



DISCUSSION PAPER SERIES:

REGISTRATION

PROFESSOR LOUISE GULLIFER

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REGISTRATION

1 Introduction

This paper considers in some detail the arguments relating to different registration systems and sets out two possible schemes: a notice filing scheme and a priority notice scheme. It is an attempt to flesh out some of the arguments behind the conclusions in the April 2016 Draft Policy Paper¹ and to identify further arguments relating to the shape and operation of a modern secured transactions register. It is assumed that the most modern technology would be available, and it will be necessary to discuss some of the conclusions with a technology expert.

Section 2 of the paper considers the rationales for registration, section 3 sets out the parameters resulting from the agreed core of a modern secured transactions law² and the arguments for and against each parameter, and section 4 considers what information should be included in the register. Section 5 looks at two specific problems: identification (which arises particularly when non-corporate debtors are included) and empty filing (which arises particularly from advance filing). Section 6 compares document filing and notice filings, section 7 sets out the two schemes and section 8 concludes.

The discussion, particularly in sections 5 and 7, is informed by comparative analysis of a number of notice filing systems. This analysis is included in four appendices, which account, in part, for the length of the paper.

2 Rationales for registration

This section explores the arguments which have been put forward identifying the benefits of a registration system for security interests. The strength of the arguments varies according to context, but the arguments are important to keep in mind when designing a system which maximises the benefits for the minimum cost.

¹ <https://securedtransactionslawreformproject.org/draft-policy-paper/>.

² See draft policy paper at <https://securedtransactionslawreformproject.org/draft-policy-paper/>.

2.A CERTAINTY FOR THOSE TAKING SECURITY

Where there is a registration system, those taking security can discover the existence of registered interests and adjust in relation to them. Further, those who have registered interests know that their interest is valid against the world, and that they will have priority over any others taking an interest in the same asset. The benefits of this ensure to secured creditors and to potential secured creditors. If these classes are benefitted, then there should be a resulting reduction in the cost of credit and an increase in its availability. There are therefore benefits to borrowers as well.

2.A.i *Those taking security*

A potential secured creditor (one who has not yet lent to the company but is considering doing so on a secured basis) wishes to know what, if any, interests others have in the assets over which they are thinking of taking security. Once it has this information, it can take action accordingly. If there is another interest in the assets, it can adjust its position, for example, by walking away from the transaction entirely, or by adjusting the price to reflect the increased risk, or by approaching the person with the other interest with a view to entering into a subordination agreement. If there are no interests registered, it can (usually) safely lend.³

The benefits of registration in this regard are twofold. First, it is a cheaper and easier method than any other way of obtaining this information, such as by due diligence. Second, if the register is centrally run and suitably regulated, the information can be relied upon as correct and complete.⁴

2.A.ii *Those who have taken security*

It is important that those taking security know that no one can 'jump ahead of them' by taking an interest in priority to theirs. This comes from a combination of the benefits of easy discovery of previous interests (see (i) above) and priority rules based on date of registration.

The certainty that this produces should make creditors more willing to lend and thus should reduce the cost of credit.⁵ It may also have other efficiency benefits. It may reduce due diligence costs, in that a creditor who knows they will get top priority does not have to investigate the creditworthiness of the debtor in as much detail as one who does not have this certainty. It will reduce the need for subordination agreements, since creditors will feel

³ This depends on (a) whether there are other methods of perfection which may be applicable, in which case the creditor needs to make enquiries before lending and (b) on priority being given to the first to register.

⁴ In order to make it complete, it is necessary to have priority rules which protect searchers from the danger of incomplete information.

⁵ For recent work on how improvement in the certainty of secured transactions law, and, in particular, the provision of a modern registration system increase the availability and reduces the cost of credit see R. Haselmann, K. Pistor, V. Vig, 'How Law Affects Lending' (2010) 23 *Review of Financial Studies* 23(2) 549; G. Affaki, 'Increasing Access to Credit: Reforming Secured Transactions Laws' (2010) International Trade Centre; C. Calomiris, M. Larrain, J. Liberti, J. Sturgess 'How Collateral Laws Shape Lending and Sectoral Activity', Working Paper, Draft, 2014.

⁵ See <http://www.doingbusiness.org/methodology/getting-credit>.

able to rely on the general law to determine priority. Further, it potentially reduces the cost of bargaining for covenants, since this is less necessary because of the certainty of being able to enforce against the asset.

2.B TRANSPARENCY BENEFITTING OTHER MARKET PARTICIPANTS

Other people, however, may potentially benefit from there being a neutral and validated source of information about interests in a debtor's assets. There are two specific arguments.

2.B.i *False wealth*

The first is that there are certain interests which can exist in a debtor's assets which are not visible without close inspection, thus creating a picture of 'ostensible ownership' or 'false wealth'. Certain people may be adversely affected by the existence of these interests, but do not have the resources to do due diligence, or are not able to insist on it, or from whom due diligence would be uneconomic. These include current and future unsecured creditors⁶, future shareholders, other future stakeholders and buyers. These people need the information to enable them to adjust. They may also need it to check that the debtor is not giving them incorrect information, through negligence or fraud. The information can be provided at low cost by registration: either registration by debtor or registration by asset. This argument works best when the information can be dispersed through intermediaries, such as credit rating agencies.

2.B.ii *A picture of the debtor's financial position*

It might be considered beneficial for there to be a means of discovering the true financial position of debtors more generally. The possible beneficiaries fall into three categories. One is those who will deal with the company in the future, who have already been discussed. The second is those who are already exposed to the credit risk of the company, that is, current shareholders and current creditors (unsecured and secured). The third are those who act as intermediaries of information to others, both stakeholders and the general public, such as credit rating agencies, analysts and journalists. The desirability of such benefits needs to be balanced against the desire for confidentiality on the part of debtors and creditors.

2.C ADDITIONAL BENEFITS

2.C.i *Information for insolvency officer*

An insolvency officer can benefit from having a list of all interests in the debtor's assets that is accurate and which enables priorities to be ascertained easily.⁷ Not only may this lead to a reduction of costs, but the additional certainty could result in a reduction in the cost of credit.

⁶ Future unsecured creditors may use the information to decide whether or not to extend credit, or whether to take additional precautions. Current unsecured creditors may use the information to decide whether to extend further credit, and also whether or not to take steps to enforce the debt owed to them.

⁷ This is particularly true if the insolvency officer can safely disregard unregistered interests.

2.C.ii *Record of transactions*

Either parties could benefit from having a record of a transaction as this will prevent their counterparty denying the transaction or backdating it. This is a concern in many civil law jurisdictions. A register works best in this regard if it records the transaction and if the transaction is certified by a third party (such as a notary). There are, of course, costs associated with this system, most notably that notice filing⁸ is not possible, and advance filing⁹ is more difficult to achieve (though it might be possible to have a priority notice system).

2.C.iii *Additional uses of a register*

Once a registration system is in place, it can also be used to deal with problems that do not, strictly speaking, arise from the creation of security interests. One is that, in relation to certain assets, a system can include asset-based registration in addition to debtor-based registration, and searching can be carried out according to either criterion (or both). Once there is an asset-based system, this can be used to solve title conflict problems arising from fraud, by extending registrable interests to absolute interests as well as security interests. The register can also hold other information (for example, whether a vehicle has ever been in a serious accident, or whether a writ of execution has been issued against that asset¹⁰), and can also include a record of non-consensual interests.¹¹

3 Parameters of proposed systems

There are certain parameters restricting the discussion in this paper. These are the features which have already been agreed as core features of a modern registration regime and which are set out in the April 2016 Draft Policy Paper.¹² This section lists and briefly discusses these features.

3.A THE REGISTRATION SYSTEM SHOULD BE FULLY ELECTRONIC

A modern system of registration cannot be wholly paper-based: this would entirely fail to take advantage of the greatly improved functionality of an electronic based system, and would not on any basis count as a modern system. The choice, therefore, is between a mixed system (where registration and/or searches could take place either by paper or electronically) or a wholly electronic system. There are a number of arguments in favour of the latter:

- Advantage can be taken of the most modern, and appropriate, technology to achieve the best possible functionality. The system will then be able to achieve whatever is

⁸ See Section 7 Scheme 1 below.

⁹ See Section 3C below.

¹⁰ See, for example, the registers of finance interests in motor vehicles run by Experian and HPI.

¹¹ This is the position in Canada, where many statutory charges and liens only take effect when registered in the PPSA register (see Cuming, Walsh and Wood 'Personal Property Security Law' (2nd edn, 2012) 323 esp./ footnote 29.

¹² <https://securedtransactionslawreformproject.org/draft-policy-paper/>

desired from a legal and policy perspective without being inhibited by practical problems.

- The system will be able to be adapted more easily to take advantage of future technological developments.
- The system can be simpler, as there is no need to include regulations accommodating two methods of registration and/or searching.
- The system can be run without human intervention (see B).
- The system can be fast, secure and cheap.
- The system can be linked to other wholly electronic systems, such as exist in other jurisdictions. It can also be linked to other registries in the same jurisdiction (such as the land registry and the IP registry).
- The system would comply with what is seen as best practice for modern registration systems¹³ and most new registration systems are wholly electronic.¹⁴
- A mixed system has an inbuilt danger of fraud: if a person is using the online system, and is identified through that system, a malicious person can still send in a paper application to change the registered information. Companies House have an electronic 'locking' system so that a person can opt for just online registration of certain company related information, to prevent this danger.¹⁵

There are arguments in favour of a mixed system and against a wholly electronic system, set out below, but these are weak and are outweighed by the arguments for such a system.

- Some creditors might not have the expertise or equipment necessary to register electronically. This is almost inconceivable in relation to financial creditors (banks and other financial institutions). It might possibly be the case if retention of title sales were registrable, but even then it is extremely unlikely. What is likely to occur, and has happened in, for example, Australia, is that intermediaries specialising in registrations (particularly bulk registrations) would enter the market, so that for those for whom registration is at all difficult, a service benefitting from economies of scale would be available.
- It might be argued that human intervention is a valuable checking device. This argument is considered below.

Note that there can be mixed elements even to an electronic registration system. A wholly electronic system requires verification of identity. This can be done in a number of ways some of which are wholly electronic.¹⁶ However, one way is to include a paper application

¹³ See, for example, World Bank Doing Business getting Credit methodology question 8 <http://www.doingbusiness.org/methodology/getting-credit> , and the associated questionnaire question 3 (n) and (o) (at <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Methodology/Survey-Instruments/DB16/DB16-GC-IR-questionnaire.pdf>) Note that the requirement does not appear to be a fully electronic register (though this could be implied).

¹⁴ For example, New Zealand, Australia, Jersey, Mexico, Colombia, the Pacific Islands (see <https://securedtransactionslawreformproject.org/reform-in-other-jurisdictions/>).

¹⁵ See <https://www.gov.uk/guidance/protect-your-company-from-corporate-identity-theft>.

¹⁶ See below. The world leader in electronic identification is Estonia.

and/or verification at some stage. This is the system operated by Companies House at the moment for online filing, whereby a one-off application for a ‘verification code’ for a filer to be registered on the system has, in some circumstances, to be made by post, and, in all cases, the verification code is sent back by post.

3.B REGISTRATION AND SEARCHING SHOULD BE INSTANTANEOUS AND TAKE PLACE WITHOUT HUMAN INTERVENTION

One of the enormous benefits of a wholly electronic system is that both registration and searching can be instantaneous and can take place without human intervention. In such a system, registration takes the form of filling in online fields, and this information appears immediately on the register as soon as the registration is activated. While the existing systems operating in this way¹⁷ tend to only require the filing of notices, it is possible for such a system to include the uploading of a document.¹⁸ The most important points to note are that registration is immediately effective once the person registering clicks the relevant activation button, and that, since there is no checking, the person registering takes the risk of error (as opposed to the registrar, or the person searching).

The arguments in favour of this approach are now considered.

- Registration is immediately effective, and can be carried out anywhere in the world and at any time (24 hrs).
 - It can therefore take place (if desired) at virtually the same time that security is granted.
 - With the use of an electronic ‘closing room’¹⁹, or maybe use of smart contract technology, it would be possible, if desired, for the grant of a security interest and registration to be absolutely instantaneous.
 - An electronic ‘closing room’ means that information in relation to a number of security interests (and lenders) can be uploaded and then registrations can take place in a prearranged order.
 - Advance registration (see C) is also possible. Despite the advantages of closing room technology, there may still be a short period of time between registration and when it becomes searchable. For this, and other reasons, advance registration is desirable.
- Registration is easy, quick and cheap.
- There is no need to maintain a large registry staff. Staff would still be required to service, maintain and upgrade the system, to operate cyber security and to deal with any queries.
- There is no risk of human error (or fraud) on the part of registry staff in inputting the information. The system is therefore much more secure. The only possibilities of

¹⁷ For example, the systems listed in footnote 14 above.

¹⁸ As will be seen from the discussion below, there is relatively little distinction between uploading a whole document and including the information contained in that document in a notice.

¹⁹ This system is used by the International Registry for international interests in aircraft (see <https://www.internationalregistry.aero/ir-web/faq>).

error or fraud are (a) in the design and operation of the system itself and (b) on the part of the person inputting the information (ie the secured creditor or its agent).

The arguments against registration without human intervention are set out below. They are few and, it is submitted, greatly outweighed by the arguments set out above.

- Human intervention can be used to check that the inputted data is internally consistent. There are two answers to this:
 - Much of this checking can be done by the IT system itself. For example, if the debtor is electronically identified by a unique key the system will not allow any references to any debtor other than the one identified.
 - The inputting creditor (or its agent) should take the risk of any inconsistency. If the system is properly designed, this risk should be minimal.

3.C IT SHOULD BE POSSIBLE TO REGISTER IN ADVANCE OF THE CREATION OF A SECURITY INTEREST

Despite advances in technology which enable registration to be immediately effective, and to coincide precisely with the grant of security, there are still advantages in a system which permits an interest to be registered in advance of its creation, and these are set out in this section. This parameter should be read in conjunction with the next, that registration should be a priority point.

- The main benefit of registration in advance is to enable a potential secured creditor ('A') to 'fix' its priority against others taking an interest in the asset(s) while negotiations for the security interest are still ongoing. It can then commit resources to the negotiations, knowing that if they come to fruition it will be protected.
 - Registration will be visible to any other potential secured creditor ('B'), who can then adjust accordingly²⁰.
- The current English law '21 day invisibility period', whereby a lender taking security could not be sure that there was a previously created but unregistered security interest, would be abolished. While there are ways of mitigating the risk of this invisibility of security interests, eg by withholding any advance for 21 days, in practice many lenders just take the risk of a previous unregistered interest, relying merely on their contractual protection.
- The ability to register in advance would remove uncertainty as to whether a security interest would be immediately effective against third parties at the time at which it was created.
 - Since there would be no time limit for registration, it would remove the risk of missed or late registration.
- Registration in advance also enables an agreed priority structure to be reflected in the order of registration, so that the register reflects the actual agreed position. It would be particularly useful in closings of complex transactions.

²⁰ For example, by negotiating a priority agreement with A, or ensuring that A's registration is removed before B advances money.

- It may also be useful in situations where one security interest is being released and another taken in replacement. If the second can be registered before the first is released and the second created, then the secured lender knows that it is continuously protected.²¹
- A system of registration in advance can (but need not as a matter of logic) enable a secured creditor to register a series of secured transactions with the same debtor. This would be especially useful if retention of title devices were registrable. It could also be useful in relation to a series of assignments of receivables which otherwise would have to be registered separately.

There are two possible models for registration in advance of creation. One is a notice filing system (as in the PPSAs) and the other is a system enabling the registration of a priority notice. These two models are discussed in detail below.²²

There are arguments against a system which enables registration in advance of creation. These are set out in this section:

- The register should provide accurate information, and therefore should only reflect security interests which actually exist. This argument has some weight but can be met in the following ways:
 - All registers of security interests have the potential to be inaccurate, since security can be redeemed by the payment of a debt, or the security interest can be transferred to a new creditor.
 - There therefore needs to be a system for amending registrations to keep them up to date. Inaccurate registration (ie those relating to a security interest which is not being negotiated and does not exist) can be included in this amendment system so that the register is kept as accurate as possible.
 - Further, the possibility of inaccuracy means that no searcher can rely fully on the register: enquiries always have to be made of the secured creditor for the actual position. This is also true in relation to the amount outstanding on the secured debt, which changes all the time and therefore is inappropriate for registration.
- There is a possibility of ‘empty filings’, that is, registrations which relate to security interests which are never granted.²³ These are of two kinds:
 - Those which were registered at a time of genuine negotiations which came to nothing.
 - These can be ‘cleaned’ from the register under an amendment system as mentioned above.
 - Those which are ‘malicious’ or which for some other reason do not relate to any actual negotiations. These are more common if security interests granted by non-corporates are included in the registration scheme.

²¹ This point was made by an attendee at the CLLS meeting in January 2016.

²² Section 7.

²³ See Section 5B below.

- This can be avoided either by requiring a registering creditor to notify the debtor of the registration and permitting the debtor to discharge an ‘empty filing’ if he does not consent (the Canadian, Australian and New Zealand systems²⁴) or by requiring the debtor’s consent to the registration (the US system).²⁵ It is suggested that the latter system can be achieved easily using current technology, and this suggestion is explored below.²⁶

3.D REGISTRATION SHOULD BE A PRIORITY POINT

It is an invariable feature of modern registration systems that registration is a priority point. Thus, priority between security interests is determined (with some exceptions) by the first creditor to register or to perfect (that is, to make a security interest effective against third parties) in another way, usually by taking possession of the secured asset or taking control of the asset, however that is defined. There seems little dispute that this is a sensible system.²⁷ The reason that English law has a different rule is because of the historical development of the registration system rather than any reasoned policy decision.²⁸ The arguments in favour of priority by date of registration are now set out.

- When coupled with a system of registration in advance, or ‘instantaneous’ registration, a creditor taking a security interest in an asset will always have an easy and cheap means of discovering whether any previous interest has been created in that asset and registered. Therefore, it is appropriate that such a creditor should, generally,²⁹ take subject to prior registered interests.
- A system of priority by date of creation (the current English law system) leads to a period of invisibility unless creation and registration are always coterminous.
- Permitting secured creditors to register in advance or (at their choice) at any time after the creation of the interest enables a secured creditor to control the risk of losing priority to another creditor. A secured creditor has the means to protect itself at any stage of the transaction, including the negotiation stage. At what point it actually does so will be a product of negotiated agreement with the debtor and its own view of the costs and benefits of registration.
- This system enables a secured creditor to know (by definitive confirmation that registration has taken place) that they have priority over all other secured creditors

²⁴ See Appendix C.

²⁵ See Appendix C.

²⁶ Section 5B(b).

²⁷ It is supported by the CLLS, as well as forming a feature of all proposals for reform of the English law of secured transactions. It is also the system that is used in the Bills of Sale register, and is one feature that the Law Commission suggest retaining in their report on reforming the law on Bills of Sale (Law Commission Report 369, Bills of Sale).

²⁸ See L Gullifer, ‘Piecemeal reform: is it the answer?’ in Frederique Dahan (ed), *Secured Lending in Commercial Transactions* (Elgar Publishing 2015).

²⁹ There could be exceptions based on specific policy reasons, such as the purchase money security interest superpriority found in the PPSA schemes.

(as well as over third parties such as an insolvency officer). By providing this certainty to secured creditors, the cost of credit is likely to be reduced.

- A system of priority by registration enables third parties, such as an insolvency officer, to have an easily accessed record of priority. The record is not entirely definitive, since a secured creditors may have perfected by another means, but the use of such means is relatively easy to discover.³⁰

It is hard to think of any arguments against a system of priority by date of registration, when coupled with a system that enables registration in advance. The main reason for lack of reform in this area is the narrow view taken by the UK Government of the power in section 894 Companies Act 2006.

3.E THE REGISTRATION REGIME COVERS INTERESTS CREATED BY ALL DEBTORS, WHETHER CORPORATE OR NON-CORPORATE (WITH THE POSSIBLE EXCEPTION OF CONSUMERS)

A modern registration system should not differentiate between different types of debtor. The reason why the English law system does this is historical: the company charges register developed out of the registers kept by companies, while security given by individuals was covered by the Bills of Sale regime. Most modern systems cover security interests created by all debtors. It is conceded that there might be special considerations in relation to security interests created by consumers, and the extent to which these should be included in the registration scheme is the subject of a separate STR paper.

The arguments in favour of including all debtors are as follows:

- There should be a secured transactions law which enables non-corporate businesses to use their assets as security, and for secured creditors to have the same protection as those lending to corporate businesses (in particular, the benefits of a registration system). This is likely to increase the availability and reduce the cost of credit to non-corporate businesses.
- The secured transactions regime should not impose a pressure on small businesses to incorporate.
- The English law on security interests granted by non-corporate businesses is not satisfactory. One part of this law is governed by the Bills of Sale Acts which are antiquated, and also section 344 Insolvency Act 1986. The rest is governed by the common law, and includes no registration regime at all.³¹ The Law Commission has now issued a report on this area, which proposes some reform, but, despite enthusiasm for a single electronic register, does not propose its immediate introduction.³²
- If asset-based searching can be included in the registration system, an asset may be subject to one interest created by a corporate and another by a non-corporate.

³⁰ This is not necessarily the case with 'control' (although this depends on how it is defined). The benefits of permitting perfection by control are, though, often thought to outweigh the lack of publicity.

³¹ The IP registers are an exception to this.

³² Law Commission Report 369, Bills of Sale, especially at 6.53 – 6.56.

Unless non-corporates are included in the registration scheme, it will not reveal a true picture as a result of an asset-based search.

The arguments against including non-corporate debtors are as follows:

- If interests created by consumers are to be excluded but those created by unincorporated non-consumers are included,³³ it is difficult to draw the line between consumers and non-consumers, since an individual may create an interest to secure borrowing intended partly for consumer and partly for business use.
- It is much more difficult to have a stable identification system for non-corporates than for corporates, since
 - Individuals do not have a unique registered identification number.
 - Individuals can change their name, address and other identifying features.³⁴

4 **What information should be included on the register**

There is ongoing discussion as to which, if any, interests which perform the function of security or which raise similar ‘false wealth’ issues, should be registrable. These discussions are the subject of other papers and so are not dealt with here. This section attempts to steer a path which is neutral as to the nature of the interests being registered. However, the nature of the interests being registered may have a bearing on the type of information which it is eventually decided to include in the register.

Although this section concerns what information should be included on the register, it first considers the purposes of registration. As discussed above, registration has two main purposes. One is to enable a secured creditor to be sure they have obtained priority. The other is to give information to searchers. In relation to the latter there are two main approaches to the provision of information by a register (although it is not necessary to adopt an extreme version of either approach: there can be a compromise).

- One approach is that the registration merely alerts a searcher to the possibility of there being a security interest affecting the relevant asset(s), so that if the searcher wants accurate information he has to contact the secured creditor (or, if he trusts him, the borrower) for more details.
- Another approach is that the registration gives the searcher reasonably accurate information as to the existence and scope of a registered security interest.

Which approach is adopted (or which compromise position) depends on a number of factors:

- The extent to which it is desired that registration cuts the cost of due diligence.
- The importance placed on transparency.
- The importance placed on confidentiality.
- To whom the register is designed to provide information.

³³ Xx to Sarah Nield’s paper.

³⁴ This problem with identification is addressed below in section 5A.

Each of these factors is now discussed in turn. In this discussion, an existing secured creditor is referred to as 'A', a potential secured creditor (a searcher) is referred to as 'B' and the debtor as 'D'.

4.A COST-BENEFIT OF REGISTRATION AND DUE DILIGENCE³⁵

One of the strongest arguments in favour of a registration system is that it greatly reduces the costs of due diligence that B has to incur when considering advancing finance. Thus,

- If B discovers that the register is clear, then it knows that there are no secured creditors holding non-possessory interests which will rank above it. The ability to rely on a negative search potentially saves a great deal of due diligence costs, but to do this it is important that a negative search is robust, that is, that there are no or very limited circumstances in which an interest which ranks above that of B will not appear on the register.³⁶
- If B discovers one or more registrations, it can either walk away or it can use the information on the register to adjust (for example, by reaching a priority agreement with an already registered creditor, or to procure the removal of a registration which does not relate to any extant security interest).
 - In relation to the option of walking away, it is important that 'false positives' on the register are kept to a minimum. If the register includes these, then they may lead to credit being unavailable (as B walks away without investigating further) or they may lead to extra costs being incurred by B investigating these false positives. There needs to be a system to ensure that the register is cleaned of 'empty filings' (of the two types identified in section 3C above and also filings which relate to interests securing obligations which have been satisfied).
 - In relation to creditor adjustments, it is important to determine the amount of information that is useful for saving due diligence costs. If creditors in the position of B are likely to undertake due diligence anyway before advancing funds, then putting detailed information on the register will not reduce due diligence costs at this stage. It may be enough for the information to indicate who should be contacted for further information.
- It should be pointed out that B is best able to take the steps outlined above if the register contains accurate information as to the assets that are the subject of registered security interests. This is particularly true if B is taking security over only some of the assets of the debtor. It can then ignore positive searches relating to other assets, thus increasing the cost savings of negative searches. The functionality of searching (for example, by asset class in relation to a particular debtor) can increase the efficiency. This point is most important where financing against specific

³⁵ See, for further discussion of false negatives and false positives, C. Walsh 'Transplanting Article 9: the Canadian PPSA experience' in O Akseli and L Gullifer, *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing, 2016).

³⁶ Examples of possible circumstances, which a system should seek to limit, are unauthorised cancellations, risk of registry error or delay, name changes, (something missing)

assets (asset based finance) is prevalent as opposed to a culture of financing on the security of the whole business (the all assets debenture, for example).

4.B TRANSPARENCY

Although to some extent the desire for transparency and confidentiality are the opposite sides of the same argument, there are some specific points to be made in relation to each which justifies them being treated separately. In relation to transparency, the following points can be made:

- Information does not achieve transparency if it is inaccurate. Thus, a small amount of accurate information can be more transparent than a large amount of information which may become inaccurate over time. The costs of keeping a large amount of information accurate have to be factored in, and weighed against the benefits of having a large amount of information on a register.
- There are no, or few, benefits in transparency of information for which there is no need, or no legitimate need. In fact, unnecessary disclosure may bring costs of:
 - Complexity, making it difficult to discover the necessary information.
 - Complicated rules regarding confidentiality, and what information can and cannot be withheld.
 - The ability to manipulate large amounts of information, which is now available through technological developments, means that transparent information can be used in ways that are unintended by the requirement of disclosure. This is an ever-present danger, but where there is no legitimate need for disclosure the costs outweigh the benefits of disclosure.
- It might be argued that the fact that B may be granted a security interest in the future by D is not a piece of information of which there is a need for transparency. This argument can be met.
 - By arguing that the benefits of registration in advance (to the potential secured creditor) outweigh any detriment.
 - By arguing that there is a benefit, since other creditors know that they must check to discover whether there is actually a security interest granted.³⁷
- Transparency is particularly useful where there is a danger of fraud and other wrongdoing, since it prevents deliberate concealment. This is because accurate information cannot easily be obtained from any party who can easily be asked. Thus, transparency could be particularly useful in an asset-based register, since searchers may only deal with one party and the asset itself.

4.C CONFIDENTIALITY

In a secured transaction there are (at least) two parties for whom confidentiality is potentially important: the secured creditor (A/B) and the debtor (D).

³⁷ This depends on the actual registration system. In a notice filing system there is nothing on the registry to indicate whether an interest has actually been granted or not. In a priority notice system, this piece of information will (or may) appear on the registry.

First, D's interest in confidentiality is examined.

- A debtor would often, ideally, like the entire secured transaction to be confidential (on the basis that it does not want anyone to know that it has borrowed money).
 - The benefit of this confidentiality to D is, however, usually outweighed by the greater benefit of the publicity given by registration (see the arguments in favour of registration set out above).
 - Further, virtually all businesses run on a certain level of debt, and, with the exception of finance provided to very large companies), most debt finance is secured. Therefore, the 'stigma' of a business having debt in its capital structure is, nowadays, of little significance. In fact, a business without debt might be thought to be running below its capacity.³⁸
- D might also want certain features of the transaction to be kept confidential.
 - The most obvious feature is the amount borrowed. This piece of information comes into the category of information for which there is no legitimate need for disclosure. Further, it is in a state of constant flux, and therefore is not a suitable piece of information for a static register.
- Individuals (whether the debtor or persons connected with the debtor) have a legitimate interest in keeping personal information confidential. Any registration system has to maintain a balance between exhibiting enough information to allow individuals to be contacted for information, and revealing personal information such as addresses and telephone numbers.
- The assets used as security may themselves involve confidential aspects (for example, the transactions underlying receivables which are the subject of a security interest or assignment, or the details of intellectual property which is used as security). This has to be borne in mind when requiring a description of assets used as security.

Second, A/B's interest in confidentiality is examined:

- A/B's interest is largely in keeping commercially sensitive information confidential.
 - Thus, for example, it will not want the terms of the loan made public, in case another lender were to approach the borrower and attempt to undercut the first lender.

4.D TO WHOM THE REGISTER IS DESIGNED TO PROVIDE INFORMATION

As mentioned above, a register provides information for potential secured creditors (Bs), but also to others with an interest in the financial state of the debtor. The wider the net of potential searchers a register is to serve, the more information can usefully be included, and accuracy becomes of greater importance.

³⁸ Debt finance is cheaper than equity because of the tax advantages, and so, unless equity finance comes from internal sources, such as family finance, the cost of capital of a business financed entirely by equity will be greater than were there to be debt in the capital structure.

- B can realistically be expected to make enquiries of A, as well as of D. Because B has a very specific enquiry about A's interest in D's assets, and because B is taking on a specific credit risk in relation to D, it is economically justifiable to expend resources in making enquiries. However, it may not be economically justifiable for a credit rating agency who is making a bulk enquiry into security interest granted by D, or a financial analyst wanting information about D to make such enquiries. Further, A may not wish to give information to such parties; either because giving such information is costly without any obvious benefit for A, or because A wishes to keep such information as confidential as possible. Thus, 'peripheral' searchers will want information that can be obtained without making enquiries, and that can be relied upon without checking.
- Once A has registered its interest, it has a reason to prefer a system whereby Bs (and potential disponees outside the ordinary course of business 'P') are more likely to make enquiries of it regarding its security interest. This is because A will get advance warning that D is looking to make further borrowing or to dispose of its assets outside of the ordinary course of business, which is likely to signal economic distress. If B and P can obtain all the information they need from the register, this 'early warning system' does not exist. Of course, A's covenants could compel D to ask permission in relation to these transactions, but if D is in economic distress it might not comply with these covenants.
- Since B can protect itself by registering its security interest, it is indifferent between a system where registration of security interests is 'voluntary' (that is, where unregistered security interests are valid against an insolvency officer of D, so that registration is a matter of choice for the secured creditor and the only result of non-registration is losing priority to other registered secured creditors) and where registration is 'compulsory' (that is, where unregistered interests are void against an insolvency officer of D).³⁹ Secured creditors might marginally prefer a 'voluntary' system, since the downside flowing from a deliberate or mistaken failure to register is reduced.
- Other potential searchers have a distinct preference for a 'compulsory' system, since this is likely to result in more security interests, which could affect them if the debtor becomes insolvent, being registered. Thus, the register gives a more 'complete' picture of the security interests affecting the debtor's assets.

4.E CONCLUSION

The discussion in this section does not come to any definite conclusions, but sets out the factors that need to be weighed in order to decide what information should be included in the registration. Certain tentative conclusions, however, can be reached.

- In relation to secured creditors as users of the system, a system which provides a minimal amount of information is likely to be sufficient for their needs. This is because:

³⁹ This argument might need to be adjusted in relation to purchase money security interests.

- A registering secured creditor is only interested in information revealed in a positive search. A negative search is, in itself, a cost saving. In relation to a positive search it is likely to make its own investigations so needs only enough information to enable it to do so.
- A registering secured creditor can protect itself from subsequent registering secured creditors, so has no interest in incentivising subsequent registrations (except in relation to PMSIs).
- A registering secured creditor wants the presence or absence of registration to be completely accurate (as this gives rise to positive or negative searches) but is less interested in the accuracy of other information, except the identification of parties and of the assets which are subject to security interests. The inclusion of other information (which may be inaccurate) is at best a matter of indifference and at worst a cost, since it increases complexity.
- A registering secured creditor has a direct interest in protecting its commercial confidentiality and an indirect interest in protecting the debtor's interest in confidentiality.
- In relation to unsecured creditors and others doing business with the debtor,⁴⁰
 - the system needs to provide ongoing accurate information. This is because such parties:
 - look to satisfaction from assets available at the time of insolvency;
 - have no, or only limited, means of protecting themselves against those taking security after they have extended credit;
 - often need to decide whether to extend credit on an ongoing basis;
 - may need to decide whether to pursue judgment and execution against assets;
 - the system needs to provide as much information as possible about the extent that assets are encumbered: these parties are not interested so much in specific assets as the general availability of assets and the financial position of the debtor;
 - these parties have a strong interest in transparency and usually no (direct or indirect) interest in confidentiality. One exception to this is a counterparty to a receivable or other intangible asset which is the subject of a security interest, and the details of which the counterparty may have an interest in keeping confidential.
- In relation to other entities who might search a register, such as credit rating agencies, analysts, journalists etc.
 - It is not necessarily the case that the register should cater for such people at all. This is a policy decision.⁴¹

⁴⁰ Such people are likely, in many cases, to rely on information coming from intermediaries such as credit rating agencies.

⁴¹ One factor that might affect this policy decision is the extent to which unsecured creditors rely on such intermediaries to provide information, and the extent to which it is more efficient for them to do so rather than searching for themselves.

- Their interest is in maximum transparency, and maximum information.
- They have no interest in confidentiality.
- In relation to an insolvency officer of the debtor
 - He is interested in the register being a complete record of interests (at the moment of insolvency), and also in the presence or absence of interests being accurate, ie no false positives or false negatives. The register will then provide a list of interests in order of priority.
 - He would have a strong preference for compulsory registration, as otherwise he would have to make enquiries about unregistered interests which would bind him.
 - While it is of use to have information additional to the identification of parties and of the assets which are subject to security interests,⁴² this is only useful if accurate. Further, an insolvency officer will have to make enquiries as to the amount outstanding on the secured obligation and other details, and so the provision of such additional information will not reduce costs.

5 Problems of identification and empty filing

This section considers in detail various ways to overcome two problems identified above: that of identifying parties to the secured transaction (particularly non-corporate debtors) and that of ‘empty filing’. Although the problems are somewhat different, it is suggested that there is a way to overcome both, relying on modern technology.

5.A IDENTIFICATION

The identification of parties is critical to a registration system of security interests. This is for several reasons:

- There needs to be a stable identifier of the debtor so that a search can reveal all relevant entries.
- There needs to be a stable identifier of the debtor (and each registration), so that an amendment or cancellation can be linked to the debtor (and to the relevant registration).
- There needs to be sufficient identification of the secured creditor, plus contact details, that interested parties can make enquiries, if necessary.
- The registrar (ie the system) also needs to have sufficient identification and contact details of both debtor and secured creditor, so that they can be contacted where necessary (see below).

There are thus two important principles in relation to identification. One is that a party must have the same identifier in relation to all entries on the register. This is relatively easy in relation to a UK registered company, since the company will have a registered name (which must be changed in the register if it changes) and a registered number. An online system with

⁴² See secured creditors above.

access to Companies House records can require⁴³ an exact match of name and number to be entered when registration takes place. If all registrations in relation to the same company are made in the same company name, a search against that name will reveal all entries relevant to that company. This desirable state of affairs is less easy to achieve in relation to non-corporate entities, since there is no single place of registration (such as Companies House) although many will be registered, for example, with the VAT authorities and therefore have a VAT number. In relation to individuals with no such registration, names are notoriously unstable as an identifier.

The second principle is that it must be possible for searchers and the registry to make contact with the parties involved. This can be done by providing contact details (addresses, email addresses, telephone numbers). There are two problems here. First, such details may change: some system for updating details therefore needs to be in place. Second, parties may wish to keep some of these details confidential.⁴⁴

5.B EMPTY FILING

As mentioned above, there are two problems of ‘empty filing’: filings which become empty because negotiations do not bear fruit and malicious or negligent filings (where there are no negotiations in the first place). One way of dealing with these issues, as well as dealing with errors in the initial registration, and with changes that occur since the initial registration (such as the satisfaction of the secured obligation), is to have a system whereby the register can be amended or registrations can be cancelled. Other methods of dealing with inaccurate and /or malicious initial registrations are discussed below, after the discussion of the amendment and cancellation system.

5.B.i *The amendment and cancellation system*

This discussion is in general terms. An analysis of the current English law and the PPSA systems in relation to voluntary and compulsory amendments and cancellations appears at Appendices A and B.

In any registration there needs to be a system for correcting errors and to keep the register up to date. In this discussion the creditor is ‘A’ and the debtor ‘D’. The likely reasons for an amendment or cancellation are:

- a. The initial registration was not authorised by D.
- b. The initial registration was authorised by D, but the negotiations have broken down and no security interest has been granted.
- c. The initial registration includes collateral which is not subject to a security interest granted by D.
- d. The secured obligation has been performed and/or the security interest has been discharged.
- e. The initial registration is inaccurate (other than in b. and c.)

⁴³ In an online registration it can be made impossible to complete the registration if the required information is not input correctly.

⁴⁴ See 4C above.

- i. In that some collateral which is the subject of a security interest is omitted or misdescribed.
 - ii. In the duration of the registration.
 - iii. In the description or the contact details of A or D.
 - iv. In any other respect.⁴⁵
- f. The initial registration has become inaccurate because of a change of any of the circumstances set out in e.
- g. The security interest has been transferred to another secured creditor.

In all these situations, an amendment or cancellation is necessary if the register is to be accurate and up to date.

The possibilities for which a system may provide (which may vary according to the reason for the amendment/cancellation) are:

- A party (usually the secured creditor) may be entitled to amend or cancel voluntarily without any human intervention.⁴⁶
- A party may request an amendment or cancellation which can only take place after an administrative procedure. Here the system may permit a party to amend or cancel without human intervention after certain administrative processes have occurred,⁴⁷ or the system may require the amendment or cancellation to be effected by the registrar.⁴⁸
- A party may request an amendment or cancellation which can only take place after a judicial procedure. It is usually the case that such an amendment or cancellation can only be effected by the registrar, since the court order will be directed at him.⁴⁹
- An amendment may not be permitted and any change requires the making of a new registration.⁵⁰
- A party (usually the debtor) may be permitted to compel another party (usually the secured creditor) to make an amendment or cancellation by serving an appropriate demand.⁵¹

⁴⁵ This depends on what is required to be included in the registration. For example, if the charge document is required to be included, the wrong document could be included.

⁴⁶ This is the case in most PPSA systems, see Appendix A.

⁴⁷ An example of this would be notarisatio.

⁴⁸ An example of the latter is the current English law system where notice can be given to the registrar of satisfaction and release (Companies Act 2006 section 859L) or of a subordination agreement (Companies Act 2006 section 859O).

⁴⁹ An example of this is the current English law system where a party can apply to the court for an order that an inaccurate registered charge document can be removed and replaced with an accurate one (Companies Act 2006 section 859N).

⁵⁰ This is the case in Australia in relation to some situations, see Appendix A.

⁵¹ This is the case in most PPSA systems in relation to reasons a. b. c and d. above, see Appendix B.

- In some situations, a secured creditor may be obliged to amend or cancel without a demand from the debtor.⁵²

Further, more detailed, choices have to be made. Any of these should be possible given modern technology. The most important are:

- The exact form in which the amendment / cancellation appears on the register:
 - One possibility is that the amendment (or, less likely, the cancellation) appears on the register as an additional notice, ‘tied’ to the initial registration by an identifying electronic ‘tag’, so that a searcher sees the whole history: this has the benefit of completeness, but at the cost of complexity.
 - Another possibility is that only the ‘up to date’ position appears on a search, but that the history is available for viewing if required.
 - A third is that the history is not available for public viewing, but is merely archived.
- How to prevent or otherwise deal with unauthorised amendments/cancellations. These could be malicious or accidental.
 - A modern electronic secured transactions registry could put identification criteria in place which would minimise the risk of anyone other than the secured creditor making an amendment or cancellation unauthorised by the secured creditor.⁵³
 - A party who is affected by an unauthorised amendment or cancellation could have the right to demand that it be removed.
 - There need to be provisions as to the effectiveness or ineffectiveness of unauthorised amendments or cancellations vis-a-vis third parties.

5.B.ii *Other methods of dealing with empty filing*

As mentioned in (a), one method of dealing with empty filings is to enable the debtor to compel the secured creditor to cancel an ‘empty filing’ registration. Another method is for the legislation to oblige a secured creditor to take an empty filing off the register.⁵⁴ This section considers other methods that could be adopted which will prevent empty filings or ameliorate their effect. This section just deals with initial registrations (amendments and cancellations are dealt with in the previous section).

⁵² This is the case in most PPSA jurisdictions in relation to a security interest over consumer goods once the secured obligation is discharged, see Appendix A. It is also the case in some jurisdictions in relation to a change of name of the debtor, or where an encumbered asset is transferred to another person subject to the security interest. In both these situations, a search against the new name or the new owner will not reveal the existing security interest, and so the secured creditor is given a grace period during which to amend the register: if the amendment is not made within the grace period the first secured creditor loses priority to a security right perfected after the name or ownership change (Canada, UNCITRAL Model Law, see Appendix B).

⁵³ See below.

⁵⁴ This is envisaged in the UNCITRAL Model law at article 20 if (a) a filing is not authorised by the debtor and (b) the secured creditor has been informed by the debtor that it will not authorise it.

- The law could require the debtor’s authorisation for a registration to be effective to perfect a security interest.⁵⁵ Although in theory this method prevents, or at least disincentivises, empty filings it has a number of drawbacks:
 - the registration still appears on the register (although it is ineffective to perfect any security interest).
 - A searcher may see it and decide not to investigate further.
 - A person who wants to make a malicious filing is unlikely to be deterred by ineffectiveness (but see below).
 - The debtor needs to go through the process of demanding a cancellation to get the register cleaned.
 - If the law enables retrospective authorisation⁵⁶ a subsequent secured creditor could still lose priority to an earlier (previously ineffective) filing.⁵⁷
 - A very wide *ex ante* authorisation by a debtor could permit an effective registration of a financing statement covering a much wider range of collateral that is actually included in the security agreement.⁵⁸
- The law could make misleading, or seriously misleading, registrations ineffective to perfect a security interest.⁵⁹
 - This suffers from the same problem as the previous method: it will not matter to the malicious filer.
 - There is a countervailing policy objective, which is that registrations should not be invalidated for errors. Therefore, the category of inaccuracy which must invalidate a registration has to be narrow.
- The law could require a secured creditor, on registration, to notify the debtor of the registration. This enables the debtor to take steps to force the secured creditor to amend or cancel an ‘empty filing’.⁶⁰
 - One downside is that, if waiver of the right to receive a verification statement is permitted,⁶¹ a secured creditor with strong bargaining power may include a waiver in the standard terms of its loan agreements, so that it has no duty to notify the debtor of the registration.
 - This, however, would not apply to malicious filings, of which the debtor is given the ability to force cancellation.

⁵⁵ This is the position in the US, see Appendix C. See also the Law Commission’s proposals, described in Appendix C.

⁵⁶ This is the case in the US, see Appendix C.

⁵⁷ C. Walsh ‘Transplanting Article 9: the Canadian PPSA experience’ in O Akseli and L Gullifer, *Secured Transactions Law Reform: Principles, Policies and Practice* (Hart Publishing, 2016) 63.

⁵⁸ Ibid.

⁵⁹ This is the position in Australia, Canada and New Zealand (see appendix C).

⁶⁰ This is the position in Australia, Canada and New Zealand, (see appendix C).

⁶¹ As in Australia, Canada and New Zealand.

- The law could make provision for the Registrar to send a verification statement to the debtor.⁶²
- The law could impose damages for ‘empty filing’.⁶³
- The law could make ‘empty filing’ a criminal offence.⁶⁴
- The law could provide for a summary judicial procedure for rectifying the record.⁶⁵
- The law could empower the registrar to remove unauthorised filings after notice has been given to the filer.⁶⁶
- Filings could be of limited duration.⁶⁷ This is not an effective remedy for the problem of empty filing, but it does mean that the register is kept reasonably ‘clean’.
- The following system could apply, based on the latest technology. It could be compulsory for a debtor to be registered on the system in order for a registration to be made against that debtor.⁶⁸ In order for a registration to be made, the debtor would have to authorise registration in advance. This could be specific or general, but either way is held on the system which automatically checks that filing complies with pre-authorisation using smart contract technology.⁶⁹ Only compliant registrations could be made.

6 Document filing versus notice filing

This is a traditional dichotomy that is used to describe registration systems.

6.A DOCUMENT FILING

‘Document filing’ is a term typically used to describe a system whereby:

- The instrument creating the security must be produced to the registrar at the point of registration.

⁶² This was envisaged under the Law Commission’s scheme but there the registrar had to send a paper copy. With modern technology an automatic forwarding would be possible. See discussion below.

⁶³ This is done in the US for an unauthorised filing (see appendix C) and in Australia if the filer does not believe on reasonable grounds that the person named is, or will become, a secured party (see appendix C): this gives rise to a civil penalty as does failure to remove an ‘empty filing’.

⁶⁴ The official comment to Article 9 suggests that this might be the a more effective solution than the current Article 9 position see 9-518 comment 3. This is the current position in the UK, under the generic section 1112 Companies Act 2006 (which is not just about the company charges register).

⁶⁵ This is also suggested in 9-518 comment 3.

⁶⁶ See National Association of Secretaries of State, *State Strategies to Subvert Fraudulent Uniform Commercial Code (UCC) Filings* (2014), available at www.nass.org/reports/surveys-a-reports

⁶⁷ This is the case in all PPSA systems.

⁶⁸ This would enable an individual debtor to be given a unique identifier (see, for example, the Estonian system, which is considered to be state of the art, see <https://e-estonia.com/component/electronic-id-card/> If a debtor wished to borrow, it would have to get itself registered.

⁶⁹ This is computer programme code based on blockchain whereby an electronic activity is self-executed when certain pre-programmed conditions (within the system) are met.

- Some form of checking takes place to ensure that a security interest has been created. This can be extensive (involving notarisation, for example, as in many civil law systems) or minimal (as in the current English law system).
- The instrument may or may not appear on the register itself.
- The register may include particulars giving information about the security interest, the assets included, the parties involved and other information.⁷⁰
- It is not possible to register in advance of the creation of a security interest.
- Creation may predate registration (as in the current English law system) or registration may itself constitute creation (this is the case in some civil law systems).⁷¹
- It is not possible for one registration to relate to more than one transaction.
- Priority is based on creation and not on date of registration (if this is different from date of creation).⁷²

The advantages of document filing are:

- Considerable amounts of information appear on the register.
- The information is accurate in that it reflects an actual transaction.
- In that sense, registration should be easy as all that is required is to upload the document, which could reduce errors.
- It also could reduce due diligence if:
 - Searchers are prepared to rely on what is on the register without further investigation and/or
 - Considerations of confidentiality do not have the result that the security agreement is very short and omits much useful information. However, this is likely to occur.
- Empty filing (in the two senses identified in 5B above) cannot occur.

The disadvantages of document filing are:

- It is impossible to have advance filing, although a priority notice system is possible.
- There will be a time gap between the creation of the security interest and the registration, unless the interest is created by registration. Modern techniques of electronic registration can, of course, reduce this gap to a very short period.
- A system of amendment and cancellation is still required as facts related to the transaction will change over time.
- Due diligence will still be required in relation to certain aspects, such as the amount outstanding.
- There cannot be one filing for a series of transactions.

⁷⁰ Such as under the current English system.

⁷¹ It is also proposed by the CLLS draft secured transactions code.

⁷² There is not necessarily a difference, see the CLLS draft secured transactions code. In civil law systems, registration is usually constitutive.

6.B NOTICE FILING

'Notice filing' is a term typically used to describe a system whereby:

- Registration consists of the submission of a notice setting out minimal information, namely
 - The names of the secured party and the debtor.
 - The assets over which a security interest has been or will be created.
- The notice will appear on the register in exactly the form in which it is submitted (typically this is now by instantaneous or near instantaneous electronic registration).
- Registration in advance of creation is possible.
- One notice can cover any number of security interests.

A notice filing system requires the searcher to make further enquiries after a positive search, but a searcher can rely on a negative search.⁷³

There are variations within each system, but it is also now possible to have a system which combines features of both systems. It will be seen that the current English system is a document filing system, as defined above, although the checking required is now minimal. The instrument itself appears on the register. The system proposed currently by the CLLS draft secured transactions code is a development of a document filing system, in that priority is not based on date of creation, but on date of registration. The Article 9/PPSA system is a notice filing system as defined above.

The advantages of notice filing are:

- Filing is very cheap and easy, and can be totally electronic.
- Advance filing is possible, so potential lenders can protect themselves and there is no problem of time gap between creation and registration.
- The priority rule (date of registration) is straightforward and simple to operate.
- There can be one registration for a series of transactions.
- It is easy to include asset identification data, which can then be the subject of a search⁷⁴.

The disadvantages of notice filing are:

- It is not clear from the register whether any interest has actually been granted.
- Searchers have to make enquiries for additional information if a search is positive.
- There is a potential problem with empty filing.⁷⁵

6.C CONCLUSION

Given the conclusions in section 4, the amount of information a register should include depends on for whom the register is really operating. The wider the scope, the more reason there is to include more information on the register, but this comes with costs: the

⁷³ See section 4 above. Of course, the searcher would itself need to register in order to secure its priority position.

⁷⁴ This would also be possible in a 'hybrid' system where particulars as well as the security agreement is filed.

⁷⁵ See sections 5 and 7 for possible solutions to this problem.

complexity and cost of registration, the need to keep the register completely updated, lack of confidentiality and (possibly) no advance registration. If the main focus is on the needs of secured creditors, then a notice filing system should suffice, in which case these costs would be avoided.

7 Two Possible schemes

In the light of the foregoing discussion, this section will now set out two worked out schemes of registration for the consideration of the STR project. The first is a notice filing system, and is heavily based on the work of the Law Commission, but takes account of technological developments since that work was done. It also takes account of the system used for security interests over intangible property in Jersey.⁷⁶ The second is basically a document filing system, but includes a priority notice system enabling registration in advance of creation.

7.A SCHEME 1 (NOTICE FILING SCHEME)

7.A.i *Initial registration*

- The register is wholly electronic.
- Registration is effected by entering information online. This is called registering a ‘financing statement’.
- In order for a registration to be made, the following needs to have occurred:
 - The registering party must have registered on the system and obtained some form of identification (eg username and password).⁷⁷
 - The secured creditor (if different) must be registered on the system and contact details must be included in that registration.
 - The debtor must be registered on the system and have been given a unique identifier (for a company this will be its name AND its registered number).
 - The debtor must have authorised (on the system) registration of a security interest against the relevant collateral.⁷⁸
- The information required for registration⁷⁹ is:
 - Identification of the debtor.
 - Identification of the secured creditor.
 - A description of the collateral.
 - The length of time for which the registration is valid (indefinite or a specific period).⁸⁰

⁷⁶ See <https://www.jerseylaw.je/laws/revised/Pages/13.776.aspx>.

⁷⁷ Note that the registering party might not be the secured creditor, but its lawyer or other agent (registering agencies have grown up in Australia, especially for bulk registrations).

⁷⁸ See 5B(b) above.

⁷⁹ More information could be required, but this would subvert one of main characteristics of the notice filing system, which is that it is cheap and easy, as well as enabling filing in advance.

⁸⁰ Encouragement of a limited period of registration is possible by using a graduated fee system. Shorter periods with renewal enable the register to be kept relatively ‘clean’ but have the disadvantage that lenders

- Information is entered (as much as possible) by drop down menus and prompts rather than from free text.⁸¹
- In relation to certain types of asset it should be possible to include in the registration a unique identifier of that asset as additional non-compulsory information. This would assist in preventing fraudulent sales and would also overcome the difficulties arising from a change in the identifier or identity of the debtor.⁸²
- The system should prevent registration of an unauthorised security interest. This should be possible using smart contract technology.
- Registration is effective from the moment at which the financing statement is searchable. This ideally would be instantaneous from when the registering party clicks the relevant button.
- The registering party should receive a confirmation (on screen and also by email, like Amazon) that the registration is effective. The content of the registration could also be included in that confirmation (again, like Amazon).
- The debtor should also receive automatic notification of the registration (this should be simple since the debtor's contact details will be included in its initial registration).
- The system should include the ability to take payment for registration, either by pre-loading credit (or some kind of periodic payment) or by use of a credit/debit card or other means of electronic payment.

7.A.ii *The effect of registration*

- What is meant by registration being effective is as follows:
 - The registered interest is effective and enforceable against third parties (if the interest has not yet been created, it will be automatically effective and enforceable from the moment it is created).
 - Priority is determined from that point.⁸³
 - The registered interest is effective according to the terms of the registration, that is, it is effective only over the collateral identified in the registration and not over other collateral. If the description of the collateral in the registration is wide than the collateral identified in the security agreement, the interest will only be valid in relation to the collateral identified in the security agreement.
 - The registered interest is valid against any insolvency officer of the debtor.

7.A.iii *Searching*

- Any person can search the register, but would have to register with the system first.

have to remember to renew. Again, this is relatively easy to deal with using modern technology (automatic reminders etc).

⁸¹ This reduces the risk of typographical error. At the recent 5th Cape Town Convention Academic Conference there was considerable discussion about the problems of permitting free text and the ways of avoiding it.

⁸² See 5A and 5B above.

⁸³ There would also have to be rules to deal with perfection by other means, eg possession and control. There would also need to be other priority rules, which will be dealt with in a separate policy paper.

- Searching could be carried out using the identifier of the debtor⁸⁴ or (if appropriate) against the identifier of the asset.
- Any person searching should be able to contact the secured creditor identified in a registration for more information. Consideration would need to be given as to whether this should just be possible by email/phone etc or whether it should be possible to contact the secured creditor through the system (this might be helpful if there were concerns about the publication of email addresses).⁸⁵
- Consideration needs to be given as to the extent to which the secured creditor is obliged (by law) to provide information, if at all.
 - It might be thought that it would be enough for the debtor to provide its information (due diligence) or for it to authorise the giving of information by the secured creditors (presumably that is the position under English law at the moment for information about, for example, the amount outstanding).
 - If compulsory provision is thought necessary (and all the PPSAs and the UCC have such a provision⁸⁶) a decision needs to be taken as to
 - What information must be provided
 - Copy of security agreement?
 - Amount outstanding.
 - What collateral is covered.
 - Who can demand information.⁸⁷
 - The main split is between a system where only the debtor (grantor) has this right (Model Law, US, Jersey) and where a wider group of people have the right including other secured creditors, (judgment) creditors and others within interest in the collateral (Canada, NZ, Australia).
 - Even then not everyone who might be interested is included eg not prospective creditors. The schemes envisage that the debtor will demand the information for these people and pass it on. This gets close to due diligence.

⁸⁴ One possibility is that the searcher would need to have access to the unique identifier of the debtor, which it could only usually get from asking the debtor. This would limit searchers to potential secured or unsecured creditors of the debtor. Another possibility is that a search can be made against the debtor's name (or number) which opens it up to the whole world.

⁸⁵ In the US system, only the debtor can demand information from the secured creditor (UCC §9-210).

⁸⁶ See Appendix D.

⁸⁷ See Appendix D.

7.A.iv *Amendment and cancellation*

1.A.i.1 Amendment

- Amendment is effected by registering an amendment notice, which automatically (without human intervention) amends the entry on the register. ⁸⁸ There should be a (short) list of what cannot be amended.⁸⁹
- Either the registered secured party or the debtor can register an amendment notice voluntarily. However, with the use of smart contract technology, voluntary amendment should only be possible with the consent of the non-amending party, ie either a joint registration is made or the other party is automatically asked to consent to an amendment notice which automatically becomes effective when consent is given.⁹⁰
- No party other than the registered secured creditor and debtor is permitted to register an amendment notice.
 - The advantage of this is that there cannot then be unauthorised or malicious amendments by third parties and there would not need to be rules as to whether such amendments are valid, and rules as to how to remove them.
 - The disadvantage is that if a third party is affected by a registration which is inaccurate (eg a new secured creditor has replaced the old one but the old secured creditor has not amended the register) they cannot amend the register themselves: they would have to use other means to force either the registered secured creditor or the debtor to amend.
- There should be provision for ‘compulsory’ amendment as follows.
 - If consumers are included, the creditor should be obliged to remove a registration relating to consumer goods within [a short period] of the satisfaction of the secured obligation.⁹¹
 - If the debtor can amend with the consent of the secured creditor as above, this should cut down the situations in which the debtor needs to be able to compel the secured creditor to amend.⁹² Probably, all that would be needed would be provision for the debtor to be able to apply for adjudication if the secured creditor refused to (or just did not) consent to an amendment. The best system seems to be that of Jersey, ie application is made first to the registrar who adjudicates: if the secured creditor serves a notice of objection, the matter goes to the court.⁹³

⁸⁸ We would need to talk to people involved in registration technology to find out if this is possible.

⁸⁹ See US system in Appendix A: there cannot be deletion of all debtors or secured creditors without providing the identifier of a new debtor or secured creditor respectively. Even this might not be necessary (see Jersey in Appendix A).

⁹⁰ Same point as last footnote.

⁹¹ This is the case in all the PPSAs and the UCC se Appendix B.

⁹² See Appendix B.

⁹³ See Appendix B, Jersey.

- There may be situations where the register should be amended to be kept up to date in order to protect third party searchers, and the debtor has little or no interest in amending. The main two situations are where there is a change in the debtor's identifier and where the assets are transferred to another person subject to the security interest. There does not seem to be a simple way of doing this, so it is probably best to follow the UNCITRAL model law provisions.⁹⁴
- It might be worth putting a general obligation on the secured creditor to keep the register up to date,⁹⁵ but it is difficult to see what sanction could be applied successfully without the law becoming very complicated.
- There might need to be a provision stating that a registration is effective unless it is seriously misleading.⁹⁶
- There should be a penalty for knowingly making a false statement on the register.⁹⁷

1.A.i.2 Cancellation

- Cancellation is possible by registering a cancellation notice, which automatically (without human intervention) amends the entry on the register.⁹⁸
- Cancellation is to deal with three situations:
 - 'Empty filing' where negotiations break down after registration.
 - 'Empty filing' by a malicious person. The system suggested for authorisation in (a) above should help prevent this.
 - Where all secured obligations have been discharged.
- The same system for cancellation should apply as for amendment, namely:
 - Either the registered secured party or the debtor can register a cancellation notice voluntarily, but cancellation should only be possible with the consent of the other party, ie either a joint registration is made or the other party is automatically asked to consent to an amendment notice which automatically becomes effective when consent is given.⁹⁹
 - No party other than the registered secured creditor and debtor is permitted to register a cancellation notice.
 - If the secured creditor refuses to consent to a cancellation notice registered by the debtor, the Jersey system should apply: application is made first to the registrar who adjudicates: if the secured creditor serves a notice of objection, the matter goes to the court.
 - It is difficult to think of a situation where a third party could be so adversely affected by failure to cancel that a system such as applied to amendments to debtor's identifier (above) needs to be put in place.

⁹⁴ See Appendix B.

⁹⁵ As mentioned on the New Zealand PPSR website, see Appendix A.

⁹⁶ See New Zealand, Australia and Canada in Appendix C.

⁹⁷ Current English law see s.1112 Companies Act 2006).

⁹⁸ We would need to talk to people involved in registration technology to find out if this is possible.

⁹⁹ Same point as last footnote.

- There might need to be a provision stating that a registration is effective unless it is seriously misleading.¹⁰⁰
- There should be a penalty for knowingly making a false statement on the register.¹⁰¹

7.B SCHEME 2

There are three possible models of priority notices which should be considered.

7.B.i *The Land Charges Registry model*

This registry relates to charges over unregistered land. Such a charge does not have to be registered, but there will be priority consequences from not registering as registration counts as notice to subsequent chargees.¹⁰² Registration is made against the name of the owner of the land (not against the land itself) ie it is a debtor based and not an asset based registry.

The rules as to priority of puisne mortgages are slightly unclear.¹⁰³ The LPA provides that priority is by date of registration,¹⁰⁴ but the Land Charges Act 1972 provides that a puisne mortgage is void against a subsequent purchaser (or mortgagee) if it is unregistered at the time of the purchase or mortgage. It does not appear that the first mortgage can regain priority even if it is registered before the second mortgage.¹⁰⁵ Thus the priority rule is based on time of creation and not time of registration. This is ameliorated by the ability to file a priority notice.

A priority notice must be filed at least 15 days before the interest¹⁰⁶ is registered.¹⁰⁷ This is because a search protects the searcher against interests registered in the 15 days after the search¹⁰⁸ (to allow for the long completion time of a land transaction). If the interest is registered within 30 days of the priority notice, and correctly references the notice in the registration, its priority position dates from the date that the interest was created¹⁰⁹ and not of the registration.¹¹⁰

¹⁰⁰ See New Zealand, Australia and Canada in Appendix C.

¹⁰¹ Current English law see s.1112 Companies Act 2006).

¹⁰² A first mortgage over unregistered land is often taken by taking possession of the title deeds, in which case registration is not usually seen as necessary, see Megarry & Wade 26-025. The Land Charges Registry and the relevant priority rules therefore relate to puisne mortgages only, that is, mortgages where the mortgagee does not have possession of the title deeds.

¹⁰³ See Goode on Legal Problems of Credit and Security (5th edn) 5-16.

¹⁰⁴ S. 97.

¹⁰⁵ Megarry & Wade 26-033 and <https://www.gov.uk/government/publications/land-charges-applications-for-registration-official-search-office-copy-and-cancellation/practice-guide-63-land-charges-applications-for-registration-official-search-office-copy-and-cancellation>.

¹⁰⁶ The system applies to interests other than mortgages as well.

¹⁰⁷ Land Charges Act 1972 s. 11(1).

¹⁰⁸ Land Charges Act 1972 s.11(5).

¹⁰⁹ Note that it does not relate back to the date of the notice.

¹¹⁰ Land Charges Act 1972 s.11(3).

7.B.ii *Cape Town Convention Aircraft Registry*

The Cape Town International Registry is an asset-based registry, ie the interests are registered against an identified asset and searches are carried out against the asset. It is a notice based registry, and all that is required for registration is:¹¹¹

- the electronic signature of the registering person;
- the name of each of the named parties;
- the following information identifying the aircraft object:
 - manufacturer's name;
 - manufacturer's generic model designation; and
 - manufacturer's serial number assigned to the aircraft object;
- the lapse date of the registration, if the registration is to lapse prior to the filing of a discharge;
- the consent of the named parties, given under an authorization;
- the electronic addresses of the persons to which the International Registry is required to send information notices; and
- if the named parties include more than one creditor, the name of the creditor who is to hold the sole right to consent to the discharge of that registration.

The requirements are the same regardless of whether an international interest or a prospective international interest is being registered. If the registration of the prospective international interest is still current at the time when the international interest is constituted, then the international interest is treated as having been registered at the time that the prospective interest was registered.¹¹² Registration is the only priority point.¹¹³

A search will reveal the notice and the date, but will not reveal whether there is actually an international interest created or not.¹¹⁴ It will be for the searcher to make enquiries of the named secured creditor to discover this.

The debtor can demand that the prospective secured creditor discharge the registration of the prospective interest and the prospective creditor must comply unless it has given value or incurred a commitment to give value.¹¹⁵

7.B.iii *CLLS draft secured transactions code.*

A new article (31.7) has been added to include a limited priority notice scheme. It is based on the land charges scheme, but if the interest is entered into within 30 days of the priority notice, the priority point is the date of the notice and not when the interest is created.¹¹⁶

¹¹¹ International Registry Rules 5.3.

¹¹² Cape Town Convention art.19(4).

¹¹³ Cape Town Convention art.29(1).

¹¹⁴ Cape Town Convention art. 22(3).

¹¹⁵ Cape Town Convention art. 25(2).

¹¹⁶ The registrant may deliver to the registrar a notice of an intention to create a charge (a priority notice) in advance of the charge instrument being entered into. The priority notice must state the registered name and

7.B.iv *Discussion*

The main difference between the Land Charges and the CLLS scheme, on one hand, and the Cape Town scheme, on the other, is that the former require a second registration (which will include far more details about the transaction) while the latter requires no further registration.¹¹⁷ However, the Cape Town scheme does not give as much information to searchers in relation to actual interests. The priority notice also expires within a short period of time, while the registration of a prospective interest under the Cape Town scheme only expires if a lapse date is chosen by the parties. The Cape Town scheme is largely tantamount to a notice filing system, and so replicating this scheme would be very similar to the scheme set out in A above, while the scheme set out here should be a true alternative. Most notably, it should provide more information to searchers than a notice filing system including whether an interest has actually been created. Certain points can, however, be taken from the Cape Town scheme to inform the suggested scheme below.

7.B.v *Suggested scheme*

- The registration scheme is fully electronic.
- Registration is effected by filling in various fields on an online form, and takes effect immediately without human intervention.
- A pre-authorisation system similar to that described in Scheme 1 above should apply, so that the registration cannot take effect without being authorised by the debtor.
- A registration can be made in relation to an interest which has been created or before an interest is created, in relation to an interest which a debtor intends to create in favour of a secured creditor.¹¹⁸
- The registration fields could include extensive information cut and pasted from the charge document. While free text does create difficulties in one sense, if the risk of error is on the registrant, there should be no real issue with requiring full particulars. Alternatively, the charge document could be uploaded (as under current law) but
 - This raises confidentiality issues.
 - It is less easy to read and search than organised particulars.
 - See below for where a registration is prior to the creation of an interest.
- One field (checkbox) shows whether the interest has been created or not.
- If the registration relates to an interest not yet created,
 - Certain fields could be left blank: this will depend on how the negotiations have progressed. One field which would have to be left blank is the date that the interest was created.

number of the chargor and the name of the charge. If a charge instrument is entered into by that chargor in favour of that chargee and is registered within 30 days after the registration of the priority notice, the charge will be deemed for the purpose of priorities with third parties (see part 8) to have been registered at the time that the priority notice was registered.⁷

¹¹⁷ Cape Town Convention art 18(3). This makes the dispensation from further registration dependent on the registration information being sufficient for a registration of an international interest, but the regulations for the aircraft registry (the International Registry) mean that this will always be the case as the requirements for the registration of a prospective or an actual interest are the same (see Official Commentary 2.125).

¹¹⁸ This terminology is based on grant, but it could also apply to a scheme which includes registration of retention of title devices without their recharacterisation.

- The tickbox would show that the interest had not yet been created.
- There would be a compulsory field for the parties to elect how long the registration should last.¹¹⁹ This would be visible on a search. If no interest was entered into during that time, the registration would lapse.¹²⁰
- If an interest was created during that time, the secured creditor would be obliged (within a specified number of days, say 5 days) to amend the registration by changing the tickbox to ‘yes’, amending any fields which had changed and filling in any empty fields including the date of the creation of the interest.
- If these amendments are made within 5 days of creation, the priority point is the date of the initial registration.
- If they are made after 5 days the priority dates from the date of the amendment: the system could be programmed so that this appears on the register if the date of creation is more than 5 days before the time of amendment.
- The amendment would require the authorisation of the debtor (see above). Effectively this would be a joint application. This should prevent entering a false date for creation, but there might also need to be a rule making entering false information a criminal offence.
- The advantages of this scheme over the CLLS scheme are:
 - There is more information on the register even in advance of the interest being created, so this could cut costs of due diligence.
 - If the interest is likely to be created very shortly it would be possible to upload all the relevant information at the initial stage.
 - All that would then be required when the interest is created is for the secured creditor to tick the box and enter the date of creation.
 - The parties choose the length of time before the initial registration lapses: it could be less or more than 30 days.

This scheme is much less worked out than the scheme outlined at A above, as it may need to be modified in the light of initial reaction. Provisions to deal with later amendments and cancellations once the secured obligation has been satisfied would be necessary to be included.

The scheme would not work if ROT clauses over inventory were included in the scheme, since it assumes that there will be one registration for each transaction. However, it could be modified (perhaps) so that there could be one advance registration, then ‘tickboxes’ to indicate each time a transaction under the ‘master agreement’ had been entered into. While outside the scope of this paper, it is suggested that the benefits of including such interests are likely to be outweighed by the costs even of such minimal registration.

8 Conclusion

This paper has surveyed the arguments for and against different types of systems of registration of security interests, in the light of the purposes of a registration system. The

¹¹⁹ It would be a matter of policy decision whether there should be a maximum time.

¹²⁰ This borrows from the Cape Town scheme rather than the rigid 30 day limit of the land charges scheme.

first policy decision that has to be taken is for whom the registration system really exists. While a system can benefit a number of different constituencies, the primary focus must drive the main parameters of the system, with the benefits to others being more peripheral. It is suggested that the primary focus is on those taking security (this could be widely construed) and therefore a system providing minimal information is sufficient for their needs.¹²¹ This indicates a preference for notice filing. However, if it is desired for others to benefit from the register as well, a scheme which includes more information on the register would be preferable.

The paper has also examined in detail the arguments for and against advance filing, and the ways to deal with some of the drawbacks. This discussion is informed by a much more detailed comparative analysis, which forms four appendices. The discussion is then used to shape two worked out schemes for a registration system. The first is a notice filing scheme, which takes advantage of technological improvements to seek to find prophylactic solutions to some of the problems of advance filing, rather than dealing with them ex post as the earlier schemes have done. This scheme is quite fully worked out, but could, of course, be open to a great deal of debate and amendment. The second scheme is much less worked out, since it might not be considered a starter at all. It is for a register which gives much fuller information, but which incorporates advance filing. It is different from the CLLS scheme, and it may be that there is room for cross-fertilisation of ideas so that a hybrid turns out to be the best.

PROFESSOR LOUISE GULLIFER

1ST NOVEMBER 2016

¹²¹ Section 4, building on the analysis in section 2.

Appendix A: Comparative analysis of voluntary amendment provisions

Current English law

- There is voluntary registration of
 - A statement that the secured debt has been paid (Companies Act 2006 s859L(2)(a)).
 - A statement that some or all of the collateral has been released from the security interest (Companies Act 2006 s859L(2)(b)).
 - An amendment to the charge which adds or amends a negative pledge clause or a clause governing the ranking of the charge (in other words, a subordination. agreement) (Companies Act 2006 s859O). This amendment can be made by the secured creditor, the debtor or any other secured creditor who is affected by the subordination agreement.

Law Commission Report no 296¹²²

- Amendments and cancellations could be made by filing an ‘additional statement’ which would appear on the register in addition to the initial registration.
- Where the amendment is the extension of the duration of the registration or adds assets to the collateral, the secured creditor will have to confirm that there is an agreement to this effect or the debtor has consented.¹²³

UNCITRAL model law¹²⁴ (registry provisions articles 16, 17, 18, 20, 21, 28, 30)

- Amendments and cancellations can be made by filing an amendment or cancellation notice (article 16) which is linked to the initial notice by a registration number (art 28). An amendment or cancellation notice would appear on the register in addition to the initial registration (art 28(2)(4)).
- There are two options (for enacting states): either an amendment notice can apply to a number of registrations (eg where the secured creditor changes its name) or there has to be a different amendment notice for each registration (art 18). There has to be a cancellation notice for each registration.
- An amendment notice can include changing the name of the secured creditor (either because it has changed its name or because the security interest has been transferred to someone else) (art 16 (2)).
- Only the person registered as the secured creditor can register an amendment or cancellation notice (art 16). It does not seem to be envisaged, however, that another person can be stopped from registering an amendment/cancellation notice, so provision is made for the effectiveness (or ineffectiveness) of an amendment or

¹²² http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc296_Company_Security_Interests.pdf.

¹²³ Law Commission report no 296 para 3.132.

¹²⁴ <http://www.uncitral.org/pdf/english/texts/security/ml-st.pdf>.

cancellation notice which is not authorised by the person registered as secured creditor.

- There are various options as to whether an amendment or cancellation notice unauthorised by the secured creditor is effective against third parties (art 21). If one of the options providing for effectiveness is chosen, then the registrar must remove a registration which is the subject of a cancellation notice, but this is not the case if one of the options providing for ineffectiveness is chosen (since the initial registration remains effective if the cancellation notice is ineffective, and because it is not up to the registrar to check whether a cancellation notice is authorised)(art 30).
- Information removed from the register must be archived for a certain period of time (art 30(3)).

New Zealand PPSA¹²⁵

- Provision is made for the voluntary registration of a ‘financing change statement’.
 - If the security interest is transferred to another person (s 155). While the identity of a new secured creditor could be discovered by the provision of information on request by a searcher, it is easier for the transferor to register the change. The financing change statement can be before or after the transfer (s 157). The transferee then becomes the secured party (s158).
 - To disclose a subordination of a security interest (s159).
 - Other purposes not specifically mentioned (but including discharge of the initial registration: this is included in the definition of financing change statement in s 135) (s 160).
- The secured creditor is given a ‘verification statement’ immediately after registering the financing change statement s.144 (this applies to the amendment procedure in the next bullet point as well). The secured creditor must forward this to the debtor within 15 days (s 148) unless the debtor has waived the right to receive it.
- Despite the drafting of the statutory provisions, the register seems to permit the amendment of a registration (by a secured creditor) directly, ie without registering a ‘financing change statement’ per se. See <http://www.ppsr.govt.nz/cms/secured-party-information/financing-statements/update-debtor-or-collateral-details>. The same page also states that it is the responsibility of the secured creditor to keep the registration up to date. This is pursuant to Personal Property Securities Regulations 2001 reg 5. A registration of a financing statement is invalid if it is seriously misleading (s 150) eg the name of the debtor is wrong or the serial number of collateral is wrong. Thus there is, in fact, an incentive on the secured creditor to keep the register updated.
- An unauthorised amendment is very unlikely as only a person who is both registered as a user (with a user ID and password) and then registered as a secured creditor group (again with a user ID and password), see <http://www.ppsr.govt.nz/cms/secured-party-information/secured-party-groups-spg/registering-as-an-spg>.

¹²⁵ <http://www.legislation.govt.nz/act/public/1999/0126/latest/DLM45900.html>.

Australian PPSA

- The Australian system seems, frankly, to be in a bit of a muddle. The statute permits the filing of a financing change statement (s 150), as well as providing for the system of amendment demands (see below in Appendix B). However, the register itself prohibits amendments of certain matters (identifier, date of birth, name of grantor, any serial no, PMSI, inventory and control disclosure and collateral type and class) (see <https://www.ppsr.gov.au/what-can-be-amended>).
- In order to amend these, the secured creditor must serve a new financing statement, which could affect its priority (see Duggan & Brown 2nd edn 6.67).
- This applies even where there is an amendment demanded in an amendment demand, if it relates to a prohibited field.
- Even the statutory review does not seem to have addressed this problem apart from recommending changing the position in relation to collateral class (6.71).

Canada¹²⁶

- Provision is made for the voluntary registration of a ‘financing change statement’
 - If the security interest is transferred to another person (SPPSA s 45, OPPSA s 47).
 - To disclose a subordination of a security interest (SPPSA s 45(6), OPPSA s 50).
 - To discharge a financing statement (OPPSA s 55).
 - Other purposes not specifically mentioned (SPPSA s 44(3) OPPSA s 49) (discharge is included in the definition of financing change statement, SPPSA s 2(q)).
- There does not seem to be statutory provisions to deal with unauthorised amendments. However, I am told by Professor Catherine Walsh that there are secure ID procedures for secured creditors in place in Canada (where registration is wholly electronic) which are likely to prevent such unauthorised amendments. Until recently a person wishing to register had to attend in person at the registry to open an account, but this can now be done online (see <https://www.ontario.ca/page/register-security-interest-or-search-lien-access-now> and <https://www.isc.ca/SPPR/Pages/RegisterChangeorRemove.aspx>) I am not quite sure what checks are required for this but I will try to find out).

¹²⁶ See <http://www.publications.gov.sk.ca/details.cfm?p=803> (Saskatchewan PPSA).
<https://www.ontario.ca/laws/statute/90p10> (Ontario PPSA).

United States¹²⁷

- Under UCC Article 9 there are two options (the UCC is enacted in each State and here the State is given the two options depending largely on the way that their real estate registry works and the way that the registry search works). See UCC 9-512
- Each option works in the same way: an amendment can be filed amending anything in a financing statement except:
 - Deleting the names of all the debtors without providing the name of a new debtor.
 - Deleting the names of all secured creditors without providing the name of a new secured creditor.
- An amendment adding collateral or a new debtor must be authorised by the debtor in an authenticated record or in the security agreement or (in relation to an amendment to cover proceeds of collateral) by acquiring the proceeds (9-509(a) – (c)).
- There are specific provisions dealing with particular types of amendments:
 - 9-513 deals with termination statements. It overtly deals with where these are compulsory (see Appendix B below). However, there seems no reason why a termination statement cannot be filed voluntarily (this might fall under 9-512 and not 9-513).
 - 9-514 deals with a transfer of the security interest to another secured creditor (called an ‘assignment’). It is not compulsory to register an amendment in relation to this: the new secured creditor’s interest continues to be perfected under the original registration (9-310(c)). However, by amending the register to reflect the new secured creditor the former secured creditor no longer has to deal with inquiries, and the new secured creditor can himself make amendments.

Jersey¹²⁸

- There is a general provision that a person named as secured creditor can amend or discharge a financing statement by registering a financing change statement (s74).

¹²⁷ See <https://www.law.cornell.edu/ucc/9>.

¹²⁸ See <https://www.jerseylaw.je/laws/revised/Pages/13.776.aspx>.

Appendix B: comparative analysis of ‘compulsory’ amendment provisions

NB the references to a. b. c. d. etc are to 5(B)(a.) above.

Current English law

- It is compulsory to give notice to the registrar within 7 days of the appointment of a receiver or manager of the company’s property pursuant to a court order or to a power in the security instrument (s 859K). This is a form of enforcement, though one that is relatively rarely used in practice except in relation to security over real property.

Law Commission report 296 (draft reg 16)

- The debtor is able to send a requirement notice requiring an amendment (‘additional statement’) in situations a. b. c. and d.
- The secured creditor must either amend the register within 15 days or commence court proceedings.
- If no court order has been obtained within 90 days, the debtor may amend the register itself
- This system did not apply where the creditor was a trustee (and registered as such) in which case the debtor had to obtain a court order to have the registration amended or cancelled.

UNCITRAL model law (registry provisions article 20, 25 and 26)

- The creditor is under an obligation to amend the register in situations a. (if informed by the debtor that it will not authorise the registration) b. and f.
- The debtor may request from the creditor (in writing) an amendment or cancellation in situations a. b. and d., and if the creditor does not comply with the request, the debtor is entitled to seek a court order for such amendment or cancellation.
- The creditor is under an obligation to amend the register if there is a change of the debtor’s identifier, or where an encumbered asset is transferred to another person subject to the security interest. In both these situations, a search against the new name or the new owner will not reveal the existing security interest. The secured creditor is given a grace period from the change during which to amend the register: if the amendment is not made within the grace period the first secured creditor loses priority to a security right perfected after the name or ownership change but before the expiry of the grace period. After the expiry of the grace period the priority rule is first to file (amendment in the case of the first security interest and registration in the case of the second security interest).

New Zealand PPSA

- The creditor is under an obligation to remove a registration relating to a security interest in consumer goods within 15 days of the performance of the secured obligations (s 161).

- The debtor may request from the creditor (in writing) an amendment or cancellation in situations a. b. c. and d. If the creditor does not comply with the request within 15 days (or get a court order maintaining the registration) the debtor is entitled to register a ‘change demand’ which is a ‘pending registration’. If within 15 days of being notified by the registry of the change demand, the creditor obtains a court order maintaining the registration, then the change demand is deleted (not confirmed). If no court order is obtained, the change demand becomes a registered amendment (sections 162 – 167). (Downsides: this procedure requires the input of the Registrar: it cannot be fully automated. Also, the timetable is tight, and if the change demand is registered improperly (ie the change is not justified but no court order was obtained in time) the only remedy for the secured creditor is to obtain a fresh registration, which will adversely affect its priority position.¹²⁹)
- This system does not apply where the security interest is provided for in a security trust deed and the initial registration discloses this fact (s164). In that case, if the creditor does not comply with the debtor’s demand for amendment or cancellation, the debtor must obtain a court order (s 168).
- The creditor is under an obligation to amend the register if it knows that an encumbered asset is transferred to another person subject to the security interest. In both these situations, a search against the new name or the new owner will not reveal the existing security interest. The secured creditor is given a 15 days grace period from the date knowledge is acquired during which to amend the register: if the amendment is not made within the grace period the first secured creditor loses priority to a security right perfected after the name or ownership change but before the expiry of the grace period. After the expiry of the grace period the priority rule is first to file (amendment in the case of the first security interest and registration in the case of the second security interest).¹³⁰
- There does not seem to be a specific provision about a name change of the debtor, but if a registration is seriously misleading (and this includes the name of the debtor) then it is invalid.¹³¹

Australia

- The creditor is under an obligation to remove a registration relating to a security interest in consumer goods within 5 business days of the performance of the secured obligations (s 167)
- The debtor may serve an amendment demand on the creditor in situations a. b. c. and d. If the creditor does not comply with 5 business days, an administrative process is triggered (ss 179 – 181). Either the Registrar can, on its own initiative, serve an amendment notice (inviting a response) on the creditor or the debtor can apply for such a notice to be served. If the creditor does not respond to such a notice within 5 business days or the response is, in the view of the Registrar,

¹²⁹ Gedye, Cuming and Wood, ‘Personal Property Securities in New Zealand’ 513 – 514.

¹³⁰ NZPPSA sections 89 - 91.

¹³¹ NZPPSA ss 149 and 150.

unsatisfactory, the Registrar may make the amendment. There is an alternative judicial process (s 182) whereby either party can apply to the court. The Registrar's decision can also be the subject of a review process under section 191.¹³²

- If the collateral is transferred to another person subject to the security interest, the original interest is temporarily perfected until the secured creditor files an amendment notice. The secured creditor has 24 months in which to do this unless another security interest attaches to the collateral at or after the time of the transfer, in which case the grace period is 5 days from the transfer or from the date on which the original secured party acquired knowledge of the transfer, whichever is later. Despite the reference to 24 months, the practical effect is that the secured party has to amend its registration within 5 days of knowing about the transfer, in order to protect its priority.¹³³
- If the debtor's name changes or (in the case of asset registration, the serial number changes), the secured creditor must file an amendment notice within 5 days it acquires knowledge of the change, or within 60 months, whichever is shorter.¹³⁴

Canada

- The creditor is under an obligation to remove a registration relating to a security interest in consumer goods within 15 days of the performance of the secured obligations (SSPSA s 50(2), OPPSA s 57).
- In provinces except Ontario, the debtor may request (in writing) an amendment or cancellation in situations a. b. c. and d. (SPPSA s 50(3)). If the creditor does not comply with the request (or get a court order maintaining the registration) the debtor is entitled to apply to the registrar to register the cancellation or amendment, on proof that the demand was made and not met (in some provinces, see SPPSA s 50(5) - (7)) or, in other provinces, is entitled to register the amendment or cancellation itself (Nova Scotia PPSA s 51(5)). In all these provinces, where security is held by a trustee, a court order is required authorising the cancellation or amendment registration. In Ontario, a court order is required in all cases (OPPSA s 56).¹³⁵
- The creditor is under an obligation to amend the register if it knows that there is a change of the debtor's identifier, or that an encumbered asset is transferred to another person subject to the security interest. In both these situations, a search against the new name or the new owner will not reveal the existing security interest. The secured creditor is given a grace period from the date knowledge is acquired during which to amend the register: if the amendment is not made within the grace period the first secured creditor loses priority to a security right perfected after the name or ownership change but before the expiry of the grace period. After the expiry of the grace period the priority rule is first to file (amendment in the case of

¹³² See Duggan & Brown 'Australian Personal Property Securities Law' (2nd edn 2016) 6.76 – 6.76.

¹³³ See Duggan & Brown 'Australian Personal Property Securities Law' (2nd edn 2016) 5.47 – 5.53.

¹³⁴ APPSA s 166.

¹³⁵ See Cuming, Walsh and Wood 'Personal Property Security Law' (2nd edn 2012) 337 – 339.

the first security interest and registration in the case of the second security interest).

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United States

- The creditor is under an obligation to remove a registration relating to a security interest in consumer goods within 30 days of the performance of the secured obligations (UCC 9-513(a) and (b)(1)).
- The debtor may send an ‘authenticated demand’ to the secured creditor in situations a. b. and d (9-513(c)(1)-(4)).
 - In relation to a security interest in consumer goods, the secured creditor must file (or cause the secured party of record to file) a termination statement within 20 days (9-513(b)(2)).
 - In relation to a security interest in any other collateral, the secured creditor must send the debtor a termination statement or file a termination statement within 20 days (or cause the secured party of record to do so) (9-513(c)).
 - I do not entirely follow the alternative of sending a termination statement (the comment is not very clear). I think it is a way of allowing the debtor to file the termination statement himself but I cannot find that written down anywhere.
 - If the secured creditor does not send a termination statement or file a termination statement within 20 days, the debtor can file a termination statement, but it must indicate that it is filed under these circumstances (9-509(d)(2)).
 - There is also liability in damages for a secured creditor who fails to file or send a termination notice (9-625(e)).
- As far as I can see, there is no equivalent provision in relation to amendments, eg where the information in the initial registration is inaccurate but I may have missed something.
- Where there is a change of the debtor’s identifier, or an encumbered asset is transferred to another person subject to the security interest, the security interest remains perfected (even though a search against the new name or the new owner will not reveal the existing security interest) in relation to existing collateral and collateral acquired within 4 months of the change. In relation to collateral acquired later, the secured creditor loses priority unless it files an amendment.¹³⁷ (9-507). This seems to be a pragmatic compromise since second secured creditors in relation to existing collateral (as opposed to after-acquired property or providing finance for new assets) are rare.¹³⁸

¹³⁶ Saskatchewan PPSA s51, OPPSA s48 is slightly different: if an amendment is not registered within the grace period the security interest becomes unperfected but can be reperfected by the filing of an amendment.

¹³⁷ UCC.

¹³⁸ See C. Walsh, ‘Transplanting Article 9 : the Canadian PPSA experience’ in O Akseli and L Gullifer, ‘*Secured Transactions Law Reform: Principles, Policies and Practice*’ (Hart Publishing, 2016) 73.

Jersey

- The debtor may serve a written amendment demand on the creditor in situations a. b. c. and d. demanding amendment or cancellation, as appropriate, within 30 days (s 75).
- If the creditor does not carry out the action demanded or served on the debtor and the registrar notice of objection, the debtor may apply to the registrar for registration of the amendment or cancellation, and the registrar must carry it out if he is satisfied that the creditor has done neither of these things. (s 76)
- If the creditor does serve a notice of objection, the debtor may apply to the court, who adjudicates. (s 77)

Appendix C: Methods to deal with ‘empty filing’

Law Commission Report no 296

- The person filing should confirm on the (electronic) financing statement that the person named as debtor agrees to the filing (reg 5(3)).
- The debtor has a right to damage if a person registers a financing statement without the debtor’s consent, or confirms the existence of a security agreement which does not exist (re 17(1)).
- On registration, the registry sends the secured party a ‘verification statement’ and also must send a copy to the debtor by post to its registered address (re 8(1)).¹³⁹ If the debtor is a foreign company without a registered place of business in the UK, the secured creditor must send it a verification statement as soon as reasonably practicable, unless the debtor has waived the right to receive such a statement (reg 8(2)). The sanction for non-compliance is liability in damages (reg 17(2)).
- On receiving this statement, the debtor can demand an amendment or cancellation (see Appendix B) if it has not authorised the registration or if any of the other reasons in 5(B)(a) a. b. c. or d. above apply.
- A penalty for knowingly making a false statement on a register (this is already English law, see s1112 Companies Act 2006).
- A financing statement is ineffective to perfect a security interest if it contains a defect so that its existence would not be discovered by a reasonable search (reg 9(1)). But nothing requires a search to actually have been carried out (reg 9(4)).

UNCITRAL Model Law

- A registration (initial or amendment notice adding assets or extending period of effectiveness of registration) is only valid if authorised by the grantor in writing (registry provisions art 2). Authorisation can be given before or after registration.
- On registration, the registry sends the secured party a ‘verification statement’ and the secured party must send a copy to the debtor within [a specified number of] days, unless the debtor has waived the right to receive such a statement (registry provisions art 15). Sanction for non-compliance by secured creditor is liability for [a fixed amount] and in damages for actual loss (registry provisions art 15(4)).
- On receiving this statement (or at any time), the debtor can demand an amendment or cancellation (see Appendix B) if it has not authorised the registration or if any of the other reasons in 5(B)(a) a.b.c or d. above apply (registry provisions art 20).
- If the registration is not authorised, and either (a) the grantor informs the secured creditor that it will not authorise it or (b) an initial authorisation has been withdrawn or (c) the security right has been extinguished, the secured creditor is under an obligation to register a cancellation notice.

¹³⁹ The Law Commission’s proposals only related to security interests granted by companies, and so the registrar (Companies House) would always have contact details registered on its system.

New Zealand

- There is no requirement that a registration be authorised.
- On registration, the registry sends the secured party a ‘verification statement’ and the secured party must send a copy to the debtor within 15 days, unless the debtor has waived the right to receive such a statement (s148). The secured creditor is sent an email containing the verification statement, which can be forwarded to the debtor.¹⁴⁰
- On receiving this statement, the debtor can demand an amendment or cancellation (see Appendix B) if it has not authorised the registration or if any of the other reasons in 5(B)(a) a. b. c. or d. above apply.
- The sanction for non-compliance is, as far as I can see, a liability in damages under the general liability section (s176).
- A financing statement is ineffective to perfect a security interest if it is seriously misleading (s149).
 - Although what is seriously misleading is not statutorily defined, it includes a seriously misleading defect or omission in the name of any of the debtors or the serial number of collateral if required to be described by serial number (s150).
 - What is seriously misleading depends on the way that the search function on the register works: the NZ one is an ‘exact match’ system, so more errors are seriously misleading than, for example, in Canada which adopts a close match system.¹⁴¹
 - There is no need to show that someone is actually misled (s151): the test is objective.

Australia

- There is no requirement that a registration be authorised.
- On registration, the registry sends the secured party a ‘verification statement’ and the secured party must send a copy to the debtor as soon as reasonably practicable, unless the debtor has waived the right to receive such a statement (s 157).
- If the secured party does not do so, this constitutes an interference with the privacy of the individual under s 13 of the *Privacy Act 1988* and also gives rise to a right to damages under s 271.
- On receiving this statement, the debtor can demand an amendment or cancellation (see Appendix B) if it has not authorised the registration or if any of the other reasons in 5(B)(a)a.b.c or d. above apply.
- Further, a person may not register a financing statement unless they believe on reasonable grounds that a security agreement will follow (s151).
 - Contravention leads to a civil penalty
- If there is an advance registration, the secured party must discharge it within 5 days unless they believe that a security agreement will follow. (s151(2))

¹⁴⁰ <http://www.ppsr.govt.nz/cms/secured-party-information/financing-statements/what-you-need-to-know/verification-statements?searchterm=waive>.

¹⁴¹ Gedye, Cuming and Wood, ‘Personal Property Securities in New Zealand’ 473-474.

- It has been strongly argued that these provisions lead to uncertainty, that they may deter legitimate advance registration and that they may increase the cost of credit.¹⁴²
- The statutory review, on balance, recommended keeping the section but amending it slightly, and also to require a further description of the collateral in the ‘free text’ field using information reasonably available to the secured party at the time of registration. This is to stop over broad collateral descriptions in advance registration. However, it does, also, lead to uncertainty.¹⁴³
- A financing statement is ineffective to perfect a security interest if it is seriously misleading (s164).
 - In addition to ‘seriously misleading’ defects, there are some which are specifically said to make a registration ineffective (s165):
 - Serial number defects where the serial number is compulsory and the defect makes the registration undiscoverable.
 - Errors in details of grantor (debtor) making the registration undiscoverable
 - Incorrect assertion that the security interest is a PMSI.
 - What is seriously misleading depends on the way that the search function on the register works: the Australian one is an ‘close match’ system, like Canada.
 - There is no need to show that someone is actually misled (s164(2)): the test is objective.

Canada

- There is no requirement that a registration be authorised.
- On registration, the registry sends the secured party a ‘verification statement’ and the secured party must send a copy to the debtor within 30 days, unless the debtor has waived the right to receive such a statement (SPPSA s 43(12), OPPSA 46(6)(OPPSA has no provision on waiver)).
- If the secured party does not do so, in Ontario it is liable to a fine of \$500 (s46(7) or is liable in damages for at least a prescribed amount (SPPSA 65(5) – (6)).
- On receiving this statement, the debtor can demand an amendment or cancellation (see Appendix B) if it has not authorised the registration or if any of the other reasons in 5(B)(a) a.b.c or d. above apply.
- A financing statement is ineffective to perfect a security interest if it is seriously misleading (SPPSA s 43(6), OPPSA s 46(4) ‘unless a reasonable person is likely to be misled materially’ but there is probably no difference in the tests)¹⁴⁴.
 - Although what is seriously misleading is not statutorily defined, it includes a seriously misleading defect or omission in the name of any of the debtors or

¹⁴² Duggan & Brown 2nd edn 6.44.

¹⁴³ Duggan & Brown 2nd edn 6.45.

¹⁴⁴ Cuming, Walsh and Wood, ‘Personal Property Security Law (2012) 363.

the serial number of collateral if required to be described by serial number (SPPSA s43(7) OPPSA s 46(5)).

- What is seriously misleading depends on the way that the search function on the register works: the NZ one is an ‘exact match’ system, so more errors are seriously misleading than, for example, in Canada which adopts a close match system.¹⁴⁵
- There is no need to show that someone is actually misled (SPPSA s 43(8)): the test is objective (this is inherent in the Ontario formulation: see OPPSA s 46(4)).

US:

- A registration is only valid (effective to perfect an interest) if the debtor authorises it by one of three means (9-509 and 9-510).
 - By making an authenticated record OR
 - By entering (or having entered) into a security agreement the debtor authorises the filing of a financing statement in relation to collateral described in that security agreement OR
 - By acquiring proceeds in which a security interest continues: this authorises registration of a financing statement in relation to those proceeds.
- This scheme replaced the previous system (before electronic registration) whereby the financing statement had to contain the signature of the debtor (former 402(1)).
- There is an action in damages for \$500 plus loss against any person who makes an unauthorised registration (9-625(b) and (e)(3)).
 - This only works if the registrant can be found (they are anonymous under Article 9, although I am not sure how that works in practice, as presumably the Registrar knows who filed) and has funds.
- A debtor could force an amendment or cancellation by sending an ‘authenticated demand’ (see Appendix B above).
- Since an amendment or cancellation normally needs the consent of the secured creditor of record (9-509(d)), a debtor cannot file one himself, but can file a ‘correction statement’ which flags up that there is a dispute (9-518).

Jersey

- No requirement that registration be authorised.
- Verification statement issued to secured party, who is obliged to send a copy to the grantor within 30 days (s.65).
- Grantor can demand cancellation (s.75) on a number of grounds including:
 - that no relevant security agreement exists between the parties named in the registration, and the person named in the registration as the secured party has not entered an agreement to give value, being an agreement that is to be secured by the relevant security agreement (s.75(1)(d)).
- Registration invalid if seriously misleading. Objective test for what is misleading (s.66).

¹⁴⁵ Gedye, Cuming and Wood, ‘Personal Property Securities in New Zealand’ 473-474.

Appendix D: Rights to obtain information for secured creditor identified in the registration

These are the rights to information provided by the statutes. Of course, any party can ask the identified secured creditor for information and they can provide it if they are willing without there being a statutory right.

Law Commission Report no 296

No provision

UNCITRAL Model Law

- Grantor has the right to call for a statement of the obligation currently secured; and a description of the assets currently encumbered from the secured creditor (art 56).
- This seems to be similar to the US system (see below): the idea being that the grantor can then pass it on. I am not sure why this choice was made in the Model Law: it was never discussed then I was there and I'm afraid I did not ask.

New Zealand

- Certain persons can request information as follows (s.177(1)):
 - Copy of security agreement.
 - Details of the secured obligation.
 - Details of the collateral.
- If information not provided interested person can apply to the court for an order (s.181).
- No explicit provisions on confidentiality etc but secured creditor can apply to court for exemption (s179).
- Persons who can demand are:
 - Debtor.
 - A person with a security interest in personal property of the debtor.
 - A judgment creditor,
 - An authorised representative of any of the above.
- Excluded are:
 - Prospective secured creditor.
 - Prospective transferee.
 - Unsecured creditor (unless has judgment)
 - These people are expected to ask the grantor to ask for the information and get it sent to them.¹⁴⁶

Australia

- An 'interested person' can request information as follows (s.275(1)).
 - Copy of security agreement

¹⁴⁶ Gedye, Cuming & Wood 177.2.

- Details of the secured obligation
 - Details of the collateral
- If information not provided interested person can apply to the court for an order (s.280).
- Exceptions are
 - where there is a confidentiality agreement (with some exceptions s275(6) and (7) or
 - where disclosure would contravene a duty of confidence (s.275(6)(c) or
 - disclosure would be illegal (s.275(b))
 - Secured creditor can apply to the court for exemption (s.278)
- An 'interested person' is (s.275(9)):
 - Grantor, or its auditor.
 - A person with a security interest in the collateral.
 - An execution creditor (statutory review suggested that this be extended to include a judgment creditor who is contemplating execution).
 - An authorised representative of any of the above (it has been recommended by the Statutory Review that this includes the insolvency officer of the grantor).
- Excluded are:
 - Prospective secured creditor.
 - Prospective transferee.
 - Unsecured creditor (unless has completed execution).
 - These people are expected to ask the grantor to ask for the information and get it sent to them: this isn't clear from the Act but seems to be envisaged by all the PPSA schemes.¹⁴⁷

Canada

- Certain persons can request information as follows (s.18 (1) OPPSA and SPPSA).
 - Copy of security agreement.
 - Details of the secured obligation.
 - Details of the collateral.
- If information not provided specified person can apply to the court for an order (s.18(8)(c) OPPSA, s.18(10) SPPSA).
- No explicit provisions on confidentiality etc but secured creditor can apply to court for exemption (s179).
- Persons who can demand are:
 - Debtor
 - A person with a security interest in personal property of the debtor.
 - A judgment creditor (under SPPSA s.18(1) and other PPSAs except Ontario any creditor).¹⁴⁸
 - An authorised representative of any of the above.
- Excluded are:

¹⁴⁷ See Duggan & Brown 5.55.

¹⁴⁸ See Cuming, Walsh & Wood, 326

- Prospective secured creditor.
- Prospective transferee.
- Unsecured creditor (unless has judgment).
- These people are expected to ask the grantor to ask for the information and get it sent to them.¹⁴⁹

United States

- The secured creditor is only obliged to comply with requests by the debtor for information (§9-210).
- The information that can be requested is:
 - List of collateral.
 - Statement of unpaid obligations.
- The persons who can demand information is limited to the debtor, on the grounds that the secured creditor should not be obliged to give information to any casual enquirer.¹⁵⁰
- The debtor is then able to pass on the information to anyone it wishes including parties with whom it is in negotiations.¹⁵¹
- Remedy if secured creditor fails to disclose information as requested is damages based on loss plus \$500 (§9-625(f)).

Jersey

- Only grantor has the right to demand information, namely
 - a copy of the security agreement;
 - a statement in writing of the amount of the indebtedness under the security agreement and of the terms of payment of the indebtedness;
 - a description of the collateral under the security agreement (s. 85(1));
 - identity of successor to secured creditor (s.88).
- Secured party can apply to court for exemption (s.86).
- If information not provided grantor can apply to the court for an order (s.87).

¹⁴⁹ Cuming, Walsh & Wood, 327

¹⁵⁰ Revised Article 9-210 note 3.

¹⁵¹ Ibid. For discussion of the differences between the US and the PPSA approaches see C. Walsh 'Transplanting Article 9: the Canadian PPSA experience' in O Akseli and L Gullifer, *'Secured Transactions Law Reform: Principles, Policies and Practice'* (Hart Publishing, 2016) 67.