

PERSONAL PROPERTY SECURITIES REGULATIONS 2023

DRAFT EXPLANATORY STATEMENT

Issued by the authority of the [DRAFT]

under section 303 of the *Personal Property Securities Act 2009*

PURPOSE AND OPERATION OF THE INSTRUMENT

Section 303 of the *Personal Property Securities Act 2009* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

The Act implements a single national law creating a uniform and functional approach to personal property securities. It establishes uniform rules for creating a valid security interest, provides coherent rules governing the priority of competing security interests (and other interests), establishes when a person acquires personal property free of a security interest, and streamlines regimes for enforcement of security interests.

Personal property is generally any form of property other than real property. The Act applies to transactions which have the effect of securing a payment or other obligation by an interest in personal property (for example, a charge, consignment or retention-of-title arrangement) regardless of the form of the transaction, or the nature of the grantor.

The Act establishes and is supported by the Personal Property Securities Register (the PPS Register), a single national online register of personal property securities.

The Regulations sets out a number of provisions relating to:

- the types of interests in personal property that are or are not subject to the operation of the Act, and
- the operation of the PPS Register (including access to and suspension of the PPS Register, the information required to effect a registration, how the collateral or prescribed property is to be described in a registration, and how grantors and secured parties are to be identified in a registration).

The Regulations incorporate the Government's response to recommendations made by the Final Report of the 2015 statutory review of the Act (the Whittaker Review).

Details of the Regulations are set out in Attachment A.

DOCUMENTS INCORPORATED BY REFERENCE

The Regulations incorporate the following disallowable instruments by reference, as in force from time to time, without modification:

Paragraph 11(a) incorporates a ‘prescribed financial market’ prescribed by regulation made for the purposes of the *Corporations Act 2001* (Corporations Act) (refer to section 9 definition in the Corporations Act).

Paragraph 11(b) incorporates an ‘approved foreign market’ prescribed by the *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669*. This instrument is made pursuant to the Corporations Act.

Paragraphs 11(a) and 11(b) are permitted by subparagraph 14(1)(a)(ii) of the *Legislation Act 2003* (the Legislation Act). Section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the Legislation Act) has the effect that references to each instrument in 11(a) and 11(b) can be taken to be references to those instruments as in force from time to time.

Disallowable instruments incorporated by paragraphs 11(a) and 11(b) are available free of charge on the Federal Register of Legislation website www.legislation.gov.au.

CONSULTATION

An Exposure Draft of the Regulations was released for public consultation in September 2023. The Regulations were updated based on the submissions received from the public, and were informed by consultation with states and territories agencies, and Commonwealth agencies.

The Act is supported by referral of certain powers from the states to the Commonwealth under subsection 51 (xxxvii) of the Constitution. The Personal Property Securities Law Intergovernmental Agreement 2008 (PPS IGA) provides that the Commonwealth may not make the Regulations without approval from the state and territory parties.

Paragraph 3.3.6(a) of the PPS IGA provides that states and territories will be taken to have approved the Regulations if the Commonwealth has received notification in writing from at least three state or territory parties (including at least two referring states).

Alternatively, paragraph 3.3.6(b) the IGA provides that the Regulations will be taken to be approved if the Commonwealth has not heard back from state and territory parties within 8 weeks from when their approval was sought. To effectively notify the Commonwealth that the Regulations are not approved, at least six state and territory parties (including at least 5 referring states) must provide written notification to the Commonwealth within 8 weeks of their approval being sought.

This approval was provided on [DATE] under paragraph [3.3.6(a)/3.3.6(b)] of the PPS IGA.

The Act specifies no other conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the Legislation Act.

The Regulations commence at the same time [Schedules 1 to 7] to the *Personal Property Securities Amendment (Framework Reform) Act 2023* commence.

REGULATION IMPACT STATEMENT

[TBC]

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The Statement of Compatibility with Human Rights is at [Attachment XX].

SUNSETTING

The Regulations are exempt from sunseting by subsection 54(1) of the Legislation Act because the enabling legislation establishes an intergovernmental scheme and the Regulations are made for the purpose of that scheme.

Details of the *Personal Property Securities Regulations 2023*

General restructure of Regulations

The Regulations replace the Personal Property Securities Regulations 2010 as registered on 1 April 2019 (the current PPS Regulations). The layout and structure of the regulations are changed. The current PPS Regulations are divided into Parts that mirror Parts of the Act. These Regulations do not follow the structure of the Act, allowing for a more coherent and end-user focussed structure.

Some parts of the current PPS Regulations contain ‘placeholders’ for regulations that have not been made under a particular Part of the Act (see for example Part 3 – Specific Rules for Security Interests of the current PPS Regulations). These ‘empty’ provisions obstruct the structure of the current PPS Regulations, and are not included in the Regulations. If new items need to be prescribed in the Regulations under a head of power in the Act, they can be added by amendment to the Regulations.

The regulations made pursuant to subsection 153(1) and section 154 of the Act set out what information should be entered into a financing statement on the Personal Property Securities Register (the PPS Register) (including, for example, how to identify a grantor and a secured party, and how to describe the collateral). In the current PPS Regulations, such matters are dealt with in long and unwieldy Schedules. The Regulations incorporate matters prescribed under subsection 153(1) and section 154 of the Act into the body of the instrument which means that the regulations are indexed in the table of provisions for ease of reference and navigation. It also allows for cross referencing of the regulations, avoiding duplication of matters when identical for the purposes of subsection 153(1) and section 154.

The Regulations will repeal and replace the current PPS Regulations. In doing so, some of the provisions are repealed and others are remade by the Regulations.

NOTES ON SECTIONS

PART 1 – PRELIMINARY

Section 1 – Name

This section provides that the name of the instrument is the Personal Property Securities Regulations 2023 (the Regulations). This replaced section 1.1 of the Personal Property Securities Regulations 2010 (the current PPS Regulations).

Section 2 – Commencement

This section provides that the Regulations will commence at the same time as Schedules 1 to 7 to the *Personal Property Securities (Framework Reform) Act 2023* commence.

Section 3 – Authority

This section states that the Regulations are made under the enabling legislation, the *Personal Property Securities Act 2009* (the Act).

Section 4 – Schedule 1

This section provides that each instrument specified in a Schedule to the Regulations is amended or repealed as set out in the Schedule concerned. Schedule 1 repeals the current PPS Regulations.

Section 5 – Definitions

Section 1.6 of the current PPS Regulations is relocated to section 5. A note to section 5 identifies a number of expressions used in the Regulations that are defined in the Act.

Section 5 defines a number of terms used in the Regulations. Some of these terms are discussed below.

ABN is short for Australian Business Number, and has the same meaning as in the *A New Tax System (Australian Business Number) Act 1999*. This definition is relocated from section 10 of the Act because it is most relevant to the Regulations. The Regulations provide when an ABN can be used to identify a registerable body that is a secured party or grantor, or that holds or has an interest in prescribed property on the PPS Register.

ACN is short for Australian Company number, and is flagged as having the same meaning as in the *Corporations Act 2001*. The Regulations provide when an ACN should be used to identify a body corporate when making PPS registration or searching for a registration on the PPS Register.

Act means the *Personal Property Securities Act 2009*, the enabling legislation under which the Regulations are made.

aircraft is defined to continue to capture a machine or craft that can derive support in the atmosphere from the reactions of the air, other than the reactions of the air against the earth's surface and has nationality and registration marks assigned to it under the *Convention on International Civil Aviation 1944* (the Chicago Convention). This is used for aircraft that are serial-numbered property under the Regulations.

The references to aircraft objects ('aircraft engine', 'airframe' and 'helicopter') as defined in the *Convention on International Interests in Mobile Equipment 2001* (the Cape Town Convention) have been removed from the definition as well as associated definitions such as Aircraft Protocol to the Cape Town Convention. This is because the Cape Town Convention is not concerned with how security interests in aircraft objects are registered under the Act. Aircraft objects ('aircraft engine' 'airframe' and 'helicopter') are classified as 'aircraft' for the purpose of PPS-registration if assigned a registration mark under the Chicago Convention, otherwise the goods could be registered against the collateral class 'other goods' with a further free text description by item or kind, for example 'airframe' or 'aircraft engine'.

ARBN is short for Australian Registered Body Number and has the same meaning as in the *Corporations Act 2001*. The Regulations provide when an ARBN can be used to identify a registerable body that is a secured party or grantor, or that holds or has an interest in prescribed property on the PPS Register.

ARSN is short for Australian Registered Scheme Number (ARSN) and has the same meaning as in the *Corporations Act 2001*. The Regulations provide when the ARSN can be used to identify a registered scheme that is a secured party or grantor, or that holds or has an interest in prescribed property on the PPS Register.

ASIC means the Australian Securities and Investments Commission.

associated data is as defined in subsection 14(4) of the Regulations (general rules for registered details of secured parties and grantors).

Australian Business Register means a register established under the *A New Tax System (Australian Business Number) Act 1999*. An ABN that is assigned to an entity will be registered on the Australian Business Register. This definition replaces the obsolete National Names Index.

CCIV is short for corporate collective investment vehicle and has the same meaning as in the *Corporations Act 2001*.

Chicago Convention means the Convention on International Civil Aviation done at Chicago on 7 December 1944, the English text of which is set out in Schedule 1 to the *Air Navigation Act 1920*; and the associated Protocols (referred to in subsection 31(2) of the *Air Navigation Act 1920*) and Annexes (that relate to international standards and recommended practices) to the Convention.

design means a right under paragraphs 10(1)(a) to (f) of the *Designs Act 2003*. The definition of 'design' is part of the definition of 'intellectual property' under section 10 of the existing Act. The definition of intellectual property will be repealed by the *Personal Property Securities (Framework Reform) Act 2023*. The definition of 'design' is moved to the Regulations because it is relevant to serial numbered property.

hull identification number means a number or code that uniquely identify a watercraft. A hull identification number must be allocated to a watercraft by, or approved to be allocated to a watercraft by, the relevant registration authority, a person approved by the relevant registration authority, or the watercraft's manufacturer. The Regulations prescribe when the hull identification number may or must be used in a registration to identify personal property that is a watercraft.

The definition is revised compared to the current PPS Regulations to omit references to the International Standard Organization and Standards. The Standards referenced in the current PPS Regulations have since been withdrawn and are no longer publicly available to view or purchase.

patent means the right to exploit or work an invention, or authorise another person to do so, under the *Patents Act 1990*. The definition of ‘patent’ is part of the definition of ‘intellectual property’ under section 10 of the Act. The definition of intellectual property will be repealed by the *Personal Property Securities Amendment (Framework Reform) Act 2023*. The definition of ‘patent’ is moved to the Regulations because it is relevant to serial numbered property.

PCT number is short for Patent Cooperation Treaty number. The definition of ‘PCT number’ is relocated from Schedule 1 section 2.2(4) in the current PPS Regulations to section 5. The definition of ‘PCT number’ is relevant to serial numbered property.

plant breeder’s rights means a right under the *Plant Breeder’s Rights Act 1994* in relation to propagating material of a plant variety. The definition of ‘plant breeder’s rights’ is currently included in the definition of ‘intellectual property’ under section 10 of the existing Act which will be repealed by the *Personal Property Securities Amendment (Framework Reform) Act 2023*. The definition of ‘plant breeder’s rights’ is moved to the Regulations because it is relevant to serial numbered property.

pooling arrangement: This definition is inserted and signposts to the definition of ‘pooling arrangement’ at subsection 8(2) of the Regulations (PPS lease – exclusion).

proceeds of crime law: This definition is inserted and signposts to the definition of ‘proceeds of crime’ at subsection 13(2) of the Regulations (what the data contains – data with respect to additional personal property).

registered scheme has the same meaning as in the *Corporations Act 2001*.

responsible entity has the same meaning as in the *Corporations Act 2001*.

serial-numbered property: This section inserts a definition of ‘serial-numbered property’. Serial numbered property is property that can be described by serial number according to column 1 of the table in section 21 of the Regulations, and is nominated in a financing statement as serial numbered property (some property can be described by serial number, or by item or kind).

sub-fund, of a CCIV, has the same meaning as in the *Corporations Act 2001*.

trade mark means the rights held by a person who is a registered owner of a trade mark under the *Trade Marks Act 1995*. The definition of ‘trade mark’ is included in the definition of ‘intellectual property’ under section 10 of the existing Act which will be repealed by the *Personal Property Securities Amendment (Framework Reform) Act 2023*. The definition of ‘trade mark’ is relocated to the regulations as it is relevant to serial numbered property.

watercraft means a boat or vessel, other than a seaplane, that is used or intended to be used in navigation or for any purpose on water, and has a hull identification number or an official number issued by the Registrar of Ships (within the meaning of the *Shipping Registration Act 1981*). The Regulations prescribe when a watercraft may or must be described by its hull identification number or official number. An amphibious vehicle, that is a vehicle that can run both on land and water, may be a watercraft if it has either a hull identification number or an official number issued by the

Registrar of Ships. Existing note 1 which signposts to existing subsection 9.1 is repealed because the transitional provisions for watercrafts is repealed.

A number of definitions have been omitted from the Regulations.

agriculture: The definition of ‘agriculture’ is omitted as it is no longer a collateral class.

aircraft engine: The definition of ‘aircraft engine’ is omitted as no new registrations can be made against a manufacturer’s number. Refer to revised serial-numbered goods and unique identified provisions at section 22.

Aircraft Protocol: The definition of ‘aircraft protocol’ is omitted as it is no longer necessary given the repeal of the definitions of ‘aircraft engine’, ‘airframe’ and ‘helicopter’.

airframe: The definition of ‘airframe’ is omitted as no new registrations can be made against a manufacturer’s number. Refer to revised serial-numbered goods and unique identified provisions at section 22.

all present and after-acquired property: The definition of all present and after-acquired property is repealed as it is well understood in the Australian commercial landscape.

all present and after-acquired property except: The definition of all present and after-acquired property is repealed as it is well understood in the Australian commercial landscape. As a result, the definition of ‘All present and after-acquired property except’ is also omitted.

AML-CTF Act: The definition is omitted because the Regulations no longer refer to the AML-CTF Act. The AML-CTF Act means the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. Table item 2 of section 1.2(6) to Schedule 1 of the current PPS Regulations required an individual grantor known to the secured party because of the operation of the AML-CTF Act to be identified in a registration using data collected by the secured party for the purposes of the operation of the AML-CTF Act. This requirement lacked transparency, and has been repealed.

chassis number: The definition of ‘chassis number’ is omitted because the Act now only allows registrations to be made against unique serial numbers. The Act allows registrations against VIN (Vehicle Identification Numbers) as a unique serial number for vehicles. See the definition of VIN in section 10 of the Act.

helicopter: The definition of ‘helicopter’ is omitted because the definition of aircraft will encompass helicopters. The current PPS Regulations provide that a helicopter must be registered, amongst other things, by its manufacturer number. The revised serial number and unique identifier provisions at section 22 mean that new registrations cannot be made against a manufacturer’s number (refer to section 22).

manufacturer’s number: The definition is omitted as aircrafts and motor vehicles are no longer registered by manufacturer number and must be registered against a unique identifier.

migrated security interest: The definition of ‘migrated security interest’ is omitted because these types of registrations are no longer being made.

National Names Index: The definition of the National Names Index is omitted because the Index no longer exists, it has been replaced by the Australian Business Register.

original registration time: The definition of ‘original registration time’ was included for migrated data provisions under the Act and is omitted because it is no longer required.

outboard motor: The definition of ‘outboard motor’ is included as part of the transitional provisions for watercrafts and the definition for ‘manufacturer’s number’. These transitional provisions have sunset, and the definition of ‘manufacturer’s number’ is now repealed. As a result this definition is no longer required and is omitted.

Patent Cooperation Treaty: The definition of ‘patent cooperation treaty’ is omitted because it is incorporated into the definition of ‘PCT number’.

prescribed property: The definition of ‘prescribed property’ is omitted because the term is no longer used to describe property prescribed for the purposes of the Act. The phrase ‘property prescribed by subsection 13(1)’ is now used for the convenience of users of the Regulations.

small aircraft: The definition of ‘small aircraft’ is omitted because the definition of aircraft will encompass small aircraft. This should have minimal impact on registrations because the serial number for registering against a small aircraft under the current PPS Regulations is that same as will be required by the Regulations (the nationality and registration marks assigned to it under the Chicago Convention).

vehicle identification number: The definition of VIN as an identifier of a motor vehicle has been omitted because it is now defined in the Act.

registration time: The definition of ‘registration time’ is omitted because it was only used in the definition of ‘all present and after-acquired property’. The definition of all present and after-acquired property is repealed as it is well understood in the Australian commercial landscape.

PART 2 – GENERAL APPLICATION AND DEFINITIONS USED IN THE ACT

Section 6 – Application in the external Territories

This section is made for the purposes of subsection 7(3) of the Act and provides that the Act will apply to Australia's Indian Ocean Territories (Christmas Island and the Cocos (Keeling) Islands). This is required as the law of Western Australia previously applied to those territories, and Western Australia's PPS arrangements ceased to operate when the Act commenced.

Section 6 is equivalent to section 1.3 of the current PPS Regulations.

Section 7 – Meaning of *security interest* – interests excluded

Paragraph 12A(1)(q) of the Act provides the power to prescribe by the Regulations the kinds of interests to be excluded as security interests.

Subsection 7(a) – garnishee notices under the Taxation Administration Act 1953

Subsection 7(a) provides that the Act will not apply to an interest in personal property mentioned in section 260-5 (amounts collected by the Commissioner from a third party) of Schedule 1 to the *Taxation Administration Act 1953* (the TAA).

Garnishee notices under section 260-5 are excluded from the scope of the Act because:

- they are excluded from being a security interest under the Act because paragraph 12A(1)(b) provides that the Act does not apply where it is provided for under a law of the Commonwealth; and
- the TAA does not declare that subsection 73(2) of the Act applies to statutory interests of that kind (garnishee notices under section 260-5 of the TAA) in accordance with subsection 73(2) of the Act.

Subsection 7(b) – Offshore Minerals Act 1994 and Offshore Petroleum and Greenhouse Gas Storage Act 2006

Subsection 7(b) provides that the Act will not apply to a security interest (for the purposes of paragraph 12A(1)(o) of the Act) in an authority, lease, licence or permit of any kind that is created under the *Offshore Minerals Act 1994* or the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*. While these Acts exclude licences, leases or permits from being considered personal property under the Act, this section also provides that an interest in any of them cannot be a security interest for the purposes of the Act.

Subsection 7(c) – Norfolk Island companies

Subsection 4(a) of section 1.4 of the current PPS Regulations excludes security interests if the grantor is a company incorporated under the *Companies Act 1985* (Norfolk Island) (the Norfolk Island Companies Act) and not registered under Part 5B.2 of the *Corporations Act 2001* (the Corporations Act). The Norfolk Island Companies Act would govern such interests.

On 2 August 2021, under the Norfolk Island Reforms, eligible companies registered under the Norfolk Island Companies Act were deemed to be registered under the Corporations Act by the *Territories Legislation Amendment Act 2020* (the Amending Act). This was to ensure that all Australian companies operate under the same legislative framework.

The Amending Act transferred registrations of eligible Norfolk Island companies to the Corporations Act. Those companies not eligible to be transferred were to be wound up under the Norfolk Island Companies Act. At the time of writing this Explanatory Statement it is unclear whether any companies registered under the Norfolk Island Companies Act are in the process of being wound up, and the Norfolk Island Companies Act is in force.

This section is retained in the Regulations out of an abundance of caution because there may be companies that remain registered under the Norfolk Island Companies Act, and therefore may be grantors of interests that should remain excluded from the operation of the Act.

Section 7 is equivalent to section 1.4 of the current PPS Regulations noting the changes to the Act in relation to excluded security interests now in the new section 12A (see Item 9 of Schedule 1 of the Bill).

Section 8 – Meaning of *PPS lease* – leases excluded

Section 8 is made for the purposes of new paragraph 13(3)(c) of the Act and prescribes that a lease of personal property that is part of a ‘pooling arrangement’ is excluded from the meaning of a PPS lease. Section 8 is equivalent to section 1.9 of the current PPS Regulations.

A pooling arrangement is an arrangement in which personal property is passed between multiple users, through one or more hires or leases of goods, before being returned to the owner in circumstances and where none of the arrangements has the effect of securing payment or performance of an obligation. Like goods are pooled for collective use of the parties to the hire or lease from time to time. Like goods, by their nature of usage of trade, can be returned in place of goods originally hired or leased. An example is wooden pallets used to ship large quantities of goods, or other such fungible goods. As these arrangements do not amount to a security interest, they are excluded from the meaning of a PPS lease.

For consistency, references to bailments in this section are omitted because the Act no longer refers to bailments. However, a pooling arrangement could in theory also involve bailment arrangements (in addition to hires or leases).

The definition of pooling arrangement is revised to refer to ‘personal property that is goods’ to better align with the head of power in the Act at new paragraph 13(3)(c) which refers to ‘personal property’ rather than ‘goods’ specifically, see Item 18 of Schedule 1 of the Bill.

Section 9 – Meaning of *personal property* – interests not excluded

Section 9 is equivalent to section 1.5 of the current PPS Regulations. Section 1.5 of the current PPS Regulations is made under the current subsection 8(3) of the Act and provides an exception to the rule in current subparagraph 8(1)(f)(ii) of the Act.

Current subparagraph 8(1)(f)(ii) of the Act provides that an interest created by the transfer of a right to payment in connection with an interest in land is not a security interest for the purpose of the Act. This exclusion captures the transfer of a real property mortgage loan that is connected to the issue of a mortgage-backed security. It therefore excludes mortgage-backed securities (MBS) themselves from the operation of the Act.

Even though it may be connected to land, the Act is intended to apply to the transfer of MBS, so as to facilitate the securitisation of mortgage payments. An MBS is ‘financial property’ like shares or

bonds. This section clarifies that the Act applies to the transfer of a real property mortgage loan in relation to a mortgage-backed security.

Item 10 of Schedule 1 of the Bill will relocate current subparagraph 8(1)(f)(ii) of the Act to new paragraph 13B(1)(c). Section 9 of the Regulations will be made under new subsection 13B(2) of the Act, as an exception to new paragraph 13B(1)(c) as an interest not excluded from the definition of personal property for the purpose of the whole Act.

Section 9 includes a note pointing to the definition of ‘mortgage backed security’ in section 286 of the *Duties Act 2001* (Qld). It also includes a note that a MBS must also fall within the definition of personal property in subsection 13A(1) of the Act to be considered personal property under the Act.

PART 3 – TAKING PERSONAL PROPERTY FREE OF SECURITY INTERESTS

Section 10 – Taking vehicles free of security interest – vehicle dealers

Section 10 is equivalent to section 2.2 of the current PPS Regulations. In accordance with new subsection 45(3) of the Act, this section can provide the circumstances in which a buyer or lessor takes a vehicle free of a security interest. Under section 10 this is where the vehicle is bought or leased from a person:

- that holds a current licence to deal or trade in that kind of vehicle; and
- the licence is issued by a licensing authority in the State or Territory where the sale or lease of the vehicle happens.

The section has the effect that a person who is licensed to deal in particular kinds of vehicles (for example, second hand motor vehicles) can sell or lease vehicles of that kind (but not other vehicles, such as new cars) free of a security interest.

The rationale for this section is that a purchaser or lessee who acquires an interest in a vehicle from a licensed vehicle dealer or trader should not have to search the PPS Register prior to acquiring their interest.

All jurisdictions, except Tasmania, Queensland and South Australia, have a licensing scheme over new vehicle dealers or traders generally. Queensland and South Australia have a licensing scheme over vehicle dealers or traders of second-hand vehicles. Tasmania does not have a licensing scheme for motor vehicle dealers and traders. Purchasers of vehicles in these states will need to rely on section 46 of the Act (taking personal property free of security interest in ordinary course of business).

The definition of motor vehicle is repealed by the Regulations. The definition is replaced with the definition of ‘vehicle’ in section 10 of the Act.

Section 11 – Taking investment instrument or intermediated security free of security interest in the ordinary course of trading- financial markets

Section 11 is a new section and made for the purposes of section 49 of the Act and prescribes financial markets. Subsection 11(a) prescribes a prescribed financial market under the *Corporations Act 2001*. Paragraph 11(b) prescribes approved foreign markets under the *ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669*. This section has the effect that a person who purchases an investment instrument or intermediated security in the ordinary course of trading on either of the aforementioned prescribed financial markets takes the personal property free of any security interests. This section protects the integrity of transactions on prescribed markets such as ASX Limited. Section 11 is a new section without an equivalent in the current PPS Regulations.

Subsections 11(a) and 11 (b) – prescribed matters are disallowable instruments

Subsections 11(a) and 11(b) each incorporate a disallowable instrument, by reference, without modification, as in force from time to time. Subsection 11(a) incorporates a ‘prescribed financial market’ prescribed by regulation made for the purposes of the *Corporations Act 2001* (refer to section 9 definition in the *Corporations Act 2001*). Subsection 11(b) incorporates an ‘approved foreign market’ prescribed by the ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669. This legislative instrument is made under the *Corporations Act 2001*. This is

permitted under subparagraph 14(1)(a)(ii) of the *Legislation Act 2003* (the Legislation Act). Section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the Legislation Act) has the effect that references to each instrument in subsections 11(a) and 11(b) can be taken to be references to those instruments as in force from time to time. Disallowable instruments incorporated by subsections 11(a) and 11(b) can be found on the Federal Register of Legislation.

PART 4 – PERSONAL PROPERTY SECURITIES REGISTER

Division 1 – Establishment of the Register

Section 12 – Personal Property Securities Register – suspension of access

Section 12 is made under new paragraph 147(5)(b) and allows the Registrar to suspend the operation of the PPS Register for up to 4 hours at a time, provided that 7 days' notice of the suspension is given by publication of a notice in a manner provided for under new subsection 147(7) of the Act. This section is intended to allow the Registrar to close the PPS Register for up to four hours for routine maintenance.

The Registrar may also suspend some or all of the PPS Register's functions under new paragraph 147(5)(b) when it is impractical to provide access. Suspension of the PPS Register under new subsection 147(5) results in that day not being counted as a 'business day' (see definition of 'business day' in section 10 of the Act).

Section 12 is equivalent to section 5.1 of the current PPS Regulations.

Section 13 – What the PPS Register contains – data with respect to additional personal property

This section is made under subsection 148(c) of the Act, which allows data about prescribed personal property to be registered on the PPS Register. Essentially, section 13 sets out when a registration can be made on the PPS Register to indicate that the property is subject to a lien or claim (that is not a security interest).

Subsection 13(1) allows data in relation to the following personal property to be registered on the PPS Register:

- (a) vehicles that have been, or will be, impounded or immobilised under the law due to involvement in the commission of certain offences ('hoon liens' registration)
- (b) personal property that is subject to an order or notice, or is confiscated or forfeited, under a provision in the proceeds of crime law as set out in subsection 13(2) ('proceeds of crime' registration)
- (c) personal property that is subject to a court or tribunal order that prevents dealing with the property or orders its sale or disposal ('court orders' registrations); and
- (d) personal property (other than vehicles confiscated under hoon laws, proceeds of crime, or property subject to court orders) that, immediately before the registration commencement time, could have been registered on a Commonwealth, state or territory transitional register.

Such registrations assist prospective purchasers and lenders to obtain up-to-date information about the status of personal property (in addition to any security interests to which the property may be subject).

Section 13 also includes a note that flags that if data covered by this section is registered, the Registrar may remove it in certain circumstances in accordance with section 184 of the Act and section 30 of the Regulations.

Example

Mr Snow offers to buy a car from an acquaintance. The acquaintance agrees but advises that he will not be able to deliver the car straight away. Mr Snow searches the PPS Register. The search result discloses that the car is subject to a confiscation order under proceeds of crime legislation. This information is contained in the PPS Register in accordance with paragraph 13(1)(b).

The definition of ‘court order’ is omitted from subsection 13(2) and the content of the definition is incorporated into paragraph 13(1)(c) by inserting ‘other than under a proceeds of crime law’. The definition of motor vehicle is repealed by the Regulations. The definition is replaced with the definition of ‘vehicle’ in section 10 of the Act.

Section 13 is equivalent to section 5.3 of the current PPS Regulations.

Division 2 – Registration: details of secured parties and grantor

Section 14 – General rules for registered details of secured parties and grantors

Section 14 sets out a number of general rules for how to correctly identify a secured party and grantor in a financing statement. Subsections 14(1) to 14(3) are new. Subsections 14(4) and 14(5) are equivalent to section 4.1 (item 5) of Schedule 1 of the current PPS Regulations.

Nominees of secured parties

Subsection 14(1) confirms that Division 2 applies in the same way to a nominee of a secured party as it would to the secured party. A secured party is able to nominate a person to act on its behalf prior to making an initial registration on the PPS Register (see paragraph (b) of Item 1 in new section 153 of the Act, see Item 23 of Schedule 5 of the Bill). The details required to be registered will be the details of the person nominated by the secured party who has authority to act on behalf of the secured party in relation to the registration.

Example

Prior to registering a financing statement, Edward nominates Bruce to act as a secured party on his behalf and provides Bruce with authority to act in relation to the registration. Section 14 means Division 2 will apply to Bruce as if Bruce were the secured party.

Example

Prior to registering a financing statement, Edward nominates Bruce Inc., a registered company under the *Corporations Act 2001*, to act as a secured party on his behalf and provides Bruce Inc. with authority to act in relation to the registration. Section 14 means Division 2 will apply to Bruce Inc. as a company as if Bruce Inc. were the secured party.

Trustees

Subsection 14(2) provides an application rule of Division 2 to trustees of a trust, a known source of confusion for registrants.

Paragraph 14(2)(a) provides that where a security interest is to be taken in the property of the trust Division 2 will apply to the trustee of the trust in the same way as it applies in relation to any other grantor. This is because a trust is not a separate legal entity. The trustee is legally responsible for the trust. This differs from the current way trusts are treated by the Act and the current PPS

Regulations. The effect of this section means that the grantor details required for a registration made for a security interest in property of a trust will be the same as the details required for a registration against that grantor for a security interest that the grantor gives in property that it holds in its own right.

Example

Jessica wishes to take a security interest in property of the Kanban Trust. Jessica knows that Hasti is the trustee of the Kanban Trust and that the Kanban Trust carries on an enterprise and is therefore required to have an ABN. Jessica knows that paragraph 14(2)(a) applies Division 2 in the case of security interests taken in property of the trust in the same way as it applies to any other grantor. Jessica registers the financing statement in accordance with section 16 against Hasti's details. Jessica knows that the Regulations do not require her to provide the ABN of the Kanban Trust.

Paragraph 14(2)(b) provides that where a trustee of a trust is taking a security interest on behalf of the trust (i.e. the trustee will be the secured party), Division 2 will apply in relation to the trustee in the same way as it applies to any other secured party. This is because a trust is not a separate legal entity. The trustee is legally responsible for the trust. This differs from the current way that trusts are treated by the Act and current PPS Regulations. The effect of this section means that the details required for a registration made for a secured party that is a trustee of a trust will be the same as the details required for the secured party if it were acting in its own right.

Example

Manasa is the trustee of the Kanban Trust. The Kanban Trust carries on an enterprise and is therefore required to have an ABN. Manasa, in her capacity as the trustee of the Kanban Trust, wishes to register a financing statement to perfect a security interest. Manasa knows that paragraph 14(2)(b) applies Division 2 of the Regulations to a trustee of a trust in the same way as any other secured party. Manasa registers herself as an individual secured party per the table contained in subsection 15(2). Manasa knows that the Regulations do not require her to provide the ABN of the Kanban Trust.

Foreign characters and numbers – transliteration etc.

The Act and current Regulations are silent about how to identify a party in a registration where the source document is in a non-Latin-based alphabet, even though it is possible that the rules for identifying a grantor will require that foreign characters be used. For example, if a registration must be made against an individual grantor according to a foreign passport. This presents registrants with a dilemma, as it means that it may simply not be possible to make an effective registration in these circumstances.

Subsection 14(3) therefore accommodates this with a clear rule. Subsection 14(3) applies if the secured party or grantor is an individual. Paragraph 14(3)(a) allows for reasonable transliteration of original characters into roman characters, and paragraph 14(3)(b) allows the use of Arabic numerals to correspond to non-Arabic numerals.

Transliteration is based on phonetic similarity, however, given this does not apply to numerals the section provides a rule for recording the corresponding Arabic number. Arabic numbers are used because underlying number systems would be comparable.

Associated data

Subsections 14(4) and (5) apply to the Division as a general rule.

The sections confirm that ‘associated data’ is data associated with an ARSN, ACN, ARBN or ARFN held on a business register kept by ASIC. The associated data that is associated with an ABN is information held on the Australian Business Register.

The Regulations may allow ‘associated data’ be included as details associated with a particular secured party or grantor as this will promote greater accuracy of data on the PPS Register.

For example, if the grantor is a body corporate with an ARSN the registration must be made against the ARSN. The Register can include data associated with the ARSN sourced from a business register kept by ASIC (for example, details of the business name, ABN, status and address). This has no legal effect, but supports the secured party to make an effective registration by verify the data against the ASIC register in real time. This helps registrants avoid registering against the wrong party, which is a risk when entering long numbers to identify the grantor.

Section 15 – Individual secured parties

Section 15 is made for the purposes of item 1 of the table in new subsection 153(1) of the Act, and sets out relevant rules for identifying a secured party who is an individual. The note clarifies that this section applies even where the individual is a sole trader operating with an ABN.

The table in this section outlines the hierarchy of identifiers (and source of those identifiers) that may be used to describe the secured party. The relevant identifier will be that which applies to the individual and has the lowest item number in the table.

In brief, the section provides that an individual is to be identified using the details recorded on:

1. their current Australian driver’s licence;
2. if they do not have such a driver’s licence, their current Australian proof of identity or proof of age card;
3. if they do not have such a driver’s licence or proof of identity or age card, their current Australian passport
4. if they do not have such a driver’s licence, proof of identity or age card or passport, their current Australian visa
5. if they do not have such a driver’s licence, proof of identity or age card, passport or visa, their passport from the jurisdiction in which they ordinarily reside;
6. if they do not have such a driver’s licence, proof of identity or age card, passport, visa, or passport from the jurisdiction in which they ordinarily reside, their birth certificate.

An individual’s first name and surname noted on the driver’s licence are the first relevant set of identifiers. The driver’s licence was chosen as a preferred identifier source since it is expected that individuals are more likely to carry a driver’s licence than a proof of age card, passport, visa, or birth certificate.

ABN no longer required

Details of an ABN are no longer required in the case of an individual grantor who is a trustee of a trust with an ABN or a sole trader.

Section 15 is equivalent to section 1.2 of Schedule 1 to the current PPS Regulations.

Section 16 – Individual grantors

Section 16 is made for the purposes of paragraph (b) of item 2 of the table in new subsection 153(1) of the Act and provides relevant rules for identifying a grantor who is an individual.

The table in this section outlines the hierarchy of identifiers (and source of those identifiers) that may be used to describe the grantor or secured party. The relevant identifier will be that which applies to the individual and has the lowest item number in the table.

Grantor details include date of birth

It is important to note at the outset that the identifier rules for an individual grantor or secured party are similar, the only difference being that a date of birth is required for a grantor but is not required for a secured party.

Dates of birth for grantors are required as, unlike secured party details, the PPS Register may be searched using grantor details. The date of birth is an additional filter to help ensure that only registrations for that specific grantor are shown in a search result.

Example

If Emily Bloggs was the grantor, Emily's first name, surname and date of birth will need to be used in the registration to identify her as the grantor.

Individual's details on driver's licence, passport etc

In brief, the section provides that an individual is to be identified using the details recorded on:

1. their current Australian driver's licence;
2. if they do not have such a driver's licence, their current Australian proof of identity or proof of age card;
3. if they do not have such a driver's licence or proof of identity or age card, their current Australian passport
4. if they do not have such a driver's licence, proof of identity or age card or passport, their current Australian visa
5. if they do not have such a driver's licence, proof of identity or age card, passport or visa, their passport from the jurisdiction in which they ordinarily reside;
6. if they do not have such a driver's licence, proof of identity or age card, passport, visa, or passport from the jurisdiction in which they ordinarily reside, their birth certificate.

An individual's first name, surname, and date of birth noted on the driver's licence are the first relevant set of identifiers. The driver's licence was chosen as a preferred identifier source since it is expected that individuals are more likely to carry a driver's licence than a proof of age card, passport, visa, or birth certificate, and can readily provide these details to a financier.

Data about the grantor known to the secured party due to the operation of the AML-CTF Act

This section also removes the ability for an individual grantor to be identified in a registration based on information collected by the secured party for the purposes of the *Anti-Money Laundering Counter Terrorism Financing Act 2006* (AML-CTF Act) found in item 2 of the table in section 1.2 of Schedule 1 to the current PPS Regulations.

After dealing with transitional issues involving data migration, the highest priority identification for an individual under the current PPS Regulations is data collected by a financier or bank in compliance with the AML-CTF Act. It is not possible to determine with any certainty the data a financier may have on file as their 'current data' for the grantor because the AML-CTF Act and Regulations do not prescribe acceptable forms of identification. This exposes third parties to the risk that a search of the PPS Register will not produce valid registrations. This undermines the integrity of the PPS Register. For example, where a financier makes a registration that identified a grantor based on data collected for the purposes of the AML-CTF Act containing a typographical error, the registration could be valid, but would be invisible to a person who searched against the grantor's correct name as per their current driver's licence.

ABN no longer required

Details of an ABN are no longer required in the case of an individual grantor who is a trustee of a trust with an ABN or a sole trader.

Partner in a partnership

If the grantor is a partner in a partnership, this section will apply if the collateral secured by the security interest is that partner's net share in the partnership. If the security interest is against collateral which is an asset of the partnership itself, section 18 will apply.

Section 16 is equivalent to section 1.2 of Schedule 1 of the current PPS Regulations.

Section 17 – Corporate secured parties and grantors

Section 17 is made for the purposes of item 1, and paragraph (c) of item 2, of the table in the new subsection 153(1) of the Act and prescribes the details for identifying a body corporate in a registration.

Hierarchy of identifiers for body corporate

Subsection 17(2) provides a hierarchy of identifiers (and source of those identifiers) for bodies corporate that are grantors or secured parties. relevant identifiers in this section will be that which applies to the body corporate and has the lowest item number in the table.

Items 1 to 5 of the table under subsection 17(2) apply in relation to new registrations (that is, registrations not migrated from a transitional register). In brief, it provides that:

1. a responsible entity of a registered scheme is to be identified by its ARSN and associated data;
2. if there is no ARSN, then it is to be identified by its ACN and associated data;
3. if there is no ARSN or ACN, and the body corporate is a CCIV, then it is to be identified by the sub-fund's ARFN and associated data;
4. if there is no ARSN, ACN or ARFN, it is to be identified by its ARBN and associated data; and

5. if there is no ARSN, can, AFRN or ARBN, it is to be identified using the name of the body corporate, provided by the law under which the body corporate is incorporated. This differs from the current section which provides that the source of the name of a body corporate is found in its constitution or equivalent document. That is because it is likely that some foreign companies are not required to have a constitution or equivalent document.

Section 17 replaces section 1.3 of Schedule 1 of the current PPS Regulations.

Section 18 – Partnership security interests – grantor’s details

Section 18 is made for the purposes of subparagraph (d)(ii) of item 2 of the table in subsection 153(1) of the Act, and provides the grantor details that must be entered into a financing statement where the collateral is assets of a partnership.

Section 18 does not apply, however, if the security interest is granted by one partner over their net interest in the partnership. In that situation, section 16 or 17 will apply instead.

Example

Corporation HZ and Corporation JF are in partnership. Each has 50% shares in the assets of the partnership. Corporation HZ uses their 50% net share in the assets of the partnership as collateral for a loan from the Bank. The Bank registers their interest on the PPS Register, and enters grantor details for Corporation HZ in line with section 17.

Hierarchy of identifiers for partners – grantor’s details

The section provides a hierarchy of identifiers (and source of those identifiers) for partner grantors. The relevant identifier will be that which applies to the partner and has the lowest item number in the table.

Item 1 of the table provides that if the partnership is carrying on an enterprise to which an ABN has been allocated, the relevant identifier is the ABN.

Item 2 of the table provides that where a partnership does not have an ABN but has a registered name under the law of the jurisdiction in which the partnership is established, the relevant identifier is the registered name.

Item 3 of the table provides that where a partnership has no ABN or registered name, it is to be identified using a combination of the name of the partnership and the details of at least one of the partners, using that partner’s details under section 16 or 17, as relevant.

Item 4 of the table provides that for any other partnership the registration must be made against each partner. If a partner is an individual they are to be identified using the individual identifier table (section 16). If a partner is a body corporate it is to be identified using the identifier table for bodies corporate (section 17).

Section 18 replaces section 1.4 of Schedule 1 of the current PPS Regulations.

Section 19 – Body Politic secured parties and grantors

Section 19 is made for the purposes of item 1, and paragraph (e) of item 2, of the table in new subsection 153(1) of the Act and provides which details must be registered for a body politic.

This section provides a hierarchy of identifiers (and source of those identifiers) for bodies politic.

Paragraph 19(a) provides that if the body politic is carrying on an enterprise to which an ABN has been allocated, the relevant identifier is the ABN and associated data.

Paragraph 19(b) provides that in any other case, the body politic is to be identified using the name of the body politic that is recorded in the constitution or constituting law (if any) of the body politic.

Subsection 19 is equivalent to section 1.6 of Schedule 1 of the current PPS Regulations.

Division 3 – Registration: description of collateral and proceeds

Section 20 – How to describe collateral

Section 20 replaces the rules for describing collateral in a registration in Schedule 1 to the current PPS Regulations.

Classes of collateral

Section 2.3 to Schedule 1 of the current PPS Regulations prescribes the following 9 collateral classes

- (a) agriculture;
- (b) aircraft;
- (c) all present and after-acquired property;
- (d) all present and after-acquired property, except;
- (e) financial property;
- (f) intangible property;
- (g) motor vehicle;
- (h) other goods; and
- (i) watercraft.

The PPS Register breaks the collateral classes ‘financial property’ and ‘intangible property’ further down based on their definition in section 10 of the Act, resulting in a registrant having to correctly select the collateral class from 18 possible options. It is not always clear what the correct collateral class is for a particular item. For example, whether particular goods are a ‘motor vehicle’ or ‘other goods’, or whether an interest in a trust is ‘financial property’ or ‘intangible property’. These collateral classes are rationalised into the following six classes:

1. All present and after-acquired property;
2. All present and after-acquired property, except specified items or kinds of personal property;
3. Serial-numbered property;
4. Accounts;
5. Intangible property, and financial property; and
6. Goods.

Personal property that would have been described by one of the removed collateral classes will now be registered against one of the revised collateral classes. For example, collateral that is currently described as ‘agriculture’ could be registered under ‘goods’.

Reducing the number of classes clarifies the distinction between them. Subsection 20(1) states that for the purposes of paragraph (a) of item 4 of the table in the new subsection 153(1) of the Act collateral must be described in a financing statement by nominating a collateral class from column 1 of the table and by further describing the collateral in accordance with the requirements of column 2 of the table.

A further description of the personal property

In addition to a description by one of six classes, a corresponding further description of the collateral may be required as a condition to making an effective registration, in accordance with column 2 of the table to subsection 20(1).

In most cases, where a further description of the collateral is required the definition of ‘description’ in section 10 of the Act requires that description be of the personal property by ‘item’ or ‘kind’.

For example, for the collateral class ‘All present and after acquired property except specific items or kinds of property’ a further description is required that describes the excluded items or kinds of property.

For the collateral class ‘intangibles, and financial products’ a further description of the property is required by item or kind of property.

‘Item’ is a specific, individually distinguishable piece of collateral.

Example

Tony Smith is registering his security interest in the original painting of ‘Blue Poles’ by Jackson Pollock. He describes the collateral as ‘goods’ and then further describes the goods by item as ‘Blue Poles by Jackson Pollock’.

‘Kind’ is a broad description, it may encompass multiple individual pieces of collateral or a ‘type’ of collateral.

Example

Tony Smith is registering his security interest in artwork held by the National Gallery of Australia. He describes the collateral as ‘goods’, and further describes the collateral as ‘Art owned by the National Gallery of Australia in 2019.’

A broad description of collateral is acceptable.

Example

A description of collateral as ‘goods’ further described as ‘sheep’ is sufficient to identify collateral that is ‘sheep wool’

Example

A description of collateral as ‘goods’ further described as ‘fruit and vegetables’ is sufficient to capture ‘apples’ at one point and ‘lettuce’ at another

However, if there is a failure to describe the collateral, this may invalidate the registration. If in doubt a broad description is preferable - if it is too narrow, it may inadvertently exclude collateral.

Example

‘Fruit’ is not an adequate description of a security interest in goods that are ‘apples, pears and lettuce’ because lettuce is not a fruit. ‘Fruit and vegetables’ would sufficiently describe ‘apples, pears and lettuce’.

Some classes of collateral must be described in a particular way for a specific purpose.

Accounts

Where a security interest is a non-purchase money security interest taken in the account as original collateral, the account must be further described as one to which section 64 of the Act applies. This describes the purchase of an account by an account financier.

Serial numbered goods

Goods that are ‘serial numbered goods’ must be described in accordance with section 21.

Goods

‘Goods’ may be further described, where applicable, by one of 3 descriptions that identifies the goods by how they are transacted. Subsection 20(2) allows ‘goods’ to be further described as

- (a) Goods leased by the secured party to the grantor
- (b) Good supplied by the secured party to the grantor on retention of title terms
- (c) Goods delivered by the secured party to the grantor on consignment

Section 21 – Serial-numbered property – further description

This section relocates section 2.2 of Schedule 1 of the current PPS Regulations and provides specific description requirements for serial-numbered goods and identifies acceptable serial numbers to describe personal property. Many of the serial numbers required by the current PPS Regulations are not unique. The Regulations now provide only unique identifiers for registration against serial numbers.

Serial-numbered goods receive special treatment under the Act because they are generally highly mobile personal property (with the exception of intellectual property) and can be readily identified by a number that is unique, accurate and affixed permanently to the property (or assigned to the property in the case of IP). The purpose of prescribing property as serial-numbered property is to ensure that such property is subject to specific rules under the Act; for example, in relation to the acquisition of property free of a security interest where the serial number is incorrect or missing (subsection 44(1) of the Act). Specifying the serial numbers that can be used to describe collateral ensures consistency in the serial numbers used to identify the property, and provides guidelines for searchers on relevant serial numbers they should use in a search. This means that for the purposes of this section, collateral nominated as serial numbered goods in a financing statement must include the specified serial number in column 2 for an effective registration.

The required serial numbers for aircraft and vehicles have been revised so that there is now a unique identifier for these classes. Registrations against aircraft and vehicles must now include the nationality and registration mark of the aircraft under the Chicago Convention or Vehicle Identification Number (VIN) respectively. Using only unique identifiers will make the PPS Register easier to use as registrants will only have one number to choose from. Searchers will also benefit from this because there will only be one number by which an item can be registered.

Example

Financier A is granted a security interest in a vehicle. The vehicle has both a VIN and a chassis number. Financier A registers the interest in the vehicle using its VIN.

Example

In the above example, Financier B is also offered the vehicle as collateral for a loan. Financier B searches the PPS Register using the VIN as the search criterion, which reveals Financier A's interest in the collateral.

Subsection 2.2(1) under the current PPS Regulations provide rules for whether property must or may be described by serial number depending on whether the collateral is considered consumer or commercial property. These rules have been omitted from the revised section as the distinction between commercial and consumer property is removed throughout the Act and Regulations. This distinction was included for consumer protection considerations and privacy which is now afforded based on the identity of the grantor (being either an individual or organisation).

The definition of intellectual property is no longer included in the Act. Definitions for 'design', 'patent', 'plant breeder's rights' and 'trade mark' are at section 4.

Section 22 – Serial-numbered property – individual and other grantors

Section 22 sets out further rules for making registrations against serial-numbered property.

Subsection 22(1) applies when the grantor is an individual and provides that a registration against an item of property specified in column 1 of the table in section 21 may be nominated under section 20 only as serial numbered property. Where property is serial numbered property, and the grantor is an individual, the registration must be made against the serial number of the property only (see also the table under new subsection 153(1) of the Act). This serves a consumer protection function because individual consumers will not have their personal information included on the Register.

Subsection 22(2) provides that if a grantor is not an individual (for example, a company) the financing statement can nominate additional serial numbered property or any other collateral class that describes the property in accordance with section 20.

Example:

Vroom Vroom Financing finances the purchase of a new vehicle by Max. The vehicle has a Vehicle Identification Number (VIN), and is therefore a 'vehicle' under the Act. Because Max is an individual, when Vroom Vroom Financing registers its security interest in the vehicle, the registration is against the VIN only, with no grantor details included in the registration.

Example:

Vroom Vroom Financing finances the purchase of a fleet of electric vans by Van Hire-en Pty Ltd, a company that hires out vans to metal bands. Vroom Vroom Financing can make a registration against the VIN of each electric van. Alternatively, Vroom Vroom Financing Co can register against the collateral class 'other goods' and further describe the collateral as 'a fleet of electric vans.' In either case, it will need to identify Van Hire-en Pty Ltd as the grantor.

Example:

Ms Ivy is developing a brand-new perfume scent using a world first technique. To fund her experiments, she borrows some money from Mr Freeze. Mr Freeze agrees to lend the money on condition that it is secured by an interest in Ms Ivy's plant breeder's right (PBR) over the world's most poisonous ivy. Mr Freeze registers a financing statement against the plant-breeder's right number issued by IP Australia. Mr Freeze does not include Ms Ivy's details in accordance with section 22 because she is an individual grantor.

Example:

Ivious is a corporation developing a pheromone-based perfume scent for dogs using a world first technique. Ivious has registered a patent for its technique under the *Patents Act 1990*. Ivious wants to branch into perfumes for humans, but as a small start-up they require further funds to ensure they can develop a marketable product in time for valentine's day. Mr Freeze is a venture capitalist, and agrees to lend Ivious the money secured against the patent and any other assets of the company. Mr Freeze registers a financing statement against the collateral class 'All present and after acquired property'. Mr Freeze makes another registration against the patent number. Although the registration against the collateral class 'All present and after acquired property' is sufficient to perfect the interest over the patent, section 44 provides a 'taking free rule' for serial numbered goods. Mr Freeze makes a registration against the patent number to protect his interests. Mr Freeze knows that if Ivious sells the patent, the buyer will acquire the patent free of his security interest if the buyer has searched the PPS Register by the serial number of the patent and found no registration.

Section 23 – How to describe proceeds

Item 4 of the table in new subsection 153(1) of the Act provides that any description of proceeds in a financing statement must comply with the Regulations.

This section requires that proceeds be described by one 'proceeds class' found in Column 1 to the table under subsection 23(1). Column 2 sets out the further description required for each class. This is summarised below:

- (a) all present and after acquired property – no further description is required;
- (b) all present and after-acquired property, except specified items or kinds or personal property – a description of personal property not covered by the registration; and
- (c) other proceeds (more than one item or kind of proceeds may be described for this proceeds class) – a further description of the personal property constituting the other proceeds.

The description of the proceeds should be sufficient to identify the items that are to be proceeds in accordance with section 10 of the Act.

Proceeds described as all present and after acquired property will mean that all assets of the grantor that satisfy the definition of 'proceeds', will be taken as proceeds to which the security interest attaches. This is the widest possible description of proceeds.

Subsection 21(2) provides further rules about whether more than one item or kind of proceeds can be described using the same class. Proceeds nominated to proceeds class 'Other proceeds' may describe more than one item or kind of proceeds, however proceeds nominated to the classes of 'all present and after-acquired property, except' and 'all present and after-acquired property, except' cannot.

It is important to ensure that secured parties are able to reflect the interest in proceeds that they may have under a security agreement in a financing statement registered on the PPS Register.

Division 4 – Registration: other prescribed matters

Section 24 – circulating asset control

Section 24 is equivalent to item 2 of the table contained within section 4.1 in Schedule 1 of the current PPS Regulations. The other items in that table are not replicated within the Regulations.

Table item 6 of new subsection 153(1) of the Act allows the Regulations to prescribe additional information to be included when registering a financing statement or financing change statement.

Section 24 allows a financing statement registered on the PPS Register to disclose if it is made for the purposes of ‘circulating assets control’. When a secured party indicates that they have control of a circulating asset, it protects their interest from vesting in the insolvent grantor.

‘Circulating asset control’ is different to ‘perfection by control’. It is relevant only to interests in particular collateral (‘circulating assets’) granted by a corporation under the *Corporations Act 2001*.

The new sections 51CA and 51CB of the *Corporations Act 2001* set out the requirements for determining if particular collateral is a ‘circulating asset’ which largely replicate sections 340, 341, 341A of the current Act. These sections provide, among other things, that the kinds of property mentioned in subsection 51CA(2) of the *Corporations Act 2001* are not circulating assets if the registration discloses that the secured party has circulating asset control of that property, and the secured party does, in fact, have circulating asset control.

The new term ‘circulating assets control’ updates this section in accordance with amendments made to the Act (see item 28 of Schedule 7 of the Bill).

Section 24 allows registrants to indicate whether the secured party has or may have circulating asset control of property of the kind mentioned in subsection 51CA(2) by indicating that the collateral may include current asset subject to circulating asset control, for the purposes of 51CA or 51CB of the *Corporations Act 2001*.

Schedule 1 of the current PPS Regulations is repealed and relocated in the new Regulations.

Table in section 4.1 of Schedule 1

The table contained within section 4.1 of Schedule 1 of the current PPS Regulations is repealed. The following items in that table are not replicated in the Regulations for the following reasons:

- Item 1 (inventory) is not replicated in the Regulations because secured parties will no longer be required to indicate whether their security interest is over inventory.
- Item 3 (transitional security interests) is not replicated in the Regulations because these transitional security interests are no longer being made. A savings provision is, however, provided in order to ensure that the data registered in accordance with this item will remain effective.
- Item 4 (migrated security interests) is not replicated in the Regulations because these registrations are no longer being made. A savings provision will be provided in order to ensure that the data registered in accordance with this item will remain effective.

- Item 5 (ABR/National Names Index data) is relocated to section 31 of the Regulations (and updated) because it relates to a secured party and grantor details, so is more conveniently located in Division 2 of this Part. See subheading section 31 in this Explanatory Statement.

Section 25 – Financing statements – personal property prescribed by section 13

Section 25 is made pursuant to section 154 of the Act and is equivalent to Schedule 2 of the current PPS Regulations.

Section 154 sets out the matters that must be included in a financing statement with respect to ‘prescribed property’. ‘Prescribed property’ is found in section 13. It includes property such as a vehicle that has been impounded under ‘hoon laws’.

Details of person who owns or has interest in property

Subsection 25(1) provides the requirements for listing details of the person who owns or has an interest in the property to which section 13 of the Regulations applies. The section provides that the details which must be evidenced in the financing statement for these purposes is the same that is prescribed by the Act and by Division 2 of the Regulations.

Subsection 25(2) provides that where property is the subject of a court order under subsections 13(b) or (c) the details of the person which must be included in the financing statement is:

- in the case of an individual (unless the property is property of a partnership), that individual’s surname, given name and date of birth. These details can be evidenced by the order of the court or tribunal or, if unascertainable from those orders a source provided by section 16 (which provides sources for individual grantor details),
- In the case of an individual where the property is property of a partnership (but not the individual’s net interest in the partnership), the details prescribed by section 18 of the Regulations.

Subsection 25(3) confirms that the general rules provided at section 14 apply to subsections 25(1) and (2) in the same manner as they would apply under Division 2.

Details of property

Subsection 25(4) provides what must be evidenced in a financing statement where the financing statement is registered against the property. The section confirms that the way property is to be described in a financing statement is the same way as collateral would be described in Division 3.

Example

Nick owns a car which has been impounded because he has been hooning in his quiet suburban street. The police make a registration against the VIN of Nick’s car as required by the Act and Regulations and do not include Nick’s details.

Section 26 – verification statements – publication as alternative

Section 26 is made pursuant to subsection 158(1) of the Act. This section provides that the Registrar may publish a single verification statement in relation to a number of registration events on a website maintained for the Registrar. The section also provides that the Registrar must omit the date of birth of the grantor from the statement that is to be published.

It is expected that a verification statement will be published on the website if the events affect a very large number of registrations, and the Registrar considers that it will be inconvenient for verification statements to be sent to the secured party.

Example

Financier A acquires Financier B's security interests perfected by registration on the PPS Register. Financier B has 400,000 active registrations on the PPS Register. Financier A lodges a financing change statement to reflect that Financier A is now the secured party in relation to the 400,000 registrations. The Registrar relies on section 26 to publish a single verification statement in relation to the transfer of the 400,000 registrations from Financier B to Financier A.

Section 26 is equivalent to section 5.6 of the current PPS Regulations with some changes to simplify the language and provide a protection for personal information.

Division 5 – Searching the Register

Section 27 – Search – access to data prohibited

Section 27 is made under paragraph 170(3)(d) of the Act. This section sets out when information on the Register should not be made available in search results.

It provides that access to data on the PPS Register is prohibited if:

- (a) a court has ordered that access to the data is prohibited; or
- (b) the Registrar considers that it is in the public interest that access to the data should not be permitted.

There is a clear imperative to withhold data when a court has ordered that the data should be withheld from the search result. Therefore, access to data will be restricted on this basis under paragraph 27(1)(a).

The Registrar can also decide to prohibit access to data on the Register. Paragraph 27(1)(b) allows the Registrar to withhold data from a search result if they consider it in the public interest to do so. This acknowledges that it is impossible to list all the circumstances where access to the PPS Register should be prohibited. Consequently, the Registrar will be able to consider, on a case by case basis and taking into account the public interest, when access should be prohibited.

In considering if access to particular data on the Register should be withheld, the Registrar is required to take into account the matters listed in subsection 27(2). These balance factors like preventing an imminent serious or imminent threat to life or health of a person, the rights of the secured party to publicise their interest via the Register and a third party to search the Register to find interests. If the grantor is an individual, the public interest in protecting their privacy must also be considered as compared to the public interest in providing access to the data.

Search results will not disclose details about a registration if access to the data has been prohibited under section 27. Instead, the searcher will be informed that the registration is 'access prohibited' and to contact the Registrar's Office. The Registrar's Office will have in place business processes to determine how these registrations can be accessed in appropriate circumstances.

Section 27 is equivalent to section 5.7 of the current PPS Regulations.

Section 28 – Search – criteria

Section 28 is made under subsection 171(2) of the Act. It requires that the PPS Register provide search results to allow for case-insensitive searching. This is to avoid the possibility that relevant registrations will not appear in the search results, due to the mere fact that the incorrect case is used for one or more of the letters entered.

Example

Sybilla McZanzik borrows money from Finance Co, using her jewellery collection as collateral. Prior to approving the loan, Finance Co undertakes a search on the PPS Register using Sybilla's name and date of birth as it appears on her driver's licence, as the search criteria. The search is undertaken using Miss McZanzik's actual first name and date of birth, but with the surname as 'McZanzik'.

As section 28 of the Regulations allows for case insensitive searching, the search results will still disclose registrations against Sybilla under the surname 'McZanzik'.

Section 28 is equivalent to section 5.8 of the current PPS Regulations.

Section 29 – Search – access to third party data

The section prescribes Austroads Ltd (ABN 16 245 787 323) as a third party under subsection 176C(1) of the Act. This means that when a person searches the PPS Register for a security interest in a vehicle by serial number any information held by the National Exchange of Vehicle and Driver Information System (NEVDIS) will be included in the search result.

Example

Ms Yasmina Fitzpatrick is considering purchasing a Holden Barina from her neighbour. Before making an offer on the car, she searches the Vehicle Identification Number (VIN) on the PPS Register. The search reveals that there is one security interest registered against the VIN. The search also includes NEVDIS data indicating that the vehicle is stolen.

Section 29 is equivalent to section 5.8A of the current PPS Regulations.

Division 6 – Removal of data from the Register

Section 30 – Removal of data – property prescribed by section 13

Section 30 is made under paragraph 184(1)(c) of the Act. It sets out when the Registrar is required to remove a registration made under section 13 of the Regulations.

The section is based on section 5.4 of the current PPS Regulations however it is reframed to require the Registrar to remove particular registrations, rather than prevent the registrations being made in the first place. As the PPS Register is a live, online database, it is impossible for the Registrar to 'prohibit' registrations being made in real time.

This ensures that registrations made by persons other than those prescribed by this section can be dealt with effectively by the Registrar.

PART 5 – RELATIONSHIP BETWEEN AUSTRALIAN LAWS

Section 31 – Concurrent operation of provisions of *Corporations Act 2001* – resolution of inconsistency

Section 31 disappplies the taking free rule in paragraph 32(1)(a) from the following dealings in collateral under the *Corporations Act 2001*:

- a compromise or arrangement under Part 5.1 of the *Corporations Act 2001* that provides for the transfer or cancellation of securities
- a transfer of shares in a company, under section 444GA of the *Corporations Act 2001* by the administrator of a deed of company arrangement (a new addition to the section)
- a resolution under section 601GC of the *Corporations Act 2001* that provides for the transfer or cancellation of interests in a registered managed investment scheme
- a compulsory acquisition of securities under Part 6A.1 or Part 6A.2 of the *Corporations Act 2001*.

Under pre-Personal Property Securities Act law, a bidder who acquired shares in a target following a takeover bid or under a scheme was generally able to acquire those shares free of any security interests. However, under the Act there is uncertainty as to whether a person would ‘take free’ of an investment instrument or an intermediated security because the relevant provisions indicate that a *consensual transaction* is required. As a result, bidders who acquire shares following a compulsory acquisition may not be able to rely on the taking free rule in the Act. As a consequence, the default position in paragraph 32(1)(a) would apply and the bidder would take subject to any security interests in the acquired shares.

Section 31 is made under subsection 255(1) of the Act, and is equivalent to section 7.1 in the current PPS Regulations.

PART 6 – TRANSITIONAL RELATIONSHIPS

Division 1 – Transitional arrangements for the commencement of this instrument

The transitional provisions have not been drafted yet and these will be included here.

SCHEDULE 1 – REPEALS

Personal Property Securities Regulations 2010

Item 1 – The whole of the instrument

Item 1 repeals the current PPS Regulations in its entirety.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Personal Property Securities Regulations 2023

The *Personal Property Securities Regulations 2023* (the Regulations) are made pursuant to the *Personal Property Securities Act 2009* (the Act).