

Schedule 7—Interaction with other laws and other matters

Part 1—Governing law rules

Division 1—Main amendments

Personal Property Securities Act 2009

Item 1 – Section 3

1. Item 1 updates the Chapter 7 summary in the current section 3 guide to the *Personal Property Securities Act 2009* (the PPS Act).
2. The amendment provides a more detailed summary for Chapter 7. It notes that Chapter 7 deals with rules for determining whether the law of Australia or the law of another jurisdiction governs a security interest transaction, the constitutional operation of the PPS Act and the relationship between the PPS Act and other Australian laws. The purpose of these amendments is to improve the navigability of the PPS Act.

Item 2 - Section 6

3. Item 2 repeals section 6 of the PPS Act which currently provides a set of rules that determine when the PPS Act will apply to a security interest.
4. The connections which are used to identify the governing law for various types of security interests in Part 7.2 are more appropriate for identifying the circumstances in which Australian law, including the Act, should be applied to a transaction concerning a security interest. The repeal of section 6 also removes the potential for inconsistency in the application of section 6 and Part 7.2 of the PPS Act.

Item 3 – Section 10 (definition of *Australian entity*)

5. Item 3 repeals the definition of *Australian entity* from section 10 of the PPS Act. The term *Australian entity* is only used in sections 6 and 237. Sections 6 and 237 will be repealed so that the section 10 definition of *Australian entity* will become redundant (see items 2 and 11 of this Schedule below).

Item 4 – Sections 39 and 40

6. Item 4 repeals and substitutes sections 39 and 40 of the PPS Act. These sections relate to security interests that are in collateral located overseas or are governed by a foreign law in circumstances where the collateral or grantor subsequently relocates to Australia.

Section 39 – Relocation of collateral

7. Item 4 substitutes a new section 39 (which provides a security interest in relocated collateral with temporary perfection) and new section 40 (which relates to the relocation of a grantor and provides for temporary perfection of a security interest in collateral that is intangible property or financial property).
8. New subsection 39(1) sets out the scope of section 39. It applies to a security interest in collateral if the following criteria are met:
 - the collateral has been located in a jurisdiction outside Australia; and

- the collateral is relocated to Australia; and
 - the security interest – for a period immediately before it was relocated - had a status under the law of the foreign jurisdiction that is functionally equivalent to being continuously perfected under the PPS Act.
9. As in the existing subsection, the new subsection 39(1) also includes a note which directs the reader to section 235 for the meaning of ‘location’ of collateral.
 10. New subsection 39(2) provides that a security interest in collateral that falls within the scope of subsection 39(1) is taken to have been, and to continue to be, temporarily perfected for a period. The temporary perfection period provides secured parties in certain circumstances the benefit of perfection for a short period, during which they can take steps to permanently perfect their security interest. New paragraph 39(2)(b) provides that the period ends at the earlier of: the end of 60 days after the day the collateral becomes located in Australia (subparagraph 39(2)(b)(i)), or the end of 10 business days after the day the secured party has actual knowledge that the collateral has become located in Australia (subparagraph 39(2)(b)(ii)).
 11. Current subparagraphs 39(3)(b)(i) and 39(3)(b)(ii) provide that the period ends at the earlier of 56 days after the day the collateral becomes located in Australia or the end of 5 business days after the day the secured party has actual knowledge that the collateral has become located in Australia. The longer grace period of 60 days in new subparagraph 39(2)(b)(i) will allow for ease of calculation and will align the Act to correspond with the temporary perfection period provided for in the NZ PPS Act. The increase to 10 business days in new subparagraph 39(2)(b)(ii) is intended to balance the need to give a secured party adequate time to perfect a security interest and the publicity function of perfection.
 12. In repealing section 39, Item 4 repeals current subsection 39(4) which provides that a security interest is taken to have not been perfected at all during the temporary perfection period if a secured party does not perfect its security interest within the required time. Repealing subsection 39(4) means that all temporarily perfected security interests will expire at the end of the temporary perfection period provided for in the provisions rather than being taken in some cases to have not been perfected at all during the temporary perfection period. If the secured party fails to perfect its security interest prior to the end of the temporary perfection period, then temporary perfection will expire but remain valid for the temporary perfection period.

Section 40 – Relocation of grantor in relation to intangible property or financial property

13. New section 40 relates to the relocation of a grantor and provides temporary perfection in relation to a security interest in collateral that is intangible property or financial property. New subsection 40(1) sets out the scope of section 40. It applies to a security interest in collateral that is intangible property or financial property if the following criteria are met:
 - the grantor has been located in a jurisdiction outside Australia and a ‘relocation event’ occurs (a relocation event occurs when the grantor either becomes located in Australia or transfers the collateral to a person who is located in Australia); and
 - as a result of the relocation event, the third-party effects of the security interest become governed by the law of Australia as provided in Part 7.2; and
 - the security interest – for a period immediately before the relocation event – had a status under the law of the foreign jurisdiction that is functionally equivalent to being continuously perfected under the PPS Act.

14. New subsection 40(1) also includes a note which directs the reader to section 235 for the meaning of ‘location’ of the grantor.
15. New subsection 40(2) provides that the security interest in collateral that is intangible property or financial property that falls within the scope of subsection 40(1) is taken to have been, and to continue to be, temporarily perfected. The temporary perfection period provides secured parties in certain circumstances the benefit of perfection for a short period, during which they can take steps to permanently perfect their security interest. New paragraph 40(2)(b) provides that the period ends at the earlier of: the end of 60 days after the relocation event (subparagraph 40(2)(b)(i)), or the end of 10 business days after the day the secured party has actual knowledge of the relocation event (subparagraph 40(2)(b)(ii)).
16. Current subparagraphs 40(3)(b)(i) and 40(3)(b)(ii) provide that the period ends at the earlier of 56 days after the day of the relocation event or the end of 5 business days after the day the secured party has actual knowledge of the relocation event. The longer grace period of 60 days in new subparagraph 40(2)(b)(i) will allow for ease of calculation and will align the Act to correspond with the temporary perfection period provided for in the NZ PPS Act. The increase to 10 business days in new subparagraph 40(2)(b)(ii) is intended to balance the need to give a secured party adequate time to perfect a security interest and the publicity function of perfection.
17. In repealing section 40, Item 4 repeals current subsection 40(4) which provides that a security interest is taken to have not been perfected at all during the temporary perfection period if a secured party does not perfect its security interest within the required time. Repealing subsection 40(4) means that all temporarily perfected security interests will expire at the end of the temporary perfection period provided for in the provisions rather than being taken in some cases to have not been perfected at all during the temporary perfection period. If the secured party fails to perfect its security interest prior to the end of the temporary perfection period, then temporary perfection will expire but remain valid for the temporary perfection period.
18. Current subsection 40(5) excludes security interests in intellectual property, ADI accounts and negotiable instruments from the temporary perfection rules in section 40. Subsection 40(5) is relocated to new subsection 40(3). Interests in these types of property are not required to be temporarily perfected. This is because negotiable instruments are tangible property that can be physically relocated, and so are covered by the main relocation rule in section 39. Security interests over ADI accounts do not require temporary perfection when the grantor relocates because the governing law does not change (it is fixed as the law that governs the ADI account, by subsection 239(4)). Intellectual property and intellectual property licences do not require temporary perfection because the governing law of the location of the intellectual property will determine if a successor in title takes free and the validity of an interest against a transferee, therefore there is no need to re-perfect.

Item 5 – Section 152 (note 1)

19. Item 5 replaces the reference to ‘Note 1’ with ‘Note’. This is because Item 6 of this Schedule repeals note 2 of section 152 of the PPS Act.

Item 6 - Section 152 (note 2)

20. Item 6 removes note 2 from section 152. Note 2 refers to section 6 which will be repealed from the PPS Act by Item 2 of this Schedule. Given section 6 will be repealed, Note 2 is not required.

Item 7 – Part 7.2 (heading)

21. Item 7 repeals the heading for Part 7.2 which currently provides ‘Australian laws and those of other jurisdictions’ and replaces it with the heading ‘Governing law rules’.

22. The amendment is being made because conflict of law rules are generally referred to in other Acts as ‘Governing law rules’.

Part 7.2 – Governing Law Rules

Item 8 – Section 233

Section 233 – Guide to this Part

23. Item 8 repeals the current guide for Part 7.2 at section 233. It substitutes a new guide into section 233 to accurately reflect the purpose of this Part (which is to provide rules that determine whether the law of Australia or the law of another jurisdiction governs a transaction concerning a security interest in collateral or proceeds).

Item 9 – After section 234

24. Item 9 inserts new sections 234A and 234B into the PPS Act.

Section 234A – Governing laws – attachment and perfection

25. Subsection 234A(1) provides that a security interest is taken to be attached to collateral under the law of a foreign jurisdiction if its status under that law is functionally equivalent to being attached to such collateral under the PPS Act. The note to subsection 234(1) directs the reader to section 19 for when a security interest is attached under the PPS Act.

26. Subsection 234A(2) provides that a security interest is taken to be perfected under the law of a foreign jurisdiction if its status under that law is functionally equivalent to being perfected under the PPS Act. The note to subsection 234(2) directs the reader to section 21 for when a security interest is perfected under the PPS Act.

27. It is necessary to use the concept of functional equivalence in section 234A because the terms “attach” and “perfect” are terms of art under the PPS Act, and have very specific meanings. These terms rely on other definitions, concepts and processes (such as registration on the Register) that will not necessarily be available under the laws of another jurisdiction.

28. Subsection 234A(3) clarifies that the effect of perfection or non-perfection of a security interest in collateral includes references to rules about taking the collateral free of a security interest and rules regarding the priority of a security interest, regardless of whether the operation of those rules is dependent on whether or not the security interest is perfected.

Section 234B – Governing laws – laws relating to conflict of laws

29. New section 234B provides for the purposes of Part 7.2 that a reference to the law of a jurisdiction is taken to be a reference to the internal law of that jurisdiction excluding the law relating to the conflict of laws. This exclusion is inserted to avoid *renvoi* which occurs when the choice of law rules in one jurisdiction may direct a dispute to the laws of another jurisdiction, only for the laws of that jurisdiction to send the dispute back.

Item 10 – Subsections 235(1) and (2)

30. Item 10 repeals subsections 235 (1) and (2) which currently provide specific rules regarding the location of personal property (including chattel paper, an investment instrument and a negotiable instrument). These subsections are replaced by new subsection 235(1) which provides that personal property is located in the jurisdiction in which the personal property is situated.
31. The combined effect of current subsections 235(1) and (2) is that the location of a certificated investment instrument, chattel paper or negotiable instrument is determined by the physical location of the instrument. However, this is not appropriate for investment instruments and the location of a certificated share should not be determined by the location of a share certificate. This is because it would be inconsistent with the *Corporations Act 2001* which provides that a share is taken to be located in the place of the share register. It would also be inconsistent with principle, as a share certificate is merely a convenient record of the existence and ownership of the share, not a physical embodiment of it. The new subsection 235(1) includes a note which clarifies that investment instruments registered as mentioned in subsection 1070A(4) of the *Corporations Act 2001* are taken to be registered where the relevant register is kept.
32. While current subsection 235(2) provides specific location rules for a negotiable instrument evidenced by an electronic record and chattel paper, these concepts will be repealed by Item 15 in Schedule 2 and Item 23 in Schedule 1 respectively.

Item 11 – Section 237

33. Item 11 repeals section 237 of the PPS Act.
34. Current section 237 provided that a grantor which is an Australian entity (a concept which will be repealed by Item 10 of Schedule 7) is able to expressly agree that a security interest is governed by the law of the Commonwealth, State or Territory.
35. This will be repealed in order to prevent parties to a security agreement from being able to agree that Australian law will apply to the security agreement where at least one party is an Australian entity.
36. The purpose of this amendment is to improve transparency and prevent the application of competing legal frameworks. The amendment is intended to prevent parties from being able to agree to the governing law which affects the validity and priority of a security interest in a way that is not transparent to third parties.
37. This aligns with the UNCITRAL Legislative Guide on Secured Transactions, which suggests that it is inappropriate for parties to be able to choose the law applicable to proprietary interests because it is not transparent to third parties. This also avoids a situation where the choice of governing law could also result in a priority contest between two competing security rights which are subject to two different laws leading to opposite results.

Item 12 – Subsection 238(1) (note 1)

38. Item 12 repeals note 1 from subsection 238(1).
39. This is a necessary amendment because note 1 currently refers to section 237 which is being repealed by Item 11 of this Schedule.

Item 13 – Subsection 238(1) (note 2)

40. Item 13 replaces the title to ‘Note 2’ with ‘Note’. This is because note 1 of subsection 238(1) is being repealed by Item 12 of this Schedule.

Item 14 – Paragraph 238(2)(a)

41. Item 14 omits the phrase ‘(the *attachment time*)’ from current paragraph 238(2)(a). The reference to attachment time will be removed because it is only relevant for subsection 238(2A) which is being repealed by Item 15 of this Schedule.

Item 15 – Subsection 238(2A)

42. Item 15 repeals subsection 238(2A) which provides that subsection 238(2) applies to a security interest from the time at which it attaches. Subsection 238(2) provides governing rules for goods that are moved. Subsection 238(2A) is redundant because a security interest does not come into existence until it has attached.

Item 16 – Subsection 238(3)

43. Item 16 removes the reference to subsection 238(2A) from current subsection 238(3), and substitutes “, (1A) and (2). The amendment is necessary because subsection 238(2A) is repealed by Item 15 of this Schedule.

Item 17 – Subsection 238(3)

44. Current section 238 provides that the general rule for goods is that the validity of a security interest in goods is governed by the law of the jurisdiction in which the goods are located when the security interest attaches, and that questions relating to the perfection of that security interest are determined by the location of the goods from time to time.
45. Item 17 omits the words ‘(including the law relating to conflict of laws)’ from subsection 238(3).
46. Subsection 238(3) currently provides an exception for goods that are of a kind that is normally used in more than one jurisdiction and that are not used predominantly for personal, domestic or household purposes. Removing the words ‘(including the law relating to conflict of laws)’ from the subsection will avoid the issue of *renvoi* and make the PPS Act more internally consistent.
47. A *renvoi* occurs when the choice of law rules in one jurisdiction may direct a dispute to the laws of another jurisdiction, only for the laws of that jurisdiction to send the dispute back. The choice of law rules in Part 7.2 generally exclude *renvoi*. Removing the express inclusion of *renvoi* in subsection 238(3) removes internal inconsistencies with other provisions of the PPS Act.

Item 18 – Subsections 239(5) and (6)

48. Item 18 repeals subsections 239(5) and 239(6).
49. Subsection 239(5) currently allows parties to a security agreement to agree in writing that the law of another jurisdiction governs a security interest in an ADI account. Repealing this subsection will mean that parties are no longer able to opt out of the general choice of law rule in subsection 239(4) which states that a security interest in an ADI account is subject to the law of the jurisdiction which governs the account.
50. The purpose of this amendment is to ensure transparency for third parties in order to allow them to identify the applicable law and appropriate register to check for security interests. Subsection 239(5) had compromised the PPS Act's publicity objective because a third party checking for security interests in an ADI account would not know where to search if the parties to the agreement had agreed that the security agreement would be governed by the laws of a foreign jurisdiction.
51. Current subsection 239(6) provides that the application of governing laws for intangible property does not apply to rights evidenced by letters of credit. This is because current subsection 240(2) provides specific rules for letters of credit under the governing laws for financial property. Given subsection 240(2) will be repealed by Item 20 of this Schedule, repealing current subsection 239(6) will mean that the governing laws for intangible property will apply to letters of credit. As noted in Item 20, letters of credit will no longer come within the definition of negotiable instrument (refer to Item 7 in Schedule 3) and instead will be classified as intangible property.

Item 19 – Section 239 (notes 3 and 4)

52. Item 19 repeals notes 3 and 4 from section 239. Note 3 is repealed as it refers to section 237 which is being repealed by Item 11 of this Schedule. Note 4 is repealed as it relates to subsection 239(6) which is being repealed by Item 18 of this Schedule.

Item 20 – Section 240

53. Item 20 repeals current section 240 which addresses governing laws for financial property and rights evidenced by letters of credit. Item 20 inserts new sections 240 (which addresses governing laws for financial property) and 240A (which addresses governing laws for intermediated securities).

Section 240 - Governing Laws – financial property

54. New section 240 provides governing laws for financial property, with specific rules for financial property consisting of an instrument embodying the payment obligation which it represents (for example, a negotiable instrument). New section 240 does not replicate the current subsection 240(2) which provided governing rules for letters of credit.
55. Letters of credit no longer fall under the definition of negotiable instruments (refer to Item 7 in Schedule 3). While negotiable instruments remain financial property as defined in section 10 of the PPS Act, letters of credit are now classified as intangible property. As a result of the amended definition of 'negotiable instruments', the rules that apply to a right evidenced by a letter of credit now falls under the rules contained within new section 239 which deals with intangible property (see Item 18 of this Schedule for further information).

56. New section 240 provides rules regarding:

- the validity of security interests in financial property (subsection 240(1)),
- the validity of security interests in financial property consisting of an instrument embodying a payment obligation which it represents (for example, a negotiable instrument) (subsection 240(2)),
- perfection of a security interest in financial property (subsection 240(3)), and
- perfection of a security interest in financial property consisting of an instrument embodying the payment obligation which it represents (for example, a negotiable instrument) (subsection 240(4)).

Governing laws for validity of security interest in financial property

57. New subsection 240(1) provides that the validity of a security interest in financial property is governed by the law of jurisdiction in which the grantor is located when the security interest attaches to the property. This is intended to mirror existing subsection 240(1).

58. New subsection 240(2) provides that the validity of a security interest in financial property consisting of an instrument embodying the payment obligation which it represents (for example, a negotiable instrument) is governed by the law of the jurisdiction in which the instrument is located when the security interest attaches. This aligns the governing law rules with that of goods in the PPS Act. This subsection replaces current subsection 240(3).

59. Current subsection 240(3) contains an exception to the governing laws for financial property. The exception provides that the validity of a security interest in financial property is governed by the law of Australia if it attached under the laws of Australia, was located in Australia at the time of attachment and the secured party has possession or control of the property sufficient to perfect the security interest under the PPS Act.

60. Attachment is a matter going to the validity of a security interest. Current subsection 240(1) provides, in effect, that Australian law governs the validity of a security interest if the security interest has attached under Australian law. However, to conclude that the security interest has attached under Australian law, the court must already have decided that Australian law applies. In determining whether Australian law governs the attachment of a security interest, the court would have regard to current subsection 240(1), which refers to the law of the grantor's location at the relevant time. If the grantor is located in Australia, Australian law applies by force of subsection 240(1) and the court can disregard subsection 240(3). On the other hand, if the grantor is not located in Australia, current subsection 240(1) indicates that Australian law does not apply and subsection 240(3) cannot affect this outcome because it is predicated on the assumption that Australian law applies.

Governing laws for perfection of security interest

61. New subsection 240(3) provides that perfection (and the effect of perfection or non-perfection) of a security interest in financial property at a particular time is governed by the law of the jurisdiction in which the grantor is located at that time.

62. New subsection 240(4) provides that perfection (and the effect of perfection or non-perfection) of a security interest in financial property consisting of an instrument embodying the payment obligation which it represents (for example, a negotiable instrument) at a particular time is governed by the law of the jurisdiction in which the instrument is located at that time. This subsection replaces current subsection 240(5).
63. Current subsection 240(5) contains an exception for the governing laws regarding perfection, and the effect of perfection or non-perfection of a security interest in financial property. The exception provides that the perfection of a security interest in financial property is governed by the law of Australia if the property is located in Australia and the secured party has possession or control of the property sufficient to perfect the security interest under the PPS Act.
64. The purpose of replacing current subsection 240(5) with new subsection 240(4) is to ensure that financial property rights that are evidenced by documents that are regarded as physically embodying the rights they represent are governed by the law of their physical location, as occurs with interests in goods.

Governing laws for non-negotiable documents of title

65. New subsection 240(5) mirrors existing subsection 240(6) which provides that a security interest in a non-negotiable document of title is governed by the law of the jurisdiction in which the goods to which the document of title relates are located when the security interest attached, under that law, to the document of title.
66. Item 20 also retains two current notes which are added to new subsection 240(5). Note 1 directs the reader to section 77 for the priority of security interests in financial property if there is no foreign register. Note 2 directs the reader to section 235 for the meaning of location of personal property, bodies corporate, bodies politic and individuals.

Negotiable instruments not evidenced by a certificate

67. New subsection 240 does not replicate current subsection 240(7). Current subsection 240(7) relates to negotiable instruments not evidenced by a certificate. Given the concept of negotiable instruments not evidenced by a certificate will be removed from the PPS Act (see Item 15 of Schedule 2), the rule in 240(7) is no longer required.

Section 240A – Governing laws – intermediated securities

68. Item 20 also inserts a new section 240A to clarify the governing law rules for intermediated securities.
69. Subsection 240A(1) provides that the validity of a security interest in an intermediated security is governed by the law of the jurisdiction in which the intermediary maintains the relevant securities account.
70. Subsection 240A(2) provides the perfection (and the effect of perfection or non-perfection) of a security interest in an intermediated security at a particular time is governed by the law of the jurisdiction in which the intermediary maintains the relevant securities account at that time.
71. The effect of new section 240A is that an intermediated security interest under Part 7.2 will now be governed by the laws of the jurisdiction in which the intermediary maintains the relevant securities account. It is intended to create a rule to determine what laws should be used to resolve issues relating to a security interest over intermediated securities. This covers an existing gap in the choice of law rules in current Part 7.2 where

the full PPS Act would otherwise apply to intermediated securities without further nuanced rules to determine whether another law may, in the circumstances, more appropriately apply.

Item 21 – Subsection 241(2)

72. Section 241 addresses governing law rules for a security interest in proceeds.
73. Item 21 repeals current subsection 241(2) which provides that the perfection (and the effect of perfection or non-perfection) of a security interest in proceeds is governed by the law of the jurisdiction (other than the law relating to conflict of laws) that governed the perfection of the security interest in the collateral that gave rise to the proceeds.
74. New subsection 241(2) provides that the law applicable to the perfection (and the effect of perfection or non-perfection) of a security interest in proceeds is the law of the jurisdiction that would otherwise govern the perfection of a security interest in collateral of the same kind as those proceeds. This change is made because proceeds will likely be a different type of collateral to the collateral that gave rise to the proceeds. Collateral of the same type should be subject to the same governing laws.
75. The purpose of this amendment is to set out clear rules for determining whether a security interest is effective against proceeds and clarify, for third parties taking a competing interest in proceeds, which rules will determine their priority position for the security interest they have taken. The amendment is consistent with recommendation 215 of the UNCITRAL Legislative Guide on Secured Transactions.

Item 22 – At the end of Part 7.2

76. Item 22 inserts a new section 241A. It sets out rules for the enforcement of a security interest in property other than intangible property (new subsection 241A(1)) and the enforcement of a security interest in intangible property (new subsection 241A(2)) located outside Australia.
77. New subsection 241A(1) provides that the enforcement of a security interest in property other than intangible property is governed by the law of the jurisdiction where enforcement takes place. This means that if the collateral is a tangible asset, then the governing law will be the law of the State where enforcement takes place.
78. New subsection 241A(2) provides that the enforcement of a security interest in intangible property is governed by the law of the jurisdiction governing the priority of the security interest. This means that if the collateral is an intangible asset, then the governing law for enforcement will be the law applicable to the security interest's priority.
79. The purpose of the new section is to create choice of law rules for the enforcement of security interests over collateral located outside Australia. It makes the governing law dependent on whether the collateral is a tangible or intangible asset. The choice of law rules are based on recommendation 218 of the UNCITRAL Legislative Guide on Secured Transactions.

Item 23 – Section 243 (note 1)

80. Item 23 omits the reference to section 6 from note 1 because section 6 is being repealed by Item 5 of this Schedule.

Division 2—References to the law relating to conflict of laws

Personal Property Securities Act 2009

Item 24 – Amendments of listed provisions

81. Item 24 removes the words ‘(other than the law relating to conflict of laws)’ from the following provisions in the PPS Act: subsections 238(1), 238(1A), 238(2), 239(1) and (2), 239(4) and 241(1). It also removes those words from paragraphs 239(3)(a), (b) and (c). These words are no longer required given the insertion of section 234B (Item 9 of Schedule 7) which provides rules on interpreting terms of art within this Schedule.

Part 2—Interaction with other laws

Corporations Act 2001

Items 25 to 32 implement recommendation 357, to relocate the circulating asset provisions in the PPS Act to the Corporations Act, as the concepts are only relevant in the context of corporate insolvency, which is regulated under the Corporations Act. The redrafted provisions are intended to operate substantively the same as the current PPS Act provisions. The provisions have been restructured and minor language changes have been made to clarify the operation of the law.

Item 25 – Section 9

82. Item 25 inserts definitions for ‘circulating asset’ and ‘circulating assets control’ into section 9 of the Corporations Act. The definitions signpost sections 51CA and 51CB respectively.
83. Section 51CA and 51CB are inserted into the Corporations Act by Item 28 of this Schedule.

Item 26 – Section 51C (subparagraph (a)(i) of the definition of *circulating security interest*)

84. Item 26 amends subparagraph 51C(a)(i) of the definition of circulating security interest in section 51C of the Corporations Act to remove references to the PPS Act. This reflects the relocation of the definition of ‘circulating asset’ to the Corporations Act under Item 28 of this Schedule.

Item 27 – Section 51C (subparagraph 51C (a)(ii) of the definition of *circulating security interest*)

85. Item 27 amends subparagraph 51C(a)(ii) of the definition of circulating security interest in section 51C of the Corporations Act to replace the reference to ‘that Act’ with a reference to the PPS Act specifically. This reflects the removal of the reference to the PPS Act earlier in the provision under Item 26 of this Schedule.

Item 28 – After section 51C

86. Item 28 inserts new sections 51CA and 51CB into the Corporations Act.
87. The effect of this item is to move the concepts of circulating assets and circulating asset control from the PPS Act currently contained in sections 340-341A of the PPS Act to the Corporations Act. Item 32 of this Schedule also amends section 10 of the PPS Act to provide that the definition of a circulating asset, for the purpose of paragraph 339 of the PPS Act is the same as that contained in the Corporations Act.

These concepts are more appropriately located in the Corporations Act which, unlike the PPS Act, contains substantive provisions relating to circulating assets.

Section 51CA – Meaning of *circulating asset*

88. Section 51CA is inserted into the Corporations Act. It relocates current section 340 of the PPS Act which has been redrafted to simplify its structure with the following amendments:

- The definition of circulating asset will be divided into two distinct sections: a general definition (subsections 51CA(1)(a) and (b) and exceptions (subsections 51CA(2), (3), (4) and (5)). Subsection 51CA(7) clarifies that terms in section 51CA of the Corporations Act are taken to have the same meaning as in the PPS Act.
- The current subsection 340(4) will be moved to subsection 51CA(3) and redrafted as a clarification of paragraph 51CA(1)(b).

89. The references to ‘chattel paper’ in current subsection 340(4A) are not replicated in new subsection 51CA(6). This is because references to ‘chattel paper’ throughout the PPS Act will be removed (refer to Items 23 and 28 in Schedule 1).

Section 51CB – Meaning of *circulating asset control*

90. Section 51CB is inserted into the Corporations Act. Section 51CB combines current sections 341 and 341A of the PPS Act, with the following restructure:

- subsection 341(1A) of the PPS Act is relocated as subsection 51CB(1) of the Corporations Act;
- current references to the meaning of ‘inventory’ in subsection 341(1B) of the PPS Act will be incorporated into paragraph 51CB(3)(b) of the Corporations Act;
- current subsection 341(1) of the PPS Act is relocated as subsection 51CB(2) of the Corporations Act;
- current subsections 341(2) to (4) of the PPS Act are relocated as subsections 51CB(3) to (6) of the Corporations Act;
- current section 341A of the PPS Act is relocated as subsections 51CB(7) to (9) of the Corporations Act; and
- subsection 51CB(10) of the Corporations Act will be inserted to provide that a term used in section 51CB has the same meaning as that contained in the PPS Act.

Circulating asset control

91. Under the PPS Act, the concept of ‘control’ is used differently in different contexts. In Chapter 2, ‘control’ is a means of perfecting a security interest. However, in Chapter 9, ‘control’ is also used in the context of distinguishing circulating assets from non-circulating assets. This has caused confusion.

92. The concept of ‘control’ in current sections 341 and 341A of the PPS Act is now referred to as ‘circulating asset control’ for the purposes of sections 51CA and 51CB of the Corporations Act. The amendment distinguishes ‘circulating asset control’ from the concept of exercising ‘control’ for the purpose of perfecting a security interest. A grantor and secured party may agree that funds should be deposited in a particular ADI account over which the secured party ostensibly exercises circulating asset control (thus taking this ADI account out of the scope of circulating assets). However, if an obligation exists that the funds were, upon deposit, required to be paid to the grantor or a related party, then in practice there would not be control being exercised by the secured party.

Circulating assets control - inventory

93. Current subparagraphs 341(1)(a)(i) and (ii) of the PPS Act will be relocated as subparagraphs 51CB(2)(a)(i) and (ii) of the Corporations Act. These subparagraphs now clarify the test that must be met by a secured party in order to have circulating asset control over inventory.
94. A secured party must agree in writing with the grantor that the grantor allocate specific items of inventory to a security interest, and will not remove that specific inventory without previously obtaining specific and express authority to do so from the secured party. The reference to 'specific items' of inventory replaces the reference to inventory that is 'specifically appropriated' to the security interest by the grantor under the agreement with the secured party. This clarifies that subsection 51CB(2) of the Corporations Act only applies to the control of those items of inventory specified. As such, the test is now whether a specific item of inventory can be sold or dealt with without the secured party's express consent.
95. Paragraph 51CB(2)(b) of the Corporations Act must also be met by a grantor if the secured party wishes to assert circulating asset control over inventory. This paragraph provides that it must be the grantor's usual practice to comply with the agreement stated at subparagraphs 51CB(2)(a)(i) and (ii) of the Corporations Act. This is an anti-avoidance provision to ensure that a secured party is only able to claim circulating asset control over inventory on the basis of an agreement of the type described in paragraph 51CA(2)(a) if that agreement is, in fact, being complied with. This replicates current paragraph 341(1)(b) of the PPS Act.

Circulating assets control - accounts

96. Subsection 51CB(4) provides that a secured party will have circulating asset control of an account, for the purposes of excluding the account from the meaning of circulating asset pursuant to 51CA(4)(b), if: the secured party, and the person to whom the account is owed, have agreed in writing that amounts paid in discharge of the account must be deposited into a specified ADI account; this is the usual practice of the parties; and the secured party has circulating asset control over the ADI account. Again, the requirement that the parties in fact be complying with the agreement to deposit amounts into a specified ADI account is an anti-avoidance mechanism.
97. Current paragraph 341(3)(d) of the PPS Act will be revised at subsection 51CB(5) of the Corporations Act to make it clearer that a secured party will not be considered to have control of an account for the purpose of subsection 51CA(4) and 51CB(4), if depositing the money into an ADI account results in any person becoming liable to pay the debtor or a related body corporate of the debtor.

Circulating assets control - ADI accounts

98. Subsection 51CB(7) provides that a secured party will have circulating asset control of an ADI account, for the purposes of excluding the ADI account from the meaning of circulating asset pursuant to 51CA(4)(b), if the secured party: is the ADI; is able to direct disposition of funds from the account without further consent by the grantor; or becomes the ADI's customer with respect to the account.
99. Current paragraph 341A(1)(b) of the PPS Act will be revised at subsection 51CB(8) of the Corporations Act to make it clearer that a secured party will not be considered to have control of an ADI account for the purpose of subsection 51CA(4) and 51CB(7), if

depositing the money into an ADI account results in any person becoming liable to pay the debtor or a related body corporate of the debtor.

Items 29 – Paragraph 442B(1)(a)

100. Item 29 removes the reference to the PPS Act from paragraph 442B(1)(a). The reference directed users of the section to the definition of circulating asset under the PPS Act by stating ‘(within the meaning of the *Personal Property Securities Act 2009*)’. This is omitted from paragraph 442B(1)(a) because the current section 340 of the PPS Act and the concept of circulating assets in the PPS Act will be relocated to section 51CA of the Corporations Act by Item 28 of this Schedule.

Item 30 – Subsection 442B(1) (note 1)

101. Item 39 substitutes the reference to ‘Note 1’ under subsection 442B(1) with a reference to ‘Note’. This is because note 2 is repealed by Item 31 of this Schedule.

Item 31 – Subsection 442B(1) (note 2)

102. Item 31 repeals note 2 from subsection 442B(1). Note 2 currently directs users to the PPS Act for the definition of circulating assets.

103. This is repealed from paragraph 442B(1) because the current section 340 of the PPS Act and the concept of circulating assets in the PPS Act will be relocated to section 51CA of the Corporations Act by Item 28 of this Schedule.

Personal Property Securities Act 2009

Item 32 – Section 10 (definition of *circulating asset*)

104. Item 32 replaces the current definition for ‘circulating asset’ in section 10 of the PPS Act with a signpost to section 339 of the PPS Act for further information. It also inserts a note directing the reader to new sections 51CA and 51CB of the Corporations Act.

105. Section 339 is amended by Item 33 of this Schedule.

Item 33 – Sections 339 to 341A

106. Item 33 repeals sections 399, 340, 341 and 341A from the PPS Act and inserts a new section 339 into the PPS Act

Section 339 – References to fixed and floating charges in other laws

107. Section 339 of the PPS Act provides, broadly, that a reference in the law of the Commonwealth or in a security agreement to a ‘charge’ is deemed, with some exceptions, to be a reference to a security interest over a circulating asset or a non-circulating asset, depending on whether the reference is to a fixed or floating charge.

108. Section 339 clarifies references to a charge, fixed charge and floating charge in other Commonwealth Acts. The section no longer attempts to specify the meaning of these terms as used in security agreements.

109. Section 339(3) provides that a reference to a charge over property is a security interest attached to a circulating asset or personal property that is not a circulating asset.

110. Section 339(4) provides that a reference to a fixed charge over property is taken to mean a security interest attached to personal property that is not a circulating asset.

111. Section 339(5) provides that a reference to a floating charge over property is taken to mean a security interest that has attached to a circulating asset.
112. New subsection 339(6) signposts the definition of ‘circulating asset’ in the Corporations Act and clarifies that ‘circulating asset’ for the purposes of the PPS Act has the same meaning as in the Corporations Act.

Sections 340-341A

113. Sections 340-341A are repealed from the PPS Act as they will be relocated to the Corporations Act by Item 135 of this Schedule.
114. The concept of circulating assets is relevant only in the context of Corporations Act provisions. The provisions have no consequences for the operation of the PPS Act itself, and it is beneficial to have all definitions relevant to sections 433 and 561 of the Corporations Act, which relate to external administration, in one place. Refer to Items 25, 26, 27 and 28 of this Schedule.

Shipping Registration Act 1981

Item 34 – Subsection 3(1) (definition of *PPSA security interest*)

115. Item 34 repeals the definition of ‘PPSA security interest’ (including the Note) from subsection 3(1) of the *Shipping Registration Act 1981* (‘Shipping Act’).
116. The definition is repealed because subsection 47A(1A) will be repealed by Item 36 of this Schedule. Subsection 47A(1A) provides in effect that a caveat over a ship cannot be lodged under the Shipping Act if it is also an interest in a ship which is a PPSA security interest.

Item 35 – Part III (heading)

117. Item 35 omits the words ‘security interests’ from the heading of Part III of the Shipping Act. The amendment arises as item 36 repeals subsection 47A(1A), which provides in effect that a caveat over a ship cannot be lodged under the Shipping Act if it is also an interest in a ship which is a PPSA security interest. As such, there is no need to refer to the concept of ‘security interests’ under the Shipping Act.

Item 36 – Subsection 47A(1A)

118. Item 36 repeals subsection 47A(1A) of the Shipping Act. Subsection 47A(1)(A) provides in effect that a caveat over a ship cannot be lodged under the Shipping Act if it is an interest in a ship which is a PPSA security interest.
119. The amendment will allow a secured party to lodge a caveat on the Shipping Register under the Shipping Act. The Shipping Act was amended by the *Personal Property Securities (Consequential Amendments) Act 2009* (Amendment Act) so that ship mortgages could no longer be registered on the Shipping Register, but instead needed to be perfected by registration under the PPS Act. The Amendment Act also amended the Shipping Act so that a holder of a security interest under the PPS Act was no longer able to lodge a caveat on the Shipping Register. As security interests over ships were registered on the PPS Register and not also registered on the Shipping Register, a caveator on the Shipping Register no longer received notice of security interests.

120. A caveat lodged on the Shipping Register does not prevent a dealing from being registered, but provides the caveator with notice of the dealings, and a window of time within which it can take action outside the Shipping Act to prevent the dealing if it so wishes.
121. The amendment will enhance the interaction between the Shipping Register and the PPS Register and prevent outcomes that are incompatible with the PPS Act, which protects holders of PPS interests by providing a mechanism for them to register and enforce security interests. It will also ensure that holders of unregistered interests in a ship that is not a PPSA security interest have no greater leverage over future dealings in that ship than holders of a registered interest.

Part 3—Other matters

Personal Property Securities Act 2009

Item 37 – Section 3

122. Item 37 removes the references to Part 3.5 of the PPS Act through repeal of para (d). A reference to Part 3.5 is not needed because Part 3.5 is repealed by Item 45 of this Schedule.

Item 38 – Section 3

123. Item 38 removes the reference to Part 9.3 from the Guide to Part 3 so that the reference to the registration commencement time of 1 February 2012 is repealed and replaced by the registration commencement time, as determined by the Minister under paragraph 306(2)(b) as 30 January 2012.
124. Item 38 also references the repeal of the requirement to review the operation of the Act within three years after it starts to apply (as required by current section 343 of the Act).

Item 39 – Section 10 (example of the definition of *expenses*)

125. Item 39 repeals the example relating to intellectual property under the definition of expenses in section 10. The example is repealed because Part 3.5, which provides rules for intellectual property, is repealed by Item 45 of this Schedule.

Item 40 – Section 10 (definition of *express amendment*)

126. Item 40 repeals the definition of ‘express amendment’ in section 10 and substitutes the short form: ‘*express amendment* of this Act: see section 244.’

Item 41 – Section 10 (definition of *intellectual property*)

127. Item 41 repeals the definition of ‘intellectual property’ from the PPS Act. ‘Intellectual property’ continues to be referred to throughout the PPS Act however it will carry the meaning found in general law.
128. Section 10 currently defines ‘intellectual property’ as rights under six Commonwealth Acts (designs, patents, trademarks, plant breeder’s rights, circuit layouts, and copyright) and corresponding foreign law. The definition only captures ‘registered’ intellectual property and excluded other forms of IP, such as copyright, circuit layouts, unregistered trademarks, confidential information or domain names. Although the definition is restricted to intellectual property regulated by legislation, the PPS Act applies to intangible property, including intellectual property that falls outside the section 10 definition.
129. Repealing the definition ensures all intellectual property rights are treated consistently, and allows the PPS Act to keep pace with the general law meaning of intellectual property, as it might develop over time.
130. This approach is consistent with international examples (New Zealand, Canada, and the United States) where intellectual property is not specifically defined in secured transactions legislation.

Item 42 – Section 10 (definition of *located*)

131. Item 42 repeals the definition of ‘located’ in section 10 and substitutes the short form: ‘*located*, in relation to personal property, or a person: see section 235.’

Item 43 – Section 10 (definition of *time of execution*)

132. Item 43 repeals the definition of ‘time of execution’ from section 10 of the Act. The definition (which currently refers to section 74) is repealed because it is redundant; the term is not formally defined in the new section 74 and will continue to remain unused in the Act as amended.

Item 44 – Section 82

133. Item 44 omits the reference to Part 3.5 from the guide provided at section 82 of the PPS Act. This is because Part 3.5 is repealed by Item 45 of this Schedule.

Item 45 – Part 3.5

134. Item 45 repeals Part 3.5 of the PPS Act. Repealing the section removes unnecessary complexity from the PPS Act and is consistent with Recommendation 243 of the UNCITRAL Guide to Secured Transactions – IP Supplement.

135. Part 3.5 currently provides specific rules for security interests in intellectual property and intellectual property licences.

136. Section 105 of the PPS Act captures a situation where intellectual property rights are sold in addition to goods. It sets out when a description of goods is taken to include a description of intellectual property rights. The effect of section 105 is not clear and is limited in its application. The section is only engaged if the exercise by a secured party of rights in relation to the goods ‘necessarily’ involved an exercise of the intellectual property rights, and if the secured party had taken an ‘additional’ security interest over the intellectual property rights.

137. While the provision potentially streamlined the process for secured parties when taking security over intellectual property rights as well as goods, it adversely affected users of the PPS Register. For example, if a person searched the Register against the details of the intellectual property only, the results would not reveal the existence of a security interest if it is included in the description and registration of the goods rather than the intellectual property.

138. Section 106 currently provides that a transferee of intellectual property is bound by a security agreement that has been granted an interest in a licence of that intellectual property, to the same extent that the transferor was bound. Similar to section 105, section 106 is limited in its application as it is not common for a security interest granted by a licensee to bind a licensor as well. The section is only relevant in situations where a licensor had agreed with the licensee’s secured party that it would be bound by the terms of the licensee’s security interest. It is not necessary for these agreements to be addressed by the PPS Act.

Item 46 - Paragraph 275(6)(a)

139. Item 46 repeals and replaces paragraph 275(6)(a) of the PPS Act.

140. Paragraph 275(6)(a) provides that a secured party does not need to make a disclosure under section 275 if (subject to some exceptions) the secured party and the debtor have agreed in writing that neither will disclose information of the kind mentioned in

subsection 275(1). It is unclear why the paragraph was limited in its application to agreements between a secured party and a debtor, when it is equally likely that a secured party will have entered into a confidentiality agreement with a grantor. The amendment will expand the paragraph and recognise that both an agreement between a secured party and a debtor or grantor is sufficient to engage the exemption.

Item 47 – At the end of paragraph 275(6)(c)

141. Item 47 amends paragraph 275(6)(c) of the PPS Act to clarify that a banker's duty of confidence cannot be relied upon to block a disclosure that would otherwise be required by section 275(1).
142. The paragraph currently provides that a secured party is not required to respond to a request under subsection 275(1) if the response would disclose information that is protected by a 'duty of confidence'. Bankers owe their customers a duty of confidence in relation to information about their accounts, including information about securities granted by the customer. However, while a bank might not be required to respond to a disclosure request if a grantor is the bank's customer, if the disclosure is required by law, then the bank should not be prohibited from disclosing information.
143. The amendment removes the circularity in the section and means a banker's duty of confidence will be subject to disclosure requirements under the section.
144. For the banker's duty of confidentiality, see *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461.

Item 48 – Subsection 275(7)

145. Item 48 repeals subsection 275(7) from the PPS Act.
146. The subsection currently provides that a secured party cannot rely on the existence of a confidentiality agreement for not responding to a request for information under section 275 on a number of grounds, including when the confidentiality agreement is made after the security agreement and when the debtor is in default.
147. These provisions were drafted on the assumption that confidentiality agreements are made primarily for the benefit of the grantor and so it should be open to them to waive the confidentiality if they so wish. However, this is not always the case and it is not unlikely that a secured party may have an interest in keeping the terms of the financing confidential. Further, it is unclear why a confidentiality agreement should become ineffective if the debtor is in default. It is therefore appropriate to repeal this subsection.

Item 49 – After paragraph 275(9)(d)

148. Item 49 inserts a new subparagraph (da) into subsection 275(9) of the PPS Act.
149. Subsection 275(9) currently confines 'interested persons' to grantors, persons with another security interest, auditors of the grantor, execution creditors and authorised representatives.
150. The new subparagraph expands the list of interested persons to include a judgment creditor that is considering whether to enforce its judgment by seeking execution against the property that is described in the secured party's registration. As the prospective execution creditor does not yet have an interest in the collateral, it could not make a request itself and it is unlikely that a grantor would make a request on its behalf. Given a

creditor has obtained a court order for payment of the amount it is owed, it is appropriate to include this category of persons in the list of interested persons.

Item 50 – Subsection 293(1)

151. Item 50 repeals and replaces subsection 293(1) of the PPS Act.
152. Subsection 293(1) allows a court to make an order to extend the period of time specified in a number of provisions in the PPS Act.

Item 51 – Section 304 (paragraph beginning “This Chapter”)

153. Item 51 omits the words ‘, or a once-only application (the review in Part 9.6)’ from section 304 of the PPS Act. This is to account for the repeal of section 343, the requirement to conduct a review of the operation of the PPS Act within three years of when it starts to apply, see Item 55 of this Schedule.

Item 52 – Section 304

154. Item 52 omits the words ‘Part 9.6 provides for an independent review of the operation of the Act 3 years after it starts to apply.’ As above (at item 51), this change is made to account for removal of the requirement to conduct a review of the operation of the PPS Act within three years of its start date.

Item 53 – Section 309

155. Item 53 omits reference to intellectual property licences from section 309. The reference is omitted because Part 3.5, which provides rules for intellectual property, is repealed by Item 41 of this Schedule. Due to the repeal of Part 3, there is no need for a reference in this Schedule.

Item 54 – Section 313

156. Item 54 repeals section 313 of the PPS Act. Section 313 applies section 106 to intellectual property licences entered into after the registration commencement time. Section 106 will be repealed by Item 45. As such, there is no longer a need for the rule contained in section 313.

Item 55 – Part 9.6

157. Item 55 repeals Part 9.6 of the PPS Act. Part 9.6 mandates a review of the operation of the Act within three years after it starts to apply (the registration commencement time). Section 343 provided for the statutory review of the Act within three years after the commencement and required the Minister to table a copy of the report of the review to Parliament. The statutory review was completed in 2015 and tabled in Parliament on 18 March 2015, accordingly this section is no longer required.

Item 56 – Amendments of listed provisions – definitions in section 10

158. Item 56 amends a number of internal signpost definitions listed in section 10 of the Act by omitting ‘has the meaning given by’ with and substituting ‘see’.
159. These changes are made for consistency with the style of new and amended definitions elsewhere in the Bill, and to bring the PPS Act in line with current drafting styles recommended by the Office of Parliamentary Counsel.