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Report No. 8

A Personal Property Securities Act for New Zealand

April 1989
Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. Its role is also to advise on ways in which the law can be made as understandable and accessible as practicable.

The Commissioners are:

The Rt Hon Sir Owen Woodhouse, KBE, DSC—President
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26 April 1989

Dear Minister,

I am pleased to submit to you Report No 8 of the Law Commission, on a new Personal Property Securities Act for New Zealand.

This report arises directly from your reference to us concerning legislation to replace the Companies Act 1955. Preliminary consultations satisfied us that replacement of Part IV of that Act (which deals with registration of charges) had to be considered in a wider context; the longstanding and widespread commercial and legal concern about the unsatisfactory state of our laws relating to chattel securities was emphasised again and again. These soundings, confirmed by the responses to our discussion papers, NZLC PP5, on Company Law, and NZLC PP6, on the Reform of Personal Property Security Law, led us to develop draft legislation.

The present document is basically a report to the Law Commission by a committee of specialists (which was established by, and worked closely with, the Law Commission) with endorsement by the Commission of their report and a recommendation for enactment of legislation in the terms proposed.

You may agree that, ideally, the new legislation would best be introduced in Parliament as part of a Companies and Commercial Law Reform Bill. This would enable the proposals on personal property securities to be considered in conjunction with the further proposals contained in our imminent Report No 9, on a new Companies Act. Together they seek to reform in a coordinated way an area of the law which underpins most commercial enterprise.

Yours sincerely

Owen Woodhouse
President

The Right Honourable Geoffrey Palmer, MP
Deputy Prime Minister and Minister of Justice

REPORT OF THE LAW COMMISSION

1 In this brief report, which prefaces and endorses a detailed report from a committee of specialists, the Law Commission recommends that a new Personal Property Securities Act be enacted in place of Part IV of the Companies Act 1955, and the whole of the Chattels Transfer Act 1924. That recommendation and this report is an inherent part of our response to the reference from the Minister of Justice to advise on the form and content of legislation to replace the Companies Act 1955. The balance of our response to that reference will be contained in our imminent Report No 9, on a new Companies Act for New Zealand.

2 Personal property (all kinds of property other than interests in land) comes in many different forms—often movable (for example, motor vehicles) and sometimes intangible (for example, patents)—and there are also many forms of interest in property which provide a lender with security in relation to a debt or other obligation (for example, a mortgage). The law provides in various ways for the recognition and protection of security interests in such property, but the overall coverage is inconsistent and incomplete—to the extent that there has been little dispute for a generation that the New Zealand law in this area is a 'quagmire'. The Commission is well satisfied that the report from its Advisory Committee on personal property securities provides the basis for early legislative reform of this difficult, neglected but indispensable area of commercial law.

3 The Commission's involvement in reform of this area of the law stems primarily from the Minister of Justice's request for a review of the Companies Act 1955 (Part IV of which deals with security interests created by companies). The need for our involvement has been reinforced both by the weight of comments and submissions

made to the Commission seeking comprehensive reform of chattel securities law, and by our general statutory responsibility to clarify the law and make it 'as understandable and accessible as practicable' (Law Commission Act 1985, section 5).

4 In the Foreword to our earlier Preliminary Paper No 6, *Reform of Personal Property Security Law,* published in May 1988, the Commission endorsed the central thrusts of the report by Professor John Farrar and Mr Mark O'Regan, and concluded that

a) The present law is complex, uncertain, anomalous, and inflexible;

b) There is an overwhelming case for reforms which will result in a comprehensive system for appropriate legal recognition and ranking of the various rights and interests in personal property—a system that is easily understood, efficient, and cheap; and

c) The next stage in the reform process is the preparation of draft legislation—based on contemporary North American models with appropriate adaptations for New Zealand conditions—to replace both Part IV of the Companies Act 1955 and the Chattels Transfer Act 1924.

5 In accordance with those conclusions, the Commission proceeded to establish the Advisory Committee. All the members of the Committee are widely experienced and expert in their professions with great demands upon their time, but they have been ungrudging in making their time available (not least for a series of weekend meetings in Wellington) to advance this project. The Commission is grateful indeed to the members of the Committee for their generous contribution of effort and expertise.

6 The commitment of the Advisory Committee to the project is in part indicative of the need for reform in this area, and of current circumstances favourable to comprehensive and coherent reform. Prominent among those circumstances are advances in information technology, experience with reform regimes in various Canadian jurisdictions, and the opportunity provided by a comprehensive review of the Companies Act 1955.

7 The Advisory Committee's report is essentially self-explanatory, although it should be read in conjunction with the more general discussion of the issues in Preliminary Paper No 6. It is, however,

appropriate to say something of two issues on which members of the Committee were not unanimous. The first was whether or not holders of security interests which were not registered under a new regime should lose priority and rank as mere unsecured creditors in the event of the insolvency of the debtor. There are policy arguments, and statutory precedents, for each of the alternative answers. The draft Personal Property Securities Act included in the report does not provide for the invalidity of unregistered security interests in the event of insolvency, and the final answer must await a policy decision in the context of an overall review of insolvency laws. Corporate insolvency will be addressed to some extent in the Commission's report on a new Companies Act, but this particular issue falls within a wider review of general insolvency law which currently rests with the Department of Justice.

8 The second issue on which the members of the Advisory Committee were not unanimous was whether or not standard remedies in relation to security interests should be provided for in the draft Act. Such provisions are a feature of the North American legislative models, but have been excluded from the draft Act contained in the present report. The Commission agrees that the questions of priorities (with which the report is primarily concerned) and remedies can be dealt with separately, welcomes the indication from the Advisory Committee that its members are available to assist in further work on the question of remedies, and proposes to work with the Ministry of Consumer Affairs and others to ensure that the topic is not neglected.

9 The essential feature of the recommended legislation is a registration system. The precise operation of such a system is a matter of administration but the Law Commission expects that the ease of access and modesty of fees associated with, for example, the Saskatchewan personal property security registry (and described in Preliminary Paper No 6) would be readily achievable in New Zealand.

10 It may also be noted that the proposed legislation would supersede the Motor Vehicle Securities Act 1989, assented to earlier this month, insofar as that Act provides for a system of registration of security interests relating to motor vehicles. The other policy objectives presently contained in that Act could be achieved by the additional provisions contained in Appendix C to the Advisory Committee's report.

11 Like the Advisory Committee, the Law Commission is conscious of the significance of business law harmonisation between Australia and New Zealand, but believes that the absence of Australian legislation corresponding to the draft Personal Property Securities Act is by no means a powerful argument against the enactment of such legislation in New Zealand. This matter is very effectively addressed both in the introduction to the Advisory Committee's report and in the summary of the consultative activity which is contained in Appendix B to the report.

12 In addition to developments in Canada, where one leading expert, Professor Richard McLaren of the University of Western Ontario Law Faculty, has advised us that 'it is entirely conceivable that by the end of 1990 we might have ten of the Canadian provinces within a new [personal property security] regime', the very recent report of Professor A L Diamond in the United Kingdom confirms that enactment of a Personal Property Securities Act in New Zealand would be entirely in line with developments in comparable countries. In his report, *A Review of Security Interests in Property*, which was commissioned by the United Kingdom Department of Trade and Industry, Professor Diamond concluded that

> There should be a new law on security interests to replace the multitude of different rules we now have. This would simplify the law enormously and speed up business transactions, and would ensure that like transactions are treated alike. There is a well-tried model in Canada and the United States on which the new law should be based. (Para 1.9)

13 The Commission fully agrees with Professor Diamond's conclusion and is able to take the matter further by commending the legislation contained in the Advisory Committee's report to the Minister of Justice for introduction and to Parliament for enactment. If introduced and enacted together with our virtually contemporaneous proposals for a new Companies Act, there would be a coherent package of commercial law reform unparalleled in New Zealand history.

REPORT OF ADVISORY COMMITTEE ON PERSONAL PROPERTY SECURITIES

Introduction

This report represents a second stage in the process of comprehensive reform of the law relating to personal property securities in New Zealand. It follows the report to the Law Commission by Professor John Farrar and Mark O'Regan published as Law Commission Preliminary Paper No 6, *Reform of Personal Property Security Law*, in May 1988 which recommended that a small committee of experts should be set up by the Law Commission to prepare draft legislation. The Commission acted on this recommendation by appointing the Advisory Committee on Personal Property Securities. The Committee was asked to complete its draft Bill by the end of 1988—partly because the Commission wished to see the draft Bill circulated for comment prior to the publication of the Commission's report on company law, and partly because of the possibility of the draft Bill being able to supersede the Motor Vehicle Securities Bill if it were available for introduction to the House before the Motor Vehicle Securities Bill became law. The Committee was also anxious to ensure that an alternative to the piecemeal reform being proposed in the Motor Vehicle Securities Bill should be available for consideration and met the Commission's deadline by presenting a draft of this report to the Commission, for circulation to interested parties, in early December 1988. Since then the Committee has received positive and helpful comments on the draft, there has been a concerted

effort to make the legislation more readable, and these have improved the final report.

THE CASE FOR REFORM

The need for a reform of the law relating to security over chattels and intangibles in New Zealand was outlined in Preliminary Paper No 6, and was accepted by the Commission in the foreword to that report. The view of Professor Farrar and Mr O'Regan that there was an urgent need for the famous 'quagmire' of chattel security in New Zealand to be drained was universally accepted by the members of the Committee and by all parties who accepted the Commission's invitation to comment on Preliminary Paper No 6. In summary (full details may be found in Preliminary Paper No 6), the law in New Zealand is currently characterised by a complete lack of coherence which means that the legal requirements for the granting of a security interest in personal property will depend on a number of features, including:

- the nature of the debtor—whether it is a company, incorporated society, or non-corporate body;
- the form of the documentation—whether it is expressed as being a charge, hire purchase agreement, lease, conditional sale, *Romalpa* provision or other legal form of security interest;
- the nature of the personal property over which security is given—this will be accentuated if the Motor Vehicle Securities Bill becomes law and a new regime peculiar to security interests in motor vehicles is superimposed on the existing complications.

THE NATURE OF REFORM

The Committee strongly believes that the best models for personal property security law reform in New Zealand are provided by Article 9 of the Uniform Commercial Code (which has been adopted in all 50 states of the United States) and the legislative regimes based on Article 9 which have been adopted in a number of Canadian provincial jurisdictions. In particular, the Committee believes that:

(1) the existence of Article 9 regimes in Canadian provinces and territories which have similar legal traditions to those of New Zealand, and which, prior to the adoption of an Article 9 regime, had similar laws relating to personal property security as those which now apply in New Zealand, makes the Article 9 model more accessible to New Zealand;

(2) the Article 9 system provides for a regime which is comprehensive and, for the great bulk of transactions, simple, and one which has been successful in reducing the complexity of financing transactions and facilitating the provision of credit in the jurisdictions in which it has been introduced;

(3) the availability of the necessary computer technology from a number of Canadian provincial jurisdictions in which Article 9 regimes have been adopted means that the introduction of the system in New Zealand should be able to be achieved with a minimum of cost and delay;

(4) the introduction of a Personal Property Securities Act would meet the needs of innocent purchasers of personal property who, under the current law, can be deprived of title to the property which they have purchased because of the existence of a security interest of which they were unaware and of which they were unable to become aware. This problem, as it relates to motor vehicles, is the major policy reason for the Motor Vehicle Securities Bill, but that Bill is restricted in its application to motor vehicles only, and it does not therefore address the problem in relation to other consumer items, nor does it overcome the acknowledged inadequacies of the current requirements of Part IV of the Companies Act, and the Chattels Transfer Act.

Some members of the Committee have seen Article 9 systems in operation, and spoken to lawyers acting for financiers, borrowers, and insolvency practitioners, bankers, consumer advocates, registry officials and law reform bodies in a number of jurisdictions where Article 9 regimes have been introduced. The experience gathered from those jurisdictions is that the system works extremely well in practice.

UNITED KINGDOM DEVELOPMENTS

Since Preliminary Paper No 6 was published the United Kingdom Department of Trade and Industry has published the report of its consultant, Professor Aubrey Diamond. The Diamond Report recommends the adoption of a Personal Property Securities Act based on the North American models, echoing an earlier recommendation by the Crowther Committee on Consumer Credit in 1971. Because of local problems involving Scots law there will however be a delay and in the meantime certain immediate reforms to company charges are recommended. The longer term goal of a Personal Property Securities Act is nevertheless clear. No other EEC country has such a system and it is envisaged that the United Kingdom would take the lead in this respect, earlier attempts to harmonise *Romalpa* clauses having failed to make progress.

HARMONISATION

The introduction of an Article 9 regime in New Zealand should provide a model for harmonisation of the various regimes which now apply in New Zealand and the Australian jurisdictions in a way which would enhance the standardisation of business laws and practices in New Zealand and Australia. At the moment, most Australian states have attempted limited reforms to their legislative equivalents of the Chattels Transfer Act 1924, but have retained the distinction between corporate and non-corporate security interests. There is, however, still a lack of consistency between the Australian states, and the adoption of the Motor Vehicle Securities Bill in New Zealand may increase the lack of harmonisation between New Zealand and Australia in this area of the law. Significantly, correspondence which the Committee has had with Australian commentators in this area indicates that there is an enthusiasm in Australia for the adoption of an Article 9 system amongst leading experts in the subject (see Appendix B).

The Committee believes that the introduction of a Personal Property Securities Act in New Zealand, based on the Canadian and United States models, and consistent with major reforms now being recommended in the United Kingdom by Professor Diamond, will mean that New Zealand will not only provide a lead in the adoption of standardised procedures between Australia and New Zealand but also play a significant role in harmonisation between the Australasian

jurisdictions and their major trading partners in Canada, the United States and the United Kingdom.

OVERVIEW OF SYSTEM

The system proposed in the draft Personal Property Securities Act, which to a large extent follows the Personal Property Security Bill introduced into the Parliament of British Columbia early in 1988, has the following general features:

(1) *Uniform rules*: The Bill creates a set of uniform rules for all forms of security interests, disregarding the distinctions which are drawn under current law between various types of security interests, such as chattel mortgages, leases, conditional sale agreements, '*Romalpa*' provisions, fixed and floating charges, floor plan agreements and so on. The fundamental concept is the concept of 'security interest' which includes all of the above legal relationships.

(2) *Perfection*: The Bill provides to a creditor with a security interest in personal property the means of perfecting that security interest. Thus, once a security interest has 'attached' to personal property (which occurs when a debtor having rights in personal property grants a security interest in that property to a creditor, and the creditor gives value) the creditor may perfect the security interest either by registration of a financing statement on a personal property security registry, or by taking possession of the property.

(3) *Registration*: While perfection by possession will be common where the collateral is, for example, a negotiable instrument, most secured transactions will now involve the registration of a financing statement, giving details of the security interest claimed by the creditor in the collateral. This will involve the establishment of a computerised, national register, on which details of all security interests in personal property will need to be entered. The current practice of registering copies of security agreements will be discontinued, but the register will give to a party conducting a search the necessary details of the security arrangement and the Bill will give rights to certain parties to obtain copies of security agreements from creditors in appropriate circumstances.

(4) *Priorities*: The Bill provides a comprehensive set of rules to resolve the priority conflicts between competing security interests. In most cases, priority will be determined by the 'first-to-file' rule under which the earlier registration affords the secured party priority in respect of after-acquired property and future advances without regard to knowledge of intervening interests. However, the Bill entitles purchase money creditors to obtain a super-priority over earlier registered floating security interests.

(5) *Transaction costs*: Because the system envisaged by the Bill provides for a much greater degree of certainty than that provided by the current law, and because the registration system will allow for the registration to be completed easily (without the involvement of lawyers in most cases) and for searches to be undertaken by telephone, the introduction of the system should see a considerable improvement in the efficiency of the provision of credit by financiers and a reduction in the transaction costs involved.

PRACTICAL IMPACT

The Committee believes that the introduction of a system along the lines of the draft Bill in New Zealand would lead to a simplification of the practical steps required by financers, as well as ensuring that different providers of finance are treated equally. Two important examples are:

Banking facilities: Under the current regime, many banks require sole traders to incorporate, so that the debtor is able to give the bank a debenture creating fixed and floating charges, which unnecessarily increases the number of companies on the register. Under an Article 9 system, sole traders can give security to a financier over their personal property, both present and future, in the same way as companies can. Further, the floating security anticipated by the statute is fixed from the outset in the sense that no additional act (such as 'crystallisation') is needed to render it effective against third parties; and

Romalpa provisions: Many suppliers of goods reserve title to the goods until they receive payment in full. This type of arrangement does not require the formalities which a mortgage or charge requires—in particular an agreement signed by the

debtor and registration of particulars of the arrangement on a public register. An Article 9 regime would treat such arrangements in the same way as other security arrangements. A supplier wishing to protect its position would therefore need to have the purchaser sign an agreement setting out the terms of future supplies and register a financing statement on the personal property security register. One registration is all that is required—it would not be necessary to register a new financing statement for each supply.

The Committee stresses that the draft Bill will not disrupt present security arrangements. The most significant change is that a floating security interest will become effective against third parties without the necessity of crystallisation. If it is enacted, creditors will need to make few if any changes in existing security documents such as finance leases, hire purchase contracts, chattel mortgages and debentures. However, as explained above, a supplier of goods on the basis of reservation of title until payment will have to obtain the signature of its customer on a document. For many creditors, the only consequence for contracting practice will be the necessity of registering a financing statement.

SCOPE OF THE REPORT

The draft Bill does not include provisions relating to the rights and remedies available to secured creditors holding security interests when a default occurs, as is done in both the United States and Canadian models. The omission of these provisions was due to some extent to the tight deadline facing the Committee, but was also based on a reluctance of some members of the Committee to adopt provisions similar to those appearing in, for example, the British Columbia Bill, given that some elements of those provisions were intended as consumer protection measures, and that comprehensive consumer protection legislation is already under consideration in New Zealand by the Ministry of Consumer Affairs. It is to be hoped that this legislation will govern the rights of secured creditors not only in respect of security interests in personal property, but also in respect of security interests over real property. In the view of the Committee, adoption of the draft Personal Property Securities Bill need not await completion of this further work as the questions of priority and remedies are distinct from each other and need not (perhaps should not) appear in the same Act. However, it was acknowledged that, if

no legislation relating to rights of secured creditors on default is enacted, then one of the objectives of the United States and Canadian models, the standardisation of creditor rights and remedies, will not be met by the draft Bill. Accordingly, the Committee intends to continue its work after the publication of this report with a view to formulating a comprehensive set of secured creditor remedies in conjunction with the work currently being undertaken by the Ministry of Consumer Affairs.

SPECIAL FEATURES

A number of special features of the draft Bill need to be highlighted. These are:

(1) *Consumer protection*: The draft Bill does not include specific consumer protection measures. The Committee believed that these should be incorporated in general consumer protection legislation. However, one of the objects of the legislation is the protection of innocent purchasers of personal property which is subject to a security interest, and the Bill achieves the objective of providing such purchasers with a means of ensuring that they are able to take good title when goods are purchased;

(2) *The effect of non-perfection*: The effect of clause 15 as it appears in the draft Bill is that a failure to perfect a security interest would not make it void against the Official Assignee or liquidator. In this respect the draft Bill follows the policy adopted by the Department of Justice in relation to the Motor Vehicle Securities Bill. Under the American and Canadian models, a security interest which has not been perfected is subordinated to the interest of a judgment creditor as well as the equivalent of the Official Assignee or company liquidator of the debtor. This part of the equivalent section in the draft Bill (clause 15) has been deleted inthe draft. The Committee was almost evenly divided on this issue and the commentary to section 15 therefore sets out in details the alternative arguments;

(3) *Motor Vehicle Securities Bill*: The draft Bill proceeds on the assumption that the adoption of a Personal Property Securities Act in New Zealand would render the Motor Vehicle Securities Bill unnecessary, and that this legislation would therefore not proceed or, if passed, be repealed. The Motor Vehicle

Securities Bill does, however, contain specific consumer protection measures relating to consumers purchasing motor vehicles from motor vehicle dealers, and these provisions could be incorporated into the draft Bill if it was considered necessary to do so. The Committee has prepared draft provisions for this purpose, and these are included in Appendix C to this report;

(4) *Securities over wool*: One of the features of the Chattels Transfer Act is the special provisions which it provides for the taking of securities over both crops and wool. Although the provisions relating to crops have been largely retained in the draft Bill (clause 30), no provisions have been added for securities over wool. This is partly due to the apparent inconsistency in the Chattels Transfer Act which provides for securities over sheep's wool but not similar fibre products from other animals, and the fact that the lack of restrictions in the Bill on the taking of security over future acquired property would mean that a secured party holding a security interest which is expressed as covering both the sheep and the wool from the sheep could claim an interest in wool from those sheep, even after the wool had been shorn. This largely obviates the need for a special regime for securities over wool;

(5) *Receiverships*: The absence of provisions relating to remedies also means that the provisions in the British Columbia model relating to receiverships do not appear in the Bill. The Committee has been informed by the Commission that provisions relating to the reform of the law of receivership will be included in the report on company law which is to be published by the Commission soon, and that it is likely that the Commission will recommend the adoption of a comprehensive regime for receiverships, whether or not the debtor is a corporate or non-corporate entity.

(6) *Statutory charges*: The draft Bill is intended to relate to security interests created by agreement and does not therefore apply to charges imposed by statute. However, the Committee would support any moves to require statutory authorities claiming security interests in personal property to register those interests under the Personal Property Securities Act as a protection to other creditors and third party purchasers.

COMPREHENSIVE REFORM

The Committee endorses the Commission's desire to see the adoption of a Personal Property Securities Act as part of a comprehensive reform of the Companies Act and the law of insolvency. The Committee believes that consistency between these reform initiatives is essential and that they should proceed together.

URGENCY

The Committee believes that the time for reform in this area of law is long overdue, that the merits of the draft Bill are clear, and that the draft Bill should be introduced to the House as part of, and at the same time as, the company law reform measures which are to be proposed by the Commission.

ACKNOWLEDGEMENTS

The Committee is grateful for assistance and support from many individuals and organisations and records its particular gratitude to Professor Ronald Cuming QC of Saskatoon, Canada. He is the author of both the Saskatchewan Act and the British Columbia Bill and the commentary thereon, and assisted the Committee during his New Zealand visit in 1988 and subsequently. His work in the development of the personal property security legislation in various Canadian jurisdictions provided a model from which much of the Committee's work drew its inspiration.

STRUCTURE OF REPORT

Based on the premise that the need for and direction of reform is clear (for the reasons elaborated in Preliminary Paper No 6, confirmed by the Commission's consultative process, and outlined above), the balance of this report comprises two parts: draft legislation, which (perhaps subject to polishing by Parliamentary Counsel) could be enacted to give New Zealand a new and immensely improved personal property securities regime; and then a section-by-section Commentary on the legislation. Further, three Appendices deal with the personnel and meetings of the Committee, the reactions of interested parties to an Article 9 based statute, and optional provisions which would provide further protection for purchasers of motor vehicles if that should be thought necessary.

March 1989

Peter Blanchard
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John Farrar
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PART I

A (Draft) Personal Property Securities Act

The draft legislation which follows gives effect to the Advisory Committee's policy conclusions on reform of the law relating to personal property securities. It should be read with the Commentary which appears in Part II of the report.

The Committee started by reviewing the draft British Columbia legislation (see Appendix 'L' to Law Commission Preliminary Paper No 6), and a number of provisions from that model remain more or less unchanged in the draft which follows. Nevertheless, quite substantial changes to that model are incorporated in the Committee's draft and these reflect existing New Zealand practice and laws (which do differ in some respects from those in the Canadian jurisdictions) as well as provisions borrowed from the United States Uniform Commercial Code, other Canadian models, and New Zealand legislation.

The provisions which are related to earlier models are generally identified in the text by the following abbreviations:

'BC PPSB'	—British Columbia Personal Property Security Bill 1988
'Ont PPSB'	—Ontario Personal Property Security Bill 1988
'Ont Bus Corp Act'	—Ontario Business Corporation Act
'US UCC'	—United States Uniform Commercial Code
'CTA'	—Chattels Transfer Act 1924 (NZ)
'PLA'	—Property Law Act 1952 (NZ)
'MVSB'	—Motor Vehicles Securities Bill 1988 (NZ)

Personal Property Securities Act ( )

PERSONAL PROPERTY SECURITIES ACT ( )

(Enacting words)

An Act to reform the law relating to security interests in personal property and to repeal and replace the Chattels Transfer Act 1924, and Part IV of the Companies Act 1955, and Part II of the Industrial and Provident Societies Amendment Act 1952.

1 Short title and commencement

(1) This Act may be cited as the Personal Property Securities Act 1989.

(2) This Act comes into force on 1 January 1990.

PART 1
INTERPRETATION AND APPLICATION

2 Interpretation

(1) In this Act unless the context otherwise requires

"accessions" means goods that are installed in or fixed to other goods;

"account receivable" means a monetary obligation not evidenced by chattel paper, or by a negotiable instrument or by a security, whether or not it has been earned by performance;

"cash proceeds" means proceeds in the form of money, cheques, drafts, and deposit accounts in deposit-taking institutions;

"chattel paper" means one or more writings that evidence both a monetary obligation and a security interest in, or a lease of, specific goods or specific goods and accessions;

"collateral" means personal property that is subject to a security interest;

"commercial consignment" means a transaction where

(a) a consignor delivers goods to a consignee for the purpose of sale, lease or other disposition on terms reserving an interest in the goods to the consignor; and

(b) both the consignor and the consignee deal in the ordinary course of business in goods of that description;

but does not include an agreement under which goods are delivered to an auctioneer for the purpose of sale;

"consumer goods" means goods that a debtor uses or acquires for use primarily for personal, family or household purposes;

"court" means a District Court;

"crops" means crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, but does not include trees;

"debtor" means

(a) a person who owes payment or performance of an obligation secured, whether or not that person owns or has other rights in the collateral; or

(b) a person who receives goods from another person under a commercial consignment; or

(c) a lessee under a lease for a term of more than one year; or

(d) a transferor of an account receivable or chattel paper; or

(e) in sections 9, 23, 27, 28(3), 28(6), 32 and 37, a transferee of or successor to the interest of a person referred to in paragraphs (a)—(d);

and if the person referred to in paragraph (a) and the owner of the collateral are not the same person, includes

(f) an owner of the collateral, where the term debtor is used in a provision of this Act dealing with the collateral;

(g) the obligor, where the term debtor is used in a provision of this Act dealing with the obligation; and

(h) both the owner and the obligor, where the context so requires;

"document of title" means a writing issued by or addressed to a bailee relating to goods in the bailee's possession that are identified or are fungible portions of an identified mass, and in which it is stated that the goods identified in it will be delivered to a named person or the transferee of a named person or to bearer or to the order of a named person;

"equipment" means goods that a debtor holds otherwise than as inventory or as consumer goods;

"financing change statement" means a writing in prescribed form relating to a registered financing statement;

"financing statement" means a writing in prescribed form relating to a security interest or proposed security interest and required or permitted to be registered under this Act and, where the context requires, includes a financing change statement and a security agreement registered under any other Act before the date this Act comes into force;

"future advance" means the payment of money, the provision of credit or the giving of value secured by a security interest, occurring after the security agreement has been executed, whether or not given pursuant to a commitment, and advances and expenditures made for the protection, maintenance, preservation or repair of the collateral;

"goods" means tangible personal property other than

(a) chattel paper; or

(b) a document of title to goods; or

(c) a negotiable instrument; or

(d) a security; or

(e) money;

and includes crops and the unborn young of animals, but does not include trees until they are severed or petroleum or minerals until they are extracted;

"intangible" means personal property other than

(a) goods; or

(b) chattel paper; or

(c) a document of title to goods; or

(d) a negotiable instrument; or

(e) a security; or

(f) money;

"inventory" means goods that

(a) are held by a person for sale or lease, or that have been leased; or

(b) are to be furnished or have been furnished under a contract of service; or

(c) are raw materials or work in progress; or

(d) are materials used or consumed in a business;

"land" includes all estates and interests, whether freehold or chattel, in real property and a licence to occupy any real property;

[New; cf NZ PLA]

"lease for a term of more than one year" means a lease or bailment of goods for more than one year and includes

(a) a lease for an indefinite term even though the lease is determinable by one or both of the parties not later than one year from the date of its execution; and

(b) a lease for a term of one year or less that is automatically renewable or that is renewable at the option of one of the parties or by agreement for one or more terms, the total of which may exceed one year; and

(c) a lease for a term of one year or less where the lessee retains uninterrupted or substantially uninterrupted possession of the goods leased for a period in excess of one year after the day the lessee first acquired possession of them, but the lease does not become a lease for a term of more than one year until the lessee's possession extends for more than one year

but does not include

(d) a lease by a lessor who is not regularly engaged in the business of leasing; or

(e) a lease of household furnishings or appliances as part of a lease of land where the use of the goods is incidental to the use and enjoyment of the land; or

(f) a lease of prescribed goods, regardless of the length of the term;

"money" means currency authorised as a medium of exchange by the law of New Zealand or of any other country;

"negotiable instrument" means

(a) a bill of exchange, note or cheque within the meaning of the Bills of Exchange Act 1908; or

(b) any other writing that evidences a right to payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment; or

(c) a letter of credit if the letter of credit states on it that it must be presented on claiming payment;

but does not include chattel paper, a document of title to goods or a security;

[cf "instrument" in BC PPSB]

"non-cash proceeds" means proceeds that are not cash proceeds;

"non-purchase money security interest" means a security interest which is not a purchase money security interest;

"other goods" means goods in which an accession is installed or to which it is fixed;

"prescribed" means prescribed by regulations made under this Act;

[New]

"prior law" means the law in force immediately before the coming into force of this Act;

"prior security interest" means a security interest created or provided for by a security agreement or other transaction that

(a) was made or entered into before this Act comes into force; and

(b) has not been terminated before this Act comes into force;

but does not include any such a security interest which is renewed, extended or consolidated by a security agreement or other transaction made or entered into after this Act comes into force.

[cf BC PPSB s 76]

"proceeds" means identifiable or traceable personal property in any form derived directly or indirectly from any dealing with the collateral or proceeds of the collateral, and includes

(a) a right to an insurance payment or any other payment as indemnity or compensation for loss or damage to the collateral or proceeds, and

(b) a payment made in total or partial discharge or redemption of an intangible, a negotiable instrument, a security or chattel paper;

"purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction creating an interest in property;

"purchase money security interest" means

(a) a security interest taken in collateral to the extent that it secures payment of all or part of the purchase price of the collateral; or

(b) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire the rights; or

(c) the interest of a lessor of goods under a lease for a term of more than one year; or

(d) the interest of a person who delivers goods to another person under a commercial consignment;

but does not include a transaction of sale by and lease back to the seller, and, for the purposes of this definition, "purchase price" and "value" include credit charges or interest payable for the purchase or loan credit;

"register" means the Register of Personal Property Securities set up under section 35;

"Registrar" means the Registrar of Personal Property Securities appointed under section 34, and includes any person to whom all or any of the Registrar"s functions, duties or powers have been delegated under section 36;

"registry" means the registry established under section 35 for the purpose of keeping the register;

"secured party" means a person who holds a security interest for the person's own benefit or for the benefit of any other person and includes a trustee where the holders of obligations issued, guaranteed or provided for under a security agreement are represented by a trustee as the holder of the security interest;

"security" means

(a) a share, stock, warrant, bond, debenture or similar document

(i) that is in a form recognised in the place in which it is issued or dealt with as evidence of a share, participation or other interest in property or an enterprise; or

(ii) that is evidence of an obligation of the issuer and that in the ordinary course of business is transferred by delivery together with any necessary endorsement, assignment, or registration in the records of the issuer or agent for the issuer, or compliance with any conditions restricting transfer; and

(b) an uncertificated security;

[cf BC PPSB]

"security agreement" means an agreement that creates or provides for a security interest, and, if the context permits, includes a writing that evidences a security agreement;

"security interest" has the meaning assigned to it by section 4 of this Act;

"security trust deed" means a deed or other document by the terms of which a person issues or guarantees or provides for the issue or guarantee of obligations secured by a security interest, and in which another person is appointed as trustee for the holders of the obligations;

[cf "trust indenture", BC PPSB]

"specific goods" means goods identified at the time an agreement in respect of those goods is made;

"the whole" means an accession together with the goods in which the accession is installed or to which it is fixed;

"uncertificated security" means a security which is not evidenced by a security certificate, and the issue and any transfer of which is registered or recorded in records maintained for that purpose by or on behalf of the issuer.

[cf Ont Bus Corp Act, s 53(1)(xa)]

"value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or liability;

"working day" means any day of the week other than

(a) Saturday, Sunday; or

(b) Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, Labour Day, and Waitangi Day; or

(c) A day in the period 25 December—2 January.

[cf Credit Contracts Act 1981]

(2) For the purposes of this Act, fungible goods and fungible securities are goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit, and includes unlike units to the extent that they are treated as equivalents under a security agreement.

(3) For the purposes of this Act, a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent.

(4) Unless otherwise provided in this Act, the determination whether goods are consumer goods, inventory or equipment for the purposes of a security interest is made as at the time when the security interest in the goods attaches.

(5) The fact that title to collateral may be in the secured party rather than the debtor does not affect the application of any provision of this Act relating to rights, obligations and remedies.

[cf UCC 9–202]

3 Notice and knowledge

(1) For the purposes of this Act

(a) a natural person "knows" or has "knowledge" of a fact in relation to a particular transaction when that person

(i) has actual knowledge of the fact; or

(ii) receives a notice stating the fact.

(b) an organisation knows or has knowledge of a fact in relation to a particular transaction when

(i) the person within the organisation who is conducting the transaction has actual knowledge of the fact; or

(ii) the organisation receives a notice stating the fact; or

(iii) the fact is communicated to the organisation in such a way that it would have been brought to the attention of the person conducting the transaction if the organisation had exercised reasonable care.

(c) a person receives a notice, demand or other document permitted or required to be given or made under this Act when

(i) it is delivered to that person or to the place of business through which the security agreement was made or to any other place held out by that person as the place for the receipt of such communications; or

(ii) it is delivered to any address at which it may be left or to which it may be posted or is given to any person to whom it may be given under subsections (4)—(10).

(d) a demand, notice or other document is made or given to a person

(i) by taking the steps reasonably required to inform the other person in the ordinary course, or

(ii) by delivering, leaving or posting it in accordance with subsections (4)—(10);

whether or not the person acquires actual knowledge of it;

(2) For the purposes of subsection 1(b)

(a) "organisation" includes the Crown, a body corporate, a government department or other governmental agency, a local authority, an estate, trust, partnership or other association of two or more persons having a joint or common interest, or any other legal or commercial entity;

(b) an organisation exercises reasonable care if it takes the steps reasonably required to ensure that significant information is brought to the attention of the person within the organisation conducting a particular transaction; but nothing in this paragraph requires a person acting on behalf of the organisation to communicate information unless such communication is part of that person's regular duties or unless the person has reason to know of the transaction and that the transaction would be materially affected by the information.

[cf US UCC, 1–201 (25)—(28)]

(3) For the purposes of this Act, registration of a financing statement is not constructive notice of knowledge of its existence or contents to third parties.

[cf BC PPSB s 47]

(4) Any demand, notice or other document required or authorised by this Act to be made or given to any person must be in writing, must, in the case of a demand made under section 13, contain an address for reply, and is sufficiently made or given if

(a) in the case of a secured party named in a financing statement or financing change statement, it is delivered to that person or is left at that person's address as specified in the financing statement or financing change statement or is posted in a letter addressed to that person by name at that address; or

(b) in the case of any other person, it is delivered to that person or is left at that person's usual or last known place of residence or business or at an address specified for that purpose in any document creating the security interest, or if it is posted in a letter addressed to that person by name at that place of residence or business or address.

(5) If the person is absent from New Zealand, the notice, demand or other document may be given to that person's agent in New Zealand. If the person is deceased, it may be given to that person's personal representative.

(6) If the person is absent from New Zealand and has no known agent in New Zealand, or is deceased and has no personal representative, or the identity or whereabouts of the person are not known, the demand, notice or other document may be made or given in such manner as is directed by an order of the court.

(7) If any such demand, notice or other document is posted to any person by registered letter it is deemed to have been delivered to that person on the fourth day after the day on which it was posted, and in proving the delivery it is sufficient to prove that the letter was properly addressed and posted.

(8) Notwithstanding anything in subsections (4), (5), (6) and (7), the court may in any case make an order directing the manner in which any demand, notice or other document is to be made or given, or dispensing with the making or giving thereof.

(9) Subsections (4)—(8) do not apply to notices or other documents given or served in any proceedings in any court.

(10) Subsections (4)—(8) do not apply to the giving of any notice where another procedure is specified in the security agreement for the giving of notices; and a notice given in accordance with that procedure is sufficiently given for the purposes of this Act.

[cf PLA, s 152(7)]

[cf MVSB, s 56]

(11) The provisions of section 37 concerning the effect of a defect, irregularity, omission or error in a financing statement or in the execution or registration of it apply, with any necessary modifications, to a defect, irregularity, omission or error in a notice, demand or other document required or authorised to be given or made to any person by this Act.

4 Meaning of security interest

(1) Subject to subsection (4), for the purposes of this Act the expression "security interest" means an interest in

(a) goods; or

(b) a document of title to goods; or

(c) a security; or

(d) chattel paper; or

(e) a negotiable instrument; or

(f) money; or

(g) an intangible;

created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to the form of the transaction and without regard to the identity of the person who has title to the collateral.

(2) For the purposes of this Act, the reservation of title by a secured party or a seller of goods notwithstanding shipment or delivery is limited in effect to the reservation of a security interest.

[cf UCC 1–201(37)]

(3) Without limiting the generality of subsections (1) and (2), the expression "security interest" includes

(a) a fixed charge; or

(b) a floating charge; or

(c) any interest created or provided for by

(i) a chattel mortgage; or

(ii) a conditional sale agreement (including an agreement to sell subject to retention of title); or

(iii) a hire purchase agreement; or

(iv) a pledge; or

(v) a security trust deed; or

(vi) a trust receipt; or

(vii) an assignment; or

(viii) a consignment; or

(ix) a lease; or

(x) a transfer of chattel paper;

which secures payment or performance of an obligation.

(4) The meaning of the expression "security interest" extends to include an interest created or provided for by

(a) a transfer of an account receivable or chattel paper; or

(b) a lease for a term of more than one year; or

(c) a commercial consignment;

even if the transfer, lease or consignment does not secure payment or performance of an obligation;

but does not extend to include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or the equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods.

(5) For the purposes of this Act the expression "security interest" does not include

(a) a lien, charge or other interest created by any other Act or rule of law; or

(b) any interest created or provided for by any of the following transactions:

(i) a transfer of an interest or claim in or under a contract of annuity or policy of insurance, except as provided by this Act with respect to proceeds and priorities in proceeds;

(ii) a transfer of an unearned right to payment under a contract to a person who is to perform the transferor's obligations under the contract;

(iii) the creation or transfer of an interest in land;

(iv) an assignment of accounts receivable made solely to facilitate the collection of the accounts receivable on behalf of the person making the assignment;

(v) an assignment for the general benefit of creditors of the person making the assignment;

(vi) a transfer of present or future wages, salary, pay, commission or any other compensation for labour or personal services;

(vii) a transfer of a right to damages in tort;

(viii) a transfer or assignment or mortgage or assignment of a mortgage of any ship or vessel or any share of any ship or vessel if at the time of execution the ship or vessel is registered or required to be registered under the provisions of Part XII of the Shipping and Seamen Act 1952;

(ix) a transfer of a right to payment that arises in connection with an interest in land, including a transfer of rental payments payable under a lease of or licence to occupy land unless the right to payment is evidenced by a security;

(x) a sale of accounts receivable or chattel paper as part of a sale of a business out of which they arose unless the vendor remains in apparent control of the business after the sale;

whether or not the interest would otherwise be a security interest.

[cf BC PPSB ss 2, 4]

(6) The registration of a financing statement relating to any interest in personal property does not create a presumption that the interest is a security interest for the purposes of this Act.

5 Application of Act

This Act applies to

(a) every security interest created or provided for after the coming into force of this Act; and

(b) every security interest created or provided for before the coming into force of this Act if it has been renewed, extended or consolidated after the coming into force of this Act; and

(c) every prior security interest to the extent provided in sections 56 and 57.

6 Conflict of laws

(1) The validity, perfection and effect of perfection or non-perfection of a security interest is governed by the law of New Zealand if

(a) at the time when the security interest attaches

(i) the collateral is situated in New Zealand, or

(ii) the collateral is situated out of New Zealand but the secured party has knowledge that it is intended to remove the collateral to New Zealand, or

(b) the security agreement provides that New Zealand law is its proper law, or

(c) in any other case New Zealand law applies.

(2) An intangible is deemed to be situated at the debtor's place of business, or at the debtor's chief executive office if the debtor has more than one place of business, or at the debtor's principal residence if the debtor has no place of business.

[New]

(3) Where a security interest to which New Zealand law does not apply under subsection (1) has attached to collateral before the collateral is removed to New Zealand, the security interest is deemed to be perfected by registration under section 19 if the secured party has complied with the requirements for enforceability of the security interest against third parties in the jurisdiction where the security interest attaches.

7 Act to bind the Crown

This Act binds the Crown.

[cf MVSB s 3]

PART 2
VALIDITY OF SECURITY AGREEMENTS AND RIGHTS OF PARTIES

8 Effectiveness of a security agreement

Except as otherwise provided by this Act, and subject to any other Act or rule of law or equity, a security agreement is effective according to its terms between the parties to it and is enforceable against third parties.

[cf BC PPSB s 9]

9 Writing requirements for security agreements

(1) A security interest is unenforceable against a third party unless

(a) the collateral is in the possession of the secured party; or

(b) the debtor has signed a security agreement that contains

(i) a description of the collateral by item or kind which is sufficient to make the collateral reasonably capable of identification; or

(ii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property; or

(iii) a statement that a security interest is taken in all of the debtor's present and after-acquired property except specified items or kinds of personal property.

(2) A description is not sufficient for the purposes of subsection (1)(b) if it describes the collateral as consumer goods or equipment without further reference to the kind of collateral.

(3) A description of collateral as inventory is sufficient for the purposes of subsection (1)(b) only while it is held by the debtor as inventory.

(4) Except as otherwise provided in this Act, a security interest in proceeds may be enforced against a third party even if the security agreement does not contain a description of the proceeds.

[cf BC PPSB s 10]

10 Attachment of security interests

(1) A security interest, including a security interest in the nature of a floating charge, attaches to collateral when

(a) value is given by the secured party; and

(b) the debtor has rights in the collateral; and,

except for the purpose of enforcing rights as between the parties

(c) the security interest is enforceable against third parties within the meaning of section 9;

unless the parties agree that it shall attach at a later time, in which case it attaches in accordance with the agreement of the parties.

(2) For the purposes of subsection (1), a reference in a security agreement to a floating charge is not an agreement that the security interest created by the floating charge attaches at a later time.

(3) For the purposes of subsection (1)(b) a debtor has rights in goods which are

(a) leased to the debtor; or

(b) consigned to the debtor; or

(c) sold to the debtor under a conditional sale agreement (including an agreement to sell subject to retention of title);

when the debtor obtains possession of the goods.

(4) For the purposes of subsection (1), a debtor has no rights in

(a) crops until they become growing crops;

(b) the young of animals until they are conceived;

(c) petroleum or minerals until they are extracted; or

(d) trees until they are severed.

[cf BC PPSB s 12]

11 Security interests in after-acquired property

Where a security agreement provides for a security interest in after-acquired property

(a) the security interest attaches without specific appropriation by the debtor; and

(b) the security interest does not attach to consumer goods, other than an accession, unless the security interest is a purchase money security interest or is a security interest in collateral obtained by the debtor as a replacement for collateral described in the security agreement.

[cf BC PPSB s 13]

12 Future advances

A security agreement may provide for future advances.

[cf BC PPSB s 14]

13 Secured parties to supply information

(1) For the purposes of this section "secured party" includes a person who was a secured party at any time within the preceding 12 months.

(2) The debtor, a judgment creditor, a person with a security interest in personal property of the debtor, or an authorised representative of any of them, may make a demand in accordance with section 3 requiring the secured party to send or make available 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, any one or more of the following items in its true and complete form as at the date specified in the demand:

(a) a copy of any security agreement creating or providing for a security interest held by the secured party in the personal property of the debtor;

(b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness;

(c) a written approval or correction of an itemised list of personal property indicating which items are collateral;

(d) a written approval or correction of the amount of the indebtedness and of the terms of payment of the indebtedness;

(e) the address and other relevant details identifying the place where the security agreement or a copy of it may be inspected.

(3) Paragraphs (1)(b), (c) and (d) do not apply to a secured party who is a trustee under a security trust deed; and, if the security trust deed and all amendments to it have been registered under the Securities Act 1978, the secured party may comply with paragraphs (1)(a) and (e) by sending or making available to the person making the demand advice that a copy of the security trust deed including all amendments to it may be inspected at the office of the Registrar of Companies at which the security trust deed is registered, identified by its address and any other relevant details.

[New]

(4) Where a demand is made in accordance with subsection (1)(c), the secured party may state that a security interest is claimed in all of the personal property of the debtor, or in all the property of the debtor other than a specified kind or item of property, or in all of a specified kind of property of the debtor, instead of approving or correcting the itemised list referred to in paragraph 1(c).

(5) On oral or written demand, the secured party must allow any person entitled under subsection (2) to receive a copy of the security agreement to inspect the security agreement or a copy of it during normal business hours at the place specified in accordance with paragraph (e) of that subsection.

(6) Where a secured party no longer has an interest in the obligation or property of the debtor that is the subject of the demand, the secured party must send or make available to the person making the demand the name and address of the secured party's successor in interest and the latest successor in interest, if known.

(7) The secured party may require payment of a fee of a prescribed amount before complying with any demand under subsection (2), but the debtor is entitled to a reply without charge once every 6 months.

(8) The secured party must comply with the demand not later than 7 working days after the day on which it is received and any required fee is paid, whichever is the later.

(9) If the secured party fails to comply with the demand, the court, taking account of any reasonable excuse of the secured party, may make an order

(a) requiring the secured party to comply with the demand; or

(b) except in the case of a demand made by the debtor, exempting the secured party or person receiving the demand from complying with the demand in whole or in part; or

(c) extending the time for compliance; or

(d) requiring the secured party to pay the reasonable legal costs of the person making the demand calculated on a solicitor and client basis; or

(e) requiring any person to take any other steps it considers necessary to ensure compliance with the demand.

(10) If without reasonable excuse the secured party fails to comply with any order made under subsection (9) the court may order that the security interest of the secured party with respect to which the demand was made is to be treated as unperfected or extinguished and that any related registration be discharged.

(11) Loss or damage as a result of reliance on information or a copy of a security agreement that is not in true and complete form supplied by a secured party in response to a demand under subsection (2) or an order of the court under subsection (9) is reasonably foreseeable loss or damage for the purposes of section 52.

PART 3
PERFECTION AND PRIORITIES

14 When security interests perfected

A security interest is perfected when

(a) it has attached; and

(b) all steps required for perfection under this Act have been completed;

regardless of the order in which the attachment and those other steps occur.

[cf BC PPSB s 19]

15 Subordination of certain security interests

Subject to section 24(3) and (4), a security interest in collateral is subordinated to an interest in the collateral acquired by a buyer or lessee under a transaction that is not a security agreement if the buyer or lessee

(a) gives value; and

(b) acquires the interest without knowledge of the security interest and before the security interest is perfected.

16 Protection of auctioneers, etc

If a security interest in collateral is unperfected the secured party is not entitled to any relief against a person selling or dealing with the collateral as an auctioneer or agent in the ordinary course of business and without knowledge of the security interest.

[New]

17 Continuity of perfection

(1) A security interest originally perfected under this Act by one method and later perfected by another method, without an intermediate period during which it is unperfected, is continuously perfected for the purposes of this Act.

(2) Where the secured party is a transferee, the security interest has the same priority as it had at the time of the transfer.

[cf BC PPSB s 23]

18 Perfection by possession of collateral

(1) Subject to compliance with section 14, possession of the collateral by the secured party, or on the secured party's behalf by another person, perfects a security interest in

(a) chattel paper; or

(b) goods; or

(c) a negotiable instrument; or

(d) a security; or

(e) a negotiable document of title to goods; or

(f) money;

but only while it is actually held as collateral.

(2) Where the collateral is an uncertificated security, a secured party is deemed to take possession of the security when a transfer of the security to the secured party has been registered or recorded in records maintained for that purpose by or on behalf of the issuer.

[cf BC PPSB s 24]

19 Perfection by registration

Subject to compliance with section 14, registration of a financing statement perfects a security interest.

[cf BC PPSB s 25]

20 Temporary perfection where collateral delivered or available to the debtor

(1) A security interest in a negotiable instrument or a security that has been perfected under section 18 remains temporarily perfected for the first 10 working days after the day on which the secured party delivers the collateral to the debtor for the purpose of

(a) sale or exchange; or

(b) presentation, collection or renewal; or

(c) registration of a transfer.

(2) A security interest in a negotiable document of title to goods or goods held by a bailee and not covered by a negotiable document of title that has been perfected under section 18 or 21 remains temporarily perfected for the first 10 working days after the day on which the secured party makes the collateral available to the debtor for the purpose of

(a) sale or exchange; or

(b) loading, unloading, storing, shipping or trans-shipping; or

(c) manufacturing, processing, packaging or otherwise dealing with the goods in preparation for their sale or exchange.

(3) If a security interest temporarily perfected under subsection (1) or (2) is not perfected by some other method before the expiration of the period referred to in those subsections

(a) it becomes unperfected at the expiration of that period; and

(b) the provisions of this Act relating to the perfection of a security interest apply to it as if the security interest had not been temporarily perfected under this section.

21 Perfection where goods in hands of bailee

(1) Subject to compliance with section 14, a security interest in goods in the hands of a bailee is perfected if

(a) the bailee has issued a document of title to the goods in the name of the secured party; or

(b) the secured party has perfected a security interest in a negotiable document of title to the goods; or

(c) the bailee holds the goods on behalf of the secured party; or

(d) a financing statement relating to the secured party's security interest in the goods has been registered.

(2) The issue of a negotiable document of title to goods does not prevent any other security interest in the goods from arising during the period when the negotiable document of title to the goods is outstanding.

(3) A perfected security interest in a negotiable document of title to goods has priority over a security interest in the goods perfected by another method after the issue of the negotiable document of title.

[cf BC PPSB s 27]

22 Security interests in proceeds

(1) Except as otherwise provided in this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest

(a) continues in the collateral unless the secured party expressly or impliedly authorises the dealing; and

(b) extends to the proceeds;

but, where the secured party enforces the security interest in both the collateral and the proceeds, the amount secured is limited to the market value of the collateral at the date of the dealing.

(2) A security interest in proceeds is continuously perfected for the purposes of this Act if the security interest in the original collateral is perfected by the registration of a financing statement which

(a) contains a description of the proceeds, if that description would be sufficient to perfect a security interest in original collateral of the same kind; or

(b) contains a description of the original collateral, if

(i) the proceeds are of a kind that are within that description; or

(ii) the proceeds are cash proceeds; or

(iii) the proceeds consist of a payment made in total or partial discharge or redemption of an intangible, a negotiable instrument, a security or chattel paper; or

(iv) the proceeds consist of a right to an insurance payment or any other payment as indemnity or compensation for loss or damage to the collateral or proceeds.

(3) If the security interest in the original collateral was perfected by a method other than one referred to in subsection (2), the security interest in the proceeds is continuously perfected for the purposes of this Act for the first 10 working days after the day on which the security interest attaches to the proceeds, but becomes unperfected at the expiration of that period.

[cf BC PPSB s 28]

23 Security interests in returned or repossessed goods

(1) Where a debtor sells or leases goods that are subject to a security interest under circumstances in which the buyer or lessee takes free of the security interest under sections 22 or 24, the security interest reattaches to the goods if

(a) the goods are returned to, seized or repossessed by the debtor or by a transferee of the chattel paper created by the sale or lease; and

(b) the obligation secured remains unpaid or unperformed.

(2) Any question concerning the perfection, by registration or otherwise, of a security interest in goods which reattaches under subsection (1), or the time of registration or perfection, shall be determined as if the goods had not been sold or leased if

(a) the security interest was perfected by registration at the time of the sale or lease; and

(b) the registration was effective at the time of the return, seizure or repossession.

(3) Where

(a) a sale or lease of goods gives rise to an account receivable or chattel paper; and

(b) the account receivable or chattel paper is transferred to a secured party; and

(c) the goods are returned, seized or repossessed;

the transferee of the account receivable or chattel paper has a security interest in the goods that attaches when the goods are returned, seized or repossesed.

(4) A security interest in goods arising under subsection (3) is temporarily perfected for the first 10 working days after the day on which the goods are returned, seized or repossessed if at the time of return, seizure or repossession the secured party had a perfected security interest in the account receivable or chattel paper.

(5) A security interest in goods temporarily perfected under subsection (4) becomes unperfected at the expiration of the period referred to in that subsection unless it is sooner perfected by registration or possession.

(6) A security interest in returned, seized or repossessed goods which

(a) reattaches under subsection (1); or

(b) is acquired by a transferee of chattel paper under subsection (3);

has priority over a perfected security interest in those goods acquired by a transferee of an account receivable under subsection (3).

(7) A security interest in returned, seized or repossessed goods acquired by a transferee of chattel paper under subsection (3) has priority over

(a) a security interest which reattaches under subsection (1); or

(b) a security interest in the goods as after-acquired property that attaches on the return, seizure or repossession of the goods

if the transferee is a purchaser whose interest in the chattel paper would have priority under section 25(5) over an interest in the chattel paper claimed by the holder of the security interest in the goods.

(8) A security interest in goods which

(a) is given by a buyer or lessee of goods that are subsequently returned, seized or repossessed; and

(b) attaches while the goods are in the possession of the buyer or the lessee or the debtor; and

(c) is perfected at the time of the return, seizure or repossession;

has priority over a security interest in the goods arising under this section.

24 Protection of buyer or lessee of goods

(1) For the purposes of this section,

(a) a buyer of goods includes a person who obtains vested rights in goods pursuant to a contract to which that person is a party, as a consequence of the goods becoming a fixture or accession to property in which the person has an interest;

(b) a seller or lessee sells or leases goods in the ordinary course of business if it is the business of the seller or lessee to sell or lease goods of that kind or nature; and

(c) goods sold in the ordinary course of business of the seller include goods supplied in the ordinary course of business as part of a contract for services and materials.

(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest in the goods given by the seller or lessor or arising under section 22 or 23, whether or not the buyer or lessee knows of the security interest, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

(3) A buyer or lessee of consumer goods takes free of a perfected or unperfected security interest in the goods if the buyer or lessee

(a) gave new value for the interest acquired; and

(b) bought or leased the goods without knowledge of the security interest.

(4) Subsection (3) does not apply to a security interest in consumer goods if the purchase price of goods bought or the market price of goods leased at the time of the commencement of the lease exceeds the amount specified in section 10(3) of the Disputes Tribunals Act 1988.

(5) A buyer or lessee of goods takes free of a security interest that is temporarily perfected under section 20(1) or (2), 22(3), 23(4) or 44 during any of the periods of 10 working days mentioned in those sections, if the buyer or lessee

(a) gave new value for the interest acquired; and

(b) bought or leased the goods without knowledge of the security interest.

(6) Where goods held as equipment are sold or leased other than in the ordinary course of business of the seller or lessor, the buyer or lessee

takes free of any security interest in the goods perfected under section 19, if the buyer or lessee

(a) bought or leased the goods without knowledge of the security interest; and

(b) the goods are of a kind that are required or permitted by regulations to be described in a financing statement by serial number and were not so described in the financing statement relating to the security interest.

(7) A sale or lease under subsection (2), (3), (5) or (6) may be for cash, in exchange for other property or on credit and includes the delivery of goods or documents of title to goods under a pre-existing contract of sale, but does not include a transfer as security for, or in total or partial satisfaction of, a money debt or past liability.

[cf BC PPSB s 30]

(8) Where under this section a buyer or lessee of goods takes free of a security interest the secured party, or if more than one, the secured party whose security interest has priority, is entitled to demand and give receipts for money payable under the contract of sale or the lease and to exercise all rights, powers and remedies of the seller or lessor as if the seller's or lessor's rights under the contract of sale or the lease had been assigned to the secured party.

[New]

(9) The buyer or lessee is not liable to the secured party for any money paid or any property delivered to any person in fulfillment or partial fulfillment of the obligations of the buyer or lessee under the contract of sale or the lease before the buyer or lessee has received notice of the secured party's entitlement under subsection (8).

[New]

25 Protection of transferees of negotiable and quasi-negotiable collateral

(1) A holder of money takes free of a security interest in the money perfected under section 19, or temporarily perfected under section 22(3) if the holder

(a) acquired the money without knowledge of the security interest; or

(b) is a holder for value, whether or not the holder knows of the security interest at the time of acquiring the money.

(2) The interest of a creditor who receives a negotiable instrument drawn or made by a debtor and delivered in payment of a debt owing to the creditor by that debtor has priority over a security interest in the negotiable instrument whether or not the creditor has knowledge of the security interest at the time of receipt.

(3) The interest of a purchaser of a negotiable instrument or a security has priority over a security interest in the negotiable instrument or security perfected under section 19 or temporarily perfected under section 20(1) or (2) or 22(3) if the purchaser

(a) gave value for the negotiable instrument or security; and

(b) acquired the negotiable instrument or security without knowledge of the security interest; and

(c) took possession of the negotiable instrument or security, or, in the case of an uncertificated security, caused a transfer of the security to the purchaser to be registered or recorded in records maintained for that purpose by or on behalf of the issuer.

(4) The interest of a holder of a negotiable document of title to goods has priority over a security interest in the document of title to goods that is perfected under section 19 or temporarily perfected under section 20(1) or (2) or 22(3), if the holder

(a) gave value for the document of title to goods; and

(b) acquired the document of title to goods without knowledge of the security interest.

(5) The interest of a purchaser of chattel paper who takes possession of the chattel paper in the ordinary course of business and for new value has priority over any security interest in the chattel paper

(a) that is perfected under section 19, if the purchaser does not know of the security interest at the time of taking possession of the chattel paper; or,

(b) that has attached to proceeds of inventory under section 22, whether or not the purchaser knows of the security interest at the time of taking possession of the chattel paper.

[cf BC PPSB s 31]

26 Priority of liens

A lien over goods with respect to which a person has furnished materials or services in the ordinary course of business has priority over a perfected security interest in the same goods unless

(a) the lien is given by an Act which provides that the lien does not have priority; or

(b) the security agreement contains a provision prohibiting the creation of a lien by the debtor and the person furnishing the materials or services does so with prior knowledge of that provision.

[cf BC PPSB s 32]

27 Purchase money security interests

(1) A purchase money security interest in collateral, other than intangibles or inventory, or, subject to section 22, its proceeds, has priority over any other security interest in the same collateral given by the same debtor if the purchase money security interest is perfected not later than 10 working days after the day on which the debtor, or another person at the request of the debtor, first obtains possession of the collateral.

(2) A purchase money security interest in an intangible or, subject to section 22, its proceeds, has priority over any other security interest in the same collateral given by the same debtor if the security interest in the intangible is perfected not later than 10 working days after the day on which it attaches to the intangible.

(3) Except as otherwise provided in subsection (5), a purchase money security interest in inventory or, subject to section 22, its proceeds, has priority over any other security interest in the same collateral given by the same debtor if, before the debtor or another person at the request of the debtor first obtains possession of the collateral,

(a) the purchase money security interest in the inventory is perfected; and

(b) the secured party gives to any other secured party who, at the date of registration of a financing statement in relation to the purchase money security interest, has registered a financing statement containing a description of collateral which includes the same item or is of the same kind, notice that the sender has acquired or expects to acquire a purchase money security interest in inventory of the debtor described by item or kind.

(4) A purchase money security interest in goods and, subject to section 22, their proceeds, taken by a seller, lessor or consignor of the collateral, has priority over any other purchase money security interest in the same collateral given by the same debtor if it is perfected

(a) in the case of inventory, at the date the debtor, or another person at the request of the debtor, first obtains possession of the collateral; or

(b) in the case of collateral other than inventory, not later than 10 working days after the day on which the debtor, or another person at the request of the debtor, first obtains possession of the collateral.

(5) A security interest in accounts receivable arising otherwise than as a security interest in proceeds has priority over a purchase money security interest in the accounts receivable as proceeds of inventory if

(a) the first-mentioned security interest is given for new value; and

(b) a financing statement relating to that security interest is registered before the purchase money security interest is perfected or a financing statement relating to it is registered.

(6) A purchase money security interest in collateral arising otherwise than as a purchase money security interest in proceeds has priority over a purchase money security interest in the same collateral as proceeds, if the first-mentioned purchase money security interest

(a) in the case of inventory, is perfected at the date the debtor, or another person at the request of the debtor, first obtains possession of the collateral; or

(b) in the case of collateral other than inventory, is perfected not later than 10 working days after the day on which the debtor, or another person at the request of the debtor, first obtains possession of the collateral.

(7) For the purposes of this section a debtor obtains possession of goods shipped to the debtor or to a person designated by the debtor only when the debtor, or another person at the request of the debtor, first obtains actual possession of the goods or of a document of title to the goods.

[cf BC PPSB s 34]

28 Residual priority rules

(1) Where this Act provides no other rule for determining priority among security interests in the same collateral

(a) priority among perfected security interests is determined by the order of

(i) registration; or

(ii) possession; or

(iii) temporary perfection under sections 20, 22, 23 or 44;

whichever first occurs in relation to a particular security interest;

(b) a perfected security interest has priority over an unperfected security interest;

(c) priority among unperfected security interests is determined by the order of attachment of the security interests.

(2) For the purposes of subsection (1),

(a) a continuously perfected security interest remains perfected by the method by which it was originally perfected; and

(b) subject to section 22, the time of registration, possession or perfection of a security interest in original collateral is also the time of registration, possession or perfection of a security interest in its proceeds; and

(c) a security interest has the same priority in respect of all advances, including future advances.

(3) For the purposes of subsections (1), (4), (5), and (6), a security interest in goods which are

(a) held by the debtor as equipment; and

(b) required or permitted by regulations to be described by serial number;

is not registered or perfected unless a financing statement is registered containing a description of the goods by serial number.

(4) Except as provided in subsection (5), the fact that the registration perfecting a security interest has ceased to be effective as a result of failure to renew the registration of a financing statement or the discharge of the registration without authorisation or in error does not affect the priority of the security interest if the secured party re-registers a financing statement in respect of the security interest not later than 20 working days after the day on which the registration ceases to be effective or is discharged.

(5) A competing perfected security interest has priority over a security interest in respect of which a financing statement is re-registered under subsection (4) to the extent that the competing security interest secures advances made or contracted for after the registration of the security interest ceases to be effective or is discharged and before the re-registration of the financing statement.

(6) Except as provided in subsection (5), a perfected security interest in collateral which is enforceable against a transferee of an interest in the collateral has priority over any other security interest granted by the transferee before the transfer except to the extent that the security interest granted by the transferee secures advances made or contracted for after the transfer and at a time when the security interest granted by the debtor is unperfected through the operation of section 44.

29 Security interests in fixtures

(1) Goods of a kind described in the First Schedule to this Act to which a security interest has attached remain goods for the purposes of this Act even if they are subsequently fixed to any land or building, and are removable by a secured party who becomes entitled to possession of them under a security agreement.

[New]

(2) A secured party who has a right to remove any goods fixed to any land or building must not remove them without first giving to the owner or other person for the time being in possession of the land or building not less than 10 working days notice of the secured party's intention to remove the goods.

[New]

(3) A secured party who has a right to remove goods from any land or building must exercise the right in a manner that causes no greater damage or injury to the land or building or other property situated on the land and that puts the occupier of the land or building to no greater inconvenience than is necessarily incidental to the removal of the goods.

[cf BC PPSB s 36(6)]

30 Security interests in crops

(1) Except as otherwise provided in this Act, a security interest in crops is a secured interest in the crops not only while growing, but afterwards when cut or separated from the soil, and whether stacked or stored on the land where the crops were grown or on any other land or premises.

[cf CTA, s 35]

(2) A security interest in crops does not prejudicially affect the rights of any lessor or mortgagee of any land on which the crops are growing,

unless and so far as the lessor or mortgagee has consented in writing to the creation of that security interest.

(3) A perfected security interest in crops is not extinguished or prejudicially affected by any subsequent sale, lease, or mortgage, or other encumbrance of or upon the land on which the crops are growing.

[cf CTA, s 37]

(4) No security interest in crops gives a security over crops that cannot in the ordinary course of husbandry be harvested within one year from the date of the execution of the security agreement creating the security interest.

[cf CTA, s 36]

(5) Subsections (1) and (3) of section 29 apply with all necessary modifications to the seizure and removal of growing crops from land.

[cf BC PPSB 37(5)]

31 Security interests in accessions

(1) Except as provided in this section, a security interest in goods that attaches before or at the time the goods become an accession has priority over a claim to the goods as an accession made by a person with an interest in the whole.

(2) The interest of any person to whom subsection (3) applies has priority over a security interest referred to in subsection (1) if the person enters into the transaction giving rise to that interest

(a) after the goods become an accession; and

(b) without knowledge of the security interest in the accession and before it is perfected.

(3) This subsection applies to

(a) a person who acquires for value an interest in the whole; or

(b) an assignee for value of the interest of a person with an interest in the whole at the time the goods become an accession; or

(c) a person with an earlier perfected security interest in the whole who,

(i) makes an advance under the security agreement, to the extent of the advance; or

(ii) acquires a right to retain the whole in satisfaction of the obligation secured.

(4) A security interest in the goods that attaches after the goods become an accession is postponed in priority to the interest of a person who

(a) has an interest in the other goods at the time the goods become an accession and

(i) has not consented to the security interest in the goods; and

(ii) has not disclaimed an interest in the accession; and

(iii) has not entered into an agreement under which another person is entitled to remove the accession; and

(iv) is otherwise entitled to prevent the debtor from removing the accession; or

(b) acquires an interest in the whole after the goods become an accession, without knowledge of the security interest in the accession and before it is perfected.

(5) A secured party who has a right to remove an accession from the whole must exercise the right in a manner that causes no greater damage or injury to the other goods or that puts the person in possession of the whole to no greater inconvenience than is necessarily incidental to the removal of the accession.

(6) A person, other than the debtor, who has an interest in the other goods at the time the goods subject to the security interest become an accession is entitled to reimbursement for any damage to that person's interest in the other goods caused during the removal of the accession, but is not entitled to reimbursement for diminution in the value of the other goods caused by the absence of the accession or by the necessity of its replacement.

(7) The person entitled to reimbursement under subsection (6) may refuse permission to remove the accession until the secured party has given adequate security for reimbursement.

(8) On the application of the secured party, the court may make an order

(a) determining the person entitled to reimbursement under this secton; or

(b) determining the amount and kind of security to be provided by the secured party; or

(c) prescribing the depository for the security; or

(d) dispensing with the need for the permission of any or all persons entitled to reimbursement under subsection (6).

(9) A person having an interest in the whole that has a lower priority than a security interest in the accession may retain the accession on payment to the secured party of the amount secured by the security interest in the accession.

(10) The secured party who has a right to remove the accession from the whole must give

(a) to each person who is known by the secured party to have an interest in the other goods or in the whole; and

(b) to each person who has registered a financing statement indexed in the name of the debtor and referring to the other goods or indexed according to the serial number of the other goods where the goods are required or permitted by regulations to be described in a financing statement by serial number;

a notice of the intention of the secured party to remove the accession.

(11) The notice referred to in subsection (10) must be given at least 10 working days before the removal of the accession and must contain

(a) the name and address of the secured party; and

(b) a description of the goods to be removed; and

(c) the amount required to satisfy the obligation secured by the security interest; and

(d) a description of the other goods; and

(e) a statement of intention to remove the accession unless the amount secured is paid on or before a specified date that is not less than 10 working days after the notice is given.

[cf BC PPSB s 72]

(12) On the application of a person entitled to receive a notice under subsection (10), the court may make an order postponing the removal of the accession.

[cf BC PPSB s 38]

32 Security interests in processed or commingled goods

(1) A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass.

(2) If more than one perfected security interest continues in the product or mass under subsection (1), the security interests rank equally

according to the ratio that the cost of the goods to which each interest originally attached bears to the cost of the total product or mass.

(3) A perfected purchase money security interest in goods that continues in the product or mass under subsection (1) has priority over

(a) a non-purchase money security interest in the goods that continues in the product or mass under subsection (1); or

(b) a non-purchase money security interest in the product or mass, other than as inventory, given by the same debtor; or

(c) a non-purchase money security interest in the product or mass as inventory given by the same debtor if, before the identity of the goods is lost in the product or mass, the secured party with the purchase money security interest in the product or mass gives to any secured party with a non-purchase money security interest in the product or mass who has registered a financing statement containing a description of collateral that includes the product or mass notice that the sender has acquired or expects to acquire a purchase money security interest in goods supplied to the debtor as inventory.

[cf Ontario PPSB, cl 37]

33 Postponement of priority of security interests

(1) A secured party may, in a security agreement or otherwise, postpone the priority of that party's security interest to any other interest.

(2) A postponement of priority is effective between the parties according to its terms and may be enforced by a third party if the third party is the person or one of a class of persons for whose benefit the agreement is intended.

[cf BC PPSB s 40]

PART 4
REGISTRATION

34 Appointment of Registrar

There shall be a Registrar of Personal Property Securities who shall be appointed under the State Sector Act 1988.

[cf MVSB, s 4]

35 Register of Personal Property Securities

The Registrar shall establish and maintain a register of security interests in personal property to be known as the Register of Personal Property Securities and for that purpose shall set up and operate a registry.

[cf MVSB, s 5]

36 Power of Registrar to delegate

(1) The Registrar may from time to time, in writing, delegate to any person all or any of the functions, duties, and powers exercisable by the Registrar under this Act, except this power of delegation.

(2) Subject to any general or special directions given or conditions attached by the Registrar, any person to whom any functions, duties, or powers are delegated under this section shall perform and may exercise those functions, duties, and powers in the same manner and with the same effect as if they had been conferred on that person directly by this section and not by delegation.

(3) Every person purporting to act pursuant to any delegation under this section is presumed to be acting in accordance with the terms of the delegation in the absence of proof to the contrary.

(4) Any delegation under this section may be made to a specified employee or to employees of a specified class, or may be made to the holder or holders for the time being of a specified office or class of offices.

(5) Every delegation under this section is revocable in writing at will, and no such delegation prevents the exercise of any function, duty, or power by the Registrar.

(6) Every delegation under this section, until revoked, continues in force according to its tenor even if the Registrar by whom it was made ceases to hold office.

[cf MVSB, s 55]

37 Registration of financing statements

(1) A financing statement may be submitted for registration at an office of the registry and the precise time of submission shall be recorded by the registry.

(2) Subject to compliance with section 42, the Registrar shall register every duly completed financing statement in the form in which it is submitted.

[New]

(3) Subject to compliance with section 42, registration of a duly completed financing statement is effective from the time it is submitted to an office of the registry.

(4) A financing statement may be registered before or after a security agreement is signed by the debtor.

(5) A financing statement may relate to one or more than one security agreement.

(6) The validity of the registration of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the execution or registration of it unless the defect, irregularity, omission or error is seriously misleading.

(7) Where collateral includes goods of a kind that are required or permitted by regulations to be described in a financing statement by serial number, the registration is invalid within the meaning of subsection (6) if the financing statement or the registration contains a seriously misleading defect, irregularity, omission or error either in the debtor"s name or in the serial number of the goods.

(8) A defect, irregularity, omission or error may be found to be seriously misleading, even if no one was actually misled by it.

(9) Failure to provide a description in a financing statement in relation to any item or kind of collateral does not affect the validity of the registration with respect to other items or kind of collateral.

(10) The secured party or any person named as secured party in a financing statement shall give to each person named as debtor in the statement, not later than 10 working days after the day on which it is submitted for registration, a copy of the statement, unless a person entitled to a copy has waived in writing the right to receive it.

[cf BC PPSB s 43]

38 Duration of, amendments to, and discharge of registrations

(1) Subject to any regulation made under section 53, a registration is effective for the period of time indicated in the financing statement by which the registration is effected or amended, unless it is sooner discharged.

(2) Subject to compliance with section 42, a registration may be renewed or amended or discharged or partially discharged by registering a financing change statement at any time before the original registration ceases to be effective, and the renewal, amendment, discharge or

partial discharge of the registration is effective from the time at which the duly completed financing change statement is submitted for registration at an office of the registry.

[cf BC PPSB s 44]

39 Transfers and variations of priority of security interests

(1) Where a secured party with a security interest in respect of which a financing statement has been registered transfers the interest or a part of it

(a) the transfer may be recorded by submitting a financing change statement for registration; and

(b) if a security interest in part only of the collateral is transferred, the financing change statement must contain a description of the collateral to which the transfer relates.

(2) Where a secured party transfers a security interest which is not perfected by registration, a financing statement may be registered in respect of the security interest naming the transferee as the secured party.

(3) A financing change statement recording a transfer of a security interest may be registered before or after the transfer.

(4) After registration of a financing change statement recording a transfer of a security interest, the transferee is the secured party for the purposes of this Part.

(5) Where two or more secured parties agree to vary the priority of any security interest in respect of which a financing statement has been or is to be registered, any secured party to whose security interest priority is conceded must register a financing change statement recording the agreed order of priorities and, if the duration of the agreement is shorter than the period for which the registration of the financing statement is effective, the duration of the agreement.

(6) Loss or damage as a result of reliance on a printed search result which did not disclose a change in the order of priorities of security interests is reasonably foreseeable loss or damage for the purposes of section 52.

[New; cf BC PPSB s 45]

40 Records of registry

(1) Subject to any regulation made under section 53 the Registrar may, for the purpose of registering a financing statement which has been

submitted for registration, process and record, by computer or otherwise, the information contained in the financing statement and any document containing the information so recorded shall be accepted for all purposes as if it were the original financing statement.

(2) Information in a registered financing statement or other registered document may be removed from the records of the registry only

(a) when the registration is no longer effective; or

(b) on the receipt of a financing change statement discharging or partially discharging the registration; or

(c) if the Registrar discharges or partially discharges the registration under section 43(7); or

(d) if the Registrar discharges or partially discharges a registration in accordance with an order of the court.

[cf BC PPSB s 46]

41 Register searches

(1) A person may, in the manner prescribed, request one or more of the following:

(a) a search of the register against the name of a debtor and the issue of the search result;

(b) a search of the register according to the serial number of goods of a kind that are required or permitted to be described by serial number in a financing statement and the issue of the search result;

(c) a search according to a registration number and the issue of the search result;

(d) a copy of any registered financing statement or other registered document.

(2) A printed search result or a copy of a financing statement or registered document that purports to be issued by the registry is receivable in evidence and for all other purposes as prima facie proof of its contents.

(3) The date and time of registration of a financing statement as shown on a printed search result issued under this section is prima facie proof of the date and time of registration of the financing statement.

[cf BC PPSB s 48]

42 Fees

Every person who submits a financing statement or other document for registration or requests a search of the register must pay the prescribed fee to the Registrar at the time of the submission or request or at such other time as the Registrar may decide.

[cf MVSB, s 18]

43 Duty to amend or discharge registrations

(1) For the purposes of this section,

"secured party" includes any person identified on a registered financing statement as a secured party;

"debtor" includes any person identified on a registered financing statement as a debtor.

(2) Where a registration relates exclusively to a security interest in consumer goods, the secured party must register a financing change statement discharging the registration not later than 20 working days after all obligations under the security agreement creating the security interest are performed, unless before the expiry of that period the registration ceases to be effective.

(3) The debtor or any person with an interest in property that falls within the description of the collateral in a registered financing statement may make a written demand to the secured party

(a) requiring that the registration be discharged if

(i) all of the obligations under the security agreement to which it relates have been performed; or

(ii) no security agreement exists between the secured party and the debtor;

or

(b) requiring that the registration be amended or discharged to reflect the terms of any agreement by which the secured party has agreed to release part or all of the collateral described in the financing statement; or

(c) requiring that the description of the collateral contained in the financing statement be amended to exclude items or kinds of property that are not collateral under a security agreement between the secured party and the debtor.

(4) Not later than 10 working days after the day on which the demand referred to in subsection (3) is given, the secured party must either

(a) register a financing change statement amending or discharging the registration; or

(b) apply to the court under subsection (8).

(5) If the secured party fails to register a financing change statement as required in subsection (4), the person who has made the demand may require the Registrar to give a notice to the secured party stating that the registration will be discharged or amended by the Registrar, in accordance with the demand, on the expiry of 20 working days after the day on which the Registrar gives the notice, unless in the meantime the secured party registers an order of a court maintaining the registration.

[cf BC PPSB s 50]

(6) Where a secured party to whom subsection (2) applies fails to comply with that subsection, the debtor or any person with an interest in the consumer goods referred to in that subsection may, without first making a demand to the secured party under subsection (3) and waiting for the response of the secured party under subsection (4), require the Registrar to give a notice to the secured party under subsection (5).

(7) If the secured party who has been given a notice under subsection (5) has not

(a) registered a financing change statement amending or discharging the registration as required in the demand made under subsection (3); or

(b) given notice to the Registrar of an application for a court order under subsection (8)

before the expiry of 20 working days after the day on which the notice was given, the Registrar shall amend or discharge the registration in accordance with the demand.

(8) On application by the secured party, the court may order that the registration

(a) be maintained or restored on any conditions and for any period of time no longer than the period for which the registration is effective under section 38(1); or

(b) be discharged or amended.

(9) Where a registered financing statement indicates that the security agreement creating or providing for the security interest is a security trust deed

(a) subsections (5), (7) and (8) do not apply; and

(b) if the secured party fails to amend or discharge the registration as required by subsection (4), the person making the demand under subsection (3) may apply to the court for an order directing that the registration be amended or discharged.

(10) No fee or expense shall be charged or reimbursed and no amount shall be accepted by a secured party for compliance with subsection (2) or a demand made under subsection (3).

(11) A secured party who without reasonable excuse fails to comply with subsection (2) or a demand made under subsection (3) is liable to pay to the person making the demand the reasonable legal costs of enforcing the demand calculated on a solicitor and client basis.

[New; cf BC PPSB s 50]

44 Transfer of debtor's interest in collateral or change of debtor's name

(1) Where a secured party gives prior consent to the transfer by the debtor of all or part of the debtor's interest in collateral which is subject to a security interest perfected under section 19, the secured party's security interest in the transferred collateral is postponed in priority

(a) to a security interest in the transferred collateral that is perfected in the period beginning on the 11th working day after the transfer and ending at the time at which the secured party submits for registration a financing change statement naming the transferee of the collateral as the new debtor or takes possession of the collateral, (whichever is the earlier); or

(b) to an interest in the transferred collateral, other than a security interest, that arises in the period referred to in paragraph (a); or

(c) to a security interest in the transferred collateral perfected in the first 10 working days after the day of the transfer, if, within that period, a financing change statement is not submitted for registration in respect of the security interest first mentioned in this subsection, naming the transferee of the collateral as the new debtor.

(2) Where, without the consent of the secured party, the debtor has transferred all or part of the debtor's interest in collateral which is subject

to a security interest perfected under section 19 and the secured party has knowledge of the information required to register a financing change statement showing the transferee as the new debtor, the secured party's security interest in the transferred collateral is postponed in priority

(a) to any other security interest in the transferred collateral that is perfected in the period beginning on the 11th working day after the day the secured party has knowledge of the information required to register a financing change statement and ending at the time at which the secured party submits for registration a financing change statement naming the transferee of the collateral as the new debtor or takes possession of the collateral, (whichever is the earlier); or

(b) to an interest in the transferred collateral, other than a security interest, that arises in the period referred to in paragraph (a); or

(c) to any other security interest in the transferred collateral perfected in the first 10 working days after the day on which the secured party has knowledge of the information required to register a financing change statement, if, within that period, a financing change statement is not submitted for registration in respect of the security interest first mentioned in this subsection, naming the transferee of the collateral as the new debtor.

(3) Where, following a transfer of an interest in collateral by the debtor in the circumstances referred to in subsection (2), there are one or more subsequent transfers of the collateral without the consent of the secured party before the secured party learns the name of the transferee who has possession of the collateral, that subsection applies as from the time at which the secured party acquires knowledge of the information required to register a financing change statement showing a subsequent transferee as the new debtor, without any need to register a financing change statement with respect to any intermediate transferee.

(4) Where in respect of a security interest perfected under section 19 there has been a change in the name of the debtor and the secured party has knowledge of the new name of the debtor, the secured party's security interest in the collateral is postponed in priority

(a) to any other security interest in the collateral that is perfected in the period beginning on the 11th working day after the day the secured party has knowledge of the new name of the debtor and ending at the time at which the secured party submits for registration a financing change statement indicating the new name of

the debtor or takes possession of the collateral, (whichever is the earlier); or

(b) to an interest in the collateral, other than a security interest, that arises in the period referred to in paragraph (a); or

(c) to any other security interest in the collateral perfected in the first 10 working days after the day on which the secured party has knowledge of the new name of the debtor, if, within that period, a financing change statement is not submitted for registration in respect of the security interest first mentioned in this subsection, indicating the new name of the debtor.

[cf BC PPSB s 51]

45 Right to compensation

(1) A person who suffers loss or damage by reason of any matter specified in section 46 of this Act is entitled to compensation from the Crown in respect of that loss or damage, subject to sections 47 and 48.

[cf MVSB, s 47]

(2) On receipt of an application for compensation, the court shall determine whether compensation is payable to the applicant under this section and if so the amount of the compensation.

46 Matters in respect of which compensation is payable

For the purposes of section 45 the specified matters are

(a) that the Registrar has failed to register any financing statement submitted for registration in accordance with this Act;

(b) that the Registrar has entered in the register any particulars of a security interest that do not correctly reflect the information contained in the financing statement;

(c) that, in response to a request for a search or other inquiry authorised by or under this Act, the Registrar has issued any printed search result or made any statement that does not correctly represent the state of the register in relation to any specified debtor or collateral;

(d) that the Registrar has failed to discharge or amend the registration of any security interest in respect of which a financing change statement has been submitted for registration in accordance with this Act;

(e) that the Registrar has failed to discharge or amend the registration of any security interest which should have been discharged or amended

by the Registrar in accordance with any provision of this Act or of any regulation made under section 53;

(f) that the Registrar has discharged or amended the registration of any security interest which should not have been discharged or amended;

(g) that the Registrar has removed from the records of the registry information which should not have been removed.

[cf MVSB, s 48]

47 Maximum compensation payable

(1) The amount of any compensation paid to a secured party pursuant to section 45 shall not exceed the amount of the debt or other pecuniary obligation or the value of any other obligation that was secured by the security interest and that is still owing to the secured party at the time when the payment of compensation is made.

(2) The amount of any compensation paid to a person other than a secured party pursuant to section 45 shall not exceed $1,000,000.

[cf MVSB, s 49]

48 Factors that may prevent or reduce compensation payments

(1) Where any loss or damage is occasioned wholly or partly by any act or omission of any person other than the Registrar, the compensation that would otherwise be payable under section 45 may be reduced by such amount as the court considers appropriate.

(2) Where

(a) any person applies to the court for payment of compensation in respect of any loss or damage suffered by reason of any amendment or discharge of a registration or the removal of any information from the records of the registry; and

(b) the Registrar, before amending or discharging the registration or removing the information, gave to the person entered in the register as the secured party a notice requiring that person to show cause why the registration should not be amended or discharged; and

(c) that person failed, within 10 working days of the date on which the notice was given, to show cause to the Registrar's satisfaction why the registration should not be amended or discharged, the court shall not make an order for payment of compensation to the applicant unless the court is satisfied that cause was not shown to the Registrar's satisfaction because of circumstances

beyond the applicant's control or for reasons that ought reasonably to be excused.

[cf MVSB, s 50]

49 Exemption from liability

(1) Except as provided in section 45 of this Act, no proceedings lie against the Crown, or the Registrar, or any other person engaged in the administration of this Act, arising from anything done or omitted to be done under this Part of this Act, unless it is shown that that person acted in bad faith in doing or omitting to do that thing.

(2) Nothing in subsection (1) of this section applies in respect of any application for review under Part I of the Judicature Amendment Act 1972.

[cf MVSB, s 21]

50 Recovery of loss where security trust deed involved

(1) An application for compensation under section 45 brought by a trustee under a security trust deed or by a person with an interest in a security trust deed must be brought on behalf of all persons with an interest in the same security trust deed, and the award of compensation, except to the extent that it provides for subsequent determination of the amount of loss suffered by each person, constitutes a judgment between each person and the Registrar in respect of each error or omission.

[cf BC PPSB s 53]

(2) In an application brought by a trustee under a security trust deed or by a person with an interest in a security trust deed, proof that each person relied on the search result is not necessary if it is established that the trustee relied on the search result, but no person is entitled to compensation under this section if that person knows at the time he or she lends money to the debtor that the search result relied on by the trustee is incorrect.

(3) In proceedings under this section, the court may make any order that it considers appropriate in order to give notice to the persons with an interest in the same security trust deed.

(4) The court may order payment of all or a portion of the compensation awarded to identified persons with interests in the same security trust deed at any time after judgment, and the obligation of the Registrar to satisfy the judgment is satisfied to the extent that any such payment is made.

[cf BC PPSB s 53]

51 Crown right of subrogation

(1) Where compensation is paid to an applicant pursuant to section 45 the Crown is subrogated to the rights of the applicant against any person indebted to the applicant whose debt was the basis of the loss or damage in respect of which the claim was paid.

(2) Where the applicant is compensated under section 45 by an amount less than the value of the interest the applicant would have had if the error or omission had not occurred, the right of subrogation under subsection (1) does not prejudice the ability of the applicant to recover in priority to the Crown an amount equal to the difference between the amount paid to the applicant and the value of the interest the applicant would have had if the error or omission had not occurred.

[cf BC PPSB s 54(2) and (3)]

PART 5

MISCELLANEOUS

52 Entitlement to damages for breach of obligations

If a person fails to discharge any duty or obligation imposed on that person by this Act, the person to whom the duty or obligation is owed and any other person who can reasonably be expected to rely on performance of the duty or obligation has a right to recover damages for any loss or damage that was reasonably forseeable as likely to result from the failure.

[cf BC PPSB s 69(1)]

53 Regulations

(1) The Governor General by Order in Council may make regulations

(a) prescribing the kinds of goods the leases of which are not within the scope of this Act; or

(b) prescribing the location and hours for the offices of the registry or any of them; or

(c) prescribing the form of the register, including the transition from any registration system in operation before the coming into force of this Act to the system established by this Act; or

(d) prescribing fees including different fees for different periods of registration; or

(e) prescribing the method of registration of financing statements; or

(f) prescribing

(i) the form, content and manner of use of financing statements,

(ii) the form, content and manner of use of notices, demands mentioned in this Act,

(iii) the manner in which collateral, including proceeds, is described in financing statements and prescribing what kinds of goods may be or shall be described by serial number,

and such regulations may make different provisions for different classes of persons; or

(g) prescribing the maximum period for which the registration of a financing statement may be effective in respect of particular kinds or types of collateral, and such regulations may make different provisions for different kinds or types of collateral; or

(h) providing for searches of the register and the method of disclosure of registered information, including the form of a printed search result; or

(i) requiring or permitting the use of statements to confirm the registration of information in financing statements and financing change statements; or

(j) providing for the Registrar's power to amend a registration that contains an error caused by an act of the Registrar or an employee of the registry; or

(k) prescribing abbreviations, expansions or symbols that may be used in a financing statement or other form, notice or document used in connection with the registration of security interests or the disclosure of information in the register or the records of the registry; or

(l) providing for such matters as are contemplated by or necessary for giving full effect to this Act and for its due administration; and

[cf BC PPSB s 78]

(2) The fees to be prescribed as provided in paragraph (d) of subsection (1) shall be calculated on the basis of the estimated cost of operating the registry including the cost of compensation or of insuring against the need to pay compensation and shall not include any additional amount intended to constitute a contribution to the consolidated account.

[New]

PART 6
REPEALS, TRANSITIONAL

54 Enactments amended

The enactments specified in the Second Schedule to this Act are consequentially amended in the manner indicated in that schedule.

[cf BC PPSB s 79]

55 Enactments repealed

(1) The enactments specified in the Third Schedule are repealed.

(2) The regulations and orders specified in the Fourth Schedule are revoked.

[cf BC PPSB s 80]

56 Transition: applicable law

(1) The validity of a prior security interest is governed by prior law.

(2) The order of priorities among security interests is determined under prior law if all of the competing security interests are prior security interests.

(3) The order of priorities between a security interest and the interest of a third party is determined by prior law if the third party interest arose before this Act comes into force and the security interest is a prior security interest.

[cf BC PPSB s 76]

(4) In any case not coming within subsection (2) or subsection (3), the order of priorities among security interests and between a security interest and the interest of a third party is determined under this Act.

[New]

57 Transition: registrations

(1) In this section, "prior registration law" means the Chattels Transfer Act 1924, the Companies Act 1955 and the Industrial and Provident Societies Amendment Act 1952 as they existed immediately before the coming into force of this Act.

(2) Except as otherwise provided in this section, a prior security interest that, on the coming into force of this Act, is covered by a registration under prior registration law is deemed to be registered and perfected under this Act.

(3) Subject to compliance with this Act, the registered and perfected status of a prior security interest deemed to be registered and perfected under subsection (2) continues for the unexpired period of the registration and may be further continued by registration under this Act.

(4) A registration under any Act of a prior security interest in

(a) the office of the Registrar of Companies; or

(b) the office of the Registrar of Industrial and Provident Societies; or

(c) any office of the High Court of New Zealand;

is deemed be registered and perfected under this Act for the period of 5 years after the day on which this Act comes into force and, subject to compliance with this Act, may be perfected for a further period by registration under this Act.

(5) A prior security interest that

(a) is an instrument by way of bailment which is registrable under the Chattels Transfer Act 1924; or

(b) under prior law had the status of a perfected security interest without filing or registration and without the secured party taking possession of the collateral;

is perfected for the purposes of this Act as at the date the security interest was created, and that perfection continues for 3 years from the date this Act comes into force, after which period it becomes unperfected unless it is otherwise perfected under this Act.

(6) A prior security interest that, when this Act comes into force, could have been, but was not

(a) registered under prior registration law, or

(b) perfected under prior law through possession of the collateral by the secured party

may be perfected by registration or possession in accordance with this Act.

(7) A prior security interest that under this Act may be perfected by the secured party taking possession of the collateral is perfected for the purposes of this Act when possession of the collateral is taken in accordance with section 18 whether the possession was taken before or after this Act comes into force and even if under prior law the security interest could not be perfected by taking possession of the collateral.

[cf BC PPSB s 77(8)]

(8) A prior security interest that, when this Act came into force, was covered by a registration under prior registration law, and is perfected under this Act without registration or the secured party taking possession of the collateral, remains perfected under this Act.

(9) A prior security interest that, when this Act came into force, could have been, but was not, covered by a registration under prior registration law and that, under this Act, may be perfected without registration or the secured party taking possession of the collateral, is perfected under this Act if all of the conditions for perfection of a security interest are met.

(10) A person who fails to indicate in the prescribed manner the appropriate prior registration law on a financing change statement providing for the continuation of a registration under prior law fails to discharge an obligation within the meaning of section 52 to any person who has suffered loss or damage as a result of reliance on the financing change statement; but the failure is not seriously misleading for the purposes of section 37.

[cf BC PPSB s 43(10) and (11)]

(11) Nothing in section 44 applies to a prior security interest registered under prior registration law and deemed by this section to be registered and perfected under this Act.

[cf BC PPSB s 77]

FIRST SCHEDULE — Section 29(1)

FIXTURES REMAINING GOODS AFTER FIXING

Partition walls of commercial office premises.

SECOND SCHEDULE — Section 54

ENACTMENTS AMENDED

Title of Enactment	Amendment
1908, No 47—The Distress and Replevin Act 1908	By repealing section 4 and substituting the following section: "**4 Application of Personal Property Securities Act**—The rights of a person distraining or levying any chattels or stock shall be subject to the rights to such chattels or stock (or any proceeds of their sale) of a person who has a security interest (as that term is defined in the Personal Property Securities Act 1989) in them."
1908, No 117—The Mercantile Law Act 1908	By inserting after section 6, the following section: "**6A Application of Personal Property Securities Act to consignments**—Sections 3 to 6 of this Act do not apply to a consignment to which the Personal Property Securities Act 1989 applies." By inserting in Part IV a notice provision designed to achieve the objectives set out in Note A to this Schedule.
1908, No 168—The Sale of Goods Act 1908	By repealing the proviso to subsection (2) of section 27 and substituting the following: "Provided that this subsection does not apply to a sale, pledge or other disposition of goods by a person who has obtained possession of the goods pursuant to a security agreement under which the seller has a security interest as defined in the Personal Property Securities Act 1989."
1952, No 51—The Property Law Act 1952	By inserting after section 99, the following section: "**99A Application to Collateral**—(1) In this section the terms "collateral" and "security agreement" have the same meaning as in the Personal Property Securities Act 1989. "(2) Sections 99 to 103 of this Act shall apply, with the necessary modifications, to collateral. "(3) Collateral or any part thereof may be sold either together with or separately from land (if any) mortgaged to secure payment of the same moneys as are secured by any security agreement."
1952, No 45—The Industrial and Provident Societies Amendment Act 1952	By amending section 13 in a manner similar to that adopted for section 101 of the Companies Act 1955. See Note B to this Schedule.
1953, No 64—The Patents Act 1953	By inserting after section 85, the following section: "**85A Application of Personal Property Securities Act**—Nothing in sections 83 to 85 of this Act shall affect the operation and effect of the Personal Property Securities Act 1989."
1953, No 65—The Designs Act 1953	By inserting after section 27, the following section:

	"27A Application of Personal Property Securities Act—Nothing in sections 25 to 27 of this Act shall affect the operation and effect of the Personal Property Securities Act 1989."
1955, No 63—The Companies Act 1955	By amending sections 101 and 308 as discussed in Note B to this Schedule. By deleting from the First Schedule all references to fees in respect of registration of instruments under Part IV; instruments creating or evidencing a charge; and satisfactions or partial satisfactions thereof.
1957, No 87—The Summary Proceedings Act 1957	By inserting after section 94, the following section: **"94A Personal Property Securities Register to be Checked**—(1) Not later than the day after executing a warrant to seize property the Registrar shall, in respect of all items seized (other than items of real property), check the register maintained under the Personal Property Securities Act 1989 for any security interest registered in respect of all or any of such items. "(2) If a security interest is found to be so registered, the Registrar shall forthwith notify the person entered in the register as the secured party— (a) of the seizure;

	(b) that the Registrar may, under section 95 of this Act, sell the items after the expiration of 7 days from the date of seizure, if the fine remains unpaid and no claim has been made by a person other than the defendant in respect of the items; and (c) of that person's rights under section 96 and section 97 of this Act."
1966, No 19—The Customs Act 1966	By inserting, with reference to sections 48(11) and 243 (confiscation provisions), notice provisions designed to achieve the objectives set out in Note A to this Schedule.
1971, No 80—The Layby Sales Act 1971	By amending the terminology in section 11(1) in a manner similar to that adopted for section 101 of the Companies Act 1955. See Note B to this Schedule. By inserting in section 11, the definitions set out in the proposed section 101(6). See Note B to this Schedule.
1976, No 65—The Income Tax Act 1976	[Section 365—see Note C to this Schedule]
1979, No 43—The Carriage of Goods Act 1979	By inserting in section 23, a notice provision designed to achieve the objectives set out in Note A to this Schedule.
1981, No 27—The Credit Contracts Act 1981	By inserting after section 9, the following section:

"**9A Inclusion of security agreement**—In this part the term "credit contract" includes any security agreement as defined in the Personal Property Securities Act 1989 and any mortgage as defined in the Property Law Act 1952 whether or not but for this section such security agreement or mortgage would be a credit contract."

1983, No 14—The Fisheries Act 1983

By inserting, with reference to section 107B (a confiscation provision), a notice provision designed to achieve the objectives set out in Note A to this Schedule.

1985, No 120—The Criminal Justice Act 1985

By repealing subsection (1) of section 84 and substituting the following subsection:

"(1) For the purposes of this section and sections 85 to 88 of this Act, unless the context otherwise requires,—

" "Encumbrance", in relation to a motor vehicle in respect of which a confiscation order is made under this section, includes a leasing agreement, a security agreement (as defined in the Personal Property Securities Act 1989), and any other agreement entered into between the offender and another party under which that other party obtains or retains any interest in the motor vehicle (whether a security interest or not):

" "Interest", in relation to a motor vehicle, means any proprietary interest, whether legal or equitable, and whether vested or contingent:

" "Leasing agreement", in relation to any such motor vehicle, does not include any agreement entered into between the offender and the holder of a rental service licence under the Transport Act 1962:

" "Motor vehicle" means a motor vehicle within the meaning of section 2 of the Transport Act 1962; but does not include a trailer within the meaning of that Act:

" "Security interest" in relation to a motor vehicle, has the same meaning as in the Personal Property Securities Act 1989."

By omitting from section 84(2) the words "(whether pursuant to a hire purchase agreement, leasing agreement or otherwise)", and substituting the words "(whether pursuant to a security agreement, leasing agreement or otherwise)".

By omitting from section 84(3)(b) the words "(whether pursuant to a hire purchase agreement, leasing agreement or otherwise)", and substituting the words "(whether pursuant to a security agreement, leasing agreement or otherwise)".

By inserting after section 84, the following section:

"**84A Personal Property Securities Register to be Checked**—(1) As soon as practicable after any motor vehicle is delivered into a Registrar's custody pursuant to section 84 of this Act, the Registrar shall check the register maintained under the Personal Property Securities Act 1989 for any security interest registered in respect of such motor vehicle.

"(2) If a security interest is found to be so registered, the Registrar shall forthwith notify the person entered in the register as the secured party—

(a) of the confiscation;

(b) of the Crown"s unencumbered title to the motor vehicle;

(c) of the provisions of section 87 of this Act; and

(d) advise as to the time within which the secured party may prove their claim or make any application to the Registrar or the Court in relation to the transfer of the motor vehicle."

By omitting from section 86(2)(c) the words "any interest in the motor vehicle", and sustituting the words "any interest or security interest in the motor vehicle".

1985, No 141—The Goods and Services Tax Act 1985

[Section 42—see Note C to this Schedule]

[NOTES TO SECOND SCHEDULE:

A Where a statute empowers a person to sell goods which are:

(a) subject to a lien; or

(b) have been seized:

then the statute should, as a minimum, be amended to ensure that any person with a security interest in the goods (in respect of which a financing statement has been registered) is made aware of the position.

No sale should be permitted unless a secured party has, a reasonable time prior to the sale, received notice of:

(a) the existence of the lien; or

(b) the seizure; and

(c) sufficient information to enable them to ascertain their rights.

Examples of the approach envisaged are set out in the Schedule as proposed amendments to the Criminal Justice Act and the Summary Proceedings Act. The Schedule also notes other statutes which require similar treatment.

B References to floating charges are not apt to describe the new security envisaged by the Personal Property Securities Act in relation to after-acquired property. A number of statutory provisions use the term "floating charge".

Such provisions also use terms such as "debenture" and "holder of debenture". Noteable among this group of provisions are sections 101 and 308 of the Companies Act 1955.

By the use of different terminology these provisions can be amended to cover both the traditional floating charge and the Personal Property Securities Act equivalent. For instance, if the underlying policy of the sections is to remain the same, sections 101 and 308 of the Companies Act would read as follows:

101. Payment of certain debts out of assets subject to floating charge in priority to claims under the charge—

"(1) Where either a receiver is appointed on behalf of a secured party holding against a company a claim secured by collateral in the form of proceeds or after-acquired property, or possession is taken by or on behalf of the secured party of any such property then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part VI of this Act relating to preferential payments to be paid in priority to all other debts shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest by the secured party."

[(2) to (5) unchanged]

"(6) In this section, the expressions "secured party"; "collateral"; "proceeds"; and "after-acquired property" have the meanings assigned to them by the Personal Property Securities Act 1989."

308. Preferential payments—

[(1) to (3) unchanged]

"(4) The foregoing debts shall—

(a) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) So far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of any secured party secured by collateral in the form of proceeds or after-acquired property, and be paid accordingly out of such collateral."

[(5) to (6) (7)(a), (7(b) and 7(c) unchanged]

"(7)(d) In this section, the expressions "secured party"; "collateral"; "proceeds"; and "after-acquired property" have the meanings assigned to them by the Personal Property Securities Act 1989."

[(8) unchanged]

A number of provisions cross-reference to section 308 of the Companies Act 1955 and will require amendment to take account of any changes to section 308. These include:

Section 15 of the Volunteers Employment Act 1973, No 25

Section 42 of the Motor Vehicle Dealers Act 1975, No 127

Section 58 of the Accident Compensation Act 1982, No 181

Section 23 of the Apprenticeship Act 1983, No 16

C Both the Income Tax Act (s 365) and the Goods and Services Tax Act (s 42) create preferential claims, the priority of which is determined by reference to section 308 of the Companies Act 1955. These provisions require changes of terminology similar to the changes evidenced by the drafts of sections 101 and 308 set out in Note B to this Schedule.]

THIRD SCHEDULE Section 55(1)

ENACTMENTS REPEALED

1924, No 49—The Chattels Transfer Act 1924 together with all amendments.

1952, No 45—The Industrial and Provident Societies Amendment Act 1952, Part II (sections 15–29).

1955, No 63—The Companies Act 1955, Part IV (sections 102–114).

FOURTH SCHEDULE Section 55(2)

REGULATIONS AND ORDERS REVOKED

Title	Statutory Regulation
The Chattels Transfer Fees Regulations 1987 ..	1987/41
[All Orders-in-Council gazetted pursuant to the Chattels Transfer Act 1924 or its amendments.	
All Chattels Transfer (Customary Hire Purchase) Orders.]	

PART II

Commentary to the Personal Property Securities Bill

SECTION 2—INTERPRETATION

The definitions in this section highlight the key components of the proposed uniform regime for personal property security interests. By far the largest number of definitions concern the classification of personal property. Viewed most generally, the statute distinguishes three broad categories of property. Tangible property other than a written document will constitute inventory, equipment, crops or consumer goods. Property comprised of a written document will qualify as chattel paper, documents of title, securities, instruments or money. Property not embodied in a tangible item or document qualifies as accounts receivable or general intangible.

This rather elaborate classification of collateral is fundamental to the achievement of two potentially conflicting objectives of the proposed statute. On the one hand, the statute seeks to provide consistent rules for all types of transactions intended as security regardless of their form. These include hire purchase, conditional sales, chattel mortgages, consignments, leases, retention of title (*Romalpa*) clauses, fixed and floating charges, and factoring agreements. On the other hand, the statute seeks to preserve the utility of these existing security arrangements in their particular transactional setting.

The statute accommodates both objectives through priority rules which anticipate the clash of competing security interests in certain typical situations. These situations are generally identified by reference to different types of collateral. For example, the priority rules

respecting purchase money security interests in inventory anticipate competing claims asserted by the *Romalpa* supplier and the holder of the floating security interest. References in this commentary to a 'floating' security are intended as a general description only. In fact, as outlined in the commentary on the definition of 'future advances' and on section 10, the distinction between fixed and floating charges under current law ceases to be of significance under this statute. The 'floating security' authorised by this statute amounts, in effect, to a fixed charge over an ever changing pool of assets which typically consists of inventory, accounts, chattel paper and equipment.

The remaining definitions largely relate to the parties associated with security transactions (debtor, secured party), the documentation involved (security agreement, financing statement) as well as the resulting legal interests (purchase money security interest). The fundamental concept of security interest is defined in section 4. The fact that these terms are generally defined without regard to any particular factual setting attests to the success of the distinctions amongst the various types of personal property in achieving a basis for uniform regulation.

ACCESSIONS

Accession refers to installation of another item to goods, for example, to a reconditioned motor installed in a boat. The proposed statute allows one creditor to finance acquisition of the boat and another creditor to finance acquisition of the motor. Priority conflicts between security interests in the motor and boat are subject to a specific priority rule. See section 31.

ACCOUNTS RECEIVABLE

Account receivable describes, for example, the right to payment to which a supplier of goods or services becomes entitled upon performance. The term is the equivalent of the New Zealand expression 'book debt'. Computerised record keeping has made the adjective 'book' misleading. 'Receivable' more accurately describes the direction of the entitlement than does the term 'debt'. Accounts receivable are a type of 'intangible', the term used by the statute to describe incorporeal personal property which is not represented by either a tangible item or document.

Special priority rules enable debtors to use their accounts receivable as an independent source of credit. Financiers who inject new value into a debtor's business against a security interest in receivables enjoy priority over the other creditors who claim the same receivables. These other creditors include the *Romalpa* supplier who claims the receivables as proceeds of inventory as well as the holder of a floating security interest who claims the receivables as after-acquired property. See section 27(5). Absolute assignments of accounts receivable are within the scope of the statute except where the assignment is part of a sale of the assignor's whole business or is made to a debt collector to facilitate collection. See sections 4(3)(c)(vii), 4(5)(b)(iv) and 4(5)(b)(x).

CASH PROCEEDS

This definition must be read in conjunction with the general definition of 'proceeds' and the commentary on that definition. When a debtor disposes of collateral (for example, a retailer sells inventory subject to a *Romalpa* clause), the security interest automatically continues in the property received by the debtor. See section 22(1).

The statute distinguishes between cash proceeds (defined to include the property identified in this definition) and non-cash proceeds (for example, goods received as trade-in). The steps for perfecting the security interest in proceeds depends upon whether the proceeds qualify as cash proceeds or non-cash proceeds. See section 22(2).

CHATTEL PAPER

The statute distinguishes between five types of documentary collateral: money, documents of title, chattel paper, security and negotiable instruments. Each is subject to one or more special rules concerning matters such as perfection and priorities. For instance, a security interest in documents of title or negotiable instruments is capable of temporary perfection without taking possession of the paper or registering a financing statement. See section 20.

The term chattel paper has no counterpart under current New Zealand law. It includes hire purchase agreements, finance leases and conditional sales contracts. Such writings serve primarily to document rights and obligations of the parties to the particular transaction. However, the bundle of rights arising under such an agreement comprises a distinct form of personal property. The proposed statute

facilitates the use of this property as an independent source of credit. Parties who inject new value into the debtor's business by purchasing or lending against chattel paper enjoy priority over creditors who claim the paper as proceeds or after-acquired property. See section 25(5). In such cases the statute has double application. It applies, firstly, to the underlying hire purchase agreement or finance lease. It also applies to the transfer of the resulting paper by way of sale or security. See section 4(3)(c)(x).

COLLATERAL

This term is a generic description of all personal property which becomes subject to a security interest. It has application in the general rules governing the creation and enforcement of security agreements. See sections 9 and 10.

COMMERCIAL CONSIGNMENT

Consignment developed from the law of agency as an alternative to the sale on credit as a means of meeting the credit needs of wholesale purchasers. In certain product lines and merchandising situations, manufacturers and wholesalers deliver goods to retailers as agents with authority to sell the goods in the ordinary course of business. This enables the supplier not only to retain property in the goods until the distributor comes into funds but also to control other features (for example, price and standardised terms) of the retail sale. A common example of this type of transaction is the bailment 'floor plan' financing provided to franchised motor vehicle dealers by vehicle manufacturers or finance companies associated with the manufacturers.

Consignment puts one party, typically a retailer, in possession of goods which are owned by another party, typically the manufacturer or wholesale supplier. The fact that the retailer has apparent or ostensible ownership of the goods may mislead subsequent creditors in their evaluation of the credit worthiness of the retailer. This consideration justified regulation of traditional security devices, for example, chattel mortgages and charges. However, the distinction between 'title' and 'security' placed consignments along with other types of title-based security, for example, title retention (*Romalpa*) clauses and finance leases, outside the traditional regime for personal property security.

The proposed statute has as its objective the provision of consistent rules for all types of transactions intended as security. To this end, the statute defines commercial consignment in this section and then subsequently identifies it as one of the transactions which is deemed automatically to create a security interest subject to regulation. See section 4(3)(c). It should be noted that the registration of a financing statement in respect of commercial consignments needs to be done only once—it is not necessary to register at the time of each subsequent delivery.

The definition requires that both the consignor and consignee are dealers in such goods. This limits the automatic application of the statute to situations in which consignment is used as a means of financing the acquisition of trading stock, called 'inventory' under the proposed statute. Consignments where one or both of the parties are not dealers in goods fall outside the definition but not necessarily outside of the statute. For instance a manufacturer will occasionally dispose of used equipment by delivering the property to a dealer in such goods as agent for sale. Depending upon its terms, such an arrangement may fall within the general definition of security agreement. See section 2 definition of security agreement and sections 4(1) and 4(3)(c)(viii).

The exclusion of auctioneers reflects the fact that the auctioneer relationship does not serve as a means of inventory finance. Also, identification of a party as auctioneer largely obviates any problems arising from ostensible ownership.

CONSUMER GOODS

Tangible personalty of a non-documentary nature falls into four categories: consumer goods, inventory, equipment and crops. As property moves down the distribution chain, its classification depends upon the role of the property in the sphere of the party who grants a security interest in the goods. See section 2(4).

For instance, a personal computer held for sale by a dealer constitutes 'inventory' for the purposes of the arrangement made by the dealer for financing acquisition of the computer from the manufacturer or wholesaler. The same computer constitutes 'equipment' for the purposes of, for example, the finance lease or conditional sale contract by which an accounting firm acquires the computer for use in its business. The same computer would constitute 'consumer goods' for the

purpose of the hire purchase contract under which the computer is acquired for home use.

As explained in the introductory comment to this section, the classification of personal property determines the relevant rules for creation, perfection and priority of security interests. For instance, the statute protects purchasers of consumer goods in respect of after-acquired property clauses, outstanding security interests and the discharge of security interests over such goods. See sections 11(b), 24(3) and 43(2). These rules reflect the relative vulnerability of consumer debtors compared with business debtors. Unlike some of its North American counterparts, the statute generally defers consumer protection to separate legislation.

COURT

Like the British Columbia legislation, but in sharp contrast to the enactments in the United States, the statute expressly involves the courts in the administration of the uniform regime. This occurs in sections 13(9) and (10) (issuance of orders for compliance with requests for information), 13(11) (award of damages for giving incorrect information), 43(8) and (9) (issuance of orders for maintenance of the registration of a financing statement), and 45–51 (compensation for errors in the registry). The District Court has exclusive jurisdiction over these matters.

Unlike the British Columbia legislation, the proposed statute does not contain a provision which confers upon the courts summary jurisdiction to determine priority disputes. In the North American experience with the uniform code, most litigation arises in the context of insolvency proceedings where a secured party's attempt to recover its collateral is resisted either by the liquidator, for example, as a voidable preference or by other secured parties who claim a priority in the specific goods.

CROPS

Both harvested and unharvested crops may serve as collateral for security agreements under the statute. The statute limits the extent to which a debtor can grant security over future crops. See section 30(4). Once harvested, agricultural produce becomes inventory and subject to different priority rules. The exclusion of trees reflects different

financing arrangements associated with the long maturation period of such plants.

DEBTOR

This definition goes considerably beyond current terminology. It reflects the fact that many arrangements, which were not traditionally viewed as security transactions, are treated as giving rise to security interests subject to the uniform rules of this statute. However, in the relatively few provisions which employ the term in this extended sense, the usage is sensible and not confusing. Where A borrows money which is secured by property belonging to B and guaranteed by C, all three companies qualify as debtors under this definition. Similarly, where X consigns goods to Y as agent for sale and Y transfers some of the property to Z, both Y and Z qualify as debtors. Identification of B and C as debtors and Y and Z as debtors entitles them to receive from A and X respectively information respecting the amount of outstanding indebtedness. See section 13(1).

DOCUMENTS OF TITLE

Once goods have been delivered to a bailee, for example, for storage or transportation, control over the goods becomes embodied in the documents issued by the bailee. This is particularly the case where the owner of the ship or warehouse issues a document which states that the goods will be delivered to the party named in the document or the named party's transferee. The definition forms the basis for special rules which anticipate that such documents will be used as proxies for the underlying goods in secured transactions. See sections 21 and 25(4).

The definition includes documents such as bills of lading, warehouse receipts, dock warrants and any other writing which specifically states the bailee's obligation to deliver to a named person or its transferee. A document which only acknowledges receipt of goods and states the bailee's obligations in the case of loss or damage to the goods does not qualify as a document of title. The statute, for example, in sections 20(2) and 25(4), provides special rules for arrangements involving 'negotiable documents of title'. Whilst this term is not expressly defined, it presumably refers to a document of title which, like a bill of exchange, can only be transferred by endorsement and delivery.

EQUIPMENT

Under the four part classification of goods, property which does not qualify as inventory, consumer goods or crops automatically falls into the residual category of equipment. This category will generally consist of goods which are used by the debtor in its business. The definition of equipment in the original North American enactment, the United States Uniform Commercial Code (hereafter 'UCC'), section 9–109(2), expressly refers to this characteristic of equipment. Equipment is subject to special rules, most notably, the possibility that certain types of equipment will, by regulation, be made subject to a requirement for serial number identification in the financing statement used to perfect a security interest. See sections 24(6), 28(3) and 37(7). Also, under section 27, perfection of a purchase money security interest in equipment is subject to different requirements than perfection of such a security interest in inventory.

FINANCING CHANGE STATEMENT, FINANCING STATEMENT

As a general rule, a security interest is made effective against third parties by means of 'perfection'. Perfection normally requires that the creditor either take possession of the collateral or, more commonly, register a financing statement. The financing statement is a document which identifies the debtor and creditor and contains a general description of the collateral. Events subsequent to the original registration may change any of these components. For example, the debtor may change its name or transfer the collateral to another person; or the original secured party may have transferred its interest. The financing change statement records these events.

The financing statement with its extremely abbreviated information is the vehicle for the so called 'notice filing' system promoted by the statute. In contrast, current law requires 'instrument filing', that is, registration of the security agreement itself. Instrument filing provides prospective creditors with detailed information about a particular credit arrangement of a debtor. However, unlike notice filing, it does not lend itself to a centralised and computerised registry.

Under present practice, a prospective creditor must search the records in both the local High Court and district Companies Office. The proposed statute anticipates establishment of a single registry which can be accessed from anywhere by telephone. The search result will show whether the debtor's property is subject to a security

interest. Further details of the credit arrangement may be demanded from the secured party under section 13.

FUTURE ADVANCE

The floating security interest anticipated by the statute rests on five components: perfection through notice filing; extension of the secured obligation to include future advances; extension of collateral to include after-acquired property; extension of collateral to encompass proceeds; and the first-to-file priority rule. A creditor and debtor can create a floating security interest by means of an agreement which provides that 'the debtor grants to the creditor a security interest in all presently-owned and after-acquired property as security for all existing obligations and future advances'. The security interest is perfected by registration of a financing statement. The priority determined by the date of registration will extend to future advances even where those advances are made with knowledge that other creditors have provided credit or acquired interests in the debtor's property. See sections 28(1) and 28(2)(c). (Contrast with UCC section 9–307(3) and 9–312(5).) As made clear by this definition, the priority result does not depend upon whether the advance was made pursuant to a commitment.

GOODS

Through its use in the definition of security interest, the concept of goods determines the ultimate scope of the statute. If property does not qualify as goods, it cannot, unless otherwise specifically provided (for example, documents of title and negotiable instruments), be subject of a security interest protected and governed by the rules of this statute. Accordingly, transfers of interests in real property fall outside the statute, except for the special case of fixtures. See sections 4(5)(b)(iii) and 31. In line with its policy of permitting the use of after-acquired property as collateral for a floating security interest, the statute imposes no requirement that the goods be 'identified' otherwise than by means of a general description in the security agreement. See section 9(1).

INTANGIBLE

The concept of intangible serves as a residual classification for any personal property which falls outside the more specific definitions.

Equipment performs a similar role for tangible personal property. Intangibles include accounts receivable, goodwill, trade marks, copyrights, licences and franchises. It also describes the wide range of documented and non-documented entitlements between bodies corporate and their investors which fall outside the definition of security. These may include certain options, partnership interests and preemptive rights. Intangibles are subject to special rules about priority. See section 27(2). Accounts receivable, the commercially most significant type of intangible, are subject to a large number of special priority rules. See sections 23, 27(2) and 27(5).

Rights in the nature of intangibles frequently appear in connection with other types of personal property. For example, a finance lease or debenture subjects the debtor to specific obligations and creates corresponding creditor rights concerning, for example, maintenance of collateral and debt/equity ratios. Although these rights constitute intangibles, it is the intent of the statute that, for purposes of the rules respecting priority and perfection, they be treated as strictly ancillary to the underlying specific personal property. Any other approach would result in an unmanageable multiplication of registration statements and extreme confusion over priority.

INVENTORY

Inventory refers to those goods, commonly known in New Zealand as trading stock, which are ultimately destined for sale or lease either in unchanged form or when incorporated in other products destined for sale or lease. The statute provides extra protection for purchasers and financiers of inventory. For example, upon compliance with specific requirements, a supplier of inventory under a title retention (*Romalpa*) clause has priority over the holder of an earlier perfected floating security interest. See sections 27(3) and 24(2).

The distinction between inventory and equipment is crucial for several important priority rules. Certain types of equipment (but not inventory) may be subject to a serial number registration requirement for perfection. See sections 24(6), 28(3) and 37(7). Different rules apply to the creation and priority of purchase money security interests in equipment. See section 27. However, in some situations, the definition does not clearly distinguish between the two types of property. Many manufacturers pursue a continuing policy of selling used machinery. Firms engaged in mineral extraction carry a stock of

cutting tools which are consumed in the course of its operation. In these cases, classification of the used machinery or cutting tools should depend upon the primary use of the asset as well as its useful life. The manufacturer's machinery should not lose its classification as equipment merely by reason of the ultimate disposition of the property. On the other hand, the classification of the cutting tools will depend upon their useful life. It is also important to note that upon disposition inventory will change its classification to equipment or consumer goods depending upon the transferee's anticipated use of the asset.

LAND

This definition, when read in conjunction with the definitions of goods and security interest, excludes from the scope of the statute arrangements in which owners, lessors or lessees of real property employ their interests as collateral. The exclusion is elaborated in sections 4(5)(b)(iii) and 4(5)(b)(ix) and discussed in the commentary to that provision.

LEASES FOR A TERM OF MORE THAN ONE YEAR

In practical and legal effect, many commercial leases are indistinguishable from hire purchase agreements or conditional sale contracts. They create the same degree of apparent ownership which justifies the traditional regulation of chattel mortgages and charges as well as the proposed regulation of title-based securities and assignments. See comment to section 2, definition of commercial consignment. On the other hand, short term and operating leases, such as those whereby a builder acquires equipment for use on a particular job, entail a far lesser degree of apparent ownership and certainly do not serve as substitutes for hire purchase or conditional sale agreements.

The original predecessor of the proposed statute (UCC section 1–201(37)) did not attempt to draw a bright line between those leases which warranted regulation as security agreements and those which did not. It simply stated that the uniform code applied 'to leases intended as security' and left the necessary distinctions to be developed as a matter of case law. Perhaps not surprisingly, the issue became one of the single most frequently litigated questions under the uniform code and the resulting case law was far from consistent.

In the interests of certainty, this definition establishes a category of leases which are automatically subject to the statute. Leases for more than one year generally serve as devices for financing acquisition of effective ownership of an asset. Such a lease will seldom be attractive, for tax or accounting purposes, unless it extends over a period longer than one year computed by reference to the original term plus the possibility of renewal or de facto extension. The one year requirement will also exclude most operating leases, the terms of which are usually measured in days or weeks.

The exclusion in subsection (d) makes clear that the automatic treatment applies only to those recurring situations where leases are employed by suppliers and acquirers of goods as an alternative to hire purchase or conditional sales contracts. Outside the definition are, for example, arrangements whereby a company leases an aeroplane to a subsidiary or associated company, or, where out of deference to the needs of a particular customer, a manufacturer disposes of used machinery under a finance lease when such disposals are not part of its normal business. Subsection (e) excludes the typical lease of goods which is ancillary to a lease of furnished premises. Such leases do not normally serve as substitutes for security arrangements. Subsection (f) allows other goods to be excluded by regulation, for example, where the leases do not function as the vehicle for commercial security.

Where a lease outside this definition serves as a means for financing acquisition of goods, it remains potentially subject to the statute under the general definition of security agreement in this section and the definition of security interest in section 4.

MONEY

Money is one of the five types of paper collateral recognised by the statute. See definition of chattel paper and accompanying comment. The definition anticipates that the money status will be determined in most cases by reference to specific statute or regulation. It should also be noted that money refers to the underlying medium of exchange, for example, bank notes. Equally liquid payment devices such as certificates of deposits and bank cheques are not money but negotiable instruments and, as such, are subject to different rules respecting perfection and priority. For example, a security interest in negotiable instruments but not one in money is subject to temporary perfection,

without the creditor registering a financing statement or taking possession of the paper. See section 20.

NEGOTIABLE INSTRUMENTS

Negotiable instruments are another of the five types of paper collateral regulated by the statute. The Bills of Exchange Act 1908 establishes fairly stringent and unambiguous requirements for qualification as a bill of exchange, promissory note or cheque. In practice, institutions which draft such instruments take considerable care to ensure that these requirements are either satisfied or not satisfied. This is not true in the case of debt instruments drafted on an ad hoc basis, particularly by non-financial institutions. Because of their atypical content, these instruments will often fall outside the requirements of the Bills of Exchange Act. Such documents will nevertheless qualify as negotiable instruments under subsection (b) if they are commercially negotiable. If not, such instruments will comprise intangibles.

Writings which satisfy the requirements of subsection (b) may appear as a component of a lease or conditional sales contract. In such a case, the closing proviso requires that the writing be considered ancillary to the larger purpose of the document. The document must be dealt with as chattel paper.

NON-CASH PROCEEDS

See definitions of proceeds and cash proceeds and accompanying comments.

NON-PURCHASE MONEY SECURITY INTEREST

For purposes of some priority rules, the statute distinguishes between purchase money security interests and non-purchase money security interests. See section 32(2). As elaborated in the comment on the definition of purchase money security interest, that term refers to a security interest which collateralises an extension of credit used to finance the acquisition of collateral. Purchase money security interests receive favoured treatment under the statute's priority rules. See, for example, section 27.

OTHER GOODS

This definition figures in section 31 which sets forth rules for priority disputes which arise, for example, when a fitter provides and installs a reconditioned motor under a conditional sales contract in a vessel subject to a finance lease in favour of another creditor. The vessel qualifies as 'other goods' under this definition.

PRESCRIBED

The statute defers a number of matters to administrative regulation. These are specified in section 53. Most concern the implementation and operation of the registry for financing statements. However, a few, such as the identification of goods excluded from the definition of leases for more than one year (section 53(1)(a)) will determine the scope of the statute.

PRIOR LAW/PRIOR SECURITY INTEREST

These definitions operate in sections 56 and 57 which determine whether this statute or pre-Act law governs particular incidents of a security arrangement created prior to the enactment date of this statute. For purposes of those provisions, prior law would include, for example, the Chattels Transfer Act 1924, Part IV of the Companies Act 1955, as well as the common law governing title retention (*Romalpa*) clauses. When read in conjunction with the definition of security interest in section 5, prior security interest includes all interests within the meaning of that section to which this statute would have applied if the interest had been created prior to the enactment date of this statute. Prior security interest properly describes, for example, the interest of a dealer who, prior to enactment date of this statute, supplied inventory subject to a *Romalpa* clause or under a commercial consignment. It also describes the fixed and floating charges created by a pre-Act debenture. However, once such an interest is renewed or extended by a post-Act agreement, it no longer qualifies for special treatment under sections 56 and 57 and is governed by the rules applicable to post-Act security interests.

PROCEEDS

A security interest under the statute extends automatically to proceeds of the collateral. See section 22(1). When inventory is sold, the sale may, depending upon its terms, result in the seller receiving cash,

traded-in goods, an account receivable, chattel paper, a conditional sales contract or a lease. All of these items clearly qualify as proceeds. Under subsection (b), payment received in discharge of, for example, the account receivable or chattel paper, also constitutes proceeds. Cash payments qualify so long as they are identifiable (for example, deposited in an earmarked account) or traceable under common law rules. New inventory acquired with cash proceeds also qualifies as proceeds. Disposition of other types of collateral also gives rise to proceeds. For instance, where a manufacturer trades in machinery which is subject to a security interest in part payment for new equipment, the new equipment qualifies as proceeds. Where insured collateral is destroyed, insurance payments constitute proceeds under subsection (a). Section 22 governs the perfection of security interests in proceeds. The automatic extension of a security interest to proceeds is one of the five key elements of the floating security interest envisaged by the statute. See definition of 'future advance' and accompanying comment.

In many situations, a business debtor will obtain credit from a number of institutions each taking a security interest in particular collateral. A disposition of property will give rise to proceeds which comprise collateral for more than one such security interest. For instance, a retailer will typically obtain a general line of credit (for example, overdraft) from a bank against a floating security interest. The same retailer will acquire inventory from suppliers under invoices containing title retention (*Romalpa*) clauses. The retailer may also factor (that is, sell or transfer by way of security) its accounts receivable to a finance house. In such a case, all three financiers can claim as proceeds, for example, cash receipts from sales of inventory. Section 27 provides specific rules to resolve these priority conflicts.

PURCHASE

Whereas popular usage tends to equate purchase with sale, this definition extends the term to cover any consensual transaction creating an interest in property. The only exclusions relate to those interests arising by operation of law, for example, the automatic vesting of a bankrupt's property in the Official Assignee under section 42(1) of the Insolvency Act 1967. The extended definition figures in the protection afforded to good faith purchasers. See section 25.

PURCHASE MONEY SECURITY INTEREST

The statute accords special status to purchase money security interests in recognition of the new value which the associated transactions bring to a debtor's business. For example, upon compliance with specific rules, the supplier of inventory under a title retention (*Romalpa*) clause or equipment under a hire purchase agreement enjoys priority over the previously perfected floating security interest held by the bank as security for an overdraft facility. See section 27.

The four subsections of this definition anticipate typical instances of purchase money finance. Subsection (a) applies to parties who supply goods under hire purchase agreements, conditional sales contracts or *Romalpa* clauses. Subsections (a), (c) and (d) relate to situations where the goods and credit are provided by the same party. In contrast, subsection (b) provides comparable treatment for the party who puts the debtor in funds to make the acquisition from another party. For example, where a manufacturer purchases 1 new equipment with the proceeds of a bank loan secured by a chattel mortgage over the equipment, the chattel mortgage creates a purchase money security interest.

A purchase money security interest does not arise unless the credit is actually used to finance acquisition of goods. A security interest given for antecedent debt does not qualify as a purchase money security interest. Under the closing proviso, the purchase money status attaches to the extent not only of purchase price obligation but also any credit charges. Sale and lease back transactions are excluded on grounds that such transactions do not bring fresh assets to the debtor's business.

REGISTER/REGISTRAR/REGISTRY

As one of its main innovations, the proposed statute anticipates centralised registration of most all security interests in personal property. Present law requires registration of some security arrangements (for example, chattel mortgages and company charges) but not others (for example, finance leases, hire purchase agreements and retention of title clauses); registration is decentralised in the local High Courts and District Companies Offices. Under this statute, the failure to register a security interest, whilst not affecting the enforceability of the security interest between the creditor and debtor, will generally render the security interest 'unperfected' and thereby limit its

enforcement against third parties, particularly subsequent creditors who have registered their security interests. See section 28(1)(b).

SECURED PARTY

Once a person qualifies as a secured party, the person becomes subject to the rules of this statute. Qualification as a secured party is controlled largely by the definition of security interest in section 5. For instance, that definition includes the seller of goods under a title retention (*Romalpa*) clause, the vendor under a hire purchase agreement, the lessor under a finance lease as well as transferors of accounts receivable and chattel paper.

SECURITY

Securities are one of the five types of paper collateral recognised by the statute. Typical securities within the definition include the ordinary shares and debenture stock issued by publicly listed companies. Whether other types of investment paper qualify as a security depends upon the content of the document as well as the circumstances of its issuance. For example, non-renounceable share warrants and non-transferable options such as those issued to key employees may not satisfy the requirements of subsection (a)(i). Such property then qualifies as intangibles. Intangible would also describe the interest of a purchaser of a security prior to the time the transfer is registered on the company's books.

Although the definition is drafted on the assumption that a security will be evidenced by a certificate or similar document, special provision is also made for uncertificated securities. See comment on the definition of that term. When securities are used as collateral, special regard must be had for the practical consequences of the alternative means (possession of the security or registration of a financing statement) of perfecting the security interest. See comment to section 19.

SECURITY AGREEMENT

Once an agreement is identified as a security agreement, it is subject to the statute. As with the term secured party, qualification as a security agreement is largely controlled by the definition of security interest in section 5. Under that definition, 'security agreement' applies to all existing title-based and encumbrance-based security arrangements. This includes hire purchase agreements, finance leases,

conditional sales contracts, title retention (*Romalpa*) clauses, chattel mortgages and floating charges.

The general definition of security interest leaves open-ended the concept of security agreement. For instance, subordination agreements and negative pledges would qualify as security agreements if they create an interest in personalty that secures payment of an obligation.

One fundamental consequence of qualification as a security agreement is that enforceability depends upon satisfaction of the formality requirements in section 9. For example, the signature requirement of that section will affect suppliers who currently deliver goods under invoices containing a title retention (*Romalpa*) clause.

SECURITY INTEREST

This term is discussed in detail in the comments to section 5. All North American enactments of the uniform regime define security interest in the interpretation section along with the other constitutive terms of the regime. The 'scope' of those enactments is the subject-matter of a subsequent section which excludes specific security arrangements and property transfers. Where the particular enactment, for example, that proposed for British Columbia, contains an extended definition of security interest, there is considerable overlap between the definition section and scope section. This statute eliminates this overlap by integrating the excluded transactions into the definition of security interest. The length of resulting definition warrants presentation in a separate section.

SECURITY TRUST DEED

Debenture stock issued by listed companies is normally secured by a trust deed which normally creates a fixed and/or floating charge over some or all of the issuer's assets. To simplify the administration of the security aspects of the arrangement, the security is transferred to a single party (the trustee) for the benefit of the holders of the debt obligations. The trustee is responsible for perfecting the security and supervising the debtor's performance of the various covenants. This practice is facilitated by treating the trustee as the secured party under the definition of that term. For special rules applicable to trust deeds, see sections 13(3), 43(9) and 50.

SPECIFIC GOODS

This term appears in the definition of chattel paper. It excludes from the scope of that definition documents (for example, debenture stock) which create an obligation and secure that obligation by means of a floating security interest.

THE WHOLE

Like the definitions of accession and other goods, this definition figures in the special priority rules in section 31 for competing security interests in accessions. Where a chandler installs a reconditioned engine in a boat, the engine is the 'accession', the boat is the 'other goods' and the combination of boat and motor is the 'whole'.

UNCERTIFICATED SECURITY

It is now technically possible, and will soon be legally permissible, that the interests of investors in bodies corporate will be documented only by computer entry. While the absence of corporeal embodiment of such interests invites special difficulties with ostensible ownership, these do not warrant placing such interests outside the concept of security. Instead, the proposed statute makes adjustments in the rules about perfection and priority to accommodate the presence or absence of documentation. See section 18(2).

Current New Zealand law (Companies Act 1955, section 90) allows the use of uncertificated securities only by way of exception. The practice is allowed and widely employed in North American jurisdictions as a means to reduce the delays and costs of security transfers. It is presently under consideration by both the New Zealand Stock Exchange and the Law Commission as one issue in the reform of company law.

VALUE

The term value appears in the rules respecting creation of security interests, priorities and protection of good faith transferees. See sections 10(1), 24, and 25. For instance, pursuant to section 10(1)(a), a security interest does not come into existence ('attach') until value has been given by the debtor. Creation of a security interest under that section is sufficiently supported by anything which qualifies as consideration in the contract sense, for example, an advance of funds, a binding commitment to extend credit or the delivery of goods

under a title retention (*Romalpa*) arrangement. However, the value requirement of that section will also be satisfied where the debtor grants a security interest to collateralise a pre-existing unsecured debt.

WORKING DAY

The calculation of the various time requirements, for example, the grace period for perfection of certain purchase money security interests under section 27(1), is calculated in terms of working days.

Subsection (2): This concept of fungible goods appears in the definition of documents of title. In that context, it makes clear that a qualifying document of title can be used both in respect of specific goods (for example, a bill of lading over one item of equipment) as well as a portion of a mass of commingled goods (for example, warehouse receipt issued upon delivery of fruit to a cold store).

Subsection (3): Possession of collateral figures in the operation of numerous rules in the statute. For example, possession of collateral by the secured party perfects its security interest under section 18 and avoids the necessity of a written security agreement under section 9(1). Possession of goods by the debtor satisfies one of the requirements for attachment under section 10(3). The rule in this subsection combats attempts to circumvent these provisions by naming the debtor or creditor as each other's agent for possession. Such a strategem could defeat the registration requirement for non-possessory interests. However, it is not the intention that the subsection preclude the use of legitimate agency relationships in security arrangements such as 'field warehousing' where the secured party exercises control through its agent over possession of collateral on the premises of the debtor.

Subsection (4): This provision acknowledges the possibility that the classification of collateral may change during possession by the debtor. This will occur, for example, when a carpenter purchases a power saw for use in business and subsequently, upon retirement of the tool from commercial service, employs it for hobby purposes around the home. This change in use converts the saw from equipment to consumer goods. A change from equipment to inventory will occur when, for example, a farmer moves a bull from stud service to a beef herd. Where the saw and bull were collateral at the time of initial service, for example, for purchase money credit, the subsequent

change in use will not affect their status as equipment for purposes of, for example, section 24 which governs the rights of good faith purchasers of the goods.

Subsection (5): This statute achieves its uniform regulation of diverse security arrangements largely by means of specific rules dealing with, for example, formation and priority. Unlike present law, these rules operate without regard to the location of title to the collateral. This subsection, like section 4(2), prevents secured parties such as suppliers under *Romalpa* clauses and hire purchase agreements from invoking their legal title to alter or avoid the operation of these specific rules.

SECTION 3—NOTICE AND KNOWLEDGE

The operation of many of the priority rules in the statute depend upon a party's awareness of an outstanding security interest. The comparable requirement in existing law gives rise to considerable uncertainty, due largely to a general or undefined concept of notice or knowledge. The proposed statute adopts several measures to alleviate this uncertainty.

Firstly, the statute consistently makes the enforceability of a security interest against a subsequent purchaser depend upon the purchaser's 'knowledge'. See, for example, sections 24 and 25. Knowledge is narrowly defined in subsections (1)(a) and (1)(b) as actual knowledge or one very specific instance of constructive knowledge (receiving notice). Unlike other statutes, such as UCC 1–201(25), this statute does not employ an objective 'reason to know' standard which is the cause for so much uncertainty.

Secondly, in contrast to the treatment of subsequent purchasers, priority as between secured parties is often resolved under rules, such as section 28(1), in which knowledge or notice plays no role whatsoever. Where resolution of priority disputes depends upon awareness of a security interest, the statute consistently refers either to giving notice or receiving notice. These actions are far more susceptible of evidentiary proof than knowledge or notice itself. For instance, under section 27, the super-priority accorded purchase money security interests depends upon the giving of notice by the party wishing to obtain priority.

Thirdly, the statute provides both general and 'safe harbour' rules for giving and receiving notice. These rules comprise the bulk of provisions contained in this section. Subsections (1)(c) and (1)(d) provide the general rules and subsections (4)—(8) set forth various safe harbour rules. It is anticipated that parties will utilise the safe harbour provisions for giving notice and thereby minimise the possibility for disputes.

Of particular interest are the rules found in subsections (1)(b) and (2) for situations where the debtor or creditor is a juristic entity. Such an entity is typically a limited liability company consisting of multiple departments with numerous employees involved in the administration of financing arrangements. For such cases, subsection (1)(b) establishes both a safe harbour standard (communication with the party conducting a transaction) and a constructive test keyed to the organisational structure of the business. It follows from the due diligence requirement that a letter received in due course by a large lending institution will place that institution upon notice of its contents.

The general 'safe harbour' means for giving notice in subsections (4)—(8) are consistent with similar provisions in the Property Law Act 1952, Credit Contracts Act 1981 and other Acts. Of particular significance is subsection (7) which enables parties to use registered mail in order to avoid the difficult problems of proof of service. Although service by unregistered mail is possible under subsection (4), only the use of registered mail raises an unrebuttable presumption of delivery.

The section does not follow its counterpart in the British Columbia legislation which establishes even more specific 'safe harbour' rules. Those rules apply to the giving of notice to partnerships, limited companies, municipal corporations and associations. For instance, under those rules, notice upon a partnership can be given, inter alia, by leaving notice with one or more of the general partners, the person in control of the management of the partnership, or by registered mail to the partnership, or any one or more of the partners.

The safe harbour rules in subsections (4)—(8) may be varied by the terms of the security agreement. For instance, a security agreement may provide that all notices to the secured party must be by registered mail addressed to a specific person. The enforceability of such

provisions is subject only to the general rules respecting unconscionability and good faith.

Subsection (3) changes existing law which, in some cases, provides that registration constitutes constructive notice for purposes of various priority rules. See, for example, Companies Act 1955 section 102(12) and Chattels Transfer Act 1924 section 4. The provision is largely superfluous but is stated to make it clear that a change to the existing law is intended. This section precludes any argument that a registered financing statement serves as a predicate for either actual knowledge or constructive notice.

Subsection (11) applies the rule found in section 37 to cases where the notice contains a defect. Under that rule, a defect will affect the validity of the notice only if it is seriously misleading without regard to whether or not any party is actually misled by the defect.

SECTION 4—MEANING OF SECURITY INTEREST

This definition comprises a key element in the proposed uniform regime for personal property security interests. Through this definition, a wide range of different property interests are reduced to a common denominator (security interest) and then subjected by section 5 to uniform regulation under the statute. It is important to note that the definition contains both a general part as well as a specific part.

The general definition in subsection (1) encompasses any arrangement which affects personal property in such a manner that the party in ostensible control of the property does not have the full legal entitlement where the arrangement is intended to secure performance of an obligation. This includes both encumbrance-based security devices such as the chattel mortgage and floating charge as well as title-based security devices such as hire purchase agreements, title retention (*Romalpa*) clauses, and conditional sales contracts. This intention is given explicit recognition in the closing sentence of subsection (1) as well as in subsections (2) and (3).

The statute seeks to leave no room for argument that a seller who delivers goods but retains title pending payment of the price has, for purposes of this statute, anything but a security interest in the goods. Subsection (2) prevents secured parties from invoking ownership rights to circumvent or defeat the priority rules of the proposed

statute. For example a, *Romalpa* supplier, hirer under a hire purchase agreement or lessor under a lease for a term of more than one year, cannot invoke its title to goods to defeat the rights of a buyer under section 24.

Subsection (3) applies the definition to standard security arrangements such as fixed or floating charges, hire purchase agreements and chattel mortgages. Subsections (2) and (3) extend the concept to transfers of accounts receivable and chattel paper. These latter types of personalty are not strictly embodied in a document in contrast to the rights associated with a negotiable instrument. Accordingly, any transfer of such property, whether it be by way of sale or security, poses a problem of ostensible ownership. For example, there is nothing in a firm's assignment of an account receivable which indicates to a subsequent prospective creditor that the firm is not still the absolute owner of the receivable. Likewise, when a dealer sells or charges chattel paper, it is not unusual for the dealer to retain possession of the paper for purposes of collecting payments. By treating these transactions as giving rise to security interests, the statute resolves problems associated with ostensible ownership by means of priority rules based upon registration and giving notice.

Other security arrangements, such as subordination agreements and negative pledge contracts, will not normally fall within the general part of the definition unless, due to the terms of the transaction and the surrounding circumstances, they create an interest in personal property that secures payment or performance of an obligation.

The shipment of goods under a bill of lading is a security device in the sense that it enables the seller to retain control of the goods until receipt of payment. However, since the buyer's obligation does not arise until the buyer takes delivery of the goods, the device does not secure the performance of an obligation. Moreover, where the bill of lading is negotiable, the seller's rights in the goods are sufficiently tied to possession of the document so as to obviate problems of ostensible ownership. In such a case, the buyer cannot obtain possession of the goods until it obtains possession of the document.

As earlier noted in the comment to the section 2 definition of security interest, other enactments of the uniform regime limit the operation of the statute by a section which excludes from its scope certain specific transactions which create interests clearly or arguably within the definition of security interest. As mentioned there, this statute

integrates those excluded transactions into the definition of security interest.

The exclusions in subsection (5) fall into two categories. Some exclusions concern arrangements which, although they involve security, are adequately regulated elsewhere. Transfers of interests in insurance policies are regulated by the Life Insurance Act 1908, mortgages of land and transfers of mortgages by the Property Law Act 1952, transfers of present or future wages by the Wages Protection Act 1983 and transfers, mortgages and transfers of mortgages of ships and vessels by the Shipping and Seamen Act 1952. The remaining exclusions mostly relate to transfers which are seldom associated with commercial financing transactions.

The only excluded transactions which arguably intersect with commercial financing are those anticipated by subsection (5)(b)(ix) insofar as it applies to a transfer of rental payments or the transfer of a promissory note secured by a real property mortgage. In the absence of the exclusion, those transfers would qualify as the transfer of an account, instrument or intangible and be subject to regulation under the statute. Under subsection (5)(b)(ix), the statute applies to such transfers only where evidenced by a security. This will be the case, for example, where rentals and mortgage payments are charged as security for debenture stock.

Of particular significance is the treatment of interests arising under contracts of insurance against the loss or destruction of personal property. It is common practice that, when property is used as collateral, the owner/debtor will transfer its interest under existing insurance policies to the secured party or specify that insurance payments be made to the secured party. These transfers do not, under the exclusion in subsection 4(5)(b)(i), result in creation of a security interest; the rights so transferred will be enforceable without regard to the formal requirements in sections 8 and 9. However, the exclusion leaves unaffected the operation of the rules, such as those found in section 27, which govern priorities in the cash or claim which arises under the policy when the collateral is destroyed.

Subsection (6) makes clear that the applicability of the statute is determined solely by reference to the general definitions and the specific inclusions and exclusions. The registration of a financing statement, for example, in respect of a priority agreement under

section 33, has no bearing upon the question whether the agreement qualifies as a security agreement.

This section does not refer to certain legal relationships, such as set-off and deposit accounts, which are the subject of specific exclusions under other enactments. See UCC section 9–104.

SECTION 5—APPLICATION OF ACT

This section determines the scope of the statute by reference to the definition in the previous section and the rules in sections 56 and 57 for prior security interests. For example, where a dealer supplies goods under a title retention (*Romalpa*) clause or finance lease, that dealer's interest in the goods, since it qualifies as a security interest under section 4, is subject to this Act under paragraph (a). Where a pre-Act debenture which creates a floating charge is renewed after enactment of this statute, it becomes subject to this Act under paragraph (b). The application of paragraph (c) is discussed in the comments to sections 56 and 57.

SECTION 6—CONFLICT OF LAWS

Like its counterparts in the United States, the British Columbia legislation which serves as a model for the proposed statute contains complex conflict of law provisions. These are needed to accommodate the movement of collateral through provinces which lack uniform law. In a single jurisdiction such as New Zealand, the conflict of law issue relates primarily to import and export transactions and yields to a much simpler solution. This section adopts the traditional conflicts regime for property disputes. The controlling law is that of the jurisdiction in which the property is situated.

Suppose, for instance, that the Australian subsidiary of a New Zealand company grants an Australian lending institution a charge over a manufacturing plant situated in New Zealand. The security interest will be governed by this statute in the absence of a choice of law clause in the agreement which specifies the applicability of Australian law. It is a fair implication from subsection (1)(a) that a New Zealand court should not give effect to such a clause. It is also unlikely that credit institutions operating in Australia can use a choice of law clause to import the proposed regime against Australian debtors and property situated in Australia.

Application of the provision to goods imported and exported under title retention (*Romalpa*) clauses will depend upon the time at which the security interest attaches to the goods. Suppose that a New Zealand exporter sells goods to an Australian buyer under a title retention document which does not specify the choice of law. New Zealand or Australian law will apply depending upon whether the security interest attaches in New Zealand or Australia. Under section 10, a security interest does not attach until the debtor obtains rights in the collateral. If such a buyer does not normally obtain rights in the goods until delivery, the title retention (*Romalpa*) clause would be governed by Australian law. Subsection (1)(a) may enable the New Zealand seller to improve its position by including in the shipping documents a provision which denominates New Zealand law. This will depend upon the Australian doctrine governing such choice-of-law clauses.

In the reverse situation, where an Australian exporter sells goods to a New Zealand buyer under a title retention clause, the security aspects of the transaction will be governed, under subsection (1)(a) by this statute where, as is normally the case, the buyer does not acquire rights in the goods until delivery in New Zealand. Where the terms of the agreement (for example, respecting risk of loss or pre-payment) entitle the buyer to rights in the goods before they leave Australia, New Zealand law will still apply under subsection (1)(b) since the knowledge requirement is clearly satisfied in such export transactions. Except by negative inference, the statute does not address the question whether the Australian seller in such a case can enforce a choice-of-law clause providing for the application of Australian law.

Accounts receivable and other intangibles have no physical location. The accounts receivable owned by an Australian subsidiary of a New Zealand company and assigned to an Australian financial institution as security exist only as entries in computer memory devices which may be located in one or both of the jurisdictions. The *lex loci* rule of subsection (1) is made applicable to such property by means of the deeming rule in subsection (2). The rule provides a commercially workable solution to the underlying ambiguity. The ease of identifying a debtor's place of business or its chief executive office eliminates the uncertainty which would otherwise attend the choice of law question under such circumstances. The rule enables the parties to identify the law which will apply to the transaction and, if they find that

law unacceptable, they can agree upon a choice of law clause in the security agreement.

Subsection (3) anticipates the situation where, for example, an Australian bank lends an Australian manufacturer funds to purchase new equipment and secures the loan by means of a chattel mortgage over the equipment. The bank complies with the Australian state equivalent of the Chattels Transfer Act 1924. If the manufacturer subsequently sells the equipment to a New Zealand buyer, the bank's security interest is deemed perfected in New Zealand under subsection (3). Under the first to file rule in section 28(1), it will prevail over a security interest subsequently granted by the New Zealand buyer to a New Zealand creditor.

SECTION 7—ACT TO BIND THE CROWN

This provision follows the well established law respecting Crown liability in New Zealand. Compare section 5 of the Commerce Act 1986 and section 3 of the Crown Proceedings Act 1950.

SECTION 8—EFFECTIVENESS OF A SECURITY AGREEMENT

This section establishes two fundamental features of the proposed regime for personal property security. Firstly, it recognises the principle of private autonomy. The debtor and creditor are generally free to contract on whatever terms they choose. Secondly the section recognises the *ad rem* nature of the rights created by the security agreement. As a property right, the security interest is enforceable against all third parties in contrast to rights created by contract which are generally enforceable only between the contracting parties.

However, parties cannot contract out of the scope of the statute, alter its priority rules as they affect third persons or avoid its formality requirements (for example, the writing requirement in section 9). Further, security agreements remain subject to other enforceability constraints such as those contained in the Credit Contracts Act 1981 and the Minors' Contracts Act 1969.

SECTION 9—WRITING REQUIREMENTS FOR SECURITY AGREEMENTS

For a security agreement to be enforceable against third parties, either the secured party must have possession of the collateral or the debtor must have signed a written security agreement containing a sufficient description of the collateral. Informal (that is, strictly oral) security agreements remain enforceable as between the parties to the contract but not as against third parties.

This formality requirement serves several purposes. It minimises evidentiary problems which arise when the security interest is invoked against third parties. It also provides the basis for section 13 which entitles certain third parties to copies of the security agreement. Finally, the rule will encourage salutary record-keeping practices.

With one exception, the documentation currently associated with the arrangements identified in section 4(2) will surely satisfy the formality requirements under this section. The exception relates to the use of title retention (*Romalpa*) clauses. Under present law, these clauses are incorporated in the standard forms (invoices, acknowledgements, quotations) employed by sellers of goods. These forms are seldom, if ever, signed by the buyer of the goods. Under the existing law of contract, these clauses are generally enforceable against the buyer as well as, under the law of personal property, against third parties such as receivers and liquidators. Under the proposed statute, the rights of the *Romalpa* seller would not be enforceable against the third parties unless the title retention document has been signed by the purchaser. In such a case, the supplier could satisfy the requirements of this section if, prior to first delivery, the supplier obtained the customer's signature on a form which set forth the supplier's terms and conditions including the *Romalpa* clause. It would not then be necessary to obtain the buyer's separate signature in connection with each subsequent supply of goods.

The rules in subsection (1)(b) and subsections (2) and (3) are largely dictated by the perceived needs of third parties who might request copies of the security agreement under section 13. Given the broad range of property which qualifies as consumer goods or equipment, a generic description of collateral as equipment or consumer goods clearly does not satisfy the informational needs of prospective creditors. Description of equipment or consumer goods by reference to their type would presumably be sufficient in cases where all goods of

that type possessed by the debtor constituted collateral under the particular agreement. It would not, however, be sufficient where the agreement covered only some goods of that particular type. In that case, the equipment must be described by reference to each item in order to enable third parties to identify the extent of the debtor's property interests. There are no specific requirements along the lines of those currently specified in the Chattels Transfer Act 1924 for identification of stock, poultry and similar collateral.

In the case of a floating security interest, the description anticipated by subsection (1)(b)(ii) sufficiently apprises third parties of the extent of encumbered property. Under subsection (3), a description of collateral as inventory, while otherwise adequate, will not protect the secured party in the event that the debtor selects an item of inventory for use as equipment in its business.

Given the multiplicity of proceeds that may result from disposition of collateral (see commentary on section 2, definition of proceeds), a generic description 'proceeds' would have little meaning to third parties. However, an itemised description would have to be excessively detailed in order to encompass all possible types of proceeds. Accordingly, under subsection (4), the fact that a security agreement does not describe the particular proceeds does not suffice to render the security interest unenforceable. Instead, the result depends upon the operation of the more detailed description requirements for proceeds found in section 22.

SECTION 10—ATTACHMENT OF SECURITY INTERESTS

Attachment refers to the creation of a security interest. Until the three events mentioned in subsection (1) have occurred, a secured party does not acquire a security interest in specific property. As perhaps its most important application, the moment of attachment determines the operation of the choice of law rule in section 6. See commentary on that section. Attachment plays a relatively minor role in the statute's system of priority rules. Priority is generally determined, under section 28(1)(a), by reference to the order of perfection through registration of a financing statement. However, attachment alone provides priority against unsecured creditors and judgment creditors under section 8 in conjunction with section 15; the order of attachment determines priority as between two unperfected security interests under section 28(1)(c).

The subsidiary role of attachment is particularly important for the floating security interest envisaged by the statute. Under this statute, a creditor can obtain a floating security interest by means of a clause granting the creditor a security interest in all of the debtor's presently-owned and after-acquired property. Under subsection (1)(b), the creditor to such an agreement obtains a security interest in after-acquired property only upon the debtor's acquisition of the goods. However, as in the case of the floating charge, the priority of competing security interests in after-acquired property generally dates from the moment of perfection, which in turn is determined by the date of registration of a financing statement. See section 28(1).

It is of little significance for the statute's priority system that the secured party has no interest in subsequently acquired property until the debtor actually acquires rights in the property. This fact does, however, have potential significance for the relative priority of security interests arising under this statute and the rights of parties arising under other laws. For instance, under sections 309 and 311 of the Companies Act 1955, the liquidator can avoid securities given by a debtor within twelve months of winding up. It is uncertain how these provisions will affect a floating security interest created and registered outside the twelve month period as it applies to property acquired within the twelve month period. It is arguable that, in the absence of any change to sections 309 and 311, the attachment of the floating security interest to property acquired within the twelve month period could constitute a voidable preference. The traditional floating charge was not susceptible to this argument. The view prevailed that, in respect of after-acquired property, the charge related back to the date of the security instrument. The change in the nature of the floating charge will also necessitate a change to the regime for preferential creditors under section 308 of the Companies Act 1955.

Subsection (2) anticipates the case, which surely must arise, that some creditors will continue to use traditional floating charge agreements under the Act. The language of these agreements will not delay attachment of a security interest to subsequently acquired property beyond the time at which the debtor acquires rights in the collateral.

The first and third elements of attachment are relatively unproblematical in view of the extended definition of value and the well defined formality requirements of section 9. However, the statute requires reference to common law rules for the determination of

when and whether the debtor acquires rights in the collateral. It is clear, by reference to subsection (3), that 'rights' for the purpose of section 10(1)(b) anticipate something less than legal title. In the three transactions referenced in subsection (3), the debtor acquires rights sufficient for attachment of a security interest no later than the time at which the debtor obtains possession of the goods. This does not preclude earlier attachment where, for example, the agreement shifts the risk of loss or requires a pre-payment before delivery of the goods.

Where a creditor holds a floating security interest over a retailer's presently-owned and after-acquired inventory, attachment of that interest to subsequently acquired inventory should not be defeated by the fact that certain inventory is delivered under title retention (*Romalpa*) clauses. It is the clear intention of the statute that the relative claims of the holder of the floating security interest and the *Romalpa* supplier should be resolved by reference to the priority rules in sections 27 and 28. In such a case, subsection (3)(c) makes clear that the retailer's possession of the inventory qualifies as sufficient rights for attachment of the security interest.

Subsection (4) deals with crops, unborn animals, minerals and trees in a manner consistent with the treatment of these types of property in the definitions of section 2. Where a party extends credit to a farmer, for example, to produce a crop or harvest trees, the parties will normally enter into a security agreement at the time of the advance. However, the creditor's security interest does not arise until the crops become grown or the trees are severed. The producer is free to obtain additional credit from another creditor prior to planting or harvesting. Although the two creditors will obtain a security interest in the crops or trees at the same moment, the priority of their interests is determined according to the date of perfection, generally by reference to the times at which they registered their financing statements. See section 28(1). Subsection (4) must be read in conjunction with section 30(4) which confines the operation of after-acquired property clauses in farm security agreements to crops harvestable within one year from the execution of the security agreement.

SECTION 11—SECURITY INTERESTS IN AFTER-ACQUIRED PROPERTY

The liberal treatment of after-acquired property clauses comprises one of the five key elements of the floating security envisaged by the

statute. See commentary on section 2, definition of future advance. The statute expressly anticipates the use of security agreements which provide simply that the debtor grants a security interest in 'all present and after-acquired property'. See section 9(1)(b)(ii). In the case, for example, of a retail debtor, this language suffices to attach a security interest to all presently-owned and future-acquired equipment, inventory and accounts as soon as the retailer acquires rights in those goods. As regards the after-acquired property, the priority of the security interest is fixed, without need for any further 'crystallisation', from the date on which the creditor registers its financing statement which may, and often will, precede execution of the security agreement. See sections 37(5) and 28(1)(a)(i).

Following the British Columbia legislation as well as enactments of the uniform code in other North American jurisdictions, this statute limits operation of after-acquired property clauses both in respect of consumer goods and crops. These limitations are designed to protect financially vulnerable debtors from monopolisation of credit by a single institution as well as from the coercion which is inherent in over-collateralisation. However, the efficacy of this limitation is somewhat undermined by the effect of the first-to-file priority rule during the stated duration of a financing statement.

Under section 30(4), an after-acquired property clause will not attach a security interest to crops harvestable more than one year after execution of the security agreement. In respect of consumer goods, paragraph (b) of the present section confines operation of such clauses to accessions, purchase money collateral and replacements. In the case of a non-purchase money loan to a consumer, the statute leaves the lender free to take a security interest in all of the debtor's presently-owned personal property subject only to the requirement in section 9(2) that the property be described by kind. However, this subsection prevents such a lender from acquiring a security interest in the debtor's future property under an after-acquired property clause. In contrast, an after-acquired property clause in a hire purchase agreement for a motor boat will, provided that it specifically refers to accessions and replacements (again, see section 9(2)), attach a security interest to, for example, a reconditioned engine or replacement craft. The exception for purchase money interests permits, for example, credit card issuers to secure indebtedness by means of 'cross collateral' or 'spreader' clauses, pursuant to which the creditor retains a security interest in all goods purchased with the card so long as

there is any outstanding indebtedness. The statute leaves the regulation of such practices to the pending reform of the credit contracts legislation.

SECTION 12—FUTURE ADVANCES

As described earlier, the liberal treatment of future advances forms another of the key components of the floating security interest permitted by the statute. See commentary on section 2, definition of future advance.

SECTION 13—SECURED PARTIES TO SUPPLY INFORMATION

The statute entitles the debtor and certain third parties to obtain information about various aspects of an existing credit arrangement. Under the present system of instrument filing, that is, where the secured party must file the entire security agreement in order to obtain priority, third parties can obtain some of this information through examination of the registered documents. However, since the proposed statute replaces instrument filing with notice filing, this information is no longer available as a matter of course.

The access to information under this section is both wider and narrower than under existing practice. At present, any member of the public can inspect the filed security documents. Under the proposed legislation, information can be obtained only by the four parties identified in subsection (2). Subsection (1) ensures that the accessibility of information will not be defeated by the transfer of the secured party's rights (for example, under a hire purchase agreement) to a third party. However, under existing law, the information entitlement is limited to the contents of the agreement and does not extend, for example, to the matters specified in subsections (2)(b)—(2)(e). Most importantly, the statute will entitle third parties to obtain information respecting the amount of the indebtedness and an identification of the specific collateral covered by the agreement.

The British Columbia legislation entitles all creditors to receive the information described in subsection (2). In contrast, under the original version of the uniform regime, only the debtor is entitled to information. See UCC section 9–208.

Subsections (3)–(8) set forth a number of largely self-explanatory rules applicable to demands for information. The importance attached to the information entitlement is reflected in the variety of remedies available for non-compliance under subsections (9) and (10). These include mandatory injunctions, modification (for example, discharge or non-perfection) of the security interest and liability for consequential loss. Existing practice on the allocation of legal costs would deter enforcement of this section since the prevailing party recovers at most a portion of its costs according to scale. Accordingly, subsection (9)(d) provides for full recovery of legal costs.

The British Columbia legislation does not recognise damages liability as a consequence of non-compliance. Instead, it provides that, in the event of non-compliance, the secured party is estopped from denying the accuracy of information. The interaction of the knowledge and reliance components of the estoppel doctrine, particularly when applied to successors in interest, make the British Columbia legislation too complicated. Subsection (11) of the proposed statute accepts damages liability, also recognised in Ontario and United States jurisdictions, as a more meaningful and workable remedy. Under this rule, a third party who extends credit after receiving false information from a prior secured party is entitled to damages under section 52.

SECTION 14—WHEN SECURITY INTERESTS PERFECTED

Whilst attachment refers to the creation of a security interest, perfection concerns the enforceability and priority of that interest against third parties. A perfected interest is prior to an unperfected interest. See section 28(1)(c). The priority of competing perfected security interests is determined according to the time of perfection. See section 28(1)(a).

A security interest is not perfected until it attaches and the necessary step has been taken. The necessary step is generally an act—possession of the collateral or registration of a financing statement—designed to notify third parties of the existence of the security interest. The holder of a floating security will not obtain a perfected security interest in after-acquired property until the goods are acquired by the debtor. This may follow by months or even years the registration of the financing statement.

Section 37(4) anticipates that registration will often precede attachment of the security interest. The delay between registration and perfection has considerable commercial utility in some cases. It enables creditors to protect themselves from possibly outstanding security interests which have been temporarily perfected without registration. See section 20. The creditor can register a financing statement and delay the advance until the period allowed for temporary perfection (usually ten working days) has elapsed.

SECTION 15—SUBORDINATION OF CERTAIN SECURITY INTERESTS

Existing law is far from consistent in its treatment of security interests in respect of which a creditor has not taken the step (usually registration) necessary to provide perfection. The failure to register renders a chattel mortgage or a charge unenforceable against a wide range of the third parties. However, other types of security arrangements particularly those based upon title, such as hire purchase and title retention devices, are effective against third parties without registration.

The British Columbia legislation, which closely follows the United States enactments in this regard, makes the unperfected security interest subordinate to a perfected security interest as well as to the rights of creditors who seize collateral under legal process (for example, execution or attachment), assignees for the benefit of creditors, a wide range of transferees as well as the liquidator and Official Assignee in insolvency proceedings. This follows well established pre-Code practice in these North American jurisdictions. In particular, it accommodates the peculiar rule of United States insolvency law which endows the trustee in bankruptcy (counterpart of Official Assignee and liquidator under New Zealand law) with all the powers of a creditor holding a judgment lien against the property of the bankrupt individual or company. This rule of insolvency law, when combined with state legislation subordinating unregistered security interests to judgment creditors, renders such interests unenforceable in insolvency proceedings governed by federal law. In New Zealand, this same result follows directly from section 18 of the Chattels Transfer Act 1924 and section 103(2) of the Companies Act 1955.

The proposed statute postpones the unperfected security interest to a perfected security interest. See section 28(1)(b). However, except as

provided in this section, the unperfected security interest remains enforceable against third parties under the general rule in section 8. Thus the provisions of the Chattels Transfer Act 1924 and Companies Act 1955 which render unregistered charges void against a liquidator or Official Assignee have not been adopted in the statute.

In practice, only two parties are possibly misled by the absence of a registration statement. The first is the prospective creditor who would normally advance credit only against a first ranking security in a debtor's goods. Under the proposed statute, if such a creditor files a registration statement, it is protected against any unperfected security interests. See section 28(1)(b). Creditors who supply goods or funds on an unsecured basis are generally either not concerned about the presence of outstanding interests or assume that such interests exist.

Prospective buyers and lessees, like prospective secured creditors, also rely heavily on the ostensible ownership of their transferor. Accordingly, they are protected from unperfected security interests under this section unless they have knowledge of the security interest. Knowledge means actual subjective awareness of the outstanding interest as opposed to constructive knowledge. See section 3.

This section is not intended, by way of negative implication, to regulate the rights of those who hold perfected security interests against purchasers and other transferees. That matter is the subject of separate and more detailed priority rules. Under those provisions, the perfected security interest may or may not prevail against a subsequent good faith transferee for value. See sections 24 and 25. This section is subject to section 24 which also contains rules which protect certain buyers and lessees of goods from unperfected interests.

The consequences of non-perfection for insolvency proceedings against the debtor are left to be determined as a matter of insolvency law. A similar approach on this issue has been taken in the Motor Vehicle Securities Bill 1988.

SECTION 16—PROTECTION OF AUCTIONEERS, ETC

Commerce in goods would be unduly burdened if unperfected security interests were enforceable against parties engaged in the business of dealing in goods as agents. In the absence of this section, disposition by an auctioneer or other such dealer would, in view of the general rule in section 8, result in conversion liability. This section

should not be construed, by way of negative inference, to govern situations involving perfected security interests.

SECTION 17—CONTINUITY OF PERFECTION

A security interest may be perfected by one means, for example, by possession or temporarily without registration, and then subsequently perfected by another means such as registration. For instance, a creditor will generally perfect a security interest in a company security, say preference shares, by means of possession. If the secured party releases to the debtor possession of the shares for purposes of redemption, its interest remains temporarily perfected for ten working days under section 20. In this case, the security interest is viewed as being continuously perfected from the moment of first possession.

Subsection (2) applies to the common situation where a dealer sells goods under a hire purchase agreement. Normally the dealer will register a financing statement which perfects the resulting security interest. If the dealer then discounts the chattel paper to a finance house, the security interest continues perfected in the hands of the transferee without any further step. However, the parties may wish to register the transfer of the agreement under section 39.

SECTION 18—PERFECTION BY POSSESSION OF COLLATERAL

The statute recognises three means of perfection: registration of a financing statement, possession of collateral and temporary perfection without either registration or possession. Permanent perfection requires a public event (possession or registration) which apprises third parties that property ostensibly owned by the debtor is subject to an outstanding security interest.

Security interests in all types of collateral capable of being reduced to possession may be perfected by possession. The secured party must take possession either personally or through an agent. However, section 2(3) precludes the secured party from employing the debtor as its agent for possession. The only types of collateral in which a security interest cannot be perfected by possession are uncertificated securities, accounts receivable, other intangibles and non-negotiable documents of title. The first three are not susceptible of possession.

Non-negotiable documents of title do not sufficiently lock up control of the goods in the document to warrant perfection by possession.

Subsection (2) anticipates the situation where a limited company issues securities which, by the terms of the issue, are evidenced only by entry on the company's book and not by any certificate. Such practice is permitted by section 90 of the Companies Act 1955 and frequently employed by closely-held private companies. Stock Exchange rules prohibit the practice for publicly listed companies. A security interest in such uncertificated securities can be perfected either by registering a financing statement under section 19 or by registering the transfer on the books of the company under this section.

SECTION 19—PERFECTION BY REGISTRATION

Most security interests created under this statute will be perfected by registration of a financing statement. Like possession, registration apprises third parties that a debtor's ostensible ownership of goods is subject to outstanding property interests. Given its notification capability and highly dateable nature, registration is a particularly apt vehicle for determining the relative priority of competing security interests. See section 28(1)(a).

Unlike possession, perfection through registration is applicable to any type of collateral whether tangible or intangible and irrespective of its negotiability. Under existing law as well as most North American enactments of the uniform regime, it is not possible to take a non-possessory security interest in negotiable property such as money, negotiable instruments or documents of title or securities. (See UCC section 9–302.) This was viewed as incompatible with the negotiable nature of the property. Under the proposed statute, the negotiability of such property is maintained by rules which protect the transferees of money, documents and securities. These rules generally permit a good faith transferee of such property to take free of a perfected security interest. See section 25. Perfection by registration, although possible, is not always a practically effective means of perfecting a security interest in, for example, money or securities. A secured party which desires protection against the debtor's unauthorised disposition of such property should always take possession of such collateral.

SECTION 20—TEMPORARY PERFECTION

It is in the nature of negotiable instruments and securities that, sooner or later, they must be presented, collected or transferred. For instance, redeemable shares, promissory notes and bills of exchange must be presented to the underlying obligor on the date specified in the instrument. Market movements in the rate of interest, will make it desirable to sell debt instruments. Upon the debtor's default, the secured party will want to realise its security by sale or exchange of the instrument.

Where, as will usually be the case, the debtor is the last named transferee on the instrument, it is the debtor who is legally entitled to effectuate these dispositions of the instrument or security. On the other hand, the secured party will normally have taken possession of the instrument in order to perfect its security interest. Under these circumstances, it is often more convenient for the secured party to release possession of the instrument to the debtor for purposes of disposition than to rearrange the legal entitlements on the instrument so as to entitle the secured party to make the disposition.

This provision permits such a secured party to turn over the instrument or security to the debtor for such limited purposes without sacrificing the perfected status of its security interest. Without this provision, the secured party could not in confidence take such a step without first registering a financing statement. The brief duration of the temporary perfection should cause few problems of ostensible ownership. Innocent transferees of the collateral during the period of temporary perfection are protected by specific rules elsewhere in the statute. See section 25(3).

A comparable need for temporary perfection arises where the secured party controls the debtor's goods either through possession of a negotiable document of title or by instructions to the bailee of the goods. The debtor can often repay the credit only if it is permitted to sell, ship or process the goods. This section enables the secured party to release to the debtor the document of title which in turn entitles the debtor to possession of the goods. The perfected status (originally established by possession of the document of title) continues for a ten working day period. As in the case of securities, other provisions of the statute protect innocent third party transferees from the consequences of unauthorised disposition by the debtor during this period. See section 25(4).

Where the debtor fails to carry out the intended disposition of the securities or goods during the ten day period, the secured party must either regain possession of the collateral or register a financing statement in order to maintain the perfection of its security interest. Further, the new perfection must be accomplished prior to the end of the ten day period in order that perfection be continuous.

SECTION 21—PERFECTION WHERE GOODS IN HANDS OF BAILEES

A debtor may have property which is held by a bailee, for example, grain in a warehouse, meat or fruit in a cold store or imported goods in a customs store. This section describes four different methods by which a secured party may obtain a perfected security interest in such goods. In New Zealand practice, where use of negotiable documents of title is not particularly common, subsections (1)(c) and (1)(d) will likely be the most common means of perfection. Creditors should note the risks involved in relying upon perfection under subsection (1)(c). If the bailee releases the goods either intentionally or inadvertently, the security interest becomes unperfected.

Subsection (2) anticipates the case where an owner has received a negotiable document of title from the bailee and transferred that document to a creditor as security. Subsection (2) empowers the debtor to create subsequent security interests in the goods. However, the capability of a negotiable document to reify rights in the goods is such that, under subsection (3), any subsequently created security interest in the goods is subordinate to that created in the negotiable document of title to the goods.

SECTION 22—SECURITY INTERESTS IN PROCEEDS

This section deals with two matters of fundamental importance, one cursorily and the other in detail. Consistent with the general rule in section 8, subsection (1)(a) provides that a security interest is not defeated by disposition of collateral unless the disposition is authorised or defeasance is required by a priority rule elsewhere in the statute. In some common cases, defeasance will result under both headings. For instance, a security agreement over inventory will normally authorise the debtor to dispose of the goods in the ordinary course of business. In respect of buyers of such inventory in the ordinary course of business, the security interest is also defeated by

section 24(2). If neither defeasing condition occurs, the security interest continues in the inventory and provides the legal basis for an action to recover the goods or hold the transferee liable for conversion.

The statute leaves to the common law the identification of what action qualifies as a sufficient authorisation to sever a security interest. It is a fair reading of the statute, however, that an explicit reference to proceeds in either the security agreement and/or financing statement should not constitute authorisation.

The second matter of fundamental importance is the automatic extension of the security interest to proceeds, as that term is defined in section 2. For example, where inventory subject to a security interest is sold, the security interest automatically extends to cash receipts, accounts receivable or chattel paper. The automatic extension of the security interest to proceeds and the continuation of the security interest through dispositions combine to generate the possibility of unjust enrichment as well as, at least in theory, some potentially bizarre results. For example, suppose that collateralised grain is sold without authorisation and outside the framework of section 24. The agricultural financier's security interest attaches not only to the receipts of the sale but may also continue through to the bread and meat resulting from the processing and consumption of the grain. The proviso to subsection (1) limits the amount which the secured party can realise by enforcing the security interest against both proceeds and original collateral.

It is the general intent of subsection (2) that perfection of a security interest in proceeds requires compliance with the same formalities, in terms of description and steps, as would apply if the proceeds were original collateral unless the proceeds are insurance payments or cash proceeds. Otherwise, a security interest perfected in original collateral continues perfected in proceeds only for ten working days. Perfection in the proceeds then lapses unless the secured party has taken the necessary steps to perfect the security interest in the proceeds.

Example: Assume supplier (S) delivers goods to debtor under a title retention (*Romalpa*) clause and registers a financing statement which describes the collateral simply as 'inventory'. The accounts receivable generated upon the debtor's sale of this inventory constitutes proceeds which fall within none of the paragraphs of subsection (2).

Accordingly, the accounts receivable as proceeds are subject to a perfected security interest in favour of S only for a period of ten working days. Perfection in the accounts then lapses unless, in the interim, S has amended the financing statement (by means of a financing change statement) to include a description which covers accounts receivable. If the inventory had been sold for cash, the security interest of S continues perfected in the cash under subsection (2)(b)(iii) but only so long as the cash qualifies as proceeds under the definition in section 2, that is, remains identifiable or traceable. Where the cash is used to acquire additional inventory, this inventory is subject to a continuously perfected security interest by virtue of subsection (2)(b)(i).

Floating security interests will not be susceptible to lapse of perfection in relation to proceeds. The agreement and financing statements associated with such security interests will normally describe the collateral as 'all presently-owned and after-acquired property of the debtor'. This description suffices to cover all possible proceeds under section 9(1)(b)(ii) and subsection (2)(b)(i).

SECTION 23—SECURITY INTERESTS IN RETURNED OR REPOSSESSED GOODS

A retail seller of goods will often enter into a variety of financing arrangements. The retailer will first grant a bank a floating security interest over all presently-owned and after-acquired property as collateral for an overdraft facility. The retailer will subsequently acquire inventory covered by title retention (*Romalpa*) clauses which provide the supplier with a security interest in the inventory. The retailer may sell the chattel paper arising from retail sales to one finance house and factor the accounts receivable to another finance house.

This section anticipates the case where such a retailer sells goods which are subsequently returned, seized or repossessed. Goods will be returned when, for example, the buyer cancels the sale on account of the facts amounting to breach of the statutory conditions respecting merchantability. The goods will be repossessed when, for example, the purchaser/debtor defaults under the conditional sale contract or hire purchase agreement by which it acquired the property. This section creates new security interests in such returned goods and sorts out the priorities as between these interests and pre-existing security

interests in the property. The following examples illustrate the operation of the section in common situations.

Example 1: One financier, (F1) holds a perfected security interest in the inventory of the retailer (R). Another financier (F2) holds a perfected security interest in R's accounts receivable. R sells goods on credit to a buyer who subsequently cancels the sale for breach of condition and returns the goods to R. The section assumes that the retail sale severed F1's security interest under section 24. Upon return of the goods, F1's security interest reattaches under subsection (1). Under subsection (3), F2 obtains a security interest in the same goods which, under subsections (4) and (5), remains perfected for ten working days and then lapses unless F2 perfects its interest, for example, by filing a financing statement. Under subsection (6) the security interest of F2 is subordinate to that of F1.

Example 2: In the previous example, suppose that R disposes of the goods under a conditional sales contract or hire purchase agreement. R also takes the necessary steps (registration) to perfect the security interest arising under that security agreement. R then transfers this chattel paper to F3. F3 perfects its security interest in the chattel paper either by taking possession or filing a financing statement which describes the chattel paper as the collateral. Upon return of the goods, F3 has a security interest in the chattel paper but not in the goods themselves (due to buyer's cancellation of the agreement). Like F2 in the preceding example, F3 obtains a temporarily perfected security interest in the goods under subsection (3). Under subsections (6) and (7), this security interest is prior to that of the inventory financier (F1) as well as any accounts receivable financier who may hold a blanket security interest in all of the accounts receivable of the retailer.

Example 3: In the previous examples, suppose that F4 holds a perfected security interest in all of R's presently-owned and after-acquired property. F4 obtains a security interest in the returned or repossessed goods without relying upon subsection (1). The priority between F4 and F1 (the inventory financier) as well as the priority between F4 and F2 (the accounts receivable financier) will depend upon the applicability and operation of section 27 (purchase money priority) or section 28(1) (first to perfect rule). Under subsection (7)(b), F4's interest will be subordinate to the security interest of F3 (chattel paper financier) in the second example if F3 acquired the

chattel paper free of F4's floating security interest under section 25(5).

Example 4: Prior to return or repossession, the buyer in example 1 grants a finance company (F5) a perfected security interest (chattel mortgage) in the goods. Under subsection (8), F5's security interest is prior to the security interests of F1 and F2 in example 1, and F3's security interest in example 2.

At first glance, the operation of the priority rules in this section appears complex out of all proportion to the incidence and significance of returned goods. However, once practitioners become conversant with the statute's priority system, they will recognise that the results in these examples reflect a well-developed view about the contribution made by various secured creditors to a debtor's business.

SECTION 24—PROTECTION OF BUYER OR LESSEE OF GOODS

This section regulates priority between purchasers and holders of security interests in the same goods. The section distinguishes three basic situations illustrated by the following examples.

Example 1: Sale of inventory in ordinary course of business. Financier (F1) holds a perfected security interest in retailer's (R's) inventory. Buyer (B) purchases these goods in the ordinary course of business. Under subsection (2), B takes free of F1's security interest even though that security interest was perfected and B had actual knowledge of the security interest. This result protects the expectations of buyers in the ordinary course of business and facilitates turnover of inventory. It also generally accords with the intentions of F1 who anticipates that R will use receipts of sales in ordinary course to repay the credit.

In example 1, the buyer will not be protected if it knows that the sale constitutes a breach of R's security agreement with F1. This will occur, for example, where R sells all of its inventory to another retailer who knows that such bulk sales are not authorised by the terms of R's security agreement with F1. However, severance of the security interest under subsection (2) does not depend upon the terms of the sale so long as the sale was not in total or partial satisfaction of a pre-existing debt. See subsection (7). It matters not whether the sale

was for cash, open credit or secured credit such as a hire purchase agreement or a conditional sales contract.

Nor does subsection (2) protect the buyer (B) against a security interest which was not created by the buyer's seller (R). This will be the case where R acquired the goods in used condition from a party (X) who had given another creditor (F2) a perfected security interest in those goods and that security interest was not severed by the sale from X to R.

Example 2: Sale of consumer goods. Buyer (B) purchases consumer goods from retailer (R) under a hire purchase contract. B subsequently sells these goods to X who will be another consumer or a dealer in used goods. So long as the purchase price of the goods involved in the B/X sale does not exceed $5,000, the amount currently specified in section 10(3) of the Disputes Tribunal Act 1988, X will take free of a perfected or unperfected security interest if X gives new value and does not know of R's interest. This will mean that, in practice, registration of security interests in low value retail goods will be of little benefit, and financiers will need to self-insure.

Example 3: Sale of equipment. Manufacturer (M) owns equipment which is subject to a perfected security interest in favour of a creditor (F). M sells this equipment to a buyer (B) who gives new value. Where the equipment is of a kind that may be described by serial number in the financing statement, B will take free of the security interest under subsection (6) if the financing statement does not include the serial number and B has no knowledge of the security interest. This restriction upon the rights of good faith purchasers is justified both by the relative sophistication of buyers of equipment (as contrasted to buyers of consumer goods) as well as by the ready access to serial number information through the registry. Where the equipment is not capable of serial number registration, B will take free of an unperfected security interest under section 15 but remain subject to a perfected security interest. A similar provision is to be found in some Canadian jurisdictions, but the categories of equipment (other than motor vehicles) required to be identified by serial number are minimal.

Example 4: Purchasers of goods subject to temporarily perfected security interests. A creditor (F1) holds a security interest in a retailer's (R's) inventory which F1 has perfected by registration of a financing statement describing the collateral as inventory. R uses cash

proceeds from the sale of this inventory to purchase a personal computer for use as equipment in the business. Under section 22(3), F1 has a temporarily perfected security interest in this personal computer for a period of ten working days. If during this ten day period, R should sell the computer, the buyer (B) will take free of the perfected security interest under subsection (5) if it gives value without knowledge of that interest. If F1 registers a financing change statement prior to the sale to B, B's rights will be governed by subsection (6). If the sale occurs after expiry of the ten day period but before F1 registers a financing change statement, B may take free of the security interest under subsection (6) or section 15. Similar results follow in the case of goods subject to security interests perfected temporarily under sections 20(2) and 23(4).

Subsection (8) is a provision which, whilst following section 18A(1) of the Chattels Transfer Act 1924, has no direct counterpart in the uniform regimes enacted in North America. It anticipates the following situation. F1 holds a perfected security interest in retailer's (R's) inventory of boats. R sells a boat to buyer (B) in ordinary course under a hire purchase agreement. This sale severs F1's security interest under subsection (2). Subsection (8) entitles F1 to demand that B pay directly to F1 the payments owed under the hire purchase contract. Subsection (9) protects B from double liability where B has made payments to R prior to receiving a notice of F1's entitlement. Where R has assigned the hire purchase agreement to another finance house (F2), the rights under subsection (8) can be exercised by the party (F1 or F2) which has priority in the chattel paper. This priority conflict will normally be resolved in favour of F2 under section 25(5).

SECTION 25—PROTECTION OF TRANSFEREES OF NEGOTIABLE AND QUASI-NEGOTIABLE COLLATERAL

This section complements the rule that security interests in money, instruments and securities can be perfected by registration of a financing statement. This section preserves the negotiability of such collateral in the face of perfected but non-possessory security interests. Its various rules can be illustrated by the following examples.

Example 1: Money subject to a perfected security interest. A creditor (F) holds a floating security over all of retailer's (R's) presently-owned

and after-acquired property. R uses some of the cash proceeds resulting from the sale of inventory subject to the security interest to pay unsecured creditor X. Since X is a holder for value of this money (see definition of 'value' in section 2), X takes the money free of F's security interest under subsection (1) irrespective of X's knowledge of that interest.

Example 2: Negotiable instruments subject to a perfected security interest. In example 1, R deposits other cash proceeds in a cheque account. R then draws a cheque on that account to pay creditor Z. Under subsection (2), Z takes this cheque free of F's security interest regardless of its knowledge of that interest. However, under the general law respecting the rights of payees of negotiable instruments, Z has no interest in the money in the account. That money remains subject to F's security interest until the cheque is actually paid at which time Z receives the payment free of the security interest under subsection (1).

Example 3: Purchasers of negotiable instruments or securities. Debtor (D) is a shareholder in L Ltd. D grants a creditor (F) a security interest in D's shares in L Ltd as security for a loan. F perfects this security interest by registration of a financing statement. If D sells these shares to a third party (T) under the circumstances described in subsections (3)(a)—(3)(c), T will take free of the perfected security interest. The possibility of this result makes registration as a means of perfecting a security interest in such collateral a far less effective type of protection than perfection by means of possession. Under subsection (4), a comparable rule applies to the case where a secured party uses registration to perfect a security interest in a negotiable document of title and leaves possession with the debtor who subsequently sells the document to a third party.

Example 4: Chattel paper. One creditor (F1) holds a floating security interest over all of retailer's (R's) presently-owned and after-acquired property. F1 perfects the security interest by registration of a financing statement. R sells an item of inventory to a buyer under a hire purchase agreement. R subsequently sells this chattel paper to another creditor (F2). Under subsection (5)(a), F2 will take free of F1's security interest only if F2 is engaged in the business of purchasing chattel paper ('ordinary course of business'), has given new value for the paper and does not know that the paper is subject to F1's security interest. Where F1's security interest is limited to inventory

and F1 claims the chattel paper as proceeds, F2 acquires the paper under subsection 5(b) free of F1's security interest irrespective of F2's knowledge of the interest. This rule enhances the negotiability of chattel paper. It also benefits parties who supply new value to a business in exchange for chattel paper. In this sense, it resembles the super priority afforded to purchase money security interests over floating security interests under section 27.

SECTION 26—PRIORITY OF LIENS

Common law and statute (for example, Carriage of Goods Act 1979, section 23) provide a variety of generally possessory liens to parties who provide materials or services in relation to goods. For example, under the common law, where a garage performs repairs on a motor vehicle, the garage has a possessory lien in the vehicle until it receives payment from the owner. Under this section, such liens have priority over any perfected security interest in the vehicle arising, for example, under a hire purchase agreement. Research discloses no New Zealand statutes which provide for the subordination of such liens to perfected security interests. An anti-lien provision in the security agreement will change the priority result but only if the garage has actual knowledge of that provision before commencing work. Note that the rule applies only to a lien over goods. It would not apply to securities or instruments subject to the possessory lien of an accountant or solicitor.

SECTION 27—PURCHASE MONEY SECURITY INTEREST

By definition, a purchase money security interest is associated with a credit transaction which injects new value into the debtor's business. See section 2, definition of purchase money security interest. In recognition of this fact, the statute affords the purchase money security interest priority over pre-existing non-purchase money security interests such as a floating security interest.

Under existing law, a similar result follows from the distinction between title and encumbrance-based securities and the nature of the floating charge prior to its crystallisation. For instance, the legal title retained by the party that supplies goods under a title retention (*Romalpa*) clause prevails over the equitable interest arising in favour of the holder of a pre-existing but uncrystallised floating charge over

the retailer's inventory. The proposed statute abolishes the distinction between title-based and encumbrance-based securities; it also anticipates a floating security interest which generally crystallises ('attaches') no later than the time when the debtor acquires the goods. See section 10 and accompanying commentary. Accordingly, the favoured status of purchase money security interests must be fashioned out of specific priority rules.

The super priority does not automatically attend every purchase money security interest. The purchaser money financier must comply with certain formalities which depend upon the type of collateral. In general, it is more difficult to obtain the special priority in respect of inventory than in respect of equipment or intangibles. Once created, the special priority extends beyond the purchased collateral to proceeds in respect of which it comes into conflict with security interests held by other creditors.

Example 1: Purchase money security interests in equipment. A creditor (F) holds a floating security interest over all of manufacturer's (M) presently-owned and after-acquired property. Subsequent to attachment and perfection of F's interest, M purchases a new item of equipment from a supplier (S) under a hire purchase agreement. Provided that S perfects (that is, through registration of a financing statement) the security interest arising under the hire purchase agreement within ten working days after delivery of the equipment to M, S's interest will have priority over F's floating security interest under subsection (1). Subsection (2) applies a similar rule to purchase money security interests in intangibles, for example, accounts receivable trade marks, and goodwill.

Example 2: Purchase money security interests in inventory. In example 1, suppose that S delivers raw materials to M under an invoice containing a title retention (*Romalpa*) clause. Under existing law, this practice would give S rights, at least in the raw materials themselves, which are prior to those held by F under a floating charge. Under this statute, the security interest created by the title retention clause will have priority over F's floating security interest only if S satisfies the requirements of subsection (3). Prior to delivering the goods to M, S must both (1) give F notice with the content prescribed in subsection (3)(b) and (2) file a financing statement. Further, also in contrast to existing law, S must obtain M's signature, either on the invoice or

other security agreement, prior to delivery of the goods. See section 9(1)(b).

Example 3: Competing purchase money security interests. Suppose, in example 1, that M finances the down-payment due under the hire purchase agreement with a loan from another creditor F2. As security, M grants F2 a chattel mortgage in the equipment. Both F2 and S have purchase money security interests in the equipment. Provided that S perfects its interest within ten working days after delivery of the equipment, its security interest will have priority over that of F2 under subsection (4). The floating security interest of F in example 2 will be subordinate to the purchase money security interests of both S and F2 if they comply with the requirements of subsection (1).

Example 4: Special priority for financiers of accounts receivable. Wholesaler (W) enters into an arrangement with a creditor (F) pursuant to which F makes available to W on a daily basis credit equal to 90 percent of the face value of W's accounts receivable. F registers a financing statement in respect to this agreement. W then acquires from supplier (S) inventory subject to a perfected purchase money security interest. When W sells an item of inventory on credit, both F and S have a security interest in the account receivable. In the absence of subsection (5), S's proceeds security interest would enjoy priority under subsection (1)(a). In recognition of the new value which F injects into the business against a security interest in the receivables, subsection (5) affords a possible priority to F. This rule seeks to encourage the use of accounts receivable as an independent source of credit. Note, however, that F's priority depends upon its registration of a financing statement before S registers a financing statement. Where the factor (F) does not enter the picture until after W has established its lines of supply, the automatic priority under subsection (5) will not often be available to F. To ensure priority for its rights in the factored accounts, F must then obtain a contractual postponement of priority from the suppliers.

Example 5: Manufacturer (M) purchases a new item of equipment from one supplier (S1) under a hire purchase agreement. Subsequently, and before discharge of this hire purchase agreement, M trades in the equipment in partial payment of another equipment purchased from a second supplier (S2) under another hire purchase agreement. In this situation, S1 has a perfected purchase money security interest in the second item of equipment as proceeds and S2

has a purchase money security interest by virtue of the second hire purchase agreement. Subsection (6) provides priority to S2 provided that S2 perfected its interest within ten working days of delivery.

The British Columbia legislation also provides a comparable super priority to those creditors who finance inputs (for example, fertiliser) used by farmers in raising produce which is subject to pre-existing security interests. In the absence of these provisions, such creditors, whilst they have a purchase money security interest in the fertiliser, do not have a purchase money interest in the produce. These provisions have been deleted from the proposed statute on the grounds that the financing of farm operations warrants no special concessions.

SECTION 28—RESIDUAL PRIORITY RULES

The priority rules in this section apply to situations not subject to regulation under the more specific priority rules elsewhere in the statute. Most such priority disputes will be resolved by use of the 'race' rules (first-to-file, first-to-perfect) in subsection (1).

Example 1: Manufacturer (M) acquires equipment with the proceeds of a loan obtained from F1. The loan is secured by a chattel mortgage over the equipment. Before F1 perfects its interest by registering a financing statement, M obtains another loan from F2 against a chattel mortgage in the same equipment. If F2 registers its financing statement prior to registration by F1, F2 will enjoy priority under subsection (1)(a)(i) even though F2 had knowledge of the prior security agreement. Where M is wound up before either party can perfect its interest, F1 will enjoy priority under subsection (1)(c).

The results in example 1 will be different if the equipment is capable of description by serial number. Suppose F1 files a financing statement prior to M's transaction with F2 but fails to describe the equipment by serial number in the financing statement. Under subsection (3), F1's interest is deemed unperfected and will be subordinate to F2's security interest under subsection (1)(b) provided that F2's financing statement describes the equipment by reference to its serial number.

Subsection (2)(c) tacks the priority of a security interest to all advances made by the secured party. The rule is crucial for the operation of a floating security interest.

Example 2: On day 1, debtor (D) and F1 enter into an overdraft facility secured by a floating security in favour of F1. F1 promptly registers a financing statement. At this time, F1 advances $1,000 to D. On day 10, D enters a similar arrangement with F2 who registers a financing statement and advances $5,000 to D. On day 30, D receives an additional advance of $3,000 from F1. In the event of winding up on day 40, the security interest of F1 enjoys priority to the extent of $4,000 under subsections (2)(c) and (1)(a)(i) even though F1 made the second advance with knowledge of F2's security interest and prior advance.

Subsections (4) and (5) regulate the consequences of a lapsed registration.

Example 3: On day 1, F1 files a financing statement having a specified life of 100 days. On day 30, F2 files a similar financing statement. On day 100, the registration of F1's security interest lapses. However, subsection (4) gives F1 a 20 working day period in which to extend the life of its financing statement by re-registration. Should F1 fail to do so, its security interest will become subordinate to the security interest of F2 on day 120. Suppose that on day 110 F2 makes an additional advance to D, and on day 115 F1 renews its registration. Although the renewed registration occurs within the grace period, F2 enjoys priority under subsection (5) as to the advance that occurred within the grace period.

Subsection (6) prevents the first-to-file priority rule from producing untoward results in situations where the debtor transfers collateral.

Example 4: On day 1, D1 grants F1 a floating security interest over all of D1's presently-owned and after-acquired property and F1 files a financing statement. On day 20, D2 grants F2 a security interest in specific equipment owned by D2 and F2 files a financing statement. On day 30, D2 sells one of its machines subject to the security interest to D1 under circumstances such that the security interest of F2 is not affected. Both F1 and F2 have perfected security interests in the machine. In the absence of subsection (6), F1 can argue that it has priority by virtue of its earlier registration. Subsection (6) makes clear that priority lies with F2 except to the extent that F1 may have advanced funds against the machine acquired from D2 prior to the time when F2 amended its financing statement in accordance with section 44.

SECTION 29—SECURITY INTERESTS IN FIXTURES

Fixtures are items of personal property which become so attached to real estate that the law no longer considers them to be personal property.

Once personal property qualifies as a fixture, it becomes subject to mortgages and other security interests over the real estate. All North American enactments of the uniform code provide elaborate rules to regulate priority as between parties with interests in the real estate and parties who acquire security interests in personal property either before or after its attachment to the real estate. These rules enable the party who provides purchase money finance for the acquisition of a fixture to obtain a super priority over both pre-existing and subsequently created interests in the real estate.

The proposed statute rejects this approach on a number of grounds. Firstly, much of the detail of the North American enactments reflects patterns of construction financing which are not practised in New Zealand. Secondly, the regime originated in a jurisdiction which has no counterpart to the New Zealand system of land registration. Finally, the relatively complicated set of rules required to mediate between personal property security and real property security have proven less than satisfactory in practice. More than any other feature of the uniform enactment, they have been subject to successive amendments and variations amongst the different North American jurisdictions.

The proposed legislation adopts a more straightforward solution to the problem. All personal property which becomes attached to real estate is divided, by a schedule to the statute, into two categories. Security interests in goods of the kind listed in this schedule remain, at all times, subject to regulation under the proposed statute, in a manner similar to chattels subject to customary hire purchase agreements under existing law. See Chattels Transfer Act 1924, section 57(7). If a creditor providing construction finance wishes to take a security interest in such scheduled property, the creditor must comply with the requirements of this statute and can safely ignore the operation of the law governing real property mortgages.

Goods not in the schedule remain subject to this statute up until the moment when they are incorporated into the structure, at which time the personal property security interest is extinguished. Accordingly, where a supplier delivers either bricks or air conditioning equipment

under a title retention (*Romalpa*) clause, its security is extinguished once the goods are incorporated or attached to the real property.

It is anticipated that the list of goods in the schedule will be very restricted; the proposed schedule refers only to office partitions. The Law Commission is concerned to establish whether the financial community thinks that other property should be incuded in the schedule.

A security agreement will normally provide that upon the debtor's default, secured party is entitled to remove the collateral from the structure. Subsection (1) recognises this right of removal. However, it must be exercised in accordance with the rules established in subsections (2) and (3). The secured party must give the occupier or owner one month's notice in writing. The secured party must also exercise care that the removal does not entail unnecessary damage to the real property.

SECTION 30—SECURITY INTERESTS IN CROPS

Crops are subject to a number of special rules. Consistent with the general rule in section 22(1), subsection (1) makes clear that a security interest in growing crops continues in the harvested produce. Subsections (2) and (3) deal with the potential conflict between the creditor who finances crops and parties who hold interests in the real estate. The statute divides the situation into two categories illustrated by the following examples:

Example 1: Real property interest antedates security interest. Farmer (D) finances acquisition of its farm with the proceeds of a loan from a creditor (F1) who takes as security a real property mortgage over the land. Subsequently, D borrows money from another creditor (F2) to finance the production of a crop. D grants to F2 a security interest in the crops. In this situation, under subsection (2), F1's interest is prior to that of F2 unless F2 consents in writing to the creation of F2's interest.

Example 2: Security interest antedates real property interest. Farmer (D) borrows money from creditor (F1) against a security interest in crops which are financed by the loan. Subsequently, D borrows money from F2 against a real property mortgage which also covers crops. In this situation, F1's interest in the crops is prior to that of F2.

Subsection (4) imposes a significant limitation upon crop financing. On the one hand, it drastically limits the effectiveness of after-acquired property clauses. On the other, it drastically limits the situations in which creditors who supply planting finance can secure their loans by a security interest in the produce. The one year limitation will prevent, for example, a bank that finances establishment of an orchard or vineyard from taking a security interest in the fruit. The provision is designed to protect farmers from the potentially coercive effects of long term financial arrangements. However, it does not appreciably limit the credit monopoly of the initial financier. By registering a financial statement at the time of the loan, the orchard financier preserves a first priority under section 28(1)(a) even though it cannot acquire an attached security interest over the fruit until within one year of harvest.

Subsection (5) makes applicable the rules from section 29 to the event of default under a farm financing agreement.

In general these provisions adapt the current provisions relating to crops in the Chattels Transfer Act 1924. However, no attempt has been made to include special provisions for securities over wool. In view of the separate commercial identity of wool, there is some doubt whether an agreement granting a security interest only in 'sheep' would also cover the sheep's wool under the description requirement in section 9(1)(b). Also questionable is whether, in such case, the wool could be claimed as 'proceeds' of the sheep under the definition of that term in section 2 for purposes of the priority rules applicable to proceeds in sections 27(1) and 27(3). Both the sheep and the wool may qualify as 'inventory' for purpose of the special priority rule applicable to purchase money security interests in section 27. In view of these uncertainties, the relative priorities of a financier holding a security interest in sheep and another financier lending against a security interest in wool can be resolved unambiguously only by means of a priority agreement. On the other hand, it is clear that, where neither the sheep nor wool are subject to outstanding security interests, a financier can establish a security interest over the wool by means of a security agreement which describes the collateral as 'sheep and wool'.

SECTION 31—SECURITY INTERESTS IN ACCESSIONS

When one item of personal property is affixed to another item of personal property, there will arise a priority conflict between the holders of security interests in the two items of property. For example, a marina (M) sells a reconditioned engine on hire purchase to the owner (O) of a vessel. M installs the engine in the vessel which is itself the subject of a separate hire purchase agreement with another creditor (F). Under this section, the security interest in the engine survives its affixation to the vessel.

Priority as between the security interest in the accession (the engine in the example) and the security interest in the other goods (the vessel) depends upon two factors: firstly, whether the accession security interest attached prior to or subsequent to affixation and, secondly, whether the accession security interest was perfected. As a general rule, the order of *attachment* determines priority between the accession security interest and pre-existing security interests in the other goods. The order of *perfection* determines priority as between the accession security interest and subsequently acquired interests in the other goods.

In the above example, assume that M and O executed the steps necessary for attachment prior to affixation of the engine. Under subsection (1), M's security interest is prior to that of F even though M's interest is unperfected. Unless M also perfects its security interest (for example, by registering a financing statement), M's interest will be defeated by a sale of the vessel under subsection (3)(a). (Whether the sale also severs F's security interest will depend upon the applicability of section 24.) M's unperfected interest will also be postponed, under subsection (3)(c), to the extent that F makes another advance under its own security agreement, for example, to pay for subsequent repairs to the vessel. Under subsection (4), if M installed the engine prior to obtaining O's signature on the hire purchase agreement, M's security interest is subordinate to F's security interest unless F consented to the security interest.

The remaining subsections govern the remedial rights of the party with a security interest in an accession. Subsection (5) gives the secured party the same right of removal as the holder of a security interest in a fixture under section 29. Damage caused during the removal entitles the holder of subordinate interests in the other goods to recover compensation under subsection (6). In the example F can

refuse to grant M permission to remove the motor until F receives adequate security for reimbursement. If necessary, the accession financier can turn to the court under subsection (8) for a determination of the required security. Under subsection (9), F can prevent removal of the engine by paying M the amount secured by M's security interest in the engine. Prior to the removal of the engine, M must give ten working days notice to both O and F as well as to any other person who has registered a financing statement against the vessel if the vessel is subject to serial number registration. In the event of a dispute, F or O or any other person entitled to receive notice may apply to the court under subsection (12) for an order postponing removal of the accession.

SECTION 32—SECURITY INTERESTS IN PROCESSED OR COMMINGLED GOODS

Where flour, sugar and eggs are commingled into a cake mix, their separate identity is lost and any security interest in the ingredients continues in the mix or cake under subsection (1). Subsection (2) governs the priority of competing non-purchase money security interest. If both interests are perfected, they rank equally according to the ratio of their costs, even though one security interest will generally have been perfected prior in time to the other one. Where one of two security interests is unperfected, it will be postponed in priority to the perfected security interest under section 28(1)(b).

Subsection (3) applies to the common situation where one of the competing claims qualifies as purchase money security interest (for example, held by a supplier under a *Romalpa* clause). Consistent with the policy embodied in section 27, this section affords priority to the purchase money security interest.

Example 1: A furniture manufacturer (M) purchases from S upholstery material under a title retention agreement. S perfects its security interest. Financier (F) provides M with operating funds under a loan agreement collateralised by a security interest in M's existing stock of hardwood timber. M assembles the timber and upholstery into furniture. The security interests of S and F continue in the furniture under subsection (1) but S's interest enjoys priority under subsection (3)(a). The priority ranking does not depend upon the relative dates of attachment or perfection of the two security interests.

Example 2: Financier (F) makes an operating loan to retailer (R) under an agreement which grants F a security interest in, inter alia, R's shop fittings. Supplier (S) sells to R timber under a title retention clause and S perfects the security interest. R's workers assemble the timber and other materials into movable partitions and cabinets (not fixtures). S's security enjoys priority over that of F under subsection (3)(b), again without regard to the order of attachment or perfection of the two security interests.

Example 3: In example 1, suppose that the loan agreement granted F a security interest in M's inventory of furniture. In this, by far more common situation, S can still achieve priority but only by compliance with the notice requirement of subsection (3)(c). This subsection and the very similar rule in section 27(3) seek to provide parity treatment for *Romalpa* suppliers and holders of floating security over inventory irrespective whether the *Romalpa* goods are simply on-sold or incorporated in a manufacturing process. However, as illustrated by the next example, in probably the most common financing situation the statute does not achieve complete parity.

Example 4: In example 1, suppose that M granted F a security in 'all raw materials, goods in process and manufactured furniture'. Further, the loan proceeds were used to pay all suppliers except S who sold M the upholstery on credit secured by retention of title. Assume also that both M and S perfect their security interests. Up to the point when the upholstery is incorporated in furniture, S's security outranks F's floating security only if S complies with the requirements of section 27(3)(b), that is, S must both perfect and give notice to F prior to delivery of the upholstery to M. However, once M incorporates the upholstery in its manufacturing process, priority is determined by subsection (1) of this section. The security interests of F and S rank equally, according to the ratio of input costs, even though S perfects after delivery of the upholstery and provides no notice to F. Where, however, F's interest does not qualify as a purchase money security interest (that is, loan proceeds were not used to finance production of the furniture), it ranks ahead of S's interest unless S complies with the notice requirement of subsection 3(c).

Sometimes, it will not be obvious whether the identity of a component is truly lost in which event the priority rule in this section applies or whether the component remains identifiable and competing security interests are regulated by the rules in section 31 for

accessions. This might be the case, for example, where various types of wood, cloth and metal fixings are assembled into furniture. In other cases, for example, where grain is fed to animals, the question arises whether the grain becomes part of the animal so as to continue a security interest in the animal itself.

SECTION 33—POSTPONEMENT OF PRIORITY OF SECURITY INTERESTS

This section recognises the well-established practice of priority agreements. Such agreements will often be the only means by which the priority rules of the statute can be modified to suit the needs of the parties to particular transactions. For instance, the holder (F1) of a first perfected floating security interest may enter into such an agreement with a subsequent financier (F2) who is willing to inject additional capital into the debtor's business only if the credit can be secured by a first ranking floating security interest.

Section 39(5), requires that the party whose interest is conceded priority (F2 in the example) must register a financing statement which records the agreed order of priority as well as the duration of the agreement. The statute is silent on the question whether and under what circumstances a priority agreement may qualify as a security agreement.

SECTIONS 34 AND 35—APPOINTMENT OF REGISTRAR AND REGISTER OF PERSONAL PROPERTY SECURITIES

The statute anticipates the establishment of a centralised register. Most of the details of its operation, including the documents and steps involved in registration, will be specified by regulations under section 53. Under existing law, registrations of security interests comparable to those created under the proposed statute are scattered amongst different offices, depending upon the type of security and the location of the debtor. See commentary to section 2, definition of financing statement. A centralised register will greatly reduce the transaction costs and risks associated with the use of personal property as collateral. A single (computerised) search will reveal to prospective creditors or purchasers of goods the existence of most outstanding security interests in the debtor's personal property.

SECTION 36—POWER OF REGISTRAR TO DELEGATE

This section provides the basis for the internal organisation and operation of the registry. It is of little concern to those involved in financing credit against security interests in personal property.

SECTION 37—REGISTRATION OF FINANCING STATEMENTS

The priority effect of a financing statement dates, under subsection (3), from the time of its submission to the registry rather than from the time at which information is entered into the (computerised) system of records. In accordance with subsection (1), the precise time of submission will be noted on the financing statement. There may be a lapse of one or two days between submission and recordation of a financing statement. However, a prospective secured creditor can easily protect itself against risk associated with this delay. The creditor will postpone the advance until it obtains under section 41 a search result having a currency date subsequent to the submission time of its own financing statement.

Subsection (4) permits registration of a financing statement prior to execution of the security agreement. This enables a prospective secured party to protect its priority position during negotiations. This is not possible under existing law which requires registration of the security agreement itself.

Under current practice, it is also more difficult for a creditor to ensure itself first priority. The creditor must first obtain execution and registration of the security agreement. It must then postpone the advance until expiration of any grace periods applicable to security arrangements which might have been concluded by the debtor during the same period. Such grace periods exist, for example, under sections 102(3) and 311(3) of the Companies Act 1955 as well as section 8 of the Chattels Transfer Act 1924. Under this statute, the creditor can ensure itself of first priority without first having to execute the security agreement with the debtor. The creditor submits for registration a financing statement. It then requests a search. If the search result, which will necessarily post-date the submission date of the creditor's financing statement, shows no outstanding security interests, the creditor can proceed to execution of the security agreement in relative confidence that it enjoys priority. However, the

strategem will not protect the creditor against security interests arising prior to the enactment date of this statute. See section 57 and accompanying comments.

The advance registration feature exposes debtors to the possibility of spurious financing statements lodged out of spite or for coercive reasons. However, section 43 entitles the debtor to obtain removal of such financing statements at the expense of the registering party and to recover any losses caused by such a tactic. Depending upon its implementation, the requirement in subsection (10) that the debtor receive a copy of the financing statement within ten working days of its submission may also serve to protect debtors from spurious registrations.

Subsection (5) is of particular significance for suppliers who deliver goods under invoices or delivery documents containing a title retention (*Romalpa*) clause. Unless signed by the buyer, such a document will not create a security interest effective against third parties. See section 9(1)(b). When signed by the debtor, each such document constitutes a separate security agreement. This subsection enables a supplier to register a single financing statement, for example, prior to the first delivery, to perfect the security interests arising upon subsequent shipments to the particular customer.

Any system of records will inevitably contain misinformation. In the proposed registry, this will result either from errors in the financing statements submitted by the registrant or from erroneous translation of the submitted information to the (computerised) records. For instance, either type of error may cause a debtor with the name James M Hanson being identified in the records as James M Hansen. Another common error will be the transposition or erroneous statement of one or more letters or figures in an equipment serial number.

Subsections (6) and (8) adopt an objective test for the effect of such errors upon the validity of the financing statement. The test applies whether or not anyone was actually misled by the error. To a large extent, operation of this standard will depend upon the capabilities of the particular software used to implement searches of the register. The error described in the preceding paragraph would not be seriously misleading where a search in the name of James M Hanson also retrieved a financing statement filed under the name James M Hansen. In keeping with this general approach, a financing statement which correctly describes certain items of equipment but omits or

erroneously describes other items of equipment is effective under subsection (9) in respect of the correctly described items.

In the case of equipment subject to serial number registration, subsection (7) requires that both predicates for a potential search, that is, the debtor's name and the serial number, be correctly identified in the register. Consider the prospective creditor who obtains a search result which reveals an outstanding security against a particular debtor but not against particular serial number equipment. This creditor should not be forced to speculate whether the equipment has been registered under an erroneous number or whether, for example, the security interest has been discharged.

SECTION 38—DURATION OF, AMENDMENTS TO, AND DISCHARGE OF REGISTRATIONS

Registrations under existing law are either valid for a fixed period (five years under the Chattels Transfer Act 1924) or are valid until discharged (under the Companies Act 1955). Subsection (1) permits the secured party to determine the duration of its financing statement. The registration fee will presumably depend upon the period specified by the secured party. It is anticipated that the secured party will choose a period sufficient for the performance of the underlying agreement. This will minimise the need for renewals. It will also minimise the possibility of lapse which has proved particularly troublesome in those North American jurisdictions which adopt a uniform period for registrations (usually five years).

Both renewals and amendments are effected by means of a financing change statement. Where this statement is registered prior to expiration of the original financing statement, the registration is deemed to remain continuously perfected from the submission date of the original statement. See section 17(1). Where the expiration date of a financing statement passes without renewal, the secured party can submit a new financing statement, the legal effect of which dates from the submission of this second statement. Note however the 20 working day grace period provided by section 28(4). Where the debtor furnishes additional collateral (for example, new equipment to secure a supplementary advance), this fact may be registered by amendment to the original financing statement. The legal effect (perfection) of this change dates, under subsection (2), from the submission of the financing change statement.

SECTION 39—TRANSFERS AND VARIATIONS OF PRIORITY OF SECURITY INTERESTS

The transfer of a security interest does not affect its validity or perfection. See section 17(2). Nevertheless, transfers may be registered under this section by means of a financing change statement. In certain situations, it is advisable that transferees take advantage of this opportunity.

Example: Assume that debtor (D) acquires equipment from seller (S) under a hire purchase agreement in respect of which S files a financing statement. S subsequently sells the chattel paper to a finance house (F). Under section 17(2), F succeeds to all of S's rights including the priority conferred by the financing statement registered by S. Unless a financing change statement documents the transfer, F will not receive notices (for example, for removal of any accessions under section 31(10)) which are mailed to S and made effective under section 3. Further F may find that the registration has been discharged without its knowledge under section 43 when the Registrar fails to receive a response to statutory notice sent to the address of S.

Subsection (5) provides for registration of a financing change statement in respect of priority agreements. The failure to file such a financing statement will not affect the enforceability of the priority agreement unless the priority agreement itself creates a security interest. See comments to sections 4 and 33. Such failure may, however, result in liability for damages under subsection (6).

SECTION 40—RECORDS OF REGISTRY

This section empowers the Registrar, for example, to maintain copies of the original financing statements on microfilm. It also entitles the Registrar to delete obsolete information from the files. The most common occasion for deletion of records arises upon discharge of the underlying security agreement, which is regulated in detail under section 43. It is only after compliance with the requirements of that section that the Registrar may remove the information under subsection (2)(c).

SECTION 41—REGISTER SEARCHES

A search of the register may be requested by reference to the debtor's name, serial number of goods required to be identified by serial

number and/or the number of the registration statement. Most commonly, the search will be conducted by reference to the debtor's name. In the case of goods capable of serial number registration, searches by reference to serial number will enable a prospective buyer to determine whether the goods are subject to a security interest created by a previous owner of the goods. Subsections (2) and (3) facilitate the use of search results as evidence. The party who contests the validity of the search result bears the burden of proving its inaccuracy.

SECTION 42—FEES

Fees for registration and searches will be set by regulation and may not exceed the cost of operating the registry. See sections 53(1)(d) and 53(2). Although normally the fee will be paid in advance, this section allows the Registrar, for example, in the case of telephone requests for a search, to render the service prior to payment. Sections 37(3) and 38(2) make payment of the fee a prerequisite for the effectiveness of a financing statement.

SECTION 43—DUTY TO AMEND OR DISCHARGE REGISTRATIONS

Maintenance of an up-to-date system of records requires an inexpensive and expedient means for discharging or amending financing statements to reflect performance of the underlying credit agreements. Of the two parties to a security arrangement, it is usually the debtor who is primarily concerned that, once a security agreement has been discharged or collateral released from the security interest, the public records be amended to disclose this fact. On the other hand, since the underlying property interest is an entitlement belonging to the secured party, the public record of that interest should not be subject to alteration without the secured party's participation.

The present section mediates the tension between these two considerations. It empowers the debtor to force the secured party to take positive steps to maintain a registration. Subsection (3) anticipates that the debtor will take the initiative of requesting a discharge or amendment. If the secured party fails to accede to the debtor's demands, the registration may be discharged, in accordance with the procedure specified in subsections (4)—(7), unless the secured party obtains a court order maintaining the registration. The secured party

is liable under subsection (11) for the legal costs incurred by the debtor for enforcement of the demand. This procedure places the expense involved in the maintenance of accurate records primarily upon the secured party rather than the debtor. Under current law, if a secured party fails to discharge or amend a filing, the debtor must bear the expense of obtaining relief through recourse to the courts.

The procedure is modified for consumer goods and security interests arising under trust deeds. In respect of consumers, subsection (2) assumes that this relatively vulnerable and unsophisticated class of debtors cannot be expected to take the initiative required for the maintenance of proper records. In the case of consumer goods, the secured party is required, without being so requested by its debtor, to discharge the registration upon performance of the credit obligation. Should the secured party fail to discharge the registration, the consumer debtor can, under subsection (6), immediately request the Registrar to initiate the procedure under subsections (5) and (7). Financing of consumer goods generally entails one-off transactions and does not involve the type of continuing arrangements which may justify maintenance of a financing statement in the absence of a presently owing obligation.

The procedure described above is not suitable for application to trust deeds, since negligence or inattention on the part of the trustee could result in inadvertent discharge of registration to the detriment of all debenture holders. Accordingly, subsection (9) requires that the debtor take the initiative and obtain a court order for discharge or amendment of the financing statement.

SECTION 44—TRANSFER OF DEBTOR'S INTEREST IN COLLATERAL OR CHANGE OF DEBTOR'S NAMES

In a system of registration keyed primarily to the debtor's name, there can be no entirely satisfactory regulation of the consequences which attend a debtor's change of name or certain transfers of collateral. Consider the following example. The debtor (D), an individual or partnership, grants a creditor (F1) a floating security in all of D's presently-owned and after-acquired property. F1 registers a financing statement in D's name. Subsequently D incorporates its business as ABC Ltd and transfers the property subject to the security interest to the new company. D then approaches F2 who, after searching the registry, lends the new company money which is secured by a floating

security interest. Unless F1 consented to the transfer of property to the new company, F1's security will survive this transfer. See section 22(1)(a).

In this example, a rule which awards priority to F1 will detract from the reliability of the registration system. A rule which awards priority to F2 will, on the other hand, detract from the value of the security available under the statute. This section proposes a compromise solution which varies according to the knowledge/involvement of F1 in the change of name or transfer of collateral.

Subsection (1) assumes that F1 consented to D's transfer of collateral to the newly incorporated business. In this not uncommon case, it is reasonable to place the risks of an inaccurate registry upon F1. Accordingly, subsection (1) affords F1 a ten working day grace period to register the change.

Depending upon the type of intervening transfer, this grace period may or may not lapse retroactively if F1 fails to file a financing change statement within that period of time. For instance, suppose that F1 does not file a financing change statement until day 25 after D's transfer of collateral to ABC Ltd. F1's security interest will be defeated by a sale of the collateral which occurs on day 15 but not one that occurs during the grace period. In contrast, F1's security interest will be subordinate to the security interest given to F2 irrespective of whether F2's interest is perfected on day 5 or day 15. If F1 registers a financing change statement within the grace period, this protects F1's security interest from a sale or creation of another security interest either within or outside the grace period, subject of course to rules such as those in sections 24 and 25.

Similar priority results follow under subsections (2) and (4) where F1 does not consent to the transfer of collateral or change of name but subsequently obtains knowledge of that fact. In this case, the grace period operates as described above but dates from the day on which F1 acquired knowledge of the transfer of collateral or change of name. For example, suppose that F1 does not discover the transfer by D to ABC Ltd until day 50 after the transfer. If F2 obtained and perfected its security interest on day 25, F2's interest will be subordinate to F1's interest under section 28(1)(a). Likewise if ABC Ltd sells collateral during the first 50 days, F1's security interest is perfected for purposes of rules such as those found in sections 15 and 24. Transfers by way of security and sale which occur after day 50 are

regulated as in the preceding example except that the ten day grace period does not commence until day 50.

SECTION 45—RIGHT TO COMPENSATION

Experience in jurisdictions with computer-based registration systems indicates that the incidence of errors is extremely low. However, public confidence in the reliability of the registration system would be considerably impaired if creditors and debtors were made to bear the financial consequences of errors made by the registry in entering data or conducting searches. Accordingly, this section provides for compensation of losses caused by such errors. Whilst entitlement to compensation is a matter of right, the award of compensation as well as the amount of the award lies within the discretion of the court. Further, the compensation may be awarded only in respect of matters specified in the following section.

SECTION 46—MATTERS IN RESPECT OF WHICH COMPENSATION IS PAYABLE

With two exceptions, the matters in respect of which compensation is payable relate to omissions in the entry and retrieval of information. For instance, compensation is potentially payable under paragraph (a) where the Registrar fails to enter a financing statement properly submitted for registration or under paragraph (b) where the financing statement is entered under a name other than that supplied in the application. However, the registry is not responsible, for example, for the erroneous search result which may be generated when a creditor requests a search in the name of 'James Hanson' for a debtor who is actually named 'James Hansen'. To be sure, the software which implements the search may well produce information in respect to James Hanson as well as James Hansen.

Except in respect of the matters specified in paragraphs (e) and (f), the Registrar is not responsible for the fact that the records do not accurately reflect the current state of the relationship between the debtor and secured party. Paragraph (f) anticipates the following situation.

Example: Debtor (D) requests the secured party (F) under section 43(3) to discharge registration. Receiving no reply from F, D notifies the Registrar under section 43(5). The Registrar notifies F under section 43(5) and, receiving no response, cancels the registration.

Now it may happen that through no fault of its own, for example, due to faulty mail service, F received neither of the two notifications and D was not entitled, under the terms of the arrangement, to discharge of the registration. Under these circumstances, F can claim compensation under section 46(f) on the grounds that the Registrar has cancelled a registration which should not have been cancelled. However, since the Registrar can not normally know about the state of affairs existing between F and D or the circumstances which led to F's failure to respond to the notices, the Registrar's liability in this situation is subject to mitigation under section 48. Paragraph (e) anticipates the converse situation where the Registrar fails to amend or discharge a registration under section 43(7).

SECTION 47—MAXIMUM COMPENSATION PAYABLE

The amount of compensation is limited to the unpaid amount of the secured debt (in the case of a secured party) or $1m (in the case of others suffering loss). It is a fair reading of this section in conjunction with section 45 that compensation is limited to actual loss. A secured party is not entitled to recover for an error specified in section 46 where that error does not affect, in fact, the enforcement of its security interest. On the other hand, the sections do not restrict legally cognisable loss to amounts rendered uncollectable by the error. It appears that a secured party can, within the monetary limits specified in section 47, also recover for damage to reputation. Nor is compensation restricted to secured parties and debtors. Compensation may also be claimed, for example, by a solicitor who is forced to indemnify a secured party under a certificate to the secured party. Also to be noted is the fact that liability under these provisions is strict, that is, without regard to culpability on the part of the Registrar.

SECTION 48—FACTORS THAT MAY PREVENT OR REDUCE COMPENSATION PAYMENTS

This section entitles the court to reduce compensation in the example discussed under section 46. The secured party may have failed to respond to the notices sent under section 43 for a number of reasons. The notices may not have reached the secured party's place of business due to a malfunction in the mail services. The notices may have reached the secured party's place of business but, due to inadvertence on the part of employees, failed to come to the attention of the party

responsible for the transaction with the debtor. The Registrar may have sent the notice, as is permissable under section 3, to the address of the secured party identified on the registered financing statement; but the secured party may have changed its address. The present secured party may be a transferee who failed to file a financing change statement under section 44. Some of these circumstances will obviously weigh more heavily than others in favour of a reduction in compensation.

SECTION 49—EXEMPTION FROM LIABILITY

Liability under section 45 is strict in the sense that it attaches without any proof of culpability on the part of the Registrar. In the absence of section 49, an aggrieved party could resort to an action based upon negligence to recover amounts in excess of the limits specified in section 47. This section precludes such alternative recourse except where the aggrieved party can prove bad faith.

Subsection (2) leaves parties free to obtain judicial review of, for example, ultra vires or unreasonable actions on the part of the Registrar. Judicial review might be warranted, for example, to contest the reasonability of fees or registration formalities.

SECTION 50—RECOVERY OF LOSS WHERE SECURITY TRUST DEED INVOLVED

In a case of a trust deed, most registry errors in respect of the matters specified in section 47 will occur in response to requests by the trustee, who will also be the party who relies upon the information. However, the prejudice will be visited upon the individual debenture holders, each of whom will suffer loss of a unique amount. In the absence of this section, the trustee could not claim compensation for harm caused by, for example, a faulty search result, since the trustee suffers no loss. The debenture holders could not claim compensation since they were not misled by the erroneous information.

This section accommodates the fragmentation of the underlying cause of action as well as the impracticability of requiring individual debenture holders to seek relief. It makes a class action by the trustee the exclusive means to enforce the right to compensation arising under section 45. The resulting judgment binds the debenture holders. The section also affords the court considerable flexibility in formulating the judgment. For instance, the judgment may determine

only the fact of liability and establish a procedure by which individual debenture holders can submit individual claims under the judgment. Alternatively, the judgment may determine both the fact and amount of liability. In any event, the total amount of the compensation may not exceed the limit specified in section 47. The risk of excess loss must be met by means of insurance.

SECTION 51—CROWN RIGHT OF SUBROGATION

The following example illustrates the operation of this section. A debtor (D) grants a floating security to one creditor (F1) as collateral for a $1.5m advance. D subsequently approaches another creditor (F2) for additional financing. On the basis of an erroneous search result, F2 lends D $2m unsecured. Had F2 known of the existence of F1's interest, F2 would have advanced no more than $500,000. In winding-up, realisation of D's assets yields only $1m all of which is paid over to F1. Due to the limitation upon liability in section 47, F2 can recover no more than $1m under section 45. Upon payment of $1m to F1, the Crown becomes entitled, under section 51(1), to enforce F1's rights to the extent of $1m against any additional property coming into the hands of the liquidator. However, under subsection (2), F2's residual claim to $1m has priority over the Crown's right under subsection (1).

SECTION 52—ENTITLEMENT TO DAMAGES FOR BREACH OF OBLIGATIONS

This section entitles a party aggrieved by non-compliance with the statute to recover damages for foreseeable losses. This provision might apply, for example, when a secured party fails to provide a copy of a financing statement as required by section 37(10), when a third party registers a spurious financing statement, where a secured party fails without excuse to discharge a financing statement under section 43 or when a secured party fails to provide information as required under section 13. In contrast to the claim for compensation under section 45, the damages claim under this section follows the usual paradigm for civil liability. Recovery is a matter of right and the amount of damages is measured by reference to the foreseeable loss.

The British Columbia legislation also recognises the possibility that non-compliance may result in no cognisable loss but yet cause considerable inconvenience. That legislation prescribes exemplary damages in the case of specified violations in order to compensate for non-monetary harm as well as to ensure compliance with the law. The proposed legislation for New Zealand rejects this remedy as being inconsistent with the general approach to civil liability in New Zealand.

SECTION 53—REGULATIONS

Most of the matters left to administrative regulation involve the design and implementation of the registration system. Only a few go to the substance of the legislation, for example, those anticipated by subsection (1)(a), and (1)(f)(iii). Subsection (2) ensures that the fees for registration of security interests in personal property are not used as a general source of revenue or to cross-subsidise other governmental activities.

SECTION 54—ENACTMENTS AMENDED

Rather than discuss the consequential amendments set out in the Second Schedule individually and sequentially, this comment groups them according to subject matter. It should be noted that, where not otherwise identified, statutory references refer to the proposed statute.

1 NEMO DAT PROVISIONS

Mercantile Law Act 1908, section 3–6

Section 3 of the Mercantile Law Act 1908 provides an exception to the nemo dat rule (that is, a buyer obtains no better title than that of the seller) where goods have been entrusted to a mercantile agent. As illustrated by the following examples, the rule both complements the concept of attachment under section 10 and has the potential for circumventing the priority rules in the proposed statute.

Example 1: Owner (O) leaves goods in possession of a dealer for the purposes of display but not for sale. The dealer sells the goods to a buyer (B) who pays the price with proceeds of a loan from financier (F) which is secured by a chattel mortgage over the goods. Section 3(1) of the Mercantile Law Act 1908 operates to provide B

with a property interest to which F's security interest attaches under section 10(1). F's rights under the chattel mortgage are prior to O's remaining property interest in the goods. The consequential amendment leaves unaffected the rule in section 3 as it applies to this case.

Example 2: Manufacturer (M) consigns goods to wholesaler (W1) for purposes of resale in the ordinary course of business. W1 sells the goods to a second wholesaler (W2) as part of a bulk sale of its business. Under section 3(1), W2 receives good title so long as W2 acts in good faith and without notice of W1's lack of authority to make a bulk transfer of the goods. In contrast, the proposed statute applies a more intricate set of rules to this case. M's retention of title is deemed to amount, in legal effect, to retention of a security interest in the goods. See section 4(2). If M failed to perfect its security interest, W2 would acquire good title under section 15. If M had perfected its security interest, W2's rights are controlled by section 24 under which the bulk nature of the transfer is incompatible with the ordinary course requirement in section 24(2). The consequential amendment ensures that the priority rules of the proposed statute govern the result in this case.

The consequential amendment defers to the proposed statute whenever the consignment is one to which the statute applies. This includes all of those title retention devices, such as *Romalpa* clauses, which fall within the definition of 'commercial consignment'.

Example 3: Manufacturer (M) consigns goods to wholesaler (W) for purposes of resale. Financier (F) holds a floating security interest over all of W's presently owned and after-acquired trading stock and proceeds as security for an operating loan made long before the consignment. If applicable, section 5 of the Mercantile Law Act would prevent F from obtaining priority over the interest of M. Under the proposed statute, the antecedent nature of the indebtedness owed by W to F does not prevent attachment of F's security interest. See section 10(1)(a) and section 2(1) definition of value. Priority between M and F will be governed primarily by section 26 of the proposed statute.

Where the consignment does not create a security interest, the Mercantile Law Act remains applicable.

Example 4: Owner (O) of a vessel leaves the craft with a marina (M) for purposes of display but not with authority to sell the boat. M

borrows money from creditor (F) against a chattel mortgage in the craft. Since the transaction between O and M probably falls outside the proposed statute, the Mercantile Law Act may apply to subordinate O's interest to that of F. In contrast, if F's interest was in the nature of a floating security for antecedent debt, section 5 of the Mercantile Law Act would subordinate F's interest to the rights of O.

Sale of Goods Act 1908, section 27

Section 27 of the Sale of Goods Act 1908 establishes exceptions to the nemo dat rule for parties who purchase goods from a seller or buyer in possession. Like the rule in section 3 of the Mercantile Law Act 1908, these exceptions complement the concept of attachment and have the potential to circumvent certain priority rules. The proposed amendment attempts to settle the operation of section 27 of the Sale of Goods Act in the most common situations.

Example 5: Manufacturer (M) purchases and pays for an item of new equipment from supplier (S). M leaves the equipment in S's possession to allow S to assemble or otherwise prepare the equipment for delivery. S sells the goods to another buyer (B). B pays the price out of proceeds of a loan from financier (FB) which is secured by a chattel mortgage over the equipment. Section 27(1) of the Sale of Goods Act provides B with ownership rights to which FB's security interest can attach under section 10 free of M's claim to the goods.

Suppose, in example 5, that M paid for the goods out of proceeds of a loan from another financier (FM) which was also secured by a chattel mortgage over the equipment. Suppose further that FM registered its security interest before FB registered its security interest. FM will argue that section 28(1) affords its chattel mortgage priority over the security interest of FB. In this instance, the relativity principle associated with the nemo dat rule should prevent FM from acquiring rights superior to those of B and FB. Accordingly, section 28(1) and the reference to attachment in section 10 must be read subject to section 27(1) of the Sale of Goods Act 1908. Nor should FM be permitted to invoke the 'given by the seller' limitation in section 24(2).

Example 6: Retailer (R) purchases goods on credit from wholesaler (W) under an arrangement pursuant to which R grants W a chattel mortgage over the goods. R resells the goods to buyer (B). Under section 27(2) of the Sale of Goods Act, B's position in respect of W's

interest would depend upon whether B acquired the goods in good faith and without notice and upon whether W registered its interest. Under the proposed regime, on the other hand, priority between B and W depends upon the more complicated rules in section 24. Under section 24, neither registration of the security interest nor knowledge of that security interest will result in subordination of B's rights to those of W. On the other hand, under section 24, the sale to B must be in ordinary course and must comply with the value requirement under section 24(6). In this circumstance, section 27(2) of the Sale of Goods Act 1908 should not defeat the operation of the carefully formulated priority rules of section 24. Accordingly, the consequential amendment eliminates the former proviso and defers to the proposed statute whenever the buyer in possession acquired its interest under a security agreement.

This amendment produces the proper result in the most common situation involving buyers in possession.

Example 7: Supplier (S) delivers goods to retailer (R) under a title retention *(Romalpa)* clause. R resells the goods to buyer (B). B's rights against S are governed by the rules in sections 15 and 24 of the proposed statute rather than by section 27(2) of the Sale of Goods Act.

As an alternative to this consequential amendment, the Committee considered a more general provision which would, in the case of any conflict between section 27 of the Sale of Goods Act and the proposed statute, defer to the proposed statute. Such provisions appear in UCC 2–403 as well as in the proposed Canadian Uniform Sale of Goods Act. Whilst such a general deferral provision produces the desired result in examples 5–7, it requires strict observance of the relativity principle to produce the desired result in the variation of example 5. The Committee opted in favour of the more limited amendment on grounds that it unambiguously dictated the desired result in the most common situation and placed less pressure upon the relativity principle. On the other hand, the present amendment has the disadvantage of deferring to the proposed statute only in a specific situation. Thus, although the Committee could not anticipate them, other cases may arise which would lie outside the amendment but also warrant deferral to the rules of the proposed statute.

It should be noted that there is one situation which, whilst it resembles example 5 does not involve section 27 of the Sale of Goods Act.

Example 8: A party instructs a manufacturer to construct a chattel (a boat) and prepays the price to finance construction. The boat is taken as collateral by a creditor of the manufacturer or the manufacturer sells the boat to a third party. Title to the chattel will normally not have passed to the prepaying buyer before the sale or security agreement and there is no cause to invoke section 27 of the Sale of Goods Act. To protect its interest, the prepaying buyer must enter a security agreement with the manufacturer pursuant to which the buyer retains a security interest (a purchase money security interest) in the vessel until delivery.

2 PREFERENTIAL CLAIMS

Companies Act 1955, sections 101 and 308; Industrial and Provident Societies Amendment Act 1952, section 13; Layby Sales Act 1971, section 11(2); Income Tax Act 1976, section 365; Goods and Services Tax Act 1985, section 42

The Committee had to assume that the present law respecting preferential claims would not be affected by the pending reform of company law and insolvency law. In the event of a winding up or receivership, these statutory provisions provide that certain otherwise unsecured claims (for example, in respect of wages, unpaid PAYE or GST and refunds of layby purchasers) shall be satisfied out of assets subject to floating charges given as security to debenture holders. Other statutes produce a similar result by cross reference to sections 101 and 308 of the Companies Act 1955; these include Volunteers Employment Protection Act 1973, section 15; Motor Vehicle Dealers Act 1975, section 42; Accident Compensation Act 1982, section 58; Apprenticeship Act 1983, section 23. Since the proposed statute does not define or regulate as such floating charges and debentures, sections 101 and 308 of the Companies Act 1955 and the comparable provisions of the other statutes must be restated to reflect the terminology and concepts of the proposed statute.

Under the proposed statutes a debenture is only one possible type of a security agreement. As stated earlier, there is no exact counterpart to the traditional floating charge. Instead, the statute envisages a floating security interest which, like the floating charge, attaches to an ever changing body of collateral which generally consists of inventory, accounts receivable and their proceeds. However, unlike the floating charge, the floating security interest is fixed from the outset in the sense that, once perfected by registration, no additional step

(crystallisation) is required to establish its effectiveness against third parties. However, this feature does not justify a rule which affords it priority as a fixed charge over the preferential claims. Like the traditional floating charge, the floating security interest provides the holder with the same ongoing opportunity for monitoring and controlling the debtor's business which arguably underlies the law respecting preferential claims.

The consequential amendments stated in Note B to the Second Schedule reformulate sections 101 and 308 of the Companies Act 1955 so as produce results similar to those which obtain under existing law. Similar changes would be made in the relevant sections of the other statutes identified in the heading to this comment. The amendments to sections 101 and 308 of the Companies Act 1955 will control operation of section 15(1)(b) of the Volunteers Employment Protection Act 1973 and the other statutes in that category.

Under the consequential amendments, preferential claims receive priority only against collateral which constitutes proceeds or after-acquired property. This priority will apply against a bank which takes as security for an overdraft a debenture granting it a security interest in all of the debtor's presently owned and after-acquired property. It will also affect the *Romalpa* supplier to the extent that the supplier seeks to enforce its security interest against the proceeds of the supplied goods.

Under existing law, creditors can avoid the priority rule by structuring their security arrangements so as to take only fixed charges. The consequential amendments leaves them the same freedom under the proposed statute. Floor plan financing of large item inventory can be conducted on an item-by-item basis so as to ensure that the security interest attaches only to inventory as original collateral and not as proceeds or after-acquired property. Further, through careful credit control practices, the secured party can ensure that accounts receivable and chattel paper resulting from disposition of the inventory will also qualify as original collateral and not as proceeds or after-acquired property.

Where the credit consists of a single initial advance or an overdraft facility which is quickly drawn upon to its limit, it will not be particularly difficult to determine whether property held by the debtor at the time of winding up or receivership comprises after-acquired property or proceeds. In contrast, where the credit consists of a revolving

facility with considerable fluctuation in the debit balance, it will be more difficult to determine whether specific property was acquired as proceeds or by means of a new advance.

3 PROPERTY LAW ACT

Unlike its North American counterparts, the proposed statute contains no chapter on default. The reasons for this omission are discussed at the conclusion of the Commentary. The core of the default chapter in the North American enactments entitles the secured party to repossess collateral, requires the secured party to dispose of collateral at private or public sale upon prior notice to the debtor, and protects the debtor's equity and right of redemption.

Under the proposed statute the rights of the debtor and creditor upon default will be governed primarily by the terms of the security agreement. The proposed amendment to the Property Law Act entitles but does not require the secured party to dispose of collateral under the provisions governing sales by the mortgagee through the Registrar of the High Court. These provisions establish a procedure with prior notice to the debtor (Property Law Act, section 99), protect the debtor's right of redemption as well as the secured party's right to a deficiency judgment (id., section 100), entitles the secured party to purchase the collateral (id., section 101) and protects the good faith purchasers at the sale (id., section 102).

4 CROWN SEIZURE STATUTES

Summary Proceedings Act 1957, section 94A; Customs Act 1966, sections 48(11) and 243; Fisheries Act 1983, section 107B; Criminal Justice Act 1985, section 84

These statutory sections entitle the Crown to confiscate property, vis, for non payment of fines under the Summary Proceedings Act 1957, for importing forbidden goods or evading duties under the Customs Act 1966, for exceeding fishery quotas and other offences under the Fisheries Act 1983 and using motor vehicles in the commission of an offence under the Criminal Justice Act 1985. In most cases, the forfeiture encompasses not only the owner's equity but apparently also any outstanding liens or encumbrances.

If the law does not respect the rights of innocent encumbrancers (a matter which probably warrants reform), it should at least provide for notice to secured parties of the fact of seizure and their position under the statute. Two of the statutes—the Summary Proceedings

Act 1957 and the Criminal Justice Act 1985—already contain some form of notice requirement. These protective devices are such that they will often be ineffective. The consequential amendments proposed for these statutes restate the language of these provisions to reflect the terminology and practice under the proposed statute and to utilise the Personal Property Securities Act register to give more effective protection to encumbrancers.

As recommended by Note A to the Second Schedule, the other statutes which presently contain no notice provisions should be amended to require the official in charge of the proceeding to search the register of personal property security interests and give notice to the secured party of their rights under the statute.

These rights of third parties vary from one statute to the next. For instance, in sales of property forfeited under the Criminal Justice Act 1985, the secured party has a second claim to proceeds after payment of the expenses of the sale. In contrast, where property subject to an encumbrance is sold under the Summary Proceedings Act 1957, section 97 of that statute provides that the court may direct application of the proceeds as it thinks fit. Under section 107B(2) of the Fisheries Act 1983, the Minister may release the property to any person with a legal or equitable title upon payment of such amount as the Minister thinks fit. Under section 287 of the Customs Act 1966, any party with an interest can apply for a waiver which may be made subject to payment of costs and duties.

5 PATENTS ACT 1953 AND DESIGNS ACT 1953

These two statutes provide for registration of assignments and mortgages in the intellectual property regulated by the particular statute. Under neither statute is registration a necessary prerequisite for the legal effectiveness of the assignment or mortgage either between the immediate parties or as against third parties. The consequences of non registration are primarily procedural in nature. Under section 27 of the Designs Act, an unregistered document cannot be admitted as evidence of title or interest in a registered design unless permitted by the court. Under section 85 of the Patents Act, in a litigation brought by the holder of an unregistered interest, the defendant can require registration. If the plaintiff fails to register within six months, the plaintiff is barred from enforcing the interest against the particular defendant in a judicial proceeding. It is the intention of the proposed consequential amendments that the failure to register under these

statutes should not bar a secured party from enforcing its rights in the event of default under a security agreement.

6 CREDIT CONTRACTS ACT

Many standardised security agreements, such as chattel mortgages and debentures, address only the terms of the security arrangement. The credit agreement, for example, loan or overdraft facility, is the subject of a separate document such as a promissory note or overdraft agreement. Standing alone, such security agreements would not qualify as a credit contract under the definition in section 3(1) of the Credit Contracts Act. However, in most situations, the linking rules in section 4 of that Act as well as the general rule in section 3(4) of that Act would operate to aggregate the two documents into a credit contract subject to challenge under section 10 of the Act on grounds of oppressiveness.

The consequential amendment leaves no room for argument that a security agreement, where it contains no credit terms, is immune from challenge under section 10 of the Credit Contracts Act. This amendment subjects to judicial scrutiny under section 10 of the Credit Contracts Act certain security agreements, such as the typical *Romalpa* arrangement, which would otherwise fall outside both the narrow definition of credit contract in section 3(1) as well and the expanded version under sections 4 and 3(4) of that Act.

The amendment does not address the issue whether review under section 10 is confined to security and credit terms or whether it also extends to other terms, for example, warranty disclaimers, which commonly occur in credit contracts such as hire purchase agreements.

7 STATUTORY LIENS AND RIGHTS OF DISTRESS

Carriage of Goods Act 1979, section 23; Distress and Replevin Act 1908, section 4

Statutory law entitles various creditors to take or retain possession of goods, to dispose of the goods, and to apply the proceeds to the unsatisfied debt. These include, in addition to the statutes identified in the heading, the Mercantile Law Act 1908 in relation to the liens of shipowners and warehouse workers. Where the creditor's claim arises from supplying goods or services in respect of the seized property, priority between the seizing creditor and a secured party will be governed by section 26 of the proposed statute. That section will

generally operate to afford the lienor priority over a secured party. However, that section does not apply to the landlord's right of distress. As an interest associated with real property, the right of distress is excluded from the scope of the statute. See section 4. Further, unlike the statutory lienors, a landlord does not supply goods or services in respect of the goods.

Section 4 of the Distress and Replevin Act provided that goods subject to a instrument under the Chattels Transfer Act 1924 were deemed to be the property of the tenant. Although probably intended to correct for the notional transfer of title involved in traditional chattel mortgages and bills of sale, this rule in effect afforded the landlord priority over these secured parties. This result accorded with the result under the counterpart English legislation. See Law of Distress Amendment Act 1908 (UK) section 4A.

Research disclosed no case law dealing with the potential priority conflict between the distraining landlord and charge holders. However, if the landlord enjoys priority over creditors holding title to goods under a bill of sale, it follows a fortiorari that the landlord would likely prevail over a charge holder.

The proposed repeal of section 4 of the Distress and Replevin Act will remove the statutory foundation for the landlord's priority. This is warranted on the grounds that a landlord's performance, unlike that of a lienor under section 26 of the proposed statute, does not enhance the value of the goods. The proposed substitute provision applies to landlords the general rule of section 8 of the proposed statute which makes a security agreement effective against all third parties. In effect, this change forces landlords, who desire security for rental obligations in addition to the normal rights of termination and reentry, to enter explicit security arrangements under the proposed statute in the same manner as other creditors.

As recommended by Note A to the Second Schedule, statutes which provide for private seizure and liens should be amended to provide notice to the secured party. This accords with the analogous recommendation for amendment to statutes which anticipate seizure by the Crown.

SECTION 56—TRANSITION: APPLICABLE LAW

At the enactment of this statute there will be in place a very large number of security arrangements concluded under pre-Act law. The interests arising from these arrangements are defined as 'prior security interests' under section 2. Sections 5, 56 and 57 address various problems respecting the enforceability of such prior security interests after enactment of this statute. Under section 5(1)(b), once a prior security interest is renewed or extended after enactment date, it is completely subject to this statute. In general, pre-Act law will apply only to determine the validity of a prior security interest under subsection (1) and certain priority disputes under subsections (2) and (3). All other questions, particularly priority disputes between pre-Act and post-Act interests, fall under subsection (4) to be resolved by this statute. The rule in subsection (1) is particularly important for prior security interests which arise from agreements, for example, title retention (*Romalpa*) arrangements and certain debentures, which may not satisfy the writing requirements in section 9.

Under subsections (2) and (3), priority disputes are determined under prior law if both competing interests arose under prior law.

Example: Prior to enactment, a debtor (D) grants to a creditor (F1) a floating charge over its undertaking. Also prior to enactment, a seller (S) delivers goods to D under invoices containing a title retention (*Romalpa*) clause. Priority as between S and F is determined under pre-enactment law. If either of the two security agreements in this example were executed after the enactment of this statute, this statute will govern the priority dispute.

It is important to note that, except for the matter of priorities, pre-enactment arrangements are governed by this statute. For instance, parties to a pre-enactment floating charge will be subject to the information requirements of section 13.

SECTION 57—TRANSITION: REGISTRATIONS

As provided by the previous section, this statute applies to priorities disputes between prior security interests and security interests created under this statute. Under this statute's priority rules, the result will generally depend upon whether the prior security interest was 'perfected' for purposes of this statute. Perfection, in turn, depends upon registration of a financing statement under this statute.

However, pre-enactment law did not recognise the concept of perfection and did not require the registration of many arrangements which create security interests under this statute. These include customary hire purchase agreements, finance leases, commercial consignments and title retention (*Romalpa*) clauses. In the absence of a rule which continues pre-enactment registrations in effect under this statute and/or deems pre-enactment interests to be perfected for purposes of this statute, such interests would almost invariably yield to a post-enactment security interest under the rule in section 28(1)(b).

The present section responds to this problem by continuing the effect of pre-enactment registrations. It also deems both registered and unregistered pre-enactment security interests to be perfected for purposes of this statute.

Where an interest was registered under pre-enactment law, the registration continues in effect for five years under subsection (4); the interest is afforded a deemed perfected status for the same period of time. To maintain the perfected nature of the interest beyond that time, the secured party must register a financing statement under this statute. Pre-enactment interests which were enforceable without registration (for example, customary hire purchase agreements, *Romalpa* clauses, finance leases and commercial consignments) continue perfected under subsection (5) for three years from the enactment date of this statute.

Example 1: A creditor (F1) holds a pre-enactment chattel mortgage over D Ltd's equipment. After conducting a search of the registry and finding no registrations against the equipment, another creditor (F2) takes a security interest in the same equipment under this statute. F1 is deemed to hold a perfected security interest which under the residual first-to-file priority rule of section 28(1)(a), takes priority over F2's security interest.

For the first five years following passage of this statute, the registry cannot be used by prospective creditors as an exhaustive guide to the existence of prior security interests in a debtor's property. Under the facts of example 1, the creditor F2 would also have to search the records maintained at the district Companies Office. If the debtor is an individual, the creditor must search the records in the appropriate High Court registry.

Example 2: Prior to enactment of this statute, a supplier (S) delivers goods to its customer (D) under an invoice containing a title retention (*Romalpa*) clause. Within three years of enactment, D grants to the creditor (F) a floating security over all of D's undertaking which includes the inventory supplied by S. F duly registers its security interest. S's interest was neither considered a security interest nor subject to registration under pre-enactment law. However, it is deemed to be a perfected security interest for purposes of this statute. S's security interest enjoys priority over F's interest under section 28(1)(a). For a period of three years following passage of this statute, the existence of such unregistered but deemed perfected security interests will unsettle the predictable operation of security interests created under this statute.

Interests that could have been but were not registered under pre-enactment law can be registered under this statute. Until they are registered, they will be viewed as unperfected under subsection (6). Subsection (7) deals primarily with pre-enactment transfers of chattel paper. Under existing law, a transfer of a chattel paper was not viewed as a secured transaction. Under subsection (7), the pre-enactment transferee's possession of the paper constitutes perfection for purposes of this statute.

In order that the pre-enactment security interests enjoy priority against interests created under this statute, the pre-enactment creditor must, within the grace periods specified in this section, register a financing change statement. That statement must indicate the prior law under which the pre-enactment security was registered. Under subsection (10), the failure to provide this information is not deemed to be seriously misleading so as to affect the validity of the registration. The failure may give rise to liability for damages under section 52.

DEFAULT

All of the North American enactments of the uniform code contain a separate chapter which regulates the rights of the debtor and secured party in the event of default under a security agreement. This chapter comprises about 20 percent of the bulk of the uniform code. The core of this part provides in effect a statutory set of standardised terms dealing with such matters as: the secured party's right to collect accounts receivable subject to a security interest, the secured party's

right to take possession of tangible collateral, the secured party's right to dispose of collateral and the effect of the disposition, acceptance of collateral and discharge of the obligation, and the debtor's right to regain the collateral.

These provisions are not mandatory. The uniform code leaves the parties free, within broad limitations, to conclude their own set of terms regulating the rights and obligations in the event of default. However, in North American practice, most standard form security agreements (chattel mortgages, debentures, finance leases, conditional sales contracts, and title retention invoices) regulate the matter of default by reference to the statutory terms. These statutory terms are designed to deal with security agreements executed by non-consumer debtors.

A few North American jurisdictions, including British Columbia, have modified the core component of this chapter by including more or less detailed provisions for the protection of consumer debtors. In most United States jurisdictions, however, consumer protection is regulated under separate statutes such as the federal Consumer Credit Protection Act and/or the state enactments of the Uniform Consumer Credit Code.

The Advisory Committee could not agree upon whether the New Zealand enactment should include the chapter on default. Those who favoured inclusion argued that the failure to regulate default would detract from the operation of the statute as a code. Further, the part would provide a satisfactory resolution of several important unsettled questions of New Zealand law. Further, inclusion of the chapter would considerably minimise the length and prolixity of most standardised security agreements. Finally, the North American experience indicated that the substance of the rules for default were entirely satisfactory to commercial debtors and creditors. Where they were not acceptable, the chapter made adequate allowance for contracting out.

Those opposing inclusion of the default chapter disagreed with some of these points and raised additional arguments. The rights of creditors and debtors under security arrangements were satisfactorily settled under New Zealand law and, where this was not the case, were best left to the contractual arrangements of the parties. Further, the chapter on default was inappropriate for New Zealand conditions

where receivers performed a frequent and crucial role in the enforcement of security agreements, a practice unknown in the United States where the uniform code originated. Finally, notwithstanding the North American experience, opponents doubted whether a single set of default provisions could adequately reflect the interests of parties to the wide range of security arrangements anticipated by the Act; they believed that the creation of standard remedies in relation to securities over personal property would not be appropriate where, as is common with most company debentures, the security agreement related to both real and personal property. Neither side in this controversy believed that the default provisions, if included, should provide special protection for consumer debtors. The committee was unanimously of the opinion that consumer protection should be regulated by a separate statute.

APPENDIX A

Membership and Meetings of Advisory Committee

The members of the Advisory Committee were (in alphabetical order by surnames):

Peter Blanchard—Partner in Simpson Grierson Butler White, Barristers and Solicitors, Auckland;

Bob Dugan—Senior Lecturer, Faculty of Law, Victoria University of Wellington;

Donald Dugdale—Partner in Kensington Swan, Barristers and Solicitors, Auckland;

John Farrar—Professor, Faculty of Law, University of Canterbury, Christchurch;

John Lusk—Partner in Russell McVeagh McKenzie Bartleet and Co, Barristers and Solicitors, Auckland;

David McLauchlan—Professor, Faculty of Law, Victoria University of Wellington;

Mark O'Regan—Partner in Chapman Tripp Sheffield Young, Barristers and Solicitors, Wellington;

Rob Thompson—Partner in Coopers & Lybrand, Chartered Accountants, Wellington.

The Advisory Committee worked closely with Law Commission personnel and, in addition to regular contact by telephone, facsimile transmissions and post, held a series of full day meetings at the

Commission's offices in Wellington. Those meetings took place on 23 July, 13 August, 9 and 10 September and 5 November 1988, and 20 January and 4 March 1989—all those dates being Saturdays except for Friday, 9 September 1988, which was the first day of a two day meeting.

APPENDIX B

Reactions to the Personal Property Securities Proposals

INTRODUCTION

The Committee has been greatly encouraged by the fact that reactions to the personal property securities law reform proposals have, almost without exception, confirmed the proposals as being long overdue, essential and appropriate.

The responses show an abnormally high degree of consensus. There is often consensus as to the need for reform but it is unusual for there to be such harmony of opinion as to the direction of the reform.

Reactions to proposals for a new Personal Property Securities Act (hereafter abbreviated to 'PPSA'), based on Article 9 of the United States Uniform Commercial Code (as is modern Canadian legislation), have been elicited in a variety of ways. These include:

— Law Society seminar series (1987)—'Chattels Securities—Revision and Update'

— Law Commission Preliminary Paper No 5—*Company Law* (December 1987)

— Law Commission Preliminary Paper No 6—*Reform of Personal Property Security Law* by J H Farrar and M A O'Regan (May 1988)

— Lecture by Professor R M Goode—Victoria University of Wellington (August 1988)

— New Zealand Society of Accountants seminar series (November 1988)—Insolvency Law

— Personal Property Securities Advisory Committee—exposure draft report (circulated on a limited basis, December 1988)

Accountants and lawyers, as would be expected, formed a high proportion of the respondents. Many of those professional respondents should be seen as representative of the many interested lobby groups for whom they act. The Committee endeavoured to ensure that the proposals were brought to the attention of affected groups and organisations. Some of those groups sought advice from their professional advisers. The submissions received are therefore representative of an even wider group than a cursory examination of the lists would, at first, suggest.

This appendix is intended to identify and acknowledge the people and organisations from which comment has come; to convey the Committees' appreciation for those responses; and to discuss briefly, where appropriate, the Committees' views on those responses.

NZLS SEMINAR SERIES

It is not possible to identify those people who commented on the need for reform at the Law Society seminars referred to above. However, the thrust of those comments was that 'comprehensive reform of chattel security law and company charges was necessary and long overdue' (see the preface to the report prepared by Farrar and O'Regan for the Law Commission).

PRELIMINARY PAPER NO 5

The Law Commission's discussion paper on company law canvassed alternatives for reform of the law of company charges. The paper considered Australian reforms of 1981 and models of the PPSA type. The Law Commission indicated a preference for the latter, and invited comment.

Respondents commented on the defects of the present system, noting the lack of a single comprehensive register, the distinction drawn between securities granted by natural persons (covered by the Chattels Transfer Act 1924) and those given by corporate bodies (and the

different rules attaching to each) and the lack of a system of registration which provided certainty as to priority without the need for recourse to the common law.

For example, the Law Society described the present system as 'seriously flawed' and the Chattels Transfer Act 1924 as deserving of 'a prompt and decent burial' while the New Zealand Financial Services Association said:

> The major defects in the present charges registration provisions are numerous and include in particular the making of a distinction between natural and corporate persons with different rules applying to each. In our opinion registration should focus on the security.

The respondents who addressed the questions on reform were virtually unanimous in their views. They all favoured a single system for corporate and non-corporate securities and, of those who expressed a preference, all but three favoured the PPSA approach.

The Australian States Companies Code was criticised. Criticism focussed particularly on the code's failure to cover all securities. For example, in the submissions of South Pacific Merchant Finance Limited it was stated:

> ... reform similar to that of the Australian States Companies Code would provide only piecemeal reform. The disadvantages of the system under the Australian States Companies Code are significant and many of the underlying deficiencies of the present system would be retained.

Those respondents who preferred the Australian model did so out of a desire for harmonisation of Australian and New Zealand business laws. This subject is covered more fully below.

The majority favoured adoption of a PPSA because the model looks at the substance of transactions and not their form and can therefore be comprehensive.

The New Zealand Financial Services Association stated:

> There is a need for a single system for corporate and non-corporate securities. Such a system would seem to offer the greatest potential for efficiency, economy and reliability.

One concern was expressed regarding the need to avoid the difficulties experienced in the United States relating to the interface between personal and real property security systems. The commentary to section 29 discusses the reasons for the approach adopted by the Committee. The need for co-ordination of insolvency and company charges reform was also noted.

Most respondents saw reform as a matter of urgency.

The submission of South Pacific Merchant Finance Limited discussed the need for reform of the law of chattels, securities and company charges. It stated:

> Both reforms should be undertaken together and as a matter of urgency. This area is more important in practice than most of the other areas covered in the [Company Law] discussion paper.

A few respondents suggested that interim reforms be made to the law of company charges while awaiting the development of a comprehensive personal property security law and register.

Such interim measures are in fact not necessary. Since those suggestions were made, the Committee has adapted a proven model law to New Zealand conditions and the Government has, in the context of the Motor Vehicle Security legislation, committed itself to the establishment of a register which is capable of easy and inexpensive extension to cover all forms of personal property security.

PPSA could therefore be put in place contemporaneously with the expected new companies legislation, out of which project the PPSA proposal grew.

In these circumstances, there is no need for interim reform and, given the urgent need for comprehensive reform, none should be countenanced.

Relevant responses to Preliminary Paper No 5 were received from:

AMP, Wellington

Auckland District Law Society

Johnson C P, Auckland

KPMG Peat Marwick, Chartered Accountants, Christchurch

Listed Companies Association

McCaw Lewis Chapman, Solicitors, Hamilton

McElroy Morrison, Solictors, Auckland

New Zealand Bankers' Association

New Zealand Business Roundtable

New Zealand Law Society

New Zealand Society of Accountants

Nicholson Gribbin, Solicitors, Auckland

NZI Corporation Limited, Auckland

Peterson, K, Solicitor, Auckland

Robb A J, Department of Accountancy, University of Canterbury

South Pacific Merchant Finance Limited, Wellington

Wellington Community Law Centre

PRELIMINARY PAPER NO 6

A number of respondents acknowledged receipt of this paper and indicated that they would only comment if they found matters of concern. Since few of this group have responded further, it is assumed that they support the proposal. However, this group of respondents is not included in the list set out below.

All submissions received in response to PP 6 were supportive of the proposals. Most respondents specifically referred to the unsatisfactory state of the present systems. There were no adverse comments on the general thrust of the proposal.

The more detailed comments were also very supportive. Because of the detailed nature of some submissions, there are areas where our final PPSA departs from some of these submissions. The following paragraphs note these differences:

The New Zealand Bankers' Association suggested that simple, optional security precedents be included in a schedule to the PPSA. The Committee has not acted on that suggestion. Given the emphasis of the PPSA on notice filing, the statute would not be the most appropriate place for the publication of precedents. However, the Committee is not opposed to any move toward standardised forms.

The New Zealand Society of Accountants made very detailed submissions. In its introductory remarks, the Society noted the unsatisfactory nature of the present system and said:

> The involvement of the Courts in security transactions, to determine the priorities and rights attaching to each party, has proven costly and time consuming to the point where *confidence in the system has been lost.* [Emphasis added.]

As noted below, the Society was concerned to ensure that full regard was had to the desirability of harmonising New Zealand law with that of Australia.

The submission based its comments on Article 9 of the Uniform Commercial Code of the United States. There appear to be no significant points of departure between the Society's stated preferences and the model ultimately adopted other than as follows:

(a) The Society would prefer motor vehicles to be dealt with on the basis of a title registration system. This approach cannot be taken at this time as there is (as yet) no official commitment to the necessary changes to the registration system. The committee understands that such changes might be contemplated in the future and considers that it would be a simple matter to adapt the PPSA to suit.

(b) The Society expressed concern that receiverships be considered in relation to the PPSA. While no receivership rules have been included in the PPSA, the matter has been considered. The provisions have been left out on the understanding that the Law Commission is to deal with the whole subject of receivers in its report on company law.

(c) The Society noted the need to consider inclusion, as security interests, of set offs and negative pledges. The PPSA catches subordination agreements and negative pledges under the general definition of 'security interest'. However, further, express treatment might need to be considered if problems appear.

(d) The Committee has not been privy to the review of insolvency law under way in the Department of Justice. It has therefore been unable to take account of all the Society's concerns regarding the relationship of the PPSA and insolvency law.

> However, most of these concerns can be accomodated by consequential amendments to other statutes and the schedules to this report are noted accordingly. The Committee is aware that the Law Commission is keeping a watching brief on the insolvency reforms to ensure that relevant issues are resolved.

Further detailed submissions were received from the Canterbury District Law Society. The Society made specific recommendations regarding rural debt financing, some of which are not accommodated by the report.

In particular, the Society suggested extending the system to record ownership and other, non-security, interests. The Committee did not consider it timely to extend the system in this way.

The proposal deals with the common rural debt securities. In relation to securities over wool, certain features of the present Chattels Transfer Act have been omitted. This is discussed in the introduction to this report under the heading 'Special Features'.

The Committee has avoided including the extra detail which would be necessary to cover all the less common types of rural security. The new type of security over future assets should reduce the need for the more exotic security forms. This could, however, be reassessed if practical problems arose.

The Society supported the use of separate legislation to deal with remedies for default but considered the issue should be addressed contemporaneously with the PPSA itself.

Submissions reacting to PP 6 were received from:

AMP

Canterbury District Law Society

Manawatu District Law Society

New Zealand Bankers' Association

New Zealand Manufacturers Federation Inc.

New Zealand Society of Accountants

South Pacific Merchant Finance Limited

GOODE LECTURE

In August 1988, Professor Goode delivered an address strongly supportive of systems such as the PPSA. The address was delivered to an audience of academics and practitioners from the fields of accounting, law and commerce. The judiciary and some state agencies were also represented at a senior level.

Professor Goode canvassed, and confirmed the seriousness of, many of the present problems which have been identified by so many of the respondents and are of concern to the Committee.

The discussion that followed the address indicated the sincere interest of the audience in the proposals. The support for them appeared to be almost universal.

NZSA SEMINAR SERIES

Identification of the source of comments made at the New Zealand Society of Accountants' seminars on insolvency law (1988) is not possible. However, Jack Hodder of the Law Commission (who was a leader of those seminars) advised the Committee that participants were particularly interested in and supportive of certain aspects of the PPSA:

(a) the likelihood that incorporation of companies merely to give a floating security would cease;

(b) the availability of some notice of the existence of reservation of title conditions relating to goods supplied; and

(c) the potential to obtain accurate information of the amounts secured.

EXPOSURE DRAFT

When, in November 1988, the Committee completed a first draft of this report, it was given restricted circulation amongst affected groups to seek criticism of the detailed proposal. Circulation was restricted because of time constraints.

There were three responses received (more are promised but have not yet been received) in time for the Committee to consider:

> Mr K F P McCormack, Registrar of Companies, Commercial Affairs Division, Department of Justice

> Mr C I Patterson, Chairman, Securities Commission
>
> Mr R D McInnes, Partner, Rudd Watts & Stone, Solicitors, Wellington

The Registrar, for the most part, examined the proposal from the perspective of the Commercial Affairs Division. The specific issues which he raised are, the Committee considers, answered by the final report.

The Registrar also appeared to have some reservations as to whether the proposed reform was justified by the perceived deficiencies of the existing system.

The Committee, and the majority of respondents, have no such doubts.

The Chairman of the Securities Commission gave his general support for the proposals with these words:

> I have for many years been strongly in favour of a reform on the lines of Article 9 of the U.S. Uniform Commercial Code, and I think the Canadians have produced the best adaptations on the principles of the Code for purposes useful to New Zealand.

Mr Patterson had one concern regarding the proposal. He considered the proposed amendments to the nemo dat rule to be insufficient. In his view, the Sale of Goods Act 1908 requires more radical reform than as proposed under the PPSA. The Committee has considered this point and agrees that the Sale of Goods Act 1908 requires further attention, but does not consider the integrity of the PPSA would be jeopardised by any delay in wider reform of the Sale of Goods Act.

Most of the concerns expressed by Mr Patterson are met, in the Committee's view, by the new sections 2(5) and 4(2). The commentary to sections 2, 4 and 24 should also be noted.

The submissions of Mr McInnes were also both supportive and constructive. The general tenor of the submissions is encapsulated in the following extract:

> This area of New Zealand's law has been long overdue for a comprehensive and consistent review based on coherent and sensible principles and I am pleased to see the topic is at last getting just that treatment, instead of the piecemeal fiddling to

which our personal property securities laws have been subject from time to time in the past.

At this point I am unable to think of any conceptual points of real significance: clearly considerable expertise and experience has already been applied to the draft bill, and in that regard I would like to say that I found the proposed commentary to the draft bill most helpful, striking as it does an appropriate balance between explanation, illustration and justification.

It is interesting to note how many of the basic concepts underlying the PPSA do in fact reflect the content of rules that presently apply in New Zealand, albeit that many of the latter may be judge made. One would hope that recognition of this will in fact assist the direction and ultimate implementation of the proposed PPSA.

However, I do feel somewhat uneasy at the possibility of the coherence of the proposed PPSA being compromised by—

(a) in particular, the Motor Vehicle Securities Bill; like Mr O'Regan, I am somewhat less than enthusiatic about this, particularly as a piece of stand alone legislation.

(b) leaving specific consumer protection provisions, and perhaps also the topic of rights and remedies, to be dealt with separately at a latter point in time. Those topics (in particular the former) certainly have the scope to erode the Article 9 concepts and coherence of the PPSA, in a way similar to the past processes that I have referred to above as 'piecemeal fiddling'.

(c) the possibility of other related areas of law undergoing similar reforms in a way which might have a similar detrimental impact on the proposed PPSA. The iniatives recently commenced by the Department of Consumer Affairs in respect of the Credit Contracts Act could yet prove to be an example of this, and perhaps even the Commission's own work in respect of insolvency laws (a topic which I will return to below in places), although the latter topic in particular should I imagine be capable of being dealt with in a way that would ultimately be harmonious with the PPSA, perhaps even as part of the same exercise.

However, I recognise the problems that exist in trying to deal with matters of the above kind, and must say that I do not feel strongly at all about (b) and (c) above.

The Committee shares the concern of Mr McInnes that there be real co-ordination of reform measures in the areas to which the passage refers.

In large part, the matters of detail referred to by Mr McInnes in the latter part of his submission have been dealt with by changes reflected in this report. Others are matters which must be dealt with in the context of the Department of Justice Insolvency Law Reform exercise and which, the Committee understands, the Law Commission will be further addressing in its forthcoming report on company law.

HARMONISATION WITH AUSTRALIAN LAW

THE NEW ZEALAND VIEWPOINT

The question of the desirability of harmonising the business laws of New Zealand and Australia arises in relation to the personal property securities law reform proposals. It is an issue to which the Committee, and a number of commentators, have given much thought.

The harmonisation issue was addressed by a number of submissions made in response to PP 5 and by that of the New Zealand Society of Accountants in its submissions on PP 6.

There are significant differences between the present laws of Australia and New Zealand. These differences are exacerbated by the lack of consistency of law between the various Australian states and territories.

There is no evidence (in the submissions or otherwise) that these differences are causing difficulties at present. The Committee is therefore of the view that adoption of the PPSA by New Zealand alone would create no new problem.

While strongly supporting a PPSA system, the New Zealand Society of Accountants considers it desirable that creditors, when seeking security over the Australian and New Zealand assets of a business, need only to comply with one system. The Committee agrees that that objective is desirable but does not believe that it should be sought at the cost of leaving many existing problems unremedied.

The Society recognised the need for balancing the benefits of harmonisation against those of the PPSA proposal and did not express a conclusion as to where that balance lay.

No respondent denied the existence of real problems with the Australian systems. The majority of the respondents, therefore, considered adoption of Australian law would represent yet another piecemeal reform of the type which has dogged the area for decades, both within and without New Zealand.

All respondents who discussed the harmonisation question noted the merit of harmonisation in appropriate cases. This factor did not, however, persuade the majority that adoption of the relevant Australian law was the correct approach to the reform of the law of company charges and personal property securities.

The views of the majority are encapsulated in the submissions of the New Zealand Law Society which noted the desirability of harmonisation 'wherever appropriate', noted problems with adopting the Australian model and concluded that:

> It would be appropriate, with the *protection* of the *New Zealand commercial community and general public in mind*, to identify and to adapt a better model. [Emphasis added.]

One respondent was in favour of adopting the Australian law simply in order to harmonise laws. Two others favoured following the present Australian model if Australia were unable or unwilling to adopt the PPSA model. None of these submissions dealt with the problems of the present Australian systems.

The Committee is of the view that a more measured approach to harmonisation issues is necessary, a view which is supported by the July 1988 Memorandum of Understanding between Australia and New Zealand on the harmonisation of business law and by the subsequent official press releases.

THE AUSTRALIAN VIEWPOINT

It is particularly significant that Australian commentators (both in direct response to the PPSA proposals and elsewhere) have noted the need for comprehensive reform in Australia. They acknowledge the continuing existence of old problems in their law.

Australian commentators note that problems arising out of the federal system increase the difficulty of comprehensive reform in Australia. They would welcome the adoption of the Committee's proposals because the sense and utility of the PPSA system would then be readily evident to the Australian legislators.

Having carefully considered harmonisation issues, the Committee is particularly grateful to find its conclusions so clearly supported by responses received from:

> Professor D St L Kelly, Chairman of the Law Reform Commission of Victoria
>
> A J Duggan, Reader in Law, University of Melbourne
>
> S W Begg, Partner, Corrs Pavey Whiting & Byrne, Solicitors, Melbourne

It should also be noted that the Attorney-General's Department of the Commonwealth Government of Australia has expressed interest in the PPSA proposals and in the reactions of the business community in New Zealand.

This interest is highly encouraging. The positive reactions already received may provide an incentive for the Australian authorities to canvass the views of the Australian business community (views which seem likely to be supportive). It is to be noted that the Attorney-General's Department has a commendable record for consultation with, and taking account of the views of, parties affected by law reform proposals in Australia.

APPENDIX C

Special Provisions Relating to Motor Vehicles

The Advisory Committee saw the proposed new legislation as superseding the Motor Vehicle Securities Bill introduced by the Government in 1988 and still before Parliament when this report was completed at the end of March 1989. If it is desired to carry forward the features of that Bill which go beyond providing a system of registration of securities, the following provisions would do so by employing the concepts and language of the Personal Property Securities Act, either in a separate part of such an Act or perhaps by amendment of the Motor Vehicle Dealers Act 1975.

1 Interpretation

(1) In this Part of this Act, unless the context requires otherwise,

"Chassis number" means any numbers or letters, or any combination of numbers or letters, stamped directly onto a metal panel, or a component, which is part of the permanent structure of the motor vehicle, and which are intended to identify the vehicle;

"Consumer" means any person other than

(a) a manufacturer;

(b) a wholesaler;

(c) a dealer;

(d) a finance company;

"Dealer" means a holder of a motor vehicle dealer's licence issued under section 15 of the Motor Vehicle Dealers Act 1975;

"Fidelity fund" means the Motor Vehicle Dealer Fidelity Guarantee Fund established by the Motor Vehicle Dealers Act 1975;

"Finance company" has the same meaning as in section 2 of the Motor Vehicle Dealers Act 1975;

"Hirer", in relation to a hire purchase agreement of a motor vehicle, means the person to whom the motor vehicle is disposed of under the hire purchase agreement;

"Hire purchase agreement", in relation to a motor vehicle,

(a) means

(i) an agreement whereby a motor vehicle is let or hired with an option to purchase; or

(ii) an agreement for the purchase of the motor vehicle by instalment payments (whether the agreement describes the payments as rental, hire or otherwise) under which the person who agrees to purchase the motor vehicle is given possession of it before the total amount has been paid;

(b) includes any other transaction which is in substance or effect a hire purchase agreement; but

(c) does not include any agreement under which the property and the motor vehicle comprised in the agreement passes absolutely to the person who agrees to purchase it, at the time of the agreement or upon, or at any time before, delivery of the motor vehicle;

"Lease", in relation to a motor vehicle, means a contract for the bailment of the motor vehicle but does not include a hire purchase agreement;

"Lessee", in relation to a lease of a motor vehicle, means the person to whom the motor vehicle was bailed under the lease;

"Lessor", in relation to a lease of a motor vehicle, means the person who bails the motor vehicle to another person under the lease;

"Manufacturer" means a person who engages in the business of manufacturing or assembling motor vehicles;

"Motor vehicle" or "vehicle"

(a) means, a vehicle including a trailer that

(i) is equipped with wheels, tracks or revolving runners upon which it moves or is moved; and

(ii) is drawn or propelled by mechanical power; and

(iii) has a registration number or a chassis number, or both of those numbers;

(b) includes any other vehicle that is declared in regulations under this Act to be a motor vehicle for the purpose of this Act; but

(c) does not include

(i) a vehicle running on rails; or

(ii) an aircraft; or

(iii) a trailer (not being a trailer designed solely for the carriage of goods) that is designed and used exclusively as part of the armament of any of Her Majesty's Forces; or

(iv) a trailer running on one wheel and designed exclusively as a speed measuring device or for testing the wear of vehicle tyres;

(v) a vehicle designed for amusement purposes and used exclusively within a place of recreation, amusement, or entertainment to which the public does not have access with motor vehicles; or

(vi) a pedestrian controlled machine designed to perform some mechanical operation and not designed for the carriage of persons or goods; or

(vii) a pedestrian controlled forklift;

"Owner", in relation to a hire purchase agreement of a motor vehicle, means the person disposing of the motor vehicle under the hire purchase agreement;

"Registration number" means any numbers or letters, or combination of numbers or letters, shown on the registration plate issued under the Transfer Act 1962 or the Transport (Vehicle and Driver Registration and Licencing) Act 1986;

"Trailer" means a vehicle without motive power that is drawn or propelled, or is capable of being drawn or propelled, by a motor vehicle from which it is readily detachable;

"Wholesaler" means a person who engages in the business of selling new motor vehicles to dealers, or to other persons who engage in that business;

(2) For the purposes of this Part of this Act, where a dealer sells a motor vehicle to a finance company whether as principal or agent, in the

expectation that the finance company will resell or otherwise dispose of the motor vehicle to a particular person, and the finance company subsequently resells or disposes of the motor vehicle to that person, the dealer shall be deemed to have sold or disposed of the motor vehicle to that person. [MVSB s 2]

(3) The provisions of this Part of this Act shall apply notwithstanding any other provisions of this Act. [New]

2 Extinguishment of security interest in case of consumer purchase from dealer

Where a consumer purchases a motor vehicle that is subject to a security interest from a dealer,

(a) The security interest in that motor vehicle shall be extinguished; and

(b) The consumer shall acquire the vehicle free from the security interest; and

(c) Where title to the vehicle was vested in the holder of that security interest, title shall pass to the consumer.

[MVSB s 28A]

3 Extinguishment of security interest in case of consumer hire purchase or lease from dealer

Where a consumer acquires from a dealer, under a hire purchase agreement or a lease, a motor vehicle that is subject to a security interest:

(a) The security interest in that motor vehicle shall be extinguished; and

(b) Where title to the vehicle was vested in the holder of that security interest, title shall pass to the dealer.

[MVSB s 28B]

4 Relevance of knowledge of security interest

Sections 2 and 3 of this Act shall apply whether the security interest is perfected or unperfected, whether or not the dealer or the consumer has knowledge of the security interest, and whether or not the dealer is the debtor, except where

(a) The security interest is disclosed to the consumer in writing before the contract of sale becomes binding on the consumer, or, as the case may be, before the hire purchase agreement or lease is entered into; or

(b) The security interest is created by or with the express consent of the consumer. [MVSB s 28C]

5 Extinguishment of security interest in case of other purchases

(1) Where a motor vehicle that is subject to an unperfected security interest is purchased otherwise than by a consumer from a dealer, and the purchaser does not have knowledge of the security interest at the time when the purchase price is paid or the exchange is made,

(a) The security interest in the motor vehicle shall be extinguished; and

(b) The purchaser shall acquire the vehicle free from the security interest; and

(c) Where title to the vehicle was vested in the holder of that security interest, title shall pass to the purchaser.

(2) This section is subject to the provisions of *sections 7 and 8* of this Act. [MVSB s 28D]

6 Extinguishment of security interest in case of other hire purchases or leases

(1) Where

(a) Any person acquires, under a hire purchase agreement or a lease, an interest in a motor vehicle that is subject to a security interest; and

(b) The security interest is unperfected; and

(c) That person does not have knowledge of the security interest at the time when the first payment is made under the hire purchase agreement or lease, as the case may be,

any secured party shall, notwithstanding any provision of the agreement between the secured party and the debtor, be bound by the terms of the hire purchase agreement or lease.

(2) Nothing in this section applies where the motor vehicle is acquired on hire purchase or is leased from a dealer by a consumer.

(3) This section is subject to the provisions of *sections 7 and 8* of this Act. [MVSB s 28E]

7 Exception where vehicle purchased from thief, etc

Nothing in *section 5 or section 6* of this Act shall apply unless the motor vehicle is purchased or acquired from a person

(a) Who is the debtor; or

(b) Who is in possession of the vehicle or who has otherwise assumed ownership of the vehicle in circumstances where the debtor

(i) Has lost the right to possession of the vehicle; or

(ii) Is estopped from asserting an interest in the vehicle against the purchaser or the hirer or the lessee, as the case may be. [MVSB s 28G]

8 Exception where sale not in the ordinary course of business

(1) This section applies only where a person who is not a consumer purchases or acquires a motor vehicle from any other person who is not a consumer.

(2) If the person purchasing or acquiring the vehicle knows that the sale or other disposition is not in the ordinary course of business of that other person, nothing in *section 5 or section 6* of this Act shall operate to extinguish any unperfected security interest in respect of the vehicle.

(3) It shall be presumed that a person does not know that a sale or other disposition is not in the ordinary course of business unless the contrary is proved. [MVSB s 28H]

9 Rights of secured party in event of hire purchase agreement or lease

(1) Where a secured party is, by virtue of *section 6* of this Act, bound by the term of any hire purchase agreement or lease relating to a motor vehicle, the secured party shall be entitled

(a) To demand and give receipts for money payable under the hire purchase agreement or the lease; and

(b) To exercise all other rights and powers of the person who disposed of the vehicle under the hire purchase agreement or lease, as if that person's rights under the hire purchase agreement or lease had been assigned to the secured party.

(2) Before exercising the rights conferred by this section, the secured party shall give notice in writing to the hirer or lessee, as the case may be, and, if practicable, to the person who disposed of the vehicle,

(a) Explaining that the hirer or the lessee, as the case may be, is obliged to pay any money owing under the hire purchase agreement or lease to the secured party; and

(b) Summarising any other rights that the secured party intends to exercise.

(3) The hirer or lessee shall not be liable to the secured party for any money paid or any property delivered to any person in reduction of any money payable under the hire purchase agreement or lease at any time before the hirer or lessee receives that notice.

(4) The receipt of the secured party shall be a complete discharge for the hirer or lessee of the motor vehicle for any money paid or any property delivered to the secured party in reduction of the money payable under the hire purchase agreement or lease. [MVSB s 281]

10 Reimbursement of secured party by dealer with knowledge of security interest

(1) Where

(a) A motor vehicle is purchased from a dealer; and

(b) The motor vehicle is subject to a security interest immediately before the time of purchase; and

(c) The security interest is perfected or the dealer has knowledge of that security interest at the time when the purchase price is paid or the exchange is made; and

(d) The security interest in that motor vehicle is extinguished by virtue of *section 2 or section 5* of this Act,

the dealer shall pay to the secured party, within 7 working days of the date on which the secured party serves a claim for payment on the dealer, the amount outstanding in respect of the debt or other obligation secured by the security interest or the value of the vehicle at the time of the extinguishment of the security interest, whichever is the lesser. [MVSB s 29]

11 Reimbursement of secured party by fidelity fund

(1) Where

(a) Any person purchases from a dealer a motor vehicle that is a motor vehicle within the meaning of section 2 of the Motor Vehicle Dealers Act 1975; and

(b) The dealer fails to comply with section 10 of this Act,

the secured party may make a claim under Part III of the Motor Vehicle Dealers Act 1975 for payment by the fidelity fund of the

amount that the dealer is required by that section to pay to the secured party.

(2) The fidelity fund shall not be liable to pay to the secured party any amount that

(a) Is recoverable from the purchaser of the motor vehicle under *section 15* of this Act; or

(b) Would have been so recoverable if the secured party had not unreasonably delayed in exercising those rights. [MVSB s 30]

12 Procedure for making claims for reimbursement

Every claim for payment made by a secured party pursuant to *section 10 or section 11* of this Act shall be accompanied by,

(a) In the case of a security interest which has been perfected by registration, a copy of the registered financing statement issued under *section 42(1)* of this Act or other evidence of the registration of a financing statement relating to the security interest held by the secured party immediately before the time of purchase; and

(b) In the case of an unperfected security interest or a security interest perfected other than by registration, a statement setting out the grounds on which it is believed that the dealer had knowledge of the security interest; and

(c) A statutory declaration by the secured party, or, where the secured party is a body corporate, by any director or other officer authorised in writing for the purpose, declaring

(i) The amount of the debt or other pecuniary obligation secured by the security interest; and

(ii) The amount received by the secured party in satisfaction of that debt or other obligation; and

(iii) The amount outstanding in respect of that debt or other obligation at the date when the declaration is made; and

(iv) The estimated value of the vehicle at the time of the extinguishment of the security interest (if such amount is less than the amount referred to in paragraph (i) of this subsection);

(v) The amount recoverable from the purchaser of the vehicle under *section 15* of this Act, if applicable. [MVSB s 31]

13 Subrogation of rights of action against debtor and dealer

(1) Where payment is made to the secured party by the dealer pursuant to *section 10* of this Act, or by the fidelity fund pursuant to *section 11* of this Act, the dealer or the fidelity fund, as the case may be, shall be subrogated, to the extent of that payment, to all rights and remedies that, but for the subrogation, the secured party would have had against the debtor, or, in the event of the death or insolvency of the debtor, against the debtor's personal representatives or other persons having authority to administer the debtor's estate, and to all other rights and remedies of the secured party in respect of any act or thing done or omitted to be done in the course of the sale or other disposition of the motor vehicle.

(2) Where payment is made to the secured party by the fidelity fund pursuant to *section 11* of this Act, the fidelity fund shall be subrogated, to the extent of that payment, to all rights and remedies that, but for the subrogation, the secured party would have had against the dealer, or, in the event of the death or insolvency of the dealer, against the dealer's personal representatives or other persons having authority to administer the dealer's estate.

(3) Notwithstanding anything to the contrary in the Companies Act 1955 or in any other Act or rule of law, if a claim made pursuant to *section 10 or section 11* of this Act arises wholly or partly by reason of any act or omission of an officer, employee, or agent of the debtor or the dealer, a District Court Judge may, if the District Court Judge thinks fit, on the application of the dealer or the fidelity fund, as the case may be, declare that any person who was knowingly a party to the act or omission shall be personally responsible, without any limitation of liability, for the repayment to the dealer or the fidelity fund, as the case may be, of the whole or any part of the amount paid by the dealer or the fidelity fund pursuant to this section.

(4) Notwithstanding anything in the Companies Act 1955 or any other Act or in any rule of law, any amount that the fidelity fund is entitled to recover from a dealer company shall, in the event of the winding up of the company, be paid in priority to all other debts in accordance with section 308(1)(d) of the Companies Act 1955, and the provisions of that section and of section 101 of that Act shall apply to it accordingly.

[MVSB s 32] [NB: This subsection presupposes the amendment of the Companies Act 1955 in line with Note B to the Second Schedule.]

14 Reimbursement of secured party in event of dealer with knowledge of security interest making hire purchase agreement or granting lease

(1) Where

(a) A motor vehicle is purchased on hire purchase from a dealer or leased from a dealer; and

(b) The motor vehicle is subject to a security interest immediately before the hire purchase agreement or lease is entered into; and

(c) The security interest is perfected or the dealer has knowledge of that security interest at the time when the first payment under the hire purchase agreement or lease is made; and

(d) The security interest is extinguished by virtue of *section 3 or section 6* of this Act,

the dealer shall pay to the secured party, within 7 working days after the date on which the secured party serves a claim for payment on the dealer, the amount outstanding in respect of the debt or other obligation secured by the security interest or the value of the vehicle at the time of the extinguishment of the security interest, whichever is the lesser.

(2) Where

(a) Any person acquires on hire purchase or leases from a dealer a motor vehicle that is a motor vehicle within the meaning of section 2 of the Motor Vehicle Dealers Act 1975; and

(b) The dealer fails to comply with subsection (1) of this section,

the secured party may make a claim under Part III of the Motor Vehicle Dealers Act 1975 for payment by the fidelity fund of the amount that the dealer is required by subsection (1) of this section to pay to the secured party.

(3) The provisions of *sections 12 and 13* of this Act shall apply, with such modifications as may be necessary, to a claim made by a secured party under this section. [MVSB s 33]

15 Secured parties subrogated to rights of seller against the purchaser

(1) Where

(a) A purchaser acquires, by virtue of *section 2 or section 5* of this Act a motor vehicle free from any security interest to which it was subject; and

(b) The purchaser pays or delivers part only of the purchase price at the time when the motor vehicle is acquired,

the secured party shall be subrogated, to the extent of the amount outstanding in respect of the debt or other obligation secured by the security interest, to all rights and remedies that, but for the subrogation, the person from whom the vehicle was purchased would have had against the purchaser in respect of the payment or the delivery by the purchaser of the balance purchase price.

(2) Before exercising the rights conferred by this section, the secured party shall give notice in writing to the purchaser and, if practical, the person from whom the vehicle was purchased,

(a) Explaining that the purchaser is obliged to pay or deliver to the secured party any money or other property owing to the seller in reduction of the purchase price; and

(b) Summarising any other rights that the secured party intends to exercise.

(3) The purchaser shall not be liable to the secured party for any money paid or any property delivered to any person in reduction of the purchase price at any time before the purchaser receives that notice.

(4) The receipt of the secured party shall be complete discharge for the purchaser of any money paid or other property delivered to the secured party in reduction of the purchase price. [MVSB s 37]

16 Revival of security interest on cancellation of contract for purchase of motor vehicle

(1) Where

(a) A purchaser contracts to purchase a motor vehicle that is subject to a security interest; and

(b) The security interest in the motor vehicle is extinguished by virtue of *section 2 or section 5* of this Act; and

(c) The contract for purchase of the motor vehicle is repudiated or rescinded,

the security interest shall revive and continue in full force and effect as if it had not been extinguished.

(2) Where a security interest revives pursuant to subsection (1) of this section, the title to the vehicle shall revest in the person in whom it was vested immediately before security interest was extinguished.

(3) Where the security interest revives pursuant to subsection (1) of this section after the registration of the security interest has been cancelled, the Registrar shall, on application by the secured party, re-register the security interest, without payment of any fee, as if it had not been cancelled.

(4) Nothing in this section shall apply if the secured party has already been paid the amount outstanding in respect of the debt or other obligation secured by the security interest or the value of the vehicle at the time of the extinguishment of the security interest, whichever is the lesser. [MVSB s 35]

17 Revival of security interest on cancellation of hire purchase agreement or lease entered into with dealer

(1) Where

(a) A consumer enters into a hire purchase agreement or a lease with a dealer in respect of a motor vehicle that is subject to a security interest; and

(b) The security interest in the motor vehicle is extinguished by virtue of *section 3* of this Act; and

(c) The hire purchase agreement or the lease, as the case may be, is rescinded or cancelled,

the security interest shall revive and continue in full force and effect as if it had not been extinguished.

(2) Where a security interest revives pursuant to *subsection (1)* of this section, the title to the vehicle shall revest in the person in whom it was vested immediately before the security interest was extinguished.

(3) Where a security interest revives pursuant to *subsection (1)* of this section after the registration of the security interest has been cancelled, the Registrar shall, on application by the secured party, re-register the security interest, without payment of any fee, as if it had not been cancelled.

(4) Nothing in this section shall apply if the secured party has already been paid the amount outstanding in respect of the debt or other obligation secured by the security interest for the value of the motor vehicle at the time of the extinguishment of the security interest, whichever is the lesser. [MVSB s 36]

18 Security interest in proceeds of sale

The extinguishment of any security interest in a motor vehicle shall not affect any security interest that may exist in respect of the proceeds of sale of the motor vehicle. [MVSB s 34A]

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