

A PPSA REGISTRATION PRIMER

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[The Personal Property Securities Act 2009 (Cth) ('PPSA') came into effect on 30 January 2012. Among other things, the PPSA introduces a comprehensive new registration system for security interests in personal property. This article explains the elements of the PPSA registration system, with particular reference to how it differs from earlier registration systems including the provisions governing registration of company charges in ch 2K of the Corporations Act 2001 (Cth) and the registration requirements in the state and territory bills of sale and motor vehicle securities statutes. The article also explores similarities and differences between the Australian PPSA registration system and the Canadian and New Zealand systems.]

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I INTRODUCTION

The *Personal Property Securities Act 2009* (Cth) ('*PPSA*') came into effect on 30 January 2012.¹ Based in part on Canadian provincial legislation,² and also on Article 9 of the United States *Uniform Commercial Code* ('*UCC*'),³ the *PPSA* is one of the most significant developments in Australian commercial law over the past half century or more. The *PPSA* applies to every transaction that in substance creates a security interest, without regard to the actual form the parties choose, and it addresses every aspect of secured lending, including the formation of security agreements, publication of security interests, priority between competing claims to collateral and remedies for default. At each of these stages, the *PPSA* enacts a more or less common set of rules for all secured transactions. In this respect it differs markedly from prior law, which was both piecemeal and dominated by considerations of form.⁴

Publication of security interests is a central *PPSA* objective.⁵ Publication is important, serving as a means of protecting third parties from being misled into believing that the debtor (or 'grantor', to use the Australian *PPSA* terminology)⁶ has unencumbered title to its assets. The *PPSA* uses the term 'perfection' to capture the publication idea, and it provides for various methods of perfection including 'possession' and 'registration'.⁷ Possession achieves the publication objective because if the secured party holds the collateral, a prospective third

¹ In this article, 'PPSAs' refers to the Personal Property Securities Acts in various jurisdictions.

² The PPSAs in the Canadian provinces are substantially uniform, with the exception of Ontario. The Australian lawmakers worked mainly from the *Personal Property Security Act*, SS 1993, c P-6.2 ('*Saskatchewan PPSA*'), but there are only minor differences between the *Saskatchewan PPSA* and the PPSAs in the other Canadian provinces (with the exception of Ontario).

³ Article 9 is titled 'Secured Transactions'.

⁴ So that legal outcomes were liable to vary depending on whether the transaction in issue was, for example, a mortgage, a charge, a pledge, a hire-purchase agreement or a conditional sale. For further details, see Standing Committee of Attorneys-General, *Review of the Law on Personal Property Securities — Options Paper* (2006) ('*SCAG Options Paper*').

⁵ Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 9–11.

⁶ *PPSA* s 10 (definitions of 'debtor' and 'grantor'). The grantor is the party who grants the security interest. The debtor is the party who owes the secured obligation. In a case where, for example, A makes B a loan and B gives A a security interest to secure repayment, B is both the debtor and the grantor. In a case where, for example, A makes B a loan and C gives A a security interest to secure B's obligation, B is the debtor and C is the grantor.

⁷ *Ibid* s 21. Aside from 'possession' and 'registration', security interests in certain types of collateral may also be perfected by 'control': s 21(2). The statute also provides for temporary perfection of security interests in certain cases: s 21(1)(a).

party claimant should realise that the secured party may have an interest.⁸ On the other hand, it would be commercially disruptive if possession were the only permissible method of publication, because typically the grantor will need the collateral to earn income to repay the secured party. In other words, there are two competing policy considerations in play: (i) the need to facilitate non-possessory secured lending; and (ii) the need to protect third parties. The solution lies in registration. Registration is a facility for enabling third parties to check for outstanding security interests before they themselves take an interest in the collateral. This was the policy underlying early registration statutes, such as the bills of sale laws,⁹ and the same policy underlies the new *PPSA* registration provisions.

The *PPSA* registration provisions are in ch 5 of the statute, and are supplemented by the regulations.¹⁰ Among other things, ch 5 provides for the establishment of the register,¹¹ spells out the mechanics of registration,¹² specifies the various ways of searching the register,¹³ provides for changes to registrations,¹⁴ and regulates potential abuses of the register while also addressing privacy concerns.¹⁵ The ch 5 registration provisions are not always easy to follow, partly because the subject matter is difficult and also partly because the drafting is in places obscure. By the same token, particularly in the early days of the new legislation, the registration provisions are likely to engage the attention of financial institutions and others more than other parts of the statute for the simple reason that, from day one, register users will need to have systems in place for complying with the registration and search requirements. With these considerations in mind, the aim of this article is to provide an accessible guide to the new provisions for the benefit of register users and their advisors and also teachers and students of secured lending law who may perhaps be struggling to come to grips with the complexity of this part of the statute. The new Australian registration system differs in some important and interesting respects from the registers in other PPSA jurisdictions. A further aim of this article is to draw attention to these differences and critically analyse them.

As the reader who decides to persevere will quickly see, the article places quite a heavy emphasis on the policies underlying the registration system and its design. There are two related reasons for this: first, many of the key provisions are impossible to understand in the abstract and secondly, a policy focus helps to

⁸ See *Twyne's Case* (1601) 3 Co Rep 80b; 76 ER 809, where the debtor, Pierce, conveyed a flock of sheep to Twyne as security for a loan, but remained in possession. A judgment creditor levied execution against the sheep and this led to a dispute with Pierce. The court held that the transaction between Pierce and Twyne was a fraudulent conveyance and so it was void against the judgment creditor. The case stands for the proposition that the transfer of ownership without possession creates a presumption of an intention to defeat creditors.

⁹ See below nn 17–18.

¹⁰ See *Personal Property Securities Regulations 2010* (Cth).

¹¹ *PPSA* pt 5.2.

¹² *Ibid* pts 5.3–5.4.

¹³ *Ibid* pt 5.5.

¹⁴ *Ibid* pt 5.6.

¹⁵ See *ibid* pts 5.7, 5.9.

enliven what might otherwise be a very dry topic. The article proceeds as follows: Part II briefly explores the main differences between the *PPSA* registration system and pre-*PPSA* registration laws; Part III deals with register searches; Part IV provides an account of the registration process; and Part V is the conclusion.

II PRE-PPSA AND PPSA REGISTRATION COMPARED

A Introduction

There are five main differences between the *PPSA* registration system and pre-*PPSA* registration laws, which can be grouped under the following headings: (i) unification; (ii) centralisation; (iii) notice filing; (iv) computerisation; and (v) renewals.

B Unification

Pre-*PPSA*, there were separate registers for different types of secured transactions; some registers operated at the federal level and some at the state level. According to the Attorney-General's Department, there were upwards of 75 separate statutes relating to security interests in personal property, administered by at least 30 separate government agencies, and many of these statutes set up separate registration systems.¹⁶ None of these registers was comprehensive: each register only covered certain types of security interest or security interests given by certain types of debtor or security interests taken in certain kinds of collateral.

For example, the state and territory bills of sale statutes, which were borrowed from England, set up registration systems for bills of sale,¹⁷ but while 'bill of sale' was defined to include mortgages and charges, the legislation did not apply to functionally equivalent forms of transaction, most notably conditional sale and hire-purchase agreements.¹⁸ Furthermore, the legislation only applied where the collateral was goods.¹⁹ By contrast, the registers established by the state and

¹⁶ Attorney-General's Department (Cth), *Review of the Law on Personal Property Securities: Discussion Paper — Registration and Search Issues* (2006) 79 [419] ('*PPS Discussion Paper 1*'). For a list of these statutes, see *SCAG Options Paper*, above n 4, 24–5 (attachment D).

¹⁷ See, eg, *Bills of Sale Act 1898* (NSW); *Bills of Sale and Other Instruments Act 1955* (Qld); *Instruments Act 1958* (Vic) pt VI. The *Bills of Sale Act 1898* (NSW) was replaced by the *Security Interests in Goods Act 2005* (NSW). Part VI of the *Instruments Act 1958* (Vic) was repealed by s 27 of the *Chattel Securities Act 1981* (Vic). For a comprehensive account of the state and territory bills of sale legislation current to 1993, see Edward I Sykes and Sally Walker, *The Law of Securities: An Account of the Law Pertaining to Securities over Real and Personal Property under the Laws of Australian Jurisdictions* (Lawbook, 5th ed, 1993) 527–56.

¹⁸ *McEntire v Crossley Brothers Ltd* [1895] AC 457. The *Security Interests in Goods Act 2005* (NSW) applied to a security instrument by or under which a security interest was reserved or created, or otherwise arose, but hire-purchase agreements and conditional sales were expressly excluded: s 3 (definitions of 'security instrument' and 'security interest'). By contrast, the *Bills of Sale and Other Instruments Act 1955* (Qld) was expressly extended to such transactions: s 6D.

¹⁹ See, eg, *Security Interests in Goods Act 2005* (NSW) pt 3. Cf *Bills of Sale and Other Instruments Act 1955* (Qld) pt 4, which also applied to assignments of book debts. See also *Instruments Act 1958* (Vic) pt IX, which provided for the registration of the assignment of book debts but was repealed in 1997 by the *Law and Justice Legislation (Further Amendment) Act 1997* (Vic) s 48.

territory motor vehicle securities laws ('the REV statutes')²⁰ applied to all forms of security agreement, but most of them only applied if the collateral was a motor vehicle.²¹ The register of company charges, established by ch 2K of the *Corporations Act 2001* (Cth), was more comprehensive than the state and territory bills of sale and REV statutes, but there were still significant gaps. First, the provisions only applied to security interests given by a corporation.²² So, for example, if the debtor was a sole trader, or a partnership, and mortgaged factory equipment to secure a loan, the mortgage was not registrable in the company charges register, though it might have been registrable under the relevant state or territory bills of sale laws. Secondly, the register of company charges covered only some forms of security agreement, specifically mortgages and charges.²³ So, for example, if a company took out a loan to buy equipment and mortgaged the equipment to secure the loan, the mortgage was registrable under ch 2K. But if the company instead bought the equipment on hire-purchase or conditional sale terms, the agreement would not have been registrable. Likewise, if a company mortgaged or charged its book debts, the agreement was registrable, but if the company assigned its book debts outright, registration was not required even if the assignment was on a 'with recourse' basis making it functionally comparable to a security assignment.²⁴ Thirdly, the scope of ch 2K was defined in part by reference to the nature of the collateral. For example, the provisions applied to some choses in action, but not others: if a company mortgaged its book debts, the agreement was registrable, but if the company mortgaged its non-trade debts, for example, a bank account, registration was not required. In the same connection, insurance policies were not covered, nor were chattel paper, documents of title or certain intellectual property rights.

Overlaying these various schemes, there were numerous specialised registers that applied to security interests given in particular kinds of goods or other property.²⁵ Some of these statutes were originally enacted to facilitate the financing of particular activities, most notably farming. Examples included the registration requirements in most states relating to security interests in livestock, wool on the sheep's back and growing crops,²⁶ sugar cane (Queensland)²⁷ and fruit (South Australia).²⁸ Other measures owed their origins to the fact that there

²⁰ See, eg, *Registration of Interests in Goods Act 1986* (NSW); *Motor Vehicles and Boats Securities Act 1986* (Qld); *Motor Vehicle Securities Act 1984* (Tas). REV is an acronym for 'Registered Encumbrances on Vehicles'. See also *SCAG Options Paper*, above n 4, 24–5 (attachment D).

²¹ See, eg, *Registration of Interests in Goods Act 1986* (NSW) s 3 (definitions of 'motor vehicle' and 'prescribed good'); *Motor Vehicles and Boats Securities Act 1986* (Qld) s 3; *Chattel Securities Act 1987* (Vic) s 13. See also *SCAG Options Paper*, above n 4, 21–3 (attachment C).

²² See *Corporations Act 2001* (Cth) s 261(1). Chapter 2K of the *Corporations Act 2001* (Cth) was repealed by the *PPSA*.

²³ See *Corporations Act 2001* (Cth) s 262.

²⁴ That is to say, in both cases the assignor uses its book debts as a means of raising finance and in both cases the assignor bears the risk of non-payment by the account debtor.

²⁵ See *SCAG Options Paper*, above n 4, 24–5 (attachment D).

²⁶ See, eg, *Factors (Mercantile Agents) Act 1923* (NSW); *Stock, Wool and Crops Mortgages Act 1930* (Tas).

²⁷ *Liens on Crops of Sugar Cane Act 1931* (Qld).

²⁸ *Liens on Fruit Act 1923* (SA).

was a title registration system already in place so that provision for the registration of security interests was a relatively easy matter.²⁹ Examples included the registration requirements for ships and patents.³⁰

This multiplicity of registers was a serious inconvenience. Consider the following example:

SP is negotiating with D, pre-PPSA, for a security interest in all of D's present and after-acquired personal property. SP wants to find out if there are any prior encumbrances.

If D is a company, the obvious starting place is the register of company charges but, as we have just seen, the register of company charges was not comprehensive and it would not necessarily give SP all the information needed. If D is unincorporated, SP's job becomes even harder: it could try searching in the bills of sale register, but, in most states, that would disclose only mortgages and charges, not hire-purchase agreements, conditional sales or leases. It also would not disclose security interests in collateral other than goods. SP could also try searching in the motor vehicle security register, but that would only tell it about security interests in D's cars and trucks, not other property. If D is a farmer, SP could try searching in the livestock register or the wool register or the sugar cane register; but, again, that would only turn up information about security interests in those particular types of property.³¹ To cut a long story short, the PPSA rolls all these disparate and piecemeal systems into a single register that covers all security interests, regardless of the nature of the collateral, regardless of the form of the security agreement and regardless of whether the debtor is a company, some other type of business entity or an individual.

C Centralisation

Pre-PPSA, with the exception of the register of company charges, the main registers, including the bills of sale registers and the registers of motor vehicle security interests, were state and territory-based and this added to the multiple search problem. Going back to our example, if D carried on business nationally,

²⁹ For details, see *SCAG Options Paper*, above n 4, 6–7 [33]–[42].

³⁰ See, eg, *Shipping Registration Act 1981* (Cth) ss 38–44; *Patents Act 1990* (Cth) s 189.

³¹ For a fuller account about the concerns relating to the multiplicity of systems, see *SCAG Options Paper*, above n 4, 26–8 (attachment E). Some security interests were subject to more than one registration statute. This compounded the problem described in the text because, depending on how either the legislature or the courts resolved the overlap, it meant either that the secured party had to register twice over or, alternatively, that searchers had to consult both registers. The problem was compounded even further if the priority rules in the two registration statutes conflicted with one another. An example was the interaction between the registration requirements in the *Patents Act 1990* (Cth) and the registration of charges provisions in ch 2K of the *Corporations Act 2001* (Cth): see John V Swinson, 'Security Interests in Intellectual Property in Australia' in Howard P Knopf (ed), *Security Interests in Intellectual Property* (Thomson Carswell, 2002) 377. Another example was the overlap between the registration of company charges provisions in the corporations statute and the legislation governing registration of security interests in motor vehicles: see *Australian Central Credit Union v Commonwealth Bank of Australia* (1990) 54 SASR 135, revd (1991) 4 ACSR 145.

and SP wanted to conduct a bills of sale register search, SP faced the prospect of separate searches in all the state and territory bills of sale registers.

Moreover, state-based registration systems raise conflict of laws issues. The following is an example:

Pre-PPSA, SP takes a security interest in D's motor vehicle. At the time, the vehicle is located in Victoria and SP registers its security interest in accordance with the *Chattel Securities Act 1987* (Vic). Some time later D moves the vehicle to Queensland and sells it to T without SP's knowledge. When SP finds out about the sale, it claims the vehicle back from T.³²

According to general choice of law principles, the *lex situs* governs the dispute between SP and T; the *lex situs* being the law of the place where the vehicle was located at the time D sold it to T (in other words, Queensland). The relevant pre-PPSA statute, the *Motor Vehicles and Boats Securities Act 1986* (Qld), provided, in effect, that a registered security interest is valid against a third party purchaser, but the courts read the statute, as it originally stood, to mean that the security interest must be 'registered in Queensland'.³³ On this basis, in our example, SP's Victorian registration would not protect it in Queensland. The practical significance of this limitation was that, to be sure of protection Australia-wide, a secured party had to register its security interest in every state and territory. If the courts had reached the opposite conclusion, they would have avoided the multiple registration problem, but they would have created a multiple search problem instead: a prospective purchaser, like T, would have had to search in every state and territory register to be sure of getting clear title.

Eventually, under pressure from the finance industry, the states and territories got their Acts together and set up a scheme for data sharing between the motor vehicle security registers. This meant that if SP, in our example, registered its security interest in Queensland, the data would be transmitted to Victoria and elsewhere and so SP would not have to go to the trouble of completing multiple registrations in every state and territory. Inter-registry data sharing was an innovative short-term solution to the conflict of laws problem, but the logical next step was to move the registration system to the federal level and this is precisely what the PPSA achieves. In the wake of the PPSA reforms, a secured party only has to register its security interest once and, likewise, there is only one place searchers need to look. All this is achieved without the messy business of transmitting data between register bases and the complex intergovernmental and legislative arrangements that underpin cooperative ventures like this. An additional feature of the reforms is that because the new national register is supported by a single federal statute, the effects of registration are now uniform Australia-wide. So, for example, in a dispute involving a registered security interest and an innocent third party who has purchased the collateral for value

³² This example is based on the facts of *Douglas Financial Consultants Pty Ltd v Price* [1992] 1 Qd R 243.

³³ See, eg, *ibid* 252–3 (Thomas J), where it was held that s 26 of the *Motor Vehicles and Boats Securities Act 1986* (Qld) (a provision that dealt with when a security interest was extinguished) was found to apply only to interests registered in Queensland rather than other states.

and without notice of the secured party's claim, the outcome will be the same regardless of variables such as where in Australia the collateral was situated at the time of the sale and where in Australia the parties are located.

To summarise, the *PPSA*: (i) does away with the need for multiple registrations and multiple searches; and (ii) ensures uniform outcomes for disputes within Australia involving competing claims to collateral. This represents a significant advance on the United States and Canada; the first problem looms large in both countries, while the second problem affects Canada in particular, due to the lack of uniformity between Ontario and the other provincial *PPSAs*.³⁴

D Notice Filing

1 Overview

Most of the pre-*PPSA* registers used a document filing system.³⁵ In other words, to register a security interest, the secured party had to lodge a copy of the actual security agreement. By contrast, the *PPSA* uses a notice filing system. In other words, to register a security interest, the secured party lodges a 'financing statement'.³⁶ The financing statement is a short pro forma summary of the transaction, typically in electronic form, which contains prescribed details, including:³⁷ the secured party's identity and contact details; the grantor's details;³⁸ a short description of the collateral;³⁹ if the collateral is serial numbered goods (for example a motor vehicle), the serial number;⁴⁰ the registration period;⁴¹ and a number of miscellaneous items.⁴²

The aim of the financing statement is not to communicate the terms of the agreement between the secured party and the grantor, but simply to alert searchers to the possibility that the secured party may have a security interest in certain collateral. A searcher wanting to confirm the secured party's interest or requiring details of the security interest must obtain them from the secured party identified in the financing statement and there are provisions in the statute aimed at facilitating follow-up inquiries of this kind.⁴³ Notice filing has a number of advantages over document filing, including: savings on storage costs; lower search costs; improved privacy protection; the opportunity for registration in advance of the security agreement; and the opportunity for blanket registrations

³⁴ The best Canada has been able to achieve is uniform choice of law rules. This at least ensures consistent choice of law outcomes regardless of the province in which an action is brought.

³⁵ See, eg, *Corporations Act 2001* (Cth) ch 2K; *Security Interests in Goods Act 2005* (NSW) pt 3.

³⁶ *PPSA* s 150.

³⁷ For a list of the prescribed information for financing statements with respect to security interests, see *ibid* s 153(1).

³⁸ But not if the collateral is serial numbered consumer property: see *ibid* s 153(1) item 2. See also below Part III(B).

³⁹ *Ibid* s 153(1) item 4.

⁴⁰ The serial number is mandatory in some cases and optional in others: see *ibid* s 153(1) item 2. See also below Parts III(B)–(C).

⁴¹ *Ibid* s 153(1) item 5.

⁴² *Ibid* s 153(1) item 8. See also below Part IV(A).

⁴³ *Ibid* ss 274–83. See also below Part III(G).

(that is, the use of a single financing statement to perfect multiple security agreements).

2 *Storage Costs*

Notice filing saves on document storage costs, particularly if the register is paper based. The point is simple: it is easier to store a single sheet of paper than a whole agreement that may be centimetres thick.⁴⁴ Technological advances in the intervening years have reduced the storage costs concern. Most personal property security registers are now at least partly, if not fully, computerised and it would be a simple enough matter to require lodgement of documents in electronic form, if there were good policy reasons for doing so. However, as we are about to see, there are other considerations that favour notice filing over document filing.

3 *Search Costs*

A register search may return a positive result or a negative one. If the result is negative, indicating no registered security interest in the relevant collateral, the searcher need look no further. If the result is positive, indicating one or more registered security interests, the searcher may want more information, such as details of the loan or the terms of the security agreement. A notice filing system allows the searcher to spot a negative result at a glance, whereas under a document filing system the searcher may have to read the whole agreement to be sure that the result is negative. In other words, a notice filing system reduces search costs in cases where there is no relevant security interest. On the other hand, it increases search costs in cases where there is a relevant security interest and the searcher requires additional information. The reason for this is that under a document filing system, the additional information will be on the register whereas under a notice filing system, the searcher must look for the additional information outside the register.⁴⁵ So, from a search costs perspective, there are considerations pointing in both directions and the move to a notice filing system depends on the assumption that notice filing achieves a reduction in aggregate search costs (that is, the costs of searches that return a negative result plus the costs of searches that return a positive result).

4 *Privacy*

Under a notice filing system, there is minimal information on the register about the parties and the terms of the security agreement, and therefore notice filing is more compatible with privacy and confidentiality objectives. It is true that the PPSAs allow searchers to make follow-up inquiries that may reveal sensitive information, but the legislature may, if it wishes, limit access to the register and the right to make follow-up inquiries. For example, the statute might

⁴⁴ In the United States, pre-Article 9 registration statutes commonly included a provision authorising the filing officer to remove from the files old filings that had not been properly renewed: Grant Gilmore, *Security Interests in Personal Property* (Little, Brown and Co, 1965) vol 1, 579–81 [21.1].

⁴⁵ See above n 43 and accompanying text.

provide that only prescribed classes of person may search the register or make follow-up inquiries, or that a person may not search the register or may not make follow-up inquiries other than for prescribed purposes. As we will see, the Australian and New Zealand PPSAs contain provisions along these lines,⁴⁶ but the Canadian PPSAs do not and nor does Article 9. These differences in approach reflect the difficulty inherent in the trade-off between privacy considerations on the one hand, and access to information on the other. It is probably unnecessary to point out that this policy tension is not peculiar to secured transactions law and that it surfaces in a variety of other contexts as well.

5 Advance Registration

A notice filing system makes it possible for the secured party to register before the security agreement is finalised. Under a document filing system, for obvious reasons, the secured party cannot register until the security agreement is in place. Why might a secured party want to register in advance of the security agreement? The answer is tied up with the way the *PPSA* priority rules are framed. In all *PPSA* jurisdictions, the main rule for resolving a competition between multiple security interests perfected by registration is that priority depends on the order of registration, and the dates of the respective security agreements make no difference.⁴⁷ One purpose of this rule is to allow a secured party to reserve its priority position by registering early. Here is an example:

On day 1, SP1 and D start negotiations for a secured lending agreement. They complete their negotiations and execute the agreement on day 5. On day 5, SP1 registers its security interest and releases the loan funds to D. Unhappily for SP1, on day 3 D signs a security agreement with SP2 covering the same collateral and SP2 registers on day 3.

Assume these events all took place pre-*PPSA*, that D is a company and that ch 2K of the *Corporations Act 2001* (Cth) applies. The governing priority rule is in s 280, which provides that, subject to a qualification that is not presently relevant, a registered company charge has priority over a subsequent registered charge.⁴⁸ On this basis, SP2 has priority over SP1. The result would be the same if the *PPSA* applied. The difference is that the *PPSA* provides for notice filing and under a notice filing system, SP1 could have avoided postponement to SP2 by registering a financing statement on day 1: this would have guaranteed SP1's priority position and prevented SP2 from beating SP1 out. By contrast, the *Corporations Act 2001* (Cth) requires document filing and under a document filing system,⁴⁹ SP1 could not register until day 5. Therefore, to protect its position, SP1 would have to make the loan conditional on obtaining first priority

⁴⁶ See *PPSA* s 173; *Personal Property Securities Act 1999* (NZ) ss 173–4. See also below Part III(F).

⁴⁷ See, eg, *PPSA* ss 55(4)–(5).

⁴⁸ There is an exception if the subsequent registered charge was created first and the holder of the charge proves that the holder of the prior registered charge had notice of the subsequent registered charge at the time the prior registered charge was created: *Corporations Act 2001* (Cth) s 280(2). However, these are not the facts of our example.

⁴⁹ *Ibid* s 265.

and then delay releasing the funds until after it had registered the agreement and completed a search to make sure no-one else had registered first. Presumably with cases like this in mind and in common with PPSAs elsewhere, s 161 of the *PPSA* allows for advance registrations. However, as we will see soon, s 151 imposes some important restrictions that potentially undercut the utility of s 161.⁵⁰

6 *Blanket Registrations*

Under a document filing system, the secured party must complete a separate registration for each security agreement. On the other hand, under a notice filing system, it becomes possible for a single registration to perfect multiple security interests in the same type of collateral. The following is an example:

D is a car dealer. On day 1, SP1 starts negotiations with D for a security interest in D's new car inventory and registers a financing statement. The financing statement describes the collateral as required by the *PPSA* and regulations, ie it says the collateral is 'commercial property, motor vehicles'.⁵¹ On day 2, the parties complete their negotiations and execute the security agreement. The security agreement describes the collateral as D's new car inventory.

The day 1 registration perfects SP1's security interest because the collateral description in the financing statement — 'commercial property, motor vehicles' — clearly covers the new car inventory. Now assume that on day 5, SP1 and D enter into a second security agreement, this time for D's used car inventory. The day 1 registration perfects this security interest, too, again because the collateral description in the financing statement covers the used car inventory. *PPSA* s 21(4) confirms that blanket registrations are permissible.

To see the implications of the blanket registration rule, assume that, in our example, on day 3, SP2 negotiates with D for a security agreement in D's used car inventory. SP2 completes a register search, discovers SP1's registration and sees that it covers commercial property and motor vehicles. SP2 makes follow-up inquiries and discovers that SP1's security agreement only covers new cars. Is SP2 safe to proceed with its transaction? The answer is 'no': if SP2 goes ahead, it will end up being subordinate to SP1's day 5 security interest. The reason is that priority turns on the date of registration, not the dates of the respective security agreements, and SP1 registered first. To be on the safe side, SP2 should negotiate a subordination agreement with SP1. Another option would be to have SP1 narrow the collateral description in its financing statement so that the statement only refers to new cars.⁵²

E *Computerisation*

The *PPSA* register is an electronic one. Computerised registration has a number of advantages over paper-based systems. One is that it saves administrative

⁵⁰ See below Part IV(A).

⁵¹ See below Part IV(A)(2), discussing the *PPSA* provisions governing collateral descriptions.

⁵² See below Part IV(C) on changes to registrations.

costs. If the register is a paper-based one, the registrar must employ staff to transcribe information from the financing statement onto the register and also to transcribe information from the register onto search certificates. On the other hand, if the register is computerised, system users have direct access to the registry database, and this eliminates the transcription function.

Another advantage of computerisation is that it avoids the risk of transcription errors. As we have just seen, paper-based systems involve a transcription function and this creates the risk that the person doing the transcribing might make a mistake. For example, assume the grantor's name is Smith, but the registry employee types 'Smyth' instead. A mistake like this may make the security interest unsearchable.⁵³ This raises the question: who should bear the risk, the searcher or the secured party? If the legislature wants to put the risk on the searcher, it will need to include in the statute a provision saying that the secured party's registration is effective from the time it lodges its financing statement at the registry office. On the other hand, if the legislature wants to put the risk on the secured party, it will need to include in the statute a provision saying that the registration is not effective until the financing statement details are correctly entered on the register. Either way, there may be pressure for a statutory compensation fund to cover losses to register users resulting from system failures. A computerised register avoids transcription errors, again because it eliminates the transcription function.⁵⁴ Furthermore, the avoidance of transcription errors substantially reduces the need for a compensation fund because transcription errors were previously a major potential category of system failure. And last but not least, because registration in a computerised system is instantaneous, there is no need for statutory provisions to establish the status of a registration between the date the secured party lodges the financing statement and the date the details are entered on the register.

F Registration Renewals

The pre-PPSA registration statutes typically required the secured party to renew its registration every year or two.⁵⁵ Failure to renew led to lapse of the registration and this, in turn, allowed the registry office to throw out the paperwork. The renewal requirement was essentially a storage control device; in other words, it was a way of keeping the amount of paper within manageable limits. A notice filing system significantly reduces the storage problem and computerised registration reduces it even further. For these reasons, the PPSAs do not require periodical registration renewals. In Australia, the rule is that, for commercial property, a secured party can choose an indefinite registration period or a

⁵³ See below Part III(B).

⁵⁴ Of course, there is still the risk that the secured party itself might make a mistake, but that was a risk under earlier systems too.

⁵⁵ See Sykes and Walker, above n 17, 650–1, discussing the registration renewal requirements in the bills of sale legislation.

specified registration period up to 25 years, and the registration continues until the period expires or the secured party terminates it.⁵⁶

III SEARCHING THE REGISTER

A Debtor's Name (Grantor Details) Searches and Serial Number Searches

There are two basic types of registration system: in the first, the statute requires registration against the debtor's name; and in the second, it requires registration against the collateral's serial number (for example, if the collateral is a motor vehicle, the statute will require registration against the Vehicle Identification Number, or 'VIN'). Correspondingly, in the first type of system, searchers look for security interests against the debtor's name, while in the second type of system, they look for security interests against the collateral serial number. The Register of Company Charges⁵⁷ is an example of a debtor's name system, while the REV statutes⁵⁸ are an example of a serial number system. The Canadian PPSAs combine both systems so that, at least for some kinds of collateral, security interests are registered against both the debtor's name and the collateral serial number.⁵⁹ The Australian *PPSA* follows suit, except that it provides for registration against the 'grantor's details', which in some cases means the grantor's name and in other cases the grantor's ACN⁶⁰ or the equivalent.⁶¹ The combination of the two systems gives the searcher a choice between searching against the grantor's details, searching against the serial number or doing both.

What are the relative advantages of the two systems? In a debtor's name system, a search should reveal every personal property security interest the debtor (or grantor) has given, or may have given, assuming they are all registered. In other words, a debtor's name search gives the searcher an indication of the extent to which the debtor has encumbered its assets. This may be useful information if, for example, the searcher is a prospective lender who plans to take a security interest in all the grantor's present and after-acquired personal property or the searcher is a judgment creditor looking for unencumbered assets to levy execution against. On the other hand, what a debtor's name search will not reveal is a security interest created by a prior owner. For example:

⁵⁶ *PPSA* s 153(1) item 5. For consumer property the maximum registration period is seven years. 'Consumer property' means 'personal property held by an individual, other than personal property held in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated': s 10 (definition of 'consumer property'). 'Commercial property' means 'personal property other than consumer property': s 10 (definition of 'commercial property').

⁵⁷ The Australian Register of Company Charges was maintained by the Australian Securities and Investments Commission. Under the *PPSA*, the Register of Company Charges will be closed and all registrations on that register will be migrated to the *PPSA* register.

⁵⁸ See above n 20 and accompanying text.

⁵⁹ See, eg, *Saskatchewan PPSA* s 48.

⁶⁰ 'ACN' is the abbreviation for Australian Company Number.

⁶¹ See *PPSA* pt 5.5. See also below Part III(E).

Mary has a little lamb. She gives Bo-Peep a security interest. Bo-Peep registers a financing statement against Mary's name. Later, Mary sells the lamb to Teacher. Later still, Searcher negotiates to buy the lamb from Teacher. Searcher does a register search in the debtor's name index to check for outstanding security interests. Searcher's only contact is with Teacher and he has no knowledge of either Mary or Bo-Peep so, naturally enough, he conducts the search against Teacher's name.⁶²

Searcher's search will not reveal Bo-Peep's security interest because Bo-Peep's security interest is registered against Mary's name, not Teacher's. This is commonly referred to as the 'A-B-C-D problem'.⁶³ In our example, Bo-Peep is A, Mary is B, Teacher is C and Searcher is D. The potential for A-B-C-D problems is the main weakness of debtor's name registration systems. Serial number registration systems address the A-B-C-D problem. For example:

Mary has a little Lamborghini. She gives Bo-Peep a security interest. Bo-Peep registers a financing statement against the VIN. Later, Mary sells the Lamborghini to Teacher. Later still, Searcher negotiates to buy the Lamborghini from Teacher. Searcher does a search in the serial number index to check for outstanding security interests.

This time, Searcher's search should reveal Bo-Peep's security interest despite the intermediate dealing in the collateral between Mary and Teacher. In summary, serial number registration systems are designed to provide a complete history of security interests in a specific asset. On the other hand, what a serial number system cannot provide is information about security interests in other assets and the extent to which the debtor has encumbered its enterprise at large. This may not matter to Searcher in our example because he is only interested in the Lamborghini. But assume instead that Searcher is a prospective lender and is planning to take a security interest in all Teacher's assets. Now Searcher will be interested in more than just the car, and a serial number search will not give him the additional information he needs. This is one weakness of serial number registration systems as against debtor's name registration. Another weakness is that serial number registration is only feasible for collateral that has a unique, systematically recorded serial number and not all collateral types have this feature. Cars do, and so, for example, do trucks, motor cycles, boats and aircraft. But lambs and other livestock do not. Nor do jewellery and works of art, crops or accounts. In all these cases, debtor's name registration is the only option.

Turning to the Australian system, the starting point is item 4 in the table appended to *PPSA* s 153(1). This provides, more or less, that if the collateral is serial numbered collateral, the financing statement either may or must set out the serial number. It is left to the regulations to specify what qualifies as serial numbered collateral. The governing provision is cl 2.2 in sch 1 of the *Personal Property Securities Regulations 2010* (Cth) ('*PPS Regulations*'), which lists the following classes of collateral as serial numbered collateral: aircraft and aircraft

⁶² This is a riff on the facts of *Twyne's Case*: see above n 8.

⁶³ See, eg, Ronald C C Cuming, Catherine Walsh and Roderick J Wood, *Personal Property Security Law* (Orwin Publishing, 2005) 255–6.

parts; certain kinds of intellectual property and intellectual property licences; motor vehicles; and watercraft.⁶⁴ This provision effectively determines the scope of the serial number index. *PPSA* s 171 provides for various kinds of searches, including grantor's details searches and serial number searches. Obviously, a serial number search will only be feasible if the collateral is serial numbered collateral. For non-serial numbered collateral, search against the grantor's details will be the only option.

B Grantor's Details Searches — Individual Grantor

If the collateral is non-serial numbered consumer property (for example, a computer) or if it is commercial property, the financing statement must set out the grantor's details as prescribed by the *PPS Regulations*.⁶⁵ If the grantor is an individual, the details that must be included are surname, given names and date of birth.⁶⁶ The grantor may go by different names. For example, the grantor's name on her birth certificate might be Gladys Mary O'Grady, but she calls herself Mary O'Grady. Or the grantor might go by a nickname, for example, Jack instead of John. Or if the grantor is married, she may use her maiden name for work purposes and her married name at home. In cases like this, which name should the secured party include in the financing statement? This question matters because if the secured party writes one name in the financing statement and the searcher looks under another name, the search will not reveal the security interest. In other words, for the register to work, we need a common set of rules for the secured party and the searcher to go by.

The *PPS Regulations* address this issue by enacting, in cascading form, a set of grantor name rules to assist secured parties and searchers.⁶⁷ At the top of the list is a transitional provision, which applies if the grantor's details are disclosed on a transitional register for migrated security interests; it requires disclosure of the grantor's surname, given names and date of birth, as recorded on the transitional register.⁶⁸ The transitional rule will cease to matter once the transition to the *PPSA* regime is complete and, in any event, the rule only applies if the grantor's details are recorded on a transitional register. The second item on the list applies if the secured party is a financial institution and the grantor is an existing customer, such as where the loan is made by the grantor's regular bank or by a financial institution the grantor has borrowed from previously; it requires disclosure of the grantor's surname, given names and date of birth as revealed to

⁶⁴ 'Motor vehicle' is broadly defined in *PPS Regulations* reg 1.7 to include not just cars, motorcycles and trucks, but also tractors and other types of mobile farm equipment (subject to speed and engine power), trailers and caravans, but not trams or trains. For definitions of the other items, see cl 1.6.

⁶⁵ *PPSA* s 153(1) items 2(b)–(c). See also *PPS Regulations* sch 1 pt 1.

⁶⁶ *PPS Regulations* sch 1 cl 1.2.

⁶⁷ See the table contained in *ibid*. Compare the model rules adopted by the Canadian Conference on Personal Property Security Law ('CCPPSL'), on which the form of the Australian provision is based. The CCPPSL model rules are discussed in Cuming, Walsh and Wood, above n 63, 249–51.

⁶⁸ The provisions governing transition from pre-*PPSA* law to the *PPSA* regime are contained in *PPSA* pt 9.

the secured party pursuant to the customer identification requirements of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2007* (Cth) (*'AML-CTF Act'*).⁶⁹ If this provision does not apply, the financing statement must disclose the grantor's surname and given names as recorded on his or her driver's licence.⁷⁰ If the grantor does not have a driver's licence, the next item on the list comes into play and it specifies that the grantor's surname, given names and date of birth as recorded on his or her proof of identity or proof of age card need to be disclosed.⁷¹ If the grantor does not have either of these documents, the next specified port of call is the grantor's Australian passport.⁷² Next in line comes the grantor's name and date of birth as specified on a current Australian visa or, failing that, on a current non-Australian passport.⁷³ The last resort point of reference is the grantor's birth certificate.⁷⁴

As noted above, once the transitional period is over, the *AML-CTF Act* customer identification procedures will become the first point of reference for determining the grantor's details. This rule benefits financial institutions because, if the grantor is already a customer, it saves them the trouble of having to go through a second customer identification process. On the other hand, the rule potentially prejudices searchers because a searcher may not know of the secured party's existence or identity and so may have no reliable means of discovering the grantor's details as they appear in the secured party's *AML-CTF Act* customer identification records. In other words, the rule puts the searcher in a 'catch 22' position: the customer may be relying on the search to reveal the very information needed to carry out the search in the first place. The *AML-CTF Act* does not specify hard and fast customer identification rules, instead leaving it to individual financial institutions to establish their own customer identification procedures.⁷⁵ Some financial institutions may use the customer's driving licence as the main method of identification, while others may rely on some other document, such as the customer's passport or birth certificate. If a searcher does not have the information to conduct a search against the grantor's *AML-CTF Act* customer identification details, the logical fallback is to conduct a search against the grantor's details as indicated by the next item on the prescribed list, that is, the grantor's driver's licence. But assume that, as it turns out, the *AML-CTF Act* rule does apply; the secured party's customer identification records disclose the details as they appear on the grantor's birth certificate; and the secured party puts these details in the financing statement. If the name as it appears on the grantor's driver's licence is different from the name appearing in the birth certificate, a search against the grantor's driver's licence details will not reveal the secured party's registration. A searcher can reduce this risk by also conducting searches

⁶⁹ See *AML-CTF Act* pt 2.

⁷⁰ *PPS Regulations* sch 1 cl 1.2 item 3.

⁷¹ *Ibid* sch 1 cl 1.2 item 4.

⁷² *Ibid* sch 1 cl 1.2 item 5.

⁷³ *Ibid* sch 1 cl 1.2 item 6–7.

⁷⁴ *Ibid* sch 1 cl 1.2 item 8.

⁷⁵ See *AML-CTF Act* s 27.

against the grantor's details as revealed by other prescribed sources, for example the grantor's passport and birth certificate, but it costs time and money to obtain this additional information, not to mention the additional fees for multiple searches. In summary, the problem with relying on the *AML-CTF Act* as a source of data for *PPSA* registration and search purposes is that the information is not equally available to registrants and searchers. The sources ranking below the *AML-CTF Act* rule on the prescribed list are not subject to this objection.

Sources of information ranking below the *AML-CTF Act* rule on the prescribed list become relevant if the *AML-CTF Act* rule does not apply. Moving to these other items, at first glance it might seem strange that the grantor's birth certificate is the last point of reference. It is tempting to think that the birth certificate should be top of the list because it is the most obvious official record of a person's name. This thinking has prevailed in Canada where model rules developed by the Canadian Conference on Personal Property Security Law state that, if the debtor is Canadian born, the name for secured parties and searchers to go by is the name as stated in the debtor's birth certificate.⁷⁶ The main shortcoming of the birth certificate test is that people typically do not carry around their birth certificates when they go shopping. Consider the following example:

Grantor purchases a high-end wide-screen television from Dealer. With Dealer acting as its intermediary, SP contracts with Grantor for a loan to finance the purchase coupled with a security interest in the television to secure repayment. Grantor is keen to take immediate delivery of the television so he can watch the AFL finals, which start the following day. The catch is that SP will not permit delivery until either Dealer or SP has registered a financing statement.

If Grantor's correct name for registration purposes is the name as it appears on his birth certificate, SP may insist on production of the birth certificate prior to registration. If so, the transaction will be delayed while Grantor applies for a copy of his birth certificate and waits for it to arrive. On the other hand, the risk of lost sales may tempt SP not to insist on sighting customers' birth certificates. That may make Dealer's customers happy, but now SP runs the risk of entering an incorrect name on the financing statement and this will invalidate the registration. In summary, the birth certificate rule puts SP in a dilemma: to insist on sighting birth certificates and risk losing business for both itself and Dealer, or to turn a blind eye and risk an unperfected security interest.⁷⁷ The driver's licence rule ameliorates this problem for a substantial subset of cases. People normally

⁷⁶ See, eg, *Personal Property Security Act*, RSA 2000, c P-7, s 43; *Personal Property Security Regulation*, Alta Reg 95/2001, cl 20(7). The CCPSL model rules have been adopted in the Atlantic provinces, Alberta, Manitoba, the Northwest Territories and Nunavut: see Cuming, Walsh and Wood, above n 63, 249–51. In Ontario, there is case law establishing that the debtor's birth certificate is the first port of call for establishing the debtor's name: *Re Haasen* (1992) 13 CBR (3d) 94; *Canadian Imperial Bank of Commerce v Melnitzer* (1993) 23 CBR (3d) 161.

⁷⁷ There is a corresponding problem on the search side of the equation. Assume Grantor is negotiating to sell his wide-screen television to Buyer. If Buyer is sensible, he will search the register for any undisclosed security interests. Given that the television is non-serial numbered consumer property, Buyer will have to conduct a search against Grantor's name and, to be sure of searching against the correct name, Buyer should insist on sighting Grantor's birth certificate. Doing this will delay the transaction and Buyer may miss out on the purchase altogether. But not doing it confronts Buyer with the risk of not getting clear title.

do carry their driver's licences with them, assuming they hold a licence in the first place. So, in our example, bearing in mind that *PPSA* register users have direct access to the system, the Australian driver's licence rule facilitates on-the-spot registration which, in turn, removes at least one of the reasons for delay in completing transactions.⁷⁸ Article 9 of the United States UCC was amended in 2010 to incorporate a driver's licence rule,⁷⁹ and Australia borrowed the idea from there.

Let us now return to our Mary O'Grady example. Assume that the name on the grantor's driver's licence is Gladys Mary O'Grady, but she calls herself Mary O'Grady and she signs the security agreement as Mary O'Grady. The secured party writes her name as Mary O'Grady in the financing statement. Later, a searcher conducts a search under the name Gladys Mary O'Grady. Will the search return the entry? In the abstract, the answer to this question depends on how the registration system is designed. There are two basic design options: exact match and close similar match. In an exact match system, as the name implies, a search will not return a registration if there is any discrepancy at all between the grantor's name as it appears in the financing statement and the name the searcher looks under. In a close similar match system, a search will return entries against the name the searcher looked under and also against names which closely correspond. So, in an exact match system, a search against the name Gladys Mary O'Grady would not return a registration against the name Mary O'Grady. On the other hand, in a close similar match system, the search might be successful, though the actual outcome will depend on how much tolerance the designers have built into the system. In a close similar match system, a search certificate will typically display a list of registrations and the searcher will have to sift through them to locate the relevant one. So, for example, in our Mary O'Grady case, the search certificate might list all the O'Gradys who appear on the register and perhaps debtors with names similar to O'Grady as well. The ball will then be in the searcher's court to narrow the field using date of birth or some other distinguishing variable as a tool.

In all the Canadian provinces except Ontario, the registers use a close similar match system. Ontario employs an exact match system.⁸⁰ New Zealand and Australia, following the Ontario lead, have both opted for exact match systems.

⁷⁸ There may be other reasons for delay; for example, SP may want to check Grantor's credit record before committing to the loan. But in many cases this can be done more quickly, in any event, than the time it takes to apply for a birth certificate.

⁷⁹ Article 9 incorporates two versions of the driver's licence rule — Alternative A and Alternative B — which enacting states can choose between. Under Alternative A, the requirement is mandatory: in other words, the secured party must include in the financing statement the debtor's name as it appears on his or her driver's licence. Under Alternative B, the driver's licence rule is a safe harbour: in other words, use of the debtor's name as it appears on his or her driver's licence guarantees the secured party protection, but the secured party is not obliged to rely on the driver's licence. See UCC § 9-503 (2011). In Australia, the driver's licence rule is mandatory. For criticism of the United States driver's licence rule, particularly Alternative A, see Harry C Sigman, 'Improvements (?) to the UCC Article 9 Filing System' (2010–11) 46 *Gonzaga Law Review* 457.

⁸⁰ Canadian Bar Association — Ontario, *Submission to Minister of Consumer and Commercial Relations concerning the Personal Property Security Act* (1998) 23.

Exact match systems and close similar match systems both have strengths and weaknesses. The main advantage of a close similar match system is the allowances it makes for human error. The main disadvantage is a potentially noisier search certificate, as our Mary O'Grady case illustrates. The main disadvantage of an exact match system is the lack of tolerance for even minor mistakes, but the advantage is a crisper search outcome. The thinking behind Ontario's choice of an exact match system is that Ontario has a larger population than any of the other provinces. This means that a close similar match system would be likely to show up more entries, particularly for common names, and so search certificates would be proportionately noisier. In other words, the costs of a close similar match system would be higher in Ontario than they are in the other provinces.⁸¹ This consideration is even stronger in the Australian context, given that the Australian PPSA register is a national one and the entire country's population is within its ambit.

C Grantor's Detail Searches — Corporate Grantor

If the grantor is a body corporate, the financing statement must include the grantor's details as prescribed by the *PPS Regulations* sch 1 cl 1.3. This provision requires the secured party to enter on the financing statement, in most cases, the grantor company's identification number, rather than its company name. Again, there is a cascading set of rules for establishing the relevant number but, for the majority of cases, it will be the company's ACN.⁸² These rules have knock-on implications for searches; the consequence is that if the grantor is a body corporate, a searcher must search by number, not name. This is another unique feature of the Australian registration system. In other PPSA jurisdictions, the statute provides for registration and search against the debtor's name.⁸³ The rule is that for registration and search purposes, the debtor's name is the name stated in its documents of incorporation.⁸⁴ This can be a trap for the unwary, particularly if the debtor carries on business under another name. For example, assume the debtor is a numbered company and its name as stated in its documents of incorporation is 276542 Ontario Ltd. The debtor carries on business using the business name Acme Products. The correct name for registration and search purposes is 276542 Ontario Ltd, not Acme Products. If the secured party registers under Acme Products, a search against the debtor's correct name will not reveal the registration. Correspondingly, a search against the name Acme

⁸¹ Ibid 22–3.

⁸² If the grantor does not have an ACN, the relevant number is its ARBN (Australian Registered Body Number). If the grantor does not have either of these specified numbers then, and only then, is the financing statement to disclose the company name as provided for in the company's constitution. If the grantor is the responsible entity of a registered scheme, the required grantor's details are the registered scheme's ARSN (Australian Registered Scheme Number): see *PPS Regulations* sch 2 cl 2.2.

⁸³ See, eg, *Personal Property Security Regulations*, RRS, c P-6.2, cl 11 ('Saskatchewan Regulations'). Cf *Personal Property Securities Act 1999* (NZ) s 172, which provides for a dual system, requiring registration against both a debtor company's name and its incorporation number and allowing for search against either or both indicators.

⁸⁴ *PPS Regulations* sch 1 cl 1.3 item 5.

Products will not reveal the security interest if the secured party has correctly named the debtor in the financing statement. The Australian approach avoids these traps, but it does put a premium on register users knowing the correct number to enter for registration and search purposes.

A particular issue in this connection is that many businesses are conducted by a company acting as trustee for a trading trust. If the grantor is a trustee of a trading trust, the financing statement must include the grantor's details as prescribed by the *PPS Regulations*.⁸⁵ The *PPS Regulations* require the secured party to enter on the financing statement the ABN⁸⁶ that has been allocated to the trust business, not the trustee company's ACN. The difficulty is that a searcher may not know whether the grantor company is a trustee or not and so it may need to make inquiries before conducting a search; clearly, if the registration is against the trust's ABN, a search against the grantor's ACN will not retrieve the registration.

D Serial Number Searches — Consumer Property

Item 4 in the table appended to s 153(1) of the *PPSA* provides that the financing statement must indicate whether the collateral is commercial property or consumer property. If the collateral is serial numbered collateral and it is consumer property then the financing statement must set out the serial number,⁸⁷ but not the grantor's details.⁸⁸

So, for example, if the collateral is a car the grantor uses for domestic purposes, the financing statement will include the VIN, but will not include the grantor's name or other details. It follows that the searcher only has one option, namely, to search against the serial number. The REV statutes were subject to the same limitation and so the approach is not entirely novel. On the other hand, in other PPSA jurisdictions, the financing statement must always include the debtor's name even if it also has to include a serial number,⁸⁹ and this enables a searcher to conduct either type of search, or both. The Australian approach was motivated primarily by privacy concerns. The objective is to keep an individual grantor's personal details off the register unless absolutely necessary.⁹⁰ The main disadvantage of the Australian approach is that it disenfranchises searchers who do not know the serial number and have no easy way of discovering it: for example, a prospective execution creditor wanting to know whether the grantor's motor vehicle is encumbered.⁹¹ The Australian lawmakers apparently thought that privacy considerations were more important. Privacy concerns do not loom as large in the other PPSA jurisdictions.

⁸⁵ Ibid sch 1 cl 1.5.

⁸⁶ 'ABN' is the abbreviation for Australian Business Number.

⁸⁷ *PPS Regulations* sch 1 cl 2.2(1)(a).

⁸⁸ *PPSA* s 153(1) item 2(a).

⁸⁹ See, eg, *Personal Property Securities Act 1999* (NZ) s 172; *Saskatchewan Regulations* cl 6, app A.

⁹⁰ See Replacement Explanatory Memorandum, *Personal Property Securities Bill 2009* (Cth) 81.

⁹¹ See Cuming, Walsh and Wood, above n 63, 274.

E Serial Number Searches — Commercial Property

Leaving aside small aircraft, aircraft parts and air frames, if the collateral is serial numbered collateral and it is commercial property, then the financing statement *may* set out the serial number,⁹² but it *must* include the grantor's details.⁹³ So, for example, if the collateral is a delivery van the grantor uses for business purposes, the financing statement may include the VIN and it must include the grantor's details. This suggests that the searcher can choose a serial number search, a grantor's details search or both. However, a serial number search may not be reliable: for example, if the search returns a nil entry the searcher has no way of knowing whether this is because there is no registered security interest or because the secured party opted not to include the VIN. Section 44(1) of the *PPSA* partly compensates for this shortcoming by providing that a buyer or lessee takes the collateral free of a security interest if the collateral is serial numbered collateral and the financing statement either does not disclose or misstates the serial number.⁹⁴ In summary, if the financing statement does disclose the serial number, a search will reveal the security interest, while if it does not disclose the serial number, the transferee will obtain clear title. So either way, the transferee is protected. On the other hand, s 44 only protects buyers and lessees. Other parties, such as prospective lenders or execution creditors, to be on the safe side should conduct a grantor's details search as well as a serial number search.⁹⁵

Why does the statute make the serial number optional for most commercial property? The reason is that commercial property will be either inventory or equipment. It is common for a secured party to take a security interest not just in the grantor's current inventory, but in all the grantor's present and after-acquired inventory. Likewise, it is common to take a security interest not just in, say, the debtor's presently owned delivery trucks, but in all the debtor's present and after-acquired fleet. In cases like this, on the date when the secured party completes the financing statement it will have no way of knowing the serial numbers of the yet to be acquired property. It follows that, as a practical matter, it would be impossible for the secured party to comply with a requirement to include the serial numbers. *PPSA* s 44 attempts to improve the reliability of serial number searches by creating an incentive for the secured party to include the serial number in cases where this is possible.⁹⁶ As we have seen, s 44 provides, in effect, that the secured party may lose to a subsequent purchaser if it does not

⁹² *PPS Regulations* sch 1 cl 2.2(1)(c). For small aircraft and the like, when described as commercial property, the serial number is mandatory: sch 1 cl 2.2(1)(b).

⁹³ *PPSA* s 153(1) item 2(c).

⁹⁴ The provision does not apply if the buyer or lessee (1) is a dealer; or (2) was a party to the security agreement: *ibid* s 44(2).

⁹⁵ The story changes if the collateral is small aircraft and like products. In this case, because the serial number is mandatory, the searcher can rely on the results of a serial number search and therefore genuinely does have two options: *PPS Regulations* sch 1 cl 2.2(1)(b).

⁹⁶ But see *PPSA* s 44(2), which provides an exception to the operation of s 44(1) if the buyer or lessee holds the property or collateral as inventory.

include the serial number.⁹⁷ On the other hand, failure to include the serial number does not affect the validity of the registration or the perfected status of the security interest. It follows that a security interest may still have priority over competing security interests and may still be effective in the grantor's bankruptcy or other insolvency proceedings, even though the financing statement does not include the serial number.

F *Restrictions on Access to the Register*

For privacy reasons, *PPSA* s 172 limits the classes of person who may search the register and the purposes of a search.⁹⁸ An unauthorised search is subject to a civil penalty and may also give rise to a damages claim.⁹⁹ For good measure, the *PPSA* goes on to provide, in s 173, that an unauthorised search or the use of information obtained from an unauthorised search amounts to a contravention of the *Privacy Act 1988* (Cth). Sections 172 and 173 of the *PPSA* are modelled on ss 173 and 174 of the *Personal Property Securities Act 1999* (NZ), but there is one important difference. The New Zealand provisions affect *all* searches, whereas the Australian provisions only apply where the search is by reference to the details of a grantor who is an individual.¹⁰⁰ They do not affect serial number searches or grantor detail searches where the grantor is a company or other business entity. On the assumption that most searches will fall into one of these categories, the impact of the Australian provisions on register use should be minimal.¹⁰¹

G *Follow-Up Inquiries*

As we saw above in Part II(D), in a notice filing system, a security interest is registered, not by lodging a copy of the security agreement, but by filing a financing statement that is no more than a bare bones summary of the transaction amounting at best to a warning that the secured party might have a security interest in one or more broadly defined classes of collateral. A searcher who wants fuller details, including a copy of the security agreement, must apply to the secured party named in the financing statement.¹⁰² Part 8.4 of the *PPSA* regulates this process.¹⁰³

According to *PPSA* s 275(1), any 'interested person' may make a request for information, while s 275(9) limits interested persons to the following: the grantor, a competing secured party, the grantor's auditor, execution creditors and

⁹⁷ See also *ibid* s 45 (taking motor vehicles free of security interest).

⁹⁸ The restrictions are listed in the table set out in *ibid* s 172(2).

⁹⁹ *Ibid* s 271.

¹⁰⁰ *PPSA* s 172(1). Cf *Personal Property Securities Act 1999* (NZ) ss 173–4.

¹⁰¹ But see *PPSA* s 176B, which provides that searchers and other register users may be required to comply with conditions relating to, among other things, the use of registered data.

¹⁰² See *ibid* s 275.

¹⁰³ Cf *Saskatchewan PPSA* s 18, on which the Australian provisions are modelled.

an authorised representative of any of these parties.¹⁰⁴ The list does not include either a prospective secured party (in other words, a lender who is proposing to take a security interest from the grantor) or a prospective transferee (in other words, a person who is proposing to buy the collateral from the grantor). What the drafters seem to have in mind is that if a prospective secured party or a prospective transferee wants to make follow-up inquiries, they can ask the grantor to obtain the information on their behalf. However, *PPSA* s 275 does not make this clear.¹⁰⁵

The s 275(9) list also excludes a person with an existing interest in the collateral other than a competing secured party or an execution creditor (for example, a transferee for value). It follows that the only option open to parties in this category will be to ask the grantor to make the request on their behalf. A prospective execution creditor, in other words, a judgment creditor who is contemplating judgment enforcement proceedings, is in the same position because the reference in s 275(9) is to current execution creditors only.¹⁰⁶ The concern in these cases is that, for obvious reasons, the grantor will be disinclined to cooperate. Another class of searcher who may want to make follow-up inquiries is the grantor's liquidator or trustee in bankruptcy. A liquidator or trustee will want to know that a secured party has a perfected security interest because this information is important for the administration of the estate. Again, liquidators and trustees are not on the s 275(9) list, but they presumably qualify as 'authorised representatives' of the grantor.

A secured party who receives a s 275 request must reply within 10 business days.¹⁰⁷ Otherwise, the person making the request may apply to the court for an order compelling compliance.¹⁰⁸ The secured party can avoid s 275 by entering into a confidentiality agreement with the debtor¹⁰⁹ before or at the time of the security agreement.¹¹⁰ However, this concession does not apply if, among other things, the debtor authorises disclosure of the information, effectively waiving its rights under the confidentiality agreement, or the s 275 request comes from the grantor.¹¹¹ In the latter connection, it is noteworthy that the statute does not

¹⁰⁴ Cf *ibid*, which allows the following parties to make requests: the debtor, a creditor, a sheriff, a person with an interest in personal property of the debtor and the authorised representative of any of these parties.

¹⁰⁵ *Ibid* 18(1) provides that the secured party must send the information to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor. Cf Australian *PPSA* s 275(2), which says simply that a request made under s 275(1) must specify an address to which the information requested should be sent.

¹⁰⁶ According to *PPSA* s 275(9)(d), this means 'an execution creditor with an interest in the collateral'.

¹⁰⁷ *Ibid* s 277. Section 278 provides for court applications for exemptions and extensions of time to respond to requests. Section 279 permits the secured party to charge a fee for providing the information, in order to recover the costs arising from responding to the request.

¹⁰⁸ *Ibid* s 280. If the secured party fails to comply with a court order, the court may make a further order extinguishing the security interest and such other orders as it thinks necessary: s 282.

¹⁰⁹ *Ibid* s 275(6). Note that 'debtor' is used in this provision instead of 'grantor', which appears in the other subsections of s 275.

¹¹⁰ *Ibid* s 275(6)(a). A secured party may also decline to comply with s 275 if 'the response would disclose information that is protected against disclosure by a duty of confidence': s 275(6)(c).

¹¹¹ *Ibid* s 275(7).

expressly restrict the grantor's freedom to pass on the information to third parties, such as a prospective secured party or transferee. This may prompt the secured party to include in the security agreement a provision prohibiting the grantor from passing on the information.

IV REGISTERING A FINANCING STATEMENT

A The Mechanics of Registration

1 *The Registration Process*

PPSA pt 5.3 governs the registration process. Section 150(3) provides that, to register a financing statement, the secured party must apply to the Registrar in the approved form and pay the prescribed fee. A registration becomes effective from the moment it becomes available for search on the register.¹¹² Section 151 is relevant to advance registrations. As we saw earlier in Part II(C), s 161 allows a secured party to register a financing statement even if it does not yet have a security interest. This is an important feature of the *PPSA* registration system because it allows a secured party to stake out its priority position before committing itself to the loan.¹¹³

Section 151 diminishes the attractiveness of advance registration. A person applying to register a financing statement must believe on reasonable grounds that a security agreement will follow.¹¹⁴ Failure to comply is subject to a civil penalty. Sections 151(2) and (3) go on to say that the secured party must discharge an advance registration within five days if there are no reasonable grounds for believing that a security agreement will follow. The onus of establishing reasonable grounds is on the secured party. In theory, the secured party may maintain an advance registration indefinitely, but in practice the secured party may be at risk unless it completes the security agreement within five days of the registration. The reason is that the provision fails to specify what constitutes reasonable grounds and, on top of this, it puts the burden of proof on the secured party. Assume, for example, that at the time of registration, the secured party believes there is a 40 per cent chance that its negotiations with the grantor will be successful: does the secured party have reasonable grounds for believing that a security agreement will result? And would the answer be different if the figure was 30 per cent or 10 per cent? Likewise, if the secured party believes at the outset that there is a 40 per cent chance of the negotiations succeeding but as the negotiations progress it becomes less optimistic, at what point does it cease to have reasonable grounds for anticipating a successful outcome and when does the five day discharge period start to run? The only sure-fire way of avoiding this

¹¹² *Ibid* s 160.

¹¹³ See Replacement Explanatory Memorandum, Personal Property Securities Bill 2009 (Cth) 85:
Advance registration would inform secured parties of the order of registration (and potentially the order of priority) while still negotiating the transaction. This would improve certainty in commercial negotiations as parties could ascertain their rights to priority over other security interests in personal property.

¹¹⁴ *PPSA* s 151(1).

uncertainty is to discharge the advance registration unless the security agreement is completed within five days.¹¹⁵ There is nothing like s 151 in any of the other PPSAs and it is hard to see the justification for it. The aim of the provision is probably to prevent possible register abuses, for example, nuisance registrations and the like. But in enacting s 151, the legislature has used a sledgehammer to crack a nut. The provision detracts from a key benefit of notice registration and it is almost certainly unnecessary; nuisance registrations have not been a major concern in other PPSA jurisdictions and, in any event, there is a whole set of other provisions, in *PPSA* pt 5.6, specifically dedicated to preventing register abuses.

The pt 5.6 provisions allow an interested party to serve an amendment demand on the secured party, requiring that a registration be discharged if the secured party does not actually have a security interest.¹¹⁶ If the secured party fails to comply, the Registrar may issue an amendment notice following which, having given the secured party an opportunity to respond, the Registrar may amend or discharge the registration.¹¹⁷ Alternatively, the person who gave the amendment demand may apply to the court for an order requiring the Registrar to amend or discharge the registration.¹¹⁸ On top of this, *PPSA* pt 5.7 gives the Registrar power to remove data, among other things, from the register if the registration is frivolous or vexatious.¹¹⁹

2 *Financing Statement Contents*

Section 153 of the *PPSA* governs the contents of the financing statement. The table appended to s 153(1) lists the following items:

- 1 the secured party's details;¹²⁰
- 2 the grantor's details;¹²¹
- 3 an address for the giving of notices;¹²²

¹¹⁵ The examples appended to s 151(1) take no account of this limitation:

Example 1: A person applies to register a financing statement that describes collateral as 'all present and after-acquired property' of the grantor described in the statement. It is sufficient to comply with this subsection if the applicant believes on reasonable grounds that the secured party described in the statement will take a security interest in a particular class of items of personal property held (or later acquired) by the grantor ...

Example 2: A person applies to register a financing statement that describes collateral as 'fruit'. It is sufficient to comply with this subsection if the applicant believes on reasonable grounds that the secured party described in the statement will take a security interest in apples ...

¹¹⁶ *PPSA* s 178.

¹¹⁷ *Ibid* ss 179–81.

¹¹⁸ *Ibid* s 182.

¹¹⁹ *Ibid* s 187.

¹²⁰ The details are prescribed by the *PPS Regulations* and the requirements for the secured party's details are the same as for grantor's details: for example, surname and given names if the secured party is an individual, and ARSN, ACN or ABN if the secured party is a body corporate. See above Parts III(B)–(D).

¹²¹ The details are prescribed by the *PPS Regulations* in sch 1 cl 1.2. For discussion, see above Parts III(B)–(D).

¹²² *PPSA* s 153(1) item 3.

- 4 a collateral description;¹²³
- 5 details of the registration end time;¹²⁴
- 6 an indication of whether the security interest is, or will be, subordinated to any other security interest;¹²⁵
- 7 an indication of whether the security interest is a purchase money security interest;¹²⁶ and
- 8 prescribed additional details which are largely of a transitional nature.¹²⁷

3 *The Collateral Description*

The financing statement must identify the collateral as either commercial property or consumer property.¹²⁸ Additionally, if the collateral is serial numbered consumer property, the collateral description must include the serial number; if it is serial numbered commercial property the serial number is optional.¹²⁹ Finally, the collateral description must identify the collateral by reference to one of the classes prescribed by the *PPS Regulations*: agriculture; aircraft; all present and after-acquired property; all present and after-acquired property except specified items; financial property; intangible property; motor vehicles; other goods; and watercraft.¹³⁰ The following are some examples.

- 1 The grantor is a consumer and the collateral is a car — the required collateral description is consumer property; serial number; motor vehicle.
- 2 The grantor is a wheat farmer and the collateral is the coming year's crop — the required collateral description is commercial property; agriculture.
- 3 The grantor is a retailer and the collateral is the grantor's accounts — the required collateral description is commercial property; intangible property.
- 4 The grantor is a manufacturer and the security interest is a general one — the required collateral description is commercial property; all present and after-acquired personal property.¹³¹

The pro forma electronic registration application lists all these options, and the secured party completes the collateral description by clicking on the desired

¹²³ Ibid s 153(1) item 4. See also below Part IV(C)(3).

¹²⁴ Ibid s 153(1) item 5.

¹²⁵ Ibid s 153(1) item 6. See also below Part IV(C)(4).

¹²⁶ Ibid s 153(1) item 7. See also below Part IV(C)(4).

¹²⁷ Ibid s 153(1) item 8; *PPS Regulations* sch 1 cl 4.1.

¹²⁸ *PPSA* s 153(1) item 4(a).

¹²⁹ Ibid s 153(1) item 4(b). See also above Parts III(D)–(E).

¹³⁰ *PPSA* s 153(1) items 4(d)–(c); *PPS Regulations* sch 1 cl 2.3. *PPSA* s 105(2) deals with the case of goods with embedded intellectual property rights and it provides, in effect, that if a financing statement is registered to perfect a security interest in the goods, it is not necessary to separately identify the intellectual property rights in the collateral description.

¹³¹ The financing statement must also include a description, in the form required by the *PPS Regulations*, of the types of collateral the secured party claims as proceeds from any dealing in the collateral: see *PPSA* s 153(1) item 4(d); *PPS Regulations* sch 1 cl 2.4. Space constraints preclude discussion of these provisions in this article.

option.¹³² The statute provides that the collateral must belong to a ‘single class’.¹³³ It follows that if a security agreement provides for a security interest over multiple collateral classes, the secured party must register multiple financing statements. For example, if the collateral comprises the grantor’s planes, boats and buses the secured party must register three separate financing statements describing the collateral as commercial property, aircraft; commercial property, watercraft; and commercial property, motor vehicles respectively. If the collateral comprises the grantor’s farm equipment, the secured party may have to register one financing statement for equipment that falls within the definition of motor vehicle,¹³⁴ describing the collateral as commercial property, motor vehicles, and another for non-motor vehicle equipment, describing the collateral as commercial property, other goods. By the same token, if the collateral comprises several motor vehicles, one or more of which is exclusively for the grantor’s private use, the secured party will have to register two financing statements, one describing the collateral as commercial property, motor vehicles and the other describing the collateral as consumer property, motor vehicles. This is a unique feature of the Australian registration system. In all the other PPSA jurisdictions, registration of security interests in multiple collateral types can be accomplished with a single financing statement.¹³⁵ The Australian approach increases the costs and complexity of the registration process and it may lead to inadvertent registration errors, particularly in borderline cases, for example where the secured party is not sure whether the collateral is a motor vehicle within the meaning of the statutory definition or whether the collateral is commercial or consumer property.¹³⁶ The best advice in the case of uncertainty is to register the additional financing statement: the additional fees may be a downside to over-registration, but under-registration may result in the security interest being unperfected. Of course this advice will not help unless it occurs to the secured party in the first place that there may be a need to register more than once.

4 Other Noteworthy Financing Statement Matters

If the collateral is consumer property or serial numbered property, the maximum registration period is seven years.¹³⁷ In all other cases, the secured party has the option of not stating an end time in the financing statement or specifying any period up to 25 years.¹³⁸ Section 153(2) provides that if the secured party

¹³² See the draft register screen shots published by the Attorney-General’s Department: Attorney-General’s Department (Cth), *Personal Property Securities Register: Draft Screen Shots* (May 2010).

¹³³ *PPSA* s 153(1) item 4(c).

¹³⁴ For definition of motor vehicle, see *PPS Regulations* reg 1.7.

¹³⁵ For an account of the Canadian approach, see Cuming, Walsh and Wood, above n 63, 254–5. See also *Personal Property Securities Act 1999* (NZ) s 147.

¹³⁶ There are no reasons given for the Australian approach in the Explanatory Memorandum: see Replacement Explanatory Memorandum, *Personal Property Securities Bill 2009* (Cth) 82, where the requirement is described but not justified.

¹³⁷ *PPSA* s 153(1) item 5(a).

¹³⁸ *Ibid* s 153(1) item 5(b).

enters an incorrect end time, for example eight years where the collateral is consumer property, the default time (in other words, seven years) applies instead.

The secured party may indicate on the financing statement whether the security interest is, or will be, subordinated to any other security interest.¹³⁹ In common with the PPSAs elsewhere, this item is optional.¹⁴⁰ The reason is that 'the subordination only affects the priority position of the parties bound by it' and so it is immaterial to the searcher's interests.¹⁴¹ One reason the parties might want to record the subordination is to substitute the senior creditor for the junior creditor as the party to whom registration inquiries should be addressed. However, the design of the Australian registration system only allows the secured party to signify, by clicking on the appropriate box, that the registration is subordinate to another registration, and there is no provision for including the senior creditor's name and contact details.¹⁴²

The statute gives special priority status to purchase money security interests.¹⁴³ However, to qualify for this benefit the secured party must, among other things, indicate in its financing statement that the security interest is a purchase money security interest.¹⁴⁴ Item 7 in the table appended to *PPSA* s 153(1) reflects this requirement. Failure to make the item 7 disclosure will result in the secured party not obtaining the benefit of the special priority rule. Conversely, an item 7 disclosure made by a secured party whose security interest is not a purchase money security interest will invalidate the registration.¹⁴⁵

5 Verification Statements

Sections 155–8 deal with verification statements. A verification statement is a notice issued by the Registrar setting out details of a registration or a registration amendment.¹⁴⁶ Section 156 provides that the Registrar must give the secured party a verification statement following a registration or a registration amendment. The purpose is to allow the secured party to check the accuracy of its registration and avoid registration errors which, as we will see shortly, can have serious consequences. Section 157 provides that the secured party must give the person registered as the grantor in the financing statement notice of the verification statement in the prescribed form. The purpose is to give the grantor an opportunity for checking the accuracy of the registration. If the registration is inaccurate — for example, if the collateral description is broader than the parties agreed on — the grantor can exercise its rights under pt 5.6. Section 157 appears to overlook the fact that if the collateral is serial numbered consumer property, the financing statement will not identify the grantor.¹⁴⁷ If the collateral is

¹³⁹ *Ibid* s 153(1) item 6.

¹⁴⁰ See, eg, *Saskatchewan PPSA* s 45; *Personal Property Securities Act 1999* (NZ) s 159.

¹⁴¹ Cuming, Walsh and Wood, above n 63, 262.

¹⁴² See Attorney-General's Department (Cth), *Draft Screen Shots*, above n 132.

¹⁴³ *PPSA* pt 2.6 div 3.

¹⁴⁴ *Ibid* s 62(2)(c).

¹⁴⁵ *Ibid* ss 164(1)(b), 165(c).

¹⁴⁶ *Ibid* ss 10 (definition of 'verification statement'), 155.

¹⁴⁷ See above Part III(D).

commercial property, the grantor may waive its right to receive a verification statement.¹⁴⁸

B Registration Errors

Registration is one of several methods the *PPSA* recognises for perfecting a security interest.¹⁴⁹ In contrast to the approach taken in some earlier registration statutes,¹⁵⁰ the *PPSA* does not automatically invalidate a security interest if the secured party fails to register.¹⁵¹ However, failure to register is likely to result in the security interest being unperfected, unless the secured party has perfected by some other method, such as by taking possession of the collateral.¹⁵² An unperfected security interest is vulnerable to various third parties: a buyer or lessee of the collateral for value;¹⁵³ another secured party who has a perfected security interest in the same collateral;¹⁵⁴ an execution creditor;¹⁵⁵ and the grantor's liquidator or trustee in bankruptcy.¹⁵⁶

The same consequences may follow if the secured party registers its security interest but makes a mistake in the financing statement that invalidates the registration. The governing provisions are ss 164–5. Section 164(1) provides that a registration error invalidates the financing statement if it is: (i) a seriously misleading defect;¹⁵⁷ or (ii) a defect mentioned in s 165. Section 165(a) applies to serial number errors in cases where inclusion of the serial number in the financing statement is mandatory and the failure to include the serial number makes the registration undiscoverable by a serial number search. Section 165(b) applies to errors in the grantor's details where inclusion of the serial number in the financing statement is not mandatory and the error in the grantor's details makes the registration undiscoverable by a search against those details.¹⁵⁸

¹⁴⁸ *PPSA* s 157(3).

¹⁴⁹ See *ibid* pt 2.2.

¹⁵⁰ See Sykes and Walker, above n 17, 631–7, summarising the invalidating effects of the bills of sale legislation from state to state.

¹⁵¹ *PPSA* s 21.

¹⁵² *Ibid* s 21(2)(b).

¹⁵³ *Ibid* s 43.

¹⁵⁴ *Ibid* s 55(3).

¹⁵⁵ *Ibid* s 74.

¹⁵⁶ *Ibid* s 267.

¹⁵⁷ 'Defect' includes an irregularity, omission or error in the registration: *PPSA* s 10 (definition of 'defect').

¹⁵⁸ The actual wording of *PPSA* s 165 is as follows:

For the purposes of paragraph 164(1)(b), a defect in a registration that describes particular collateral exists at a particular time if any of the following circumstances exist:

- (a) in a case in which the collateral is required by the regulations to be described by serial number in the register — no search of the register by reference to that time, and by reference only to the serial number of the collateral, is capable of disclosing the registration;
- (b) in a case in which the collateral is not required by the regulations to be described by serial number in the register — no search of the register by reference to that time, and by reference only to the grantor's details (required to be included in the registered financing statement under section 153), is capable of disclosing the registration ...

Sections 164(1)(a) and (b) are likely to overlap in their application to serial number errors and errors in the grantor's details. The reason is that, in other PPSA contexts, the main test of whether a financing statement error or omission constitutes a seriously misleading one is whether it makes the registration potentially unsearchable.¹⁵⁹ This test is likely to be adopted under the Australian PPSA. It follows that a serial number error to which ss 164(1)(b) and 165(a) apply, or an error in the grantor's details to which ss 164(1)(b) and 165(b) apply, is necessarily also an error that is seriously misleading.

1 *Example 1*

SP takes a security interest in Grantor's wide-screen television set which Grantor holds for personal use. The collateral is non-serial numbered consumer property, so the financing statement must set out Grantor's name and there will be no serial number. Grantor's name as shown on her driver's licence is Gladys Mary O'Grady, but she goes by the name Mary O'Grady and this is the name SP writes in the financing statement.

According to the statute and regulations, assuming that neither the transitional rule nor the *AML-CTF Act* rule applies, the correct name for registration and search purposes is the name as it appears on Grantor's driver's licence.¹⁶⁰ It follows that SP has entered the incorrect name on the financing statement. The mistake will make the registration undiscoverable by any searcher who looks under the correct name. On this basis, SP's registration is invalid both because: (i) there is a seriously misleading defect within the meaning of s 164(1)(a); and (ii) s 164(1)(b), read in conjunction with s 165(b), applies.

2 *Example 2*

SP takes a security interest in Grantor's wide-screen television set which Grantor holds for personal use. The collateral is non-serial numbered consumer property, so the financing statement must set out Grantor's name and there will be no serial number. Grantor's name as shown on her driver's licence is Gladys Mary O'Grady. SP makes a keyboarding slip while completing the financing statement and types Gladys as 'Gledys'. In all other respects, the financing statement is accurate.

Does SP's typographical mistake affect the validity of the registration? It might be tempting to think not, because s 164 is concerned only with seriously misleading errors and typing an 'e' for an 'a' may seem trivial. However, the question has to be addressed in context and the key point in Example 2 is that, as we saw above in Part III(B), the PPSA registration system is an exact match one. In an exact match registration and search system, the secured party's misspelling of Gladys makes its registration unsearchable. Therefore, as in Example 1, ss 164(1)(a) and (b), read in conjunction with s 165(b), apply.

¹⁵⁹ See *Re Lambert* (1994) 119 DLR (4th) 93 (Ontario Court of Appeal); *Fairbanx Corporation v Royal Bank of Canada* (2010) 68 CBR (5th) 102 (Ontario Court of Appeal); *Stevenson v GMAC Leaseco Ltd* (2003) 227 DLR (4th) 154 (New Brunswick Court of Appeal).

¹⁶⁰ See above Part III(B).

The Ontario Court of Appeal's decision in *Fairbanx Corporation v Royal Bank of Canada* ('Fairbanx')¹⁶¹ confirms this analysis. In that case, the debtor company entered into a factoring agreement assigning its accounts to Fairbanx.¹⁶² The debtor's name, as indicated in its documents of incorporation, was 'Friction Tecnology Consultants Inc', 'Tecnology' being spelt without an 'h'. But the debtor carried on business using an incorrect spelling of its name, that is, with the 'h' in 'Technology'. It spelt its name this way on its letterhead and invoices and it also used the incorrect spelling in its security agreement with Fairbanx. Fairbanx registered a financing statement, but it used the incorrect spelling of the debtor's name ('Technology' instead of 'Tecnology'). Some time later, the debtor approached the Royal Bank of Canada for a loan secured on the debtor's present and after-acquired personal property including its accounts. The bank conducted a PPSA search using the debtor's incorrect name and it found Fairbanx's registration. The bank agreed to the loan some months afterwards and at this point it conducted another register search, this time using the correct spelling and the search did not return Fairbanx's entry. The bank went ahead and registered its own financing statement, using the correct spelling of the debtor's name. The bank and Fairbanx ended up in a dispute over various accounts the debtor had factored to Fairbanx. The bank argued that Fairbanx's security interest was unperfected because of the spelling error in its financing statement and, because the bank itself was perfected, it had priority.¹⁶³ The Court ruled in the bank's favour.¹⁶⁴

Fairbanx is a strong case because the bank conducted two register searches before entering into the security agreement with Fairbanx: the first time round, it spelt 'Technology' with the 'h' in its search application and the search returned Fairbanx's entry. The second time round, it spelt 'Tecnology' without the 'h', and the search did not return the entry. In other words, the case offers a practical

¹⁶¹ (2010) 68 CBR (5th) 102.

¹⁶² *Ibid* 103 (Feldman JA). The Ontario *Personal Property Security Act*, RSO 1990, c P-10, s 2 ('Ontario PPSA'), in common with the Acts in other PPSA jurisdictions, applies to both security and non-security assignments and the assignee under a non-security assignment is deemed to hold a security interest for the purposes of the Act. Cf the Australian PPSA s 12(3).

¹⁶³ *Fairbanx* (2010) 68 CBR (5th) 102, 109–13 (Feldman JA). The bank's argument was that Fairbanx's misspelling of the debtor's name would be likely to have materially misled a reasonable person: at 110. Ontario PPSA s 46(4) provides that a financing statement is not invalidated by an error or omission unless a reasonable person is likely to be materially misled. Cf Australian PPSA s 164. Ontario PPSA s 20(1)(a)(i) provides that an unperfected security interest is subordinate to a perfected security interest in the same collateral. Cf Australian PPSA s 55(3). See also above n 157 and accompanying text.

¹⁶⁴ *Fairbanx* (2010) 68 CBR (5th) 102, 113 (Feldman JA, Doherty and Cronke JJA agreeing). See also *Stevenson v GMAC Leaseco Ltd* (2003) 227 DLR (4th) 154 (New Brunswick Court of Appeal), which is another case in the same vein. There, the debtor's correct name was 'Motor Home & Trailer Sales Ltd', whereas the name that appeared in the financing statement was 'Motorhome & Trailer Sales Ltd'. The Court held that, in the context of New Brunswick's exact match retrieval and search system, the error was seriously misleading: at 195 (Robertson JA, Turnbull and Deschênes JJA agreeing). In Australia, if the grantor is a company, registration and search is by reference to the grantor's company number, not its name: see above Part III(C). It follows that a fact situation like the ones in *Fairbanx* and *Stevenson* could not arise in Australia. However, these cases are still important for what they have to say about the significance of apparently minor errors in an exact match registration and search system.

demonstration of how, in an exact match registration and search system, even an apparently minor spelling mistake can make a registration undiscoverable. Another interesting feature of the case is that no-one was actually misled by Fairbanx's mistake. Specifically, the bank was not misled because its first search returned Fairbanx's entry. The Court held that the bank's knowledge was irrelevant: the test is an objective one and so it makes no difference that no-one was actually misled.¹⁶⁵ Returning to the Australian scene, *PPSA* s 164(2) makes this point explicitly: 'In order to establish that a defect is seriously misleading, it is not necessary to prove that any person was actually misled by it.'¹⁶⁶ The outcome of *Fairbanx* seems harsh on Fairbanx and unduly generous to the bank. But there are several policy justifications. One is that a strict error rule increases the incentive for a secured party to make sure its financing statement is accurate and this, in turn, increases the reliability of the register. Another is that introducing a knowledge qualification would increase litigation costs, first, because the courts would have to inquire into the competing party's state of knowledge and this would mean longer and more expensive trials, and secondly, because it would make case outcomes less predictable.

The objective character of the *PPSA* s 164 test has important implications for bankruptcy trustees and liquidators. Assume Grantor goes into liquidation. SP claims to have a security interest in all of Grantor's inventory. If this claim is proved, the liquidator may have to hand over the inventory to SP and this will reduce the pool of assets available for distribution among Grantor's unsecured creditors. On the other hand, an unperfected security interest is by and large ineffective against Grantor's liquidator with the result that SP is reduced to the status of an unsecured creditor in the insolvency proceedings.¹⁶⁷ As we have seen, a security interest may be unperfected if there is a mistake in the financing statement, and so the liquidator will want to go through SP's financing statement with a fine-tooth comb checking for potentially invalidating mistakes. This weapon would not be available to the liquidator if the s 164 test was a subjective one because then the liquidator would have to prove that they themselves were misled by the mistake or, alternatively, find someone else who was and it is unlikely that they would be able to satisfy either of these requirements.

3 Example 3

SP takes a security interest in Grantor's delivery truck. Grantor is a company and the truck is commercial property. SP misstates Grantor's ACN in the financing statement, but correctly states the truck's serial number.

A person searching against Grantor's correct details would not discover SP's security interest, given the error in the financing statement and the exact match nature of the Australian registration and search system. On the other hand, a

¹⁶⁵ *Fairbanx* (2010) 68 CBR (5th) 102, 110 (Feldman JA, Doherty and Cronke JJA agreeing).

¹⁶⁶ Cf *Saskatchewan PPSA* s 43(8), which provides that it is not a condition to a finding that a defect, irregularity, omission or error is seriously misleading that anyone was actually misled by the defect, irregularity, omission or error.

¹⁶⁷ *PPSA* s 267.

serial number search would retrieve the registration. The question is whether, in the circumstances, a searcher should be expected to conduct both types of search. The answer is provided by *PPSA* s 165(b), which makes it clear that if the collateral is not required to be described by serial number, an error in the grantor's details, such as the one in Example 3, will invalidate the registration. By implication, it makes no difference that a searcher could discover the registration by conducting a serial number search. The rationale is that since serial number disclosure is optional for commercial property, a serial number search may not turn up a result anyway. In other words, a nil return on a serial number search is ambiguous: it may mean either that there is no registered security interest, or that there is a registered security interest and the secured party opted not to include the serial number in the registration. In these circumstances, it would be unreasonable to expect a searcher to conduct a serial number search in addition to searching against the grantor's details.¹⁶⁸

4 Example 4

SP takes a security interest in Grantor's motor vehicle. Grantor holds the car for personal use and so the collateral is serial numbered consumer property. SP must include the serial number in the financing statement, but not Grantor's name. SP misstates the serial number.

Section 164(1)(a) applies because SP's mistake will make its registration undiscoverable and so it is a seriously misleading defect. Given that SP's registration is undiscoverable, s 164(1)(b), read in conjunction with s 165(a) will also apply.

5 Example 5

SP takes a security interest in all Grantor's present and after-acquired personal property. Due to a clerical misunderstanding, SP's financing statement describes the collateral as 'all present and after-acquired personal property except motor vehicles'.

Example 5 is a little different from the previous cases because here SP's mistake does not make the registration undiscoverable. Therefore the defect is not a seriously misleading one in the primary sense. However, it is still seriously misleading in the sense that it gives the wrong impression about the scope of SP's security interest and so it may lead third parties into a false sense of security, so to speak. The result is that, subject to s 164(3), the registration is ineffective. Section 164(3) provides as follows: 'A registration that describes

¹⁶⁸ See *Stevenson v GMAC Leaseco Ltd* (2003) 227 DLR (4th) 154, 188 [81] (Robertson JA, Turnbull and Deschênes JJA agreeing). This case addresses a similar issue in the context of the New Brunswick *Personal Property Security Act*, SNB 1993, c P-7.1, s 43. Cf *Re Lambert* (1994) 119 DLR (4th) 93, 104 [40]–[41] (Doherty JA for Grange, Doherty and Weiler JJA), holding that a reasonable searcher would conduct both types of search and that therefore a debtor's name error does not invalidate a registration if the financing statement correctly states the serial number. However, *Re Lambert* is distinguishable from the Australian situation because in that case, the collateral was consumer goods and so the serial number was mandatory. In Australia, if the collateral is serial numbered consumer goods, the financing statement will not include the grantor's details: see above Part III(D). Therefore, *Re Lambert* has no direct relevance for Australia.

particular collateral is not ineffective only because the registration is ineffective with respect to other collateral described in the registration.’ Applying this provision to Example 5, SP’s statement that its security interest does not cover SP’s vehicles is misleading, but the balance of the collateral description is not misleading. Therefore, SP’s error invalidates the financing statement, but only so far as the vehicles are concerned.

6 Example 6

SP takes a security interest in Grantor’s home computer. Grantor is an individual and the computer is for his personal use. This means that the financing statement must contain Grantor’s details, including his name and date of birth. SP correctly states Grantor’s name in the financing statement, but misstates his date of birth.

This is not a seriously misleading error in the sense of making SP’s security interest undiscoverable and it may not be a seriously misleading error in any other sense either, though to be sure we would need to know all the facts of the case.¹⁶⁹ For example, it might make a difference if there were two grantors on the register with the exact same first, middle and surnames as SP’s grantor so that, without accurate birth dates, searchers could not tell them apart. Even if this were the case, though, a court might still conclude that the error is not a seriously misleading one because a reasonable searcher would resolve the uncertainty by making a *PPSA* s 275 follow-up inquiry.

C Registration Amendments

1 General

A secured party can amend a registration, for example to change the registration period, to change the grantor’s details or to discharge a registration before the end of the registration period. The method for making amendments is to register a financing change statement.¹⁷⁰ The following is an example:

On day 1, SP1 takes a security interest in all Grantor’s present and after-acquired personal property. It registers a financing statement but it misstates Grantor’s details. On day 2, Grantor sells some superseded equipment to Buyer. On day 3, SP1 discovers the mistake in its financing statement and registers a financing change statement to correct it. On day 4, Grantor gives SP2 a security interest in its fleet of trucks and SP2 registers a financing statement.

¹⁶⁹ Cf *Personal Property Securities Act 1999* (NZ) s 172(c), which provides for register searches against the debtor’s name and date of birth. Since the debtor’s date of birth is a search point, the registration may be invalidated if the date is incorrectly stated.

¹⁷⁰ *PPSA* s 150(2). In the other *PPSA* jurisdictions, a financing change statement may be registered to amend the collateral description: see, eg, *Personal Property Securities Act 1999* (NZ) s 162; *Saskatchewan PPSA* s 44(3). But in Australia, while the *PPSA* itself does not foreclose this possibility, the system has been designed not to allow amendment of a collateral class. So, for example, if the financing statement discloses the collateral as ‘all present and after-acquired personal property except [insert exception]’ and the secured party wants to delete the exception, this can only be done by registering a new financing statement.

SP1's security interest was unperfected on day 2, when Grantor sold the equipment to Buyer, so Buyer will take the equipment free of SP1's security interest.¹⁷¹ On the other hand, SP1's security interest is perfected by the time SP2 arrives on the scene at day 4, so SP1 will have priority over SP2 under the first to register rule in *PPSA* s 55(4).

A financing change statement must be registered before the original registration lapses. For example:

SP registers a financing statement that specifies a registration period of 5 years. At the end of year 4, it decides to extend the registration period to 7 years.

SP can extend its registration by registering a financing change statement. But assume that SP waits till the end of year 5 before making the change. Now SP cannot register a financing change statement because there is no current financing statement to change. Instead, SP will have to start again, registering a new financing statement with a registration period of 2 years. One disadvantage of doing things this way is that SP's priority time for the purpose of the *PPSA* s 55 priority rules will be pushed back to the date of its new registration, whereas if SP had registered a financing change statement while the original registration period was still current, it would have retained the original registration date as its priority time.¹⁷² Additionally, SP's security interest will be unperfected from the date its original registration ends to the date it registers a new financing statement and it may be at risk if a third party acquires an interest in the collateral before SP's new registration.

2 *Transfer of Collateral*

Consider the following example:

SP1 has a security interest in Grantor's printing press perfected by registration. Grantor transfers its interest in the printing press to T1 with SP1's consent. In other words, T1 agrees to acquire the printing press subject to SP1's security interest and so T1 steps into Grantor's shoes and takes over the debt owing to SP1.

The statute requires SP1 to amend its registration to record the fact that T1 has taken over from Grantor.¹⁷³ The reason is that the transfer affects the discoverability of SP1's security interest. Assume that T1 later negotiates to sell the printing press to T2 without disclosing SP1's security interest. T2's register search, if any, is likely to be against T1's grantor details. But if SP1 has not registered a financing change statement, the search will not return SP1's registration.

PPSA s 34 is the governing provision. It implies that SP1's registration becomes ineffective when Grantor transfers the printing press to T1, but provides

¹⁷¹ *PPSA* s 43(1).

¹⁷² *Ibid* s 55(4) provides that priority between competing security interests is determined by the order of their priority times. Section 55(5) defines 'priority time', in relevant part, as meaning the date of registration.

¹⁷³ *Ibid* s 34.

that SP1's security interest is temporarily perfected for a period of 24 months from the date of the transfer.¹⁷⁴ However, if another security interest attaches to the collateral at or after the time of the transfer, SP1's grace period reduces to five business days after the transfer.¹⁷⁵ The purpose of this concession is to give SP1 time to amend its registration, while at the same time limiting the potential prejudice to searchers who, until SP1 amends its registration, may have no means of discovering SP1's security interest. The temporary perfection rule means that, provided SP1 amends its registration during the grace period, it will be continuously perfected from the date of its first registration and so its priority position is protected relative to any competing security interest in the collateral. Assume, for example, that SP1's original registration date is day 1. The transfer from Grantor to T1 takes place on day 2. T1 gives SP2 a security interest in the printing press and SP2 registers a financing statement on day 3. SP1 registers a financing change statement on day 4, which is within 5 business days of day 2. SP1's security interest is continuously perfected from day 1: it was initially perfected by registration on day 1, it was temporarily perfected from day 2 to day 3 and it was perfected by registration from day 3 onwards. On these facts, SP1 has priority over SP2. The governing provision is *PPSA* s 67, which deals with priority of security interests in transferred collateral. It provides that SP1 has priority over SP2 if SP1's security interest was perfected immediately before Grantor transferred the collateral to T1 and has remained continuously perfected thereafter.¹⁷⁶

On the other hand, if SP1 fails to amend its registration within the grace period, its security interest will become unperfected at the end of the grace period and so SP1 will not have the benefit of the priority rule in *PPSA* s 67.¹⁷⁷ Assume, for example, that SP1's original registration date is day 1. The transfer from Grantor to T1 takes place on day 2. T1 gives SP2 a security interest in the printing press and SP2 registers a financing statement on day 3. Day 7 is the last of the five business days after day 2. SP1 registers a financing change statement on day 10. On these facts, SP1's security interest is not continuously perfected from day 1: it is originally perfected by registration on day 1, it is temporarily perfected from day 2 to day 7, it is unperfected from day 8 to day 10 and it is

¹⁷⁴ *Ibid* s 34(1)(a).

¹⁷⁵ *Ibid* s 34(1)(c). Cf *Saskatchewan PPSA* s 51(1), which provides for a period of 15 days after the transfer.

¹⁷⁶ Now assume that SP1's original registration date is day 1. The transfer from Grantor to T1 takes place on day 2. On day 3, T1 sells the printing press to T2 outside the ordinary course of T1's business and without SP1's knowledge or consent. SP1 registers a financing change statement on day 4, which is within five business days of day 2. As in the example in the text, SP1's security interest is continuously perfected from day 1: it was initially perfected by registration on day 1, it was temporarily perfected from day 2 to day 3 and it was perfected by registration from day 3 onwards. Nevertheless, even though SP1's security interest was perfected on day 3, the date of T1's sale to T2, T2 takes title to the printing press free of SP1's security interest. The governing provision is *PPSA* s 52, which provides that, as a general rule, a buyer of goods for new value takes the goods free of any security interest that is temporarily perfected.

¹⁷⁷ *PPSA* s 34(2).

perfected again by registration thereafter. Consequently, *PPSA* s 67 does not apply and, subject to *PPSA* s 68, SP2 has priority over SP1.¹⁷⁸

Returning to the original example, assume now that Grantor sells the printing press to T1 *without* SP1's consent. In this case, *PPSA* s 34 provides that SP1's security interest is temporarily perfected for 24 months from the date of the transfer, subject to the qualification that, if another security interest attaches to the collateral at or after before the time of the transfer, SP1's grace period reduces to five business days *after SP1 acquired actual or constructive knowledge of the transfer and its details*. Accordingly, whether or not SP1 consented to the transfer, SP1 notionally has 24 months from the date of the transfer to amend its registration unless a third party acquires a competing security interest in the meantime, in which case the grace period reduces to five business days. However, since SP1 is at risk if a competing security interest does materialise, it has a strong incentive to amend its registration within five business days of learning about the transfer.¹⁷⁹ It follows that s 34 is not as generous to third parties, or as prejudicial to searchers, as it seems at first sight. Section 34 seems unnecessarily complex in this respect: if the practical effect of the provision is that SP1 must register a financing change statement within five business days after the date of the collateral transfer or the date SP1 finds out about the transfer, as the case may be, the provision would be much easier to follow if the drafters had simply made the grace period five business days to begin with. The reader's difficulties are compounded by the complex interaction between s 34 and the priority rules in ss 52 and 67. It is impossible to understand the full implications of s 34 without working through its relationship with these other provisions, and neither the statute nor the Explanatory Memorandum provides a clear indication of the relevant connections.

3 *Change in Grantor's Details and Other Particulars*

Consider the following case:

SP takes a security interest in Grantor's computer and registers a financing statement correctly recording Grantor's married name, which is the name on her driver's licence. Twelve months later, and while SP's registration is still current, Grantor renews her driver's licence, but reverts to her maiden name.

SP must register a financing change statement because otherwise SP's registration will be unsearchable by anyone relying on Grantor's new driver's licence.

¹⁷⁸ Now assume that SP1's original registration date is day 1. The transfer from Grantor to T1 takes place on day 2. On day 3, T1 sells the printing press to T2 outside the ordinary course of T1's business and without SP1's knowledge or consent. SP1 registers a financing change statement on day 10, which is more than 5 business days, but less than 24 months, after day 2. On these facts, SP1's temporary perfection does not time out on day 7 because the shorter grace period is only triggered if *another security interest* attaches to the collateral. It follows that SP1's security interest was continuously perfected at all relevant times. Nevertheless, *PPSA* s 52 applies and T2 takes title to the printing press free of SP1's security interest.

¹⁷⁹ SP1 is also at risk of a resale by T1 to T2 during the period that its security interest is temporarily perfected: *PPSA* s 52. Even though a resale by T1 to T2 does not trigger the shorter s 34 grace period, s 52 gives SP1 an added incentive to amend its original registration quickly in order to keep the period of temporary perfection as short as possible.

The governing provision is *PPSA* s 166, which preserves the effectiveness of SP's registration for five years from the date of Grantor's name change or five days after SP finds out about the change or should have known about it.¹⁸⁰ Section 166 applies not just to name changes, but to any change that affects the discoverability of a registration: for example, if the grantor is a company and its ABN changes, or if the collateral is serial numbered consumer property and the serial number changes.

As we saw above in Part III, the registration requirements vary depending on whether the collateral is commercial property or consumer property. For example, the financing statement must disclose whether the collateral is consumer property or commercial property. Furthermore, if the collateral is serial numbered consumer property the financing statement must disclose the serial number but not the grantor's details, whereas if the collateral is commercial property (whether serial numbered or not) the financing statement must disclose the grantor's details.¹⁸¹ 'Consumer property' means personal property held by an individual, other than personal property held in the course or furtherance, to any degree, of carrying on an enterprise to which an ABN has been allocated; 'commercial property' means personal property other than consumer property.¹⁸² The implication is that, at least in the case of common household items (such as motor vehicles, home computers or furniture), the secured party will need to confirm, before registration, how the grantor is, or is planning to, use the collateral. Furthermore, the grantor's use of the collateral may change over time and this may have implications for the secured party's registration. Consider the following example:

On day 1, SP makes a loan to Grantor to finance the purchase of a car which Grantor plans to use exclusively for non-commercial purposes. SP takes a security interest in the car and registers a financing statement on the basis that the car is consumer property. Grantor runs a business to which an ABN has been allocated. On day 2, while the security agreement and SP's registration are still current, Grantor starts using the car for occasional business trips.

On day 1, the car is consumer property and so SP must comply with the registration requirements for consumer property. But on day 2 the car ceases to be consumer property and, given the different registration requirements for commercial property, SP's financing statement no longer complies with the statute. Does this mean that SP's registration is now invalid? This is another case where s 166 applies: the effect of the provision here is that, despite the emergence of the registration defect on day 2, SP's registration remains valid for five years, unless SP discovers the new facts, in which case it has five days to register a

¹⁸⁰ This is equivalent to temporary perfection. But s 166 does not describe it as such. One consequence is that the transferee protection rule in *PPSA* s 52 does not apply in a case where SP's security interest is perfected by virtue of s 166.

¹⁸¹ *Ibid* s 153.

¹⁸² *Ibid* s 10 (definitions of 'consumer property' and 'commercial property').

financing change statement to make its registration comply with the requirements for commercial property.¹⁸³

Assume SP1 holds a security interest in Grantor's yacht perfected by registration. SP1 assigns its security interest to SP2. At this point, SP2 takes over as the secured party and SP1 drops out of the picture. Does the financing statement have to be amended? The governing provision is s 162, which provides that the parties *may* amend the registration. The amendment is optional because a change in the secured party's details does not affect the discoverability of the registration; unlike the grantor's details, the secured party's details are not a search point. The main reason why the parties might want to amend the registration, even though they are not obliged to, is to make SP2 the party of record so that searchers' follow-up inquiries under s 275 will be directed to SP2, rather than SP1.

V CONCLUSION

The new *PPSA* registration provisions are a substantial improvement on previous Australian law in numerous respects. First, there is now only one register for security interests in personal property and it is comprehensive in scope; all security interests are registrable under the new system without regard to the form of the security agreement, the nature of the collateral or whether or not the debtor is incorporated. Secondly, the register is a national one and this avoids the need for multiple registrations and searches, which is a characteristic of state and territory-based registration systems. Thirdly, the register is fully computerised, a feature which facilitates direct user access to the register database and avoids the need for transcription of information from registration applications to the register and from the register to search certificates, in contrast to paper-based registration systems. Fourthly, whereas many of the older registration statutes required the secured party to lodge a copy of the security agreement, the *PPSA* register is based on a notice filing system. Notice filing is easier and cheaper than document filing. In conjunction with the first to register priority rule, notice filing also opens the way for a secured party to reserve its priority position by registering a financing statement before committing itself to the loan. Finally, the new system maximises the utility of the register by providing for registration and search not only against the grantor's details, but also against the collateral serial number (where feasible).

The Australian legislation has a number of innovative features that will certainly attract interest and debate among secured transactions lawmakers and scholars in other parts of the world. From a Canadian and United States perspective, first and foremost among these is the Australian achievement in shifting both the register and the statute from the state to the federal level. Other innovations likely to intrigue international observers include the Australian approach to security interests in consumer motor vehicles, which allows for registration and search against serial number but not grantor's details (debtor's name); in the case

¹⁸³ *Ibid* s 166(2).

of security interests given by a corporate grantor, the requirement for registration and search by reference to the grantor's company number, rather than its name; and Australia's reliance on the *AML-CTF Act* customer identification requirements and driver's licences as primary sources of an individual grantor's name for registration and search purposes.

There are some flaws in the Australian *PPSA* at the drafting level. Specific examples discussed in this article include s 34 (dealing with registration amendments following a transfer of the collateral), s 151 (imposing restrictions on advance registrations) and the duplication between ss 164 and 165 (the invalidating error provisions). No doubt other problems will emerge as time goes by. There is provision for a review of the legislation three years after the commencement date,¹⁸⁴ which should provide an opportunity to correct mistakes and make improvements based on experience gained during the early years of this major new statutory development.

¹⁸⁴ *Ibid* s 343.