

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2010 No. 291**

Issued by the authority of the Attorney-General

*Personal Property Securities Act 2009*

*Personal Property Securities Regulations 2010*

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 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 taking an interest in personal property (for example, a charge, consignment or pledge) regardless of the form of the transaction, the nature of the debtor or the jurisdiction in which the personal property or parties are located.

The Act will be supported by a single national online register of personal property securities (the register). The register will replace the existing confusing array of both electronic and paper-based national, State and Territory registers of personal property securities.

The Regulations sets out a number of provisions relating to:

- the types of interests over personal property that are or are not subject to the operation of the Act;
- the interaction between the enforcement provisions in the Act and the National Consumer Credit legislation; and
- matters pertaining to the register (including access to and suspension of the 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).

Details of the Regulations are set out in the [Attachment](#).

Consultations on the Regulations commenced with the release of discussion papers in August 2008 and November 2009. An Exposure Draft of the Regulations was released for consultation in April 2010. The Regulations were updated based on submissions received from relevant peak industry bodies, States and Territories agencies, and Commonwealth agencies.

The Act is based on a referral of power from the States and Territories. 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. The PPS IGA provides that the State and Territory parties will be taken to have approved the Regulations if the Commonwealth has notification in writing from at least three State or Territory parties (including at least two referring States) that they approve the Regulations. This approval was provided on 12 November 2010.

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 *Legislative Instruments Act 2003*.

The Regulations commence on the day after they are registered on the Federal Register of Legislative Instruments.

**Details of the *Personal Property Securities Regulations 2010***

**PART 1 – PRELIMINARY**

**Division 1 – Preliminary**

**Regulation 1.1 – Name of Regulations**

This regulation provides that the title of the Regulations is the *Personal Property Securities Regulations 2010*.

**Regulation 1.2 – Commencement**

This regulation provides for the Regulations to commence on the day after they are registered.

**Division 2 – General application of the Act**

**Regulation 1.3 – Application of the Act to external Territories**

This regulation provides that the *Personal Property Securities Act 2009* (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 applies to those territories, and Western Australia's current PPS arrangements will cease to operate upon commencement of the new PPS arrangements under the Act.

**Regulation 1.4 – Interests to which the Act does not apply**

***Subregulation 1.4 (1)***

Subregulation 1.4 (1) provides that the Act will not apply to a right or 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*. This is in order to avoid ambiguity and to maintain the existing relationship between section 260-5 and security interests in personal property.

***Subregulation 1.4 (2)***

Subregulation 1.4 (2) provides that section 74 (execution creditor has priority over unperfected security interest) will apply to the following interests:

- a lien, charge or other interest in personal property of a kind prescribed in paragraph 8 (1) (b) or (c); or
- an interest provided for by a transaction described in subparagraph 8 (1) (f) (ii) or (iv).

This regulation will ensure that the kinds of interests purported to be dealt with under section 74, which may arise under statute or common law, are not, at the same time, excluded under subsection 8 (1) of the Act.

The reference to paragraphs 8 (1) (f) (ii) and (iv) is intended to ensure that the range of interests that an execution creditor may claim in the context of section 74 will not be constrained by subsection 8 (1). This includes, for example, garnishee orders.

### **Example**

A receives judgment against B and causes a writ of execution to be issued against B. As a result, B's car is seized.

Section 74 of the Act will give A priority over unperfected security interests in B's car. Without subregulation 1.4 (2), paragraph 8 (1) (b) or (c) of the Act (interests to which the Act does not apply) will together prevent section 74 from having this effect.

### **Regulation 1.5 – Interests to which the Act applies**

The Act does not apply to the transfer of a right to payment in connection with an interest in land, where the land is specifically identified (subparagraph 8 (1) (f) (ii)). Subparagraph 8 (1) (f) (ii) will exclude the transfer of a real property mortgage loan in connection with the issue by the person of a mortgage-backed security and mortgage-backed securities (MBS) themselves from the operation of the Act, if the writing evidencing the transfer identifies the land secured by the mortgages which are being transferred.

However, notwithstanding that it may be connected to land, the Act is intended to apply to the transfer of a real property mortgage loan and the MBS itself, so as to facilitate the securitisation of mortgage payments.

This regulation clarifies that the Act applies to the transfer of a real property mortgage loan under an all mortgage-backed security, even in cases where the transfer identifies the land secured by the mortgage.

### **Example**

The Bank A bundles the rights of repayment for a number of outstanding loans they have provided over farm properties near Tumut, NSW. Bank A sells this bundle of loan repayment rights (the sale's documentation specifies some of the more prominent farms involved) to Company B, which agrees to pay Bank A back for the bundle over the next five years.

Concurrent with and consequent to the transfer of the bundled rights, mortgage-backed securities in relation to the repayment rights are issued to a number of investors in Company B in relation to the repayment rights who finance this purchase with a loan from Bank C. Bank C then on sells the right to repayment from the sale of the bundled rights to a private investor, Mr D.

Mr D's interest in the right to repayment is a security interest to which the Act applies in accordance with subregulation 1.5 (1) (b).

The interest of Bank C in the mortgage-backed securities is a security interest to which the Act applies in accordance with subregulation 1.5 (1) (a).

## **Division 3 – Definitions**

### Regulation 1.6 – Definitions

This regulation defines a number of terms used in the Regulations. A number of these terms are discussed below.

**ACN** is the number given by ASIC to a company upon registration under the *Corporations Act 2001*. The Regulations provides when the ACN can be used to identify, in a registration on the register, a body corporate that is a secured party, a grantor, or that holds or has an interest in prescribed property.

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

**agriculture** is prescribed in the Regulations as a class of collateral. This collateral class includes personal property that is crops and/or livestock.

**aircraft** is defined in such a way that it encompasses aircraft that has a nationality and registration mark assigned to it under the Chicago Convention, as well as those that are “aircraft engine”, “airframe” or “helicopter” as defined in the *Convention on International Interests in Mobile Equipment 2001* (Cape Town Convention). This encompasses all aircrafts that are registrable by the Civil Aviation Safety Authority, as well as those aircraft objects that are registrable on the International Registry established under the Cape Town Convention.

The Cape Town Convention creates a uniform international legal framework to protect investors in aircraft objects. The International Registry established under this convention is an international register of security interests over aircraft objects. The Australian Government is considering whether to accede to the Cape Town Convention. Allowing aircraft objects to be included in the definition of “aircraft” will assist in the transition to the Cape Town Convention rules, if Australia were to accede to the Cape Town Convention.

**aircraft engine** has the meaning given in the Aircraft Protocol. Adopting the same definition as the Aircraft Protocol will assist in the transition to the Cape Town Convention rules, if Australia were to accede to the Cape Town Convention.

**Aircraft Protocol** is a protocol to the Cape Town Convention. The Aircraft Protocol adapts the Cape Town Convention provisions to meet the particular requirements of aircraft finance.

**airframe** has the meaning given in the Aircraft Protocol. Adopting the same definition will assist in the transition to the Cape Town Convention rules, if Australia were to accede to the Cape Town Convention.

The definition for airframe excludes those used in military, customs or police services, and requires that the airframe (when appropriate engines are installed) must be certified by a competent aviation authority to transport at least eight persons or goods in excess of 2750 kilograms. At the time of writing, the competent aviation authority in Australia is the Civil Aviation Safety Authority.

***all present and after acquired property*** is prescribed in the Regulations as a class of collateral or proceeds. This collateral class is used where the collateral or proceeds includes:

- personal property as at the registration time for the financing statement for the security interest or the prescribed property; and
- personal property after the registration time for the financing statement for the security interest or the prescribed property.

***all present and after acquired property, except*** is prescribed in the Regulations as a class of collateral or proceeds. This collateral class is used where the collateral or proceeds includes all present and after acquired property, except for an item or class of personal property recorded in the financing statement as being exempted from being collateral or proceeds in the financing statement.

### **Example**

Company X grants Bank Y a security interest over all its present and after acquired property, except for an old car that is a collector's item. When Bank X registers its security interest on the register, it assigns the collateral class "all present and after acquired property, except" to the collateral, and records in the registration that the car is exempted from being collateral.

***AML-CTF Act*** means the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. The AML-CTF Act provides an alternative method of identifying grantors and secured parties. The Regulations therefore specify when identification in accordance with the AML-CTF Act is taken to be sufficient for the purpose of the identification of grantors, secured parties and persons that hold or have an interest in prescribed property, in a registration on the register.

***ARBN*** is the number given by ASIC to a registrable body under Part 5B.2 of the *Corporations Act 2001*. The Regulations provides when the ARBN can be used to identify, in a registration on the register, a registrable body that is a secured party, grantor, or that holds or has an interest in prescribed property.

***ARSN*** is the number given by ASIC to a registered scheme upon registration under section 601EB of the *Corporations Act 2001*. The Regulations provides when the ARSN can be used to identify, in a registration on the register, a registered scheme that is a secured party, grantor, or that holds or has an interest in prescribed property.

***ASIC*** means the Australian Securities and Investments Commission. ASIC is the entity that assigns ACNs, ARBNs and ARSNs under the *Corporations Act 2001*.

***Australian Business Register*** means that register established under section 24 of the *A New Tax System (Australia Business Number) Act 1999*. The Australian Business Register includes, among other information, the ABN (defined in the Act).

The Regulations provides when the ABN can be used to identify the secured party, grantor, or person that holds or has an interest in prescribed property.

***chassis number*** means the numbers or letters, or both, that uniquely identifies a motor vehicle. The Regulations prescribes when the chassis number can be used to identify a motor vehicle.

**Chicago Convention** means the Convention on International Civil Aviation signed in Chicago in December 1944, as amended by Protocols mentioned in subsection 3A (2) of the *Air Navigation Act 1920*. The Chicago Convention is referred to in clause 2.2 of Schedule 1, which provides that the relevant serial number description for small aircraft is the nationality and registration mark assigned to the aircraft in accordance with the Chicago Convention.

**helicopter** has the meaning given in the Aircraft Protocol. Adopting the same definition will assist in the transition to the Cape Town Convention rules, if Australia were to accede to the Cape Town Convention.

The definition for helicopter excludes those used in military, customs or police services, and requires that the airframe (when appropriate engines are installed) must be certified by a competent aviation authority to transport at least five persons or goods in excess of 450 kilograms. At the time of writing, the competent aviation authority in Australia is the Civil Aviation Safety Authority.

**hull identification number** means the numbers or letters, or both, that uniquely identifies 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.

**manufacturer's number** means the numbers or letters, or both, that uniquely identifies an aircraft, motor vehicle or outboard motor. The Regulations prescribe when a manufacturer's number may or must be used in a registration to identify personal property that is an aircraft, motor vehicle or outboard motor.

**migrated security interest** is flagged as having the meaning given by section 332 of the Act.

**National Names Index** is an index of title created by ASIC. The National Names Index records, among other information, the ACN, ARBN and ARSN allocated to an entity under the *Corporations Act 2001*.

**original registration time** for migrated data registered under section 333 of the Act, means the time at which the security interest or prescribed property was registered on the transitional register.

**outboard motor** means an internal combustion engine that has a propeller and a manufacturer's number, is designed to be attached to a boat or vessel, and is intended for use to propel a boat or vessel. Outboard motors are referred to in the Regulations due to such property being considered to be 'watercraft' in some instances (see transitional meaning of 'watercraft' in regulation 9.1).

**prescribed property** is flagged as being property that is mentioned in subregulation 5.3 (1).

**registered scheme** is flagged as having the meaning given by section 9 of the *Corporations Act 2001* (the Corporations Act).

**registration time** is flagged as having the meaning given by subsection 160 (1) of the Act.

**responsible entity** is flagged as having the meaning given by section 9 of the *Corporations Act*.

***small aircraft*** means personal property that satisfies the definition of “aircraft”, but is not an “airframe”, “aircraft engine” or “helicopter”. Small aircraft therefore include all machines 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,

***vehicle identification number*** means the numbers or letters, or both, that uniquely identifies a motor vehicle. The Regulations prescribe when a vehicle identification number may or must be used in a registration to identify personal property that is a motor vehicle.

***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 prescribes 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.

### ***Note 2***

This note to regulation 1.6 also flags that several other words and expressions used in the Regulations have the meaning given by the Act. This includes, but is not limited to, “ABN”, “account”, “chattel paper”, “crops”, “financial property”, “goods”, “intangible property”, “intermediated security”, “investment instrument”, “livestock”, “National Credit Code”, “negotiable instrument” and “transitional register”.

### ***Regulation 1.7 – Meaning of motor vehicle***

This regulation defines “motor vehicle” for the purposes of the Act.

Subregulation 1.7 (2) includes in the definition of motor vehicle, property of a kind that are ordinarily characterised as motor vehicles. This includes cars, trucks, motor-cycles (both on-road and off-road), and self-propelled agricultural and mining equipment. The property must be capable of a speed of at least 10 km/h, have one or more motors that have a total power greater than 200 W, and have either a vehicle identification number, a chassis number or a manufacturer’s number. However, the vehicle must not run on rails, tram lines or other fixed paths.

### **Example**

Mrs Y borrows money from Financer Z to buy a ride-on mower. The ride-on mower is built to be propelled on land by a motor forming part of the vehicle, and has a manufacturer’s number. However, it is not capable of speeds of at least 10 km/h and its motor does not have a total power greater than 200 W. This ride-on mower is not a motor vehicle under subregulation 1.7 (2).

### **Example**

A motorised wheelchair is built to be propelled wholly on land by a motor forming part of the wheelchair. However, it is not capable of a speed of at least 10 km/h, its total power is not greater than 200 W, and it does not have any of the



required serial numbers. This motorised wheelchair is not a motor vehicle under subregulation 1.7 (2).

Subregulation 1.7 (3) includes in the definition of motor vehicle goods without motor power that are designed to be towed behind or attached to an ordinary motor vehicle (for example, trailers or caravans). The motor vehicle must be capable of travelling at a speed greater than 10 km/h, and have either a vehicle identification number, a chassis number or a manufacturer's number.

### **Example**

Company X owns a caravan that weighs one tonne and is designed to be attached to a four wheel drive vehicle. When the caravan is attached to the four wheel drive, the four wheel drive is able to travel at more than 10 km/h. This caravan is a motor vehicle under subregulation 1.7 (3).

The kinds of property that are covered in the definition of motor vehicle in subregulations 1.7 (2) and (3) are broad enough to encompass the different definitions in existing State and Territory Acts relating to recording encumbrances against motor vehicles. This allows current registered interests to be migrated from such registers to the new register as “motor vehicles”.

Note that an amphibious vehicle – that is a vehicle that can run both on land and water – may be a motor vehicle under subregulation 1.7 (2), if it is built to be propelled wholly on land by a motor that forms part of the vehicle. This is notwithstanding that it may also have another motor that propels the amphibious vehicle through water. However, if the amphibious vehicle is such that the one motor propels the vehicle on both land and water, then it will not satisfy the definition of “motor vehicle” under this regulation.

### Regulation 1.8 – Meaning of security interest

This regulation provides that the extinguishment of a beneficial interest in an account or chattel paper is not a security interest under the Act.

The type of transaction that this regulation is targeted at includes when debt instruments are sold by a seller to a special purpose vehicle (SPV), and the SPV then on-sells the receivables to investors. The event described in the Regulations may arise, for example, when the securitisation vehicle's interest over the receivables is extinguished. An extinguishment of a beneficial interest in an account or chattel paper may occur in the following circumstances:

- when the seller makes a further advance to the underlying obligor and the receivable cannot remain in the securitisation structure; or
- when the seller breaches a representation and warranty made in relation to the assets when they were assigned to the securitisation vehicle.

## **PART 2 – GENERAL RULES FOR SECURITY INTERESTS**

### Regulation 2.1 – Taking motor vehicles free of security interests

This regulation has the effect that a motor vehicle that satisfies the definition of motor vehicle in regulation 1.7 will be taken free of a security interest in circumstances if a search of the register using the serial number does not disclose a registration on the register (section 45 of the Act).

## **Example**

Miss A's tractor has a manufacturer's number, is capable of a speed of at least 10 km/h, and has a motor with a total power greater than 200 W. It therefore meets the definition of "motor vehicle" under regulation 1.7.

Bank A registers its security interest over Miss A's tractor and other property. Bank A makes only one registration covering the tractor and the other property.

On 20 April, Mr X decides to buy the tractor from Miss A. Mr X searches for a registration over the tractor using the relevant serial number (in this case, the manufacturer's number). Mr X's search does not disclose Bank A's registration against the tractor, as Bank A's registration did not include the serial number.

Later on that same day, Bank A registers its security interest in the tractor using the serial number.

On 21 April, Mr X and Miss A enter into a contract for the sale of the tractor to Mr X. Relying on the search undertaken on 20 April, Mr X does not search the register again.

Mr X will acquire the tractor free of Bank A's security interest, despite the fact that, at the time the contract was entered into, Bank A had perfected its security interest in the tractor by a registration using the tractor's serial number.

### Regulation 2.2 – Taking motor vehicles from prescribed persons

This regulation provides that a buyer or lessee takes a motor vehicle free of a security interest, as provided under subsection 45 (3) of the Act, where the motor vehicle is bought or leased from a person:

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

The regulation has the effect that a person who is licensed to deal in only particular kinds of motor vehicles (for example, second hand motor vehicles) can sell or lease motor vehicles of that kind free of a security interest.

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

All jurisdictions, except Tasmania, Queensland and South Australia, have a licensing scheme over new motor vehicle dealers or traders generally. Queensland and South Australia have a licensing scheme over motor vehicle dealers or traders of second hand motor vehicles. Tasmania does not have a licensing scheme for motor vehicle dealers and traders. Notwithstanding this, purchasers of motor vehicles in these states are equally protected via section 46 of the Act (taking personal property free of security interest in ordinary course of business).

### **PART 3 – SPECIFIC RULES FOR CERTAIN SECURITY INTERESTS**

This heading is a placeholder only to ensure that the Parts in the Regulations correspond with the Parts in the Act. Regulations are not made under this Part at this time.

### **PART 4 – ENFORCEMENT OF SECURITY INTERESTS**

#### *Regulation 4.1 – Relationship with consumer credit legislation*

This regulation provides that a specified provision of Chapter 4 of the Act mentioned in an item in this regulation is taken to have been complied with in the circumstances mentioned in the item, if a provision of the National Credit Code (the Code) has been complied with in the circumstances mentioned in the item.

The Act is not intended to exclude or limit the operation of the Code. There are overlaps between the Act and the Code when credit is provided, or is intended to be provided, wholly or predominantly for personal, domestic, or household purposes, and the collateral is used wholly or predominantly for personal, domestic, or household purposes. The Code does not apply where the credit was intended for business purposes, even if the credit is secured against personal property that is used wholly or predominantly for personal, domestic or household purposes.

As the Act is not intended to exclude or limit the operation of the Code, to the extent that the two frameworks are able to operate concurrently, a secured party will have to comply with both the enforcement requirements in Chapter 4 of the Act (enforcement of security interests) and the enforcement provisions of the Code.

By prescribing provisions of the Code that, once complied with, are deemed to constitute compliance with the Act, this regulation assists in ensuring that compliance with both regimes is not unnecessarily onerous on secured parties undertaking enforcement action.

### **PART 5 – PERSONAL PROPERTY SECURITIES REGISTER**

#### *Regulation 5.1 – Access to register*

This regulation provides that the Registrar can suspend the operation of the register for not more than 4 hours, provided that 7 days notice of the suspension is given by publication of a notice in a manner provided for under subsection 147 (6). This regulation is intended to allow the Registrar to close the register for up to four hours for routine maintenance.

The Registrar may also suspend some or all of the register's functions under subsection 147 (5) when it is impractical to provide access. However, suspension of the register under 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).

#### *Regulation 5.2 – Notification of suspension of access to register*

This regulation provides that the Registrar may publish notice of a refusal to give access to, or a suspension of the operation of, the register on an Internet website that is maintained by the Registrar.

### Regulation 5.3 – What the register contains

This regulation provides that data in relation to the following personal property may be contained in the register:

- motor 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)
- personal property that is subject to an order or notice, or is confiscated or forfeited, under a provision in the proceeds of crime law (“proceeds of crime” registration)
- 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
- any other property that, prior to registration commencement time, was registrable on a transitional register (“other prescribed property” registration).

This allows property that is currently registrable on transitional registers to also be registrable on the 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).

#### **Example**

Mr A 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 A searches the 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 register in accordance with regulation 5.3 (1) (b).

### Regulation 5.4 – Prohibited registration

This regulation has the effect that registrations of personal property prescribed in regulation 5.3 can only be made by certain persons. This ensures that only persons currently permitted to register details on state and territory security interest registers, or those persons authorised to make registrations on the register, will be able to register prescribed property on the register.

### Regulation 5.5 – Financing statements

This regulation refers readers to Schedule 1 for matters prescribed for items of the table in subsection 153 (1) of the Act, and to Schedule 2 for matters prescribed for items of the table in section 154 of the Act.

### Regulation 5.6 – Verification statements – publication as alternative

This regulation provides that the Registrar may publish a single verification statement in relation to a number of registration events on an Internet website maintained for the Registrar. Subregulation (2) provides that the statement must not include the date of birth of the grantor.

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. For example, in respect of migrated data from transitional registers to the new register. The Registrar’s ability to issue a single verification statement will facilitate this migration process.

## **Example**

The ASIC Register of Company Charges is a transitional register containing registrations which will be migrated and registered on the register.

When the registrations migrated from ASIC are registered on the register, the Registrar will be able to publish a single verification statement notifying interested parties that company charges registered on the ASIC Register of Company Charges have been registered on the register. This avoids the need for the Registrar to send a verification statement for every charge currently registered on the ASIC Register of Company Charges, and also avoids secured parties being inundated with such statements.

### Regulation 5.7 – Access to the register prohibited

This regulation provides that access to the register is prohibited if:

- a court has ordered that access to the data is prohibited; or
- 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.

Alternatively, the Registrar may also consider that it will be in the public interest to withhold data from a search result. This acknowledges that it is impossible to list all the circumstances where access to the 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.

Subregulation (2) prescribes the matters that the Registrar must take into account when determining whether to withhold access to the data in the public interest. This subregulation was developed in consultation with the privacy commissioners' office at both the State and Federal level. However, subregulation (2) does not contain an exhaustive list of matters that the Registrar may take into account in making a determination.

The search results will not disclose details about a registration that is access prohibited. 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.

### Regulation 5.8 – Search – criteria

This regulation provides that the method by which the results of a search will be worked out must 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 has been used for one or more of the letters entered.

## **Example**

Jane McDoe borrows money from Finance Co, using her jewellery collection as collateral. Prior to approving the loan, Finance Co undertakes a search on the

register using Jane’s name and date of birth as it appears on her driver’s licence, as the search criteria. The search is undertaken using Miss McDoe’s actual first name and date of birth, but with the surname as “Mcdoe”.

As regulation 5.8 allows for case insensitive searching, the search results will still disclose registrations against Jane under the surname ‘McDoe’.

*Regulation 5.9 – Administrative process – statements in relation to amendment demand*

Division 2 of Part 5.6 of the Act provides that a person may give a secured party an amendment demand to register a financing change statement to amend or discharge a registration. If the secured party fails to make the necessary amendments, the person can give a statement to the Registrar regarding the amendment demand (subsection 180 (3)). Upon receiving the amendment statement, the Registrar will then send an amendment notice to the secured party requiring that the amendment demanded be applied to the registration. If the secured party fails to make the amendment demanded within the relevant period, the Registrar may make the amendment (subsection 180 (1)).

This regulation sets out the statements that must be included in an application for an amendment demand under subsection 180 (3).

The information contained in the statement to amend the registration pursuant to subsection 180 (3) should give the Registrar sufficient information to make an informed decision whether to make the amendment or discharge the registration as requested.

**Example**

Bank X registers a security interest over Grantor A’s apple and banana crops. The security agreement between Bank X and Grantor only provides for the apple crop to be security, and so the registration should only be against the apple crop. Grantor A therefore sends an amendment demand to Bank X.

Six days after sending the amendment demand to Bank X, Grantor A sends a statement to the Registrar. Grantor A makes all the necessary statements under subsection 180 (3) and regulation 5.10. The Registrar is therefore assured that the requirements for sending the amendment notice to the secured party have been met and can make an informed decision whether to amend the registration as requested by Grantor A.

*Regulation 5.10 – Removal of data*

This regulation allows the Registrar to remove data (including an entire registration) from the register, if the removal of the data is required by a court order.

**PART 6 – JUDICIAL PROCEEDINGS**

This heading is a placeholder only to ensure that the Parts in the Regulations correspond with the Parts in the Act. Regulations are not made under this Part at this time.

## **PART 7 – OPERATION OF LAWS**

### *Regulation 7.1 – When Act prevails – formal requirements relating to arrangements*

This regulation, prescribed under paragraph 263 (1) (c) of the Act, lists the State and Territory laws whose formal requirements will not affect the effectiveness of a security agreement.

As a general rule, a security agreement is effective according to its terms, subject only to the laws of the Commonwealth, State or Territory, or the common law (subsections 18 (1) and 257 (1) of the Act). This regulation provides an exception to that general rule. That is, the effectiveness of a security agreement will *not* be subject to legislation prescribed in this regulation.

## **PART 8 – MISCELLANEOUS**

This heading is a placeholder only to ensure that the Parts in the Regulations correspond with the Parts in the Act. Regulations are not made under this Part at this time.

## **PART 9 – TRANSITIONAL PROVISIONS**

### *Regulation 9.1 – Transitional meaning of watercraft*

This regulation provides that “watercraft” also includes outboard motors that have an engine number that is subject to a transitional security interest and before registration commencement time, the outboard motor was registered on a transitional register, under legislation that conferred priority on security interests that are registered on that transitional register.

This regulation assists with the migration of interests over outboard motors currently registered on the Queensland Register of Encumbered Vehicles (Queensland REV) to the register, as interests over outboard motors are currently registered on the Queensland REV using its serial number and without grantor details. This ensures that all security interests over outboard motors that arise prior to registration commencement time in Queensland are registered under the collateral class ‘watercraft’ on the register (watercraft can be described by serial number) and not the collateral class ‘other good’ (which cannot be registered against a serial number and requires grantor details).

### *Regulation 9.2 – Temporary perfection rule – exception*

This regulation provides that temporary perfection under section 322 will not apply to a transitional security interest that, before the PPS registration commencement time, was registrable on a transitional register that conferred priority but was not so registered.

Such transitional interests need to be excluded, otherwise these interests will have an unfair advantage over security interests registered after the registration commencement time that they will not otherwise have. This is shown in the example below.

#### **Example**

In November 2010, Company A grants Financier X a charge over its property. The relevant law provides that the charge is registrable on Transitional Register X, and that registered charges have priority over unregistered charges. Financier X does not register its interest.

Assume that the PPS registration commencement time occurs in May 2011.

In June 2011, Company A grants Financier Y a security interest over the same assets. Financier Y immediately registers its security interest on the register.

If not for regulation 9.2, section 322 will have the effect that Financier X's charge will have priority over Financier Y. This is notwithstanding that prior to the PPS registration commencement time, Financier X will have lost out to all registered security interests.

This regulation also recognises that an exemption must be made where the legislation governing the transitional register provided a time in which secured parties must register their interest on that transitional register, and that time period had not yet lapsed as at the PPS registration commencement time (see paragraph 9.2 (2) (a)).

### **Example**

Prior to the PPS Act, the *Corporations Act 2001* required that where a company creates a charge, the company must ensure that it lodges a notice in the prescribed form setting out particulars of the charge within 45 days of the charge being created.

Thirty days before the registration commencement time, Company A takes a charge over Company B's assets in relation to a debt owed by Company B. As the time period for registering on the transitional register had not yet lapsed when the PPS registration commencement time occurred, Company A's security interest will therefore have temporary perfection from immediately before the PPS registration commencement time under section 322.

This regulation (in subregulation 9.2 (3)) also clarifies that a provisional registration recorded on the ASIC Register of Company Charges immediately prior to the PPS registration commencement time, will have the benefit of the temporary perfection provided under section 322.

### **Regulation 9.3 – Sunset of Part 9**

This regulation provides that the transitional provisions contained in Part 9 of the Regulations, will cease to have effect immediately after the end of the month that is 24 months after the PPS registration commencement time. This is in line with the sun-setting of a number of transitional provisions in the Act.

## **SCHEDULE 1 – FINANCING STATEMENT MATTERS FOR ITEMS OF THE TABLE IN SUBSECTION 153(1) OF THE ACT**

### **PART 1 – MATTERS FOR ITEMS 1 AND 2**

Part 1 contains the matters prescribed for items of the table in subsection 153 (1); that is, it contains the rules to correctly identify either the secured party or grantor in a financing statement registered on the register, as well as the source of those relevant identifiers.

These clauses are required primarily to ensure the accuracy of information recorded for grantors. Accuracy of grantor details is critical since the register is partly indexed by grantor details (the only exception being registration of financing statements over consumer property that is described by serial number). Since an entity can be described in many ways, it is important that the



regulations provide rules on which identifier to use and from where that identifier should be sourced. This will allow the secured party to know which documents and details they need to obtain from the grantor, and searchers will also know what grantor details they should enter in their searches.

The identifier rules also apply when identifying the secured party in a registration. This is to achieve consistency in how the secured party and grantor identifiers are recorded.

The relevant identifier varies, depending on the entity type of the secured party or grantor. The item that applies to the person with the lowest item number in the tables will be the relevant identifier and source.

### Clause 1.1 – Definitions for Part 1

This clause provides a definition for “individual” for the purposes of Part 1.

The definition of “individual” clarifies that a sole trader is to be identified using the “individual” identifier rules (clause 1.2), notwithstanding that the individual may be a sole trader and has an ABN.

It also clarifies that where the individual is a partner or a trustee, and the enterprise carried on by the partnership or trust has been allocated an ABN, then that individual will not be identified using the ‘individual’ identifier rules in clause 1.2.

#### **Example**

Joe Bloggs and Jane Doe are partners carrying on a business which has been allocated ABN 123456789.

A partnership is not a separate legal entity. However, since the business has been allocated an ABN, Joe and Jane are not treated as ‘individuals’ for the purposes of Part 1, and are therefore not to be identified in the registration as per the identifier rules in the “individual” table in clause 1.2 (they will instead be identified using the “partner” identifier rules in clause 1.4).

### Clause 1.2 – Individual secured party or grantor

This clause provides the relevant rules for identifying a grantor or secured party who is an individual.

The table in this clause 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, grantor details is a search criteria, and the date of birth is an additional filter to ensure that only registrations for that specific grantor are shown in a search result.

### **Example**

If Joe Bloggs was the grantor, Joe's first name, surname and date of birth will be recorded on the register (in relation to registrations over consumer property that does not have a serial number).

If Joe was a secured party, only Joe's first name and surname will be recorded.

#### *Details contained on a transitional register*

Table item 1 in clause 1.2 provides the identifiers required in relation to registration that are migrated from transitional registers under section 333 of the Act. Table item 1 is an acknowledgement that it will not be reasonable to make contact with all the secured parties or grantors specified in migrated registrations to obtain updated details. Consequently, table item 1 provides that whichever secured party and grantor identifiers were recorded on the transitional register, will be the relevant identifier on the PPS register for that migrated registration.

### **Example**

Joe Doe borrows money from Car Finance Co to buy his car. Car Finance Co registers its security interest over the car on the NSW Register of Encumbered Vehicle (REVs). The interest is registered on REVs against the car's vehicle identification number (VIN), and notes that the secured party is "Car Finance Co".

When this registration is migrated to the register, the secured party identifier might be entered as "Car Finance Co". This is notwithstanding that, for non-migrated registrations, Car Finance Co will be identified using its ACN.

A similar table item is also contained the identifier tables for bodies corporate (clause 1.3), partners (clause 1.4), trustees (clause 1.4), and bodies politic (clause 1.5).

#### *AML-CTF Act Requirements*

Table item 2 in clause 1.2 allows the identifier for the individual obtained pursuant to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML-CTF Act) to be the relevant identifier. This recognises that additional costs would have been incurred by organisations had they been required to comply with two streams of rules dealing with individual identity. By specifying that the identifiers recorded as per the AML-CTF Act is sufficient, organisations will not be required to re-verify their customers and obtain information that complies with the new identifier rules under this regulation.

### **Example**

Mr X and Ms Y are partners of a business. In June 2010, the partnership borrows additional capital from Bank Z, and provides the partnership cars as collateral. Bank Z obtains details of the partners and the partnerships, as required under the AML-CTF Act. In particular, it obtains the full name of the partnership and verifies that this is the name recorded on a certified copy of the partnership agreement.

The PPS reform is implemented in May 2011. In that month, Bank Z registers the security interest over the partnerships cars on the register. As there are multiple cars, Bank Z decides not to register the security interest against the serial numbers, but against the partnership details (this is allowed as the cars are commercial property). The partnership details obtained by Bank Z under AML-CTF Act rules can be validly recorded on the register.

### **Example**

Assume that Mr X and Ms Y are not customers of Bank Z prior to the PPS registration commencement time.

On June 2001, they obtain their first loan from Bank Z. Bank Z records its security interest on the register. The partnership will be identified using the partnership ABN, as opposed to the name recorded on the partnership agreement. This is because the ABN identifier is the item that applies to the partnership with the lowest item number.

AML-CTF Act organisations should be aware that while their own registrations will be valid under this regulation, so too will the registrations of other AML-CTF Act organisations which may have recorded security interests against the same grantors and same property but under different names (that is, the names may be different but are nevertheless valid identifiers as per the AML-CTF Act).

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

It is expected that table items 3-8 of clause 1.2 will apply in relation to new registrations (that is, registrations not migrated from a transitional register) and grantors not identified under the AML-CTF Act rules. In brief, it provides that an individual is to be identified using the details recorded on:

- their current Australian driver's licence;
- if they do not have such a driver's licence, their current Australian proof of age card;
- if they do not have such a driver's licence or proof of age card, their current Australian passport
- if they do not have such a driver's licence, proof of age card or passport, their current Australian visa
- if they do not have such a driver's licence, proof of age card, passport or visa, their passport from the jurisdiction in which they ordinarily reside;
- if they do not have such a driver's licence, proof of 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.

### Clause 1.3 – Body corporate secured party or grantor

This clause provides the relevant rules for identifying a grantor or secured party that is a body corporate.

#### *Body corporate trustees*

This clause firstly clarifies how corporate trustees are to be identified. Corporate trustees could potentially be identified using the body corporate identifiers (clause 1.3) or the trustee identifiers (clause 1.5).

Subclause 1.3 (1) clarifies that where the trustee has an ARSN, it should be identified using the body corporate identifiers (clause 1.3). Other trustees that do not have an ARSN are not to be identified using the body corporate identifiers in clause 1.3.

#### **Example**

ABC Ltd (ACN 111 111 111) is the responsible entity for DEF Trust (ARSN 222 222 222). ABC Ltd grants a security interest to Bank X in its capacity as the responsible trustee of DEF Trust. ABC Ltd will be identified in a registration by its ARSN.

#### *Hierarchy of identifiers for body corporate*

This clause provides a hierarchy of identifiers (and source of those identifiers) for bodies corporate that are grantors or secured parties. The relevant identifiers in clause 1.3 will be that which applies to the body corporate and has the lowest item number in the table.

Table item 1 in clause 1.3 provides that whichever secured party and grantor identifiers were recorded on the transitional register, will be the relevant identifier on the PPS register for that migrated registration.

It is expected that table items 2 to 5 of clause 1.2 applies in relation to new registrations (that is, registrations not migrated from a transitional register). In brief, it provides that:

- a responsible entity of a registered scheme is to be identified by its ARSN;
- if there is no ARSN, then it is to be identified by its ACN;
- if there is no ARSN or ACN, it is to be identified by its ARBN; and
- if there is no ARSN, ACN or ARBN, it is to be identified using the name of the body corporate, as provided in the body corporate's constitution or equivalent document.

### Clause 1.4 – Secured party or grantor is a partner

This clause provides a hierarchy of identifiers (and source of those identifiers) for partners that are grantors or secured parties. The relevant identifier will be that which applies to the partner and has the lowest item number in the table.

Table item 1 in this clause provides that whatever secured party and grantor identifier was recorded on the transitional register, will be the relevant identifier on the PPS register for that migrated registration.

Table item 2 provides that if the entity is a partner in a partnership carrying on an enterprise to which an ABN has been allocated, the relevant identifier is the ABN.

Otherwise, table item 3 provides that the partner is to be identified using the individual identifier table (clause 1.2).

Clause 1.5 – Secured party or grantor is a trustee

This clause provides a hierarchy of identifiers (and source of those identifiers) for grantors or secured parties that are trustees. The relevant identifier will be that which applies to the trustee and has the lowest item number in the table.

Table item 1 provides that whatever identifier was recorded on the transitional register for the trustee, will be the relevant identifier on the PPS register for that migrated registration.

Table item 2 provides that where the trustee is of a trust that is carrying on an enterprise to which an ABN has been allocated, the relevant identifier is the ABN.

Otherwise, table item 3 provides that the trustee is to be identified using the individual identifier table (clause 1.2).

Clause 1.6 – Body politic secured party or grantor

This clause provides a hierarchy of identifiers (and source of those identifiers) for bodies politic. The relevant identifier will be that which applies to the body politic and has the lowest item number.

Table item 1 in this clause provides that whatever secured party and grantor identifier was recorded on the transitional register, will be the relevant identifier on the PPS register for that migrated registration.

Table item 2 provides that if the body politic is carrying on an enterprise to which an ABN has been allocated, the relevant identifier is the ABN.

Otherwise, table item 3 provides that the body politic is to be identified using the name of the body politic that is recorded in the constitution of the body politic.

**PART 2 – MATTERS FOR ITEM 4**

Clause 2.1 – Application of Part 3 – personal property that is intermediated security

This clause provides that, for the purpose of describing collateral and proceeds in a financing statement (item 4 of subsection 153 (1) of the Act), personal property that are intermediated securities are to be treated as financial property.

Clause 2.2 – Description by serial number

This clause provides when personal property *may* or *must* be described by a serial number in a financing statement registered, or to be registered, on the register. It will also identify which serial number is allowed to be used to describe the personal property.

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. The purpose of prescribing property as a serial-numbered good 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 45 (1)).

#### *Serial number description - mandatory*

Paragraphs 2.2 (1) (a) and (b) provides that consumer property for the following collateral classes *must* be described by serial number:

- aircraft;
- intangible property that is further described as a design, patent, plant breeder’s right, or trademark (or a licence over such intangible personal property);
- motor vehicles; and
- watercraft.

Requiring property used for consumer purposes to be described by serial number will promote privacy protection to grantors. Such property will be identified and searchable on the register using the serial number, and not by the grantor’s name (item 2 of subsection 153(1)).

#### **Example**

Mr B approaches a bank for a loan to buy a boat, and offers the bank an interest over the boat. Mr B intends to use the boat to go on non-commercial fishing expeditions.

Mr B is concerned that if the bank registers its security interest over his boat, his details will be available for everyone to see on the register. The bank assures Mr B that since the boat is consumer property, it will be registered against its hull identification number and there will be no need to record Mr B as a grantor on the registration.

Subparagraph 2.2 (1) (a) (ii) provides that consumer property that is “intangible property” that is further described in the financing statement as a design, patent, plant breeder’s right or trade mark, *must* be described by serial number. The reason for this is that IP Australia allocates unique serial numbers to such personal property, and in the interest of maintaining the privacy of individuals, and to assist in ease of searching the register, this serial number will be required to be entered in order to describe the property.

#### **Example**

Mr X is an accidental inventor. With the help of his lawyer, he lodges a patent application with IP Australia and obtains a patent application number. Mr X then obtains finance from Bank Z in order to develop his invention further.

Bank Z registers a financing statement over the collateral on the register. Since Mr X does not have an ABN, the collateral is consumer property. Bank Z chooses “intangible property” in the drop down of collateral classes, and is further required to choose a further descriptor. Bank Z chooses “intellectual property” and “patent” as the further descriptors (that is, “intangible property: intellectual

property: patent”). Bank Z will then be required to enter in the relevant patent serial number.

In general, only serial-numbered goods that are consumer property must be described by serial number. An exception to this rule exists for commercial property that is an aircraft that is further described as an aircraft engine, airframe, helicopter or small aircraft (paragraph (b) of subclause 2.2 (1)). This is because Australia is considering acceding to the Cape Town Convention. The International Registry under the Cape Town Convention requires aircraft objects (that is, aircraft engine, airframe and helicopter) to be registered by their serial numbers. Mirroring the International Registry rules for aircraft objects (and for consistency, also small aircraft) will therefore assist in the transition to the Cape Town rules in the event that Australia accedes to the Convention.

### **Example**

Bank X has a purchase money security interest over an aircraft engine bought by Airline Ltd.

Bank X registers a financing statement for the above security interest. In the financing statement, Bank X chooses “aircraft” in the drop down for collateral classes. It then chooses a further descriptor “aircraft engine” (that is, “aircraft: aircraft engine”). Since the additional descriptor “aircraft engine” has been chosen, Bank X will be required to enter in the relevant serial number for the aircraft engine.

It should be noted, however, that a non serial-numbered registration over commercial aircraft can still be made by not further describing the collateral as an aircraft engine, airframe or helicopter.

### **Example**

Bank Y has a purchase money security interest over 10 aircraft engines bought by AustAir Ltd.

Assume that Bank Y only wants to make one registration to perfect its security interest over these 10 aircraft engines. In the financing statement, Bank Y therefore chooses “aircraft” in the drop down for collateral classes. At this point, a free text field is available, allowing Bank Y to describe the collateral in free text (this is optional). There is no requirement to describe each of the 10 aircraft engines against its serial number, since the collateral has not been further described as “aircraft engine”.

### *Serial number description - optional*

Paragraph 2.2 (1) (c) provides that commercial property for the following collateral classes *may* be described by serial number:

- motor vehicles;
- watercraft; and
- intangible property that is further described as a design, patent, plant breeder’s right, or trademark (or a licence over such intangible personal property).

The general rule is that if the collateral is commercial property, then there is no requirement to describe the collateral by its serial number. This recognises that in relation to commercial transactions, it will not always be reasonable to separately register each property covered by a security interest on the register. (The exception to this rule is commercial property that is an aircraft that is further described as an aircraft engine, airframe, helicopter or small aircraft, which must be described by serial number. The reasons for this exception are discussed above).

### **Example**

Motor Dealer A Ltd has obtained floor plan financing from Financier B to finance the acquisition of 200 cars. Financier B has a purchase money security interest over the cars under the financing agreement. Financier B determines that instead of registering its security interest over each of the 200 cars, it will make a general registration against the motor vehicles held by Motor Dealer A. This will be sufficient to perfect its security interest over the cars.

Since registration against the serial number of serial-numbered property is only optional for commercial property, searchers will need to determine whether to undertake a serial number search, a search against the commercial grantor's details, or both, when searching for a registration for the personal property.

### **Example**

Bake Stuff Co (ACN 123456789) runs a struggling bakery. It approaches Bank Z for a loan and offers its delivery van as collateral.

Prior to agreeing to the loan, Bank Z searches the register against the VIN of the delivery van. It notes that there are no registrations against the VIN.

Bank Z then searches the register against the ACN of the company. Bank Z comes across a registration which notes that Bank A has a purchase money security interest over Bake Stuff Co's motor vehicles.

### *Serial numbers*

Subclause 2.2 (3) provides the acceptable serial numbers to use to describe the property.

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.

### **Example**

Financier A has a security interest over a car that is consumer property. The car has both a vehicle identification number (VIN) and a chassis number. Financier A notes that paragraph (c) of clause 2.2 (3) of Schedule 1 of the Regulations requires that a motor vehicle with a VIN must be described by its VIN and not its chassis number. Financier A therefore registers the car using its VIN.



## **Example**

In the above example, Financier B is also offered the car as collateral for a loan. Financier B searches the register. Financier B knows, based on paragraph 2.2 (3) (b) of Schedule 1 of the Regulations, that since the car has a VIN, any registrations on the register over the car will be against the VIN. It therefore searches the register using the VIN as the search criteria.

### Clause 2.3 – Classes of collateral

Table item 4 (c) of subsection 153 (1) of the Act provides that a financing statement must include a description of the collateral by reference to a single class as prescribed by the Regulations.

This clause provides that the classes of collateral are as follows:

- (i) agriculture;
- (ii) aircraft;
- (iii) all present and after-acquired property;
- (iv) all present and after-acquired property, except;
- (v) financial property;
- (vi) intangible property;
- (vii) motor vehicle;
- (viii) other goods; and
- (ix) watercraft.

Separating collateral into classes will make it easier for users of the register to filter for particular security interest registrations, in particular where there are many registrations made against a grantor's name or identifier. Definitions for the collateral classes are provided:

- in this clause (see “other goods”);
- in other regulations (see regulation 1.6 for “aircraft”, “agriculture”, “all present and after-acquired property”, “all present and after acquired property, except” and “watercraft”, regulation 1.7 for “motor vehicle”, and regulation 9.1 for “watercraft” registrable on a transitional register); or
- in the dictionary section of the Act (see “financial property” and “intangible property”).

### Clause 2.4 – Description of proceeds

Table item 4 (d) of subsection 153 (1) of the Act provides that any description of proceeds in a financing statement must comply with the Regulations.

This clause provides that proceeds must be described in a registration as:

- all present and after acquired property;
- in a way that identifies the items that are to be proceeds; and
- in a way that identifies the class of property that are to be proceeds (including identifying the class by identifying a larger class of personal property that wholly includes the class).

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 register.

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.

This regulation also mirrors the definition of “description” in section 10, which clarifies that a description of proceeds identifying a larger class of personal property that wholly includes the class that specifically identifies the proceeds is an allowable description.

### **Example**

Bank X has a security interest over apple crops grown by Fruit Grower Ltd. The security agreement specifies that Bank X’s security interest continues in the proceeds, and that the proceeds apply only to the apples harvested from the apple trees.

Bank X registers a financing statement with respect to the security interest. Proceeds are described as ‘fruits’. This will be a sufficient description, as ‘fruits’ is a larger class of personal property that wholly includes apples.

## **PART 3 – MATTERS FOR ITEM 7**

### *Clause 3.1 –Purchase money security interest*

Table item 7 of subsection 153 (1) of the Act provides that a financing statement is to include an indication of whether the security interest is, or is to be, a purchase money security interest (to any extent) if the security interest is in respect of a class of collateral prescribed by the regulations for the purposes of this clause.

A purchase money security interest is defined in section 14 of the Act. Section 14 provides that a security interest in certain types of collateral cannot be subject to a purchase money security interest, for example:

- collateral that the grantor intends to use predominantly for personal, domestic or household purposes (unless the collateral is of a kind required or permitted by the regulations to be described by serial number); or
- collateral that is a chattel paper, an investment instrument, an intermediated security, a monetary obligation or a negotiable instrument.

This clause therefore provides that, for the purposes of table item 7 of subsection 153 (1) of the Act, a financing statement can have an indication of whether the security interest is, or is to be, a purchase money security interest, for the class of collateral that can be subject to a purchase money security interest under section 14 of the Act. This avoids the need to specify again those collateral types that are contemplated under section 14 as possibly having a purchase money security interest.

## **PART 4 – MATTERS FOR ITEM 8**

### *Clause 4.1 – Prescribed matters – financing statement*

Table item 7 of subsection 153 (1) of the Act provides that a financing statement is to include an indication of whether the security interest is, or is to be, a purchase money security interest (to any extent) if the security interest is in respect of a class of collateral prescribed by the Regulations.

This clause provides the matters that are to be included in a financing statement that is registered on the register.

### *Inventory and Control*

The Act sets out the requirements for determining whether collateral is a “circulating asset” in section 340 (in Part 9.5 of the Act). It provides, among other things, that the kinds of property mentioned in subsection 340 (5) are not circulating assets if the registration discloses that the secured party has control of that property, and the secured party does, in fact, have control.

Clause 5.1 therefore allows registrants to indicate whether the secured party has control of property of the kind mentioned in subsection 340 (5) as follows:

- by indicating that the collateral may include current asset subject to control, for the purposes of Part 9.5; and
- by indicating that the collateral may include inventory, for the purposes of Part 9.5.

### *Transitional security interest*

This clause also provides that a registration will need to indicate whether the registration relates to a transitional security interest or not. This clause reflects paragraph (c) of subsection 320 (3) of the Act.

### *Migrated security interest*

This clause also provides that a registration must disclose that the collateral is subject to a migrated security interest, and the name of the transitional register from which the migrated data is sourced. This applies to migrated data that is registered under section 333 (registration of migrated data from a transitional register).

### *Data from external registers*

This clause also provides that the “original registration time” and the name of the transitional register from which the migrated data is sourced, is required to be recorded for migrated registrations.

Migrated security interests are security interests recorded in an existing register (transitional register) that are migrated to the PPS Register (section 332 of the Act). The original registration time is therefore the date that a migrated registration was registered on the transitional register.

## **Example**

Financier F had registered its interest over Mr O's car on a state register of encumbered vehicles on 19 August 2008. This register is identified as a transitional register that will be migrated to the PPS Register.

Financier F's registration is migrated from the transitional register to the register. The resulting registration will therefore include the following details:

- that the registration is a "transitional" registration
- that the registration is a "migrated" registration
- the "original start date", which is the date the data was first registered on the transitional register; and
- the name of the transitional register from which the migrated data was sourced.

It should be noted that a financing statement or financing change statement is required to be in the "approved form" for it to be registered (subsection 150 (3)). The Registrar will approve a form by written instrument (section 302). The "approved form" may require additional information than is prescribed in the Act and the Regulations (including administrative type information, such as the contact person for the secured party group).

## **SCHEDULE 2 – FINANCING STATEMENT MATTERS FOR THE TABLE IN SECTION 154 OF THE ACT**

### **PART 1 – PRELIMINARY**

#### *Clause 1.1– Definitions for Schedule 2*

This clause provides the definitions for terms referred to in Schedule 2.

The definition of "individual" clarifies that a sole trader is to be identified using the "individual" identifier rules (clause 2.1), notwithstanding that the individual may be a sole trader and has an ABN.

It also clarifies that where the individual is a partner or a trustee, and the enterprise carried on by the partnership or trust has been allocated an ABN, then that individual will not be identified using the "individual" identifier rules in clause 1.2.

### **PART 2 – MATTERS FOR ITEM 1**

#### *Clauses 2.1 to 2.4 – Identifiers for persons who hold or has an interest in prescribed property*

These clauses provide the rules regarding how to identify persons who hold or have an interest in prescribed property described in a registered financing statement, as well as the source of those relevant identifiers.

These clauses mirror the corresponding clauses in Schedule 1 regarding secured party and grantor identifiers that are required for financing statements in relation to security interests. This is to achieve consistency between the recording of a person's identifier for both security interest and non-security interest registrations.

As with clauses 2.1 to 2.5 in Schedule 1, the relevant identifier will vary, depending on the entity type of the person that owns or has an interest in the prescribed property. The table item that applies to the person with the lowest item number will provide the relevant identifier and source of the identifier.