

# Forum Law

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## PERSONAL PROPERTIES SECURITIES *an overview*

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The new Personal Properties Securities Act [the Act] came into force on 30 January 2012.

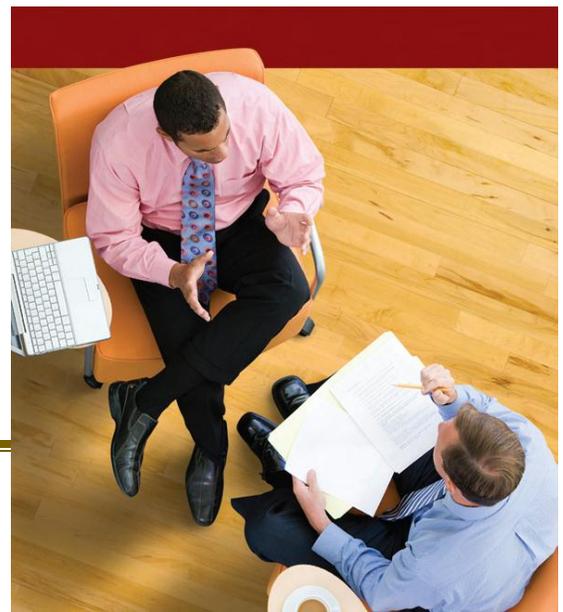
The Act relates to the registration of securities over “Personal Property” [i.e. not land or “real property”. It covers situations where a **Secured Party** [the party seeking the security] wants to take an enforceable security over Personal Property [ “tangible property” like products/goods/vehicles/inventory, and financial instruments and “intangible property” such as intellectual property]. This Personal Property is referred to as “the **Collateral**”. Having an enforceable security over the Collateral can provide some protection in the event of the insolvency of the person or entity *holding* the Collateral or the person who *owes the debt* to the Secured Party [the **Grantor**]

The Act replaces more than 70 pieces of legislation Australia-wide. For example it replaces the REVS register for motor vehicles, and ASIC company charges, bailment and consignment arrangements for goods on another person’s land, and “retention of title” clauses in supply agreements.

The purpose of the Act is to streamline and harmonise all of the previous pieces of Commonwealth and state legislation into one Act.

To comply with new Act and ensure that your Personal Property is protected against any competing claims by your customers or suppliers or third parties you will need to take the following steps:

1. Identify which interests in your Personal Property you need to protect. To assist with this process please refer to our attached CHECKLIST [Attachment 1].
2. There are 2 stages to “**perfect**” a security interest in goods [Collateral]. The first stage is to have complying “Security Agreement” and the second stage is to register the security interest on the PPSR [Personal properties Securities Register].
3. **Revise your written Agreements** with your customers or other parties who may have possession of your



Personal Property to ensure that you all agree in writing to the new terms. Have the parties sign the new revised "Security Agreement". For example, Security Agreements are contained in your terms of trade [as a retention of title clause], a company charge, a bailment agreement or consignment agreement or any agreement where you do not have possession of the Personal Property in which you have an interest.  
*Forum Law will advise and assist you with this task.*

4. Set up an Account on the **PPSR** website at [www.ppsr.gov.au](http://www.ppsr.gov.au) . Retain your account details for future use.
5. Set yourself up as a Secured Party Group on the PPSR website
6. Create a **Financing Statement** on the PPSR website.
  - The Financing Statement is the registration document you will need to create on the PPSR to register your "security interest" in the Collateral of the Grantor. This process of registration is referred to as the "perfection" of the security interest
  - You can download the Financing Statement from the PPSR website [[www.ppsr.gov.au](http://www.ppsr.gov.au)]. The classes of Collateral are prescribed in the Financing Statement. [see attached the requirements for a FINANCING STATEMENT as Attachment 2]
  - You will need to first identify the specific class of "Collateral" for the Financing Statement [ see attached a list of the PRESCRIBED "CLASSES" OF COLLATERAL. [Attachment 3].
  - You are advised to include in your registration of any Collateral a security interest in the "proceeds" of the Collateral [s.31]. This covers situations where the original Collateral is on-sold and where goods are processed or co-mingled. Consider describing the Collateral as "all present and after acquired property"
  - Be sure to discharge the Security Interest once the arrangement with the Grantor is completed.

You will need to prepare and register a Financing Statement for each customer [Grantor] but you will not be required to register a new Financing Statement each time you supply goods to that same customer. The one Financing Statement will cover all goods in the SAME class for that Grantor. You will need to register a new Financing Statement for a different CLASS of goods for the same customer. [s.20(6) & s. 32(1)(b)]

## 7. In respect of former "Retention of Title" [ROT] Clauses:

- 7.1 ROT clauses create a "Security Interest" under the Act and must now be worded correctly and registered under the Act to ensure maximum protection to a seller of goods [the Secured Party].
- 7.2 The seller [Secured Party] will remain the owner of the goods until the goods are paid for or as provided in the terms of trade. For the purposes of the Act, however, **ownership of the goods is largely irrelevant. Possession is the**

**issue.** The Act will treat the arrangement as if it were a secured loan, and the Act will apply as if the purchaser [the Grantor] who has possession of the goods had become the owner of the goods and had granted security over the goods back to the seller [the Secured Party].

7.3 A Purchase Money Security Interest [PMSI] [pronounced “pimsee”] [see Attachment 4 below] secures obligations of the purchaser [Grantor] for the *unpaid purchase price* of the Collateral, and any related credit or interest. By registering a PMSI over goods [ as Collateral] the seller [Secured Party] will have a priority over other perfected [registered] security interests granted by the purchaser [Grantor] over the same goods that are not a PMSI. In effect, the registration of a PMSI as a security interest will give the Secured Party a “super priority” subject to compliance with the Act. The types of Collateral that cannot be described as a PMSI are:

- Goods ordinarily used for personal domestic or household use [other than a motor vehicle];or
- Collateral that is a “chattel paper”, an investment instrument, an intermediated security, or a negotiable instrument

PMSI’s will arise in the following scenarios which are usually involving a commercial situation :

- Where a lender [the Secured Party] advances funds at the point of sale for the purchase of personal property [for example a car] the Grantor will grant to the lender [Secured Party] a secured interest including a PMSI over the Collateral [the car];
- Where a seller [the Secured Party] advances property to a purchaser [the Grantor][for example under a ROT] the purchaser will grant to the seller a secured interest including a PMSI over the Collateral [the goods sold];
- Where a Hirer/Lessor/Bailor/Consignor of goods [the Secured Party] provides goods for hire/lease/bailment/consignment [for example equipment] the Grantor [the Hiree/ Lessee/Bailee/Consignee who takes and uses those goods on their own property will grant to the Hirer/Lessor/Bailor/Consignor a secured interest including a PMSI over the goods [the Collateral]. These arrangements are referred to as a PPS Lease [see “13. Equipment Leases” below]

7.4 When you revise your ROT clauses, you must ensure the terms match your method of trading, e.g. if there are sub-sales to third parties, or co-mingling and processing of goods. If goods become attached to land then they may no longer have rights to the goods under the ACT as fixtures are excluded and the seller may need to consider a caveat or other notice of their interest

7.5 You can elect to just revise the ROT clauses only in your existing agreements if you are not able to re-issue a whole new agreement [see 7.5 below]. You must seek agreement to these revised clauses from the Grantor [purchaser] by obtaining from the Grantor a signed copy of the revised clause [by email or fax may be sufficient].

## 7.6 Timing:

Generally you will not have to register ROT arrangements for goods which have been supplied before 30 January 2012 EXCEPT where the money for these goods is likely to be outstanding after 30 January 2014. This allows for a 2 year “transition period” from 30 January 2012.

For all new supplies where the seller [Secured Party] has a **PMSI** [a Purchase Money Security Interest]. [s.14] the following time frames apply.

- Where the seller [Secured Party] sells “Inventory” that is *tangible property* as Collateral then the seller must register the Financing Statement on the PPSR before the purchaser [being the Grantor of the security interest in the goods] takes possession of the said Inventory AND on the Financing Statement the seller must indicate that the security interest is a PMSI [a Purchase Money Security Interest]. [s.14].
- Where the seller [Secured Party] sells “Inventory” that is *intangible property* as Collateral then the seller must register the Financing Statement on the PPSR before the security interest “attaches” to the Inventory. “Attachment” is when the purchaser takes possession of the Inventory which is intangible which could mean the downloading of software from the seller’s computer server or accessing a source code. On the Financing Statement the seller must indicate that the security interest is a PMSI [a Purchase Money Security Interest].
- Where the seller [Secured Party] sells “Non-Inventory” that is *tangible* as Collateral then the seller must register the Financing Statement on the PPSR within 15 business days after the purchaser [ being the Grantor of the security interest in the goods] takes possession of the said Non- Inventory AND on the Financing Statement the seller must indicate that the security interest in the Collateral is a PMSI [a Purchase Money Security Interest].
- Where the seller [Secured Party] sells “Non-Inventory” as Collateral that is *intangible* then the seller must register the Financing Statement on the PPSR within 15 business days after the security interest “attaches” to the Non-Inventory. “Attachment” is when the purchaser takes possession of the Inventory which is intangible which could mean the downloading of software from the seller’s computer server or accessing a source code AND on the Financing Statement the seller must indicate that the security interest in the Collateral is a PMSI [a Purchase Money Security Interest].



*“Inventory” is defined in s.10 of the Act as :*

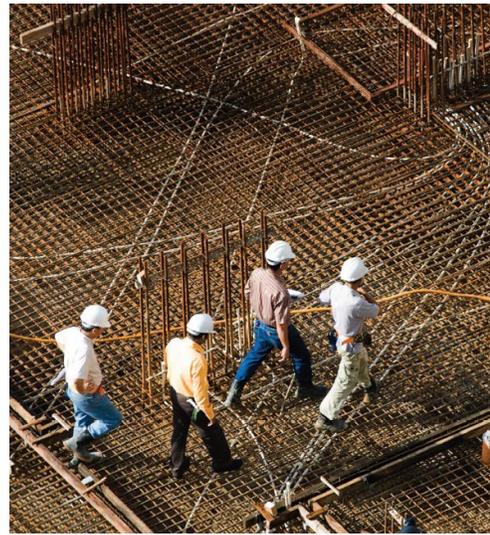
*Personal property used in the ordinary course of business by an entity with an ABN, including:*

- *property held for sale, or lease*
  - *property held to be provided under a contract for services*
  - *property held as raw materials or as work in progress, and*
  - *property used or consumed as materials.*
- Where the security interest in the original Collateral is perfected [by registration of a Financing Statement on the PPSR] but the security interest in the “proceeds” of that Collateral are not included in that Financing Statement then there is a “temporary perfection” of those “proceeds” for 5 business days after the perfection [registration] of the original Collateral. [s.33(2)]. So it is advisable to perfect the security interest over the “proceeds” in this time by ensuring they are included as part of the Finance Statement.

## 8 Construction companies:

The lease of equipment and portable cabins on a construction site will give rise to a PPS Lease, if the lease term could exceed one year, or 90 days, in the case of equipment that may or must be described by serial number under the PPS regulations. The lessor of the equipment will be entitled to notify their interest on the PPS Register.

A principal’s take-out rights in construction contracts may give rise to a security interest in personal property that ought to be registered by the principal against the contractor.



## 9. Agricultural perfected security interests

Part 3.2 of the Act specifically provides for a situation in which a secured party provides value for crops to be grown or livestock to be fed to register and gain priority over all other security interests in the crops and livestock and resultant proceeds.

## 10. Intellectual property

As the Act applies to tangible and intangible property [see above], this includes intellectual property which is subject to a statutory registration (for example patents, designs and trade marks) and any other statute (for example copyright).

While the Act generally applies to intellectual property in the same way as it does to other forms of personal property, you need to be aware that certain rules apply to the correct identification of that intellectual property when you register it on a Financing Statement. Pursuant to s 44 of the Act any serial number identifying the intellectual property must (for consumer property) or may (for commercial property) be entered with the serial number in the Financing Statement. If this requirement is not complied Otherwise the perfection of your security interest over the intellectual property may be compromised.

If you hold a security interest in intellectual property currently registered under legislation (such as the Patents Act, Designs Act and the Trade Marks Act) and showing on registers operated by IP Australia then you have until the end of the transition period being 30 January 2014 to perfect that interest.

#### 11. Financing agreements

The new definition of security interest contained in the Act extends the concept of security interests beyond traditional forms of security. This means that where arrangements like conditional sale, hire purchase and finance lease agreements secure payment or performance of an obligation, they will now be regulated by the Act.

#### 12. Receivables

The Act describes interests arising from certain transactions to be "deemed" security interests, whether or not the security interest secures a payment or performance of an obligation. The interests of a transferee under a transfer of an account or "chattel paper" are included as security interests. An "account" is defined under the Act as including a monetary obligation arising from disposal of property or the "provision of services". Therefore it appears that a receivable will be a security interest which can be protected by the Act.

#### 13. Equipment Leases

An equipment lease may give rise to a security interest as either an in-substance security (e.g. a finance lease) or a deemed security interest (PPS Lease). If so, it will need to be registered on the PPS Register to protect the lessor's rights (subject to the transitional arrangements). Leases of equipment for more than a year (or 90 days for certain serial numbered goods) must be registered and perfected to be protected in favour of the Secured Party [the Lessor].

#### 14. Enforcement

- A seller can no longer "enforce" its ROT clause by simply taking goods back if they are not paid for as there are prescribed enforcement procedures under the Act);
- For the "transition period" of 2 years, until 30 January 2014, old ROT clauses and company charges which have been migrated from ASIC Register of Charges, will take priority over PMSI's, but otherwise PMSI's take priority over unperfected security interests
- The following table shows priorities over interests in goods [Collateral]

### PPSR – PRIORITIES

#### FIRST PRIORITY PRIORITY

#### SECOND PRIORITY

Perfected Security Interest

Unperfected Security Interest

Perfected by control of the goods

Perfected by other means

Perfected first in time

Perfected later in time

- An Unperfected Security Interest vests in the Grantor on an insolvency which means the liquidator can take ownership in priority to any other person.

## 15. Exceptions-Low value consumer transactions

A purchaser or lessee of personal property, takes the property free of any security interest where the purchaser/lessee intends to use it predominantly for personal, domestic or household purposes and the market value is not more than \$5,000 (or higher amount under s.47 of the Act). This exemption from the Act does not apply if the purchaser or lessee buys or leases with knowledge that the sale or lease constitutes a breach of another security agreement relating to the goods. Further, it does not apply if the property is of a kind that the regulations say may or must be described by serial number in a registration; or where the purchaser or lessee believes that the market value exceeds \$5,000 (or higher amount prescribed).

## 16. Searching the PPSR

If you want to search the PPSR to check out the status of goods [tangible or intangible] or of the assets of a company or an individual then refer to the PPSR website pages at

<http://www.ppsr.gov.au/AsktheRegistrar/Whocansearch>

<http://www.ppsr.gov.au/ForBusiness/ForBusinessSearching>

You can use the tutorial to assist you with your search. You will need create an account to pay for the search.

You can conduct a search using any of the following identifiers:

1. Registration Number of a vehicle
2. Serial Number
  - a. Vehicle and watercraft serial number search
  - b. Other serial number types search
3. Grantor
  - a. Grantor individual search for which you will need the consent of the grantor and their name and date of birth
  - b. Grantor organisation search
4. an Ordinal

**An example from New Zealand** - The case of *Graham v Portacom New Zealand Ltd [2004] 2 NZLR 528* was the first New Zealand case and a good example of why you should register a security interest. The case reports show that Portacom was a company that had leased portable toilets to NDG Pine. Separately, NDG Pine took a loan from HSBC secured by a fixed and floating charge over all of its property. Unlike Portacom, HSBC registered its security interest on the PPS register. NDG Pine defaulted on its loan and HSBC appointed receivers to NDG Pine. Under the pre-PPS law, Portacom would have been able to take registered security interest had priority over Portacom's unregistered interest as the owner and lessor. Portacom's failure to register its lease meant the receivers could sell the toilets and pay the proceeds to HSBC, even though Portacom was the lawful owner and had only leased them to NDG.

***As you will appreciate this is a very summarised overview of the new Act. We can assist you further as required. Please call us at Forum Law on (+ 61 2) 9560 3388.***

## A CHECKLIST

## ATTACHMENT 1

<b>DOES THE PPSA AFFECT YOUR BUSINESS?</b>	<b>Yes</b>	<b>No</b>
<b>In the course of your business :</b>		
• Do you supply or have supplied to you goods on credit, either on retention of title terms or on the basis of receiving/providing some form of security over the goods?	<input type="checkbox"/>	<input type="checkbox"/>
• Do you enter into documents that include charging clauses or do your standard documents include clauses that are intended to give you some form of security over non-real estate assets?	<input type="checkbox"/>	<input type="checkbox"/>
• Do you supply credit/finance (including vendor finance) secured by non-real estate assets or borrow funds secured by non-real estate assets?	<input type="checkbox"/>	<input type="checkbox"/>
• Do you lease or enter into similar arrangements for a period of more than one year or for an indefinite term?	<input type="checkbox"/>	<input type="checkbox"/>
• Do you or any of your customers factor their debts?	<input type="checkbox"/>	<input type="checkbox"/>
• Are you party to any commercial consignment arrangements?	<input type="checkbox"/>	<input type="checkbox"/>
• Do you provide or enter into hire-purchase arrangements?	<input type="checkbox"/>	<input type="checkbox"/>
• Do you take or provide security over goods by way of pledge?	<input type="checkbox"/>	<input type="checkbox"/>
• Do you take or provide security over intellectual property?	<input type="checkbox"/>	<input type="checkbox"/>
• Do you acquire debts or are you involved in receivables financing?	<input type="checkbox"/>	<input type="checkbox"/>
• Do you currently take or grant any form of security over non-real estate assets to secure the performance of obligations, eg under franchise arrangements, shareholder agreements or joint ventures?	<input type="checkbox"/>	<input type="checkbox"/>

If you have answered YES to any of the above questions, the PPSA is likely to apply to your business.

## ATTACHMENT 2

[Taken from the Regulations] The table below sets out the requirements of section 153 of the Personal Property Securities Act to register details of the secured party, grantor and collateral on the Personal Property Securities Register.

**Personal Properties Securities Regulations 2010** (Table 1)  
**Schedule 1 Financing statement matters for items of table in subsection 153 (1) of Act**

<b>Financing statements with respect to security interests</b>		
<b>Item</b>	<b>Data about:</b>	<b>Details of data</b>
<b>1</b>	The secured party	The details prescribed by the regulations, in relation to each secured party, of: (a) the secured party; or (b) a person nominated by the secured party who has authority to act on behalf of the secured party.
<b>2</b>	The grantor	Whichever of the following is applicable: (a) if the collateral is consumer property, and is required by the regulations to be described by serial number—no grantor's details; (b) if the collateral is consumer property, and is not required by the regulations to be described by serial number—the grantor's name and date of birth, as evidenced in accordance with the regulations, and no other details; (c) in any other case—the grantor's details as prescribed by the regulations.
<b>3</b>	Giving of notices	The following: (a) an address (including an email address or fax number) for the giving of notices to the secured party (or secured parties) relating to the registration; (b) details of any identifier provided for the giving of notices to the secured party (or secured parties). Note: For identifiers, see section 289.
<b>4</b>	The collateral and proceeds	A collateral description in accordance with all of the following rules: (a) the collateral must be described as one of the following: (i) consumer property; (ii) commercial property; (b) the collateral may or must be described by serial number, if allowed or required by the regulations; (c) the collateral must belong to a single class of collateral prescribed by the regulations; (d) any description of proceeds must comply with the regulations. Note: Two or more types of collateral that belong to

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**Financing statements with respect to security interests**

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<b>Item</b>	<b>Data about:</b>	<b>Details of data</b>
		different classes prescribed by the regulations must be described in separate registrations. However, two or more registrations can be effected through a single application.
<b>5</b>	The end time for registration	For all the collateral described in the statement, the following data: (a) for collateral other than consumer property or property described by a serial number: (i) no stated end time; or (ii) an end time for the registration no later than the time (the <b>default time</b> ) that is the end of the day 25 years after the registration time; or (iii) if the registration is amended to include or change (but not omit) an end time--an amended end time for the registration no later than the time (the <b>default time</b> ) that is the end of the day 25 years after the amendment time for that amendment; (b) for consumer property, or property described by a serial number: (i) an end time for the registration no later than the time (the <b>default time</b> ) that is the end of the day 7 years after the registration time; or (ii) if the registration is amended to change the end time—an amended end time for the registration no later than the time (the <b>default time</b> ) that is the end of the day 7 years after the amendment time for that amendment.
<b>6</b>	Subordination	An indication of whether the security interest is (or is to be) subordinated to any other security interest. However, this indication need not be included.
<b>7</b>	Security interest	An indication of whether the security interest is, or is to be, a purchase money security interest (to any extent) if the security interest is in respect of a class of collateral prescribed by the regulations for the purposes of this item.
<b>8</b>	Any matter prescribed by the regulations	Details of the matter prescribed by the regulations, whether or not the matter also comes under any of the other items in this table.

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## ATTACHMENT 3

### Personal Property Securities Regulations 2010

### Schedule 1

#### 2.3 CLASSES OF COLLATERAL

(1) For paragraph (c) of **item 4** of the table in subsection 153 (1) of the Act the following classes of collateral are prescribed:

- (a) agriculture;
- (b) aircraft;
- (c) all present and after-acquired property;
- (d) all present and after-acquired property, except \_\_\_\_\_ [to be inserted];
- (e) financial property;
- (f) intangible property;
- (g) motor vehicles;
- (h) other goods [see below];
- (i) watercraft.

(2) In paragraph (1) (h):

**other goods** means personal property that is goods, other than agriculture, aircraft, motor vehicles and watercraft.

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## ATTACHMENT 4

### PERSONAL PROPERTY SECURITIES ACT 2009 - SECT 14

#### Meaning of purchase money security interest

##### General definition

(1) A ***purchase money security interest*** means any of the following:

- (a) a security interest taken in collateral, to the extent that it secures all or part of its purchase price;
- (b) a security interest taken in collateral by a person who gives value for the purpose of enabling the grantor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights;
- (c) the interest of a lessor or bailor of goods under a PPS lease;
- (d) the interest of a consignor who delivers goods to a consignee under a commercial consignment.

##### Exceptions

(2) However, a ***purchase money security interest*** does not include:

- (a) an interest acquired under a transaction of sale and lease back to the seller; or
- (b) an interest in collateral (as original collateral) that is chattel paper, an investment instrument, an intermediated security, a monetary obligation or a negotiable instrument; or
- (c) a security interest in collateral that (at the time the interest attaches to the collateral) the grantor intends to use predominantly for personal, domestic or household purposes.

(2A) Despite paragraph (2)(c), a ***purchase money security interest*** includes an interest if:

- (a) the interest is covered by subsection (1); and
- (b) the interest is in collateral that (at the time the interest attaches to the collateral) the grantor intends to use predominantly for personal, domestic or household purposes; and
- (c) the collateral is of a kind that is required or permitted by the regulations to be described by serial number.

##### Mixed securities

(3) If a security interest in [collateral](#) secures obligations covered by subsection (7) ( *purchase money obligations* ) and other obligations, the security interest is a purchase money security interest only to the extent that it secures the purchase money obligations.

(4) If a security interest is granted in personal property ( *purchase money collateral* ) that secures a purchase money obligation, together with other [collateral](#), the security interest is a purchase money security interest only to the extent that it is granted in the purchase money [collateral](#).

Renewal etc.

(5) A purchase money security interest does not lose its status as such only because the purchase money obligation is renewed, refinanced, consolidated or restructured (whether or not by the same secured party).

Application of payments to obligations

(6) In any transaction, if the extent to which a security interest is a purchase money security interest depends on the application of a payment to a particular obligation, the payment must be applied:

(a) in accordance with any method of application to which the parties agree; or

(b) if the parties do not agree on a method--in accordance with any intention of the debtor manifested at or before the time of the payment; or

(c) if neither paragraph (a) nor (b) applies--in the following order:

(i) to obligations that are not secured, in the order in which those obligations were incurred;

(ii) to obligations that are secured, but not by purchase money security interests, in the order in which those obligations were incurred;

(iii) to obligations that are secured by purchase money security interests, in the order in which those obligations were incurred.

Purchase money obligations

(7) This subsection covers an obligation of a debtor incurred:

(a) as all or part of the purchase price of the [collateral](#); or

(b) for value given to enable the grantor to acquire or use the [collateral](#) (provided the [collateral](#) is so acquired or used).

References to purchase price and value

(8) In this section, a reference to a purchase price, or value, includes a reference to credit charges and interest payable for the purchase or loan credit.