

MIGRATED SECURITY INTERESTS: LOST IN TRANSITION

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I INTRODUCTION

Part 9.4, division 6 of the *Personal Property Securities Act 2009* (Cth) (*PPSA*) introduces a concept that is unique to Australia: the migrated security interest. This represents an ambitious and facilitative approach to implementing personal property securities reform within Australia and on its face appears to support the aim of providing a ‘single uniform regime on a national basis’.¹ No other jurisdiction effecting personal property securities reform of this type has opted for universal migration of existing security interests. The investigation in this article considers whether the Australian approach sets a new benchmark in personal property securities reform or whether the unintended consequences of migration strike at the heart of what it was intended to achieve: certainty, simplicity and efficiency.

A Migrated Security Interests

The definition of ‘migrated security interest’ is contained in section 332 of the *PPSA*:

Meaning of migrated security interest

An interest in personal property is a *migrated security interest* in the personal property if all of the following conditions are met in relation to the interest:

- (a) it is a transitional security interest in the personal property;

Note: Transitional security interests are security interests that arise under security agreements made before the registration commencement time, to which this Act will apply at the registration commencement time (see sections 307, 308 and 310).

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¹ Law Reform Commission, *Personal Property Securities*, Interim Report No 64 (1993), 125–6 [11.12] (‘LRC Report’).

- (b) data in a transitional register in relation to the property is:
 - (i) given to the Registrar as mentioned in section 330 or 331; and
 - (ii) accepted by the Registrar;
- (c) a registration in that transitional register in relation to the property was effective immediately before the time the data was given to the Registrar;
- (d) the registration in a transitional register was duly authorised by the law under which the register was maintained.

The fundamental concept behind the migrated security interest is that the security interest needs to be recorded on a 'transitional register'. While section 330 indicates that a transitional register is a 'register maintained under a law of the Commonwealth, a State or a Territory', nowhere in the *PPSA* or the *Personal Property Securities Regulations 2010* (Cth) is a list of the transitional registers provided.² Accordingly, the issue of whether an existing register will be a transitional register has largely been a decision of the Commonwealth Attorney-General's Department in consultation with the existing register owners. Initially there were approximately 40 existing securities registers which were being considered as transitional registers; however, this has been pared back to 26 reflecting, for example, decisions not to migrate existing registers which do not afford priority upon registration³ or which record security interests in collateral that will expire during the two year transitional period.^{4 5}

B Policy

Australia's personal property securities reform has been driven by a desire to improve upon the existing ramshackle collection of laws and myriad of registers on which security interests can or must be recorded. The LRC Report identified seven objectives of personal property law reform although it noted that it was 'not possible to meet all these goals equally'.⁶ During the following 15 years, the hierarchy of these objectives evolved so that three became dominant. Paragraph 1.14 of the Commentary accompanying the consultation draft of the Personal Property Securities Bill 2008 identifies these as follows:

2 A current list of transitional registers can be found on the Personal Property Securities Register website under the heading 'What happens to existing security interest registers?': Personal Property Securities Register, *About PPS* <http://www.ppsr.gov.au/www/ppsr/ppsr.nsf/Page/AboutPPS_AboutPPS#security>.

3 See, eg, a charge over Victorian taxi licence recorded on the register maintained by Victorian Taxi Directorate. Note that mostly security registers which do not confer priority upon registration are also in respect of security interests which have been excluded from operation of the *PPSA* by State and Territory legislation. For general discussion, see *ibid*.

4 See, eg, the Register of Liens of Crops and the Register of Liens on Wool maintained by the Department of Sustainability and Environment in Victoria. The *Instruments Act 1958* (Vic) s 66 limits the duration of registrations recorded on those registers so that any existing registrations will expire during the two year transitional period. Existing registrations will be temporarily perfected as transitional security interests from registration commencement time.

5 Additionally, the Register of Cooperative Charges maintained by the Department of Justice in the Northern Territory which contains no registrations to migrate has been descoped as a transitional register.

6 LRC Report, above n 1, 40 [4.30].

- (a) certainty – to remove uncertainty arising from the vast amount of Commonwealth, State and Territory legislation and the uneasy interaction of statutes, the common law and equitable legal principles. The new arrangements would apply consistently throughout Australia;
- (b) simplicity – they will be less complex than the existing arrangements;
- (c) efficiency – they will lower costs for all parties involved in personal property securities transactions.⁷

The Options Paper prepared by the Standing Committee of Attorneys-General considered the benchmarks for personal property securities reform in greater detail.⁸ Although the objectives have a different nomenclature, the key considerations are the same.⁹ For the purposes of this article, I will refer to the policy objectives as certainty, simplicity and efficiency.

In some respects, the concept of migrated security interests is, superficially at least, the very embodiment of at least one of the policy objectives underlying personal property securities reform in general. Where the existing legal and regulatory environment governing security registrations is fragmented and complex, migrating existing registrations to the Personal Property Security Register ('PPSR') can be seen as a commitment by government to simplifying transitional security arrangements and removing some of the inconvenience and expense for secured parties. When considered in the context of the lukewarm and tentative reaction of stakeholders to personal property securities reform over the years,¹⁰ it is easy to understand why government considered that migrating security interests might be an attractive option. Similarly, the fact that secured parties do not incur direct registration costs appears to support the view that migration gives effect to the policy objective of efficiency.

7 Commentary, Personal Property Securities Bill (Cth) 2008, May 2008, 11–12 [1.14].

8 Standing Committee of Attorneys-General, *Review of the Law on Personal Property Securities* (Options Paper, 2006) ('Options Paper').

9 Ibid 10 [63]. The benchmarks referred to in the Options Paper are that the solution must be comprehensive in coverage, provide legal certainty and be efficient. The discussion on comprehensive in coverage focuses on the personal property security regime applying to all forms of personal property irrespective of who owns the property and where the property is located. Accordingly, a secured party would only need to deal with two registration systems (land titles and personal property) rather than the complex existing arrangements thereby providing a simpler outcome. Similarly, the Senate Standing Committee on Legal and Constitutional Affairs noted the Attorney-General's Department's evidence of 'the four c's' underpinning the development of the Bill which would deliver 'more certain, consistent, less complex and cheaper arrangements': Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth, *Report: Exposure Draft of the Personal Property Securities Bill 2008* (2009) 4 [2.9] ('Senate Report') (emphasis in original).

10 See discussion in Anthony Duggan and Michael Gedye, 'Personal Property Security Law Reform in Australia and New Zealand: The Impetus for Change' (2009) 27 *Penn State International Law Review* 655.

II A BRIEF HISTORY OF MIGRATED SECURITY INTERESTS

The aetiology of migrated security interests is worth considering in connection with the evolution of Australia's personal property securities reform. How did we get to this point and why?

A Law Reform Commission Report

Although there have been piecemeal reviews of the law and registration requirements relating to personal property securities over the years,¹¹ the genesis of the current legislation dates back to 1990 when then Commonwealth Attorney-General Michael Duffy referred the adequacy of existing personal property securities laws to the Law Reform Commission for review.¹² The terms of reference focused particularly on the creation and enforcement of security interests by or against trading or financial corporations.¹³ In this context it is unsurprising that the form of the register and basis of the transitional arrangements recommended by the Commission focused on the Register of Company Charges as the centrepiece of personal property securities registrations. Interestingly, the Commission noted that:

the cost of setting up a completely new register is likely to be high, especially if all existing registers have to be collapsed in to it. This is likely to be a significant deterrent to reform. The existing [Australian Register of Company Charges] would seem to be the most logical and least expensive basis for a national register of security interests.¹⁴

The Commission recommended that the Australian Register of Company Charges be expanded to include all personal property securities over companies to be regulated by the personal property securities regime¹⁵ and to provide a parallel facility within the Australian Securities Commission's computer system to allow registration of security interests over individuals' property with an electronic link to the Australian Register of Company Charges. The Commission noted that this would allow 'all State named-indexed registers to be made redundant in due course'.¹⁶

11 See, eg, the report prepared by the Molomby Committee in 1971–72. For a general overview of the history of personal property securities reform in Australia, see Options Paper, above n 8, 2 [10]–[13]; see also Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6962 (Robert McClelland).

12 At this time there were also a number of concurrent investigations being conducted by law reform commissions in Victoria, New South Wales and Queensland. The four law reform commissions attempted to reach a consensus on recommendations but the discussions were not completed prior to the date by which the Law Reform Commission was required to report on its findings. To reflect these ongoing discussions, the Law Reform Commission released Report 64 as an 'interim' report. Ultimately, discussions between the four law reform commissions were unsuccessful and no final report was issued by the Law Reform Commission: Australian Attorney-General's Department, *Personal Property Securities: Discussion Paper* (1995) 1 [3]–[4] ('1995 Discussion Paper').

13 LRC Report, above n 1, xii.

14 Ibid 128 [12.4].

15 This was specifically expressed to include 'reverse' securities: ibid 129 [12.5].

16 Ibid 129 [12.7].

The Commission also considered the position of the existing asset-based registers¹⁷ and recognised that these would need to be brought within the ambit of any new register. Ultimately, the Commission recommended that these existing registers be maintained but electronically linked to the Australian Register of Company Charges so that lodgement on one would be taken to be lodgement on the relevant other.¹⁸ This way it would also be possible to search the existing asset-based register and the Australian Register of Company Charges simultaneously.¹⁹

The draft bill prepared by the Commission gave effect to these proposals by providing in clause 275(7) '[t]he Commission may enter in the [Australian Register of Company Charges], as well as the information that this Part requires to be entered, such other information as it thinks fit'. Note 1 to the clause indicates that '[o]ther registers may be part of the [Australian Register of Company Charges] under the Corporations Regulations'.

As such, there was no provision made for migrating existing registered security interests in the draft bill as this was considered by the Commission to be expensive and inefficient and was unnecessary given the system of linked registers recommended in the LRC Report.

B 1995 Discussion Paper

It is perhaps an understatement to observe that the recommendations made by the Law Reform Commission did not generate a groundswell of support from the legal and financial community. In an attempt to reinvigorate debate on personal property securities reform within Australia, the then Commonwealth Attorney-General Michael Lavarch released a discussion paper in 1995. As noted in its introduction, the 1995 Discussion Paper was 'effectively a summary of the [A]LRC's Report' but sought particular comment on the vexed issue of purchase money security interests.²⁰ In this respect, the 1995 Discussion Paper did not add to the position outlined in LRC Report.

C The Bond Bill

For many years following the 1995 Discussion Paper, interest in personal property securities reform in Australia languished. Response to government initiatives had been poor and without the persistence of certain individuals, reform may never have occurred. The Bond Bill was championed by Professor David Allan and prepared by a committee of the Banking Law Association in an

17 An asset-based register is one that records security interests against assets (such as motor vehicles) as opposed to recording security interests against the party which has given the security.

18 LRC Report, above n 1, 129–31 [12.8]–[12.12].

19 Although the Report does not expressly deal with the question, it seems that the cross-linking contemplated by the Commission had the Australian Register of Company Charges as a hub with each of the asset-based registers and the individual register proposed to be maintained by the Australian Securities Commission as a spoke. It is unclear how the asset-based registers were to be linked (if at all) to the individual register and what limitations that might create for searching.

20 1995 Discussion Paper, above n 12.

effort to revive personal property securities reform following the tepid response to the draft bill proposed in the LRC Report. An earlier draft had been prepared by the Banking Law Association which had been criticised by the Association's members as being 'too American'; however, the revised draft, which was to become known as the 'Bond Bill', received much broader support and a workshop was convened at Bond University on 25–27 April 2002 to discuss the draft bill and issues in implementation.²¹

Regrettably, neither the Bond Bill nor the workshop focused on transitional arrangements and clause 77 of the Bond Bill which was to set out the transitional provisions simply said '[To be inserted] [sic]'.

D Options Paper 2006

Professors Duggan and Gedye observe that renewed governmental interest in personal property securities reform occurred when the then Commonwealth Attorney-General Phillip Ruddock attended a symposium in 2005 and heard Professor David Allan present on the need for law reform.²² It seems that this Damascene revelation was the impetus for the Options Paper prepared by the Standing Committee of Attorneys-General in April 2006. The Options Paper briefly outlined three possibilities for transitional arrangements:

- (a) only capture securities created after a particular date but prior to commencement of the register – however, this grandfathering proposal was noted as perhaps more appropriate for securities which have a short registration period;
- (b) arrange for data in existing registers to be 'transferred' to the new register; and
- (c) require secured parties to re-register their security interests on the personal property securities register – noting that this was the transitional regime in New Zealand.²³

No further analysis was provided for any of the transitional options but evidently, the possibility of migrating security interests which had been so emphatically discounted by the Law Reform Commission had been revived.

E Discussion Paper – Registration and Search Issues, November 2006

Clearly personal property securities reform had captured the Attorneys-Generals' attentions as shortly after the Options Paper was released in 2006, the first of a series of discussion papers was released. The *Review of the Law on Personal Property Securities: Discussion Paper – Registration and Search Issues* expanded on the three options provided in the Options Paper and for the first

21 David Allan, 'Uniform Personal Property Security Legislation for Australia – Introduction to the Workshop on Personal Property Security Law Reform' (2002) 14 *Bond Law Review* 1, 6–11.

22 Duggan and Gedye, above n 10, 657.

23 Options Paper, above n 8, 16 [99].

time, provides considered analysis around the mechanical aspects of migrating security interests and the concomitant legal considerations.²⁴

The Registration and Search Issues Paper suggested two options for data migration:

- (a) electronic data migration – where information about existing registrations would be electronically transferred to the PPSR; and
- (b) manual data migration – where information about existing registrations would be manually re-typed into the PPSR.²⁵

It is clear from the discussion that serious consideration of electronic data migration was still in embryonic stages. The explanation section begins with the words ‘to the extent that electronic data migration is feasible’ and goes on to provide:

Preliminary exploration of this possibility suggests that it is more likely to be technically feasible and successful if applied to a small number of existing registers. For example, priority could be given to attempting electronic data migration from State registers of encumbered vehicles and from the ASIC corporate charges register. *The extent to which this is possible*, and the number of registers that could be migrated in this way, is yet to be determined. ... Overseas experience suggests there is some risk of error with electronic data migration.²⁶

These views, although preliminary, are expressed in more favourable terms than the discussion of manual data migration where it was noted:

This option does not create as strong a possibility of seamless migration as electronic data migration, both because of the time that re-keying would take and because of the prospect of transcription error. To the extent that part or all of the transitional approach came down to a choice between manual re-keying and requiring re-registration, this would essentially be a choice as to whether the responsibility for data re-entry should rest with business or government (subject to cost recovery arrangements).²⁷

Importantly, the Registration and Search Issues Paper acknowledged that ‘migrated data from existing registers may not comply with the formal requirements for registration under the new system’²⁸ and indicated that the Registrar would need to be empowered to determine that transitional security interests would not be seriously misleading for the purposes of the PPSA if they do not strictly comply with the requirements under the Act.²⁹

The Registration and Search Issues Paper sought comments on the options for transitional arrangements. Although only preliminary investigations had been made of the feasibility of electronic data migration, it appears to have quickly become stakeholders’ preferred transitional option, particularly when compared

24 Australian Attorney-General Department, *Review of the Law on Personal Property Securities: Discussion Paper – Registration and Search Issues* (2006) 73 (‘Registration and Search Issues Paper’).

25 *Ibid* 73 [393]–[394].

26 *Ibid* 73 [393] (emphasis added). No further information was provided on overseas electronic data migration.

27 *Ibid* 73 [394].

28 *Ibid* 74 [402].

29 *Ibid* 75 [406].

with the risk of manual data re-entry or the significant effort required of secured parties to re-register their securities. Given that the effort, cost and risk were yet to be fully identified, responses received may have differed if a full feasibility study had been conducted earlier taking into account the requirements of the PPSA and the information contained on the transitional registers. Whether consciously or not, the government appeared to be favouring electronic data migration and this was seized upon by stakeholders.

F Personal Property Securities (Transitional Provisions and Consequential Amendments) Bill 2008 Consultation Draft

A consultation draft of the Personal Property Securities (Transitional Provisions and Consequential Amendments) Bill 2008 (Cth) ('Transitional Provisions Bill') was released by the Attorney-General's Department in May 2008. This was a companion piece to the Consultation Draft of the Personal Property Securities Bill 2008 (Cth) and contained provisions dealing with migration,³⁰ application of the Personal Property Securities Bill to transitional security interests (such as the 'taking free' rules and the effect of bankruptcy or insolvency on a transitional security interest)³¹ and temporary perfection of transitional security interests.³²

The Transitional Provisions Bill set out for the first time the framework of how migration would occur. It is substantially similar to the migration provisions contained in part 9.4 division 6 of the *PPSA*. At its core, the migration process operated so that the Registrar could require a transitional register to provide data in relation to existing registered security interests over personal property. This data would be registered on the PPSR before registration commencement time so that existing information would be available for searching as soon as the PPSR achieved operational commencement. The Commentary to the Transitional Provisions Bill indicates that the migration period was expected to be three months.³³

The Transitional Provisions Bill also gave the Registrar power to regularise defects in registrations created by the migration process. This had first been identified as a necessary power of the Registrar in the Registration and Search Issues Paper to protect against migrated security interests being considered 'seriously misleading' (and therefore an ineffective method of perfection) if they did not contain all of the information required to be contained in a financing

30 Personal Property Securities (Transitional Provisions and Consequential Amendments) Bill 2008 (Cth) pt 4 div 4 ('Transitional Provisions Bill').

31 Transitional Provisions Bill, pt 4 divs 1–3.

32 Transitional Provisions Bill s 16.

33 Commentary, Personal Property Securities (Transitional Provisions and Consequential Amendments) Bill 2008, May 2008, 2 [8]. Under current scheduling, migration will occur during the period 12 September 2011 to 30 October 2011: *Personal Property Securities Program Schedule (External Stakeholder Focus)*, v14, 1 July 2011. There are five available on the govdex register, although information is only available to registered users: Australian Government Department of Finance and Deregulation, *The Australian Government Collaborative Workspace – govdex*, <www.govdex.gov.au>.

statement under the eventual *PPSA*.³⁴ Under the Transitional Provisions Bill, the Registrar was given power to provide a determination under legislative instrument that stated types of defects would not make a registration ineffective.³⁵ The legislative instrument would make a migrated security interest with a stated defect effective until the end time specified in the registration.³⁶

The Transitional Provisions Bill was incorporated into chapter 7 of the Personal Property Securities Bill 2008, Exposure Draft released in November 2008. The revised Personal Property Securities Bill was referred to the Senate's Standing Committee on Legal and Constitutional Affairs; however, due to the short timeframe for the inquiry the draft transitional provisions were not considered.³⁷ Accordingly, the provisions outlined in May 2008 will by and large be the provisions relied upon to effect migration and transition existing security interests into the personal property securities regime. It is disappointing that the Standing Committee was unable to receive submissions and probe the efficacy of the proposed migration process at the time. Greater clarity on the proposed arrangements for migration would have assisted in focusing stakeholders' attention on not only the mechanical aspects of migration but also the legal implications.

G Summary of Migration

The history of data migration is illustrative in helping to understand the reasons why data migration was developed. Associate Professor Patrick Quirk has observed that 'reform fatigue' had affected banks' interest in personal property securities reform and as 'those who would bear [its] burden', were critical stakeholders.³⁸ In particular, many Australian banks had just lived through introduction of the *Personal Property Securities Act 1999* (NZ) in New Zealand and were mindful that re-registration was a labour-intensive process. To this extent, data migration might be seen as an inducement to elicit support from a key stakeholder group. While this is understandable, it seems that data migration was a solution offered without a deep technical analysis, in particular, in relation to data recorded on the transitional registers and how this would fit the requirements under the *PPSA*. Although it was contemplated that the Registrar would be able to regularise defects, the nature and extent of those defects was not circulated broadly for stakeholder review and validation of assumptions underpinning the migration process was not sought during initial development.

34 See also Commentary, Personal Property Securities (Transitional Provisions and Consequential Amendments) Bill 2008, May 2008, 3 [17].

35 Transitional Provisions Bill s 30.

36 Note that Transitional Provisions Bill s 27 and earlier versions of the Personal Property Securities Bill required that the Registrar specify an end time for a migrated security interest. This was modified in s 333 of the *PPSA* to reflect that the *Corporations Act 2001* (Cth) does not require a registration on the Register of Company Charges to specify an end time and does not otherwise provide for the registrations to expire after a given period.

37 Senate Report, above n 9, 55 [6.1]–[6.3].

38 Patrick Quirk, 'Whether Australian Secured Transactions Laws Will Transition from the English System to the *Personal Property Securities Act*?' (2009) 31 *Thomas Jefferson Law Review* 219, 227–8.

Stakeholders who may have thought that they were getting a ‘free ride’ would later appreciate that this would not be the case.

III A COMPARATIVE VIEW

One of the reasons often cited for personal property securities reform is the benefit of harmonising Australia’s laws with those of other jurisdictions.³⁹ Professor Duggan in particular has been vocal in his view that departing from models adopted in other jurisdictions creates unintended consequences.⁴⁰ His evidence before the Senate Standing Committee on Constitutional and Legal Affairs in this respect is unequivocal:

The New Zealand approach has substantial benefits ... Close adherence to the North American model makes sense, because it enables the local lawmaker to free-ride on Canadian and United States learning experience. By contrast, departure from the model creates uncertainty and increases the risk of error.⁴¹

Although these comments were directed to the ‘substantive’ provisions of the *PPSA*, they ring true for some of the more mechanical provisions as well. While adopting an innovative and facilitative approach to registering transitional security interests on the PPSR is to be commended, the risk is potential legal uncertainty. For this reason it is expedient to examine the transitional processes adopted by other jurisdictions of comparable legal and economic backgrounds.

A United States

In the United States, the law of secured transactions is contained in Article 9 of the *Uniform Commercial Code* (*UCC*). The *UCC* was first introduced in the United States in the 1950s⁴² and operates as a uniform act which was intended to be enacted in each state; however, some states make their own amendments to the text so that while all 50 states and the District of Columbia have adopted Article 9, the law is not the same in each of those places. That said, the variations between the enactments in each state are not usually significant and they have not undermined the efficacy of the uniform laws. As noted in PA Bar Report:

When the *UCC* was first promulgated in 1952, Article 9 was perhaps its most novel feature. Before the *UCC* there was no single body of law that governed liens in personal property. Instead, in each state a confusing patchwork of different statutes and common law doctrines applied to such liens, depending on the specific type of property and other variables. Those laws differed markedly from state to state. Article 9 replaced that nonuniform patchwork with a single uniform

39 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2009, 6961 (Robert McClelland).

40 Duggan and Gedye, above n 10, 662–3.

41 Senate Report, above n 9, 22 [3.14].

42 The *UCC* was first promulgated by the National Conference of Commissioners on Uniform State Laws and the American Institute in 1952 and Pennsylvania became the first State to enact it in 1953: The Article 9 Task Force of The Business Law Section of The Pennsylvania Bar Association, *Report on the Uniform Commercial Code Modernization Act of 2001* (2001) 1 (‘PA Bar Report’).

statute applicable to almost all types of personal property. Article 9 has been an enormous success, adopted by every state in the Union, and is perhaps the most successful of any of the uniform laws promulgated during the hundred-plus years of [the National Conference of Commissioners on Uniform State Laws]'s existence.⁴³

A significant difference between the Australian personal property securities model and Article 9 derives from the fact that separate legislation in each state also means separate registration systems. Article 9 was initially adopted before the widespread use of computers and electronic filing we are familiar with today. Until the 1999 revision of Article 9,⁴⁴ a number of states maintained a 'dual filing system' with multiple registers on which financing statements could or must be lodged. For example, the general rule was that financing statements were to be filed with the state's central filing office (for example the Department of State) but in certain circumstances, a filing would also need to be made with a county filing office or only with the county filing office in other instances; further, real estate related filings under Article 9 were to be lodged with the appropriate real estate recording office in the given state.⁴⁵ Mostly these filing offices maintained electronic registration systems but some were paper based.⁴⁶

The 1999 revision sought to conform the filing systems in each state to streamline registration processes and reduce transaction costs associated with registration and searching. In eliminating dual filing systems, the Permanent Editorial Board of the Uniform Commercial Code and the affected states needed to consider similar issues to those facing Australia in implementing the *PPSA*. Should they transfer filings from discontinuing registers, require secured parties to re-register financing statements on the continuing registers or grandfather the existing perfected security interests so that they would continue to be effective for a specified period? The Permanent Editorial Board adopted a grandfathering approach which provided that registrations made with a discontinuing filing office would remain effective until the earlier of the time the existing financing statement would have ceased being effective under the law of the original filing jurisdiction or 30 June 2006, whichever is earlier.⁴⁷ This reflected that 'the vast majority' of financing statements filed under the previous version of Article 9 only had a registration period of five years⁴⁸ and it was anticipated that these would either expire through the lapse of time or that the secured party would

43 Ibid 2.

44 While the Revised Article 9 was promulgated in 1999, it did not commence until 1 July 2001 and some states adopted non-uniform commencement dates of 1 October 2001 (Connecticut) and 1 January 2002 (Alabama, Mississippi and Florida): Permanent Editorial Board for the Uniform Commercial Code, *Report: Maintaining Perfection beyond June 30, 2006 of Security Interests Created and Perfected by Filing under Former Article 9* (2005) 1 <<http://extranet.ali.org/directory/files/DEC2005PEB-report.pdf>> ('PEB Report').

45 *UCC* §9-401(1) third alternative; *ibid* 7–8.

46 Craig Wappett, Laurie Mayne and Tony Duggan, *Review of the Law on Personal Property Securities: An International Comparison of Personal Property Securities Legislation* (Commonwealth Attorney-General's Department, 2006) 33.

47 *UCC* §9-705(c); PEB Report, above n 44, 1.

48 PEB Report, above n 44, 2.

need to file an 'in lieu' financing statement at a continuing filing office which cross-referenced the earlier filing.⁴⁹ During this five year transitional period, discontinuing filing offices would need to maintain existing filings and respond to search requests; however, they would not accept new filings and amendments to existing filings were to be made by way of an 'in lieu' financing statement.⁵⁰

By and large, the grandfathering option appears to have been successful as the transitional period allowed the dual filing states to replicate the filing system in the other States initially without requiring re-registration.⁵¹ Some interpretation issues arose in connection with continuing filings that were to extend beyond 30 June 2006 and this is the subject of the Permanent Editorial Board's report. Importantly, the problems which did arise were a result of trying to bring all existing transactions within the scope of the Revised Article 9 by application of the drafters' pen rather than a filing requirement. As noted in the Report, '[t]he drafters may not have anticipated and considered these specific cases in crafting the rules in Part 7'.⁵² Indeed, that is the precise risk against which legislative drafters need to remain vigilant in developing transitional rules.

B Canada

Like the United States, Canadian personal property securities legislation is based principally on a model act⁵³ with separate legislation and registers in each adopting province. The reform process in Canada has been a lengthy one with Ontario being the first province to adopt personal property securities legislation in 1967, although it did not take effect until 1976. The original *Personal Property Security Act*, RSO 1976, c 73 in Ontario did not apply to security interests granted by companies which were regulated by the *Corporations Securities Registration Act*, RSO 1980, c 94 ('CSRA'). Over time, this was found to be unworkable and eventually both Acts were repealed and replaced with the *Personal Property Security Act*, RSO 1990, c P-10.⁵⁴ The existing registers were replaced with a single register for recording all security interests, regardless of whether the grantor was a natural person or otherwise.

49 UCC §9-706; see also *ibid*; PA Bar Report, above n 42, 10.

50 The Revised Article 9 does not specifically deal with non-continuing filing offices although the Enactment Guide provided a complex model provision which could be adopted by affected States: PA Bar Report, above n 42, 15.

51 Many affected filings on discontinuing registers were also recorded on continuing registers so that requiring re-registration may not have provided any additional benefit in many instances.

52 PEB Report, above n 44, 3.

53 The *Model Uniform Personal Property Security Act* was adopted by the Canadian Bar Association in 1970; however, there are also other model and uniform acts which have been created such as the *Uniform Personal Property Security Act* adopted by the Conference of Commissioners for Uniformity of Legislation in Canada in 1971 and the *Model Western Canada Personal Property Security Act*.

54 ('PPSA 1990'). See New South Wales Law Reform Commission, *Personal Property Securities*, Discussion Paper No 28 (1992) [3.8].

Each of the Canadian provinces (other than Quebec)⁵⁵ has now adopted a personal property security regime and by and large similar transitional provisions.⁵⁶ For the most part, these provide that an existing security interest is temporarily perfected for the unexpired portion of the registration⁵⁷ or for a specified period⁵⁸ (or in some cases, whichever occurs first). In some provinces, specific rules are provided for certain types of collateral. Other than in Ontario, a secured party who wanted to rely on a security interest after the relevant transitional period or who wanted to renew a registration before it expired, would need to do so on the applicable Personal Property Security Register.

In transitioning security interests registered under the *CSRA* to the Personal Property Security Register, Ontario adopted an approach most closely resembling Australian migration. Section 78(3) of the *PPSA 1990* provides:

Entries in registration system

- (3) The registrar shall, with respect to each mortgage, charge and assignment, and each assignment thereof, registered under the former Act for which no certificate of discharge has been registered as of the 10th day of October, 1989, enter into the central file of the registration system established for the purposes of this Act,
- (a) the name of the debtor as shown in the registration under the former Act;
 - (b) the registration number under the former Act; and
 - (c) a notation, in English or French, indicating that the registration was made under the *Corporation Securities Registration Act* or a predecessor of that Act and that a copy of the instrument is available for inspection in the offices (giving the appropriate address) of the Ministry of Consumer and Business Services. R.S.O. 1990, c. P.10, s. 78 (3); 2001, c. 9, Sched. D, s. 13.

Although not expressly mentioned, it seems likely that this was the ‘overseas experience’ referred to in the Registration and Search Issues Paper where it was noted that there is risk of error involved in electronic data migration.⁵⁹ Compared with the information to be provided by Australia’s transitional registers under the data migration scheme, the information required by the registrar in Ontario seems extremely simple and by implication, concerning for data migration here.

55 Owing to its French origins, Quebec maintains a civil code. However, in 1994 it amended the Code to include a ‘hypothec’ being a ‘real right on a movable or immovable property made liable for the performance of an obligation. It confers on the creditor the right to follow the property into whose hands it may be, to take possession of it or to take it in payment, or to sell it or cause it to be sold and, in that case, to have a preference upon the proceeds of the sale ranking as determined in this Code’: *Civil Code of Quebec*, RSQ 1991, c 64, s 2660. A Registry of Hypothecs is also maintained.

56 The exact form of the *PPSA 1990* differs between provinces owing to differences in the form of model or uniform act on which it was based and an objective of conforming with the laws of other provinces where possible. See New South Wales Law Reform Commission, above n 54, [3.8]–[3.9].

57 Eg, Saskatchewan and Manitoba.

58 The temporary perfection period varies between the provinces, eg, British Columbia, Alberta, New Brunswick, Nova Scotia and Prince Edward Island specify a period of 3 years whereas Newfoundland and Labrador specifies a period of 2 years.

59 Registration and Search Issues Paper, above n 24, 73 [393].

C New Zealand

New Zealand adopted its Personal Property Securities Act in 1999 and unlike its North American counterparts, incorporated a single, national register as the centrepiece of its reform agenda. As New Zealand enjoys a unitary legal system, legislators did not struggle with the state-federal issues that have complicated reform in the United States, Canada and Australia. Under the New Zealand regime, the Act provided for a six month transitional period during which prior existing securities would be temporarily perfected. As noted in *Personal Property Securities in New Zealand*:

The policy behind the provisions was to provide a short transitional period during which security interests entered into before commencement of the Act ... could be perfected under the *PPSA* if the secured party wished to maintain the priority status that existed before commencement of the Act.⁶⁰

In particular, section 195 provides that prior registered security interests are deemed to be perfected by registration during the transitional period; as a corollary, section 198 provides that they become unperfected at the end of that period unless they are re-perfected under the Act (usually by re-registration). From a practical perspective, this meant that a significant volume of existing registered securities and other transitional securities had to be registered on the Personal Property Securities Register within a relatively short period.⁶¹ While the burden of registration placed on secured parties was significant, it forced a closer scrutiny of both the security value of existing securities and of credit policies, not least because a registration fee was payable for all transitional security interests.⁶² Anecdotal evidence suggests that banks closely scrutinised their retail loan portfolios to remove obsolete or low value securities and to change credit policies so that securities that were rarely enforced, such as over motor vehicles worth less than \$30 000, were no longer required. In some instances, this reduced the number of security interests being registered during the transitional period by two-thirds.

New Zealand's experience, good and bad, is often referred to in guiding the Australian position on many PPS issues; it seems fair to suggest that Australian companies, in particular banks, with operations in New Zealand have based their view of optimal transitional provisions on the experience in New Zealand. Given the volume of securities currently registered in Australia,⁶³ it is easy to appreciate

60 Michael Gedye, Ronald Cumming and Roderick Wood, *Personal Property Securities in New Zealand* (Thomson Brookers, 2002) 560 [193.1].

61 In New Zealand registrations were able to be made in the six months prior to commencement of the register. In effect, this option was limited to financial institutions with a large number of registrations: Steve Flynn, Laurie Mayne, Rob McInnes and Mark O'Regan, *Personal Property Securities Act – Getting Started* (New Zealand Law Society, 2000) 73.

62 In Australia all transitional security interests, including migrated security interests, can be registered free of charge: *Personal Property Securities Program Cost Recovery Impact Statement – External Consultation Summary* (2010) Australian Government: Attorney-General's Department, iii–iv <www.ema.gov.au>.

63 The PPS Branch of the Attorney-General's Department ('PPS Branch') has indicated that it expects between 4.5 million and 5 million registrations to be migrated from transitional registers.

why the prospect of manually re-registering securities during a short transitional period was not embraced.

D United Kingdom

The United Kingdom does not presently have a personal property securities regime. The Law Commission's Report No 296 on Company Security Interests was submitted in August 2005 based on a lengthy consultation.⁶⁴ As the name indicates, the Report was ultimately limited to securities granted by companies although the terms of reference included examining whether to extend the scheme to non-corporate debtors; this was considered in Parts VIII–XI of Consultation Paper 164.

The Report recommended that prior registered charges be treated as registered under the new scheme without any requirement for re-registration.⁶⁵ Interestingly, it also recommended that existing unregistrable charges should not have to be registered after the scheme comes into effect⁶⁶ thereby minimising the complexity of any transitional period. The *Report on the Implementation of Law Commission Proposals* presented to Parliament indicates that while some of the recommendations proposed had been incorporated in the *Companies Act 2006 (UK)* c 46 ('*Companies Act*'), the government intends to revise the scheme to apply to all companies across the United Kingdom, whether incorporated under the *Companies Act* or any of its predecessor enactments.⁶⁷ The revised scheme is not expected to come into effect before 2012 and it seems unlikely that a plenary regime for personal property securities will be considered in the United Kingdom in the short term.

E International Summary

In the main, the international experience has been a combination of temporary perfection coupled with a re-registration requirement for securities which will extend beyond the transitional period. In jurisdictions where the tenor of existing security interests was predominantly short, this meant that it was unnecessary for secured parties to take any further steps to ensure continued perfection in most instances. The disadvantage of this approach, however, is that the existing registers need to operate in parallel with the relevant personal property securities register during the transitional period. Accordingly, while registration processes were streamlined, searching the register for security interests involved multiple registers.

64 Law Commission, *Registration of Security Interests: Company Charges and Property Other than Land – A Consultation Paper*, Consultation Paper No 164 (2002); Law Commission, *Company Security Interests: A Consultative Report*, Consultation Paper No 176 (2004).

65 Law Commission, *Company Security Interests*, CM 6654 (2005) 154 [6.63].

66 *Ibid* 154 [6.64].

67 Ministry of Justice, *Report on the Implementation of Law Commission Proposals*, House of Commons Paper No 719, Session 2010–11 (2011) 8 [23].

Other jurisdictions opted for a short transitional period so that the majority of security interests needed to be re-registered in accordance with the new legislative requirements. Although this creates a registration burden on secured parties, it means that the register quickly becomes the single source of truth and minimises confusion.

No other comparable jurisdiction has attempted a wholesale migration of existing registered security interests, state and federal, as contemplated under the *PPSA*.

IV THE MECHANICS OF DATA MIGRATION

The mechanics of data migration are complex and the orchestration required to transmit data from 26 transitional registers in relation to approximately 5 million registrations cannot be underestimated. The general process for migration is outlined in the *PPSR Data Migration Strategy*⁶⁸ although there have been a number of refinements to the process since that document, in particular through the development of 'Find and Claim'. The following is a high level overview of how migration will occur:

(a) *Pre-RCT catalogue of secured party groups provided to participants*

Secured parties which have opted to participate in the Find and Claim process (discussed below) prior to registration commencement time ('Pre-RCT Find and Claim') will be sent a catalogue of secured party groups. The catalogue will be generated through migration testing and will identify a list of secured party groups to be created by the migration process.⁶⁹ Participants will claim secured party groups belonging to them from the catalogue and will nominate a secured party group into which the registrations held by the existing secured party groups will be migrated.

(b) *Register owners upload existing registrations*

At the commencement of the migration period, each transitional register owner (for example ASIC in respect of the Register of Company Charges) uploads all of their existing registrations to a secure web page using the form of data file provided by the PPS Branch's data migration team ('DMT'). At regular intervals during the migration period, the large

68 Personal Property Securities Program, *PPSR Data Migration Strategy*, version 1.0, undated ('Data Migration Strategy').

69 Secured party groups are used on the PPSR to organise registrations. They are not (necessarily) the same as the secured party which holds the benefit of the security and are used for administrative purposes only. Eg, a large finance company might choose to have separate secured party groups for its retail lending and motor vehicle finance divisions, even though the same legal entity is the secured party. For Find and Claim, secured party groups will be created based on the secured party's ACN, the account number that a secured party has with a transitional register (eg, NSW REVS) or, for smaller registers, the registration number of existing registered security interests.

transitional register owners⁷⁰ will upload new registrations and deltas (ie, existing registrations which have changed since the original file was uploaded).

(c) *Uploaded files processed*

The uploaded data is processed by the DMT to create registrations for the PPSR. During the weekend prior to registration commencement time, all transitional registers will close and final data updates will be processed.

(d) *Registration reports sent*

During the migration period, the DMT will periodically send reports to Pre-RCT Find and Claim participants of successful migrations which contain details of PPSR registration numbers. This will enable participants to record these details in their collateral management systems prior to registration commencement time.

Any file which is not successfully uploaded and processed will have a rejection report generated and will be sent to the transitional register owner. Rejection reports will be issued only where there is a technical failure (for example the data uploaded was corrupt or not in the correct format).

(e) *Post-RCT catalogue of secured party groups made available*

Following registration commencement time, the updated Find and Claim catalogue will be available to secured parties seeking to identify their migrated security interests ('Post-RCT Find and Claim'). It will be the same catalogue as the Pre-RCT Find and Claim catalogue but will indicate which secured party groups have already been claimed. PPSR account customers will be able to access the catalogue through their PPSR account and casual users who have not registered for an account on the PPSR will need to claim their registrations through the contact centre.

If a Post-RCT Find and Claim participant wishes to transfer claimed registrations to a different secured party group, it will need to do this through the transfer functionality on the PPSR. The PPS Branch has indicated to industry participants that transferring migrated security interests between secured party groups will initially be free of charge; however, no detail has been provided on the timeframe during which this must occur in order to avoid the fee.

A Find and Claim

The Find and Claim process is part of the overall data migration strategy which was developed in response to significant risks identified in the initial Data Migration Strategy. As seen from the high level overview above, it is a

⁷⁰ These are identified in the PPS Data Migration Strategy as transitional registers with more than 1 million registrations, being the Register of Company Charges and the encumbered vehicles registers in Qld, NSW and Vic: see Personal Property Securities Program, above n 68, 9–11.

mechanism by which a secured party identifies migrated security interests belonging to it (through the secured party group associated with the security interest) and asserts its claim to the corresponding registration on the PPSR. A secured party cannot deal with any migrated registrations until it has claimed them under the Find and Claim process as they will not otherwise receive the registration token.⁷¹ Find and Claim also creates the possibility that the same secured party group could be claimed by more than one secured party creating further uncertainty and prolonging the period during which the migrated security interest will be in stasis.⁷²

Under the original proposal, the DMT was intending to send confirmation statements⁷³ and registration token to each 'address for service'. The details contained in the confirmation statement and registration token together provide sufficient information to enable someone to amend or discharge a registration.

The problem with the original process outlined in the Data Migration Strategy revolved around the expression 'address for service'. The term was not defined in the Data Migration Strategy and discussions with the PPS Branch indicated that it was not necessarily the registered office of a company and may be any address specified by the lodging party in the relevant form. Over time, this address information may become outdated as secured parties move premises. Once a security interest is registered, there may not be any requirement to update this information and a number of transitional registers, such as the Register of Company Charges, do not provide the mechanism to do so.⁷⁴

Financiers expressed concern that the confirmation statement and registration token might not reach their intended recipient and could easily fall into the hands of third parties. This would allow those third parties to discharge the security interest (or assign it to themselves) if they were so minded. In an extreme case, this could have significant implications for not just the financier's loan book but also for its regulatory capital.

This risk was identified by financiers participating in the Business Process and IT Users Forum in early 2010. The PPS Branch's initial response was to require secured parties to 'data cleanse' their existing registrations, that is, to validate the content of each registration and update the existing registrations (where possible). This was an expensive option for secured parties and not well received given that the exposure was created solely as a result of the proposed

71 The registration token is used to gain access to a PPSR registration and is akin to a PIN for a registration.

72 It is not clear how secured parties' obligations under the *PPSA* will operate for a disputed migrated security interest. Eg, *PPSA* ss 151(2), (3) requires a secured party to discharge a registration within five business days of it ceasing to have a reasonable belief that the collateral secures any obligation. This may not be possible if the registration is disputed as the legitimate secured party may not have access to the registration token to effect this within the prescribed period. Failing to discharge a registration may expose the secured party to civil penalties under the Act (although it is noted that the court may extend the period for compliance).

73 Confirmation statements can be likened to verification statements for migrated security interests; however, they are not treated as verification statements for the purposes of the *PPSA*.

74 ASIC Form 311B which is lodged with ASIC to effect a change to the charge does not provide for the secured party's change of address to be included.

migration process; further, many of the transitional registers were not resourced adequately to deal with the large volume of inquiries and lodgements that were anticipated. Eventually, it became apparent that this solution was not viable and the PPS Branch recognised that another answer would need to be found. Find and Claim became the eventual solution.

B Migration Summary

As can be seen from the discussion above, the process of migration is extremely complex and involves many moving parts. Coordinating 26 transitional registers in migrating up to 5 million registrations to a single, national register over a comparatively short period requires a skilled conductor who understands intimately each section of the securities orchestra. Even assuming that migration occurs flawlessly, asserting a claim to those securities is a complex process requiring secured parties to identify migrated security interests according to classifications not normally used by them and perhaps hope that another secured party will not also claim the same migrated security interest.

The Find and Claim process itself is complex and perhaps more so than necessary. Had the initial migration strategy been prepared in closer consultation with stakeholders, the risks could have been identified and alternative solutions developed earlier. For example, confirmation statements and registration tokens could simply have been sent to the registered office of each secured party. This would have provided an efficient and workable solution for a significant proportion of migrated security interests given that most financiers are incorporated and required to maintain registered offices.

V MEETING THE OBJECTIVES?

It is tempting to consider the political backdrop to personal property securities reform and view the decision to migrate existing registered security interests as both necessary and groundbreaking in the field; however, groundbreaking and effective are not synonyms. It is appropriate to review and benchmark migrated security interests against the criteria of certainty, simplicity and efficiency to determine how successful and revolutionary migrating security interests really is.

A Certainty

Certainty should be the attribute that underpins every aspect of personal property securities law and implementation in Australia. There are, however, three significant ways in which this policy objective is undermined by migrated security interests.

1 PPSA Registration Requirements

Transitional registers do not necessarily contain the information required under the *PPSA* for financing statements on the PPSR. For example, the *Personal Property Securities Regulations 2010* (Cth) prescribe nine collateral classes and each financing statement must specify the relevant class to which the collateral belongs in order for registration to occur.⁷⁵ A financing statement which specifies the wrong collateral class may be seriously misleading for the purposes of section 164 of the *PPSA* with the effect that the financing statement does not validly perfect the security interest.

Similarly, where the *PPSA* provides that collateral may or must be described by serial number, the Regulations specify the type of serial number to be recorded in the financing statement and the hierarchy to be used where there is more than one serial number available.⁷⁶ If the financing statement does not contain a serial number (or the prescribed serial number), it will be seriously misleading under section 164 (where the collateral must be described by serial number) or otherwise subject to the taking-free rules (where the collateral may be described by serial number).⁷⁷

A useful illustration is the Register of Company Charges maintained by ASIC. While many company charges recorded on that register extend to all assets and undertakings, many are fixed charges over specific assets such as ‘yellow goods’ vehicles used in mines. ASIC does not maintain information about the underlying secured property on its register and a third party searching the Register of Company Charges needs to obtain a copy of the charge instrument to determine the property secured by it. Accordingly, ASIC will specify a collateral class of ‘all present and after acquired property’ for all migrated security interests, even where the charge is a fixed charge over a specific asset.⁷⁸ Further, mining vehicles may be motor vehicles and treated as ‘serial numbered collateral’ under the *PPSA*. Details of the serial number are not included in the Register of Company Charges and there is no requirement that the charge

75 *Personal Property Securities Regulations 2010* (Cth) sch 1 cl 2.3.

76 *Ibid* sch 1 cl 2.2.

77 *PPSA* ss 44, 45.

78 The PPS Branch and transitional registers have prepared data mapping examples which indicate how migrated financing statements will be completed: see CTHCOCH document available in the data mapping examples folder on the govdex register: see Australian Government Department of Finance and Deregulation, *The Australian Government Collaborative Workspace – govdex*, <www.govdex.gov.au>. These data mapping examples are helpful in indicating just how much variance there is between data recorded on transitional registers and the registration requirements of the PPSR as well as the potential variation between information to be migrated by a given transitional register. A number of fields are expressed to be completed at the transitional register’s discretion based on information contained on the transitional register and that register’s assessment as to the reliability of the data. See, eg, ‘secured party contact name’, ‘additional information’ and ‘attachment’ fields in the VicRoads data mapping example.

instrument itself include this information. ASIC will not include any serial numbers in migrated data.⁷⁹

The effect of this is that migration creates at least two opportunities for an existing charge to be impaired: first, by ascribing an incorrect collateral class to the collateral and secondly, by creating a taking-free risk as a result of the serial number requirements under the *PPSA*.⁸⁰ After extensive and repeated representation from industry regarding these risks,⁸¹ the PPS Branch has responded by including amendments to section 44 which provide that during the 24-month transitional period, the taking-free rules do not apply to migrated security interests, other than motor vehicles and watercraft.⁸² Similarly, the PPS Branch has advised that the Registrar will issue a legislative instrument under section 337 regularising defects created by migration, for example, the transitional register not recording data about the migrating security interest required by the *PPSA* or providing a generic value for a relevant data field, such as the collateral class. However, in the case of migrated security interests which do not have an expiry date specified (such as a charge registered at ASIC), the security interest will only be protected for five years (and the taking-free risk will only be avoided for two years). After this time, the registration will need to be amended to meet the requirements of the *PPSA* in order to maintain its effectiveness.⁸³ This is further complicated by the fact that certain fields cannot be amended, such as the collateral class field,⁸⁴ and in these cases a new registration is required. As a result, the PPS Branch has had to develop a

79 Note also that it is not possible to include serial numbers where the collateral class specified is ‘all present and after acquired property’: see Attorney-General’s Department, *Personal Property Securities: 6.4.3.1 Describing Collateral*, June 2010, 34 [4.4.9] and Attorney-General’s Department, *Personal Property Securities System Integration: B2G Interface Specification*, version 5.2, 74–5. In these circumstances, additional registrations would need to be made which recorded the serial number as required by the *PPSA* and Regulations.

80 In this example, I have assumed that the mining vehicle was commercial property rather than consumer property; if the mining were in fact consumer property, the registration would be defective as a result of s 165(a). The example also assumes that the mining vehicle was not required to be registered on any state or territory register of encumbered vehicles.

81 See, eg, submissions made to the Senate Legal and Constitutional Affairs Legislation Committee’s Inquiry into the Personal Property Securities (Corporations and other Amendments) Bill 2010: Australian Bankers’ Association, Submission No 6 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Personal Property Securities (Corporations and Other Amendments) Bill 2010*, 21 April 2010, 3; Allens Arthur Robinson, Blake Dawson, Freehills and Mallesons Stephen Jaques, Submission No 7 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Personal Property Securities (Corporations and Other Amendments) Bill 2010*, 21 April 2010, [3]–[4].

82 The rationale for excluding motor vehicles and watercraft is that the transitional registers on which they are presently recorded already require details of serial numbers and this would unfairly protect secured parties which had not registered their security interests in accordance with the pre-*PPSA* requirements.

83 The need to do this may be mitigated by the Regulations being considered by the PPS Branch which prescribe what will not be considered ‘seriously misleading’ for the purposes of section 164. Similarly, judicial interpretation of ‘seriously misleading’ may also alleviate the need for subsequent amendments although it is unlikely that many of the defects which will be regularised under the legislative instrument will come before the courts for consideration during the five year period.

84 Attorney-General’s Department, *Personal Property Securities Program: Change information – Linking registrations*, version 1.0 (undated), 2.

‘linking’ mechanism so that new registrations can be made which link to existing registrations without adversely affecting the priority of the security interest.

Of course, the defects identified in the example above are two of many that may arise. Consider the situation where a security trustee in a securitisation structure grants a charge which is registrable at ASIC. The existing registration will be recorded against the security trustee’s ACN whereas the *PPSA* and Regulations require that the registration be recorded against the ABN of the trust.⁸⁵ Without the protections referred to above, the registration would immediately be ineffective upon migration through the operation of section 165(d) of the *PPSA*. There is potentially a rich vein of similar examples which has not yet been mined.

When benchmarking against the objective of certainty, applying the *PPSA*’s registration fields to migrated security interests does at times make that certainty elusive. Aside from having to identify the period during which remediation must be performed,⁸⁶ perhaps the greater confusion is generated by considering the implications of not remediating the potential defect. On the one hand, it could make the registration ineffective from the date of migration and thereby surrendering priority but on the other, have little or no effect at all. The efficacy of the migration process is seriously compromised if it is necessary to amend or re-register security interests during the specified period to protect against risks which are created solely by the migration process itself. It seems unlikely that secured parties contemplated that this would be required when electronic data migration was first proposed as a solution. Had secured parties appreciated this they may have considered that certainty could be better and more efficiently achieved by other means, such as wholesale re-registration or having permanent protection for migrated security interests.

2 ‘Duly Authorised by the Law under Which the Register Was Maintained’

The definition of ‘migrated security interest’ contained in section 332 of the *PPSA* contains in paragraph (d) a requirement that the registration in the transitional register was duly authorised by the law under which the register was maintained. At first glance, the requirement does not seem particularly onerous or significant; however, when comparing the legislative requirements under section 262 of the *Corporations Act 2001* (Cth) (*‘Corporations Act’*) with the practice of secured parties and ASIC, the potential implications of section 332(d) become clearer.

Section 262 of the *Corporations Act* sets out in subsection (1) the charges to which chapter 2K of the *Corporations Act* applies and provides as follows:

Subject to this section, the provisions of this Chapter relating to the giving of notice in relation to, the registration of, and the priorities of, charges apply in relation to the following charges (whether legal or equitable) on property of a company and do not apply in relation to any other charges:

85 *PPSA* s 153 and *Personal Property Securities Regulations 2010* (Cth) sub-reg 5.5(1), sch 1, item 2.5.

86 Eg, is there a taking-free risk which needs to be remediated within the transitional period or does the risk arise solely following the 60-month ‘temporary protection’ period?

- (a) a floating charge on the whole or a part of the property, business or undertaking of the company;
- (b) a charge on uncalled share capital;
- (c) a charge on a call on shares made but not paid;
- (d) a charge on a personal chattel, including a personal chattel that is unascertained or is to be acquired in the future, but not including a ship registered in an official register kept under an Australian law relating to title to ships;
- (e) a charge on goodwill, on a patent or licence under a patent, on a trade mark or service mark or a licence to use a trade mark or service mark, on a copyright or a licence under a copyright or on a registered design or a licence to use a registered design;
- (f) a charge on a book debt;
- (g) a charge on a marketable security, not being:
 - (i) a charge created in whole or in part by the deposit of a document of title to the marketable security; or
 - (ii) a mortgage under which the marketable security is registered in the name of the chargee or a person nominated by the chargee; or
 - (iii) a charge where there is an agreement in force under which the chargee (or a person who has agreed to act on the instructions of the chargee) controls the sending of some or all electronic messages or other electronic communications by which the marketable security could be transferred;
- (h) a lien or charge on a crop, a lien or charge on wool or a stock mortgage;
- (j) a charge on a negotiable instrument other than a marketable security.

The nub of the problem is that while the *Corporations Act* does not require certain charges to be registered, it is common practice for fixed charges over specific property to be registered at ASIC, and ASIC duly accepts them. Despite this, however, it is arguable that they are not duly authorised under the *Corporations Act*. An example might be a fixed charge over a plant breeder's right which is not expressly referred to in section 262(1)(e). Similarly, it is common to register charges over ships with ASIC notwithstanding that section 262 does not require them to be registered.⁸⁷

In *Personal Property Securities in Australia*, the question is also raised as to how fixed and floating charges over all of a company's assets and undertakings are to be treated where part of the company's encumbered assets includes property not expressly referred to in section 262.⁸⁸ Under a strict interpretation, it is arguable that the inclusion of those uncertain assets mars the entire registration so that it does not satisfy the definition of a migrated security interest under section 332 of the *PPSA*. If this were the case, any migrated charge would only be temporarily perfected during the 24-month transitional period as a transitional security interest with the effect that it would need to be re-registered on the PPSR

87 Steve Edwards, Craig Wappett and Bruce Whittaker, *Personal Property Securities in Australia* (LexisNexis, 2010) [6.800] (at February 2011).

88 *Ibid.* *Personal Property Securities in Australia* also notes that similar issues may arise with bills of sale registers where a security instrument purports to secure property other than goods.

within that time. The cost to a secured party in poring over the asset registers of every company which has granted it a security interest to determine whether there were any 'suspect' assets included would be enormous and a secured party might decide that the simplest way to avoid the risk would be to re-register every migrated charge. Ultimately, this would render the entire migration process nugatory but perhaps more catastrophically, would undermine confidence in migrated security interests and erode certainty.

Of course, there is the alternative view that the courts would prefer an interpretation which gave effect to the legislative intention, presumably being that migrated security interests are just as effective as they were prior to migration. However, there are a number of difficulties with this approach. First, the discussion regarding PPSR registration fields has indicated that there will be many circumstances under the *PPSA* where a migrated security was not as effective as it was on the transitional register. Second, it presupposes that a court is at liberty to apply its own interpretation of the provision. The accepted canon of statutory interpretation is that a court must prefer an interpretation which would give effect to the legislative intention where there is an ambiguity.⁸⁹ Strictly reading section 332(d), there is no ambiguity if the secured property does not fall within the ambit of section 262(1) of the *Corporations Act*. While ASIC may permit registration of charges not encompassed in section 262(1), it cannot be said that they are 'authorised by law'.

Further support for a strict interpretation may be garnered from the interaction between section 332(c) and section 332(d). Section 332(c) requires that the migrated security interest must have been 'effective' on the transitional register immediately prior to migration. This suggests that the legislative drafters were concerned that a security interest may have been effective on a transitional register but not duly authorised by law. The PPS Branch has indicated that the provision was included 'because REVS registers do not prevent the registration of interests not authorised by their legislation'.⁹⁰ Similarly, a fixed and floating charge may be registered with ASIC and given effect to by courts but not otherwise have been authorised by the *Corporations Act*. If the legislature had not considered that there were some instances where a registration could be effective without having been duly authorised by law, it would not have been necessary to include paragraph (d) in the definition at all. This suggests that a distinction was intended by the legislature and that the paragraphs should not be conflated in an attempt to give a broad effect to migration. Ultimately, the fact

89 See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 305 (Gibbs CJ): 'if the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust'. Or perhaps put another way, if a literal reading of the legislation would produce an 'absurd or unintelligible result' yet the intention of Parliament is clear, 'the Courts may correct an error in expression': *Re Lawrie and Secretary, Department of Family and Community Services* (1998) 54 ALD 483, 485-6 (Barnett DP).

90 Personal Property Security Reform Legal Special Interest Group, *List of Outstanding Legal Issues, Regulatory Issues*, updated 24 January 2011 available on govdex register.

that these questions will fall to the courts to decide itself undermines the certainty intended by the *PPSA*. Questions regarding the effectiveness of security interests, particularly those which arose prior to the *PPSA*, should be answered by legislation rather than turn on judicial consideration which may not occur until a number of years after the introduction of the *PPSA*. This would create further uncertainty, in particular in insolvency situations where judicial interpretation could have significant implications for decisions made by administrators, liquidators and creditors.

3 *Searching for Prior Security Interests*

The migration of security interests yields a further element of uncertainty in connection with searching the PPSR. Most other jurisdictions require details of corporate grantors to be recorded against the entity's name rather than its organisation number. This has created a slew of well documented problems where financing statements have been recorded against business names, rather than the organisation name, or include abbreviations; accordingly, when a third party searches the register using the correct entity name, existing security interests are not disclosed.⁹¹ Depending on the nature of the misdescription, the jurisdiction involved and whether the search functionality of the particular register is 'exact match' or produces a list of similar names in the search results, the consequence can be either that the misdescription is treated as 'seriously misleading' under the relevant legislation or a financier will advance credit without having the priority it thinks it does.

The functional design of the PPSR and legislative requirements have avoided this problem by requiring that security interests are recorded against organisation numbers⁹² in much the same way that a charge is registered against a company's ACN with ASIC. The Australian PPSR additionally has the ability to verify the organisation number included in a financing statement with ASIC or the Australian Business Register so that even transcription errors can be identified if the company name returned from ASIC does not match the one anticipated for the ACN entered. This should materially reduce the risk of errors which would lead to the non-disclosure of a secured party's security interest when the grantor's organisation number is searched.

Unfortunately, some transitional registers do not record organisation numbers on existing registrations. For example, a registration on the Bills of Sale Register

91 See, eg, Lynn M LoPucki, 'The Sparring Tool Filing System Disaster' (2007) 68 *Ohio State Law Journal* 281 for discussion of filing problems in connection with Article 9; Roderick J Wood, 'Commentary: Registration Requirements and Registration Errors under the *APPSA*' (1996) 27 *Canadian Business Law Journal* 132 for examples arising under the *Personal Property Securities Act*, RSA 2000, c P-7 ('*Alberta PPSA*') in Canada; Richard North, 'The *New Zealand Personal Property Securities Act*: Growing Pains' (2005) 11 *Canterbury Law Review* 123 for illustrations in New Zealand.

92 Eg, an Australian Company Number (ACN), an Australian Business Number (ABN) or an Australian Registered Scheme Number (ARSN).

in Queensland only requires a company name and no organisation number.⁹³ This means that prospective lenders cannot solely rely on a search of the PPSR using merely a company's ACN to disclose a prior security interest and so they will also need to search against a company's name. Importantly, from the secured party's perspective at least, no inaccuracies or abbreviations in the grantor's name recorded on a transitional register will render the migrated security interest 'seriously misleading' under section 165(b).⁹⁴ This is because section 153, item 2(c) and schedule 1, part 1.3 of the *Personal Property Securities Regulations 2010* (Cth) provide that the details of the company *as recorded on the transitional register* satisfy the name requirements for the grantor and accordingly, cannot be misleading.⁹⁵

This leaves prospective financiers in the unenviable position of having to second guess potential errors or abbreviations which may have been used in a corporate grantor's name when the original financing statement was made as the PPSR operates on an 'exact match' basis.⁹⁶ For example, a search of 'Asia Pacific Holding' would not disclose a security interest registered against 'Asia Pacific Holdings'. Other companies are commonly referred to by abbreviations⁹⁷ while many operate under various business names. Even a 'reasonable diligent search' test⁹⁸ of the type adopted in the United States would not provide a prospective financier with any comfort as any defect will be protected under the *PPSA*. Accordingly, a prospective financier can never be certain that all prior security

93 See Bills of Sale Form 1: Application to Register a Security Interest. It is unclear from the *Bills of Sale and Other Instruments Act 1955* (Qld) whether an abbreviation, use of business name or minor error recorded in the grantor's name will render the registration ineffective.

94 This section provides that a defect will be seriously misleading if no search of the register by reference only to the grantor's details (required to be included in the registered financing statement under s 153) discloses the registration (in circumstances where the collateral need not be described by serial number).

95 Note, however, that the legislation under which the security interest was recorded on the transitional register may provide that the registration was ineffective if there are any defects or abbreviations in the grantor's name. This would exclude the security interest from being a migrated security interest under s 332(c) with the effect that the security interest would be treated as a transitional security interest. While conducting a search of the PPSR using the ACN or the correct company name would not disclose the existing security interest, the security interest will be protected from being seriously misleading by operation of the legislative instrument to be made under s 337.

96 While the PPSR operates on an 'exact match' basis, there are certain qualifications to that rule as outlined in Attorney-General's Department, *Personal Property Securities Program: 1.11.1 Describing Search*, version 1.0 (Final), 5.6.2. These qualifications are that searches are case insensitive, ignore 'white space', ignore punctuation in names, ignore leading zeros in ASIC identifiers and ignore 'noise words' (such as 'the', 'of' and 'and') in organisation names only. Additionally, the PPS Branch is proposing that certain words will be treated as equivalents although as at the time of writing, the list of equivalent words not been advised. Suggested examples were to treat 'Proprietary Limited', 'Pty Limited' and 'Pty Ltd' as equivalents.

97 Eg, each of Australia's four major banks is routinely referred to as ANZ, CBA, NAB and Westpac rather than their correct legal names.

98 LoPucki, above n 91, 284: 'If a reasonable diligent search would discover the erroneous filing, the filing was effective despite the error'.

interests have been identified no matter how many searches it undertakes.⁹⁹ In the United States, insurance is available to protect against the risk that searching does not disclose a security interest and it is conceivable that a service of that type may emerge here over time.

While this is an existing problem for organisations and individuals alike,¹⁰⁰ it is exacerbated by migration as it means that potentially significant defects may never be seriously misleading, even after the expiration of the temporary protection period afforded by section 337. This undermines certainty for prospective lenders whose diligent searching may not disclose a perfected prior security interest and in turn, increases their compliance costs and risk of subordination. It also creates inconsistency as to how migrated security interests are treated in terms of defects,¹⁰¹ adding to the complexity of the regime. Again, this is a risk which could have been avoided by requiring transitional security interests to be re-registered in accordance with the *PPSA*'s requirements.

B Simplicity

On its face, migration appears deceptively simple: security interests can be registered on the transitional registers until close of business before registration commencement time *et voila!* everything appears on the PPSR from the moment it becomes operational. This is not to suggest that migration is an exercise in Panglossian naïveté but it does disguise the complexity of the logistical and technological framework underpinning the process. While it is fair to say that few expected it to be an easy process, perhaps many secured parties did not appreciate that it would be so complex.

The Find and Claim process is a difficult one. Admittedly, this was not the way that migration had originally been devised with the earlier process being arguably more streamlined and transparent; however, the risk to secured parties that significant volumes of registration details and tokens could go astray and the attendant hazards this posed could not be ignored by government, and thus, the Find and Claim process was born. What this does suggest, however, is that the initial feasibility assessment of data migration focused more on the technical aspects of collecting and transferring the vast amounts of data and less on the question of what data is presently collected and what data will be required which

99 In the United States, the 'reasonable diligent search' adds significant cost to transactions and one study indicated that the average cost in filing and searching in connection with loans valued between \$20 million to \$74 million was \$25 000 per loan. See LoPucki, above n 92, 284; Peter A Alces, 'Abolish the Article 9 Filing System' (1995) 79 *Minnesota Law Review* 679, 691. Fees associated with Article 9 filings and searches in the United States are also magnified as, unlike Australia's PPSR, there is no single, national register and multiple filings and searches may be required in numerous States.

100 See Wood, above n 91 for discussion of *Miller, McClelland Ltd v Barrhead Savings & Credit Union Ltd* (1995) 122 DLR (4th) 285 (Alberta Court of Appeal) as example of a case affecting natural persons under the *Alberta PPSA*.

101 Paradoxically, many secured parties will amend defects which the courts may ultimately determine are not seriously misleading so as to protect against the risk that the security interest will be unperfected. In contrast, a defect that falls squarely within the ambit of what is seriously misleading under s 165(b) will be protected as a result of migration.

is central to both the data migration process and the effectiveness of migrated security interests. The PPS Branch is to be commended for the way in which it has liaised with stakeholders through its Business Process and IT Users Forum and has responded to concerns raised by participants. Perhaps if this engagement with secured parties had occurred at the time that migration was first proposed in the Options Paper in 2006, the vulnerabilities could have been identified earlier and a more simple process designed taking these into account.¹⁰²

Aside from the complexity of the Find and Claim process and the burden this places on secured parties, the other aspect of migration which adds additional complexity is the linked registration process. At play here are the competing objectives of accuracy and fairness. While the policy that collateral classes cannot be amended is sensible and just in relation to new registrations where the secured party knows what the legislative requirements are at the time the registration is made, it is more difficult to assert where the inaccuracy is occasioned merely by the migration process itself. There are two options which could have been used to resolve this problem more simply: first, allow secured parties to amend collateral classes for migrated security interests so as to ensure that the information required by the *PPSA* and Regulations is captured in the financing statement;¹⁰³ and second, not have an end time for regularising defects so that a registration for a migrated security interest will be effect for its duration. Ultimately, both of these solutions involve a trade off between the objectives of accuracy and fairness. Instead of favouring one over the other, the government has adopted a process which creates undue complexity and detracts from the policy objective of simplicity. At the time of writing, the process for linking registrations has not yet been released and it is yet to be seen what level of complexity this will add.¹⁰⁴ On the one hand, it may be merely an inconvenience but on the other, it may be a considerable irritation.

C Efficiency

There are two fundamental considerations in determining efficiency: cost and process. Australia's proposed fees schedule is one of the most expensive in the PPS world. Under the Cost Recovery Impact Statement,¹⁰⁵ the proposed fees range from \$7.40 for a financing statement which has a duration of seven years or less to \$130 for financing statements which have an undefined duration.¹⁰⁶ By

102 The Find and Claim Paper was not released until the second half of 2010 when registration commencement time was still scheduled for May 2011.

103 This could be limited to the transitional period and penalties included in the *PPSA* where a secured party was found to have abused this power.

104 The *Change information: Linking registrations* concept paper above n 84 outlines a business case and certain assumptions regarding linking registrations but does not detail the process of how this will occur. It is also not clear that the assumptions will necessarily be validated by the end process.

105 Australian Attorney-General's Department, *Personal Property Securities Program: Consultation Draft Cost Recovery Arrangements* (2010) ('Cost Recovery Impact Statement').

106 *Ibid* 19. The fees quoted are for registration online; higher charges apply where the registration is effected through the contact centre.

contrast, the maximum registration fee in New Zealand is NZ\$3.07.¹⁰⁷ The United States does not have a uniform fee structure for UCC filings but by way of illustration, a financing statement in California costs US\$5,¹⁰⁸ in New York it costs US\$20¹⁰⁹ and in Delaware it costs US\$30.¹¹⁰

There are a number of reasons for Australia's comparatively high registration fees. First, the PPSR will operate on a cost recovery basis so that the cost of running the PPSR and the contact centre is borne by users.¹¹¹ Initial forecasting indicated that the PPSR was expected to generate approximately \$62.9 million in revenue over three years;¹¹² however, more recent forecasts have indicated that this is likely to be closer to \$107 million in gross revenue and \$2.1 million in profit.¹¹³ This profit is notwithstanding that the PPSR will need to repay an additional \$18 million in supplementary government funding provided in the 2010–11 Budget over the initial three years of operation.¹¹⁴

Additionally, the cost of building the Find and Claim process was not included in the initial budget and this is expected to be in the vicinity of \$800 000.¹¹⁵ Originally, the PPS Branch had sought upfront contribution from pre-RCT Find and Claim participants to fund development but after discussions with financiers, decided that these would be costs to be recovered under the cost recovery model. The fees proposed in the Cost Recovery Impact Statement are being reviewed following submissions received during the consultation period and the PPS Branch has indicated that the final fee schedule will be released at the end of July. The revised fee structure will need to take into account the additional \$800 000 under cost recovery principles. The government has indicated that PPSR fees will be reviewed every two years¹¹⁶ and the expectation is that registration fees will be reduced over time.

Another possible reason that the fees are comparatively high is that unlike New Zealand, Australia is not charging registration fees for any transitional

107 See Personal Property Securities Register Companies Office, *Homepage | Personal Property Securities Register* <www.ppsr.govt.nz>. Note, however, that the maximum duration of a registration in New Zealand is five years and registrations need to be renewed for security interests which extend beyond the registration period.

108 Where lodged electronically, see Debra Bowen, *Forms and Fees – Uniform Commercial Code (UCC) – California Secretary of State* (2011) California Secretary of State <www.sos.ca.gov/business/ucc/forms.htm>.

109 Where lodged electronically, see NYS Department of State Division of Corporations, State Records & UCC, *UCC Fee Schedule* <www.dos.state.ny.us/corps/fees_ucc.html>.

110 Where lodged electronically, see State of Delaware, *UCC Filing & Expedited Fees* (6 July 2010) <<http://corp.delaware.gov/uccfeesSept09.shtml>>.

111 Cost Recovery Impact Statement, above n 105, 8 [3.3.1].

112 See the section on the Attorney-General's Expense Measures in Australian Government, *Budget Measures 2007–08*, Budget Paper No 2 (2008) 79.

113 Cost Recovery Impact Statement, above n 105, 18 [5.4.1].

114 *Ibid* 17 [5.3.7].

115 As advised by the PPS Branch.

116 Cost Recovery Impact Statement, above n 105, 21 [7.2].

security interest.¹¹⁷ While this is perhaps more understandable for migrated security interests where the registration is generated differently from a new registration, any non-migrated transitional security interest (other than those loaded through the pre-load process) would be using the PPSR to register these security interests. Ultimately, this means that the cost of transitional security interests is being borne by all users of the PPSR and not merely the secured party which has the benefit of it. If registration fees were charged for transitional security interests, the registration fees for all users could be significantly reduced. Further, charging registration fees for transitional security interests may have the added benefit of focusing secured parties' attention on whether to register the security interest at all, thereby reducing the potential for unnecessary clutter on the PPSR.

While the comparatively high cost of registration does not make the PPSR as cost effective as initially anticipated, this is ultimately a disappointment rather than a significant inefficiency. The requirement that many migrated security interests will nevertheless need to be re-registered, however, does undermine the purpose and value of the entire migration process. In many ways, migration should be a 'set and forget' arrangement: once migrated, securities should be as effective on the PPSR as they were on the transitional register and a secured party should need to do no more to maintain a perfected security interest other than through renewing it where necessary. The migration process does not operate in this seamless way. Already, amendments have needed to be made to the *PPSA* to ensure that secured parties were not at risk of third parties acquiring serial numbered collateral from registration commencement time and now secured parties will have 24 months in which to record serial numbers to ensure that the taking-free risk does not apply. Any other defect which may have been caused by migration will only be protected for five years and secured parties will need to determine whether any of these defects are likely to be seriously misleading or otherwise specified in section 165. These arrangements lead to double-handling of a task that could have been done once, either by requiring secured parties to re-register existing security interests during a transitional period or by accepting that there will be inadequacies in the registration details of migrated security interests.

VI CONCLUSION

Migration of transitional registers represents a significant development in the evolution of personal property securities reform. It demonstrates government commitment to the reform agenda and a facilitative approach to ensuring that the burden of reform is not crushing. In these respects, the PPS Branch is to be

117 However, fees will be charged to amend a transitional or migrated security interest: Attorney-General's Department, *Clarification Statement: Fees for Registration of Transitional Interests on PPSR, Notice of Verification Statement*, available on govdex register in Data Migration and Find and Claim folder.

commended for its stakeholder engagement and in particular, its responsiveness to concerns raised by secured parties.

However, good intentions do not always equate to a good outcome and data migration is an example of this. As an incentive to garner support for personal property securities reform from reform weary financiers, it has been a success. However, in measuring the migration process and outcomes against the government's policy objectives of certainty, simplicity and efficiency, the perceived benefits of migration begin to fade. The effectiveness of certain migrated security interests is brought into question through strict adherence to the registration requirements and through the definition of 'migrated security interest' itself. This will necessitate re-registration of many security interests or use of the linking process resulting in needless double-handling to ensure that existing security interests remain enforceable and retain their existing priority. This process is costly to secured parties in terms of time and labour costs, even if fees are not charged to register transitional security interests.

Migration is an inherently difficult and complex process; yet seemingly, this has been a discovery which occurred comparatively late in the process for many parties. The mechanics of migration were not articulated until late 2009, well after the initial suggestion had been raised in the Registration and Search Issues Paper. Further, they were not given the benefit of public consultation or Senate review in the same way that the substantive provisions were and so tended not to grab people's attention in the same way that other issues did, even where they were potentially just as significant.

Of course, none of this is to suggest that migration cannot or will not work. The PPS Branch has been working unflaggingly with the transitional registers and the company building the Find and Claim capabilities to ensure that the process occurs as smoothly as possible. The purpose of this article is to identify how it could have been improved when assessed against the policy objectives. It has been noted that '[I]aw reformers in the United Kingdom will pay close attention to Australian successes and failures in the upcoming transition'.¹¹⁸ Although the United Kingdom is not presently proposing a similar data migration arrangement, its government will no doubt be reviewing all aspects of Australia's transition to form its own view on the optimal transitional process. It behoves it, as well as the Australian government in its post-implementation review, to consider the efficacy of migration in meeting stated policy objectives.

118 Quirk, above n 38, 269.