is based on current section 137 of the PPS Act which provides rules on how a person may object to a notice from a secured party of its intention to retain the collateral. New section 133 is informed by subsection 61(2) of the Saskatchewan PPSA.

153. New subsection 133(2) provides that a person entitled to receive a notice of retention of collateral, is entitled to object to the retention before the end of 10 business days (in accordance with new subsection 132(3)(c) (above)).

154. This new section 133 is a mandatory enforcement rule (as per new section 111).

When the section applies

155. New section 133 only applies to parties who receive a notice from a secured party that the secured party intends to retain collateral.

156. This differs from current section 137 which allows a person that receives a notice from a secured party to dispose of collateral, dispose of collateral by purchase, or retain collateral to object to the disposal. The PPS Act will no longer allow persons to object to a secured party disposing of collateral, or disposal of collateral by purchase, because secured parties are obliged to dispose by public sale and obtain the market value of the collateral. The position is, however, different when a secured party intends to retain collateral because a secured party is not obliged to pay market value for collateral in order to retain it.

When a secured party must not retain collateral

157. New subsection 133(3) provides that a secured party must not retain the collateral if they are given a notice of objection. A secured party is, however, able to retain the collateral notwithstanding an objection if:

- the secured party requests proof of a person's interest in the collateral (new section 134 below) and the objector does not provide the requested proof within 10 business days; or
- a court makes an order that the objection is ineffective (see new section 135 below). This has been inserted to allow a secured party to apply to court to challenge an objecting party's objection.

Section 134 – Retaining collateral—proof of interest

158. New section 134 is based on current section 138 which provides a mechanism for secured parties to request proof of an objecting party's interest in the collateral it seeks to retain.
159. This section is a mandatory enforcement rule (as per new section 111).
160. The new section 134 continues to allow a secured party to request proof of a grantor's interest in the collateral, but adds an ability for the secured party to request proof of an objecting party's claim that it would be adversely affected by the secured party retaining the collateral.
161. A secured party must provide an objecting party at least 10 business days to respond to a request for proof. The objecting party may extend this period by court order under section 293.

Proof of adverse effect

162. New subsection 134(b) allows a secured party to request proof from an objecting party that retaining the collateral will adversely affect them. This will be inserted to provide secured parties with a mechanism to request further information about an objection. This differs from the current position under the PPS Act where a secured party can only request proof of an objector's interest. This reflects the current position under subsection 61(2) of the Saskatchewan PPS Act.

Section 135 – Retaining collateral—court order

163. New section 135 is inserted to provide an avenue for the secured party to apply to court to challenge an objecting party's notice of objection for the retention of collateral.
164. The court will be able to make an order that the objection is ineffective if it is satisfied that either one, or both of the items listed in new paragraph 136(2)(a) or (b) are satisfied.
165. This section is a mandatory enforcement rule (as per new section 111).

Paragraph 135(2)(a)

166. The court may make an order that a notice of objection is ineffective if it is satisfied that the objecting party did not do so in order to protect its interest in the collateral or any amount likely to be received from the disposal of the collateral.
167. This provides the court an ability to assess the purpose of an objecting party's notice of objection.

Paragraph 135(2)(b)

168. The court may make an order that a notice of objection is ineffective if it is satisfied that the market value of the collateral secured by the enforcing party's security interest is less than the total amount of payments owed to the secured party and any reasonable expenses that would be involved in enforcement against the collateral.
169. This will render the objection ineffective because there would be no residual value in the collateral, and so no remaining interest for the objecting party to protect.

Section 136 – Retaining collateral free of interests

170. New section 136 combines current sections 134 (which provides when a secured party may retain collateral) and 136 (which provides rules regarding interests in retained collateral).

When secured party may retain collateral

171. New subsection 136(1) maintains the current position under subsection 134(1) of the PPS Act that a secured party may only retain collateral if it has exercised a right to seize the collateral.

172. The subsection amends the current circumstance in which a secured party seizes the collateral from a ‘default by the debtor’ to a ‘default under the security agreement’. The reference to a debtor being in default is too narrow because a security agreement will typically include default triggers that do not relate to the debtor, but rather to the grantor. A security agreement might also allow the secured party to enforce even if there is no default by either the debtor or the grantor – for example, if market circumstances change in a materially adverse way. This amendment confirms that a secured party should be able to seize collateral in accordance with the default provisions contained within the security agreement, not just those that relate to a debtor’s default.

173. The amendment is made to align with similar changes throughout the chapter regarding default under the security agreement.

174. New subsection 136(2) is amended from the current position under subsection 134(1) to reflect the new provisions regarding the notice of objection provisions contained at new sections 133 and 134 (see above for further information).

175. Importantly, the subsection provides that a secured party may only retain the collateral if all paragraphs 136(2)(a)-(c) are satisfied. If any of these paragraphs are not satisfied, a secured party is not entitled to retain the collateral.

176. New subsection 136(3) confirms the current position that a secured party entitled to retain the collateral is also entitled to take any steps necessary to reflect the transfer of the title resulting from the retention.

Collateral retained free of interests

177. New subsection 136(4) is based on current subsection 136(2) which provides that a secured party who retains collateral takes the collateral free of the interest of the grantor, the security interest of the secured party who retains the collateral (i.e. their own security interest) and any security interest that has a lower priority than the secured party’s own security interest.

178. Non-PPS Act interests are not affected by this section and will remain with the collateral to the extent provided by other law.

Protection of those who acquire retained collateral

179. New subsection 136(5) is based on current subsection 136(3).

180. The protection is provided to a third party acquiring the collateral in circumstances where the secured party has not complied with the procedure for retaining collateral and the person has no knowledge that the requirements of new section 132 have not been

complied with. This is because a third-party acquiring collateral for new value is unlikely to know whether the secured party complied with any obligations under the PPS Act.

181. A further amendment is made to the knowledge provision in this subsection. Subsection 136(3) currently provides that a third party acquiring the collateral must not have ‘actual knowledge’ of the secured party not complying with the retention of collateral rules under the PPS Act. This is amended to ‘knowledge’ under new subsection 136(5). This aligns the new definition of knowledge in Items 4 and 5 of Schedule 3.
182. New subsection 136(6) is based on current subsection 136(4) of the PPS Act which confirms that the protection to acquiring third parties is extended whether or not the secured party had an effective registration.

Extinguishment of obligation owed to the secured party

183. New subsection 136(7) is based on current subsection 136(5) of the PPS Act which provides that upon a secured party retaining collateral, the debt or other obligation secured by the security interest is extinguished. The subsection also clarifies that even though the secured party retaining collateral takes the collateral free of a lower ranking party’s security interest, the debt or other obligation owing to the lower priority party is not extinguished.

Division 7—Miscellaneous enforcement matters

184. New Division 7 groups all current miscellaneous enforcement matters which were previously dispersed throughout Chapter 4 into one division.
185. Where sections have been relocated, their current section number is provided below. If no amendment has been made to the sections other than the relocation, this is simply stated under that section’s heading. Any amendments to the sections are explained below their respective headings.

Section 137 – Security for enforcement expenses

186. New section 137 replicates current subsection 18(5) of the PPS Act which confirms that a security interest is taken to secure the reasonable expenses related to the enforcement of the security interest, unless the parties agree otherwise.
187. This will be moved to section 137 because it relates to enforcement but can be contracted out of. The relocation of the subsection does not affect the policy intention, nor how the section ought to be applied.

Section 138 – When certain enforcement notices are not required

188. New section 138 is based on current section 144 of the PPS Act which provides when a secured party is exempted from giving a notice under new sections 129 (when disposing of collateral), 132 (statement of account), 142 (enforcing interests in accordance with land law), 144B (notice to higher priority parties for enforcement against accounts and negotiable instruments) or 144K (removal of accession).
189. The phrase ‘the debtor defaults’ in current subsection 144(b) will be amended in new subsection 138(b) to ‘a default under the security agreement’. The reference to a debtor being in default is too narrow because a security agreement will typically include default triggers that do not relate to the debtor, but rather to the grantor. A security agreement might also allow the secured party to accelerate clauses and enforce even if there is no

default by either the debtor or the grantor – for example, if market circumstances change in a materially adverse way. This amendment is made in accordance with other provisions throughout the chapter that deal with defaults.

190. Current subsection 144(c) will be amended in new subsection 138(c) to clarify that another secured party is included in the reference to ‘another person’. This clarifies that another secured party may have waived their right to receive a notice under the above listed sections, and if it does so, the secured party enforcing their interest is not required to give notice to that secured party.
191. New subsection 138(d) is inserted to expand the section’s application to provide that a secured party is not required to give a notice to another secured party if the other secured party is not perfected by registration or possession and the enforcing secured party has no knowledge of the other secured party’s security interest. The knowledge requirement is inserted as a failsafe for situations where a secured party has no knowledge of a higher-ranking security interest that is not perfected by possession or registration because, for example, it is perfected by control or temporarily perfected. Requiring the enforcing party to provide notice when it has knowledge of a higher priority security interest which is not perfected by registration or possession allows that higher ranking secured party the opportunity to either perfect by registration, or take steps under this chapter to seize the collateral or take over the enforcement.

Section 139 – Enforcement of collateral – statement of account

192. New section 139 is based on current section 132 which provides rules by which any person with an interest in the collateral or the grantor can request a statement of account from the secured party following the completion of enforcement. The following amendments will be made to the section.
193. Current subsection 132(1) does not clearly state at what point a secured party who is enforcing their interest in collateral can be asked to provide a statement. New subsection 139(1) specifies that statement of account can be requested when the secured party has completed its enforcement against the *whole* of the collateral whether under Chapter 4 or otherwise. A secured party will have completed its enforcement against the whole of the collateral where they have sold the collateral.
194. New paragraphs 139(2)(a) and (b) provide the timing requirements of when a statement of account must be given to a person under subsection 139(1), being the period of 20 business days after the day the person requests the statement or such longer period as is reasonable in the circumstances. The period in subsection (b) may be extended by a court under section 293.
195. New paragraph 139(3)(a) requires the secured party to show, in the case of a disposal by lease or licence, the total amount expected to be received by the secured party under the terms of the lease or licence, or if that cannot be specified the method by which the amount expected to be received will be calculated. This amendment accommodates the rights of those with a security interest in the collateral, or the grantor, to request and receive a statement of account from the secured party, whilst also accommodating the reality that a secured party may not be able to accurately calculate the amount that is expected to be received given market factors such as fluctuating interest rates.
196. New subsection 139(4) provides rules for when a statement of account must be provided by a secured party who has not completed their enforcement against the whole

of the collateral before the end of the 6-month period after the collateral is seized. The secured party must, in accordance with subsections 139(5) and (6), give a written statement of account for each 6-month period after seizing the collateral, until the enforcement against the whole of the collateral is completed.

197. Under new subsection 139(5), the statement of account for a 6-month period must be given to any other person with a security interest in the collateral, or the grantor, upon their request.
198. New paragraphs 139(6)(a) and (b) provide the timing requirements of when a statement of account must be given to a person under subsection 139(4), being the period of 20 business days after the day the person requests the statement or such longer period as is reasonable in the circumstances. The period in paragraph (b) may be extended by a court under section 293.
199. New subsection 139(7) provides the details that must be contained in a statement of account when the secured party has not completed its enforcement against whole of the collateral.

Part 4.4—Special enforcement rules for certain types of collateral

Division 1—Introduction

200. Part 4.4 relocates all rules for collateral to which special enforcement rules apply into one part. These are currently dispersed throughout the chapter, but will be moved to this part for ease of reference.

Section 140 – Guide to this Part

201. Section 140 is inserted to provide a guide for Part 4.4 of Chapter 4. The guide sets out how the divisions will be divided for special enforcement rules in different types of collateral.

Division 2—Security interests and land law

Section 141 – Obligations secured by interests in personal property and land

202. New section 141 relocates current section 117 to Part 4.4 of Chapter 4. The section remains the same, however, the following minor amendments are made:
- The section has been amended to remove notes 1 and 2 under subsection 117(1) and these are not replicated in new subsection 141(1). Current note 1 provides that the section does not apply in relation to collateral used predominantly for personal, household or domestic purposes. This distinction will be removed from Chapter 4 (see under subheading ‘Section 109 – Security interests to which this chapter does not apply’ above).
 - Current note 2 under subsection 117(1) is also not replicated under new subsection 141(1) of the PPS Act. Current note 2 provides that the section does not apply to collateral to a security interest under consumer credit legislation due to current section 119 (i.e. the National Credit Code). Section

119 will be repealed by this Schedule (see under subheading ‘Section 109 – Security interests to which this chapter does not apply’ above).

203. A new note is added under subsection 141(1) to clarify the interest in land might be a kind of interest excluded from the definition of *security interest* by new section 12A, or from the definition of *personal property* by new section 13B.

Section 142 – Enforcing security interests in accordance with land law decisions

204. New section 142 relocates current section 118 to Part 4.4 of Chapter 4.
205. The section remains the same, however the following minor amendment is made to clarify which rules of Chapter 4 still apply to the section:
- Current subsection 118(6) is amended in new subsection 142(6) to provide that the only provisions of Chapter 4 that apply to the section are new sections 120 (distribution of property received from enforcement), 138 (when certain enforcement notices are not required), 141 (obligations secured by interests in personal property and land) and this section. This does not alter the scope or application of the section and is provided as a reference tool to aid users of the section with the restructure of Chapter 4.

Division 3—Market-traded collateral

Section 143 – Enforcement of security interests in market-traded collateral

206. New section 143 combines all current sections within the PPS Act that relate to the enforcement of security interests in market-traded collateral into one section.
207. Current subsections 109(3) and (4) are repealed by this Schedule. Those subsections described ‘market-traded’ collateral in terms of how an interest in the collateral is perfected - security interests in investment instruments perfected by possession and control and security interests in intermediated securities perfected by control. The method of perfection is not an accurate way to determine if the collateral is traded on a financial market, and should therefore only be subject to some parts of Chapter 4.
208. New subsection 143(1) states that (subject to subsection 143(2)) this chapter does not apply to ‘a security interest in an investment instrument or an intermediated security issued by a body corporate or other person that is listed (within the meaning of the *Corporations Act 2001*)’. The effect of this (in addition to the removal of subsections 109(3) and (4)) is to accurately capture when personal property is ‘market traded’ and allow a secured party to trade in the market without having to comply with the procedures and time limits of the PPS Act.
209. New subsection 143(1) confirms that Chapter 4 does not apply to enforcement in a security interest in an investment instrument or intermediated security issued by a body corporate or other person that is listed within the meaning of the *Corporations Act* subject to subsection 143(2).

Subsection 143(2)

210. New subsection 143(2) provides the rules in Chapter 4 that will apply to enforcement of a listed security interest.

211. New paragraph 143(2)(a) states that new section 112 (which deals with the rights and remedies of parties to security agreements generally) will apply to the extent that it relates to new sections 113, 116 or 120, as follows:

- a secured party is required to exercise all rights, duties and obligations when enforcing a security interest in an honest and commercially reasonable manner under new section 113 (paragraph 143(2)(b));
- a secured party recovers judgment or issues execution against a grantor in relation to collateral does not extinguish the security interest in the collateral under new section 116 (paragraph 143(2)(d)); and
- a secured party must distribute proceeds on enforcement under new section 120 (paragraph 143(2)(e));

212. New paragraph 143(2)(c) provides that new subsection 114(2) (which is about mandatory enforcement rules) will apply to the extent that it relates to new sections 113, 116 or 120, as follows:

- a secured party is required to exercise all rights, duties and obligations when enforcing a security interest in an honest and commercially reasonable manner under new section 113 (paragraph 143(2)(b));
- a secured party recovers judgment or issues execution against a grantor in relation to collateral does not extinguish the security interest in the collateral under new section 116 (paragraph 143(2)(d)); and
- a secured party must distribute proceeds on enforcement under new section 120 (paragraph 143(2)(e)).

213. New paragraph 143(2)(d) provides that new section 116 (which deals with the effect of recovering judgment or issuing execution) will apply.

214. New paragraph 143(2)(e) provides that new section 120 (distribution of property received from enforcement of a security interest) will apply.

Division 4—Enforcement of security interests in accounts and negotiable instruments

Section 144 – Enforcement of security interests in accounts

215. New section 144 relocates the enforcement rules currently contained in section 120, which relates to a security interest that is secured by collateral consisting of an account, to Division 4 of Part 4.4. The enforcement rules relating to an interest in a negotiable instrument in current section 120 are being relocated to new section 144A. The enforcement rules relating to an interest in collateral that is a ‘chattel paper’ will not be reproduced because the concept of a ‘chattel paper’ will be removed from the PPS Act (see Part 3 of Schedule 1).

216. New section 144 provides rules on enforcement of security interests in accounts, in particular that a secured party may serve a notice on a person (*account debtor*), or seize any proceeds of the account, if the account debtor owes money to a grantor of the collateral and there is a default under the security agreement.

217. New section 144 differs from current section 120 in the following ways:
- The heading of the section will be amended to clarify that the section deals with the enforcement of security interests in accounts. The amended heading will specify that the section deals specifically with accounts, rather than liquid assets generally.
 - Subsection 120(3) which provides an obligor 5 business days to make its payments is not replicated in new section 144.
218. The reference in current paragraph 120(1)(b) to ‘one or more persons’ owing an amount to the grantor on the collateral will be amended to ‘a person (the account debtor)’ in new paragraph 144(1)(b). This amendment will be made to allow the section to apply to each debtor separately in relation to the amount owing by that debtor to the grantor. The effect of this amendment means that a secured party will be able to seek the entire amount owing by the grantor from each separate account debtor. To avoid doubt, a secured party may only recover the total amount of the obligation owing under a security agreement (though it may do so from separate parties). This is clarified by Note 1 under new subsection 144(1).
219. Note 2 is added to remind users that a secured party may be prevented from taking action under this section by a higher-ranking secured party in accordance with new section 144B (below).
220. New subsection 144(2) will provide that the secured party may enforce the security interest in an account by doing either or both of the following:
- at paragraph 144(2)(a), giving the account debtor a notice under new subsection 81B(3) to pay the amount or any remaining amount owed to the secured party. New subsection 81B(3) provides what must be included in the notice to an account debtor under this section (see Item 75 of Schedule 3). Of relevance, the notice requirements at new subsection 81B(3) require a secured party to provide proof of the dealing in any notice under this section. New subsection 81B(3) replaces current subsection 120(2) of the PPS Act.
 - at new paragraph 144(2)(b), seize the proceeds of the account which the secured party is entitled to under section 32 of the PPS Act (see Items 19-22 of Schedule 3).
221. The reference to a ‘debtor’ defaulting on the secured obligation in current paragraph 120(1)(c) will be amended in paragraph 144(1)(c) to ‘a default under the security agreement’. The reference to a debtor being in default is too narrow because a security agreement will typically include default triggers that do not relate to the debtor, but rather to the grantor. A security agreement might also allow the secured party to accelerate clauses and enforce even if there is no default by either the debtor or the grantor – for example, if market circumstances change in a materially adverse way. This amendment confirms that a secured party should be able to seize collateral in accordance with the default provisions contained within the security agreement, not just those that relate to a debtor’s default.
222. Current subsections 120(4) and (5) (which provide how amounts received by the secured party under this section must be applied depending on whether it is received as currency or another form) will not be replicated in new section 144. This is because any

amounts received by the secured party as a result of enforcement will be subject to the new section 120 (see above under subheading ‘Section 120 – Distribution of property received from enforcement’) which provides a mandatory enforcement rule for the distribution of proceeds received as a result of enforcement by a secured party.

Section 144A – Enforcement of security interests in negotiable instruments

223. New section 144A relocates enforcement rules relating to negotiable instruments contained in current section 120 to Division 4 of Part 4.4.
224. This section provides rules on enforcement of security interests in negotiable instruments, in particular that a secured party may serve a notice on a third-party negotiable instrument issuer who owes an amount on the negotiable instrument if there is a default under the security agreement, or seize any proceeds of the negotiable instrument to which the secured party is entitled under section 32.
225. New section 144A relocates the provisions in current section 120 which deal only with the provision of a notice where the security interest is secured by collateral consisting of a negotiable instrument.
226. The heading of new section 144A will be amended to clarify that the section deals with the enforcement of security interests in negotiable instruments. The amended heading will specify that the section deals specifically with negotiable instruments, rather than liquid assets generally.
227. The reference in current paragraph 120(1)(b) to ‘one or more persons’ owing an amount to the grantor on the collateral will be amended to ‘a person (the *negotiable instrument issuer*)’ in new paragraph 144A(1)(b). This amendment reflects that there is no debtor associated with a negotiable instrument.
228. Note 1 clarifies that if there are 2 or more negotiable instrument issuers, the section applies to each issuer separately in relation to the amount owing by the issuer.
229. Note 2 is added to remind users that a secured party may be prevented from taking action under this section by a higher-ranking secured party in accordance with new section 144B (below).
230. New subsection 144A(2) will provide that the secured party may enforce the security interest in negotiable instrument by doing either or both of the following:
- At paragraph 144A(2)(a), giving the negotiable instrument issuer notice to pay the amount or any remaining amount owed to the secured party. New subsection 144(3) (explained below) provides what must be included in a notice under this section.
 - At new paragraph 144A(2)(b), seize the proceeds of the negotiable instrument which the secured party is entitled to under section 32 of the PPS Act (see Items 19-22 of Schedule 3).
231. Current subsection 120(3) which provides an instrument issuer 5 business days to make its payments is not replicated in new section 144A.
232. New subsection 144A(3) provides requirements for a notice from the secured party to an instrument issuer. The secured party must identify the negotiable instrument and include proof that the secured party is entitled to require the negotiable instrument issuer to make payment of the amount owed under the negotiable instrument. The notice must

state when the amount is due to be paid, with a minimum of 10 business days for payment, or a later date if the amount is due more than 10 business days after the notice is issued. A note is added to remind users that the minimum 10-day period is extendable by court order under section 293. If, however, the amount is due and payable on a certain date under the security agreement, a negotiable instrument issuer is not able to apply to court for an extension.

233. The reference to a ‘debtor’ defaulting on the secured obligation in current paragraph 120(1)(c) will be amended in new paragraph 144A(1)(c) to ‘a default under the security agreement’. The reference to a debtor being in default is too narrow because a security agreement will typically include default triggers that do not relate to the debtor, but rather to the grantor. A security agreement might also allow the secured party to accelerate clauses and enforce even if there is no default by either the debtor or the grantor – for example, if market circumstances change in a materially adverse way. This amendment confirms that a secured party should be able to seize collateral in accordance with the default provisions contained within the security agreement, not just those that relate to a debtor’s default.
234. Current subsections 120(4) and (5) (which provide how amounts received by the secured party under this section must be applied depending on whether it is received as currency or another form) will not be replicated in new section 144. This is because any amounts received by the secured party as a result of enforcement will be subject to the new section 120 (see above under subheading ‘Section 120 – Distribution of property received from enforcement’) which provides a mandatory enforcement rule for the distribution of proceeds received as a result of enforcement by a secured party.
235. New subsection 144A(4) relocates the requirement to provide a copy of the notice to a grantor from current subsection 121(5). This is relocated to subsection 144A(4) for ease of reference.
236. New subsection 144A(5) clarifies the ways in which a negotiable instrument issuer will be able to discharge its obligation under a negotiable instrument to the extent of that payment.
237. At paragraph 144A(5)(a), if a payment is made by the negotiable instrument issuer to the grantor before the end of the period provided in the notice from the secured party, that payment is taken to discharge part of the obligation demanded by the secured party in the notice. This is inserted to clarify that the negotiable instrument issuer is only obliged to make payment of an amount under a notice to the extent that it has not already made that payment to the grantor.
238. At paragraph 144A(5)(b), a payment made to the secured party before the end of the period stated in the notice will discharge that obligation.

Section 144B – Enforcement against accounts and negotiable instruments—notice to higher priority parties

239. New section 144B mirrors current section 121 of the PPS Act, which provides rules about when and how a secured party must provide notice of its intended enforcement against an account or negotiable instrument to a higher priority party.
240. New section 144B does not replicate current subsections 121(4) and (5) of the PPS Act. Subsections 121(4) and (5) (which provide where a secured party must provide a copy of its notice to a grantor) have been effectively replicated in new subsection 81B(5)

in relation to enforcement against accounts and new subsection 144A(5) in relation to negotiable instruments. This has been done for ease of reference and does not affect the way those provisions work within the new subsections.

Division 5—Seizure and disposal or retention of crops and livestock

Section 144C – Meaning of *take* and *water source*

241. New section 144C relocates current section 138A which provides definitions for ‘take’ and ‘water source’.

Section 144D – Seizure and disposal or retention of crops

242. New section 144D relocates current section 138B which provides rules for the seizure and disposal or retention of crops.

Section 144E – Seizure and disposal or retention of livestock

243. New section 144E relocates current section 138C which provides rules for the seizure and disposal or retention of livestock.

Division 6—Accessions

Section 144F – Right to remove accession

244. New section 144F is inserted to clarify the current position under the PPS Act that a secured party with a security interest over an accession has a right to remove the accession in order to exercise an entitlement to seize the collateral under new section 121 above. While the PPS Act assumes this is the case, it does not contain a provision expressly providing such a right.

Section 144G – Damaging goods when removing accession

245. New section 144G replicates current section 92 of the PPS Act, which provides that a secured party must not cause greater damage to the whole of the collateral when removing an accession.

246. The new section is rewritten for ease of use.

Section 144H – Reimbursement for damage caused in removing accessions

247. New section 144H relocates current section 93 of the PPS Act, which provides that a person, other than a grantor, is entitled to reimbursement for any damage to their interest in the whole of the collateral as a result of the removal of the accession.

248. Any reimbursement payable does not include reimbursement for a reduction in the value of the property caused by the absence of the accession or by the necessity of the replacement of the accession.

Section 144J – Refusal of permission to remove accession

249. New section 144J relocates current section 94 of the PPS Act, which provides when a person may withhold permission from the secured party to remove the accession.

Section 144K – Notice of removal of accession

250. New section 144J replicates current section 95 of the PPS Act, which provides what is required to be in a notice given by a secured party when they wish to exercise an entitlement to remove an accession and when a notice is not required.

Section 144L – When person with an interest in the whole may retain accession

251. New section 144K relocates current section 96 of the PPS Act, which provides when a person with an interest in the whole may retain the accession.

Section 144M – Court order about removal of accession

252. New section 144L relocates current section 97 of the PPS Act, which provides the orders a court may make about the removal of an accession.

Part 2—Other amendments

Corporations Act 2001

Item 2 – Subsection 442CC(1A)

253. Item 2 omits the reference to section 140 of the PPS Act in subsection 442CC(1A) of the Corporations Act and replaces it with a reference to section 120 of the PPS Act. This is a consequential change made as a result of the restructure of Chapter 4 of the PPS Act (see above).

Item 3 – Paragraph 588FP(3)(c)

254. Item 3 omits the words ‘under section 123 of the *Personal Property Securities Act 2009*’ and substitutes this with ‘(whether under section 121 of the *Personal Property Securities Act 2009* or otherwise)’.

Marine Navigation Levy Collection Act 1989

Item 4 – Subsection 10(2)

255. This is a consequential amendment made as a result of the restructure of Chapter 4 of the PPS Act (see Item 1 of this Schedule of this Explanatory Memorandum).

256. Item 4 omits the reference to section 123 of the PPS Act from subsection 10(2) of the Marine Navigation Levy Collection Act 1989 and replaces this with a reference to section 121 of the PPS Act. This amendment is a consequential change made as a result of the restructure of Chapter 4 of the PPS Act (see Item 1 of this Schedule of this Explanatory Memorandum).

Marine Navigation (Regulatory Functions) Levy Collection Act 1991

Item 5 – Subsection 9(2)

257. This amendment is a consequential change made as a result of the restructure of Chapter 4 of the PPS Act (see Item 1 of this Schedule of this Explanatory Memorandum).

258. Item 5 omits reference to section 123 of the PPS Act from subsection 9(2) of the *Marine Navigation (Regulatory Functions) Levy Collection Act 1991* and replaces this with a reference to section 121 of the PPS Act.

Personal Property Securities Act 2009

Item 6 – Section 10

259. Item 6 inserts definitions for ‘controller’ and ‘default’ into section 10 of the PPS Act.

Definition of Controller

260. The definition of controller is inserted to point users of the PPS Act to new section 109 (see under subheading ‘Security interests in personal property subject to certain Corporations Act controllers’).

Definition of default

261. The definition of default is inserted to clarify that a default under a security agreement will also include an occurrence of any event provided for by a security agreement that gives a secured party a right or remedy to enforce the security interest. For example, some security agreements will allow the secured party to enforce even if there is no failure to make payment or perform an obligation – for example, if market circumstances change in a materially adverse way.

Item 7 – Section 10 (note to definition of *expenses*)

262. Item 7 omits a reference to subsection 18(5) of the PPS Act in the note to the definition of expenses in section 10 of the PPS Act and replaces this with a reference to section 137 of the PPS Act.

263. This amendment is a consequential change because subsection 18(5) is relocated to section 137 of the PPS Act (see under subheading ‘Section 136 - Retaining collateral free of interests’ of this Schedule).

Item 8 – Section 10 (definition of *land law*)

264. Item 8 omits the words ‘has the meaning given by section 117’ and substitutes this with ‘see section 141’. The amendment is necessary because section 117 is relocated to new section 141 (see under subheading ‘Section 141 - Obligations secured by interests in personal property and land’ of this Schedule).

Item 9 – Section 10

265. Item 9 inserts a definition for ‘mandatory enforcement rule’ in section 10 of the PPS Act. This points users of the PPS Act to new section 111 which contains a list of mandatory enforcement rules in Chapter 4 of the PPS Act (see under subheading Section 111 – Meaning of mandatory enforcement rule’ of this Schedule).

Item 10 – Section 10 (definition of *notice of objection*)

266. Item 10 omits the words ‘has the meaning given by section 137’ and substitutes this with ‘see section 133’. The amendment is necessary because section 137 is relocated to new section 133 (see under subheading ‘Section 133 - Retaining collateral—objection’ of this Schedule).

Item 11 – Section 10

267. Item 11 inserts definitions for ‘receiver’ and ‘receiver and manager’ into section 10 of the PPS Act. The definitions both point users to the definitions contained within new section 109 (see under ‘Security interests in personal property subject to certain Corporations Act controllers’ of this Schedule).

Item 12 – Section 10 (definition of *take*)

268. Item 12 repeals the definition of take and replaces it with a reference to section 144C. The amendment is necessary so that the definition is relocated to new section 144C (see under subheading ‘Section 144C - Meaning of *take* and *water source*’ of this Schedule).

Item 13 – Section 10 (*water source*)

228. Item 13 omits the words ‘has the meaning given by section 138A’ and substitutes this with a reference to section 144C. The amendment is necessary so that the definition is relocated to new section 144C (see under subheading ‘Section 144C - Meaning of *take* and *water source*’ of this Schedule).

Item 14 – Subsection 31(1) (note)

229. Item 14 omits the words ‘140 (distribution of proceeds received by secured party)’ and substitutes this with ‘120 (distribution of property received from enforcement)’. The amendment is necessary because section 140 is relocated to new section 120 (see under subheading ‘Section 120 – Distribution of property received from enforcement’ of this Explanatory Memorandum).

Item 15 – Paragraph 31(3)(b)

230. Item 15 replaces the reference to paragraph 140(2)(f) in paragraph 31(3)(b) with a reference to paragraph 120(3)(f). The amendment is necessary because section 140 is relocated to new section 120 (see under subheading ‘Section 120 – Distribution of property received from enforcement’ of this Schedule).

Item 16 – Subsection 31(3) (note)

231. Item 16 replaces the reference to paragraph 140(2)(f) in the note below subsection 31(3) with a reference to paragraph 120(3)(f). The amendment is necessary because section 140 is relocated to new section 120 (see under subheading ‘Section 120 – Distribution of property received from enforcement’ of this Schedule).

Item 17 – Section 54 (paragraph beginning “Priority rules”)

232. Item 17 omits the words ‘the debtor defaults’ from the paragraph beginning with ‘Priority rules’ in section 54 of the PPS Act and substitutes this with ‘there is a default under a security agreement’.

233. This aligns the language in section 54 with the amendments made throughout the PPS Act to references to a debtor defaulting. A reference to a debtor being in default is too narrow because a security agreement will typically include default triggers that do not relate to the debtor, but rather to the grantor. A security agreement might also allow the secured party to accelerate clauses and enforce even if there is no default by either the debtor or the grantor – for example, if market circumstances change in a materially adverse way.

Item 18 – Section 83 (paragraph beginning “Other provisions”)

234. Item 18 omits the words ‘Division 6 of Part 4.3 (enforcement of security interests in crops and livestock)’ and substitutes this with ‘Division 5 of Part 4.4 (about enforcement of security interests in crops and livestock)’. The amendment is necessary because current Division 6 of Part 4.3 is relocated to new Division 5 of Part 4.4.

Item 19 – Section 87

235. Item 19 removes the sentence, ‘The Part also deals with the removal of accessions by a secured party who has an interest in the accession’ from section 87 of the PPS Act.
236. This amendment is necessary because sections dealing with enforcement against accessions are moved to Chapter 4 of the PPS Act.

Item 20 – Subsection 95(5)

237. Item 20 omits the words ‘the debtor defaults’ from subsection 95(5) of the PPS Act and substitutes this with ‘the default giving rise to the entitlement’.
238. This aligns the language in subsection 95(5) with the amendments made throughout the PPS Act to references to a debtor defaulting. A reference to a debtor being in default is too narrow because a security agreement will typically include default triggers that do not relate to the debtor, but rather to the grantor. A security agreement might also allow the secured party to accelerate clauses and enforce even if there is no default by either the debtor or the grantor – for example, if market circumstances change in a materially adverse way.

Item 21 – Paragraph 95(6)(a)

239. Item 21 replaces the term ‘default’ with ‘the default’ in paragraph 95(6)(a). This is to allow the new definition of default to be inserted into the paragraph (see Item 6 of this Schedule).

Item 22 – Subsection 95(6) (note)

240. Item 22 omits a reference to section 144 of the PPS Act in the note under subsection 95(6) of the PPS Act and replaces this with a reference to section 138 of the PPS Act.
241. This amendment is a consequential change because section 144 is relocated to section 138 of the PPS Act (see under subheading ‘Section 137 - Security for enforcement expenses’ of this Schedule in this Schedule).

Item 23 – Paragraph 254(2)(h) (paragraph (b) of the note)

242. Item 23 omits the words ‘110 (rights and remedies of debtors and secured parties)’ and substitutes this with ‘112 (rights and remedies of parties to security agreements generally)’. This amendment is necessary because current section 110 is relocated to section 112 (see under subheading ‘Section 112 – Rights and remedies of parties to security agreements generally’ of this Schedule).

Item 24 – Paragraph 254(2)(h) (paragraph (c) of the note)

243. Item 24 repeals paragraph (c) of the note under paragraph 254(2)(h) of the PPS Act. This note provided a reference to section 119 which is to be repealed (see under subheading ‘National Credit Code’ of this Schedule).

Item 25 – Paragraph 254(2)(h) (paragraph (ca) of the note)

244. Item 25 omits the words ‘140 (distribution of proceeds received by secured party)’ from paragraph (ca) of the note under paragraph 254(2)(h) and substitutes this with ‘120 (distribution of property received from enforcement)’. The amendment is necessary because section 140 is relocated to new section 120 (see under subheading ‘Section 120 – Distribution of property received from enforcement’ of this Schedule).

Item 26 – Subparagraph 267(1)(a)(iii)

245. Item 26 deletes subparagraph 267(1)(a)(iii) from paragraph 267(1)(a) of the PPS Act.

246. Subsection 267(1) provides triggers for when unperfected security interests will vest in an insolvent company. The trigger at subparagraph 267(1)(a)(iii) provides, in effect, that security interests will vest upon the ‘execution of a deed of company arrangement’.

247. The references to the execution of a deed of company arrangement are unnecessary. A security interest will only vest upon execution of a deed of company arrangement if the security interest was unperfected at the ‘section 513C day’ as defined in the Corporations Act. The relevant section 513C day, in the context of a deed of company arrangement, will be either the date of the appointment of an administrator (provided for by subparagraph 267(1)(a)(ii) of the PPS Act), or the date on which a winding up will have been taken to have commenced (provided for by subparagraph 267(1)(a)(i) of the PPS Act). This means that any security interest that was unperfected on that day will have already vested on that day, as a result of the trigger events that are the appointment of the administrator or the occurrence of the winding up.

Item 27 – Subparagraph 267(3)(b)(iv)

248. Item 27 repeals subparagraph 267(3)(b)(iv) of the PPS Act and substitutes it with new subparagraphs 267(3)(b)(iv) and 267(3)(b)(iva).

249. Subsection 267(3) of the PPS Act provides that a purchaser of property from a secured party with an unperfected security interest can take good title to that property despite the operation of sections 267 and 267A, if the person had no knowledge of the occurrence of the trigger event that led to the grantor’s insolvency. Both sections, however, only refer in this context to the trigger events for corporate grantors, and not to the bankruptcy-related trigger events that the sections otherwise apply for individual grantors.

250. The new subparagraphs will provide correct references to personal bankruptcy.

251. For the new knowledge provision, see Items 4 and 5 of Schedule 3.

Item 28 – Subparagraph 267A(2)(b)(iv)

252. Item 28 repeals subparagraph 267A(2)(b)(iv) of the PPS Act and substitutes it with new subparagraphs 267A(2)(b)(iv) and 267(3)(b)(v).

253. Subsection 267A(2) of the PPS Act provides that a purchaser of property from a secured party with an unperfected security interest can take good title to that property despite the operation of sections 267 and 267A, if the person had no knowledge of the occurrence of the trigger event that led to the grantor’s insolvency. Both sections, however, only refer in this context to the trigger events for corporate grantors, and not to

the bankruptcy-related trigger events that the sections otherwise apply for individual grantors.

254. The new subparagraphs will provide correct references to personal bankruptcy.

255. For the new knowledge provision, see Items 4 and 5 of Schedule 3.

Item 29 – After subparagraph 268(1)(a)(i)

256. Item 29 inserts subparagraph 268(1)(a)(ii) to paragraph 268(1)(a) of the PPS Act.

257. Subsection 268(1) exempts certain security interests from vesting in the grantor. Inserting paragraph 268(1)(a)(ii) will exempt PPS leases from the vesting provisions in sections 267 and 267A of the PPS Act. This means that a PPS lease will not be subject to vesting in an insolvent grantor regardless of whether it has been perfected or not.

258. This is intended to align the vesting exemptions for all deemed security interests.

Item 30 – Paragraph 268(1)(aa)

259. Item 30 deletes paragraph 268(1)(aa) from the PPS Act.

260. Section 268(1)(aa) states that sections 267 and 267A do not apply to a security interest for which the rules relating to its perfection are governed by a foreign law. The provision is not necessary, as the sections will simply not apply to the security interest because it is governed by a foreign law.

261. The governing law rules in Part 7.2 determine which laws govern the ‘perfection, and the effect of perfection or non-perfection’ of security interests, and if those rules specify that the laws of a jurisdiction other than Australia are to apply to the ‘perfection, and the effect of perfection or non-perfection’ of a security interest, then it is clear that sections 267 and 267A will not be engaged.

Item 31 – At the end of subsection 268(1)

262. Item 31 adds a note to the end of subsection 268(1). The note is added to clarify that the vesting rules in subsection 267(2) and section 267A will not apply to a security interest if the effect of perfection or non-perfection is governed by a foreign law.

Item 32 – Subsection 268(2)

263. Item 32 repeals and replaces subsection 268(2) in the PPS Act.

264. Section 268(2) exempts turnover trusts from the application of the vesting rules under section 267. Current subsection 268(2) does not correctly characterise a turnover trust arrangement. The terminology of junior creditor and senior creditor will be amended in new subsection 268(2) to provide that the collateral consists of an obligation by a person, termed the obligor, to pay money to another person, termed the junior creditor, where the obligor also owes money to a third person, the senior creditor.

265. Current paragraph 268(2) provides that the agreement between the junior creditor and senior creditor must include a requirement in an agreement between the junior creditor and senior creditor that where the property or proceeds are not transferred, the junior creditor must hold the property on trust for the senior creditor (subparagraph 268(2)(c)(iii)) and that a security interest be granted by the junior creditor to the senior creditor (subparagraph 268(2)(c)(iv)). These are not necessary features of an agreement for a turnover trust and are not included in new subsection 268(2).

266. Section 267 is only engaged if a turnover trust arrangement gives rise to a security interest. The concern in the context of turnover trust arrangements is that the declaration of trust itself could give rise to a security interest under the PPS Act. If it does not, then the PPS Act (and section 267) will not be relevant. If it does, then the proper effect of subsection 268(2) should be to exclude it from the operation of section 267, whether or not the arrangement also contains an additional grant of a security interest over the subject matter of the trust.
267. For similar reasons, paragraph 268(2)(c)(ii) will be amended to provide any property transferred to the junior creditor from the obligor is held on trust for the senior creditor. This differs from current paragraph 268(c)(ii) which states that the arrangement also obliges the junior creditor to transfer property to the senior creditor- transferring property is not a necessary feature of a turnover trust arrangement.

Item 33 – Paragraph 272(e)

268. Item 33 omits the words ‘118 (proceeding as if personal property were land)’, and to substitute it with ‘142 (enforcing security interests in accordance with land law decisions)’. The amendment is necessary because section 118 is relocated to new section 142 (see under subheading ‘Section 142 - Enforcing security interests in accordance with land law decisions’ of this Schedule).

Item 34 – Paragraph 296(f)

269. Item 34 repeals and replaces subsection 296(f). New subsection 296(f) provides that the onus of proof for proving purchase by public sale occurred lies with the person asserting that the purchase occurred. The note will be replaced to point users of the PPS Act to new subsection 130(4) which sets out the rule that a secured party who wishes to dispose of collateral by purchase must do so by public sale.

Protection of the Sea (Civil Liability) Act 1981

Item 35 – Subsection 22(1B)

270. Item 35 omits reference to section 123 of the PPS Act from subsection 22(1B) of the *Protection of the Sea (Civil Liability) Act 1981* and replaces this with a reference to section 121 of the PPS Act. This amendment is a consequential change made as a result of the restructure of Chapter 4 of the PPS Act (see Item 1 of this Schedule).

Protection of the Sea (Harmful Anti-fouling Systems) Act 2006

Item 36 – Subsection 18(6)

271. Item 36 omits reference to section 123 of the PPS Act from subsection 18(6) of the *Protection of the Sea (Harmful Anti-fouling Systems) Act 2006* and replaces this with a reference to section 121 of the PPS Act. This amendment is a consequential change made as a result of the restructure of Chapter 4 of the PPS Act (see Item 1 of this Schedule).

Protection of the Sea (Prevention of Pollution from Ships) Act 1983

Item 37 – Subsection 27A(5B)

272. Item 37 omits reference to section 123 of the PPS Act from subsection 27A(5B) of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and replaces this with a reference to section 121 of the PPS Act. This amendment is a consequential change

made as a result of the restructure of Chapter 4 of the PPS Act (see Item 1 of this Schedule of this Explanatory Memorandum).

Protection of the Sea (Shipping Levy Collection) Act 1981

Item 38 – Subsection 12(4)

273. Item 38 omits reference to section 123 of the PPS Act from subsection 12(4) of the *Protection of the Sea (Shipping Levy Collection) Act 1981* and replaces this with a reference to section 121 of the PPS Act. This amendment is a consequential change made as a result of the restructure of Chapter 4 of the PPS Act (see Item 1 of this Schedule).