

Review of the Personal Property Securities Act 2009

Consultation Response Template

Consultation Paper 4

Instructions:

Please use the form below to provide feedback with respect to the proposed recommendations and issues listed in each section of the form. Please refer and respond to the proposed recommendation or issue as set out in Consultation Paper 4. The heading and paragraph number of the relevant sections of the consultation paper are included to help guide you.

Please note your agreement or disagreement with the proposed recommendation by deleting either 'Yes' or 'No' where indicated. Comments can be provided in the box below each proposition. There is no word limit for comments but succinct responses clearly setting out the reasons for agreement or disagreement with the proposed recommendation will be of most use for the purposes of the review.

You may respond to as many or as few propositions as you wish.

Name: Australian Securitisation Forum
Organisation: The Australian Securitisation Forum (ASF) was established in 1989 and is the peak body representing securitisation industry in Australia. Its role is to promote the development of securitisation in Australia. The ASF's members include representatives of all of Australia's banks, many of Australia's investment banks, building societies and credit unions, the major non-bank originators, many other participants in the Australian financial system, as well as organisations that provide professional services to the securitisation industry (such as trustee companies, mortgage insurers, ratings agencies and the major legal and accounting firms).
Background/Expertise/Interest in PPSA Review: As the representative body for key industry and adviser participants in the securitisation industry the ASF has a keen interest in the PPSA as it applies to securitisation transactions. The PPSA has had a significant impact on aspects of securitisation transactions, in particular as a result of its application to transfers of accounts and similar transactions that were not, prior to introduction of the PPSA, treated as security interests. Many of the seemingly anomalous issues that have been experienced under the PPSA have arisen in the context of securitisation transactions.
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2.2.2 How the terms affect the registration of a financing statement
Proposed recommendation 4.1: <i>That the Act be amended as described in Section 2.2.2.</i>
Do you agree with the proposed recommendation? No submission
Comments:

2.2.3 Other uses of the terms "consumer property" and "commercial property"
Proposed recommendation 4.2: <i>That the definitions of "consumer property" and "commercial property" in s 10 of the Act be deleted.</i>
Do you agree with the proposed recommendation? No submission
Comments:

2.3 The "inventory" question
Proposed recommendation 4.3: <i>That item 1 of the table in item 4.1 of Schedule 1 to the Regulations be deleted.</i>
Do you agree with the proposed recommendation? No submission
Comments:

2.4 The "control" question

Proposed recommendation 4.4: *That item 2 of the table in item 4.1 of Schedule 1 to the Regulations be deleted.*

Do you agree with the proposed recommendation? | No submission

Comments:

2.5 The "subordinate" question

Proposed recommendation 4.5: *That item 6 of the table in s 153(1) be deleted.*

Do you agree with the proposed recommendation? | No submission

Comments:

2.6 The collateral classes

Should a new collateral class be added to the Register, of "all present and after-acquired property relating to"?

Comments:

We agree that this would be useful to avoid the need for multiple class registrations.

2.6 The collateral classes

Do you agree that the collateral classes should be changed as suggested in Section 2.6.5? Do you have any alternative suggestions?

Comments:

We support the adoption of more general and simpler collateral classes to reduce the need for multiple class registrations.

2.6 The collateral classes

Do you have any practical experience of working with the Canadian and New Zealand systems for identifying collateral in a registration?

Comments:

No submission.

2.7.2 The legal effect of the free text field

Should the Act be amended to clarify the legal effect of the free text field?

Comments:

No submission.

2.7.3 Should the free text field be compulsory?

Proposed recommendation 4.8: *That the Act not be amended to oblige a registrant to include details of collateral in the free text field as a condition to making it an effective registration.*

Do you agree with the proposed recommendation?

No submission

Comments:

2.7.4 What type of information should be allowed in the free text field?

Proposed recommendation 4.9: *That the Act not be amended to prohibit the practice described in Section 2.7.4.*

Do you agree with the proposed recommendation?

No submission

Comments:

2.7.5 Should the free text field be available for the "allpap" class?

Proposed recommendation 4.10: *That the Register functionality not be amended to activate the free text field for a registration against the collateral class "allpap".*

Do you agree with the proposed recommendation?

No submission

Comments:

2.8 The "PMSI" question

Proposed recommendation 4.11: *None at this stage, pending further consideration.*

Comments:

No submission

2.9 Description of proceeds

Proposed recommendation 4.12: *None at this stage, pending further consideration.*

Comments:

We do not object to the proposal but refer to our submissions response to Paper number 2 as to the need to address competing priorities as between the transferees of accounts and persons who hold security interests in accounts as proceeds of collateral. These are often undiscoverable and, from a practical perspective, can be unknown even to the transferor of the account.

2.10.4 How broad should the concept be?

(a) Should the categories of serial-numbered property be broadened? If so, how? No, for the reasons stated in the paper.

(b) Should the categories of serial-numbered property be reduced? If so, how? No, we can see no policy driver for this.

(c) Does any change need to be made in relation to the use of patent application numbers (if patents continue to be a category of serial-numbered property)?

Comments:

No submission.

2.10.5 The registration period

Proposed recommendation 4.14: *That the table in s 153(1) of the Act be amended to provide that a registration against serial-numbered property have a maximum period of seven years if the grantor is an individual, but that it be able to have the same registration period as for any other collateral, in the case of any other type of grantor.*

Do you agree with the proposed recommendation?

No submission

Comments:

2.10.6.1 Motor-vehicles - breadth of the concept

(a) Should the concept of "motor vehicle" under the Act more closely with its vernacular meaning?

(b) If not, should it be simplified in some other way? If so, how?

Comments:

No submission.

2.10.6.2 The July 2014 amendment

Proposed recommendation 4.16: *That the Regulations be amended as described in Section 2.10.6.2.*

Do you agree with the proposed recommendation?

No submission

Comments:

2.10.7 Aircraft

Proposed recommendation 4.17: *If aircraft continues to be a class of serial-numbered property for the purposes of the Act, that item 2.2(1) of Schedule 1 to the Regulations be amended so that a registration to perfect a security interest over aircraft may include the aircraft's serial number, but is not required to.*

Do you agree with the proposed recommendation?

No submission

Comments:

2.10.8 Intellectual property licences

Proposed recommendation 4.18: *If Government decides to continue to apply the concept of serial-numbered property to certain types of intellectual property, that items 2.2(1)(a)(ii)(E) and (c)(iii)(E) of Schedule 1 to the Regulations be deleted.*

Do you agree with the proposed recommendation? No submission

Comments:

2.11.1.1 Individual grantors - the rules

Proposed recommendation 4.19: *Do you agree that financial institutions should use the same rules as others to identify grantors, rather than AML/CRF Act data?*

Comments:

2.11.1.2 Is a driver's licence appropriate as the principal source of details for an individual grantor?

Proposed recommendation 4.20: *That items 3 to 8 of the table in item 1.2 of Schedule 1 to the Regulations not be amended.*

Do you agree with the proposed recommendation? No submission

Comments:

2.11.2 Body corporate grantors

Proposed recommendation 4.21: *That item 5 of the table in item 1.3 of Schedule 1 to the Regulations be amended to provide that the identifying details for a body corporate that is not captured by any of items 1 to 4 of the table be its name or identifying number under the law under which it is incorporated.*

Do you agree with the proposed recommendation? No submission

Comments:

2.11.3.2 The use of ABNs

Should the use of ABNs for trusts be discontinued?

Comments:

No. However, it should be clarified that recognition by the PPSA and PPSR of a grantor's capacity as trustee of a trust (whether described by ABN or any other identifier) does not imply that a reallocation or 'transfer' of accounts between trusts with a common trustee constitutes a 'transfer' of the account for the purposes of s12(3).

2.11.3.3 The name of the trust

Proposed recommendation 4.23: *That a registration relating to assets of a trust not be required to include the name of the trust.*

Do you agree with the proposed recommendation? Yes

Comments:

Given that most securitisation trusts are stand-alone special purpose vehicles and are identified by the trust ABN, it should not be necessary to include the name of the trust in a registration relating to assets of the trust.

2.11.3.4 A trust that has both an ARSN and an ABN

Proposed recommendation 4.24: *If the Regulations continue to require that registrations be made against a trust's ABN, that item 1.5(1)(b) of Schedule 1 to the Regulations be amended to make it clear that it applies "to any trustee of a trust that is not a body corporate".*

Do you agree with the proposed recommendation? No submission

Comments:

2.11.4.1 The distinction between a partnership, and the partners in a partnership

Proposed recommendation 4.25: *That the current distinction drawn in item 1.4 of Schedule 1 to the Regulations, between the assets of a partnership and a partner's net interest in the partnership, be maintained and clarified.*

Do you agree with the proposed recommendation? No submission

Comments:

2.11.4.2 Partnerships that do not have an ABN

Should a registration be made against a partnership's name (and not the individual partners) if the partnership does not have an ABN?

Comments:

No submission.

2.11.5 Multiple grantors

Should the Act be amended to clarify when it is appropriate to include more than one person or entity in a registration as the grantor?

Comments:

No submission

2.11.6 Foreign names, and exact vs close match searching**Proposed recommendation 4.28:** *That:*

(a) the Register continue to use an exact-match methodology for searches; and
(b) the Regulations be amended to provide, in circumstances where a grantor's or secured party's name or other identification details would otherwise need to be entered on the Register in letters that are not accepted by the Register, that the registrant be able instead to use any reasonable transliteration of that name or other identifying details for the purposes of the registration.

Do you agree with the proposed recommendation?

No submission

Comments:

2.12.1.2 The definition of a "secured party"**Proposed recommendation 4.29:** *That paragraph (b) of the definition "secured party" in s 10 of the Act be deleted.*

Do you agree with the proposed recommendation?

No submission

Comments:

2.12.1.3 The table in s 153(1)**Proposed recommendation 4.30:** *That item 1(b) of the table in s 153(1) of the Act be amended as described in Section 2.12.1.3.*

Do you agree with the proposed recommendation?

No submission

Comments:

2.12.2 Multiple secured parties*Does the current process for including multiple secured parties in a registration need to be changed?*

Comments:

No submission

2.12.3 GONIs**Proposed recommendation 4.32:** *That the expression "GONI" on the Register be replaced with a term that more clearly indicates its purpose.*

Do you agree with the proposed recommendation?

No submission

Comments (including suggestions for the replacement term):

2.13.3 The registration period - What can be done?

Should the end-time rules be amended to provide that the maximum registration period for all registrations is seven years?

Comments:

No submission.

3.2 What are the consequences if a financing statement does not comply with the table in s 153(1)?

Proposed recommendation 4.34: *That s 153(1) be amended to clarify that data entered on the Register will be a financing statement if the data populates the fields referred to in the table in that section, whether or not the data as so entered is accurate.*

Do you agree with the proposed recommendation?

No submission

Comments:

3.3 When will a financing statement be ineffective?

Proposed recommendation 4.35: *That s 164(1) and 165 be amended as described in Section 3.3.*

Do you agree with the proposed recommendation?

No submission

Comments:

3.4 What is "seriously misleading"?

(a) *Do you agree with the explanation of the term "seriously misleading" that is given in Section 3.4?*
(b) *Should the explanation be included as a definition in the Act?*

Comments:

No submission.

4.2.2 Should s 151(1) be repealed?

(a) *Should s 151(1) be repealed?*

(b) *Should s 151(1) be amended to only allow a registrant to register a financing statement against a grantor if it has the grantor's consent to do so?*

Comments:

No submission.

4.2.3 How certain must it be that there is or will be a security interest?

Proposed recommendation 4.38: *That s 151(1) be amended, if it is retained, to provide that a person may register a financing statement if the person believes on reasonable grounds that the person described in the statement as the secured party is or may be, or may become, a secured party in relation to the collateral.*

Do you agree with the proposed recommendation?

No submission

4.2.3 How certain must it be that there is or will be a security interest?

Comments:

4.2.4 How precisely must the registration describe the collateral?

Would it be appropriate for s 151(1) to provide that a registration must describe the collateral in a manner that is no broader than is reasonably necessary to identify the collateral that the registrant reasonably believes is or may be subject to a security interest in the favour of the nominated secured party?

Comments:

No submission

4.3.1 Advance registrations

Should the mechanism in ss 151(2) and (3) for removing advance registrations be retained? Should the timeframe of five business days be removed?

Comments:

No submission

4.4.2 "Unperfected" security interests

Proposed recommendation 4.41: *That s 167 be amended so that it applies (and applies only) to registrations against individuals (or to registrations against serial-numbered property that do not include the grantor's details because the grantor is an individual), and so that it only requires the secured party to remove a registration from the Register if it no longer has any security interest over any collateral that is perfected by the registration.*

Do you agree with the proposed recommendation?

No submission

Comments:

4.4.2 Who may make an amendment demand?

Proposed recommendation 4.42: *That s 178(1) be amended to allow an amendment demand to be made by a person who is identified as the grantor in the registration, or was otherwise the grantor of the security interest to which the registration related.*

Do you agree with the proposed recommendation?

No submission

Comments:

4.4.3 Deemed security interests

Proposed recommendation 4.43: *That s 178(1) be amended to accommodate the fact that a registration may perfect a security interest that does not secure an obligation because it is deemed to be a security interest by s 12(3) of the Act.*

Do you agree with the proposed recommendation?	No submission
Comments:	

4.4.4 Changes to the collateral class	
<i>(a) Should s 178 be amended to require a secured party to make a fresh, narrower registration as required, and then release the previous, overly-broad one? Is this necessary to respond to an amendment demand?</i>	
<i>(b) Should the functionality of the Register be amended to allow a secured party to amend the collateral class in a registration from a broader class to a narrower (or to a number of narrower) classes?</i>	
Comments:	
No submission	

4.4.5.1 Security trust instruments	
Proposed recommendation 4.45: <i>That s 179(3) be deleted.</i>	
Do you agree with the proposed recommendation?	Partly
Comments:	
<p>In securitisation transactions it is common for the grantor or a person associated with the grantor to appoint the security trustee to act for investors who do not themselves control or have any active role in the selection of the trustee. In these circumstances it would seem merit in requiring that the grantor deal with the security trustee directly to require any necessary change rather than exposing the investors to the risks of the amendment demand process.</p>	

4.4.5.2 The contents of an "amendment statement"	
Proposed recommendation 4.46: <i>That reg 5.9(g) of the Regulations be deleted, and that the balance of that regulation be simplified so that it is easier for users who are unfamiliar with the Act to understand what it requires.</i>	
Do you agree with the proposed recommendation?	See our comments on 4.4.5.1 above
Comments:	

4.4.5.3 Terminating the Registrar's administrative process - when does a proceeding "come before a court"?	
Proposed recommendation 4.47: <i>That it be made clear that a proceeding "comes before a court" for the purposes of s 179 when a party first files an originating process with the court.</i>	
Do you agree with the proposed recommendation?	No submission
Comments:	

4.4.5.4 Should the whole "amendment demand" process be replaced?
<i>(a) Should we adopt the NZ approach to amendment demands, for some or all grantors?</i>
<i>(b) If so, what time should be allowed for the secured party to obtain the necessary court order?</i>
Comments:
(a) – No (b) – Not applicable

4.4.6 Contracting out of amendment demands
<i>Should a secured party be prohibited from requiring its grantor to agree not to make an amendment demand?</i>
Comments:
No.

4.5 Expired registrations
<i>Do Sections 4.2 and 4.4 sufficiently address the concern over removing expired registrations from the Register?</i>
Comments:
No submission

5.1 Modes of access to the Register
<i>Are the current modes of access to the Register sufficient? If not, what are some suggestions of other methods?</i>
Comments:
No submission

5.2 Should a secured party be required to include a copy of its security agreement with its registration?
Proposed recommendation 4.52: <i>That the Act not be amended to require a secured party to file a copy of its security agreement as part of its registration.</i>
Do you agree with the proposed recommendation? No submission
Comments:

5.3 Should a registration be required to specify a maximum secured amount?
Proposed recommendation 4.53: <i>That the Act not be amended to provide that a registration be</i>

5.3 Should a registration be required to specify a maximum secured amount?

required to specify a maximum amount secured.

Do you agree with the proposed recommendation?

No submission

Comments:

5.4 Registering against multiple collateral classes

Proposed recommendation 4.54: *That item 4(c) of the table in s 153(1) of the Act, and the functionality of the Register, be amended to enable a registration to be made against a number of collateral classes at the same time using a common free text field.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.5.1 The legal implications of linking registrations

Proposed recommendation 4.55: *That the Act and the Regulations not be amended to provide that a security interest will only be continuously perfected by a series of registrations if those registrations are linked using the "Earlier Registration Number" field on the Register.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.5.2 The mechanics of linking

Proposed recommendation 4.56: *That the Register be amended to allow multiple registration numbers to be entered in the "Earlier Registration Number" field on the Register.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.6 Only one registration per asset?

Proposed recommendation 4.57: *That the current structure of the Register as principally a grantor-based registration system be retained, and that it not be amended to allow one registration to perfect all security interests over an asset, regardless of the identity of the grantor.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.7 Separate registers for leases?

Proposed recommendation 4.58: *That the Act not be amended to provide for separate registers for security interests that arise from different types of transactions.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.7 Separate registers for leases?

5.9.2 Should the range of "interested persons" be widened?

Proposed recommendation 4.59: <i>That the list of "interested persons" in s 275(9) be expanded to include a judgment creditor of a grantor that is considering whether to enforce its judgment by seeking execution against property that is described in the secured party's registration.</i>	
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Do you agree with the proposed recommendation?	No submission
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Comments:

5.9.3 The timeframe for responses
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Proposed recommendation 4.60: <i>That the period within which a secured party must respond to a request for information under s 275, as set out in s 277, remain 10 business days.</i>	
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Do you agree with the proposed recommendation?	See below
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Comments:

We believe this is the minimum period required particularly for situations involving security trustees.

5.9.4 Does a secured party need to provide an entire copy of the security agreement?

Proposed recommendation 4.61: <i>That s 275 be amended to provide that a secured party is only required to provide those parts of a security agreement that are relevant to ascertaining the identity of the grantor and the secured party, the identity of the collateral, and the amount secured.</i>	
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Do you agree with the proposed recommendation?	Yes
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Comments:

Given that the relevant security interests in most securitisation transactions are contained in various documents which may or may not contain sensitive information, we agree with the proposal to limit the information required to be provided by a secured party.

5.9.5 The effect of a confidentiality agreement - the scope of s 275(6)(a)

<i>(a) Should this section also apply to confidentiality agreements between the secured party and the grantor?</i>
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<i>(b) Should a confidentiality agreement that obliges the grantor or debtor not to disclose information about the transaction but leaves the secured party free to make disclosures engage the exemption as well?</i>
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<i>(c) Should s 275(6)(a) be amended to accommodate carve-outs of the type discussed in Section 5.9.5?</i>
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Comments:

No submission.

5.9.5 The effect of a confidentiality agreement - the qualifications in s 275(7)

(a) Should ss 275(7)(a) and (b) be deleted?

(b) Should ss 275(7)(c) and (d) be deleted?

(c) Can you explain why the wording of paragraphs (c) and (d) of s 275(6) is structured so differently?

Comments:

No submission.

5.9.6 Disclosure that is prevented by a duty of confidence

How can the circularity described in Section 5.9.6 be broken? Should the banker's duty of confidence prevail?

Comments:

No submission.

5.10 Layout of the Register

Proposed recommendation 4.65: *That the layout of the Register, and the order and manner in which it asks questions of a registrant or a searcher, be reviewed in order to make them as simple and easy to use as possible, particularly from the perspective of an unsophisticated user.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.11 Supporting functionalities

Proposed recommendation 4.66: *That AFSA be asked to incorporate suggestions in the submissions that go to the supporting functionalities of the Register into its current planning processes, and to discuss them with AFSA's consultative forums, as appropriate.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.12.1 Serial-numbered property that is consumer property

Proposed recommendation 4.67: *That s 157(1) be amended to require a secured party to give a notice of a verification statement to the grantor, whether or not the grantor's details are included in the registration, on the basis described in Section 5.12.1.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.12.2 Registration events

Proposed recommendation 4.68: *That the Act be amended to provide that a secured party is only*

5.12.2 Registration events

required to give a notice of verification statement to the grantor in relation to a financing change statement, if the relevant change affects the way in which the registration identifies the grantor, the secured party or the collateral, but that the Act not be amended to exempt a secured party from the obligation to give a notice of verification statement just because it is part of a bulk transfer.

Do you agree with the proposed recommendation?

No submission

Comments:

5.12.3 Should a notice of verification statement be optional for commercial transactions?

Proposed recommendation 4.69: *That s 157 of the Act not be amended to provide that a secured party need only give a notice of verification statement to a grantor in relation to commercial property, if it agrees with the grantor that it will do so.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.13 Constructive notice of the contents of the Register

Proposed recommendation 4.70: *That the Act not be amended to provide that a person should not be taken to have knowledge of the contents of the Register where the general law would hold otherwise.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.14 Residual references to the Register as a collateral register

Proposed recommendation 4.71: *That s 160 of the Act be amended as described in Section 5.14, and that corresponding simplifications be made where possible to other sections of the Act.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.15 Court power to rectify errors in registration?

Should the Act give Courts a general power to provide relief for errors in registrations?

Do you agree with the proposed recommendation?

No submission

Comments:

5.16 Registrar's power to correct errors on the Register

Proposed recommendation 4.73: *That s 186 be amended to make it clearer that it applies only to data that was removed from the Register by the Registrar.*

Do you agree with the proposed recommendation?

No submission

Comments:

5.16 Registrar's power to correct errors on the Register

5.17.2 Registrations migrated from the ASIC charges register

Proposed recommendation 4.74: <i>That residual issues with registrations that were migrated from the ASIC charges register be addressed as described in Section 5.17.2.</i>	
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Do you agree with the proposed recommendation?	No submission
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Comments:

5.17.3 Registrations migrated from State and Territory motor vehicle or similar securities registers

Proposed recommendation 4.75: <i>None at this stage, pending further consideration.</i>	
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Comments:

Noted.

5.17.4 Registrar's power to amend the Register

Proposed recommendation 4.76: <i>That the Act be amended to empower the Registrar to amend migrated data on the Register as the Registrar considers necessary to correct errors in the migration process.</i>	
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Do you agree with the proposed recommendation?	No submission
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Comments:

6.1 Registrar's discretion to refuse to register a financing statement

Proposed recommendation 4.77: <i>That ss 150(3)(c) and (d) be deleted.</i>	
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Do you agree with the proposed recommendation?	No submission
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Comments:

6.2 Amendment of the Register in accordance with a court order

Proposed recommendation 4.78: <i>That the Act be amended to provide that the Registrar does not need to exercise procedural fairness when giving effect to a court order, and that the Registrar instead be able to seek further directions from the court before giving effect to the court's order.</i>	
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Do you agree with the proposed recommendation?	No submission
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Comments:

6.3 Registrar's investigative powers

6.3 Registrar's investigative powers

Proposed recommendation 4.79: *That s 195A be amended to confirm that the Registrar's power to conduct investigations extends to investigations that are conducted for the purpose of pursuing the enforcement of civil penalties.*

Do you agree with the proposed recommendation?

No submission

Comments:

6.4 A business day calendar

Should concern over the term "business day" be addressed by requiring the Registrar to maintain a "business day calendar" on the Register's website? Should the definition be simplified? If so, how?

Comments:

No submission.

6.5 Notices to secured parties that cannot be located

Proposed recommendation 4.81: *That the Registrar be empowered to issue a notice to a secured party by publication on the Registrar's website, if the Registrar has no other valid notice details for a secured party, and that the associated notice period required by the Act be extended in these circumstances.*

Do you agree with the proposed recommendation?

No submission

Comments: