Law Commission
Reforming the law

Bills of Sale
A Consultation Paper

50 YEARS

Consultation Paper No 225

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BILLS OF SALE

A Consultation Paper

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THE LAW COMMISSION – HOW WE CONSULT

About the Commission: The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed.

The Law Commissioners are: The Rt Hon Lord Justice Bean (Chairman), Stephen Lewis, Professor David Ormerod QC and Nicholas Paines QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation paper: Bills of sale.

Geographical scope: England and Wales.

Duration of the consultation: 9 September 2015 to 9 December 2015.

How to respond

Please send your responses either:

By email to: bills_of_sale@lawcommission.gsi.gov.uk

OR

By post to: Fan Yang, Law Commission, 1st Floor, Tower, Post Point 1.53, 52 Queen Anne's Gate, London SW1H 9AG
Tel: 020 3334 3385

For those consultees who wish to respond only to our proposals and questions in respect of logbook loans, we have prepared a separate response form, available at http://www.lawcom.gov.uk/project/bills-of-sale/.

If you send your comments by post, it would be helpful if, where possible, you also send them to us electronically.

After the consultation: We plan to publish recommendations in 2016 and present them to the Government. It will be for Government and Parliament to decide whether to change the law.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency. The Principles are available on the Cabinet Office website at https://www.gov.uk/government/publications/consultation-principles-guidance.

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THE LAW COMMISSION

BILLS OF SALE

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GLOSSARY OF TERMS

Absolute bill of sale	A bill of sale granted for purposes other than to secure the repayment of a loan
Actual notice	A person has actual knowledge of facts if those facts are within that person's first hand knowledge
Affidavit	A statement of fact sworn under oath or affirmation before a person authorised by law to administer affidavits
Assignment	The transfer of a right from one person to another, such as by way of sale
Bankruptcy	A process by which the assets of an insolvent person are realised and distributed among their creditors
Bill of sale	A document that transfers ownership of goods from one person (A) to another in circumstances where A retains possession of the goods
Book debts	Sums owed to a business by its customers
Charge	A non-possessory security interest over goods which gives the lender the right to have the proceeds of sale of the charged goods for the satisfaction of the secured loan. A charge does not transfer ownership. Goods can be subject to multiple charges granted to different lenders
Chose in action	A personal right which can only be enforced by action
Conditional sale	An agreement under which a person (A) takes possession of goods on terms that A makes payment instalments and does not become the owner of the goods until, usually, A has paid all the instalments
Consideration	The inducement for parties to enter into a contract, which can take any form
Constructive notice	A legal presumption that a person has notice of facts if that person can discover those facts by due diligence or inquiry into the public records
Creditor (or lender)	A person to which another person owes money or its equivalent

Factoring	A form of invoice financing in which the invoice financier is responsible for collecting book debts from the business's customers
Facultative agreement	A form of invoice financing in which the business is obliged to offer to the invoice financier all book debts that fall within the scope of the facultative agreement as they arise. The invoice financier is not obliged to purchase the book debts, but almost invariably will
Fixed charge	A charge over specific assets to secure the repayment of a loan
Floating charge	A charge over a class of assets or, more usually, over all of the assets of the borrower, both present and future to secure the repayment of a loan. On insolvency, the floating charge "crystallises" over the assets the borrower owns at that moment
General assignment	The transfer of a class of rights, both present and future, from one person to another
Guarantee	A person (A) guarantees the debts of another person (B) if A makes a promise to answer for the repayment of B's debts if B defaults.
Hire purchase	An agreement under which goods are hired to a person (A) on terms that A makes payment instalments and does not become the owner of the goods until, usually, A has paid all the instalments and exercised an option to purchase the goods
Insolvent	A person is insolvent if they have insufficient assets with which to satisfy their debts and financial liabilities
Invoice discounting	A form of invoice financing in which the business remains responsible for collecting book debts from its customers. The business then transfers such sums as necessary to the invoice financier
Invoice financier	The party that buys book debts from a business in return for making available to the business a percentage of the value of the book debts
Invoice financing	An agreement under which a business sells its book debts to an invoice financier in return for the invoice financier making available to the business a percentage of the value of the book debts. When the customer pays the book debt, the invoice financier receives the amount of its advance plus charges. The business receives the balance

Lien	A right to hold goods belonging to another person until that person repays the debt or performs some other obligation. The creditor does not have the right to sell the goods
Pledge	A right to hold goods belonging to another person until that person repays the debt or performs some other obligation. The creditor has the right to sell the goods if the borrower defaults
Security bill of sale	A bill of sale granted to secure the repayment of a loan
Stock-in-trade	Goods that a business keeps in stock for the purposes of carrying on its business
Trustee in bankruptcy	A person that takes control of an insolvent person's assets in order to sell them and share the proceeds among the creditors
Whole turnover agreement	A form of invoice financing in which the business sells all its book debts, both present and future, to the invoice financier

ABBREVIATIONS

ABFA	Asset Based Finance Association
BIS	Department for Business, Innovation and Skills
CCTA	Consumer Credit Trade Association
CONC	FCA's rulebook dealing with consumer credit
DVLA	Driver and Vehicle Licensing Agency
FCA	Financial Conduct Authority
FOS	Financial Ombudsman Service
HCSTC	High-cost short-term credit
OFT	Office of Fair Trading

ONLINE CONTENT

All websites and electronically available materials referenced in this consultation paper were last accessed on 25 August 2015.

CHAPTER 1
INTRODUCTION

WHAT ARE BILLS OF SALE?

1.1 Bills of sale are a means by which individuals can use goods they already own as security for loans, while retaining possession of those goods.

1.2 In English law, there are many ways of securing a loan. However, bills of sale occupy a distinct niche in the law of security interests because:

(1) unlike hire purchase (which is used to buy new goods), bills of sale are granted on goods the borrower already owns;[1]

(2) unlike pawnbroking (where the lender takes possession of the goods), bills of sale allow the borrower to keep the goods while making repayments;

(3) unlike mortgages on land, bills of sale are secured on moveable tangible goods; and

(4) unlike company charges (which are granted by companies and limited liability partnerships), bills of sale can only be granted by individuals and unincorporated businesses.

[1] See para 4.79 in Chapter 4 for an explanation of hire purchase. Hire purchase is, strictly, not a form of security but a functional equivalent. The protections for hirers and private purchasers in hire purchase law that we discuss in this consultation paper also apply to conditional sale. A conditional sale is an agreement under which the purchaser takes possession of goods and makes payment instalments. Ownership of the goods does not pass to the purchaser until, usually, the purchaser has paid all the instalments. References in this consultation paper to hire purchase include conditional sale.

Bills of sale in the nineteenth century

1.3 Bills of sale were common in Victorian times. Concerns were expressed at that time that moneylenders could use bills of sale to lead "thousands of honest and respectable people to their ruin".[2] It was said that borrowers did not understand the effect of what they were signing.[3] They did not realise that they were transferring ownership in their household goods to a moneylender, who could then seize the goods from them on default. The moneylender could also seize the goods from a subsequent purchaser, who bought them in good faith, unaware of the moneylender's interest. Similarly, it was also a concern that other creditors could suffer detriment because of secret bills of sale.[4]

1.4 As a result, Parliament passed the Bills of Sale Act 1878 and the Bills of Sale Amendment Act 1882.[5] We refer to these as the 1878 Act and the 1882 Act respectively and together as the Bills of Sale Acts. The Bills of Sale Acts did not create bills of sale, which exist at common law, but were designed to regulate their use. Unfortunately, they do so in a particularly opaque way. The Bills of Sale Acts first drew adverse comment within just a few years of their enactment, and have been criticised many times since. Yet they continue in force.

Bills of sale in the twenty-first century: logbook loans

1.5 In the twenty-first century, bills of sale have been revived in the form of "logbook loans". This is a form of sub-prime consumer credit secured on a vehicle. Borrowers transfer ownership of their existing car, van or motorcycle to the logbook lender, while continuing to use it. The borrower hands the logbook lender the V5C registration document – or "logbook" – but this is purely symbolic and has no legal effect.

1.6 The legal effect is produced by a document, the "bill of sale", which must meet the complex requirements of the 1882 Act. The logbook lender must then register the bill of sale at the High Court, in accordance with Victorian procedures, at some cost in time and money. We will see in Chapter 5 that the register appears unfit for purpose.

[2] Hansard (HC), 8 March 1882, vol 267, cc393-402.

[3] Hansard (HC), 17 May 1854, vol 133, cc474-477: "Persons were in the habit of obtaining credit upon the supposition that they possessed valuable property in the shape of furniture and stock in trade, but, when the creditor had obtained judgment and the officer came to levy execution, it oftentimes turned out that the debtor had given a bill of sale of all he possessed".

[4] "The 1878 Act was designed to prevent the rights of creditors from being affected by secret dispositions of property by persons remaining in possession of that property" (H Beale, M Bridge, L Gullifer, E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed, 2012), p 431, para 11.06).

[5] Its full title is the Bills of Sale Act (1878) Amendment Act 1882.

1.7 Twenty-first century consumers who come across logbook loans face the same difficulties as their Victorian counterparts who came across bills of sale secured on household goods: there continue to be complaints that borrowers do not understand what they are signing; that borrowers who default risk having their vehicles seized too readily; and that those who, unwittingly, buy a second hand vehicle subject to a logbook loan are faced with stark choices. Usually, they have the choice of paying off someone else's logbook loan, paying for the vehicle a second time or losing the vehicle they have paid for.

1.8 The detriment suffered by consumers who engage with logbook loans has attracted much criticism in the media. The headlines below all appeared in 2014:

> Beware 'toxic' logbook loans;[6]
>
> Citizens Advice warning over legal logbook loans;[7]
>
> Logbook lenders are flouting the law, say debt advisers.[8]

THIS PROJECT

Terms of reference

1.9 In September 2014, Her Majesty's Treasury asked the Law Commission to examine the Bills of Sale Acts and consider how they can be reformed. Our terms of reference are as follows:

> Her Majesty's Treasury asks the Law Commission to review the Bills of Sale Acts 1878 to 1891.[9] In particular, the Law Commission is asked:
>
> (1) to consider the use which is currently made of the legislation and how far it meets the needs of users and third parties, and
>
> (2) to make recommendations for reform, to ensure that the law in this area is up-to-date, fair, and effective.

Geographical scope

1.10 The Bills of Sale Acts do not apply to Scotland.[10] Accordingly, this is not a joint project with the Scottish Law Commission and we make proposals for England and Wales only.

6 http://www.gocompare.com/covered/2014/07/beware-toxic-logbook-loans/.

7 http://www.bbc.co.uk/newsbeat/article/29638238/citizens-advice-warning-over-legal-logbook-loans.

8 http://www.theguardian.com/money/2014/feb/16/logbook-loans-citizens-advice-lending-payday.

9 Minor amendments to the Bills of Sale Acts were made in the Bills of Sale Act 1890 and the Bills of Sale Act 1891. These amendments were incorporated into the Bills of Sale Acts.

10 The Scottish Law Commission considers that Scottish law requires, in general, security over moveable tangible property to be possessory (Scottish Law Commission, *Discussion Paper on Moveable Transactions* (2011) Discussion Paper No 151, p 142, para 16.1).

Next steps

1.11 We seek views on our proposals and replies to our questions by 9 December 2015. For those consultees who wish to respond only to our proposals and questions in respect of logbook loans, we have prepared a separate response form.[11] All responses should be sent to the address on page iii. Our aim is to publish final recommendations in summer 2016.

1.12 Our 2016 report will not include a draft bill. However, if our recommendations are accepted by Government, our intention would be to draft a bill thereafter.

A LONG-STANDING PROBLEM

1.13 Criticism of the Bills of Sale Acts is not a recent development. In 1888, Lord Macnaghten commented that to say the meaning of the 1882 Act:

> is reasonably clear, would be to affirm a proposition to which I think few lawyers would subscribe, and which seems to be contradicted by the mass of litigation which the Act has produced and is producing every day. For my own part, the more I have occasion to study the Act the more convinced I am that it is beset with difficulties which can only be removed by legislation.[12]

1.14 In the past 50 years, the Bills of Sale Acts have been examined four times. Each review made major criticisms of them.

Earlier reviews

1.15 In 1971 and 1986, two major reviews on credit law called for the repeal of the Bills of Sale Acts. In 1971, the Crowther report commented:

> It is difficult to imagine any legislation possessing more technical pitfalls than the Bills of Sale Acts, particularly in relation to security bills of sale.[13]

1.16 In 1986, the Diamond report concluded:

> The time has come to repeal the Bills of Sale Acts.[14]

1.17 In 2002, the Law Commission's consultation paper on the registration of security interests also considered the Bills of Sale Acts in the context of lending to unincorporated businesses. Then, we concluded that serious consideration should be given to reform. Our final report on registration of security interests was confined to those granted by companies.[15]

[11] Available at http://www.lawcom.gov.uk/project/bills-of-sale/.

[12] *Thomas v Kelly and Baker* (1888) 13 App Cas 506 at 517.

[13] Report of the Committee on Consumer Credit, vol 1 (1971) Cmnd 4596, p 179.

[14] A Diamond, *A Review of Security Interests in Property* (1989), p 92, para 18.1.8.

[15] Company Security Interests (2005) Law Com No 296.

Consultation on logbook loans in 2009

1.18 A consultation by the Department for Business, Innovation and Skills (BIS) in 2009 was the first time that the Bills of Sale Acts were examined from the perspective of logbook loans. The consultation noted:

> The Government is concerned that increasing numbers of vulnerable consumers who resort to bill of sale loans are ending up in a much worse position and slipping further into unsustainable debt as a result.[16]

1.19 BIS criticised the complexity of the Bills of Sale Acts and the imbalance between the rights of the lender and those of the borrower:

> Their complexity makes it difficult for consumers to understand fully the liability they are taking on when they borrow. We are concerned that the relationship under a bill of sale loan arrangement is inappropriately weighted in favour of the lender to the detriment of the consumer. This creates a situation with the potential for the lender to take unfair advantage of the consumer.[17]

1.20 The consultation set out four options:

(1) do nothing;

(2) introduce a voluntary code of practice or other non-statutory regulation;

(3) reform the Bills of Sale Acts; or

(4) ban the use of bills of sale for consumer lending, this being the approach that was proposed.[18]

1.21 In 2011, following a change of Government, BIS published its response to the consultation. BIS noted that "the evidence received in response to the consultation did not indicate that the problems identified were sufficient to justify a ban on using bills of sale for consumer lending".[19] Nor did BIS even propose the reform of the Bills of Sale Acts as:

> the size of this task compared to the size of the problem and the long time lag before consumers would see any benefits made this an unattractive option.[20]

[16] BIS, *A better deal for consumers: consultation on proposals to ban the use of bills of sale for consumer lending* (2009), p 4.

[17] Above, p 6, para 1.

[18] Above, p 7, para 5.

[19] BIS, *Government response to the consultation on proposals to ban the use of bills of sale for consumer lending* (2011), p 11, para 39.

[20] Above, p 11, para 37.

1.22 Instead, BIS saw a voluntary code of practice as the solution.[21] This led to the introduction of the Consumer Credit Trade Association code of practice for logbook lenders (the CCTA Code), which we discuss in Chapter 4.

THE USES MADE OF BILLS OF SALE

1.23 Our terms of reference ask us to consider the uses which are currently made of bills of sale. We therefore examined the High Court registry where bills of sale must be registered.[22] We started by looking through over 2,000 bills of sale in order to ascertain the broad uses made of them. We then examined 102 bills of sale in depth. The results are set out in Chapter 2.

Logbook loans

1.24 Bills of sale are overwhelmingly (but not exclusively) used for logbook loans. Logbook loans account for over 90% of bills of sale registered at the High Court and are therefore central to this review.

Other uses

1.25 Bills of sale may also be used to:

(1) buy new vehicles as a direct alternative to hire purchase. This evades the protections available to hirers in hire purchase law;[23] and

(2) borrow money on the security of goods other than vehicles. An example is an unincorporated business, such as a hotel, borrowing money on the security of its furniture and fittings.[24]

1.26 The 1878 Act also applies to general assignments of book debts.[25] When unincorporated businesses make a general assignment of book debts, the assignment is not a bill of sale. However, the Insolvency Act 1986 requires that it is registered "as if it were" a bill of sale, in accordance with the procedure set out in the 1878 Act. Otherwise it is ineffective against a trustee in bankruptcy.[26]

1.27 This means that our review is wider than just logbook loans. In Chapter 6, we consider the effect of the Bills of Sale Acts on lending to unincorporated businesses. Although most of our proposals are targeted at consumer credit agreements secured on vehicles, we are also alive to the consequences of our proposals for:

(1) loans secured on goods other than vehicles;

[21] Above, p 11.

[22] See para 1.34.

[23] See paras 2.24 to 2.27 in Chapter 2.

[24] See paras 2.28 to 2.31 in Chapter 2.

[25] See paras 6.19 to 6.54 in Chapter 6.

[26] Insolvency Act 1986, s 344. Section 71(3) of the Enterprise and Regulatory Reform Act 2013 made provision for minor amendments to s 344. The amendments are to come into force on a date to be appointed by the Secretary of State (Enterprise and Regulatory Reform Act 2013, s 103(3)).

(2) loans for business purposes which exceed £25,000, and which are therefore outside the consumer credit regime; and

(3) general assignments of book debts. We consider how our proposals affect the registration of general assignments in Chapter 13.

Absolute bills

1.28 The 1878 Act is not confined to bills of sale used to secure loans. It also regulates documents which transfer ownership of goods outright, while allowing the transferor to keep possession. These are known as "absolute bills".

1.29 As we discuss in Chapter 2, we found no evidence that any absolute bills were registered in 2014. In Chapter 14, we propose that absolute bills should no longer be regulated.

PROBLEMS WITH THE CURRENT LAW

1.30 The current law suffers from five key defects:

(1) it is unduly complex;

(2) it requires highly technical documentation;

(3) the registration regime is in need of modernisation;

(4) it offers little protection to borrowers; and

(5) it offers no protection to purchasers.

Undue complexity

1.31 There is widespread consensus that the Bills of Sale Acts are far too complex. This applies to both the language used in the legislation, and to the specific requirements it sets out.

1.32 It is impossible to say now whether the language of the Bills of Sale Acts would have been comprehensible to the Victorian reader. It is with certainty that we can say that it is impenetrable for the modern reader.

Technical document requirements

1.33 The 1882 Act requires that a bill of sale document complies with a long list of technical requirements, with severe consequences if there is a failure to do so. Unfortunately, these requirements are more likely to baffle the borrower than to warn them about the consequences of a bill of sale.

The registration regime is in need of modernisation

1.34 The registration regime under the Bills of Sale Acts uses the High Court as the repository of the bills of sale register. The High Court registration regime is seriously out-of-date. It is still paper-based and reliant on manual processes.

1.35 Registration was introduced in the Bills of Sale Acts to enable third parties to check if the goods they were about to deal with were already subject to a bill of sale. However, the High Court register is so difficult to search that very few people do so.

The current law offers little protection to borrowers

1.36 Logbook loans are subject not only to the Bills of Sale Acts, but also to consumer credit law, Financial Conduct Authority (FCA) regulation and the CCTA Code. Despite this, there remain concerns that logbook lenders can repossess vehicles too readily, often leaving borrowers with a large and increasing outstanding amount to repay.[27]

1.37 Under hire purchase law, hirers in default have some protection against repossession of goods. Where the hirer has paid more than one third of the total hire purchase price, the lender may only seize the goods with a court order. This protection does not apply to bills of sale. When a borrower defaults on a logbook loan, there is nothing to prevent the logbook lender from repossessing the vehicle beyond issuing a couple of notices, and the expiry of short grace periods.[28]

The current law offers no protection to purchasers

1.38 If a person buys a vehicle subject to a logbook loan, the logbook lender is entitled to repossess the vehicle from them at will. This is the case even when the purchaser acted in good faith and without notice of the logbook loan.

1.39 Again, this contrasts with hire purchase law. Broadly, purchasers who buy, for personal use, a vehicle subject to a hire purchase agreement acquire ownership of the vehicle, provided that they have acted in good faith and without notice of the hire purchase agreement.[29] Similar provisions do not apply to bills of sale.

1.40 The detriment suffered by purchasers is particularly acute. They have already paid the borrower for the vehicle and now face losing the vehicle to the logbook lender unless they either pay off a loan they do not owe or pay the logbook lender again for the vehicle.[30]

OUR PROPOSALS

1.41 As we explain in Chapter 7, we think that individuals should continue to be allowed to borrow money on the security of their goods. However, the Bills of Sale Acts no longer provide appropriate regulation of this area. In our view, they should be repealed in their entirety and replaced with new legislation to govern the way that individuals may use goods they already own as security for loans, while retaining possession of them.

[27] Unlike hire purchase lenders, logbook lenders do not strictly "repossess" the vehicle in the sense of taking it back. "Repossession" reflects usage in the industry.

[28] See paras 4.42 to 4.48 in Chapter 4.

[29] Hire Purchase Act 1964, ss 27 to 29.

[30] The purchaser has no right to pay off only the outstanding loan amount. The logbook lender could insist on payment for the vehicle, even if that exceeds the outstanding loan amount. Though the purchaser is entitled to recover financial loss from the borrower, the borrower will normally be untraceable or else unable to compensate the purchaser.

1.42 In Chapter 8, we consider new terminology and definitions. We provisionally propose that this form of security interest should be renamed as a "goods mortgage". Those, like logbook loans, which are secured on vehicles, should be referred to as "vehicle mortgages".

1.43 The details of the proposed new legislation relating to goods mortgages are set out in Chapters 9 to 12. We consider, in turn, the requirements relating to the goods mortgage document, registration, borrower protection and purchasers.

1.44 Consumer groups made many criticisms of logbook lenders which do not fall within our remit. In particular, it was said that interest rates and default charges are excessive. The FCA has imposed a cap on interest rates and default charges in payday lending. Whether similar provisions should apply to logbook loans is a matter for the FCA rather than us.

OUR WORK SO FAR

1.45 In October 2014, we issued a call for evidence and received 13 replies (listed in Appendix F). We have also met 40 organisations and individuals who have provided us with an understanding of this area (listed in Appendix G). We are particularly grateful to the following five stakeholder groups.

Consumer groups

1.46 Consumer groups gave up a great deal of time to share their experiences and views of logbook loans with us. This was invaluable in helping us to understand how consumers may be given effective protection.

Lenders

1.47 We spoke to four logbook lenders who together make up the vast majority of the logbook lending market. Although the impetus for this project came from consumer groups, it was interesting to hear how the Bills of Sale Acts are also failing logbook lenders. The CCTA also contributed to our understanding of the industry.

1.48 Logbook loans share many of the same features as hire purchase, and we have therefore looked at hire purchase law as a precedent for reform. We spoke to eight hire purchase lenders who gave us an insight into how hire purchase law is working.

1.49 This project also extends to business finance. The Asset Based Finance Association provided us with the benefit of its own knowledge and that of its members.

Registries

1.50 Registration is a key area for reform. Masters of the High Court and staff who run the bills of sale register shared their experiences with us, patiently answered our many questions and put up with the disruption caused by our surveys.

1.51 For logbook loans, commercially-run asset finance registers have become an integral part of industry practice. The organisations that run asset finance registers provided us with a great deal of information on how those registers are operated.

1.52 Many jurisdictions have set up registers of security interests (including New Zealand, Australia and Canada). We spoke to those working on registers slightly closer to home in Scotland and Jersey. It was very helpful to share thoughts and ideas on what a reformed registration regime might look like.

Regulators

1.53 Within Government, overall policy responsibility for consumer credit has been transferred from BIS to the Treasury. We have been in touch with both departments about this project.

1.54 The FCA now has responsibility for regulating consumer credit. During the course of this project, the FCA shared their thoughts with us on several occasions.

Academics

1.55 Bills of sale are one of the many types of transaction by which security for loans may be granted. We are grateful to the academic community who guided us about how bills of sale fit within a broader structure of security interests. We acknowledge the work of the Secured Transactions Law Reform Project, which is trying to bring some coherence to the law of security interests more generally.

THE STRUCTURE OF THIS CONSULTATION PAPER

1.56 This consultation paper is divided into 15 further chapters.

1.57 We start by looking at how bills of sale are used in Chapter 2. We then outline the law in this area: Chapter 3 provides an overview of the Bills of Sale Acts. Chapter 4 examines other protections available to borrowers under consumer credit legislation and the CCTA Code. It also considers the protections available to other forms of consumer credit which do not apply to bills of sale.

1.58 Chapters 5 and 6 then look at the impact of the law on the practice and operation of the relevant industries. Chapter 5 focuses on the logbook loan: it describes the various stages of logbook lending, from application to enforcement. Chapter 6 discusses the impact of the Bills of Sale Acts on lending to unincorporated businesses.

1.59 Chapter 7 sets out the key problems with the Bills of Sale Acts. The following seven chapters then look in detail at how to address those problems. They set out our proposals and questions for consultees:

(1) Chapter 8 looks at the scope of the legislative regime that might replace the Bills of Sale Acts;

(2) Chapter 9 considers how the document requirements should be simplified;

(3) Chapter 10 looks at how the registration regime should be modernised;

(4) Chapter 11 discusses what protections should be introduced to protect borrowers under consumer credit agreements such as logbook loans; and

(5) Chapter 12 looks at how purchasers should be protected.

1.60 Chapter 13 considers how the proposals to reform the law of bills of sale impact on the growing industry of invoice financing. Chapter 14 looks at absolute bills of sale.

1.61 We move on to consider the impact of our proposals in Chapter 15. Finally, Chapter 16 lists our proposals and questions to consultees.

CHAPTER 2
USES OF BILLS OF SALE

2.1 The use of bills of sale has grown dramatically in recent years, from 2,840 registered in 2001[1] to 52,483 in 2014.[2] This reflects the rapid increase in the use of logbook loans. By "logbook loan", we mean a loan secured on a car or other vehicle which the borrower already owns, and where the borrower retains possession of the vehicle while making the repayments.

2.2 The vast majority of bills of sale are used for logbook loans, but some are not. Our analysis of bills of sale registered at the High Court showed that bills of sale may also be used in the following ways:

(1) as an alternative to hire purchase, to buy vehicles; and

(2) to secure loans on other goods, such as wine or artworks.

2.3 In addition, the High Court also registers general assignments of book debts. These are transactions in which businesses sell debts owing to them in the future to an invoice financier. Insolvency legislation requires such transactions to be registered in accordance with the 1878 Act procedure for bills of sale.

2.4 The following table provides an estimate of the number of bills of sale and general assignments of book debts registered in 2014.[3]

Table 2.1 Bills of sale and general assignments of book debts registered in 2014

Bills of sale and general assignments of book debts registered in 2014	**Number**
Logbook loans (approximate)	47,723
To buy vehicles (sample estimate)	4,500
To secure loans on other goods (sample estimate)	260
General assignments of book debts (recorded separately)	97
Total (bills of sale and general assignments)	**52,580**

[1] Registration of Security Interests: Company Charges and Property other than Land (2002) Law Commission Consultation Paper No 164, p 222, para 9.6.

[2] We are grateful to the High Court for these figures. In addition to bills of sale, the High Court registered 97 general assignments of book debts in 2014.

[3] The estimates are based on two samples of bills of sale taken from the High Court registry. The first sample considered the broad nature of 2,200 bills of sale. The second looked in more detail at a further 102 bills of sale.

2.5 We consider below the typical logbook loan and the typical logbook loan borrower. As we will see, logbook loan borrowers are generally "sub-prime" with few other forms of borrowing available to them.

2.6 We then look briefly at each of the other types of transaction we have listed. Finally, we note that although the legislation requires the registration of "absolute bills", this does not appear to take place in practice.

LOGBOOK LOANS

The typical logbook loan

2.7 A logbook loan is usually used as a form of medium-term credit. In its consumer credit research, the Financial Conduct Authority (FCA) found that many interviewees had taken out logbook loans of around £1,500, usually for a term of 18 months.[4]

2.8 Our own survey of bills of sale registered at the High Court showed that these are typical figures, though there is some variation.[5]

(1) The loan amounts ranged from £100 to £3,500, with a mean of £844.[6]

(2) The typical term was between six months and three years, with a mean of 16 to 17 months. There were occasional instances of logbook loans for longer terms: we saw one with a term of four years and another of five years.

2.9 Interest rates tend to be high, though there was significant variation. The lowest interest rate in our survey was 60% per year and the highest was 443% per year (with the most common yearly rates at 120% and 187%). The bills of sale documents referred to interest rates in different ways, with some stating yearly rates and others stating monthly rates (from 7.5% to 12%).

2.10 This variation can have a significant impact on the amount a borrower would be required to repay. Table 2.2 below indicates the total amount a borrower would be required to repay for a one year logbook loan of £1,500 at the interest rates discussed above.[7]

[4] FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014), p 23.

[5] We collected information on 102 bills of sale registered at the High Court, of which 92 were logbook loans.

[6] While £1,500 is greater than the mean loan amount of the logbook loans in our sample, it was not unusual to see logbook loans of £1,000 or more. Of the 92 logbook loans in our sample, 32 were for a loan amount of greater than £1,000. The mode in our sample was £500.

[7] This interest calculation does not take account of any additional fees such as, for example, an arrangement fee.

Table 2.2 Effect of interest on a one year logbook loan of £1,500

Interest rate	Interest	Total amount repaid
60% per year	£900.00	£2,400.00
120% per year	£1,800.00	£3,300.00
7.5% per month (equivalent to 138.18% per year)[8]	£2,072.70	£3,572.70
187.08% per year	£2,806.20	£4,306.20
12% per month (equivalent to 289.6% per year)	£4,344.00	£5,844.00
443.08% per year	£6,646.20	£8,146.20

2.11 This level of variation in interest rates suggests that logbook lenders do not necessarily compete on price. Research by the FCA found that there was very limited "shopping around" among the logbook loan borrowers it interviewed:

> The vast majority of respondents came across the company with which they took out the loan at the same time they first encountered the product itself, with many not even considering that there could be other competitors out there offering a similar product… Shopping around was virtually non-existent within this product area.[9]

The typical logbook loan borrower

2.12 Logbook loans cater for the "sub-prime" rather than the mainstream credit market. In other words, logbook loan borrowers often find it difficult to access other more conventional forms of credit. As the FCA research put it, they have "good reason to believe that other forms of credit were not, or were no longer available to them – with the exception for some of payday loans".[10] It quoted one borrower as saying:

[8] The equivalent yearly rate of a monthly rate, compounded twelve times in one year, is:

$$((1 + \text{monthly rate expressed as a decimal})^{12} - 1) \times 100.$$

[9] FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014), p 26.

[10] Above, p 26.

> That's what my problem was, my credit rating was not good, so I knew I didn't have options, only the likes of this kind of loan…[11]

2.13 The FCA found that most logbook loan borrowers were dealing with:

> broader financial challenges such as servicing other debts or attempting to consolidate debts, variable income patterns, periods of unemployment or sudden income shocks or unexpected bills or expenses.[12]

2.14 Though borrowers with logbook loans may be dealing with difficult financial circumstances, they are not necessarily the poorest in society. The FCA found that logbook loan borrowers tended to have slightly higher income levels than those using payday loans or those seeking debt management services. The FCA suggested that this was because logbook loan borrowers had a car that was valuable enough to secure a loan.[13]

Logbook loans compared with payday loans

2.15 In the FCA research, borrowers tended to view logbook loans and payday loans as similar. The two types of loans were sometimes advertised together. As one logbook loan borrower reported:

> There was a big sign on the building that said "Do you need access to money, don't want a payday loan? How about a different option, come and talk to us."[14]

2.16 Some borrowers use both products. Citizens Advice found that out of 127 logbook loan cases handled by its bureaux between April and September 2013, 37% of clients with logbook loans also had one or more payday loans.[15]

2.17 The main difference between logbook loans and payday loans is that logbook loans involve a larger amount over a longer period.[16] While a payday loan is typically available for £50 to £750 over a one month period, a logbook loan may give people access to greater amounts over a longer period. The FCA noted that:

[11] Above, p 24.

[12] Above, p 23.

[13] Above, p 23.

[14] Above, p 31.

[15] Statistics available at http://www.citizensadvice.org.uk/index/campaigns/current_campaigns/recent_campaigns/logbook-loans.htm.

[16] FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014), pp 23 and 31.

> almost all logbook loan respondents had opted for this product because they felt that they needed a lump sum – generally more than £1000 – a greater amount than they often perceived to be available to them elsewhere in the consumer credit market.[17]

2.18 Where borrowers are dealing with broader financial challenges, a one month payday loan will not give them the opportunity to get their finances in order, while a logbook loan over the course of a year may do so.

2.19 Although there can be overlap between borrowers taking out logbook loans and those taking out payday loans, the products are regulated in different ways. As we explore in Chapter 4, payday lending is subject to FCA price cap rules, but these do not apply to logbook lending. It has been suggested that the greater regulation of payday lending may increase the market for logbook loans.[18]

Consumer or business loans?

2.20 Logbook loans are mostly used by consumers, but self-employed people may also borrow money in this way.[19]

2.21 Bills of sale documentation records the occupation of the borrower and the type of vehicle. We found examples where market traders, builders or plumbers use logbook loans to borrow money on the security of their vans. However, there is no indication of the purpose for which the logbook loan was taken out. Where a market trader borrows £1,500 on the security of a van, this may be for a business purpose (such as to buy stock) or for a personal purpose (for example, to repair a broken boiler). The documentation does not distinguish between the two.

2.22 In some cases where self-employed people take out a loan, the distinction between consumer and business loans may be arbitrary. Research suggests that those in financial difficulties often juggle their debts, using whatever money is available to meet the debt which is most pressing.[20] For example, a market trader may use existing money to pay for the boiler and then borrow for the stock, or pay for the stock and borrow for the boiler, depending on which debt falls due first.

2.23 As we discuss in Chapter 4, current English and Welsh legislation treats loans of £25,000 or less made to individuals that are for business purposes as if they were consumer credit. We think this is the right approach. In the course of this project, we do not distinguish between business and consumer loans, where the loan is made to an individual and the amount is £25,000 or less.

[17] Above, p 23. See also para 2.7.

[18] See http://www.ft.com/cms/s/0/5a077c68-8783-11e4-8c91-00144feabdc0.html#axzz3hGzRti8p.

[19] One logbook lender had estimated in 2010 that 25% of its logbook loans by number and 40% by value were for business purposes.

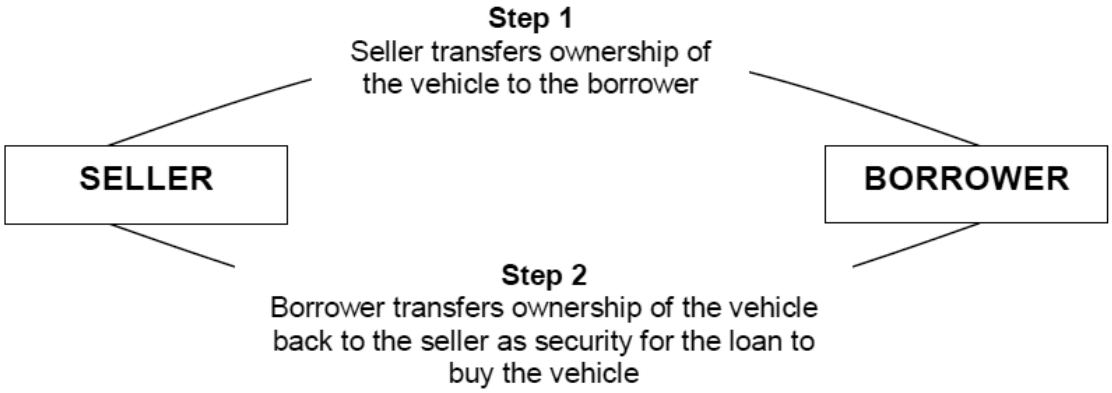
[20] Citizens Advice notes that borrowers with logbook loans often have multiple other loans and up to twice as much debt as other borrowers: https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/people-with-logbook-loans-are-overloaded-with-debt/.

SECURED LOANS TO BUY VEHICLES

2.24 Bills of sale are sometimes used as a direct alternative to hire purchase to secure loans used to buy vehicles. The advantage of bills of sale, from the lender's point of view, is that several protections provided to hirers under hire purchase law do not apply. For example, under hire purchase law, the lender may not seize the vehicle without a court order once the hirer has paid one third of the price. We outline these protections in Chapter 4, and discuss them in detail in Chapter 11.

2.25 Using bills of sale to purchase vehicles involves an imaginative interpretation of the statute. As we will see in Chapter 3, the legislation in effect prohibits borrowers from granting security over goods which they do not own.[21] Yet where a bill of sale is used to purchase a vehicle on credit, the seller is the owner at the point of sale. As shown in the diagram below, there must first be a notional transfer of ownership from the seller of the vehicle to the borrower. The borrower then immediately transfers ownership of the vehicle back to the seller as security for the loan to buy the vehicle.

Chart 2.3 Structure of a bill of sale transaction to buy a vehicle



2.26 This use of bills of sale appears relatively rare. The Consumer Credit Trade Association, the trade association which represents the great majority of logbook lenders, indicated that it is only aware of one member that uses bills of sale in this way. The Chartered Trading Standards Institute suggested that the practice is only used in South Wales, with around 80 vehicles a month bought in this way.

2.27 Bills of sale documentation at the High Court registry does not distinguish directly between logbook loans and bills of sale used to buy a vehicle. We estimated that nine bills of sale in our sample of 102 bills of sale were used in this way – based on the higher, more specific amount of the loan and the lower interest rate. This suggests a higher rate of use than respondents to our call for evidence indicated, though with only a small sample, our figure may be an over-estimate.

[21] See paras 3.46 to 3.47 in Chapter 3.

LOANS SECURED OVER OTHER GOODS

2.28 Bills of sale allow individuals to use any goods they own as security for a loan. In our two surveys of the High Court register, we found a total of 12 bills of sale over goods other than vehicles, suggesting that there may be around 260 non-vehicle bills of sale registered each year.

2.29 Six of the bills of sale we found were over wine; two were over hotel furniture and fittings. The others were one each over: a mobile home; art and antiques; a vintage steam engine; and a herd of cows. The value of these bills of sale was typically much greater than for logbook loans, with several exceeding £100,000. Some were clearly used for business lending, while others were granted by individuals guaranteeing the debts of their businesses.[22]

2.30 We heard from a High Court Master that when he started registering bills of sale in 1996, the majority were granted over the contents of a brewery or public house and were clearly for business purposes. The Master also referred to one bill of sale involving a valuable viola. In addition, staff at the High Court pointed us to an "unusual case" in which a loan of over £20 million was partially secured on a classic car collection. Although at one level this might be thought of as a "logbook loan", it is a very different commercial arrangement.

2.31 As we discuss in Chapter 3, the legislation creates difficulties in using bills of sale in this way. First, a valid bill of sale given to secure a loan must include a schedule which contains a specific description of the goods.[23] Where a loan is secured on furniture, for example, it may be difficult to describe that furniture specifically. We have seen schedules of multiple pages, describing room by room the contents of a hotel. Secondly, the legislation requires that the date and amount of the repayments are fixed in advance, which may cause difficulties where an individual guarantees business debts. We return to these issues in Chapter 6.

GENERAL ASSIGNMENTS OF BOOK DEBTS

2.32 "Book debts" means sums due to a business. They often represent a significant portion of a business's assets, particularly if the business involves little plant and machinery or stock-in-trade. Businesses can sell their book debts to an invoice financier to obtain cash flow now for money owed to them in the future by customers. The sale of book debts represents an important source of liquidity for businesses.

[22] See para 6.13 in Chapter 6.

[23] See para 3.39 in Chapter 3.

2.33 A general assignment of book debts means that a business sells all its book debts, both present and future, to an invoice financier. As we see in Chapter 6, insolvency legislation requires that a general assignment must be registered "as if it were" a bill of sale. If not so registered, it is ineffective against a trustee in bankruptcy.[24]

2.34 We discuss the problems associated with registering general assignments of book debts in Chapter 6. We were told that the registration regime is particularly costly and can introduce delay. This leads some invoice financiers to register only some of their general assignments. One told us, for example, that it only registers the general assignment if the business's facility limit, that is the amount of cash it seeks to raise by selling its book debts, is £100,000 or above. For general assignments involving smaller sums, the invoice financier will take its chances on bankruptcy.

2.35 General assignments of book debts are filed separately at the High Court. In 2014, 97 were registered. As we explore in Chapter 15, these numbers may increase if the registration regime were simplified.

ABSOLUTE BILLS

2.36 As we explain in Chapter 3, the legislation also requires the registration of "absolute bills". An absolute bill is like a bill of sale that is granted to secure a loan, in that it allows a person to transfer ownership of goods to someone else while retaining possession of the goods. The distinction is that absolute bills transfer ownership outright, rather than to secure loans.

2.37 The current registration procedure for absolute bills was introduced in 1878. The use of absolute bills at that time is not entirely clear. They were probably mainly used to raise money. However, absolute bills have sometimes been used to keep goods away from creditors. Two cases (from 1940 and 1966) concern claims from estranged wives. In *Youngs v Youngs*,[25] a wife sought to enforce a judgment for unpaid alimony. The husband replied that she could not seize the furniture as he had sold it to his live-in housekeeper, even though the furniture was not moved and he continued to make use of it. If this claim was true, the transaction would have amounted to an absolute bill of sale, which should have been registered.

2.38 Whatever use has been made of absolute bills over the years, we found no evidence that any were registered in 2014.

2.39 We discuss absolute bills in more detail in Chapter 14. We ask whether the requirement to register absolute bills should be abolished.

[24] Section 344 of the Insolvency Act 1986 states that a general assignment of book debts must be registered "as if it were" an absolute bill. This means that general assignments of book debts must be registered according to the same procedure as, even though these transactions are not, absolute bills, as described below.

[25] [1940] 1 KB 760. See also *Koppel v Koppel* [1966] 1 WLR 802.

CONCLUSION

2.40 Currently, the vast majority of bills of sale are used for logbook loans. These loans are secured on a car and other vehicle which the borrower already owns. If the borrower defaults on the logbook loan, the lender can seize the vehicle and sell it. Logbook loans are usually for £100 to £3,500, lent over a term of between six months and three years, and are aimed at the sub-prime market.

2.41 However, not all bills of sale are used in this way. In this consultation paper we also consider how far bills of sale legislation meets the needs of unincorporated businesses that wish to secure loans for substantial amounts (often over £100,000) or that wish to sell their book debts. As we shall see, in these larger transactions, the technicalities and costs of complying with bills of sale legislation can also be irksome.

CHAPTER 3
THE LAW OF BILLS OF SALE

> If it is true that all legislation is for the furtherance of litigation, it was an undoubted success; if not, it was, I think with all respect for its authors a failure.[1]
>
> Until the advent of the Rent Acts, the Bills of Sale Acts held unchallenged sway as the most criticized examples of parliamentary draftsmanship.[2]

3.1 Bills of sale are governed by two Victorian statutes: the Bills of Sale Act 1878 and the Bills of Sale Amendment Act 1882,[3] which are reproduced in Appendix A and Appendix B respectively to this consultation paper. We refer to these as the 1878 Act and the 1882 Act respectively, and together as the Bills of Sale Acts. The Bills of Sale Acts have been strongly criticised for over a hundred years, but they continue in force.

3.2 In this chapter, we start by describing the evolution of the bills of sale legislation. We then consider the regimes contained in the Bills of Sale Acts. We will see that the Bills of Sale Acts are technical, difficult to understand, onerous to comply with and offer meagre protection to borrowers who grant a bill of sale to secure a loan.

EVOLUTION OF THE BILLS OF SALE ACTS

The common law

3.3 Bills of sale exist at common law quite independently of the Bills of Sale Acts. A bill of sale is a document by which a person transfers ownership of goods to another. This can cover a wide variety of dealings with personal property; people can sell their goods, exchange them, give them as gifts, or mortgage them to get a loan. If the former owner delivers the goods to the new owner at the same time as the transfer of ownership, a bill of sale is not necessary. The new owner obtains ownership by virtue of possession. A bill of sale is used in situations where the former owner nevertheless keeps possession of the goods.

3.4 Bills of sale have existed at common law since at least the Middle Ages. At that time, they were most commonly used commercially, especially in the shipping industry. In the Victorian era, the general population began to own more personal goods and, as a result, it became common to see lenders extending credit on the security of small personal items. The leading text in 1896 noted that a common standard clause in the bill of sale was:

[1] C Willis, "The Bills of Sale Acts" (1887) 3 *Law Quarterly Review* 300 at 300.

[2] A Diamond, "Hire-Purchase Agreements As Bills of Sale (I)" (1960) 23 *Modern Law Review* 399 at 401.

[3] Its full title is the Bills of Sale Act (1878) Amendment Act 1882.

> all and every the household goods, furniture, plate, linen, china, books, stock in trade, brewing utensils and all the effects.[4]

3.5 As discussed in Chapter 2, it was (and is) possible to transfer ownership of goods absolutely to another person, but nevertheless remain in possession of those goods. These "absolute bills" may be used for purposes other than borrowing money.

3.6 Most often, however, bills of sale were (and continue to be) used as security for loans. The borrower would transfer ownership of goods to a lender but would keep possession of those goods.[5] When the loan was repaid, the borrower would regain ownership. Effectively, the borrower "mortgaged" the goods. Bills of sale used in this way are known as "security bills".[6]

3.7 The practice of transferring away ownership of goods while retaining possession created a "false wealth" problem: potential purchasers or other potential lenders could be misled into thinking that the person in possession of the goods still owned them. Those in possession of goods could sell them to subsequent purchasers or obtain further credit on the strength of those goods. In both cases, the transaction was fraudulent as the former owner in possession no longer owned the goods, yet the purchaser or lender had no way of knowing this.

Introduction of the Bills of Sale Acts

3.8 The Bills of Sale Acts therefore did not create bills of sale, but were intended to regulate their use. There was already some legislation aimed at dealing with the "false wealth" problem, most significantly the Fraudulent Conveyances Act 1571. By the nineteenth century, as the credit market expanded, it was thought that this Act was failing to prevent increasing fraud in this area.[7]

3.9 A statute regulating bills of sale was first introduced in 1854 to target fraud. The underlying rationale of the Bills of Sale Act 1854 was:[8]

> …to prevent lengthy and expensive proceedings to prove or disprove allegations of fraud, it would be better to provide for the registration of all such transfers, so that a search would enable creditors and others interested to ascertain the rights of any apparent owner.[9]

3.10 The 1878 Act was also intended to prevent fraud on potential purchasers and potential lenders. It superseded the 1854 Act and is still in force today. It requires the registration of bills of sale at the High Court so that potential purchasers and potential lenders can check whether goods are already subject to a bill of sale.

4 J Weir, *The Law of Bills of Sale* (1896), p 23.

5 This is in contrast to pawnbroking, where the borrower has to leave the goods with the lender.

6 Or, sometimes, "conditional bills".

7 A Kiralfy and H Potter, *Potter's Historical Introduction to English Law and its Institutions* (4th ed, 1958) p 550.

8 The Bills of Sale Act 1854 was substantially the same in its terms as the 1878 Act.

9 A Kiralfy and H Potter, *Potter's Historical Introduction to English Law and its Institutions* (4th ed, 1958) p 550.

3.11 The 1878 Act did not distinguish between absolute bills and security bills but referred merely to "bills of sale" in general. It led to a rise in the use of security bills. Transactions commonly involved loans secured on furniture, linen and plate as well as carriages for more wealthy borrowers. It became a concern that borrowers were being coerced into granting security bills the effect of which they did not understand. In response to this emerging need for consumer protection, the 1882 Act was introduced.[10]

3.12 The 1882 Act only regulates bills of sale which are used as security for a loan. It introduced a legal distinction between security bills and bills used for other purposes, or absolute bills.

THE BILLS OF SALE ACTS

3.13 Both the 1878 Act and the 1882 Act are highly technical pieces of legislation. They are difficult for a modern reader to understand and onerous for a modern user to comply with. For legislation that was intended to protect consumers, the 1882 Act offers only scant protection to borrowers who grant a security bill over their goods.

3.14 Security bills are governed by both the 1878 Act and the 1882 Act. The provisions of the 1878 Act apply only where they are consistent with the provisions of the 1882 Act.[11] Absolute bills are governed only by the 1878 Act.

SCOPE OF THE BILLS OF SALE ACTS

Individuals rather than companies

3.15 The Bills of Sale Acts only apply to transfers of ownership of goods by individuals and not companies. The terminology of the 1878 Act in general demonstrates that it does not apply to companies (for example, the definition of "personal chattels").[12] Section 17 of the 1882 Act specifically states that the Act does not apply to debentures issued by companies and secured upon their capital stock, goods, chattels or effects.[13] Case law has confirmed this position; "the Bills of Sale Acts apply to individuals only and not to corporations at all".[14]

3.16 For companies, and limited liability partnerships, a separate regime for registering security granted over their assets applies under Part 5 of the Companies Act 2006.

[10] Lord Herschell in *The Manchester, Sheffield, and Lincolnshire Railway v North Central Wagon Company* (1888) 13 App Cas 554 at 560: "The purpose of the Act of 1882 was essentially distinct. It was to prevent needy persons being entrapped into signing complicated documents which they might often be unable to comprehend, and so being subjected by their creditors to the enforcement of harsh and unreasonable provisions".

[11] 1882 Act, s 3.

[12] The definition of "personal chattels" specifically excludes "the capital or property of incorporated or joint stock companies": see 1878 Act, s 4.

[13] The Bills of Sale Acts also exclude charges executed by registered industrial or provident societies (which are now known as cooperative and benefit societies) as long as they are registered with the Financial Conduct Authority within 21 days of the execution of the instrument (Cooperative and Community Benefit Societies Act 2014, s 59).

[14] Lloyd J in *NV Slavenburg's Bank v Intercontinental National Resources Ltd* [1980] 1 All ER 955 at 975.

Application of the Bills of Sale Acts

3.17 The Bills of Sale Acts only apply to a transaction involving the transfer of ownership of goods by an individual where it satisfies the following five conditions:

(1) there must be a document on which the Bills of Sale Acts can operate. Purely oral transactions are not caught by the Bills of Sale Acts.[15] One criticism of the current legislation is that it is possible to escape the application of the Bills of Sale Acts merely by entering into a transaction orally;

(2) the new owner's rights to the goods must derive from the document. The new owner must become owner by virtue of the document rather than, for example, taking possession;[16]

(3) the document must fall within the definition of "bill of sale" contained in the 1878 Act;

(4) the document must relate to property that falls within the definition of "personal chattels" contained in the 1878 Act. In this consultation paper, we use the term "personal chattels" where this is necessary in the context of the discussion. Otherwise, we use the term "goods" to refer to "personal chattels"; and

(5) the document must give the new owner the right to seize or take possession of the goods.[17]

3.18 The common law continues to apply to transactions that do not satisfy these conditions. The common law also continues to apply to transactions that do satisfy these conditions to the extent that the Bills of Sale Acts do not modify the position.[18]

3.19 We consider the definitions of "bill of sale" and "personal chattels" in the following paragraphs. The definitions are technical, obscure and offer little in the way of clarification.

[15] Section 3 of the 1878 Act provides that the Act applies to "every bill of sale executed…". *Ramsey v Margrett* [1894] 2 QB 18 confirmed that the Bills of Sale Acts are not engaged unless there is a document falling within the definition of "bill of sale" contained in the 1878 Act which acts to effect the transfer of ownership.

[16] *Re Hardwick, ex p Hubbard* (1886) 17 QBD 690 (CA); *Wilkinson v Girard Frères* (1891) 7 TLR 266; *Bowker v Williamson* (1889) 5 TLR 382.

[17] 1878 Act, s 3. For security bills, the lender's right to seize the goods is limited by section 7 of the 1882 Act.

[18] For example, see para 3.56 for discussion of the mortgagee's right of seizure at common law.

Meaning of "bill of sale"

3.20 The 1878 Act defines "bill of sale" by giving a long list of examples of documents that fall within the definition.[19] The definition captures both absolute bills and security bills. It is often criticised as being convoluted: indeed, the first limb of the definition starts off in a circular manner by referring to "bills of sale" within the definition itself.

3.21 The legislation states that "bill of sale" shall include:

(1) "bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels";

(2) "powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt"; and

(3) "any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred".

3.22 The first limb broadly refers to any document transferring ownership of goods. These would be classified as absolute bills. The second limb captures any document which gives a person the right to seize goods against which a loan has been secured. These would be classified as security bills. The final limb is the broadest. Importantly, it brings documents to transfer ownership of future goods within the scope of the Bills of Sale Acts. We use the term "future goods" to refer to goods that are not yet owned by the person granting the bill of sale.

3.23 The extremely broad ambit of the definition of "bill of sale" reflects the "funnelling" approach of the Bills of Sale Acts to regulation. The 1878 Act brings all of these different ways of dealing with goods within the scope of regulation. The legislation in later sections then imposes restrictions that outlaw some of the documents captured by the definition of "bill of sale". Only those documents that fall within the definition of "bill of sale" and that do not fall foul of any restrictions are permissible under the Bills of Sale Acts.

Exclusions

TRANSACTIONS IN THE ORDINARY COURSE OF BUSINESS

3.24 Section 4 of the 1878 Act excludes certain documents from the definition of "bill of sale". Among the exclusions are transfers of goods in the ordinary course of business; bills of sale of goods in foreign parts or at sea; bills of lading; warrants or orders for the delivery of goods; and other documents used in the ordinary course of business as proof of the possession or control of goods.

3.25 These exclusions broadly mean that commercial transactions within the ordinary course of business are excluded from the scope of the Bills of Sale Acts.

[19] 1878 Act, s 4.

SHIPS AND AIRCRAFT

3.26 The Bills of Sale Acts also exclude "transfers or assignments of any ship or vessel". Aircraft mortgages created after 1 October 1972 are similarly excluded.[20] This is because charges over ships and aircraft are regulated by separate legislation.[21]

AGRICULTURAL CHARGES

3.27 A separate statutory regime exists to allow farmers to grant charges to banks over farming stock and other agricultural assets: the Agricultural Credits Act 1928. The charge may be a fixed charge, a floating charge or both, and is known as an "agricultural charge". Agricultural charges are deemed not to be bills of sale, and will take effect despite the provisions of the Bills of Sale Acts.[22]

3.28 The assets over which an agricultural charge can be granted are defined widely. They include crops, whether these are growing or severed from the land; livestock, including any produce and progeny; and agricultural machinery.[23] Unlike a bill of sale, it is perfectly possible for an agricultural charge to cover future goods, such as livestock yet to be born.[24]

3.29 In Chapter 2 we described a bill of sale over cows. Where farmers use crops, livestock or agricultural machinery as security for a loan, they have a choice between using a bill of sale or an agricultural charge. In light of the relative simplicity of the agricultural charges regime, we suspect this route would be more common. However, agricultural charges must be in favour of a bank. Where farmers use other financiers, it appears that they must use bills of sale. We consider this overlap in Chapter 8.

Meaning of "personal chattels"

3.30 The 1878 Act includes a lengthy definition of "personal chattels".[25] The definition applies to both absolute bills and security bills. Where a security bill is granted over goods that do not fall within the definition of "personal chattels" this has significant consequences.[26] The definition captures:

(1) "goods, furniture and other articles capable of complete transfer by delivery";

(2) "(when separately assigned or charged) fixtures and growing crops". Fixtures when transferred together with the land or building to which they are attached are not "personal chattels". Similarly, growing crops when transferred together with the land on which they grow are not "personal chattels"; and

[20] Mortgaging of Aircraft Order 1972 SI 1972 No 1268, art 16.

[21] On charges, see paras 6.14 to 6.15 and paras 6.57 to 6.58 in Chapter 6.

[22] Agricultural Credits Act 1928, s 8(1).

[23] Agricultural Credits Act 1928, s 5(7).

[24] See para 3.46.

[25] 1878 Act, s 4.

[26] See para 3.39.

(3) machinery used in or attached to any factory or workshop. These fall within the definition of "personal chattels" even if they would have otherwise constituted "fixtures".[27]

3.31 This protracted definition of "personal chattels" is broadly intended to capture moveable tangible property. It does not include land, stocks or shares, intellectual property or other "choses in action", which are not tangible goods.[28]

3.32 We note that growing crops when separately transferred from the land on which they grow are "personal chattels". A bill of sale could be granted over growing crops and other agricultural goods that satisfy the definition of "personal chattels".[29] This means that there are two registries that could be used to register security interests over agricultural goods: the High Court registry where the farmer grants a bill of sale and the Land Registry where the farmer grants an agricultural charge. One reason for requiring the registration of security interests is to give notice to third parties interested in the goods.[30] In other words, registration makes security interests "visible" to third parties. As security interests over agricultural goods could be registered with two registries, this creates a "visibility problem" for third parties who may not be aware of the need to search both.

DOCUMENT REQUIREMENTS

3.33 The legislation requires both absolute bills and security bills to contain certain prescribed information. As the 1882 Act was introduced to prevent borrowers from being coerced into signing security bills that they did not understand, the requirements for security bills contained in that Act are especially stringent. We refer to the prescribed information that must be contained in absolute bills and security bills as "document requirements".

3.34 We saw in Chapter 2 that bills of sale are now predominantly used in the form of logbook loans. The document requirements now do little to protect logbook loan borrowers. In fact, the complexity of the document requirements acts to prevent the modern borrower from understanding the nature of the logbook loan.[31]

[27] Certain fixed trade machinery is excluded from the definition of "personal chattels": fixed motive-powers (eg water wheels and steam engines); fixed power machinery (eg shafts, wheels and drums); and steam, gas and water pipes (1878 Act, s 5).

[28] 1878 Act, s 4.

[29] In our visits to the High Court registry during the course of this project, we came across a security bill granted over a herd of cows.

[30] See paras 10.8 to 10.9 in Chapter 10.

[31] See para 5.14 in Chapter 5.

Absolute bills under the 1878 Act

3.35 The 1878 Act requires that absolute bills state the consideration for which they are given and that they are registered in the High Court.[32] Failure to do this renders the absolute bill void:

(1) as against all trustees in bankruptcy of the former owner;

(2) under any assignment for the benefit of creditors of the former owner; and

(3) as against any person who attempts to seize the goods subject to the absolute bill pursuant to a court order.

This means that if, for example, the former owner goes bankrupt, the new owner has no claim to the goods. Instead, they are available to be distributed among the former owner's creditors.

3.36 However, an absolute bill remains valid as between the former owner and the new owner.[33] In a dispute between the former owner and the new owner, the new owner would be treated as the true owner of the goods.

3.37 As we describe below, the registration procedure is onerous. By contrast, the legislation allows flexibility over the absolute bill document itself. The only requirement is that it must state the consideration for which it was given.

Security bills under the 1882 Act

3.38 The document requirements for security bills are much more onerous. All security bills must be made in accordance with a standard form, set out in a schedule to the 1882 Act.[34] We reproduce the standard form in Appendix C to this consultation paper. The standard form is complex and archaic, and is more likely to bemuse borrowers than to inform them. We set out the requirements below, using the term "secured goods" to refer to the goods, ownership of which has been transferred by the borrower to the lender to secure the loan.

3.39 Under the 1882 Act, a security bill must include:

(1) the date of the security bill;

(2) the names and addresses of the borrower and lender;

[32] 1878 Act, s 8 and s 10. "Consideration" is a legal term which refers to the inducement for parties to enter into a contract. In a contract for the sale of goods, the consideration for one party is the payment of money by the other, and the consideration for the other party is the receipt of goods from the other. As the sale of goods example demonstrates, consideration can be monetary or non-monetary.

[33] 1878 Act, s 8.

[34] 1882 Act, s 9.

(3) the loan amount, which must be at least £30.[35] Interestingly, if this had kept pace with inflation since 1882, the minimum loan amount would now be over £3,000. The security bill must secure a monetary obligation, as opposed to any other form of obligation;

(4) a declaration by the borrower of receipt of the loan amount;

(5) words that effect a transfer of ownership, by way of security, by the borrower to the lender, of goods capable of specific description.[36] This description must be in a separate schedule to the security bill, rather than in the body of the security bill;

(6) a statement of the loan amount, the rate of interest and the repayment instalments, including the date by which repayment is to be made;

(7) any agreed terms for the maintenance of the secured goods;

(8) a provision that the secured goods cannot be seized by the lender for any reason other than those specified in section 7 of the 1882 Act;[37]

(9) the signature of the borrower;

(10) an attestation clause. This means that a witness must certify that the security bill has been properly signed. The attestation must be by a "credible witness" who is not a party to the security bill;[38]

(11) the name, address and description of the witness, including his or her occupation; and

(12) a schedule to the security bill that specifically describes the secured goods. Where the schedule to the security bill includes secured goods that do not fall within the definition of "personal chattels" in the 1878 Act, the security bill is not in accordance with the standard form.[39]

3.40 If a security bill is not in accordance with the standard form, it is completely void against all third parties and against the borrower. Surprisingly, the lender not only loses any right to the secured goods but also loses the right to sue the borrower for repayment of the loan.[40]

[35] 1882 Act, s 12.

[36] The standard form uses the word "assign". A validly executed and registered security bill has been interpreted to transfer ownership of goods: "A valid security bill of sale, duly registered, operates to transfer legal title to the goods comprised in the bill" (*Halsbury's Laws of England* (5th ed, 2008), vol 50, para 1683).

[37] See para 3.57.

[38] 1882 Act, s 10.

[39] The result is that the security bill is completely void against all third parties and the borrower.

[40] 1882 Act, s 9. The lender could recover the principal loan amount and reasonable interest by way of restitution: *North Central Wagon and Finance Co Ltd v Brailsford* [1962] 1 WLR 1288.

3.41 This extremely severe sanction appears disproportionate given how difficult compliance is. The onerous document requirements expose lenders to the risk of making a mistake. In one recent case, even a solicitor entering into funding arrangements fell foul of the standard form.[41]

The effect on logbook loans

3.42 Logbook lenders told us that they had in the past been challenged on whether their paperwork complied with the 1882 Act. One logbook lender said that the High Court had rejected registration of its security bills as the occupation of the witness had been insufficiently described.

3.43 One particular point of controversy is whether the logbook lender's agent or employee may witness the borrower's signature. The 1882 Act states that the witness may not be a party to the security bill.[42] Logbook lenders argue that the party is the logbook lender as a corporate entity; the agent or employee, as an individual, is not a party. We found that, in practice, the borrower's signature of the security bill is nearly always witnessed by the agent or employee who signs on behalf of the logbook lender. In *Logbook Loans Ltd & Nine Regions Ltd v OFT*,[43] the Administrative Appeals Chamber of the Upper Tribunal confirmed that this practice was acceptable. It held a security bill was not void because it had been witnessed by the logbook lender's employee.

3.44 We were told that there are now far fewer technical challenges than there were. In practice, most logbook lenders are able to achieve compliance by staying close to the wording of the standard form set out in the 1882 Act. This protects logbook lenders, though it has the effect of confusing borrowers.[44]

The effect on other security bills

3.45 As we explore in Chapter 6, the document requirements are more difficult to meet where loans are made to unincorporated businesses. Here there may be more need for bespoke arrangements, for example, to allow the lender to take security over flexible loan facilities. In these cases, it is not possible to state the amount of the loan and the date of repayment in the security bill document. Also, where security is taken over the contents of a pub or hotel, it may be more difficult to describe the goods specifically. If a lender fails in a single one of the document requirements, the security bill is void against all third parties and against the borrower.

[41] *Chapman v Wilson, Pitts and LawFinance* [2010] EWHC 1746 (Ch).

[42] 1882 Act, s 10.

[43] [2011] UKUT 280 (AAC) (13 July 2011).

[44] See para 5.14 in Chapter 5.

SECURITY OVER FUTURE GOODS

3.46 We saw in paragraph 3.22 that a document transferring ownership of future goods is within the scope of regulation of the Bills of Sale Acts. The legislation then provides that if a borrower does grant a security bill over future goods, the lender's claim on the secured future goods is valid against the borrower but not against third parties.[45] The aim of this provision is to prevent borrowers from entering into wide-reaching security bills that capture not only goods already owned by them but also any goods that they may own in the future.

3.47 As unincorporated businesses are in effect not able to use future goods as security, they are prevented from granting floating charges (over future inventory, for example). We discuss this in more detail in Chapter 6.

REGISTRATION REQUIREMENTS

3.48 The Bills of Sale Acts require all bills of sale to be registered at the High Court. As we discuss in Chapter 5, the registration system is cumbersome and expensive and in urgent need of modernisation.

3.49 The registration requirements for absolute bills and security bills differ, as explained below.

Absolute bills under the 1878 Act

3.50 The registration requirements for absolute bills are that:[46]

(1) the execution of every absolute bill must be witnessed by a solicitor. The solicitor must state as part of the signature that before the execution of the absolute bill, its effect was explained to the former owner by the solicitor; and

(2) within seven clear days after the date of execution of the absolute bill, the following documents must be filed with the High Court:[47]

(a) the absolute bill, together with every schedule annexed or inventory referred to in it;

(b) a true copy of the absolute bill, schedule or inventory and of the signature of the witness;

(c) an affidavit of the time the absolute bill is granted and of its due execution and witnessing and a description of the residence and occupation of the former owner and the witness;[48] and

[45] 1882 Act, s 5.

[46] 1878 Act, s 10.

[47] "Clear days" means complete days not including the day on which the period begins (the date of execution of the absolute bill in this case) and, if the period ends on the occurrence of an event, the day of that event.

[48] An affidavit is a written statement of fact that is sworn before a person authorised to administer affidavits, such as a solicitor. For absolute bills, this means that the witnessing solicitor must swear the affidavit before another solicitor who administers the affidavit.

(d) where the absolute bill is given subject to any condition, that condition is deemed to be part of the absolute bill and must be written on the same paper before registration and set out in the true copy filed.

3.51 Failure to register an absolute bill in accordance with the registration requirements has the same effect as failure to set out the consideration for which it is given. The absolute bill is void against certain third parties.[49]

3.52 The registration of an absolute bill must be renewed every five years failing which the registration lapses. As with an initial failure to register in accordance with the statutory requirements, the absolute bill will then be void against certain third parties.[50]

Security bills

3.53 The 1882 Act requires every security bill to be registered in accordance with the 1878 Act, but with two modifications:[51]

(1) **the witness:** while an absolute bill must be witnessed by a solicitor, a security bill need only be witnessed by a credible witness who is not a party to the security bill.[52] Unlike absolute bills, it is not necessary for the witness to explain the effect of the security bill to the borrower; and

(2) **the effect of non-registration:** if a lender fails to register a security bill, its security is void against all third parties and also against the borrower. This means that its ownership of the secured goods can be defeated by all third parties and the borrower. However, unlike failure to comply with the document requirements, the lender may still sue the borrower for repayment of the loan.

3.54 As with absolute bills, registration of a security bill must be renewed every five years, failing which the registration lapses. In the case of security bills, this will result in the security becoming void against all third parties and the borrower.

SECURITY BILLS: SEIZURE AND SALE OF THE SECURED GOODS

3.55 Although the 1882 Act was intended to protect borrowers, it does very little to prevent the lender from seizing and selling the secured goods. The 1882 Act imposes only two restrictions: the lender may only seize the secured goods for a specified reason; and it must wait five days before selling them.

[49] See para 3.35. The absolute bill is void as against all trustees in bankruptcy, under any assignment for the benefit of creditors and as against any execution creditor.

[50] 1878 Act, s 11.

[51] 1882 Act, s 8.

[52] 1882 Act, s 10. This requirement is discussed at para 3.43.

Seizure of secured goods only for a specified reason

3.56 Where borrowers grant a valid security bill, they effectively "mortgage" their goods to the lender. At common law, the lender is the owner of the mortgaged goods, so it has a right to possess them as soon as the mortgage document is signed.[53]

3.57 For security bills, the 1882 Act limits the lender's right to seize the secured goods straight away.[54] Instead, the lender is only permitted to seize the secured goods for one of the four reasons specified in the 1882 Act.[55] These are if the borrower:

(1) is in default in the repayment of the loan amount;

(2) defaults in the performance of any agreement contained in the security bill for the maintenance of the secured goods;

(3) becomes bankrupt; or

(4) fraudulently removes or allows to be removed the secured goods from the premises.

3.58 As we saw in paragraph 3.39, any security bill that purports to extend the lender's right of seizure is not in accordance with the standard form set out in the 1882 Act.

Five day wait before sale

3.59 At common law, a mortgagee has the right to sell the secured goods. In the case of security bills, the 1882 Act puts a limited restriction on this right. A lender who has seized the secured goods must wait five clear days before sale.[56] After this five day period has passed, the lender may remove and sell the secured goods even if the security bill contains no express power of sale.[57]

3.60 During the five days, the borrower may apply to court for an order restraining the sale of the secured goods.[58] A judge may make such an order if satisfied that the cause for seizure "no longer exists". A strict reading of "no longer exists" means that a borrower would only be entitled to relief where the loan has been, or will immediately be, repaid in full.

[53] The "mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right" (Harman J in *Four Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 at 320).

[54] Contemporary debates make clear that the purpose of this provision was "to prevent money-lenders from entering upon the property or goods of the debtor without any default" (Hansard (HC), 20 March 1882, vol 267, cc1398-416).

[55] 1882 Act, s 7.

[56] 1882 Act, s 13.

[57] *Re Morritt, ex p Official Receiver* (1886) 18 QBD 222 (CA).

[58] 1882 Act, s 7.

3.61 This protection is of limited use in practice. First, the burden is on the borrower to seek relief from the court. We will see that, in reality, few borrowers make an application to court.[59] Secondly, the five day grace period is extremely short.[60] Even if borrowers could go to court, they are unlikely to be able to act so rapidly. Thirdly, a borrower in default is unlikely to be in a financial position to repay the loan in full, so will find it difficult to obtain an order restraining sale.

3.62 Many concerns have been expressed about the lack of effective borrower protection against seizure and sale under the Bills of Sale Acts, especially where borrowers are vulnerable. We consider options for reform in Chapter 11.

CONCLUSION

3.63 In this chapter, we have outlined the current law of bills of sale. We have seen that the Bills of Sale Acts:

(1) are written in old-fashioned language which is difficult for a modern reader to understand;

(2) contain complex document requirements for security bills which are now more likely to confuse borrowers than to protect them. For lenders, the sanction for non-compliance is severe; this is disproportionate given how difficult, and potentially costly, it is to comply;

(3) require registration of bills of sale at the High Court by way of a cumbersome and expensive regime that is in urgent need of modernisation. Again, lenders risk onerous consequences for failure to comply; and

(4) do little to protect borrowers from lenders seizing and selling the secured goods.

3.64 Since the Victorian era, other more modern sources of regulation have come into effect that supplement the Bills of Sale Acts. We discuss these in Chapter 4.

[59] See para 5.65 in Chapter 5.

[60] It has been extended by a voluntary code of practice for logbook lenders. See para 5.65 in Chapter 5.

CHAPTER 4
CONSUMER CREDIT REGULATION

4.1 Providing credit is a highly regulated activity. The last few years have seen major changes to that regulation, as responsibility has passed from the Office of Fair Trading (OFT) to the Financial Conduct Authority (FCA). In this chapter we provide a brief outline of the consumer credit landscape; the scope of consumer credit legislation; and the role of FCA authorisation.

4.2 We then look in more detail at five areas of regulation that apply to logbook loans and other loans secured by bills of sale. These are:

(1) requirements for pre-contract information, designed to increase borrowers' understanding of the transaction;

(2) the cooling off period;

(3) protections for borrowers in default;

(4) the rebate for early settlement; and

(5) the courts' power to re-open unfair credit relationships.

4.3 We also discuss the right of borrowers to complain to the Financial Ombudsman Service (FOS) and self-regulation by logbook lenders.

4.4 Finally, we consider protections which apply to other forms of consumer credit, but which do not apply to bills of sale. For hire purchase agreements, there are circumstances in which a lender may not repossess goods without a court order; borrowers have a statutory right of voluntary termination; and if an innocent private purchaser buys a vehicle subject to a hire purchase agreement, they acquire good title. This is not currently the case for bills of sale. Furthermore, unlike payday loans, there is no price cap for logbook loans.

4.5 Although loans secured by bills of sale are subject to a considerable volume of regulation, that regulation does not mesh well with the Bills of Sale Acts. The document requirements may confuse borrowers rather than warn them of the effect of a security bill; and if borrowers wish to prevent repossession the onus is on them to apply to court. Few logbook loan borrowers are in a position to do this.

THE LANDSCAPE OF CONSUMER CREDIT REGULATION

The Consumer Credit Act 1974

4.6 Much of our current consumer credit law can be traced to the Crowther report in 1971, which aimed to provide a coherent approach to all forms of consumer credit.[1] The Crowther report led to the Consumer Credit Act 1974 (CCA 1974), which provided the framework for extensive secondary legislation. The CCA 1974 has been heavily amended over the years (most notably by the Consumer Credit Act 2006 and by the implementation of the Consumer Credit Directive 2008) but much of it continues to apply.

4.7 Some elements of the CCA 1974 have been repealed. This reflects twin pressures: first from the European Union to harmonise consumer credit regulation; and secondly from the United Kingdom Government by its policy to replace consumer credit legislation with FCA regulation.

The Consumer Credit Directive 2008

4.8 In 2008, the Consumer Credit Directive (the Directive) was introduced to harmonise consumer credit law across European Union member states.[2] It was thought necessary "to ensure that all customers in the Community enjoy a high and equivalent level of protection of their interests and to create a genuine internal market".[3] The Directive was implemented in the United Kingdom through a series of regulations made in 2010 and 2011.[4]

4.9 The Directive applies to consumer credit agreements of up to €75,000. In April 2008, this equated to a figure of £60,260. The result is that consumer credit law now distinguishes between credit agreements of under and over this figure.

FCA rules

4.10 The FCA formally took over responsibility for regulation of consumer credit from the OFT on 1 April 2014. The aim was to introduce a more robust regime, where the regulator had greater supervisory powers, including increased power to impose sanctions on lenders.

1 Report of the Committee on Consumer Credit (1971) Cmnd 4596.

2 Directive 2008/48/EC of the European Parliament and of the Council of 23rd April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

3 Above, recital 9.

4 Chiefly Consumer Credit (EU Directive) Regulations 2010 SI 2010 No 1010 as well as Consumer Credit (Disclosure of Information) Regulations 2010 SI 2010 No 1013; Consumer Credit (Agreements) Regulations 2010 SI 2010 No 1014; Consumer Credit (Total Charge for Credit) Regulations 2010 SI 2010 No 1011; and Consumer Credit (Advertisements) Regulations 2010 SI 2010 No 1969. The latter two statutory instruments have been repealed by the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No 2) Order 2013 SI 2013 No 1881. Other amendments have been effected by Consumer Credit (Amendment) Regulations 2010 SI 2010 No 1969; and Consumer Credit (Amendment) Regulations 2011 SI 2011 No 11.

4.11 This was accompanied by a change of ethos, away from legislation to a more flexible system of principles and rules set out in the FCA's rulebook. Some of the material previously in the CCA 1974 is now to be found in the part of the FCA's rulebook dealing with consumer credit, referred to as "CONC".[5]

4.12 The regulatory framework for consumer credit is highly complex: provisions may be in statute, regulations or CONC, with some differences over which provisions apply to which credit agreements.

THE SCOPE OF CONSUMER CREDIT LEGISLATION

"Regulated credit agreements"

4.13 Under the CCA 1974, all credit agreements made with individuals are "regulated credit agreements", subject to certain exemptions. Two exemptions relevant for bills of sale are:

(1) **business loans of more than £25,000.** Where credit is wholly or predominantly for business purposes, it is excluded from the CCA 1974 if the amount of the loan exceeds £25,000. Where the borrower declares that the credit is for business purposes, it is presumed to be so, unless the lender or its agent knows or has reasonable cause to suspect otherwise;[6] and

(2) **loans to "high net worth individuals" of more than £60,260**. This exemption applies to large loans made to those thought wealthy enough to seek their own financial or legal advice.[7] In broad terms, individuals are of "high net worth" if they have a net income of £150,000 or more, or assets of £500,000 or more (not including a home or pension). For the exemption to apply, the borrower must make a declaration agreeing to forego the usual protections. The borrower must also obtain a statement from an accountant giving details of their income or assets.

4.14 A "regulated credit agreement" is a key concept in consumer credit law. We use it in this consultation paper to refer to all credit granted to individuals which does not fall into one of the exemptions.

4.15 These two exemptions would not apply to a typical logbook loan. Even though some logbook loans are made to self-employed people for business purposes, they are very unlikely to exceed £25,000. However, the exemptions would apply to some of the other bills of sale we discussed in Chapter 2. As we saw, some business loans (such as those secured on hotel furniture) may be of substantial amounts. Others (including those secured on wine) were private loans of over £60,260, which are likely to have been made to high net worth individuals.

[5] Available at http://www.fshandbook.info/FS/html/FCA/CONC.

[6] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 SI 2001 No 544, art 60C(4) to (6).

[7] Department of Trade and Industry, *Consultation on Draft Statutory Instruments: Exemptions, Post-contract information, Licensing* (2006), p 17, available at: http://webarchive.nationalarchives.gov.uk/20060810193027/dti.gov.uk/files/file32773.pdf.

EU legislation

4.16 The Directive provides for wider exemptions than the CCA 1974. It does not apply to:

(1) any credit which is wholly or predominantly for business purposes;

(2) any credit for more than £60,260; or

(3) any consumer credit secured on land.

4.17 We saw in paragraph 4.13 that the CCA 1974 regulates some business lending and some credit agreements for more than £60,260.[8] This is because when the Directive was implemented through regulations and changes to the CCA 1974, domestic legislation took a broader approach to regulation than the Directive requires.

CONC

4.18 CONC adds a further layer of complexity. Some rules, such as the requirement to provide adequate explanation, apply to small business loans but not to any loans of more than £60,260.[9]

Our approach

4.19 In Chapter 11, we consider new protections for borrowers who grant security through bills of sale. We think these new protections should apply to all security bills that secure "regulated credit agreements".

4.20 When looking at logbook loans, we do not think that it is helpful to distinguish between loans for private purposes and small loans made for business purposes. As we discussed in Chapter 2, self-employed people may be just as vulnerable when they are borrowing to buy stock or tools as when they are borrowing for private purposes.

4.21 Similarly, we wish to protect non-high net worth individuals who are borrowing large amounts in a private capacity. For example, an individual taking out a consolidation loan of more than £60,260 secured on a mobile home may be particularly vulnerable.

FCA AUTHORISATION

4.22 The FCA's approach to regulation involves three pillars: authorisation, supervision and enforcement. Authorisation is the first stage of allowing lenders to enter the market. Supervision refers to the FCA's on-going monitoring of lender conduct. Enforcement refers to steps taken by the FCA to address poor lender conduct.

[8] It also regulates some consumer credit secured on land. See Part 14A of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 SI 2001 No 544 for definitions of "regulated credit agreements" and the exemptions. Agreements falling within art 3(1)(b) of Directive 2014/17/EU are also exempted.

[9] CONC 4.2, explained at paras 4.32 to 4.34.

4.23 The FCA decided to prioritise authorisation of those sections of the consumer credit industry which posed the greatest risks. Logbook lenders were identified as high risk and were scheduled as one of the first groups to undergo the authorisation process. All logbook lenders have interim permission to carry on a consumer credit business but must ultimately be fully authorised by the FCA. Logbook lenders wishing to convert their interim permission into full authorisation had to apply between 1 January and 31 March 2015. The FCA is required to respond to applications within six months.[10]

4.24 Previously, consumer credit businesses were licensed by the OFT. Logbook lenders describe FCA authorisation as more demanding, as it puts the onus on them to explain their business model in depth. Logbook lenders must meet various "threshold conditions". Some of these conditions are procedural points, such as registration at Companies House, but most are broad principles. In 2014 the FCA published a guide for lenders which set out the broad principles as follows:

> **Appropriate resources**. The firm must demonstrate appropriate financial resources, nature and scale of the business and skills and experience of those managing the firm's affairs.
>
> **Suitability**. The firm must demonstrate the competence and ability of management, and that the firm's affairs are conducted in an appropriate manner regarding the interests of consumers and the integrity of the UK financial system.
>
> **Business model**. The firm's strategy for doing business must be suitable for its regulated activities and have regard to the FCA's operational objectives.[11]

4.25 The guide explains that lenders must submit a business plan "setting out your business aims and objectives and how you will organise your resources to achieve them". It continues:

> If you don't have a business plan, or haven't revised your current one for some time, now is the time to start working on this.[12]

4.26 The logbook lenders we spoke to said that preparing the application for authorisation had been onerous. They expected that smaller logbook lenders may not be able to comply and would not be allowed to continue trading.

[10] Financial Services and Markets Act 2000, s 55V(1).

[11] FCA, *Being regulated by the Financial Conduct Authority: guide for consumer credit firms* (2014), p 14, available at https://www.fca.org.uk/static/documents/consumer-credit-being-regulated-guide.pdf.

[12] Above, p 15.

PROTECTIONS IN CONSUMER CREDIT LEGISLATION

4.27 The CCA 1974 and associated regulations and CONC set out comprehensive provisions on all aspects of a consumer credit agreement. They cover advertising, pre-contract information, formalities for entering into a credit agreement, standard terms and conditions, the rights and obligations of the parties during the lifetime of the credit agreement and provisions covering discharge, breach, termination and enforcement.

4.28 Here, we concentrate on those areas of consumer credit law that are most relevant to bills of sale. We discuss five areas:

(1) **the borrower's pre-contractual understanding of the transaction:** although the protections help borrowers understand the credit agreement, the security aspect is left to the bill of sale document. We saw in Chapter 3 that the bill of sale document is very archaic;

(2) **the cooling off period**, which allows borrowers to extricate themselves from a regulated credit agreement though may be of limited use in practice;

(3) **protections when borrowers default**, to guard against aggressive or premature repossession of the secured goods;

(4) **the right of a borrower to a rebate on early settlement:** this applies even if it is the borrower's default that triggers acceleration and so early settlement; and

(5) **the courts' powers to re-open unfair credit relationships:** although the courts have wide statutory powers to intervene to protect borrowers from unfair credit relationships, there is little evidence that these powers have been used to re-open credit agreements secured by bills of sale.

PRE-CONTRACTUAL UNDERSTANDING

4.29 Various provisions are aimed at giving borrowers information, explanations and warnings regarding the nature of the credit agreement. Below, we consider how far lenders must highlight one of the most important aspects of a logbook loan, which is that borrowers who fail to keep up repayments risk having their vehicle repossessed.

Pre-contractual information

4.30 The Directive requires that the borrower must be provided in writing with certain pre-contractual information.[13] This includes the type and amount of credit, the cost of credit, information about the credit provider and key dates. Importantly, none of the prescribed pre-contractual information describes the effect of granting security under a bill of sale.

[13] In the form of the Standard European Consumer Credit Information. This provision of the Directive was implemented through the Consumer Credit (Disclosure of Information) Regulations 2010 SI 2010 No 1013.

4.31 As this requirement derives from the Directive, it does not apply to small business loans or loans of more than £60,260. However, we were told that many logbook lenders provide standard pre-contract information to all borrowers. If lenders provide information in purported compliance with the implementing regulations, then aspects of the credit agreement will be regulated.[14]

Adequate explanation

4.32 Lenders are required to give an adequate explanation to borrowers before they enter into the credit agreement.[15] This provision is set out in CONC and applies to small business loans, but not to loans of more than £60,260.[16]

4.33 Under CONC 4.2.5, the particular issues which lenders must discuss with borrowers include:

> 2(c) the features of the agreement which may operate in a manner which would have a significant adverse effect on the customer in a way which the customer is unlikely to foresee; and
>
> 2(d) the principal consequences for the customer arising from a failure to make payments under the agreement at the times required by the agreement including, where applicable...:
>
> .....
>
> (v) repossession of the customer's home or other property.

4.34 This requires logbook lenders to provide an explanation that failure to make scheduled repayments may lead to repossession of the vehicle. However, as we discuss in Chapter 5, borrowers may find it difficult to understand the explanations they are given.[17]

Setting out the terms of the security

4.35 Any security granted by the borrower in relation to a regulated credit agreement must be in writing and "embodied" in the credit agreement. This means that the credit agreement must either set out all the terms of the security or expressly refer to a separate security document.[18] In practice, because the bill of sale document must follow its own standard form, the credit agreement will cross-refer to it.

[14] Reg 2(2) of the Consumer Credit (Agreements) Regulations 2010 SI 2010 No 1014 (the Agreements Regulations 2010) states that where a credit agreement would not otherwise have fallen within the scope of the Directive, but pre-contractual information has been disclosed in compliance (or purported compliance) with the Consumer Credit (Disclosure of Information) Regulations 2010 SI 2010 No 1013, the Agreements Regulations 2010 will also apply to the credit agreement.

[15] Until April 2014, this was set out in CCA 1974, s 55A. It is now to be found in CONC 4.2.

[16] CONC 4.2.1.

[17] See para 5.12 in Chapter 5.

[18] This applies to all regulated credit agreements: see CCA 1974, s 105(9) and Consumer Credit (Agreements) Regulations 1983 SI 1983 No 1553, para 20 of sch 1 and para 9 of sch 3.

Scope for confusion

4.36 As we have seen, bills of sale must be written in a technical way, so the credit agreement cross-refers to a document which may be entirely incomprehensible to the borrower. Many logbook loan borrowers felt that the paperwork was complex and did not understand its meaning.[19]

COOLING OFF PERIOD

4.37 The cooling off period applies to all regulated credit agreements.[20] The borrower can withdraw from a regulated credit agreement without reason for a period of 14 days from the day on which the regulated credit agreement is made.[21]

4.38 In practice, borrowers are unlikely to exercise their right to withdraw during the cooling off period.[22] If they do, they must repay any credit provided by the lender plus interest.[23] Borrowers will generally have already spent the loan.

MEASURES TO PROTECT BORROWERS IN ARREARS

4.39 Regulation is designed to encourage lenders to develop fair procedures to deal with arrears, to notify borrowers of problems early on and to agree appropriate repayment plans with borrowers. If the parties cannot agree, the borrower may have the right to apply to court for more time to pay. These protections apply to all regulated credit agreements.

Forbearance

4.40 CONC requires lenders to "establish and implement clear, effective and appropriate policies and procedures" for dealing with borrowers in arrears. Lenders must also make special provision for "the fair and appropriate treatment" of those "who the firm understands or reasonably suspects to be particularly vulnerable".[24]

4.41 CONC states that borrowers should be treated with "forbearance and due consideration". This might include taking token repayments for a time, or reducing or waiving interest payments. It would not permit lenders to demand unreasonably large repayments.[25]

[19] See para 5.14 in Chapter 5.

[20] CCA 1974, s 66A. The cooling off period does not apply to certain credit agreements: those for credit exceeding £60,260 and those related to securing and financing the purchase of land.

[21] The 14 days runs from the latest of: the day on which the regulated credit agreement is made; the day on which the lender first informed the borrower of the credit limit; and the day on which the borrower received a copy of the regulated credit agreement under the CCA 1974, s 61A or s 63. For logbook loans, all these events may occur on the same day.

[22] And some may not know that it exists: the FCA found that many of its respondents "did not feel they had been informed about a cooling-off period" (FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014), p 29).

[23] CCA 1974, s 66A(9) and (10).

[24] CONC 7.2.1.

[25] CONC 7.3.

Notice of sums in arrears

4.42 If the borrower misses two repayments under the credit agreement (or four repayments if due at weekly intervals), the lender is obliged to send a notice of sums in arrears.[26] The notice must follow a standard form and include an information sheet prepared by the FCA.[27]

4.43 The information sheet emphasises that borrowers should not ignore the problem. Instead, they should contact the lender to discuss options. It also points borrowers towards sources of help and advice, including Citizens Advice, Money Advice Service and National Debtline.[28]

Default notice

4.44 The CCA 1974 requires the lender to serve a notice of default on the borrower before any enforcement action can take place. The notice signals the lender's intent to take enforcement action. The notice must give the borrower a period of no less than 14 days within which to remedy the default; enforcement action may not be taken unless that period has elapsed and the borrower has not remedied the default.

4.45 The default notice must follow a standard form and include an information sheet prepared by the FCA, similar to that accompanying the notice of sums in arrears.[29] Among other things, the information sheet tells the borrower of the possibility of going to court to ask for more time to repay:

> **You may be able to ask a court for more time to repay a debt** – but only in some circumstances. Speak to a debt adviser before considering court action. Keep copies of letters and emails in case these are needed by the court.[30]

4.46 The information sheet also warns:

> **If you don't do something quickly, the lender can take action against you**. For example, by demanding payment of money owed, or repossessing goods on hire-purchase.

4.47 The information sheet does not specifically mention that, for logbook loans, the borrower's vehicle may be repossessed.

[26] CCA 1974, s 86B.

[27] Consumer Credit (Information Requirements and Duration of Licences and Charges) Regulations 2007 SI 2007 No 1167, regs 19 to 24 and sch 3.

[28] Available at http://www.fca.org.uk/your-fca/documents/information-sheets/information-sheet-arrears.

[29] Available at http://www.fca.org.uk/your-fca/documents/information-sheets/information-sheet-default.

[30] See also Consumer Credit (Enforcement, Default and Termination Notices) Regulations 1983, SI 1983 No 1561, para 9 of sch 2.

4.48 We heard from consumer groups that these notices can be of limited use to logbook loan borrowers. The proliferation of paperwork can cause some borrowers in financial difficulties to "bury their heads in the sand". Letters go unopened and notices go ignored.

Time orders

4.49 As mentioned in the information sheets sent with the arrears notice and default notice, borrowers may, in certain circumstances set out in the CCA 1974, apply to court for a time order, giving them more time to repay.[31] This can be a useful protection, but the procedure is both costly and cumbersome.

The procedure

4.50 The first problem is that a borrower applying to court must pay the court fee. The standard fee is £155.[32] The Government consulted on whether this fee should be raised to £255 in January 2015.[33] The Government intends to proceed with this increase, but this has not yet been implemented.[34] Borrowers in arrears are unlikely to be able to pay such a fee. Some borrowers may be eligible for a remission of court fees. Those on means tested benefits are entitled to a full remission. Others may be entitled to a full or partial remission, depending on a complex formula which looks at their monthly income and disposable capital.[35]

4.51 Secondly, the procedure is cumbersome. In particular:

(1) if the borrower applies for a time order following receipt of a notice of sums in arrears or a default notice, the application may only be made if the borrower gives notice to the lender of an intention to make such an application and then waits 14 days before applying;[36]

(2) the notice itself must set out a "proposal" on what the borrower could reasonably afford by way of repayments; and

[31] CCA 1974, s 129.

[32] Civil Proceedings Fees (Amendment) Order 2014 SI 2014 No 874, para 2.4 of sch 1.

[33] Ministry of Justice, *Enhanced court fees: the Government response to Part 2 of the consultation on reform of court fees and further proposals for consultation* (2015), p 26, para 114, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396887/cm8971-enhance-fees-response.pdf.

[34] Ministry of Justice, *The Government response to consultation on enhanced fees for divorce proceedings, possession claims, and general applications in civil proceedings and Consultation on further fees proposals* (2015), p 12, para 37, available at https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation/supporting_documents/Government%20response%20to%20consultation%20on%20enhanced%20fees%20and%20consultation%20on%20further%20fees%20proposals%20web.pdf.

[35] See EX160 Application for a Fee Remission Form, available at http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=4396.

[36] CCA 1974, s 129A(1). The borrower can also apply for a time order in other situations set out in section 129(1) of the CCA 1974 that do not first require a notice of intention.

(3) the application must follow a prescribed form, part of which involves setting out detailed information in precise sequential order.[37]

4.52 It is difficult to reconcile the requirement to give 14 days' notice before making the application for a time order with the fact that, under the default notice, the borrower is likely to have only 14 days to cure the default. Even if the borrower gives notice immediately on receipt of a default notice, that notice is likely to expire before the borrower is permitted to make the application.

The court's powers

4.53 A time order is designed to help borrowers in temporary financial difficulties who could repay the loan if given sufficient time.

4.54 In *Southern & District Finance plc v Barnes and Another*,[38] the Court of Appeal considered when it would be appropriate to grant a time order. It held that the overriding criterion is that it must be just to do so, balancing the interests of lender and borrower. A time order should ordinarily be granted for a fixed or stipulated period, to assist with temporary financial difficulties. The Court of Appeal emphasised that it was unlikely to be just to grant a time order where the court doubted the borrower's ability to resume repayment of at least the instalments due under the credit agreement, even after being given more time.

4.55 Where a time order is granted the court has wide powers. The time order will provide for the borrower to make repayment of the sum owed in such instalments and at such times as the court deems reasonable.

4.56 The court also has power to alter the terms of the credit agreement, for example by reducing the rate of interest.[39] In *Southern & District Finance plc v Barnes and Another*, the court ordered that no additional interest be added to the account beyond that already owing, to give the borrower a realistic chance of repaying the loan by instalments. In *Director General of Fair Trading v First National Bank plc*,[40] the House of Lords confirmed that, if a time order was appropriate, the court should be ready to include any provision amending the credit agreement which it considers just to both parties.[41]

Conclusions on time orders

4.57 Logbook lenders and other lenders are supposed to show forbearance towards those in temporary financial difficulties. If they do not, time orders are the main way in which a borrower can prevent the lender from repossessing secured goods under a bill of sale.

4.58 However, reliance on time orders is unsatisfactory for three reasons:

[37] Civil Procedure Rules, Practice Direction 7B, para 7.3.

[38] [1996] 1 FCR 679.

[39] CCA 1974, s 136.

[40] [2001] UKHL 52, [2002] 1 AC 481.

[41] Above, Lord Bingham at para 29.

(1) **borrowers must have the means to protect themselves:** applications to court are costly. Currently, the standard application fee for a time order is £155. A borrower in default is unlikely to be able to pay such a fee;

(2) **borrowers may have insufficient time to object:** lenders need wait only 14 days from issuing a default notice before seizing goods. Meanwhile borrowers must give 14 days' notice following receipt of the default notice before applying for a time order. This means that borrowers must act as soon as they receive the default notice, and even then they may be too late; and

(3) **borrowers must know what they have to do:** borrowers must be well informed enough to make an application for a time order within the strict deadlines and using the correct procedure. We doubt, for example, that many borrowers would be able to comply with the requirements of the prescribed application form for a time order without legal advice.[42]

4.59 By contrast, for hire purchase agreements, the onus is on the lender to seek a court order in some circumstances before repossessing goods. In Chapter 11 we consider whether similar rules should apply to bills of sale.

REBATE ON EARLY SETTLEMENT

4.60 When the borrower defaults, the lender may terminate the credit agreement and "accelerate" the loan. This means that the lender demands immediate payment of all sums due under the credit agreement. If this process were unregulated, the lender could demand all the interest and charges which would have been payable if the credit agreement had run its full term.

4.61 For example, in *Shaw v Nine Regions Ltd*,[43] the borrower had taken out a logbook loan of £3,000, at a high interest rate over 36 months of weekly repayments. If the logbook loan had run its course, the total repayment would have been £13,724.88. When the borrower defaulted on repayment, the logbook lender, according to the terms of the credit agreement, terminated for breach and demanded payment of the full outstanding balance, which was £10,856.88.

4.62 However, a borrower under a regulated credit agreement who repays early, either in whole or in part, is entitled to a rebate of the charges attributable to the period after the early settlement date.[44] Importantly, this also applies when a credit agreement is accelerated on default.[45] This point was confirmed in *Shaw v Nine Regions Ltd*. The logbook lender subsequently informed the borrower that, taking account of the statutory rebate for early settlement, the total sum due was reduced from £10,858.88 to £1,523.86, even though the borrower's default had triggered acceleration of the logbook loan. The borrower was not obliged to pay future interest which had not yet fallen due.

[42] Civil Procedure Rules, Practice Direction 7B, para 7.3.

[43] [2009] EWHC 3514 (QB); [2010] CTLC 1.

[44] Calculated in accordance with the Consumer Credit (Early Settlement) Regulations 2004 SI 2004 No 1483.

[45] Or "for any other reason", as CCA 1974, s 95(1) makes clear.

4.63 The statutory rebate provides an important protection, both to borrowers who repay early and to those who default. However, if borrowers in default cannot pay the sum due on early settlement, the statutory rebate will not prevent repossession. Instead, in a typical logbook loan, the early settlement rebate will affect the extent of the shortfall after the vehicle has been repossessed and sold.

POWER TO REOPEN UNFAIR CREDIT RELATIONSHIPS

4.64 Sections 140A, B and C of the CCA 1974 came into force in April 2007, giving the court a wide power to re-open a credit agreement where the relationship is unfair. These provisions replaced the previous provisions on extortionate credit bargains, which were widely criticised as being ineffective.[46] The new provisions allow the court to re-open a credit agreement if it is of the opinion that the relationship between the lender and borrower under that credit agreement is unfair to the borrower because of one or more of the following factors:

(1) any of the terms of the credit agreement;

(2) the way in which the lender has exercised or enforced any of its rights under the credit agreement or any related agreement; and

(3) any other thing done (or not done) by or on behalf of the lender, either before or after the making of the credit agreement.[47]

4.65 In determining whether the relationship is unfair, the court must have regard to all matters it determines relevant. Notably, if the borrower alleges that the credit relationship is unfair, the burden of proof is on the lender to prove the contrary.[48]

4.66 Section 140B of the CCA 1974 gives the court extensive powers to remedy a relationship that it has found to be unfair. These include requiring the lender to repay in whole or in part any sum paid under the credit agreement; reducing or discharging any sum payable under the credit agreement; or requiring the lender to do or refrain from doing anything in connection with the credit agreement.

4.67 We have not found any reported cases in which the court has intervened in a regulated credit agreement involving a logbook loan using these powers.[49] Although these sections are drafted in wide terms, their practical effect in the logbook loan market is unclear.

[46] See G Howells and L Bently, "Loansharks and extortionate credit bargains: part 2" [1989] *Conveyancer and Property Lawyer* 234 at 234 to 235: "Three reasons explain the ineffectiveness of section 137 – (1) the onus placed on the debtor to raise the issue; (2) the statutory formulation employed; and (3) the judicial reticence to interfere with agreements voluntarily entered into by the parties".

[47] CCA 1974, s 140A(1).

[48] CCA 1974, s 140B(9).

[49] In *Shaw v Nine Regions Ltd*, discussed in paras 4.61 to 4.62, the logbook lender had miscalculated the total amount due to be repaid. The Court of Appeal rejected the borrower's argument that this made the credit relationship unfair.

THE FINANCIAL OMBUDSMAN SERVICE

4.68 FOS is an independent body that handles individual complaints between borrowers and financial businesses which the parties cannot resolve between themselves. Established by Parliament, it is impartial and free of charge to complainants.

4.69 Borrowers under a consumer credit agreement have the right to complain to FOS if they are consumers or micro-businesses.[50] The borrower must first complain to the lender, which has eight weeks to resolve the complaint. If, after this period, the lender has not resolved the complaint to the borrower's satisfaction, the borrower may take the complaint to FOS.

4.70 Ombudsmen are required to determine complaints "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case".[51] Ombudsmen may therefore depart from the law where they consider the law to be operating unjustly. They have the power to award compensation, including for distress and inconvenience, up to a maximum of £150,000.[52]

4.71 This means that borrowers with a logbook loan may complain to FOS if a lender has acted unfairly. However, a FOS determination will take time. The borrower must first spend eight weeks attempting to resolve the issue with the logbook lender, and must then wait several months for FOS to decide the case. This will not be sufficiently quick to prevent repossession. FOS may provide compensation after the event if it thinks that the logbook lender's unfair actions caused the borrower financial loss or distress.

4.72 The ability of a purchaser who innocently buys a vehicle subject to a logbook loan to complain to FOS is limited. We discuss this in Chapter 5.[53]

SELF-REGULATION BY LOGBOOK LENDERS

4.73 In Chapter 1, we discussed the consultation by the Department for Business, Innovation and Skills in 2009 on bills of sale for consumer lending. The consultation eventually led to a code of practice intended to give the logbook loan industry an opportunity to "put its own house in order".

4.74 The Consumer Credit Trade Association drafted the code of practice (the CCTA Code). Its members that offer logbook loans undertook to comply with it from 1 February 2011.

4.75 The CCTA Code supplements the legislation. In some cases, it extends the limited protection given to borrowers by the Bills of Sale Acts. In particular it gives borrowers the right to terminate a logbook loan voluntarily by handing the vehicle to the lender.

[50] Defined as businesses with an annual turnover of less than €2 million and fewer than ten employees (FCA Handbook, *Dispute Resolution: Complaints (DISP),* 2.7.3 and Glossary, available at https://fshandbook.info/FS/html/FCA/DISP).

[51] Financial Services and Markets Act 2000, s 228(2).

[52] FCA Handbook*, Dispute Resolution: Complaints (DISP),* 3.7.

[53] See para 5.89 in Chapter 5.

4.76 We do not discuss the CCTA Code in detail in this chapter, but consider its provisions wherever relevant throughout this consultation paper.

REGULATION THAT DOES NOT APPLY TO BILLS OF SALE

4.77 Several important protections apply to other forms of consumer credit but not to bills of sale. Here we outline the protections in hire purchase law and the price cap on payday loans.

Hire purchase

4.78 Like bills of sale, hire purchase is a way in which consumer credit can be secured on goods. In both cases, the goods are usually vehicles. The main difference is that hire purchase is used to buy vehicles, while bills of sale are mainly used to borrow money on the security of a vehicle which the borrower already owns.

4.79 The usual structure of a hire purchase agreement is that the dealer transfers ownership of the vehicle not to the hirer but to the lender; the hirer then hires the vehicle, with an option to purchase it at the end of the hire purchase agreement. As the lender retains ownership of the vehicle until the hirer exercises the option to purchase, it can (in theory) repossess the vehicle if the hirer defaults.

Protections for hirers

4.80 The CCA 1974 includes specific provisions to prevent a hire purchase lender from repossessing goods inappropriately. Broadly, there are two key protections for hirers:

(1) **court order:** once the hirer has paid one third of the hire purchase price, the lender may not repossess the goods on default without first seeking and obtaining an order of the court; and

(2) **voluntary termination:** this allows hirers to limit their liability. The hirer can return the goods to the lender at any time and remain liable for just one half of the hire purchase price.[54]

4.81 We consider these protections in more detail in Chapter 11. The consumer groups we spoke to during this project indicated that borrowers often confuse logbook loans with hire purchase. Many borrowers mistakenly believe that these protections apply to logbook loans.[55]

[54] And any accrued arrears, if not already paid. See para 11.52 in Chapter 11.

[55] In some cases, voluntary termination may be available under the CCTA Code but this is not a statutory right.

Protection for private purchasers

4.82 If a vehicle subject to a hire purchase agreement is sold, the law protects private purchasers (who are not acting as trade or finance purchasers) who act in good faith and without notice of the hire purchase agreement.[56] Such purchasers will become the owner of the vehicle and the hire purchase lender loses all rights to it.

4.83 This rule does not apply to bills of sale. Instead, where a vehicle is subject to a logbook loan, the lender is entitled to seize it from a purchaser who has bought the vehicle without any knowledge that the logbook loan exists. As we discuss in Chapter 5, this has led to considerable criticism. In Chapter 12, we make proposals for reform.

Price cap for payday loans

4.84 In Chapter 2, we explained the overlap between logbook loans and payday loans. Both are aimed at the sub-prime market, and many borrowers use both products. The main difference between logbook loans and payday loans is that logbook loans typically involve a larger loan over a longer period.

4.85 Since 2 January 2015, the price of payday lending has been capped. This cap does not apply to logbook lenders.

"High-cost short-term credit"

4.86 The FCA price cap applies to "high-cost short-term credit" (HCSTC).[57] HCSTC is defined as credit with an annual percentage rate of 100% or more, and which is due to be substantially repaid within a maximum period of 12 months.[58] This definition is aimed at payday lending.

4.87 Bills of sale lending is explicitly excluded from the definition of HCSTC. The FCA considered whether the definition should be expanded to include logbook loans but declined to do so:

> We continue to think that products currently excluded from the definition, although high-cost, are quite distinct in the nature of the products and the problems that they may cause consumers.[59]

The FCA also felt that our consultation may "change business models" in the logbook loan industry.[60]

[56] Hire Purchase Act 1964, ss 27 to 29. For "trade or finance purchaser", see paras 12.20 to 12.21 in Chapter 12.

[57] The price cap is set out in CONC 5A and was made in accordance with the FCA's duty under section 137C of the Financial Services and Markets Act 2000 (as amended by the Financial Services (Banking Reform) Act 2013) to make general rules with a view to securing an appropriate degree of protection for borrowers against excessive charges.

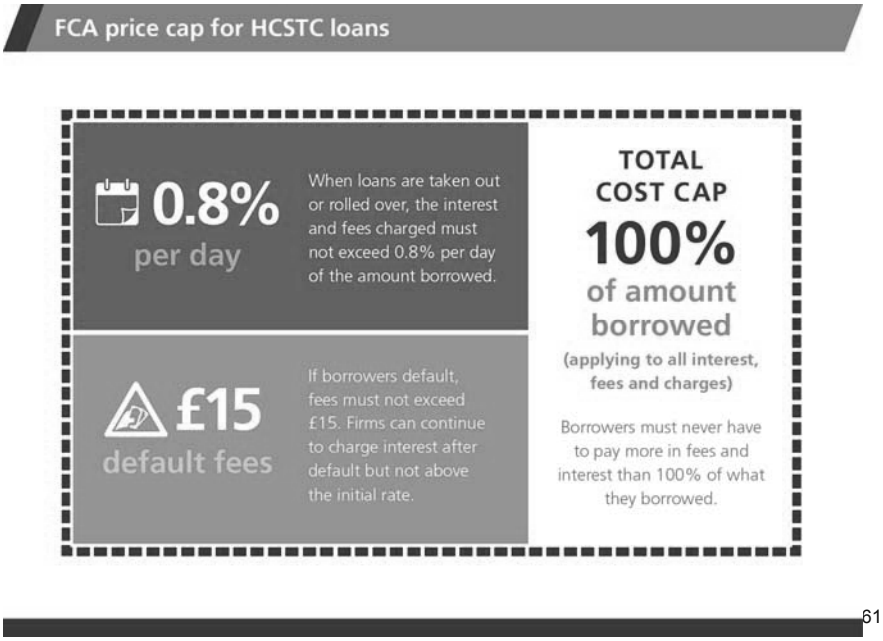
[58] FCA Handbook, Glossary, available at http://fshandbook.info/FS/html/FCA/Glossary.

[59] FCA, *Policy Statement PS14/16: Detailed rules for the price cap on high-cost short-term credit* (2014), p 23, available at http://www.fca.org.uk/your-fca/documents/policy-statements/ps14-16.

[60] Above, p 23.

Three components

4.88 As the following diagram shows, the price cap has three components.



[61]

4.89 The first component is that interest and fees may not exceed 0.8% of the outstanding principal per day.

4.90 The second component is that fixed charges on default must not be more than £15.[62] This may be lower than lenders' actual costs in sending notices.[63] The FCA explained that:

> in setting the default cap level we balanced a number of considerations: the need to protect borrowers from quickly spiralling debt; allowing the lender to recover at least part of the costs occasioned by default; having appropriate incentives for the borrower to repay the loan; and not rewarding poor affordability assessments by firms. We consider that a ceiling of £15 strikes the right balance.[64]

As we shall see, default charges are often much greater than this in the case of logbook loans. Citizens Advice, in particular, has raised concerns about how quickly default charges can build up.[65]

4.91 The third component is a total cost cap of 100% of the amount borrowed, applying to all interest, fees and charges.

[61] Above, p 5.

[62] CONC 7.7.5 requires charges to borrowers in default or arrears difficulties to be no higher than a firm's reasonable costs. The FCA felt that a cap would complement CONC by setting a maximum amount chargeable. Firms would still need to demonstrate compliance with CONC (FCA, *Policy Statement PS14/16: Detailed rules for the price cap on high-cost short-term credit* (2014), p 35).

[63] FCA, *Policy Statement PS14/16: Detailed rules for the price cap on high-cost short-term credit* (2014), p 36.

[64] Above, p 37.

[65] See para 5.68 in Chapter 5.

4.92 The FCA thought that these caps would preserve a competitive market, but that a lower cap would not. The FCA recognised that "price caps are not generally a pro-competitive regulatory tool" but that:[66]

> The structure of the cap is sufficiently flexible to give firms the opportunity to adapt their pricing and products… The proposed structure and level of the price cap also ensures that the amount of revenue a firm can gain is proportionate to the amount of credit lent and the duration… As a result, we have concluded there will be a viable market at the level and structure proposed but at lower levels of the price cap, in particular the initial cost cap, viability of the market is at risk.[67]

4.93 It has been suggested that one effect of the price cap may be to expand the logbook loan industry.[68] If payday lending becomes less available, more borrowers may turn to logbook loans. It will therefore be even more important to have a legislative regime relating to logbook loans that is fit for purpose.

CONCLUSION

4.94 As we have seen, loans secured by bills of sale are regulated not only by the Bills of Sale Acts but also by several other sources of regulation. These include:

(1) the CCA 1974 and associated regulations that implement the Directive;

(2) the FCA. The FCA is currently subjecting logbook lenders to a rigorous authorisation process. CONC also requires lenders to give adequate warnings about repossession and to establish "clear, effective and appropriate" procedures to deal with borrowers in default with "forbearance and due consideration";[69]

(3) FOS. Borrowers may make a complaint to FOS that a logbook lender has acted unfairly. If upheld, FOS may award compensation, up to a maximum of £150,000; and

(4) the CCTA Code. Logbook lenders have agreed to additional regulation of their conduct on a voluntary basis.

4.95 These sources of regulation do not always mesh well with the Bills of Sale Acts. In this chapter, we highlight three concerns:

(1) when consumers take out a logbook loan, they are often confused by the paperwork involved. They are faced with two documents, one of which is written in a particularly technical and confusing way. There are insufficient warnings that a borrower who does not keep up the repayments could lose the vehicle;

[66] FCA, *Policy Statement PS14/16: Detailed rules for the price cap on high-cost short-term credit* (2014), p 20.

[67] Above, p 20. "Initial cost cap" refers to the first component of the price cap that interest and fees may not exceed 0.8% of the outstanding principal per day.

[68] See para 2.19 in Chapter 2.

[69] See paras 4.40 to 4.41.

(2) unlike some situations in hire purchase, there is no requirement on the lender to seek a court order before seizing goods. Instead, the onus is on the borrower to apply for a time order. Few logbook loan borrowers have the resources or expertise to do this; and

(3) there is overlap between borrowers that take out payday loans and logbook loans, yet payday loans are subject to a price cap while logbook loans are not. This might have the effect of expanding the market for logbook loans.

4.96 It is not within the remit of this project to amend the consumer credit regime as a whole. However, we think that there is a need to reform the legislation governing bills of sale to remedy gaps in the protection currently afforded to logbook loan borrowers.

CHAPTER 5
IMPACT OF THE LAW: LOGBOOK LOANS

5.1 In this chapter we describe the various stages of a logbook loan from application through registration to enforcement. We then look at the position of purchasers who buy vehicles subject to logbook loans. At each stage, we highlight the problems caused by the archaic legislation relating to logbook loans.

5.2 Consumer groups were critical of many aspects of logbook lending. Some, such as poor-quality affordability checks and high interest rates, are common to all forms of sub-prime lending. They are not caused by the Bills of Sale Acts: they would need to be addressed by Financial Conduct Authority (FCA) regulation rather than by this consultation. The FCA authorisation process for logbook lenders is already underway and should raise standards across the industry.

5.3 However, four problem areas can be addressed through law reform. These are:

(1) the document requirements, which present difficulties for borrowers and logbook lenders alike;

(2) the High Court registration process, which costs lenders between £35 and £51 for each logbook loan, and provides no apparent benefit to third parties;

(3) the enforcement process, where borrowers have few protections; and

(4) the risk to innocent purchasers that they will lose the vehicle they have paid for.

THE APPLICATION PROCESS

5.4 Although some logbook lenders run branch networks, most do not. Typically, potential borrowers contact logbook lenders by telephone or through a website. The FCA found that the initial telephone call generally consisted of providing details about the vehicle and the desired loan amount.[1]

The face-to-face meeting

5.5 The next stage is a face-to-face meeting. The FCA found that these meetings often took place so soon after the initial telephone call that borrowers felt as though the logbook loan was already a "done deal".[2] While this speed clearly responds to borrowers' wishes, it allows little time for reflection or second thoughts.

5.6 A logbook lender told us that meetings may be conducted at the premises of one of its "partner" firms; the customer's home; or at a neutral place, such as a cafe. The FCA commented that:

[1] FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014), p 26.

[2] Above, p 26.

> A number of respondents were unhappy with the set-up of face-to-face meetings, describing how they sometimes took place in borrowed, shared and impersonal office space – for example within the branch of [a] local credit store or pawnbroker.[3]

5.7 As we have seen, the Bills of Sale Acts require the borrower to sign the security bill document in the presence of a witness, who must then swear an affidavit. This makes a face-to-face meeting necessary. There are many issues to be covered at the meeting. We were told that the meeting takes between 45 minutes and two hours. Most of the time is taken with affordability checks and with examining the vehicle. Logbook lenders said that only five to 15 minutes will be spent on explaining and signing the security bill document.

5.8 Logbook lenders said that they would take the vehicle's V5C registration document, or "logbook", which gives this type of lending its name. However, this act is purely symbolic. The logbook shows the registered keeper of the vehicle and does not affect its ownership. Borrowers can easily apply to the Driver and Vehicle Licensing Agency (DVLA) for another copy of the logbook. Some logbook lenders also ask borrowers for duplicate keys (which may be useful on repossession). However, borrowers rarely have duplicate keys with them. One logbook lender suggested that only 10% of borrowers provided them.

Borrowers' understanding of logbook loans

5.9 As we have seen, the FCA rules on consumer credit (CONC) require logbook lenders to explain that failure to make scheduled repayments may lead to repossession of the vehicle.[4]

5.10 In addition, the Consumer Credit Trade Association (CCTA) has produced a three page standard information sheet for logbook lenders to give to borrowers.[5] The relevant material is on the second half of page 1:

> A Bill of Sale is what gives us our security over your vehicle. This means that:
>
> Until you have repaid your loan **we are technically the legal owner of your vehicle**. However, you can still keep driving it and once you have paid off your loan the ownership goes back to you.
>
> The Bill of Sale will be registered with the High Court in London and the register is open to public inspection.

[3] Above, p 26.

[4] See paras 4.32 to 4.34 in Chapter 4.

[5] Available at http://www.ccta.co.uk/admindocs/codes_of_practice/2015_borrower_information_sheet_member_newA.pdf.

> If you default on the payment of your loan, or other terms within the loan agreement, we will have the right to serve a Default Notice on you under the Consumer Credit Act 1974. If you do not make good the default, within the time stated in the notice, **we will be entitled to take possession of your vehicle and sell it. You should note that we do not need a court order to repossess your vehicle**.
>
> If your vehicle is repossessed and sold for an amount of money that is insufficient to pay off the money you owe us **you will still have to pay the shortfall. The sale of the vehicle does not put an end to the loan.**

5.11 The information sheet states the main message: that the logbook lender may take possession of the vehicle without a court order. However, consumer groups thought that it was overly wordy. They also objected to the phrase "we are *technically* the legal owner".

5.12 Most borrowers will be aware that they have given the logbook lender rights to their vehicle. However, they may not "really think" about this, or appreciate the full implications. As one respondent to the FCA study put it:

> He didn't say anything about the ownership of the car. You don't really think about it all until afterwards. I had no idea…[6]

5.13 Borrowers may fail to appreciate that a logbook loan which is so easy to obtain may be difficult to repay; or that if, on default, they fail to engage with a logbook lender, repossession is the likely outcome. Nor would many borrowers understand how quickly arrears, interest, default fees and repossession fees can accumulate, or how little a vehicle may fetch in a public auction. Therefore they may not appreciate the implications of remaining liable for the shortfall. Consumer groups thought that many borrowers confuse logbook loans with hire purchase agreements, where repossession is less likely to take place.

The security bill document

5.14 The FCA commented that borrowers did not examine the small print of logbook loan paperwork, which consists of "complex, lengthy documents, often not written in 'plain English'".[7] Logbook lenders were more direct: one described the security bill document as "horrific". The CCTA said that the standard form required under the 1882 Act:

> does not satisfy the modern requirement that documents should be written in plain and intelligible language that an ordinary person could easily understand.[8]

6 FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014), p 27.

7 Above, p 27.

8 CCTA, *Response to Law Commission Call for Evidence* (2014), p 8.

5.15 They asked for it to be overhauled. We agree. We think that the standard form is entirely incomprehensible and serves to distract borrowers' attention from other more important issues.

5.16 As we have seen, failure to comply with the document requirements carries a heavy sanction for logbook lenders: they not only lose any rights over the vehicle but are also not entitled to recover the loan amount owed to them.[9] Given this sanction, logbook lenders are understandably reluctant to change the standard form to make it more accessible. This is an issue which requires statutory reform.

5.17 In Chapter 9, we make proposals to bring the security bill document up-to-date. Our aim is to produce a short, simple document which contains clear provisions and warnings.

HIGH COURT REGISTRATION

5.18 In Chapter 3, we explained that registration was introduced by Victorian legislation to allow potential purchasers and other potential lenders to find out about existing bills of sale over goods. As far as logbook loans are concerned, High Court registration fails to fulfil this function. The CCTA said:

> The register is not fit for purpose and does not provide any benefits to lenders or borrowers.[10]

5.19 The process is paper-based. It is expensive and cumbersome, adding £35 to £51 to the cost of every logbook loan. As the High Court register cannot be searched by vehicle, logbook lenders also routinely register with commercially-run asset finance registries.

5.20 Below we describe the difficulties and costs of registering a logbook loan at the High Court and the problems in searching the register to find out if a logbook loan exists. In Chapter 10, we propose to abolish the requirement to register security bills over vehicles at the High Court.

How logbook loans are registered

5.21 The signed security bill document must be sent to the High Court, together with a copy; a £25 fee; and a sworn affidavit from the witness. In practice, following the face-to-face meeting, the witness (who is usually an agent or employee of the logbook lender) will visit a solicitor to swear an affidavit. The agent or employee will then post the documents by special delivery to the High Court.

5.22 On receipt, the High Court stamps both the original and the copy with a date and number. The original is returned to the logbook lender. The High Court then enters some basic details onto an Excel spreadsheet (including the name and postcode of the borrower). The copy is then put into a box, in number order.

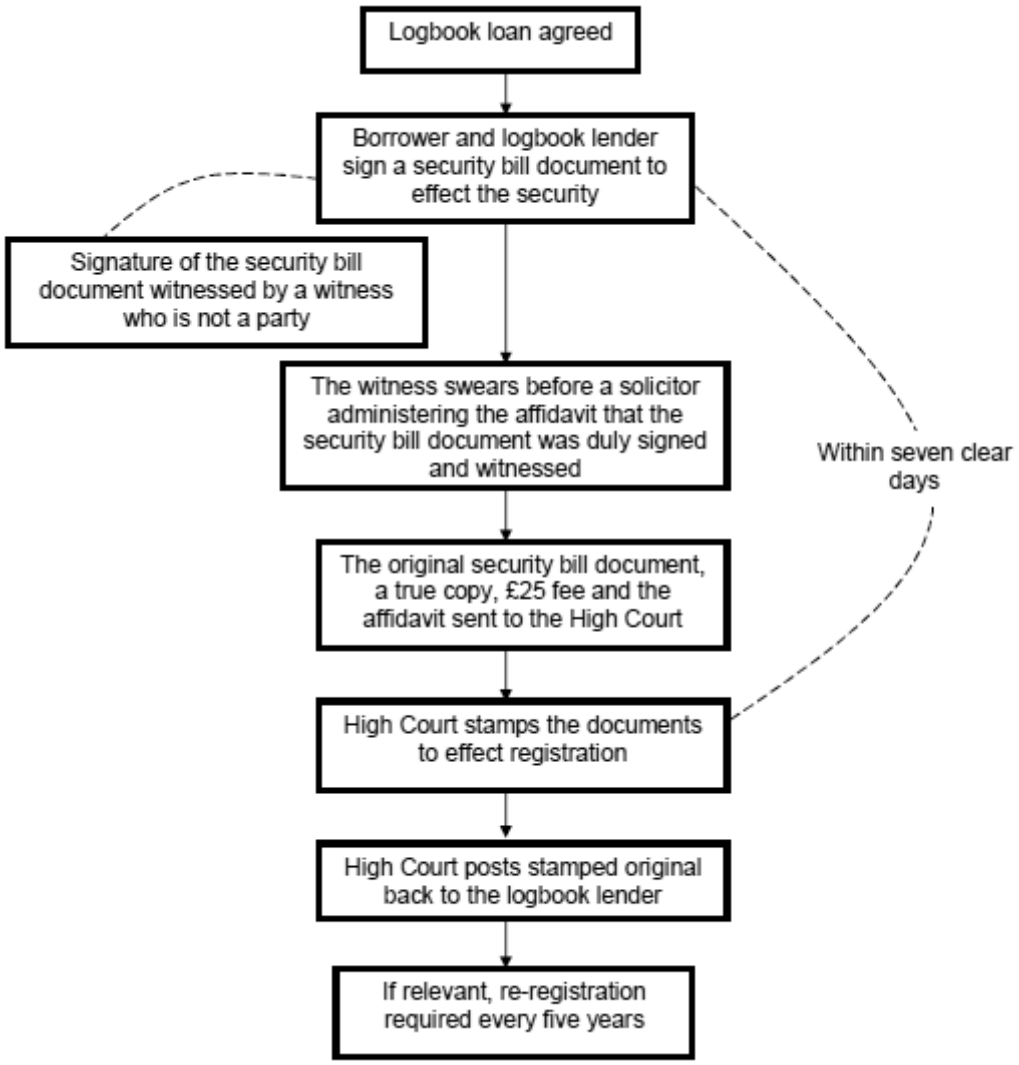
[9] See para 3.40 in Chapter 3.

[10] CCTA, *Response to Law Commission Call for Evidence* (2014), p 5.

5.23 The High Court must receive and stamp the security bill document within seven clear days of the date of execution.[11] As we discuss below, this short period may be difficult to meet. If the seven clear day period is missed, the logbook lender may apply for late registration, which costs an additional £50.

5.24 The registration process is illustrated in the following diagram.

Chart 5.1: Process for registering a logbook loan at the High Court



[11] The 1878 Act does not require the High Court to stamp the security bill document. Rather, stamping is standard practice in the High Court's procedure for registering bills of sale as evidence of the date of registration.

Seven clear days means that the security bill document must be stamped by the seventh day after the date of execution (eg, if execution was on 1 September, registration must take place on 8 September).

The cost of registration

5.25 The High Court registration regime is expensive. As well as the £25 registration fee, logbook lenders must pay for the affidavit and postage. Even though the affidavit is in standard form, solicitors charge between £5 and £10 for each affidavit; special delivery postage is currently £5.60. There is also the cost of staff time for the agent or employee to travel to the solicitor, swear the affidavit and post the documents.

5.26 The costs of postage and staff time will be less if several security bill documents can be dealt with together, but it is rare for logbook lenders to amass more than a handful of them for each visit to the solicitor. The seven clear day time limit means that logbook lenders cannot wait more than a few days before sending the security bill document to the High Court. Furthermore, only the agent or employee who witnessed the signature may swear the affidavit: it is not possible for one member of staff to swear affidavits "in bulk".

5.27 The table below gives logbook lenders' estimates of the cost of registering each security bill document.

Table 5.2: Costs associated with registration of security bill documents

Type of fee	**Cost**
High Court registration fee (if within seven clear days)	£25
Solicitor's fee for the affidavit	£5 to £10
Staff time swearing the affidavit	£3.50 to £10
Postage fee for sending requisite documents to the High Court[12]	£1 to £5.60
Additional fee for late registration: £50 for each late registration, which is required in at least 1% of cases	Adds an average of 50p to the cost of registering each security bill
Total cost for registering each security bill document	£35 to £51

5.28 In broad terms, the registration process adds between £35 and £51 to the cost of each logbook loan. The logbook lenders we spoke to had different practices about whether the £25 registration fee is passed onto borrowers directly. Even if the registration fee is absorbed by logbook lenders initially, it will still be borrowers who bear the cost in the end.

[12] Logbook lenders use special delivery to try to ensure compliance with the seven clear day deadline. The High Court bears the postage fee of returning stamped originals to logbook lenders.

Problems with the seven clear day time limit

5.29 Logbook lenders gave us many examples where registration takes more than seven clear days. It is particularly a problem over Christmas, when the post is delayed and the High Court is shut. Also, if the agent or employee forgets to enclose the registration fee, the documents would be returned and would need to be reposted with the fee. In one case, an agent had suffered a heart attack. As only the person who witnessed the signature can swear the affidavit, this caused delay in sending the documents to the High Court.

5.30 Where the seven clear day deadline is missed, the logbook lender must make an application before a Master of the High Court to allow the registration out of time. Masters of the High Court told us that there are sometimes 20 applications a month. The application is decided on the documents. Masters generally allow late registration as third parties would not usually suffer any prejudice; an intervening security bill registered before the late security bill would in any case have priority.[13] However, late registration applications take court time and cost logbook lenders an additional £50.

Priority between competing security bills

5.31 It is possible for a fraudulent borrower to grant two or more security bills over the same vehicle. The law on this is clear. The security bill with the earlier stamp will have priority. In *Nine Regions Ltd (trading as Logbook Loans) v OFT*, the First-tier Tribunal placed particular significance on the fact that:

> A third party should be able to see whether a bill has been executed. Receipt by the registry would tell him nothing.

The Tribunal had little hesitation in deciding that priority between competing security bills should be decided according to the date shown on the stamp.[14]

5.32 This rule is clear but arbitrary. Each morning, High Court staff will open the post and stamp the security bills, but the post is not kept in any particular order. A security bill received on Monday morning may well be stamped before a security bill received on the previous Friday.[15] One logbook lender said that the stamp is sometimes unclear so the date of registration is difficult to establish.

Error

5.33 The document-heavy regime is also susceptible to error. One logbook lender told us that it had received stamped security bills which should have been sent to a competitor. Another said that it had received a late registration order without a signature of the Master.

[13] The security only becomes enforceable against third parties when the security bill document is stamped.

[14] As held by David Marks QC, John Randall and Vernon Fuller in *Nine Regions Ltd (trading as Logbook Loans) v OFT* [2010] UKFTT 643 (GRC) at paras 172 to 173.

[15] The High Court receives post Monday to Friday.

Removing security bills from the register

5.34 When a logbook loan is paid off, either the logbook lender or the borrower may apply to the High Court for a "memorandum of satisfaction" to be written on the security bill, to show that ownership has returned to the borrower. We did not find any memoranda of satisfaction in our visits to the High Court during the course of this project. One High Court Master told us that he had dealt with only one in five years. Another indicated that she had seen none in twelve years.

5.35 One reason for the lack of memoranda of satisfaction appears to be the expense. An application for a memorandum of satisfaction costs £50 if both parties consent. A contested application costs £480. We understand that once the logbook lender explains these costs to the borrower, the borrower accepts a simple letter of satisfaction from the logbook lender.

5.36 As we saw in Chapter 3, registration must be renewed every five years. If not, registration lapses and the security becomes void against all third parties and the borrower.[16] This occurs whether or not the logbook loan has been repaid.

County court registers

5.37 The 1882 Act requires the High Court to send copies of security bills to county courts. Where the borrower is not resident in London, or if the security bill describes the secured vehicle as being located outside of London, the High Court must forward a copy of the security bill for registration at the county court that presides over the area in which the borrower or the secured vehicle is located.[17]

5.38 High Court Masters told us that there had been irregular compliance with this requirement. After not forwarding security bills for a period of nine months, the High Court once again began sending them to local county courts. However, when it became apparent that county courts were not maintaining registers of security bills, the High Court stopped forwarding them entirely about two years ago. This aspect of the legislation has fallen into disuse.

Searches

5.39 The High Court registers a security bill against the borrower, not the vehicle. In other words, a third party with the registration or vehicle identification number of a vehicle would not be able to search the High Court register to find out if a security bill is registered against the vehicle. Instead, the third party would need the name and postcode of the borrower and would have to pay a £45 fee. Those who have the security bill registration number may search free of charge, but only the logbook lender that granted the loan would know this number.[18]

[16] 1878 Act, s 11.

[17] 1882 Act, s 11.

[18] Those who wish to search the High Court register give High Court staff (in person or by post) the details they wish to search against. High Court staff then conduct the search by checking the Excel spreadsheet.

5.40 The CCTA told us than none of its members check the High Court register before agreeing a logbook loan. The High Court confirmed that searches are rare. Staff told us that between February 2015 and June 2015, they did not conduct a single search of the bills of sale register. Further, they told us that cost can be a prohibitive factor. When staff inform a third party that a search using the borrower's name and postcode costs £45, third parties frequently decide not to proceed.

Conclusion

5.41 The purpose of requiring registration of bills of sale is to put third parties on notice.[19] The High Court register no longer fulfils that purpose; we have seen that third parties rarely search. Logbook lenders are forced to comply with a registration regime that is cumbersome, expensive and susceptible to error merely to ensure that their security is valid.

5.42 There is a need for an asset finance register, where anyone dealing with a vehicle can enter the vehicle's details and find out whether a logbook loan is secured against it. However, as we see below, this need is currently met by commercially-run asset finance registries rather than the High Court.

ASSET FINANCE REGISTRIES

5.43 The code of practice drafted by the CCTA (the CCTA Code) requires its members to register logbook loans with an asset finance registry within 24 hours of the documentation being signed.[20] Asset finance registers are commercially-run electronic registers that record encumbrances over vehicles, including logbook loans. There are three main providers: HPI, Experian and Cheshire Datasystems Limited (CDL).[21]

5.44 Registration is generally free and can be done simply and online. Some logbook lenders told us that they register with one provider and expect the providers to share data among themselves.[22] Others register with all three. Once a logbook loan is registered, asset finance registries have an alerting system that notifies the logbook lender if there is activity against the relevant vehicle.

[19] See para 3.9 in Chapter 3.

[20] CCTA, *Code of practice: bills of sale for consumer lending regulated under the Consumer Credit Act 1974* (2015), para 3.14.

[21] Asset finance registries mainly record encumbrances over, and were created for, vehicles. They could record encumbrances over any uniquely identifiable asset and there are encumbrances recorded over, for example, agricultural machinery and printing presses.

[22] The extent of data sharing is unclear. We were told that HPI, Experian and CDL could only share data if they had the specific consent of the logbook lender.

5.45 Asset finance registers are widely searched by second-hand vehicle dealers and those providing motor finance. The information they provide is not limited to logbook loans. A full "vehicle provenance check" draws on information recorded in many sources, including DVLA, the Motor Insurance Anti Fraud and Theft Register and asset finance registers, to give a comprehensive picture of the status of a vehicle. The vehicle provenance check reveals whether the vehicle has ever been stolen, whether it has suffered a total insurance loss and, importantly, whether it is subject to a finance interest such as hire purchase or a logbook loan.

5.46 The logbook lenders we spoke to all conduct a vehicle provenance check with at least one of the three providers before agreeing a logbook loan. For trade searchers, search fees are negotiated with the provider. The logbook lenders we spoke to generally pay between £1.70 and £3 a search.

5.47 Consumers may also carry out vehicle provenance checks, but they pay more. For a consumer, a vehicle provenance check costs £12.99 from CDL and £19.99 from HPI and Experian. Cheaper checks are available, but they are unlikely to reveal a logbook loan. As we explore in Chapter 12, it is still relatively uncommon for consumers to carry out vehicle provenance checks. Consumers could buy a vehicle that is subject to a logbook loan in good faith and without any indication that the logbook loan exists. We discuss the problems this causes at the end of this chapter.

ENFORCEMENT

5.48 Logbook lenders told us that default is relatively common. As one logbook lender put it, its typical customer has no savings, so any unexpected expense will impact on repayment. Here we consider how logbook lenders deal with default, tracing the process from arrears to repossession, sale and possible shortfall.

Default procedures

5.49 Under both CONC and the CCTA Code, logbook lenders must deal with default with forbearance and due consideration. The CCTA Code puts it in the following terms:

> Members shall consider cases of financial difficulty sympathetically and positively, treat customers in default or arrears difficulties with understanding, forbearance and due consideration and encourage their customers to contact them should they experience financial difficulty.[23]

5.50 Logbook lenders are required to have robust policies to deal with default. They must also note when borrowers are vulnerable, for example, because of physical or mental health problems, and deal with such cases appropriately.[24]

[23] CCTA, *Code of practice: bills of sale for consumer lending regulated under the Consumer Credit Act 1974* (2015), para 4.7.3.

[24] CONC 7.2.1 and 7.2.2.

5.51 As soon as a borrower is late with a repayment, the logbook lender will make contact, either by telephone, text, email or letter. Borrowers are asked to get in touch to tell the logbook lender about any problems and discuss an alternative repayment plan. One logbook lender told us that it would ask borrowers to provide an updated income/expenditure form, together with supporting evidence and an offer of repayment. If the collections worker is satisfied, the offer will be agreed. If not, the documents must go to the compliance team for review.

Problems

5.52 These procedures rely on there being engagement between the borrower and the logbook lender. However, engagement may be difficult to achieve. Borrowers may fail to respond at all; and when they do respond they may feel lost in a bureaucratic process. The FCA's research found a perception among some borrowers that logbook lenders were unwilling to engage with their difficulties. Logbook lenders would "repeat the same basic information, giving consumers the sense that their situation was not being taken seriously".[25]

5.53 The threat of repossession is a powerful one. Consumer groups suggested that it is used to pressure borrowers into making repayments that they cannot afford. The FCA research commented:

> A few respondents who really struggled to keep up with payments were informed that they would need to make lump payments in order to avoid repossession of the vehicle, which were often perceived to be unfair and unaffordable.[26]

Voluntary termination

5.54 The CCTA Code allows borrowers "to voluntarily surrender the assigned vehicle in full and final settlement of all claims".[27] In other words, the borrower may give the vehicle to the logbook lender and walk away from the logbook loan.[28] The borrower is entitled to do so, even if the value of the vehicle is insufficient to cover the full amount they owe to the logbook lender. For hire purchase, there is a statutory entitlement to terminate voluntarily once the hirer has paid half of the hire purchase price.[29] For logbook loans, voluntary termination has no statutory basis but is simply part of self-regulation under the CCTA Code.

5.55 Voluntary termination appears to be common. Logbook lenders suggested that 10% to 15% of vehicles may be handed over in this way. It is an important option for borrowers with little hope of repaying a logbook loan. Instead of waiting for the logbook lender to proceed to repossession and face a shortfall they cannot pay, borrowers have some control of the logbook loan.

[25] FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014), p 27.

[26] Above, p 27.

[27] CCTA, *Code of practice: bills of sale for consumer lending regulated under the Consumer Credit Act 1974* (2015), para 4.8.11.

[28] This is discussed in detail in para 11.64 in Chapter 11.

[29] Consumer Credit Act 1974 (CCA 1974), s 100.

5.56 We think more should be done to make borrowers aware of this option. Consumer advisers also need to be aware of it, so that they can raise the possibility with their clients. In Chapter 11 we discuss voluntary termination in detail and propose that it should be given a statutory basis.

The road to repossession

5.57 The CCTA Code states that:

> Members shall regard the lawful seizure of a secured asset as a serious enforcement option, to be taken only when attempts of [sic] have failed with the customer, to mutually agree a realistic and sustainable arrangement to clear arrears.[30]

5.58 The logbook lenders we spoke to emphasised that they would prefer to agree an alternative repayment plan rather than proceed to repossession. The former is more profitable and they have no desire to become second-hand vehicle salesmen. They pointed to low repossession rates of between 2.2% to 5% of all logbook loans issued.

5.59 Logbook lenders said that they would only issue a default notice if attempts to negotiate an alternative repayment plan fail.[31] Most logbook lenders have procedures for further review before such a step can be taken.

5.60 A default notice requires the logbook lender to wait 14 days before enforcement action, and most wait 16 or 17 days to allow for postage time.[32] During this time logbook lenders said they would continue to try to reach alternative arrangements. After the default notice has expired, the logbook lender may proceed to repossession, though some send an additional letter or "seizure notice" at this point.

5.61 Despite these procedures, there continue to be examples where logbook lenders repossess too readily. The Financial Ombudsman Service (FOS) gives the following case on its website:

> A few months after taking out a logbook loan – secured against her car – Mrs Q was asked to reduce her working hours, and began to have trouble paying her bills.
>
> Realising she wouldn't be able to make her repayment, Mrs Q emailed the loan company to explain her situation. At this point, she had paid back all but £500 of the original £3,000 loan.

[30] CCTA, *Code of practice: bills of sale for consumer lending regulated under the Consumer Credit Act 1974* (2015), para 4.8.7.

[31] The CCA 1974 requires a default notice to be served on the borrower before the logbook lender can repossess the secured vehicle. See paras 4.44 to 4.47 in Chapter 4.

[32] The CCA 1974 provides for a 14 day grace period. See para 4.44 in Chapter 4.

> But by the time the company got in touch with Mrs Q three weeks later, she'd missed a payment and more interest and charges had been applied to her account. The lender told Mrs Q that she needed to pay £250 immediately to clear her arrears – and that if she didn't, they would pass her account to a debt collector.
>
> Unfortunately, Mrs Q's employer was having problems paying its staff. Mrs Q told the lender that she would pay the £250 – but would have to do so in two parts. She made the payments over two successive weeks and didn't hear anything more from the lender. However, the following week she returned home to find her car had been repossessed while she was out.[33]

Repossession

5.62 Some logbook lenders use their own staff to repossess vehicles, but most use independent agents. These agents must be authorised as debt collectors or debt administrators (or both) by the FCA.[34]

5.63 As one logbook lender put it, "repossession is never a pleasant experience" for either party. In the FCA research, some interviewees found the process "rather traumatic":

> I was on my way to work… a lorry was following me. I pulled in to let a bus through and the lorry came up next to me. This man was at the window, reached in and took the keys. "Can you step out of the car?" I thought it was the border force, he looked like a police officer. He told me if I found £1,200 right there they wouldn't take the car. I couldn't focus, they wouldn't let me get my stuff out of the car.[35]

Citizens Advice provided similar case histories.

5.64 Meanwhile, logbook lenders provided examples of abuse by borrowers where the agent had been forced to call the police. One logbook lender told us that agents are only paid £200 to £300 for each vehicle; they did not want to create trouble. If the situation escalates, the agent is instructed to walk away and try again another time.

[33] FOS, *Ombudsman News* (August 2014), issue 119, available at http://www.financial-ombudsman.org.uk/publications/ombudsman-news/119/119-short-term-credit.html.

[34] CONC 7.13.13: "A firm must ensure that a third party engaged by it, where required, has the appropriate Part 4A permission to engage in the regulated activities undertaken in the course of the third party's business". Whereas debt collecting involves taking steps to procure payment of a debt to the lender, debt administration involves exercising or enforcing rights under credit agreements on behalf of the lender. See the definitions in Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 SI 2001 No 544, arts 39F to G.

[35] FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014), p 28.

Sale

5.65 Following repossession, the 1882 Act requires logbook lenders to wait five days before sale.[36] The CCTA Code extends this period to 14 days.[37] During this time borrowers may apply to court for relief, though this happens extremely rarely. One logbook lender mentioned two cases in three years.[38]

5.66 Some logbook lenders feel obliged to sell vehicles through public auction, though there was some concern about the generally low prices obtained at these auctions. One mentioned that a better price could be obtained through eBay. Vehicles are frequently repossessed without keys, which lowers their value. To increase the value, logbook lenders may valet the vehicle or buy a key. These costs will be added to the borrower's account. One logbook lender mentioned £2 a day for storage, £14 for a valet, and £87 as a fixed fee for sale.

The costs of default, repossession and sale

5.67 The process of default, repossession and sale may add significant costs to the borrower's account. Logbook lenders may charge for letters and phone calls; repossession typically costs £300 and sale charges will add more.

5.68 As part of an evidence gathering process in April 2014, Citizens Advice found that some borrowers had been hit with high charges when they defaulted on the logbook loan.[39] It gave the following examples:[40]

Table 5.3: Costs associated with default, repossession and sale

Type of charge	Cost of charge
Charge for phone call to borrower	£12
Charge for letter to borrower	£12
Late payment charge	£54
Repossessed car storage	£2 per day plus VAT plus £20 administration charge
Releasing a car after it had been repossessed	£800
Releasing a van after it had been repossessed	£1,000

36 1882 Act, s 13.

37 CCTA, *Code of practice: bills of sale for consumer lending regulated under the Consumer Credit Act 1974* (2015), para 4.8.8.

38 We saw in para 3.61 in Chapter 3 that it may be difficult for borrowers to obtain court relief under the 1882 Act. Some borrowers appear to be turning to ex parte injunctions: http://www.consumeractiongroup.co.uk/forum/showthread.php?188432.

39 Statistics available at http://www.citizensadvice.org.uk/index/campaigns/current_campaigns/recent_campaigns/logbook-loans.htm.

40 Citizens Advice, *Citizens Advice evidence on bill of sale consumer lending* (2014), p 5.

5.69 The FCA found that borrowers were often surprised at the default charges:

> They didn't explain about all these £12 letters… When I ran into difficulties in July this year, it would be £12 letters every week, so another £50 a month. I owe hundreds in that.[41]

5.70 The FCA requires charges to be reasonable. Under CONC 7.7.5, a lender

> must not impose charges on customers in default or arrears difficulties unless the charges are no higher than necessary to cover the reasonable costs of the firm.

5.71 For payday lending, the FCA has gone further and imposed a cap.[42] As discussed in Chapter 4, fixed charges on default may not exceed £15. There may be a case to consider some caps on default charges for logbook loans, though this is an issue for the FCA rather than us.

Shortfall

5.72 The sale of a repossessed vehicle is unlikely to result in a surplus. More often, there is a shortfall between the outstanding loan amount, interest, arrears and charges and the price achieved on the sale of the vehicle.

5.73 Some logbook lenders see the logbook loan as a loan on the vehicle.[43] Once the vehicle is repossessed, the logbook lender has no further claim and so does not pursue the borrower for any shortfall.

5.74 Others continue to pursue borrowers. There was recognition that very little money is recovered, but an attempt is still made to recover some. The CCTA Code permits logbook lenders to apply to court for an order securing the shortfall on borrowers' homes in very limited circumstances.[44] For borrowers who have already lost their vehicle, this additional step may leave them feeling entirely helpless.

[41] FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014), p 27. The FCA's research found that "contractual documentation was often written in complicated language, with key terms and conditions buried within the lengthy small print" and that "APRs were not always visible at the point of advertising, and additional fees and charges rarely so" (above, p 29).

[42] See http://www.theguardian.com/money/2015/jun/11/big-fall-in-payday-loan-problems-reported-to-citizens-advice.

[43] This is a US view of the nature of a logbook loan. The law varies from state to state as to whether "deficiency balances" (shortfalls) are recoverable by the lender. It has been remarked that "lenders and even consumer advocates maintain that lenders generally do not pursue deficiencies even when it is legal to do so" (J Hawkins, "Credit on Wheels: The Law and Business of Auto-Title Lending" (2012) 69 *Washington and Lee Law Review* 535 at 552).

[44] CCTA, *Code of practice: bills of sale for consumer lending regulated under the Consumer Credit Act 1974* (2015), para 4.8.9.

Conclusion

5.75 Logbook lenders have procedures to treat borrowers with forbearance, but these procedures require engagement from borrowers. Where borrowers fail to engage, matters may escalate rapidly to repossession. Repossession can be traumatic for borrowers, depriving them of a vehicle they need, adding costs and leaving a substantial shortfall.

5.76 Among the large logbook lenders we spoke to, repossession rates varied from 2.2% to 5%. Other smaller logbook lenders may have higher rates. Given the financial and human costs of repossession, we think that a 5% rate is too high. We hope that the more robust affordability checks required by the FCA will reduce this figure.[45]

5.77 Unlike hire purchase, the law of bills of sale does not require logbook lenders to obtain a court order before repossession, even where much of the logbook loan has been repaid. Instead, the onus is on borrowers to apply to court, which rarely occurs.

5.78 We welcome the CCTA Code provisions on voluntary termination, which provides an escape for borrowers unable to repay their logbook loan. We think this right should be given a statutory basis.

5.79 In Chapter 11 we make proposals for reform. We seek to put in place a borrower protection regime that:

(1) encourages dialogue between borrowers in default and logbook lenders;

(2) encourages logbook lenders to view repossession as a measure of last resort;

(3) provides independent oversight of repossession where borrowers have indicated an intention to repay; and

(4) gives borrowers the choice to surrender the vehicle without further liability.

PRIVATE PURCHASERS

5.80 The law of bills of sale offers no protection to those who buy vehicles subject to logbook loans.[46] Even where the purchaser acquired the secured vehicle in good faith and without any notice of the logbook loan, they will not acquire ownership of the vehicle. The logbook lender retains ownership and, as owner, can repossess the secured vehicle from the innocent private purchaser at will. This contrasts with the position of innocent private purchasers in the law of hire purchase.[47]

[45] See para 7.51 in Chapter 7.

[46] See Chapter 12.

[47] See Chapter 12.

5.81 The position of innocent private purchasers has led to substantial criticism from consumer advisers and the press. The Independent reported:

> An increasing number of second-hand car buyers could have their vehicle snatched from them because of an outstanding logbook loan from the previous owner.[48]

Another website states:

> There are widespread stories of motorists buying cars, only to find that logbook loan companies are within their rights to repossess them because of outstanding loans from previous owners.[49]

5.82 To illustrate these stories, we provide two examples. The Money Saving Expert website reports:

> In one case… a man spent £1,100 on a car and a few weeks later he received a letter from a logbook loans company saying he owed £637.
>
> Despite contacting the loan firm to explain the car had been sold to him and providing the loan firm with the seller's address, someone still turned up to take the car away.
>
> Worried he would lose his car and not have a way to get to work, he borrowed money in order to pay the loan off.[50]

5.83 Citizens Advice reported the following:

> A CAB in the South East saw a 22 year old man who bought a car on the internet for £1300 and spent an additional £600 to £700 on improvements to it. He was given a logbook with the car but there was no indication that the car was subject to a logbook loan. He contacted the police when his car was apparently stolen one night and was informed that the car had been legally repossessed by a logbook loan company. It emerged that the original owner had bought the car legally but taken a logbook loan out on it and then sold it to a second owner who then quickly sold it on to the man. This resulted in him losing his car and £2000. He faced having to recover his losses through a court process but had no guarantee of success and was unclear which of the former owners he should take to court.[51]

[48] Available at http://www.independent.co.uk/money/loans-credit/logbook-loans-leave-secondhand-car-buyers-at-risk-9556757.html. See also http://www.saga.co.uk/insurance/car-insurance/logbook-loans.aspx.

[49] Available at http://www.gocompare.com/covered/2014/07/beware-toxic-logbook-loans/.

[50] Available at http://www.moneysavingexpert.com/news/travel/2014/06/do-you-know-your-second-hand-cars-history-beware-logbook-loans.

[51] Citizens Advice, *Citizens Advice evidence on bill of sale consumer lending* (2014), p 7.

Logbook lenders' processes

5.84 We saw that asset finance registries can alert logbook lenders if there is activity against a vehicle, including a change of registered keeper. Logbook lenders said that they would usually contact the purchaser and attempt to come to some arrangement. Sometimes they would decide not to pursue the purchaser: for example, if the purchaser helped them to pursue the borrower or intermediate trade seller; or if 150% of the principal loan amount had already been repaid (which would cover the principal loan amount plus costs). More usually, they would offer the purchaser three choices: to pay off the logbook loan; to buy the vehicle at a discount (one said it would offer to sell at 85% of trade value); or to surrender the vehicle.

5.85 From the purchaser's point of view, all these options seem unfair. The choice is between repaying someone else's logbook loan; paying again for the vehicle; or losing it. In some cases, logbook lenders may repossess without making contact, as in the example given by Citizens Advice.

The CCTA Code

5.86 The CCTA Code provides very little protection to purchasers. The only requirement is that logbook lenders register with an asset finance registry.[52] This means that a private purchaser who pays £12.99 to £19.99 for a full vehicle provenance check will discover that the vehicle is subject to a logbook loan.

5.87 The problem is that many consumers buy vehicles without carrying out a full vehicle provenance check. As we discuss in Chapter 12, they may not realise that they need to check; the price is too high for such checks to be a normal part of buying a second-hand vehicle; and consumers can be confused by other cheaper checks which fail to provide information about logbook loans.[53]

The lack of other protections

5.88 In addition to the lack of legislative protection, private purchasers do not benefit from robust FCA protection. We see in Chapter 12 that the FCA considers that its scope to act in respect of the treatment of private purchasers is limited.[54]

5.89 FOS also has limited power to hear complaints about how logbook lenders treat private purchasers. Generally, FOS only hears disputes between a lender and its customer, that is, the borrower. There is a narrow exception to this rule for debt collection, where FOS hears complaints from third parties who are being chased for a debt that they do not owe. This means that private purchasers can refer a dispute to FOS if they are being pursued for the outstanding logbook loan. However, we understand from FOS that, as the logbook loan is secured over a vehicle that belongs to the logbook lender, such complaints are unlikely to be upheld.

[52] See para 5.43.

[53] See paras 12.36 to 12.40 in Chapter 12.

[54] See paras 12.48 to 12.50 in Chapter 12.

5.90 Private purchasers may complain to the CCTA under the CCTA Code, but the CCTA is unlikely to uphold a complaint against a logbook lender who has acted within its rights.

5.91 The current legislative and regulatory regime relating to logbook loans leaves private purchasers who act in good faith and without notice in an unacceptable position. We have noted that:

(1) there is no legislative protection;

(2) the protection in the CCTA Code makes unrealistic expectations of consumers who buy second-hand vehicles;

(3) the FCA has limited remit to supervise logbook lender treatment of private purchasers; and

(4) private purchasers have limited rights to complain to FOS. FOS will hear, but is unlikely to uphold, the complaint.

5.92 In Chapter 12, we make proposals to address this issue.

CONCLUSION

5.93 In this chapter, we discussed the impact that the current legislative and regulatory regimes have on logbook loans. The problems created by those regimes fall into four broad categories:

(1) the document requirements are very complex. This makes the security bill document difficult for borrowers to understand. Failure to comply could have serious consequences for logbook lenders;

(2) the registration process is in urgent need of modernisation. The High Court register is expensive and cumbersome and no longer fulfils its intended purpose, which is to allow third parties to find out about bills of sale;

(3) there is insufficient protection for vulnerable borrowers facing repossession; and

(4) private purchasers are in an extremely vulnerable position. They have no protection under legislation and only the most minimal protection under the CCTA Code. The FCA has limited scope to supervise their treatment by logbook lenders, and they have only limited rights to complain to FOS.

5.94 As we argue in Chapter 7, there is an urgent need for reform of the law to address these problems.

CHAPTER 6
IMPACT OF THE LAW: ACCESS TO FINANCE FOR UNINCORPORATED BUSINESSES

6.1 There are major differences between how incorporated and unincorporated businesses are permitted to secure loans on goods. While incorporated businesses such as companies and limited liability partnerships (LLPs) can use fixed and floating charges registered at Companies House, sole traders and general partnerships whose business is unincorporated must use the Bills of Sale Acts.[1]

6.2 In 2014, there were 5.2 million private sector businesses in the United Kingdom, of which 70% were unincorporated.[2] The great majority of unincorporated businesses (over three million) had no employees.[3] They were effectively self-employed individuals whose borrowing is similar to consumer borrowing. As we have seen, business loans to individuals of less than £25,000 are regulated as consumer credit.[4] Around 33,600 unincorporated businesses employed ten or more staff, and may have needed to borrow more substantial sums.[5]

6.3 There have been many complaints that the technicality of the Bills of Sale Acts restricts secured lending to unincorporated businesses. As a leading banking textbook puts it:

> The cumbersome provisions for registration and the need to follow the prescribed form applicable to bills of sale render the chattel mortgage an unattractive security. Furthermore, for historical reasons the granting of a bill of sale tends to cast doubts on the credit standing of the trader who effects it. The tendency in modern trade is to avoid it wherever possible.[6]

6.4 In this chapter, we consider the impact of the Bills of Sale Acts on access to finance by unincorporated businesses. We discuss three ways in which the Bills of Sale Acts fetter the ability of unincorporated businesses to access finance:

1 We use the term "general partnership" to include a conventional unlimited partnership and a so-called "limited partnership" under the Limited Partnerships Act 1907 (where one or more persons with unlimited liability are joined by "limited partners" who stand to lose only the capital they contribute). Limited partnerships are not to be confused with LLPs, which are treated as companies for these purposes.

2 Department for Business, Innovation and Skills, *Business population estimate for the UK and regions: 2014 statistical release* (2014), p 7, paras 29 to 36, available at https://www.gov.uk/government/statistics/business-population-estimates-2014.

3 Above, p 4, table A.

4 The Consumer Credit Act 1974 also regulates loans to small partnerships.

5 Department for Business, Innovation and Skills, *Business population estimate for the UK and regions 2014: detailed tables* (2014), table 4, available at https://www.gov.uk/government/statistics/business-population-estimates-2014.

6 E Ellinger, E Lomnicka and C Hare, *Ellinger's Modern Banking Law* (5th ed, 2010), p 839.

(1) **security bills over specific goods:** although businesses may use specific goods as security for loans, the 1882 Act imposes technical document and registration requirements which restrict the extent to which unincorporated businesses can do this;

(2) **general assignments of book debts:** these must be registered as if they were absolute bills, a process which is particularly expensive and cumbersome; and

(3) **future goods**: the Bills of Sale Acts do not permit security to be granted over goods which the borrower may acquire in the future. We look at the implications of this for unincorporated businesses.

SECURITY BILLS OVER SPECIFIC GOODS

6.5 Our surveys of the bills of sale register found examples of security bills being granted over hotel fixtures and fittings and farm stock.[7] Clearly, unincorporated businesses can use security bills in this way, but their use is rare. Both the document requirements and the registration requirements cause problems.

Problems caused by the document requirements

6.6 In Chapter 5 we saw that logbook lenders follow the standard form of a security bill document closely in order to avoid the risk of the security bill being held void. For business lending, the standard form is not just difficult to comply with but can be substantively restrictive.

6.7 As described in Chapter 3, the 1882 Act provides that a security bill document must include a statement of the loan amount and the repayment instalments, including the date by which repayment is to be made. As we discuss below, this is incompatible with some types of business lending.

Inability to secure a revolving facility or overdraft

6.8 A revolving facility is a loan whereby the borrower has the flexibility to decide how often they want to draw the loan and in what amounts, up to a prescribed facility limit. Similarly, an overdraft may be drawn at any time and in any amounts up to a prescribed overdraft limit. The nature of an overdraft is that it does not need to be repaid at a specified time and in specified instalments.

6.9 Under the 1882 Act, it is not possible to use a security bill to secure these types of lending. Unless the amount of the loan and the date of repayments can be specified in the document, the security bill is void and both the security and the underlying credit agreement are unenforceable.

[7] See paras 2.28 to 2.30 in Chapter 2. As explored in Chapter 3, charges over farm stock can also be registered as agricultural charges at the Land Registry under the Agricultural Credits Act 1928.

Inability to secure a guarantee

6.10 Where a business takes out a loan, an individual may promise to repay the loan if the business fails to do so. This promise is a "guarantee". This scenario not only applies to unincorporated businesses but also to incorporated businesses. Commonly, a company director guarantees the loans of a company. In some circumstances, a lender may wish to secure that guarantee against the director's goods, for example if the director owns a valuable art collection.

6.11 The 1882 Act prevents guarantees being secured on goods. This is because a guarantee is a promise by A (the guarantor) to answer for the repayment of a loan owed by B (the borrower) in the event of B's default. The sum of money promised by A may never need to be paid if B never defaults. This is incompatible with the requirement to state the date on which repayment is to be made.

6.12 This is echoed in the experience of one practitioner who told us:

> I was recently asked to advise on a proposed tangible chattels security by way of bill of sale, to be given in support of a director's guarantee of lending to a comparatively small private company. The advice had to be that such security could not validly be created, because the lending was to be repayable, and the guarantee would only be enforceable "on demand", whereas the statutory form of bill of sale requires the sum secured to be payable on a date specified in the bill (*Hughes v Little* (1886) 18 QBD 32; *Hetherington v Groome* (1884) 13 QBD 789).

6.13 We found one exception to this in our visits to the High Court register. The circumstances were very specific. It appeared that the borrower had already defaulted on the loan and the lender had called on the guarantor, setting a date by which the guarantor was to pay. The security bill could therefore be made to fit the standard form.

Inability to grant several charges over the same goods

6.14 An incorporated business may grant lenders a fixed charge over goods. While a security bill transfers ownership, a fixed charge gives the lender a more limited interest in the goods. The lender is at no point the owner of the goods. The lender has a right to take possession of the goods in the event of default and is entitled to the proceeds of sale for the satisfaction of the loan amount.

6.15 The practical difference is that an incorporated business may give more than one charge over the same goods. Take an example of a printing business, owning a printer worth £150,000, that grants a fixed charge to a bank for £50,000. If the company wishes to borrow more money, it is not forced to return to the same lender. Instead, it may borrow another £50,000 from a finance company, by granting the finance company a second fixed charge over the same printer. In the event of insolvency, the printer would be sold. The proceeds would first be used to satisfy the bank's loan (as first charge holder) and any money left over would be used to satisfy the finance company's loan (as second charge holder).

6.16 By contrast, once an unincorporated business has granted a security bill over goods to a lender, the lender owns those goods, and the business cannot use them as security for another loan.

Problems caused by registration

6.17 Security bills must be registered according to the procedure described for logbook loans in Chapter 5. For larger loans, the costs may be less significant. However, lenders would then be more concerned about the problems caused by a paper-based registration regime, such as returning documents to the wrong lender. They would also be concerned that a later security bill may be stamped first, depriving the first lender of the security.

6.18 Below we describe how some invoice financiers take documents in person to the High Court to be registered, and only release money once the documents have been stamped. The same pressures would apply to lenders using security bills, adding expense and delay.

GENERAL ASSIGNMENTS OF BOOK DEBTS

6.19 The term "book debts" or "receivables" means sums due to a business.[8] Where a business provides goods or services on credit, the customer owes the business a book debt. That book debt, represented by the business's invoices, is an asset with a value that can be realised by selling it to an invoice financier.

6.20 Under insolvency law, a general assignment of book debts by an unincorporated business must be registered "as if it were" an absolute bill of sale. If not, it will not be valid in the event of bankruptcy.[9] This means that the extremely cumbersome registration procedure under the 1878 Act applies.

6.21 We first give an overview of the invoice financing industry. We then describe the application of the 1878 Act to general assignments of book debts before looking at the problems this poses.

Terminology

6.22 There is no standard terminology in this area. To avoid confusion, we will use terms in the following way:

[8] Technically, "receivables" is slightly wider than "book debts" but we use the terms interchangeably here. Strictly, "book debts" does not capture all sums due to a business but the distinction is not necessary for the purposes of this consultation paper. For more information, see H Beale, M Bridge, L Gullifer, E Lomnicka, *The Law of Secuity and Title-Based Financing* (2nd ed, 2012), p 409, para 10.22.

[9] Insolvency Act 1986, s 344.

(1) **book debts:** the sums due to a business. We also refer simply to "debts". Since the sums due are often represented by an "invoice", that term is sometimes used interchangeably with book debts; hence the general term "invoice financing". The terms "accounts receivable" or "receivables" are also common in the United States;[10]

(2) **business:** the party seeking finance, which sells its book debts to the invoice financier; and

(3) **debtor:** the customer of the business that owes book debts to that business. We also use the term "customer".

Importance of the industry

6.23 Over the past few decades, invoice financing has been a growing source of working capital for small and medium sized businesses.[11] The Asset Based Finance Association (ABFA) represents over 95% by turnover of invoice financiers in the United Kingdom and Ireland. At the end of 2013, its members were advancing over £18 billion to over 43,000 businesses.[12]

6.24 Invoice financing has become an alternative to traditional bank lending. Unlike bank lending, it focuses on the quality of the debts, rather than the creditworthiness of the business. Invoice financiers are given detailed up-to-date records about the business's debtors and will monitor the amount outstanding from each one. This, coupled with the fact that invoice financiers own the debts, means that they can often offer finance even where banks have refused to lend. They may also make available greater sums.

6.25 In addition, the process may be quicker than traditional bank lending. We understand that speed is often particularly important for small businesses.[13]

Invoice financing in practice

6.26 A typical invoice financing transaction proceeds as follows:

(1) the business agrees to sell and the invoice financier agrees to purchase the book debts. This generally takes the form of an agreement to purchase present and future book debts, which allows the business to maintain a continuing source of working capital;

(2) the invoice financier makes available to the business a percentage of the face value of the book debts (between 70% to 90% is the general range);

[10] The term "receivables" is also used in major English law textbooks, eg R Goode, *Commercial Law* (4th ed, 2010), p 787.

[11] Growth may further increase in light of a ban on anti-invoice finance terms in contracts due to come into force in early 2016, see https://www.gov.uk/government/news/restrictions-lifted-on-invoice-finance-to-help-small-firms-grow.

[12] Very broadly, this equates to around £500,000 to each business.

[13] ABFA, *Call for Evidence: Response of the Asset Based Finance Association* (2014), p 6.

(3) the business can choose how much of this fund to draw down; we are told that most businesses do not use all of the funds available but draw down closer to 50%; and

(4) when the book debt is paid by the customer, the invoice financier receives the amount of its advance plus charges and the business gets the remaining balance.

Invoice discounting versus factoring

6.27 There are two main products offered by invoice financiers: invoice discounting and factoring.

Invoice discounting

6.28 Invoice discounting can be thought of as a "minimum service" invoice financing transaction. Usually, the business remains responsible for debt collection; debtors continue to pay what they owe to the business, which then transfers such sums as necessary to the invoice financier.

6.29 We understand that invoice discounting is usually offered to larger businesses that do not need additional credit management expertise. It tends to be cheaper than factoring. It can also be done on a confidential basis, without disclosing the invoice financing arrangement to the business's debtors.

Factoring

6.30 In factoring, the invoice financier is responsible for debt collection. Notice of the factoring arrangement is given to debtors, who are instructed to pay the invoice financier directly. We understand that factoring tends to be offered to smaller businesses which benefit from outsourcing debt collection to the invoice financier.

Whole turnover agreements versus facultative agreements

6.31 Both invoice discounting and factoring can be structured in two ways: as a whole turnover agreement or as a facultative agreement.

Whole turnover agreement

6.32 Under a whole turnover agreement, the business agrees to sell and the invoice financier agrees to purchase all present and future book debts such that:

(1) all book debts in existence at the time of the whole turnover agreement are sold to the invoice financier. These are sometimes referred to as "take-on" debts; and

(2) all future book debts are also sold to the invoice financier. These will automatically be owned by the invoice financier as soon as they come into existence, without any further action by either the invoice financier or the business.

Facultative agreement

6.33 Under a facultative agreement, the business is obliged to offer to the invoice financier all debts falling within the scope of a facultative agreement as they arise. The invoice financier is not obliged to purchase the debts, even though in practice it almost invariably will.

The legal framework

A general assignment

6.34 In an invoice financing transaction, the business sells its book debts to an invoice financier. In law, that sale is known as an "assignment".[14] An assignment of book debts is "general" where a business assigns a class of book debts, both present and future, to the invoice financier.

6.35 A whole turnover agreement is a general assignment of book debts. A facultative agreement is not. This is because the facultative agreement does not effect any assignment; it simply obliges the business to offer book debts to the invoice financier. When these are offered and accepted, the assignment that takes place is a specific assignment of an identifiable debt, not a general assignment.

The requirement to register a general assignment

6.36 Section 344 of the Insolvency Act 1986 applies where "a person engaged in any business" makes a general assignment of book debts. It is limited in two ways:

(1) it only applies to unincorporated businesses, not companies or LLPs; and

(2) it only applies to general assignments, not specific assignments.

6.37 Section 344 requires a general assignment to be registered "as if it were" an absolute bill of sale. If not so registered, it will be ineffective against a trustee in bankruptcy, who would collect the debts and use them to satisfy the claims of the business's creditors.

Avoiding registration

6.38 It is possible to structure an invoice financing agreement as a facultative agreement so as to avoid the need for registration. However, there are legal and practical drawbacks to this. The invoice financier must rely on the business to notify it of newly created debts. There is a risk that the business may grant an interest in the debt to someone else, or else sell only low-quality debts to the invoice financier, while retaining high-quality debts for itself.[15]

[14] See further *Chitty on Contracts* (31st ed, 2012), ch 19. An assignment is not a security interest; it is an outright sale of the book debts. Though it is possible for invoice financiers to give a loan to the business and secure that loan over the business's book debts, an outright sale by way of assignment is much more common.

[15] N Ruddy, S Mills, N Davidson, *Salinger on Factoring* (4th ed, 2006), p 174, para 8-28, suggests for example that the business might create a fixed charge on book debts in favour of a bank and the invoice financier, in the case of a facultative agreement, "might be precluded from buying any more debts except subject to the charge if the bank was unaware of the factoring agreement when the charge was created".

6.39 As a result, the great majority of invoice financing agreements made by unincorporated businesses in the United Kingdom will fall within the scope of registration. It is therefore important to have a user-friendly registration system.

Problems with the registration regime

6.40 A general assignment of book debts must be registered at the High Court "as if it were" an absolute bill, rather than a security bill.[16] This means that the document does not have to comply with the standard form. However, the document must be witnessed by a solicitor, who must explain its effect.

6.41 The process is even more cumbersome than the registration process for logbook loans described in Chapter 5. It normally involves three solicitors:

(1) the invoice financier (or its solicitor) prepares the invoice financing agreement and sends it to the business (or its solicitor);

(2) the business signs the invoice financing agreement in the presence of its solicitor. The solicitor must fully explain the nature and effect of the invoice financing agreement to the business;

(3) the business's solicitor prepares an affidavit explaining that step (2) was duly carried out. The business's solicitor must swear the affidavit before another solicitor who administers the affidavit;

(4) the business (or its solicitor) sends the invoice financing agreement and affidavit to the invoice financier (or its solicitor). The invoice financier's solicitor presents all of the documentation at the High Court for registration. We understand that this is generally done in person; and

(5) once the documents are stamped by the High Court, the invoice financier's solicitor returns the documents to the invoice financier so that the invoice financier knows it is safe to release funds.

This must all be completed within the seven clear day period for registration mandated by the 1878 Act.

6.42 As we discuss below, this process is particularly expensive. It causes delay in funding and must be repeated every five years. Although the purpose of registration is to put third parties on notice that an unincorporated business has made a general assignment of its book debts, how far it achieves this purpose is questionable.

Expense

6.43 Invoice financiers' estimates of the cost of registering a general assignment of book debts are set out in the table below.

[16] Insolvency Act 1986, s 344(4). For the distinction, see paras 3.53 to 3.54 in Chapter 3.

Table 6.1 Costs associated with registration of a general assignment of book debts

Type of fee	Cost
High Court registration fee	£25
Invoice financier's solicitor fees	£150 to £1,200 plus VAT
Business's solicitor fees	£300 to £500 plus VAT
Solicitor's fee for administering the affidavit	£5 to £10[17]
Total (excluding VAT)	**£480 to £1,735**

Delay in funding

6.44 The registration process, even when carried out promptly, can take three to five working days. ABFA told us that its members all withhold funding until they have confirmation that the documents have been duly registered at the High Court. Without such confirmation, the invoice financier cannot be confident that the general assignment of book debts will be valid in the event of a bankruptcy.

6.45 We have seen that an industry advantage of invoice financing over traditional bank lending is the speed with which funds can be advanced. That is certainly true where funds are advanced to incorporated businesses.[18] Even for unincorporated businesses, invoice financing is still generally quicker than traditional bank lending despite the registration process.

6.46 We think that unnecessary delay caused by the registration process should nevertheless be removed where possible. Delay in funding, even by a matter of days, may have serious consequences if a business has an urgent need for working capital.

Re-registration

6.47 The 1878 Act requires re-registration every five years. Most invoice financing agreements are for at least a five year term. Registration with all its attendant problems is, therefore, a process invoice financiers need to go through more than once with many invoice financing agreements.

6.48 Re-registration is also required each time the constitution of a general partnership changes. This is an unfortunate consequence of partnership law that is outside the scope of this project. Though this problem will remain, we hope that the burden of registration will be significantly mitigated by the proposals set out in Chapter 10 and Chapter 13.

[17] Based on information from logbook lenders.

[18] For companies, the general assignment is not dependent on valid registration. We understand that a company can receive the funds in its account within 24 hours.

Putting third parties on notice

6.49 Invoice financiers do not necessarily search the book debts register before agreeing an invoice financing agreement with an unincorporated business.[19] There are two reasons for this:

(1) the book debts register is paper-based, which makes it difficult to search; and

(2) most invoice financiers have other ways of verifying the book debts that the business offers for sale. For factoring agreements, the invoice financier telephones debtors to check whether the debt has already been assigned. For invoice discounting agreements, auditors investigate whether there has been any previous assignment to maintain confidentiality.

6.50 One invoice financier told us that it is not aware of any way of searching other than by making a physical visit to the High Court. The invoice financier's solicitor generally searches for prior general assignments and registers the current general assignment in one visit to the High Court. While this is preferable to two separate visits, it means that, if a prior general assignment were found, the resources spent on agreeing the current general assignment and preparing it for registration would have been wasted.

Non-registration

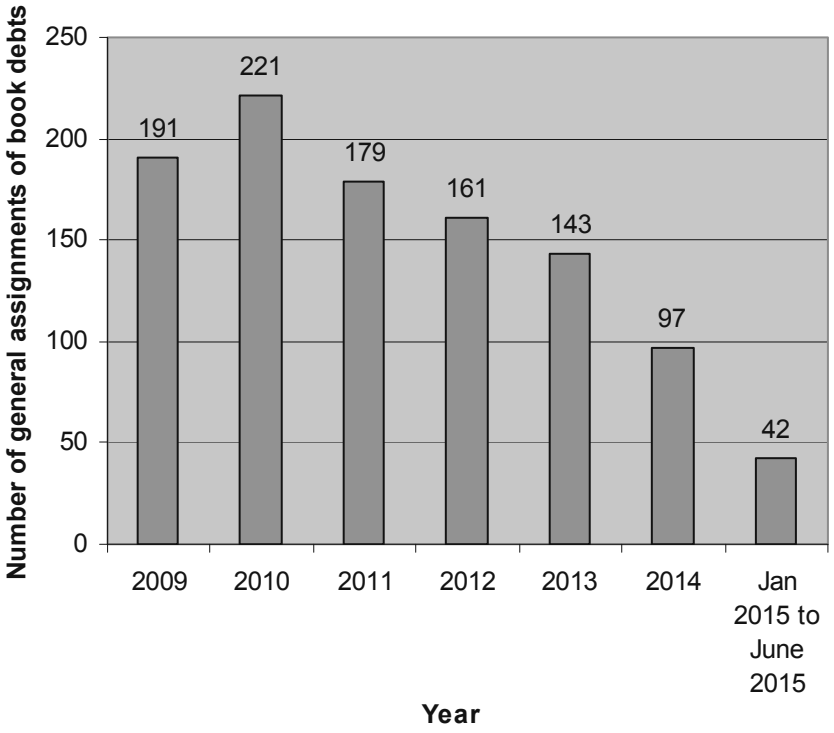
6.51 The registration system is so burdensome and expensive that some invoice financiers do not register at all: instead, they take their chances on bankruptcy. One invoice financier told us that it registers invoice discounting agreements but not factoring agreements. As factoring agreements are disclosed to the business's debtors, invoice financiers rely on that disclosure for protection.[20] Another only registers invoice financing agreements where the business's facility limit is £100,000 or above.

6.52 The diagram below shows the number of general assignments of book debts registered at the High Court in each year since 2009. It suggests a decline since 2010.

[19] And for those that do search, the register is not authoritative as not all general assignments of book debts are registered.

[20] On the basis that a later invoice financier contemplating a factoring agreement would phone the same debtors and find out about the prior factoring agreement.

Chart 6.2 Number of general assignments of book debts registered at the High Court since 2009



Conclusion

6.53 Ideally, the High Court register would be replaced by a simple online system. In practice, we do not think that the volume of business would justify an entirely new system at this stage. However, we think that it could be made much easier to register at the High Court by making some fairly minor changes: for example, by abolishing the requirements for solicitor witnesses and affidavits, and by allowing submission by email.

6.54 In Chapter 13, we explain why we think there is a case for continuing to require registration and how our proposals for reform would improve the current position.

FUTURE GOODS

6.55 The 1882 Act restricts borrowers from granting security bills over goods which they do not currently own.[21] Section 5 states that a security bill shall be void, except as against the borrower, in respect of any goods "of which the grantor was not the true owner at the time of the execution of the bill of sale".

6.56 This contrasts with the ability of a company or LLP to give a floating charge over all its present and future goods.

[21] Future book debts can be assigned as a general assignment of book debts is not a bill of sale, but must be registered "as if it were" a bill of sale.

What is a floating charge granted by a company or LLP?

6.57 A floating charge, like a fixed charge, is a form of security in which ownership of goods does not transfer to the lender. Unlike a fixed charge, the lender's security is not over specified goods. The floating charge "hovers" over all goods (or a class of goods) owned by the borrower from time to time but does not restrict the borrower's ability to deal with those goods. Its hallmark is that the borrower is free to deal with goods in the ordinary course of business unless there is a default. If there is a default, the floating charge "crystallises" to become a fixed charge over the specific goods of that class owned by the borrower at the time of the default.

6.58 It may be helpful to give an example. A company which sells chairs decides to borrow money from a bank. The bank wants to secure the loan and so takes a floating charge over all goods owned by the company from time to time. So long as the company duly repays the loan amount, it is free to buy chairs from suppliers and sell chairs to customers in the ordinary course of business. The bank's floating charge does not restrict this. If, however, the borrower defaults on the loan, the bank's floating charge becomes a fixed charge and attaches to all the goods owned by the company at the time of default, including the chairs. The company then cannot deal with those chairs without the bank's consent.

6.59 For companies and LLPs, the floating charge is a major form of secured lending. Where the main assets of a company or an LLP are its stock-in-trade, the floating charge may be the only form of secured lending available to it.

Floating charges are not available to unincorporated businesses

6.60 An unincorporated business cannot grant a floating charge over its goods for three reasons:

(1) there is no transfer of ownership as required by the standard form for a security bill;[22]

(2) it may not be possible to specifically describe future goods as required by the standard form for a security bill; and[23]

(3) the 1882 Act in effect prohibits the borrower from granting security over future goods.[24]

[22] See para 3.39 in Chapter 3.

[23] See para 3.39 in Chapter 3.

[24] 1882 Act, s 5. If the lender's security over future goods is enforceable only against the borrower, but not third parties, it is of little use to the lender.

6.61 Several commentators have noted that unincorporated businesses come under pressure to incorporate so that they can grant floating charges.[25] This was the conclusion of the review committee on insolvency law and practice chaired by Sir Kenneth Cork in 1982 and of the New Zealand Law Commission.[26] As a leading textbook states:

> A trader who wishes to raise credit against a security over his plant or equipment is frequently asked to incorporate his business, whereupon the bank is able to provide the required finance against a floating charge.[27]

Our approach

6.62 We can see that in theory it may be useful for unincorporated businesses to be able to use future goods as security for loans – at least in so far as the future goods are for business rather than personal use.

6.63 However, we do not think that it is possible to recommend introducing a floating charge for unincorporated businesses as part of this project for three reasons:

(1) floating charges are an extremely powerful form of security. In our recent consultation paper on consumer prepayments on retailer insolvency, we explain how, when a company retailer becomes insolvent, almost all its assets are distributed to fixed and floating charge holders, leaving the mass of unsecured creditors to recover only small proportions of their debts.[28] A floating charge is capable of affecting the interests of all creditors (including landlords, utility companies and trade suppliers). There would need to be an in-depth review of whether it is right for unincorporated businesses, essentially individuals, to be able to grant this form of security;

(2) it would have major implications beyond the law of bills of sale. For example, there would need to be a review of the impact on insolvency law; and

(3) given how potent the floating charge is, it would be essential for there to be an electronic register of floating charges granted by unincorporated businesses that could be easily and cheaply searched by all those potentially affected. The process could take many years, delaying urgently needed reform of the law relating to logbook loans and other forms of bills of sale and general assignments of book debts.

[25] Company Security Interests (2005) Law Com No 296, p 5, para 1.14.

[26] Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558; New Zealand Law Commission, *A Personal Property Securities Act for New Zealand* (1989) Report No 8, p 10.

[27] E Ellinger, E Lomnicka and C Hare, *Ellinger's Modern Banking Law* (5th ed, 2010), p 839. See also H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed, 2013), p 769, para 23.73.

[28] Consumer Prepayments on Retailer Insolvency (2015) Law Commission Consultation Paper 221.

6.64 For these reasons, we have concluded that the introduction of floating charges for unincorporated businesses would require a separate project. We discuss this issue further in Appendix D.

CONCLUSION

6.65 In this chapter, we have seen that the law of bills of sale has an adverse effect on access to finance by unincorporated businesses by:

(1) adding unnecessary technicalities to granting security over goods;

(2) making it impossible to use goods to secure certain kinds of business lending, such as revolving facilities, overdrafts or guarantees; and

(3) requiring an extremely cumbersome process for registering general assignments of book debts.

6.66 In Chapter 9 we propose to remove many of the technical document requirements set out in the 1882 Act, including those which prevent revolving facilities, overdrafts or guarantees from being secured on goods.

6.67 In Chapters 10 and 13, we propose to retain the High Court register for bills of sale granted over goods other than vehicles and general assignments of book debts. However, we think that the process could be made much simpler, quicker and cheaper by, for example, removing the requirements for solicitor witnesses and affidavits and by allowing registration by email.

CHAPTER 7
THE CASE FOR REFORM

7.1 The Bills of Sale Acts suffer from five major defects:

(1) the language of the Bills of Sale Acts is very archaic and impenetrable for modern readers, including, for example, words such as "witnesseth" and "doth" in the standard form for a security bill. The Bills of Sale Acts are written in highly technical and overly legalistic terms;

(2) the standard form required by the 1882 Act is confusing for borrowers and imposes burdensome requirements on lenders. Lenders face onerous consequences for minor mistakes;

(3) the High Court register is expensive and cumbersome to use and is of no benefit to third parties. Lenders register bills of sale at the High Court only to ensure the validity of their security, not so as to inform third parties that a bill of sale exists;

(4) the current law offers limited protection to borrowers. If borrowers default, there is little to prevent lenders from proceeding to repossession; and

(5) the current law offers no protection to private purchasers who act in good faith and without notice. The lack of regulatory oversight over the treatment of such purchasers compounds this problem.

We have reached the conclusion that the Bills of Sale Acts are not fit for their purpose, and are in urgent need of reform.

7.2 In this chapter, we start by explaining why we do not wish to "ban" or "abolish" bills of sale. We think borrowers should continue to be permitted to borrow money on the security of their existing goods while retaining possession of them.

7.3 However, we think that the Bills of Sale Acts should be repealed in their entirety and replaced with up-to-date legislation. We provide a brief outline of our proposals for a new statute.

7.4 Finally, there are some issues which the proposed legislation will not cover, including the regulation of interest rates. Instead, logbook lending will continue to be supervised by the Financial Conduct Authority (FCA), which has powers to intervene if necessary.

WHY BILLS OF SALE SHOULD NOT BE "BANNED"

The debate in 1882

7.5 Over the years there have been many calls for bills of sale to be banned. Interestingly, this was considered before the 1882 Act was passed. According to *Hansard* for 1882:

> The question that the Select Committee last year had to consider was whether bills of sale ought to be abolished altogether, or whether they ought to put as many restrictions as they could in order to secure honesty in the transaction.[1]

7.6 The Committee was persuaded to continue to allow the use of bills of sale over goods by the fact that borrowers could raise money over real property, such as land and buildings. Accordingly,

> It was felt that they could not properly deny a man the right to raise money on personal property while they allowed others to raise money on real property; and it seemed right that a man should have the power to pledge his property, whether personal or real, in order to relieve himself from temporary pressure.[2]

The debate from 2009 to 2011

7.7 A very similar debate took place this century. When the Department for Business, Innovation and Skills (BIS) consulted on the matter in 2009, its preferred approach was to ban the use of bills of sale for consumer lending.[3]

7.8 In 2011, BIS noted that a ban was "very unpopular with lenders, but over half of other respondents, consumer groups, enforcers and experts stated that it was their preferred option."[4] Some non-lenders argued against the ban, expressing concern that:

> access to credit for sub-prime borrowers should not be restricted. This group stated that a reform of the Bills of Sale legislation was necessary to give consumers the same level of protection as pawn-broking and hire purchase agreements, ensuring that consumers have sufficient protections should things go wrong.[5]

7.9 BIS decided against a ban on the ground that

> bills of sale are an important source of credit for some consumers and small businesses and we do not feel that at this time it would be right to cut off this particular supply of credit. This is especially so at a time when mainstream sources of credit are becoming more difficult to access.[6]

1 Hansard (HC), 8 March 1882, vol 267, cc393-402.

2 Hansard (HC), 8 March 1882, vol 267, cc393-402.

3 BIS, *A better deal for consumers: consultation on proposal to ban the use of bills of sale for consumer lending* (2009), p 4.

4 BIS, *Government response to the consultation on proposals to ban the use of bills of sale for consumer lending* (2011), p 9, para 32.

5 Above, p 10, para 36.

6 Above, p 11, para 40.

Our view

7.10 A number of consumer groups told us that they would support a ban on logbook loans. However, we are not persuaded that the case for a ban has been made out for three reasons.

7.11 First, logbook loans provide an important source of credit for many borrowers. In Chapter 2, we saw that logbook loans can allow access to larger sums over a longer period than payday loans. This can be especially important for self-employed people who need to borrow to buy stock or materials. If borrowers were not permitted to provide security for these loans, they would either have to pay higher interest rates, or would be denied credit altogether.

7.12 Secondly, where an economic need exists, attempts to ban an activity will inevitably lead to avoidance or evasion. We think it would be possible to circumvent a ban on logbook loans by structuring the transaction as a sale and leaseback, or as a sale and subsequent hire purchase. Alternatively it might encourage borrowers to use illegal and unregulated forms of lending.

7.13 Finally, as was argued in 1882, it seems illogical to allow the widespread use of mortgages on land, but to deny them on goods.

7.14 We do not think that there is anything inherently wrong with a borrower raising money on personal property, such as a vehicle, while retaining possession of it. However, the borrowers involved are often vulnerable and therefore need appropriate protections.

THE NEED FOR REFORM

7.15 We have reached the conclusion that the Bills of Sale Acts as they stand are failing lenders, borrowers and third parties alike:

(1) they fail lenders by imposing disproportionate sanctions for failure to meet technical document requirements, and by perpetuating an unnecessarily cumbersome and expensive registration regime;

(2) they fail borrowers by providing inadequate protections on default. In particular, they allow unscrupulous logbook lenders to repossess too readily, leaving the borrower without a vehicle and with mounting debts; and

(3) they fail private purchasers who buy vehicles in good faith and without any knowledge of the bill of sale. Such purchasers are left with the unattractive choices of paying off someone else's logbook loan, paying for the vehicle again, or losing it.

7.16 The Bills of Sale Acts are unfit for their purpose and are in urgent need of reform. We think that they should be repealed in their entirety and replaced with new legislation. Appendix E sets out an overview of the structure of the proposed new legislation.

7.17 In the rest of this consultation paper, we discuss in detail what this new legislation should look like. We look in turn at the structure of the proposed new legislation, document requirements; registration requirements; borrower protection and private purchaser protection. In developing proposals for borrower protection and private purchaser protection, we draw on and extend the protections already available in hire purchase law.

A NEW STATUTE

7.18 We propose a new statute to govern the way that individuals may use their existing goods as security, while retaining possession of the goods. In Chapter 8 we discuss new terminology for this form of security interest. We suggest that it should be called a "goods mortgage".

7.19 For all goods mortgages, we propose to simplify the document requirements and provide more protection for private purchasers who buy goods in good faith and without knowledge of the goods mortgage. However, other proposals would apply to some goods mortgages but not others.

7.20 In the chapters that follow we suggest two key distinctions. These are between:

(1) mortgages on vehicles ("vehicle mortgages") and mortgages on other goods; and

(2) loans which are regulated credit agreements and those which are not. As discussed in Chapter 4, all credit agreements with individuals are regulated credit agreements, unless they are business loans of more than £25,000 or loans to "high net worth individuals" of more than £60,260.[7]

7.21 Vehicle mortgages would no longer need to be registered at the High Court. Instead it would be sufficient for logbook lenders to register their interest with a designated asset finance registry. Mortgages on other goods would continue to be registered at the High Court, though the procedure would be simplified. For both vehicle mortgages and mortgages on other goods, registration would not be mandatory, but certain consequences would follow from failure to do so: the lender's security would be enforceable against the borrower, but not third parties.

7.22 For goods mortgages securing regulated credit agreements, borrowers would be given three new protections: prominent warnings on the goods mortgage document; protection against repossession without a court order after one third of the loan amount has been repaid; and a right of voluntary termination.

7.23 The new legislation would apply to logbook loans and more widely. Here we provide a brief summary of how our proposals would apply to the different uses of bills of sale we identified in Chapter 2.

[7] There are other exemptions listed in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 SI 2001 No 544, arts 60C to H. The two exemptions discussed here are the most relevant for goods mortgages and vehicle mortgages.

LOGBOOK LOANS

7.24 As we have seen, over 90% of bills of sale are used for logbook loans. In other words, they are used to secure regulated credit agreements on vehicles. For logbook loans, we make the following proposals.

Simplifying the document requirements

7.25 In place of the complex standard form, a vehicle mortgage would require only a short, simple document. For vehicle mortgages securing regulated credit agreements we propose that the document should include prominent warnings that the logbook lender owns the vehicle until the loan is repaid and that if the borrower does not keep up with repayments, the vehicle may be repossessed.[8]

Modernising the registration regime

7.26 There would be no requirement to register vehicle mortgages at the High Court. Instead, the logbook lender's security would only be valid against a third party if it is registered with a designated asset finance registry. Under our proposals, a government entity would designate asset finance registries.[9]

7.27 As we have seen, registration at the High Court is extremely costly. We estimate that this reform will save the logbook loan industry around £2 million a year. This saving will indirectly benefit borrowers as logbook lenders currently either pass on registration costs to individual borrowers or build registration costs into their prices.

Protecting borrowers

7.28 There is currently very little to protect borrowers from logbook lenders that seek to repossess the mortgaged vehicle on default. This is an issue that has generated much criticism from consumer groups. We propose two measures to address this problem. Both are drawn from the law of hire purchase.

Court order

7.29 We propose that, where the borrower has repaid at least one third of the total loan amount, the logbook lender should be required to obtain a court order before repossessing the mortgaged vehicle.[10] If the borrower defaults before one third of the total loan amount has been repaid, the logbook lender would be free to repossess the vehicle without a court order.

7.30 This measure is intended to protect borrowers who are in default because of temporary financial difficulties. The intention is that the court process will give these borrowers time to address those temporary financial difficulties and resume repayments on the logbook loan.

[8] See paras 9.17 to 9.20 in Chapter 9.

[9] See paras 10.43 to 10.61 in Chapter 10.

[10] See paras 11.17 to 11.45 in Chapter 11.

Voluntary termination

7.31 Where the borrower has no realistic prospect of resuming repayments on the logbook loan, the court order is of little help. It may only increase the expense the borrower must bear.

7.32 For these borrowers, we propose the right of voluntary termination.[11] This means that borrowers would be able to release themselves from a logbook loan they can no longer afford by handing over the mortgaged vehicle to the logbook lender.

7.33 Where the logbook lender is a member of the Consumer Credit Trade Association, borrowers already enjoy this protection under a code of practice (the CCTA Code). However, a statutory right would be clearer and better publicised. We propose to follow the CCTA Code provisions, which in some ways go further than the equivalent provisions in hire purchase law.

Protecting private purchasers

7.34 The Bills of Sale Acts do not give any protection to private purchasers who buy mortgaged vehicles, even if they act in good faith and without notice of the bill of sale. This is an area that has generated much adverse publicity for the logbook loan industry.

7.35 We think that the protection given to private purchasers in hire purchase law should be extended to the law of goods mortgages. We propose that a private purchaser, being someone who does not deal in vehicles or vehicle finance, should acquire ownership of the vehicle, if they act in good faith and without notice of the vehicle mortgage.[12]

SECURED LOANS TO BUY VEHICLES

7.36 In Chapter 2, we saw that bills of sale are sometimes used to buy new vehicles as a direct alternative to hire purchase. This use of bills of sale involves an imaginative interpretation of the law, employing a two part structure: the seller first transfers ownership of the vehicle to the borrower and then takes a bill of sale over it.

7.37 The main motivation for this form of transaction appears to be for lenders to avoid the protections provided to hirers under hire purchase law. We think that it is highly undesirable for bills of sale to be used in this way.

7.38 Our proposals extend key aspects of borrower protection already available under hire purchase law to goods mortgages. This means that any motivation to use a goods mortgage to secure a loan to buy a vehicle rather than hire purchase will disappear.

[11] See paras 11.62 to 11.76 in Chapter 11.

[12] See paras 12.26 to 12.47 in Chapter 12.

LOANS SECURED OVER OTHER GOODS

Simplifying the document requirements

7.39 Again, we propose to simplify the complex standard form for the granting of mortgages over goods other than vehicles.[13] We think this will be particularly useful for some forms of business lending, for example to secure overdrafts or revolving facilities, or where directors guarantee a company's debts.

7.40 For goods mortgages securing regulated credit agreements, we propose that the document should include prominent warnings that the lender owns the goods until the loan is repaid and that if the borrower does not keep up with repayments, the goods may be repossessed.

Modernising the registration regime

7.41 Where a borrower uses goods other than a vehicle as security, we propose that the mortgage should continue to be registered at the High Court. However, the system would be simplified.[14] There would be no need to file an affidavit; registration would be by email; and the seven clear day time limit would be abolished.

Protecting borrowers

7.42 Where a mortgage over other goods is used to secure a regulated credit agreement, we propose that borrowers would be given the same protections as for vehicle mortgages.[15] This means that where the borrower has repaid one third or more of the total loan amount, the lender should be required to obtain a court order before repossessing the mortgaged goods. Similarly, the borrower should have a right of voluntary termination.

7.43 These protections would not apply to goods mortgages securing business loans of more than £25,000 or where the "high net worth individual" exemption applies as these are not regulated credit agreements.

Protecting private purchasers

7.44 In hire purchase law, the protections given to private purchasers apply only to vehicles.

7.45 We think that if the market for mortgages over other goods were to develop, private purchasers of other goods would be in equal need of protection. In fact, they may be in more need, as (in the absence of an asset finance registry) they would have little practical ability to find out that the goods were subject to a mortgage. We therefore propose that the protection for private purchasers should apply to all goods mortgages: a private purchaser should acquire ownership of the goods, if they act in good faith and without notice of the goods mortgage.[16]

[13] See paras 9.14 to 9.16 in Chapter 9.

[14] See paras 10.65 to 10.80 in Chapter 10.

[15] See paras 11.17 to 11.45 and paras 11.62 to 11.76 in Chapter 11.

[16] See paras 12.30 to 12.31 in Chapter 12.

GENERAL ASSIGNMENTS OF BOOK DEBTS

7.46 Insolvency law currently requires general assignments of book debts to be registered as if they were absolute bills in order to be valid in the event of the unincorporated business's bankruptcy.[17]

7.47 We think that there are still good reasons to retain the requirement for registration.[18] It would no longer be possible to register these transactions as if they were absolute bills. Under our proposals, general assignments of book debts would be registered in accordance with the simplified High Court registration regime we propose for mortgages over other goods.[19] This would significantly reduce the cost of registration – we think by at least £350 for each general assignment.

ABSOLUTE BILLS

7.48 As we have seen, the 1878 Act provides that absolute bills are only valid against certain third parties if they are registered at the High Court.

7.49 Absolute bills are almost never registered and probably seldom used. Our provisional view is that there is no need to continue to regulate them.[20] Under our proposals, any regulation of absolute bills would be removed.

PROBLEMS OUTSIDE OUR REMIT

7.50 The new legislation will sit alongside FCA authorisation and supervision of logbook lenders. The FCA authorisation process and continuing oversight under the supervision and enforcement pillars should significantly improve standards in the application process.[21] FCA oversight also has a role to play in monitoring industry standards on borrower default and treatment of private purchasers.

7.51 Several of the abuses brought to our attention are a matter for the FCA rather than our proposed new legislation. In particular, FCA processes will monitor whether logbook lenders:

(1) carry out robust affordability assessments;

(2) provide adequate explanations of the consequences of taking out a logbook loan; and

(3) provide adequate information about the cost of borrowing.

[17] Insolvency Act 1986, s 344.

[18] See paras 13.5 to 13.7 in Chapter 13.

[19] See paras 13.16 to 13.21 in Chapter 13.

[20] See paras 14.32 to 14.35 in Chapter 14.

[21] See paras 4.22 to 4.26 in Chapter 4.

7.52 Consumer groups have expressed concerns about the high interest rates and default charges in logbook lending. As we have seen, the price cap rules that came into force for payday loans in January 2015 do not apply to logbook loans.[22] In Chapter 5, we said that there might be a case for the FCA to introduce a cap on default charges for logbook loans.[23] We defer to the FCA on this issue.

7.53 Where there are failings in the way logbook lenders interact with borrowers, FOS is an alternative means of seeking recourse. Under our proposals, FOS would continue to have a powerful role in protecting borrowers. It is able not only to provide compensation for breaches of the law, but it may also go further and consider whether logbook lenders' behaviour is fair and reasonable.

CONCLUSION

7.54 We think that logbook loans perform a useful function in modern society but that the law of bills of sale is in need of wholesale reform in order to create an effective modern legislative framework. We welcome views.

7.55 In the following chapters, we make detailed proposals on the content of the proposed new legislation, and ask questions. We look forward to receiving responses on these issues.

QUESTION 1

Do consultees agree that bills of sale should not be "banned" or "abolished"?

QUESTION 2

Do consultees agree that the law of bills of sale should be reformed?

[22] See paras 4.84 to 4.93 in Chapter 4.

[23] See paras 5.67 to 5.71 in Chapter 5.

CHAPTER 8
PROPOSALS FOR REFORM: A NEW LEGISLATIVE FRAMEWORK

8.1 The Bills of Sale Acts are no longer fit for purpose. Here, we start by explaining why we think they should be repealed and replaced with new legislation. The terms "bill of sale", "security bill" and "personal chattels" convey little to a modern reader. We discuss new terminology. Of the various possibilities, we think the term "goods mortgage" would be the easiest for modern readers to understand.

8.2 We then consider the scope of the new legislation. Broadly, the new statute would apply where individuals use their existing goods as security for loans and other non-monetary obligations while retaining possession of them. Goods subject to a specialist registry (such as ships, aircraft and some agricultural goods) would be excluded.

8.3 Finally, we ask whether a goods mortgage should operate as a transfer of ownership or as a charge; and whether any types of goods mortgages should be prohibited.

REPEAL OF THE BILLS OF SALE ACTS

8.4 The Bills of Sale Acts are particularly opaque pieces of Victorian legislation. The language is impenetrable for modern readers. To demonstrate this, we set out the definition of "bill of sale" in section 4 of the 1878 Act. It is a single sentence of 218 words:

> The expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.

8.5 Our view is that there is little to be gained from trying to amend the Bills of Sale Acts when they are so difficult to understand and use. Instead, we propose to repeal both the 1878 Act and the 1882 Act and replace them with new legislation.

8.6 While the existing definition of "bill of sale" is based on a list of various agreements and documents, the new definition would look at the function of the transaction. We consider absolute bills in Chapter 14 and reach the conclusion that there is no reason to regulate them. The new legislation, therefore, would be confined to how individuals may use their existing goods as security for loans and other non-monetary obligations while retaining possession of them.

QUESTION 3

Do consultees agree that the Bills of Sale Acts should be repealed and replaced with new legislation regulating how individuals may use their existing goods as security while retaining possession of them?

NEW TERMINOLOGY

8.7 We saw in Chapter 3 that a "bill of sale" is a document by which a person transfers ownership of goods to another. In a "security bill", the transfer of ownership from borrower to lender takes place as security for a loan. Security bills can only be granted over "personal chattels", which broadly captures personal tangible property.[1]

8.8 The terms "bill of sale", "security bill" and "personal chattels" convey little meaning to the modern reader. We wish to replace these terms with new labels which are easier to understand while remaining accurate. What words would convey most meaning to a modern reader?

Possible terms

8.9 Many words are used to convey the idea of security for a loan, including "security interest", "charge", "collateral" and "mortgage". Equally, several words can be used to convey the idea of personal chattels, including "goods", "tangible goods", "personal property" or "personal possessions". These words could be used in a variety of combinations, such as "personal property security interest" or "goods collateral". We note that in the United States, a bill of sale would be referred to as a "chattel mortgage".

8.10 Unfortunately, several terms have the potential to be misunderstood. For example, readers may think that a "charge" is simply another word for credit, or that "security" means that they or their goods will be secure. Meanwhile, "collateral" tends to be used in the banking industry rather than by individuals.

"Goods mortgage"

8.11 Of the various options available, we favour the term "goods mortgage". Most people are familiar with the concept of a mortgage over land. We believe the term "mortgage" has entered the vocabulary of the general population and conveys a degree of seriousness to the transaction.

[1] See paras 3.30 to 3.31 in Chapter 3.

"Vehicle mortgage"

8.12 In Chapter 10 we propose separate registration requirements for goods mortgages secured on vehicles registered with the Driver and Vehicle Licensing Agency.[2] These would be referred to as "vehicle mortgages". Thus, the document presented to a borrower with a logbook loan would refer to a "vehicle mortgage", and would give an appropriate warning about its effect.

A label rather than a concept

8.13 We welcome views on these terms. It is important to note that we intend to use the phrase "mortgage" as a label, and not because we wish to import other legal concepts associated with mortgage law. Whatever label is used, the legislation would define the terms and set out the consequences.

QUESTION 4

Do consultees agree that:

(1) the phrases "bill of sale", "security bill" and "personal chattels" should be replaced?

(2) the new legislation should use the term "goods mortgage" to refer to secured loans over goods generally?

(3) the new legislation should use the term "vehicle mortgage" to refer to secured loans over vehicles?

THE SCOPE OF THE NEW LEGISLATION

8.14 In broad terms, the new legislation would apply where:

(1) an individual;

(2) uses goods;

(3) which the individual already owns;

(4) as security for a loan or other non-monetary obligation; and

(5) retains possession of the goods.

8.15 Below we consider the various elements of this definition. Goods subject to specialist registries, such as ships, aircraft and some agricultural goods, would be excluded from the new legislation.

[2] The Driver and Vehicle Licensing Agency (DVLA) is responsible for collecting and maintaining driver records and vehicle records in Great Britain. The DVLA registers all vehicles for tax purposes. "Vehicle" is given a very wide definition in statute (Vehicle Excise and Registration Act 1994, s 1(1B)). See also fn 10.

An individual

8.16 By "individual", we mean a natural person, rather than a corporate entity. We saw in Chapter 3 that the Bills of Sale Acts apply only to individuals and not companies or other incorporated entities.[3] For companies, a separate regime applies under the Companies Act 2006.

8.17 The Companies Act 2006 applies only in respect of companies incorporated in England and Wales. This means that where an overseas company grants security over its assets, that security cannot be registered at Companies House. We were told during the course of this project that some lenders try to register such security at the High Court under the Bills of Sale Acts. We think that the new legislation should put beyond doubt that it applies to individuals only and not to incorporated entities.

Goods

8.18 In the Bills of Sale Acts, the definition of "personal chattels" is very convoluted but broadly captures personal tangible property. As a goods mortgage is predicated on the borrower retaining possession, we think the new legislation should exclude intangible goods.

8.19 We therefore propose to include a definition of "goods" in the new legislation that refers to personal tangible property and explicitly excludes intangible goods, such as intellectual property rights.[4] Certain investments, such as shares and bonds, could be represented by certificates but would nevertheless constitute intangible goods under the new legislation.

Already owns

8.20 As we have seen, the main distinction between a hire purchase agreement and a security bill is that hire purchase is used to buy new goods on credit, while security bills are used to raise money on the security of existing goods. The new legislation would not apply where the borrower is buying new goods on credit, such as in hire purchase.

8.21 In Chapter 2, we noted that it was possible to structure a loan to buy a vehicle as a security bill by engaging in a double transaction. The lender transfers ownership of the vehicle to the buyer first, and then takes a security bill over it. In Chapters 11 and 12 we make proposals which would align goods mortgages much more closely with hire purchase. We think that this will remove the incentive to structure transactions in this way.

8.22 Transactions that provide for the purchase of new goods on credit, such as hire purchase, would still be allowed. However, they would not be regulated by the new legislation.

[3] See paras 3.15 to 3.16 in Chapter 3.

[4] The new legislation would not include book debts in the definition of "goods". A general assignment of book debts must be registered "as if it were" a bill of sale, but book debts themselves are intangible and so not "goods".

8.23 Under the Bills of Sale Acts, security interests in future goods are effectively prohibited. Later in this chapter, we consider the difficult question of whether or not the use of future goods as security should be permitted.

As security for a loan or other non-monetary obligation

8.24 Under the Bills of Sale Acts, the definition of "security bill" captures only transactions in which the borrower transfers ownership of goods to the lender as security for a loan – a monetary obligation. Where the former owner transfers ownership of goods to the new owner for any other reason, that is an absolute bill.

8.25 We think it is logical for transactions such as a sale or gift of goods where the former owner remains in possession to fall outside the definition of "goods mortgage." However, we think the new legislation should apply where ownership of goods is transferred to secure a non-monetary obligation. An example might be where one person (A) agrees to fix another person's (B) vehicle. B wants to be sure that A will fix the vehicle so A agrees to transfer ownership of A's vehicle to B as security, though A is permitted to remain in possession and make use of the vehicle. Such a transaction is classified as an absolute bill under the current legislation.[5]

8.26 Our view is that "goods mortgage" should be defined so as to capture a transaction designed to secure any obligation, whether monetary or non-monetary. Otherwise, following our proposals for absolute bills, transactions to secure non-monetary obligations would be entirely unregulated.

The borrower retains possession

8.27 The Bills of Sale Acts do not apply where the lender's security is possessory, that is, where the lender takes possession of goods. For example, in a pledge, a borrower leaves goods with a pawnbroker as security for a loan.[6] There are also many circumstances in which a trader acquires a lien over goods in their possession. A vehicle repair shop may retain a car until payment of the bill.[7] Solicitors and insurance brokers may refuse to hand over documents until their fee or commission has been paid.[8] We think that the legislation should not apply to any security interest where the goods are in the possession of the lender.

[5] Even shortly after the Bills of Sale Acts were passed, it was reported that this sort of absolute bill was rare (J Weir, *Law of Bills of Sale* (1896), p 1). We think that this sort of transaction is also likely to be rare in modern society.

[6] In a pledge, ownership does not pass to the pledgee (Lord Mersey in *The Odessa* [1916] 1 AC 145 at 159: the pledgee sells "by virtue and to the extent of the pledgor's ownership, and not with a new title of his own"). We are concerned here though with possession.

[7] See, eg, *Albemarle Supply Company Limited v Hind and Company* [1928] 1 KB 307.

[8] See, eg, *Mann v Forrester* (1814) 4 Camp 60 and *Barratt v Gough-Thomas* [1951] Ch 242.

8.28 In some cases, the goods may be located in a specific place. For example, we have seen security bills issued over wine held in a specialist store. It may also be possible to secure a loan on gold held in a vault or artworks on loan to a gallery. We would welcome views on how the new legislation should apply to these arrangements. Our preliminary view is that the goods should be considered to be in the possession of the borrower if they remain under the borrower's control.

Exclusions

Ships and aircraft

8.29 We discussed in Chapter 3 the fact that dealings with ships and aircraft are outside the scope of the Bills of Sale Acts.[9] Such transactions are subject to their own regulatory regimes. The new legislation would not apply to such transactions.

Agricultural charges

8.30 In Chapter 3 we saw that agricultural charges given to banks are governed by the Agricultural Credits Act 1928 and registered with the Land Registry.

8.31 At present it would appear that in some circumstances farmers have a choice: they could grant security over growing crops, livestock or farm machinery either by using an agricultural charge or by using a security bill. From the point of view of third parties it is clearly undesirable to be forced to search two registers. Our preliminary view is that the new legislation should exclude any agricultural charge which falls within the scope of the Agricultural Credits Act 1928 (with the exception of loans secured on vehicles).[10] In other words, other charges which could be registered under the 1928 Act could not be registered as goods mortgages.[11] We particularly welcome views on the implications of this proposal.

A functional approach

8.32 The proposed definition is based on the substance of the transaction rather than its form. One criticism made of the Bills of Sale Acts is that it is possible to escape their scope merely by entering into an oral transaction. An oral agreement would be caught by the new legislation that we propose. However, as we explain in Chapter 9, the transaction would be void if it were not evidenced in writing.

8.33 Nor would the definition depend on whether a transaction was structured as an outright transfer of ownership, a charge or a trust. Below, we consider whether the parties should be given a choice over how the transaction is structured.

[9] See para 3.26 in Chapter 3.

[10] Tractors and agricultural vehicles need to be registered with the DVLA unless, broadly, they are solely for use on private land. Goods mortgages granted over such tractors and agricultural vehicles registered with the DVLA would be "vehicle mortgages" under our proposals.

[11] If the bank fails to register that charge as an agricultural charge, it will be void against all parties except the farmer (Agricultural Credits Act 1928, s 9(1)).

QUESTION 5

Do consultees agree that the new legislation should regulate transactions where individuals use goods they already own as security for a loan or other non-monetary obligation and retain possession of the goods?

In particular, should the new legislation:

(1) apply only to security granted by individuals?

(2) cover transactions where the obligation secured is non-monetary?

(3) provide that goods are considered to be in the possession of the borrower if they remain under the borrower's control?

QUESTION 6

Do consultees agree that the new legislation should not apply to:

(1) dealings with intangible goods?

(2) dealings with ships and aircraft?

(3) any security interest which could be registered as an agricultural charge (with the exception of loans secured on vehicles)?

HOW WOULD A GOODS MORTGAGE TAKE EFFECT?

8.34 Under the Bills of Sale Acts, a security bill takes effect by transferring ownership of the goods to the lender, subject to two conditions. First, the lender is only permitted to repossess the goods for one of four reasons: default on payment; default on maintenance; fraudulently removing the goods; or bankruptcy of the borrower.[12] Secondly, ownership is transferred back to the borrower once the loan is repaid.

8.35 In Chapter 6, we contrasted a security bill with a charge, where the lender receives a more limited interest in the goods.[13] The practical difference is that a company may give more than one charge over the same goods, whereas a borrower who grants a security bill may only transfer ownership to a lender once.

8.36 Our initial view is that a goods mortgage, like a security bill, should take effect by transferring ownership to the lender. However, we think that the parties should be able to agree that it should take effect as a charge instead, if that is what they want. This would give borrowers the opportunity to charge the same goods more than once. In practice, we think charges would be rare. Few goods are sufficiently valuable to bear more than one charge. However, our proposal may offer more flexible possibilities to some unincorporated businesses.

[12] 1882 Act, s 7. See para 3.57 in Chapter 3.

[13] See paras 6.14 to 6.16 in Chapter 6.

8.37 For both outright transfers and charges, we think that the legislation should continue to specify that the lender is not entitled to repossess goods except for specified reasons; and that, for outright transfers, the borrower regains ownership once the loan is repaid. This should apply to all goods mortgages.

8.38 Of the four specified reasons in the 1882 Act, we think that fraudulently removing the goods should no longer be a ground for repossession. There are two reasons for this:

(1) its meaning is unclear, particularly for a vehicle. For example, if the borrower drives the vehicle abroad, it could take considerable investigation to determine if that was fraudulent removal; and

(2) the lender is, in any case, unlikely to be aware that goods have been fraudulently removed unless the borrower has also defaulted on repayment.

8.39 In modern society, the lender is likely to be concerned that the borrower has insured the goods. This would fall under the requirement that the borrower "maintains" the goods, but it is unlikely that "maintenance" would commonly be understood in this way.[14] We propose to make this clear in the new legislation.

8.40 As we discuss in Chapter 11, greater protections would apply to goods mortgages securing regulated credit agreements. Here, where a borrower in default has repaid at least one third of the total loan amount, the lender would only be entitled to repossess the goods if it has obtained a court order.

QUESTION 7

Do consultees agree that a goods mortgage should take effect by transferring ownership to the lender unless the parties agree that it should take effect as a charge instead?

QUESTION 8

For all goods mortgages (whether or not securing a regulated credit agreement, and whether taking effect as a transfer of ownership or a charge), do consultees agree that the new legislation should:

(1) prevent lenders from repossessing goods except for one of three specified reasons:

(a) default on payment;

(b) default on maintenance or insurance of the goods; or

(c) the bankruptcy of the borrower?

[14] It has been held in case law that insurance provisions are capable of being "necessary for maintaining the security" within s 7(1) of the 1882 Act. See, eg, *Hammond v Hocking* (1884) 12 QBD 291.

(2) no longer provide that fraudulently removing the goods is a specified reason that allows lenders to repossess goods?

(3) where there is a transfer of ownership, specify that ownership is automatically transferred to the borrower once the loan is repaid?

SHOULD ANY GOODS MORTGAGES BE PROHIBITED?

8.41 The Bills of Sale Acts currently prohibit two types of transaction. These are security bills granted for small amounts; and security bills over future goods. Here we look at each in turn, and ask whether these transactions should continue to be prohibited under the new legislation we propose.

Goods mortgages for small amounts

8.42 Under the 1882 Act, security bills are not permitted to secure loans of less than the minimum amount, which was set at £30. As we have seen, if the amount had kept pace with inflation, it would now be over £3,000.

8.43 Security bills are now used to secure much smaller loans than were permitted in 1882. In our survey of bills of sale registered at the High Court we were surprised to find so many small loans. Out of 102 bills of sale, 14 were for less than £500. The lowest was for £100. We found two bills of sale for £200; four for £250; there was one for £272.80 and three for £300. The remaining three were for amounts between £400 and £499.

Arguments for a minimum amount

8.44 Two arguments can be put for preventing small loans from being secured on goods. First, the only purpose of securing a loan is to allow for the possibility of repossession; yet for these small loans the costs of repossession appear to be out of proportion to the amount of the loan. As we saw in Chapter 5, the costs of repossession and sale will be at least £400.[15] It seems harsh that borrowers who default on a small loan of £200 are not only at risk of losing their vehicle but would also be faced with charges of double the amount of the loan.

8.45 Secondly, the great majority of people who wish to borrow £200 should be able to find unsecured loans. If not, it is doubtful that they should be able to grant a vehicle mortgage. A person who fails the affordability tests for a payday loan would be better off not borrowing money at all, rather than putting their vehicle at risk and facing the possibility of a large shortfall.

Arguments against a minimum amount

8.46 On the other hand, two strong reasons can be put against requiring goods mortgages to secure a minimum amount:

[15] This includes £300 for repossession, £14 for a valet, £87 for sale and £2 a day for storage. Often costs are much greater than this.

(1) it may encourage borrowers to borrow more than they need to reach the minimum loan amount; [16] and

(2) secured lending is generally cheaper than unsecured lending. The interest rates in logbook lending, though high, are lower than in payday lending. Introducing a minimum loan amount may cause borrowers to turn to more expensive payday loans to borrow loan amounts below the minimum threshold.[17]

8.47 Furthermore, minimum amounts are only effective if they are kept up-to-date. As we have seen, inflation has rendered the £30 threshold in the 1882 Act meaningless. Yet it may be difficult to ensure that a minimum sum is regularly revised and updated.

8.48 This issue raises difficult questions about how far borrowers should be entitled to make their own choices, and how far the state should intervene to protect borrowers from the consequences of their own actions. On balance, we think that on this issue, borrowers should make their own choices. We do not propose a minimum amount, though we welcome views.

QUESTION 9

Do consultees agree that a goods mortgage should be available to secure loans of any amount with no minimum?

Goods mortgages over future goods

8.49 We saw in Chapter 6 that the Bills of Sale Acts in effect prevent borrowers from granting security over future goods. If a lender takes such a security, it is valid only against the borrower and not against third parties.[18] This, together with the requirements that the goods must be specifically described and that the borrower is their true owner, means that it is not possible to give security over whole classes of goods, or all goods which a borrower may possess. This appears to be a borrower protection measure.[19]

[16] This was also a concern in the Victorian era when the £30 limit was being debated: Hansard (HC), 20 March 1882, vol 267, cc1398-416. Sir Henry James said of one view: "He was afraid that if they adopted the low figure of £20 the money-lenders would be prompted to lend a little more than £20."

[17] We saw in paras 2.15 to 2.16 in Chapter 2 that there is significant overlap between logbook loan borrowers and payday loan borrowers.

[18] 1882 Act, s 5.

[19] Hansard (HC), 27 March 1882, vol 268, cc117-35: "The House was aware that a practice had grown up in regard to bills of sale among moneylenders of not only taking assignments of all the goods possessed by the borrowers, but of all the goods afterwards to be acquired. That system applied very widely, and it was thought advisable to provide, as Clause 5 proposed to provide, that bills of sale should include only the goods enumerated in the schedule. In that way a borrower would assign all he had, but not what he would have in the future."

8.50 A security over future goods does have the potential to be exploitative. Borrowers tend to concentrate on the present and give too little thought to possible risks in the future.[20] If borrowers have problems giving sufficient thought to the loss of goods they already own, it would be much more difficult for them to envisage the loss of goods they may own in five years' time. In the hands of an unscrupulous lender, a goods mortgage over future goods could permit a lender to pursue a shortfall for years to come, repossessing not only the borrower's present goods, but any goods the borrower may acquire later when their circumstances have improved.

8.51 Given the potentially onerous consequences, we think it is right that borrowers should not be permitted to grant security over future goods, unless the loan is to be used to acquire those goods.[21]

QUESTION 10

Do consultees agree that borrowers should not be permitted to use future goods as security for a loan, unless the loan is to be used to acquire those goods?

CONCLUSION

8.52 The Bills of Sale Acts are opaque, complex and unsuitable for the twenty-first century. We think they should be repealed. We propose that they should be replaced with a new "Goods Mortgages Act". This would apply to transactions where individuals use goods they already own as security for a loan or other non-monetary obligation while retaining possession of the goods.

[20] For an overview of the literature on behavioural biases, see S Huck, J Zhou and C Duke for the Office of Fair Trading, *Consumer Behavioural Biases in Competition* (2011), especially pp 22 to 32, paras 3.22 to 3.55.

[21] The United States Uniform Commercial Code prevents the granting of security over future goods if they are "consumer goods": s 9-204(b)(1). "Consumer goods" are defined as "goods that are used or bought for use primarily for personal, family, or household purposes": s 9-102(a)(23).

CHAPTER 9
PROPOSALS FOR REFORM: SIMPLIFYING THE DOCUMENT REQUIREMENTS

9.1 In Chapter 3, we discussed the document requirements for security bills in the 1882 Act. In Chapters 5 and 6 we saw that the highly complex standard form, as well as being incomprehensible to modern borrowers, causes difficulties for logbook lenders and makes it impossible to secure some forms of business lending.

9.2 In this chapter, we propose that a goods mortgage should be set out in a written document which is signed by the borrower in the presence of a witness. However, we propose that there should be more flexibility over the content of the document. The main requirement would be that, if the document is used to secure a logbook loan or other regulated credit agreement, it should contain clear warnings.

9.3 We have three aims:

(1) to make it easier for lenders to comply with the legislation;

(2) to enable unincorporated businesses to use goods mortgages to secure overdrafts, revolving facilities and guarantees, where the amount of the loan or the date of repayment cannot be specified in advance; and

(3) to make it plain what a goods mortgage entails for regulated credit agreements, where borrowers might be in more need of protection.

9.4 We start by briefly discussing the failings of the current standard form. We consider why a separate goods mortgage document should nevertheless be required. We then look at what information the goods mortgage document should contain and the sanction for non-compliance.

STANDARD FORM UNDER THE 1882 ACT

9.5 The standard form of a security bill is highly complex, consisting of no fewer than 12 separate requirements.[1]

9.6 The policy rationale for introducing the standard form was to protect borrowers. Contemporary debates in the House of Commons noted that:

[1] See para 3.39 in Chapter 3.

> Many money-lenders advertised under the names of fictitious banks; and sometimes they advertised in this form – "A widow, with capital to spare, will be happy to lend on easy terms. Strict secrecy. Five per cent." In an evening paper published in Nottingham he had counted, on one occasion, 13 of these money-lending advertisements. Having entrapped a man into his office, the money-lender proceeded in this way – He produced a bill of sale containing a large number of clauses, which it was impossible for the borrower to read or understand in the time allowed…[2]

9.7 The aim of the standard form was to warn borrowers against entering into a transaction that could lead "thousands of honest and respectable people to their ruin."[3] We can only speculate whether Victorian borrowers derived any benefit from the standard form. It is clear that modern borrowers do not understand it.

9.8 Logbook lenders now follow the standard form closely, following previous challenges on the compliance of their paperwork with the 1882 Act.[4] This is because the sanction for non-compliance is so severe: not only is the security over the vehicle void, but the logbook lender also loses its right to repayment of the loan.

9.9 In Chapter 6 we saw that for some forms of business lending, the document requirements have a substantive effect. For example, the 1882 Act requires the security bill to state the amount of the loan and the repayment date. This prevents security bills from being used to secure overdrafts, revolving facilities or guarantees.

A GOODS MORTGAGE SHOULD BE IN WRITING

9.10 We think that a goods mortgage should only be valid if it is set out in a written document signed by both parties. This is because granting a goods mortgage is a serious transaction, with implications not only for the borrower but also for third parties.

9.11 At present, the requirement that a borrower must sign the security bill in the presence of a witness necessitates a face-to-face meeting. We see advantages in this. We would be concerned if a logbook loan could be granted over the telephone or online. It would be too easy for borrowers to transfer ownership of a vehicle, possibly late at night or while drunk, without understanding the implications of what they are doing. Though the requirement to give an adequate explanation of a logbook loan does not necessarily require a face-to-face meeting, demonstrating compliance is likely to be easier with such a meeting.[5] Requiring a physical signature before a witness reinforces the value of a face-to-face meeting.

[2] Hansard (HC), 20 March 1882, vol 267, cc1398-416.

[3] Hansard (HC), 8 March 1882, vol 267, cc393-402.

[4] See paras 3.42 to 3.44 in Chapter 3.

[5] The requirement to give adequate explanation is in the FCA's consumer credit rules. See paras 4.32 to 4.34 in Chapter 4.

9.12 We therefore think that there should continue to be a requirement that the borrower applies a physical signature to the document in the presence of a witness. We do not propose any restrictions on who that witness should be. At present, logbook loans are nearly all witnessed by the lender's employee or agent. We would expect this to continue for logbook loans. However, we would allow some flexibility for the signature to be witnessed by someone else, which may be useful for non-regulated business loans.

9.13 We think that the goods mortgage document should be separate from the credit agreement. For a consumer mortgage of a home, the borrower signs a separate mortgage deed. This deals with the grant of security over a home. It includes a statement that the borrower grants the lender a property right over the home. We think that a goods mortgage should also have its own document, to reinforce its importance.[6] The consumer groups we spoke to also saw value in this.

Question 11

Do consultees agree that:

(1) a goods mortgage should only be valid if it is set out in a written document signed by both parties?

(2) the borrower's signature should be a physical signature made in the presence of a witness?

(3) the goods mortgage should be in a separate document from the credit agreement?

CONTENTS OF A GOODS MORTGAGE DOCUMENT

9.14 A goods mortgage may be granted by a wide range of borrowers, from a consumer taking out a £500 logbook loan to an unincorporated business borrowing £100,000. We wish to simplify the existing document requirements under the current legislation so as to make a goods mortgage more suitable for business borrowing, while still providing adequate warnings to consumers. We think that it would be helpful for lenders to ask the Plain English Campaign to approve their goods mortgage document, but we do not propose that this should be a mandatory requirement.[7]

9.15 We propose that all goods mortgage documents should include some basic information, but that the requirements should be much more flexible than at present. In the table below, we look at each of the current document requirements and consider whether they should be retained for goods mortgage documents in general.

[6] The goods mortgage document would contain a similar statement. See table 9.1.

[7] See http://www.plainenglish.co.uk/.

9.16 For regulated credit agreements, we think that borrowers should be given clear warnings about the effect of the goods mortgage. In the following section we suggest possible warnings for borrowers with logbook loans. This could be adapted for other goods mortgages used to secure regulated credit agreements.

Table 9.1 Document requirements for all goods mortgages

Requirement	Retain?	Rationale
The date of the goods mortgage document	Yes	This is basic information that would be included in any contract.
The names and addresses of the borrower and lender	Yes	This is basic information that would be included in any contract.
The loan amount, which must be at least £30	In amended form	Under our proposals, a goods mortgage could be used to secure a monetary or non-monetary obligation. The document should state the obligation which is secured by a goods mortgage, but it would not be necessary to state a fixed sum. This would enable a goods mortgage to be used to secure a revolving facility, overdraft or guarantee where the loan amount that is to be secured is not fixed.[8]
A declaration by the borrower that they have received the loan amount	No	In the interests of keeping the goods mortgage document as clear and as short as possible, our view is that it is not necessary to include this statement. We do not think this statement serves any meaningful purpose in the goods mortgage document.
Words that effect a transfer of ownership, by way of security by the borrower to the lender, of goods capable of specific description	In amended form	The words should make clear to the borrower that ownership of the goods is being transferred to the lender in order to secure an obligation. Where the lender takes a charge, the words should make clear to the borrower that the goods are charged in favour of the lender in order to secure an obligation. For regulated credit agreements, we think that this is an important piece of information that should appear very prominently, using prescribed wording. We seek views from consultees on some suggested wording later in this chapter.

[8] See paras 8.42 to 8.48 in Chapter 8 for discussion of the requirement for a minimum loan amount.

Requirement	Retain?	Rationale
A statement of the loan amount, the rate of interest and the repayment instalments, including the date by which repayment is to be made	No	We have already discussed inclusion of the loan amount in the goods mortgage document. We think that the goods mortgage document should deal only with information relevant to the grant of security. Information concerning the rate of interest and repayment instalments relate to the personal promise of the borrower to repay the loan. This information would in any case be included in the credit agreement.
Any agreed terms for the maintenance of the secured goods	No	In the interests of keeping the goods mortgage document as clear and as short as possible, our view is that it is not necessary to include this information. This information could be included in the credit agreement.
A provision that the secured goods cannot be seized by the lender for any reason other than those specified in section 7 of the 1882 Act	In amended form	The provisions of section 7 of the 1882 Act remain useful in restricting the very wide power of seizure available to mortgagees at common law.[9] In Chapter 8 we proposed that the new legislation should contain similar provisions. However, we do not see a need to repeat these provisions in the goods mortgage document. For regulated credit agreements, the goods mortgage document should make clear to borrowers that they are at risk of losing possession of the goods if they default. We seek views from consultees on some suggested wording later in this chapter.
The signature of the borrower	Yes	This would reinforce the importance of the goods mortgage document and prove its validity.
An attestation clause	In amended form	As discussed above, requiring a witness to attest the signature prevents borrowers from granting goods mortgages remotely by telephone or online.

[9] See paras 3.56 to 3.57 in Chapter 3.

Requirement	Retain?	Rationale
The name, address and occupation of the witness	Yes	This is basic information required of any witness to a contract.
A schedule to the goods mortgage document that specifically describes the secured goods	In amended form	The goods mortgage document should specify the goods over which the borrower is granting security. Specific description, though in some cases cumbersome, is essential to identify the secured goods and to prevent a lender from claiming that other goods also fall within its security. We therefore propose that the new legislation uses similar wording. There seems to be no particular reason to require the description to be in a schedule, and we would remove this requirement.[10]

[10] Though, in practice, some goods mortgage documents may still use a schedule, for example, where the borrower grants security over all the furniture and fittings in a hotel.

Question 12

Do consultees agree that a goods mortgage document should contain:

(1) the date of the goods mortgage?

(2) the names and addresses of the borrower and lender?

(3) the obligation which is secured by the goods mortgage?

(4) a statement that ownership of the goods is being transferred to the lender, or that the goods are being charged in favour of the lender, in order to secure the obligation?

(5) the name, address and occupation of the witness?

(6) a specific description of the goods?

Question 13

Do consultees agree that it is not necessary to require that the goods mortgage document contain:

(1) a fixed sum where the secured obligation is monetary?

(2) specific description of the goods in a separate schedule?

PROMINENT STATEMENTS IN LOGBOOK LOANS

9.17 Most goods mortgages will be vehicle mortgages used to secure logbook loans. Two important consequences of a vehicle mortgage should be made clear to borrowers:

(1) the logbook lender owns the vehicle until the logbook loan is repaid; and

(2) in the event of default, the borrower risks losing possession of the vehicle.

9.18 We think that the goods mortgage document should include prominent statements drawing attention to both these points. We think it would be useful for the Financial Conduct Authority (FCA) to prescribe wording and that legislation could give the FCA power to do so.[11] Prescribing wording would give certainty to logbook lenders and would help to convey the messages to borrowers. However, we for our part do not propose to be so prescriptive as to mandate font sizes or typefaces.

[11] For consumer mortgages of a home, the prescribed warnings derive from the Mortgages and Home Finance Conduct of Business Sourcebook, otherwise known as "MCOB", which is produced by the FCA, available at http://fshandbook.info/FS/html/handbook/MCOB.

9.19 We think it would be useful to carry out research with borrowers with logbook loans before deciding which words to use. It may be that these messages could also be conveyed graphically, for example, by a picture. We make some preliminary suggestions below, to seek consultees' views on this issue. We also welcome views on whether the new legislation we propose should require these prominent statements to appear on websites and advertising.

Transferring ownership[12]

YOU TRANSFER OWNERSHIP OF YOUR VEHICLE TO US UNTIL YOU HAVE REPAID YOUR LOAN

Repossession

YOUR VEHICLE MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON YOUR LOAN

9.20 As indicated, this message might be reinforced if it were accompanied by a picture, for example, of a tow-truck removing a vehicle.

Question 14

Do consultees agree that where a regulated credit agreement is secured on a vehicle the vehicle mortgage document should include prominent statements that:

(1) the lender owns the vehicle until the loan is repaid?

(2) in the event of default, the borrower risks losing possession of the vehicle?

Do consultees have views on:

(3) the suggested formulations for the prominent statements?

(4) whether the prominent statements should also appear on websites and advertising?

PROMINENT STATEMENTS FOR OTHER LOANS

9.21 We do not think that these prominent statements would be required for goods mortgages which do not secure regulated credit agreements, either because the credit agreement is for business purposes and of more than £25,000 or because it relates to a loan of more than £60,260 taken out by a high net worth individual. The purpose of these exemptions is to give greater freedom of contract where the borrower is well-resourced enough to seek legal and financial advice. These borrowers are considered to be less in need of legislative protection and so the prominent statements may appear paternalistic.

[12] Logbook loans are unlikely to take effect by way of charge.

9.22 However, some regulated credit agreements could be secured on goods other than vehicles. We think that adapted versions of the prominent statements should apply in these circumstances.

Question 15

Do consultees agree that:

(1) adapted versions of the prominent statements should be required for regulated credit agreements secured on goods other than vehicles?

(2) it is not necessary to include the prominent statements for goods mortgages which do not secure regulated credit agreements?

SANCTION FOR FAILURE TO COMPLY

9.23 The sanction for failure to comply with the document requirements in the 1882 Act is harsh and disproportionate. The lender not only loses any right to the secured goods but also loses the right to sue the borrower for repayment of the loan.

9.24 We propose a different sanction: the lender would still be entitled to repayment of the loan, but the goods mortgage itself would be void. In other words, the lender would lose any right to the secured goods, both as against the borrower and as against third parties.

9.25 We think there needs to be some sanction, because lack of compliance would be likely to cause detriment to borrowers. The goods mortgage document deals only with the grant of security, not the loan itself. It would therefore be inappropriate in the event of non-compliance for the lender to lose the right to sue the borrower for repayment of the loan.

Question 16

Do consultees agree that the sanction for failure to comply with the document requirements should be that the lender loses any right to the secured goods, both as against the borrower and as against third parties?

CONCLUSION

9.26 The document requirements in the 1882 Act do little to protect borrowers while making it excessively difficult for lenders to comply. As discussed in Chapter 6, the requirements in addition prevent unincorporated businesses from granting security for some forms of borrowing.

9.27 We think that the document requirements should be simplified, to allow for revolving facilities, overdrafts and guarantees to be secured on goods. For goods mortgages, the current complex standard form should be replaced by a short, simple document which makes clear to borrowers what a goods mortgage entails and the potential consequence of default.

CHAPTER 10
PROPOSALS FOR REFORM: MODERNISING THE REGISTRATION REGIME

10.1 As we discussed in Chapter 5 the current High Court registration regime adds between £35 and £51 to the cost of each logbook loan. Yet it fulfils very little purpose. The High Court register is so cumbersome to search that logbook lenders also register voluntarily with private asset finance registries. In practice, other lenders and trade buyers rely on these private asset finance registries to discover whether there are any finance interests over the vehicle.

10.2 Here, we make proposals to reform the registration system, first for mortgages secured on vehicles and then for mortgages secured on other goods. In Chapter 13, we explain how the new registration regimes would apply to general assignments of book debts while in Chapter 14, we argue that registration of absolute bills should be abolished altogether.

10.3 We start by discussing the conceptual framework lying behind registration, asking why registration is needed at all. Its main purpose is to inform other lenders and purchasers that the goods are subject to a bill of sale. Ideally, the register should be searchable by asset. In practice, however, this is only possible for vehicles, which, unlike other goods used as security, can be uniquely identified.

10.4 We therefore make a distinction between vehicle mortgages and other goods mortgages. We propose that there should be no requirement to register vehicle mortgages at the High Court. Instead, there should be a requirement on logbook lenders to register with a designated asset finance registry. For other goods, registration at the High Court would continue, but would be significantly simplified.

REGISTERING SECURITY INTERESTS: CONCEPTUAL FRAMEWORK

10.5 There is considerable academic literature on the registration of security interests generally, much of it comparing the United States Uniform Commercial Code with the position in the United Kingdom.[1] As one commentator put it, the issue has "engendered countless debates and declarations over the years" and contributed to "countless paper mountains".[2] We draw on this literature to look at the concepts which underlie registration of security interests.

10.6 The literature distinguishes between interests where the lender takes possession of the goods (a possessory security interest) and those where the borrower retains possession (a non-possessory security interest). For example, while pawnbroking involves a possessory security interest, a vehicle or goods mortgage would be non-possessory.

[1] See in particular, R Goode, *Commercial Law* (4th ed, 2010), p 718 and H Beale, M Bridge, L Gullifer, E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed, 2012), ch 9. See also: I Davies, "The Reform of Personal Property Security Law: Can Article 9 of the US Uniform Commercial Code be a precedent?" [1988] *International and Comparative Law Quarterly* 465 and W J Gough, *Company Charges* (2nd ed, 1996).

[2] G McCormack, *Registration of Company Charges* (2nd ed, 1994), p 1, para 1.1.

WHY REGISTER?

10.7 In common law jurisdictions, non-possessory security interests must generally be registered for three broad reasons.

Giving notice to third parties interested in the goods

10.8 The first and foremost reason is to protect third parties who wish to acquire an interest in the goods. These third parties may either be other lenders, proposing to take security over the same goods for another loan, or a potential purchaser. As we asked in our consultation paper on company security interests:

> How is a third party who might be contemplating making a further loan to the debtor against security over the debtor's assets to know that a particular asset or class of assets is already subject to a non-possessory security? Similarly, how is someone thinking of buying the property from the debtor to know that it is mortgaged or charged to the creditor?[3]

10.9 The lender will wish to be confident that it will be in a position to take possession of the goods, even if the borrower sells the goods, or grants another security interest to a different lender. However, this will be unfair to the purchaser or new lender, unless they have a realistic way of finding out about the first lender's interest.

"False wealth" more generally

10.10 A secured lender is usually in a strong position in the event of the borrower's bankruptcy. If it has a security interest in the borrower's most valuable goods, or in a broad range of the borrower's goods, it will be in a much stronger position than unsecured creditors. Other creditors and potential creditors therefore have an interest in finding out about the security interest, so they know how little they are likely to receive on a potential bankruptcy.

10.11 A borrower who remains in possession of secured goods may give the impression of "false wealth". Registration will allow all creditors to find out that the borrower is less wealthy than at first appears.[4] As we noted in our consultation paper on company security interests:

[3] Registration of Security Interests: Company Charges and Property other than Land (2002) Law Commission Consultation Paper No 164, p 2, para 1.7.

[4] "For many years there has been concern that if a debtor has possession of property that in fact belongs to a third party or is subject to a security in favour of a third party, creditors might be misled. As a result various legislative measures were passed. One was… the doctrine of 'reputed ownership'. The other was to require registration of transactions or documents under which the debtor is left in possession of property that belongs or is mortgaged or charged to another" (H Beale, M Bridge, L Gullifer, E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed, 2012), p 388, para 9.04).

> The risk of the impression of 'false wealth' and the lack of a means whereby the existence of non-possessory secured lending could be discovered resulted in the introduction of the requirement to register the existence of many non-possessory securities, whether created by companies or by individuals.[5]

Proof and priority

10.12 Registration also provides a means of verifying that the security interest exists and when it was granted.[6] This is especially important where a fraudulent borrower grants two competing interests over the same goods. Different registration schemes have different rules to decide priority. As we have seen, for bills of sale, priority is determined on the basis of the date of the High Court stamp.[7]

10.13 These different arguments for registration indicate the establishment of different types of register, which we discuss in the paragraphs that follow.

ASSET REGISTER OR DEBTOR REGISTER?

10.14 The many security interest registers around the world can be divided into two types. Some register the interest against the vehicle or goods (an "asset register"). Others register against the borrower (a "debtor register"). The register maintained by the Land Registry, the UK Ship Register and the Aircraft Register are examples of asset registers. To carry out a search, it is necessary to have details of the land, ship or aircraft in question. By contrast, the company charges register at Companies House is an example of a debtor register. To search it, it is necessary to have details of the company.

Registers to assist purchasers

10.15 Where the register's main purpose is to inform a potential purchaser, an asset register is more useful. The potential purchaser is likely to know details of the asset (such as a vehicle, ship or aircraft). However, there are practical limitations to establishing asset registers. For an asset register to work, the goods must have a unique identifier. Of the goods we have seen being secured with bills of sale, only vehicles meet this test.

10.16 By comparison, a potential purchaser will find a debtor register more difficult to use. Where the asset in question has already changed hands, they may be unaware of the existence and identity of the borrower at all; and even in a direct sale, borrowers may give a false name or hide behind an intermediary. Where the borrower is an individual, rather than a company, there are other problems. The High Court bills of sale register lists borrowers by name and postcode, but borrowers can change name and move home.

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5 Registration of Security Interests: Company Charges and Property other than Land (2002) Law Commission Consultation Paper No 164, p 2, para 1.9.

6 "Registration is also a useful safeguard against fraud, particularly any attempt to represent that a security interest came into effect earlier than was really the case" (H Beale, M Bridge, L Gullifer, E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed, 2012), p 388, para 9.06).

7 See paras 5.31 to 5.32 in Chapter 5.

Registers to assist general creditors

10.17 A general creditor, however, may find a debtor register more useful than an asset register. When lending to a company, for example, the creditor may wish to know all the fixed and floating charges registered against that company, rather than having to search against each of the company's main assets.

EFFECT OF REGISTRATION: "ATTACHMENT" AND "PERFECTION"

10.18 It is common to make a distinction between a security interest which is valid only against the borrower, and an interest which is valid against third parties.[8] In the United States these concepts are referred to as "attachment" and "perfection".[9] "Attachment" occurs when the security interest is valid against the borrower. The security interest "attaches" to the vehicle or goods so that the lender can enforce it against the borrower. The security interest is "perfected" when third parties are also bound by it.[10] While the terms "attachment" and "perfection" originate in the United States, they "are beginning to come into use" to describe the position under English law.[11]

10.19 Furthermore, some third parties may be treated differently from others.[12] As we saw in Chapter 4, in hire purchase law, private purchasers are granted special protection. If a vehicle subject to a hire purchase agreement is sold, the lender may not enforce its security interest against a private purchaser who acts in good faith and without notice of the hire purchase agreement.[13]

10.20 As we explain below, we think that a vehicle or goods mortgage should be valid against the borrower even if it is unregistered. However, it should only be "perfected" against a third party if it is registered. In Chapter 12 we discuss protections for private purchasers who act in good faith and without notice.

8 "All consensual security interests need … to *attach* to a specific identified asset or class of assets (this is said to render the security binding between the debtor and the creditor); and to be *perfected* in whatever way the law demands for the particular type of security in issue, typically by possession or registration (this renders the security binding between the insolvent debtor and third parties in favour of the creditor)" (M Bridge, L Gullifer, G McMeel and S Worthington, *The Law of Personal Property* (1st ed, 2013), p 148, para 7-007).

9 See Uniform Commercial Code, Article 9, section 9-203(a): "A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment." See also sections 9-308 to 9-316 with respect to perfection.

10 "The expression 'perfection' is a useful way to describe any steps that a secured creditor has to take in order to be able to make the security effective against other secured creditors, trustees in bankruptcy and company liquidators or administrators" (H Beale, M Bridge, L Gullifer, E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed, 2012), p 387, para 9.01).

11 See R Goode, *Commercial Law* (4th ed, 2010), p 665, fn 183.

12 "Most perfection requirements, such as registration are concerned with the validity of the security as against the liquidator or administrator of the debtor's assets. Prior to insolvency, these statutory requirements do not touch the debtor-creditor arrangements, and then any conflict between competing third party claims against the debtor's assets is resolved by normal priority rules" (M Bridge, L Gullifer, G McMeel and S Worthington, *The Law of Personal Property* (1st ed, 2013), p 149, para 7-007, fn 26).

13 Hire Purchase Act 1964, ss 27 to 29.

10.21 To summarise: registration may be used for different reasons, may be done in different ways and may have different effects. Below we explore how the reasons for registration apply first to logbook loans, and then mortgages on other goods.

REASONS TO REGISTER LOGBOOK LOANS

10.22 In Chapter 5 we described the industry practice of dual registration of logbook loans.[14] Logbook lenders are forced to register at the High Court, at considerable difficulty and expense, because the legislation requires it to both attach and perfect their security. To give third parties notice of their interest they also register with private asset finance registries on a voluntary basis.[15]

10.23 For logbook loans, we do not think that any of the three reasons we have listed justify retaining High Court registration.

Notice to third parties

10.24 The main reason for registration is to give notice to third parties. This is particularly true for logbook loans, where other lenders and trade purchasers have a strong interest in discovering the existence of the logbook loan. Unfortunately, the High Court register fails in this purpose because third parties cannot search it by asset. Instead, logbook lenders register voluntarily with asset finance registries. These registers allow other lenders and trade purchasers to enter the vehicle's details and discover a wide range of information about it, including whether it is subject to a hire purchase agreement or logbook loan.

False wealth

10.25 General creditors do not usually search the High Court register to find out if a borrower has taken out a logbook loan. This is because creditors in any event rarely expect to receive much on the bankruptcy of ordinary consumers. To put the issue bluntly, most logbook loan borrowers do not present a problem of false wealth, because no creditor would think that they had enough wealth to be worth pursuing on bankruptcy – even if they had not taken out a logbook loan. The small amount of useful information which a search of the High Court register would provide does not justify the costs of making it.

10.26 Lenders may have an interest in exchanging data more widely – on all sources of borrowing, including payday loans – but this is not an issue which can be addressed through the High Court registry.

Proof and priority

10.27 As we have seen, the priority rules for logbook loans can operate in a somewhat arbitrary fashion.[16] We think that the existence of the signed vehicle mortgage document would be sufficient proof in any disputes between the logbook lender and the borrower. As we discuss below, priority between a logbook lender and other lenders or trade purchasers should depend on registration with a designated asset finance registry.

[14] See paras 5.43 to 5.46 in Chapter 5.

[15] At least in so far as other logbook lenders are concerned, registration with an asset finance registry appears to be an effective way of providing notice – see para 5.46 in Chapter 5.

[16] See paras 5.31 to 5.32 in Chapter 5.

Conclusion

10.28 For logbook loans, the benefits of High Court registration do not justify the costs. As we discuss below, we do not propose to require registration of vehicle mortgages at the High Court. Instead, logbook lenders should only be entitled to enforce the logbook loan against a third party if it has been registered with a designated asset finance registry.

REASONS TO REGISTER OTHER GOODS MORTGAGES

10.29 Mortgages over other goods would mainly be granted by unincorporated businesses over a range of goods, such as furniture and fittings. They can be for substantial sums, sometimes of more than £100,000.

10.30 This form of secured lending is relatively rare at present, so very few purchasers or creditors would even think of searching the High Court register. However, the market for this type of secured lending has the potential to expand if the law were modernised. We have considered how each of the three reasons set out above might apply if mortgages over other goods became commonplace.

Notice to third parties

10.31 High Court registration is unlikely to be of much benefit to purchasers who were, for example, buying hotel furniture. However, it may not be entirely useless. For example, auctioneers may check the register before auctioning the contents of a hotel. As it is not possible to list these types of goods in an asset register, a debtor register provides the only form of notice which can be given.

False wealth

10.32 If goods mortgages to secure business lending became common, general creditors might find a goods mortgage register useful. Where a lender is providing substantial sums to a business with apparently valuable assets, it might then have more incentive to check the register.

Proof and priority

10.33 With substantial sums at stake, there may be some value in having an external registration regime for deciding priority issues between competing lenders.

Conclusion

10.34 For these reasons, we propose to retain the High Court register for other goods mortgages, at least for the time being. We think that there might be dangers to purchasers and other creditors if unincorporated businesses were permitted to grant goods mortgages without any form of registration at all.[17]

[17] The efficacy of registration of security granted by incorporated businesses is recognised by the Companies Act 2006.

10.35 Ideally, the High Court register would be converted into an electronic online register, so that it would be easy to register and search. However, the current use of the register for bills of sale granted over goods other than vehicles would not justify the development costs for such a conversion at this stage. Instead, we propose some less radical changes which would make the High Court registration regime more user-friendly. We propose that the legislation should be sufficiently flexible to allow for a full review of the registration regime if the level of lending secured on goods other than vehicles were to expand.

OUR PROPOSALS

10.36 We now look at how our proposed registration regimes would work, considering first vehicle mortgages and then mortgages secured on other goods. These registration regimes would apply irrespective of whether the mortgage is used to secure a regulated credit agreement.

REGISTERING VEHICLE MORTGAGES

10.37 Our proposals distinguish between mortgages secured on vehicles and those secured on other goods. We would define a "vehicle" as any vehicle registered with the Driver and Vehicle Licensing Agency. All these vehicles can be identified by a unique vehicle identification number and a registration number.

10.38 We think that it is wrong to perpetuate the practice of dual registration of logbook loans. We therefore propose to remove the requirement to register a logbook loan with the High Court. We estimate that removing the burden of dual registration would save logbook lenders around £2 million a year.[18]

10.39 Registration of vehicle mortgages, albeit not with the High Court, would have legislative effect. We propose that a logbook lender should be entitled to enforce a vehicle mortgage against a borrower whether or not it is registered. However, logbook lenders should not be entitled to enforce the vehicle mortgage against a third party or trustee in bankruptcy unless it has been registered with a designated asset finance registry. This means that an unregistered vehicle mortgage would not be enforceable against any purchaser, whether private or trade, and any creditor, whether secured or unsecured.[19] Unsecured creditors would only be affected by a vehicle mortgage on the borrower's bankruptcy and, as we noted earlier in this chapter, ordinary consumers are unlikely to pose a "false wealth" problem.[20] However, in the interests of encouraging registration, we think it is better to have a definitive rule rather than different rules for secured and unsecured creditors.

10.40 Designated asset finance registries have different processes for registration and different forms of vehicle provenance check. We think that the neatest solution is for priority to be determined by the date and time that the details of the vehicle mortgage become publicly available.

[18] This is based on 47,723 vehicle mortgages with an average High Court registration cost of £43 each (£2,052.089).

[19] For private purchasers, we propose to introduce special legislative protection in any event. See Chapter 12.

[20] See para 10.25.

10.41 There would be no time limit for registering, but any third party who acquired an interest in the vehicle before the mortgage had been registered would take free of the mortgage.[21] We think this would give logbook lenders a strong incentive to register quickly.

10.42 Registration has had legislative effect for bills of sale since 1854.[22] We do not propose to change this position and rely only on voluntary registration because of the detriment that could cause.[23]

Question 17

Do consultees agree that:

(1) there should be no requirement to register vehicle mortgages at the High Court?

(2) instead, a logbook lender should not be entitled to enforce a vehicle mortgage against a third party or trustee in bankruptcy unless the vehicle mortgage has been registered with a designated asset finance registry?

(3) priority should be determined by the date and time that the details of the vehicle mortgage become publicly available?

DESIGNATING ASSET FINANCE REGISTRIES

10.43 As we explain below, in many jurisdictions the registration of personal security interests is organised by the state. However, in the United Kingdom, the registration of finance interests in vehicles is left to three private firms: HPI, Experian and Cheshire Datasystems Limited (CDL). In practice, logbook lenders register with one or all of these firms. Logbook lenders also conduct vehicle provenance checks with one or more of these firms before granting a logbook loan to a borrower. Second-hand vehicle traders also carry out these checks.

[21] "There is a countervailing principle [to the principle that one cannot sell what one does not have], applying widely but not comprehensively, of protection against prior interests in property for a person who acquires an interest in that property in good faith, for value and without notice" (M Bridge, L Gullifer, G McMeel and S Worthington, *The Law of Personal Property* (1st ed, 2013), p 906, para 36-004).

[22] When it was introduced by the Bills of Sale Act 1854 – see para 3.9 in Chapter 3.

[23] Registration is not required in hire purchase legislation though it is industry practice to register hire purchase interests with an asset finance registry. This can lead to unjust outcomes. In *Moorgate Mercantile Ltd v Twitchings* [1977] AC 890, the dealer had carried out a vehicle provenance check with HPI before purchasing a second-hand vehicle from the hirer. The lender usually registered its hire purchase agreements with HPI but inadvertently failed to register this particular one. The dealer received a "clean" vehicle provenance check and so purchased the vehicle. The House of Lords found in favour of the lender because the dealer was a trade purchaser and so not protected by the Hire Purchase Act 1964. This seems harsh on the dealer. See Chapter 12 for discussion of the Hire Purchase Act 1964.

10.44 One possibility would be to replace the private registries with a state-run scheme. However, this would introduce potential delays and costs. We think the most pragmatic solution would be for a government body to designate suitable registries for vehicle mortgages. In line with industry practice, we expect that the designated asset finance registries will initially be HPI, Experian and CDL, though the panel could be reviewed if other providers enter the market.

10.45 Below we set out our reasons for rejecting a state-run scheme and our suggested criteria for designating asset finance registries.

Reasons for rejecting a central asset finance registry

10.46 Other jurisdictions that have introduced a requirement to register security interests have established a central electronic state-run register, including Canadian provinces, Australia, New Zealand and Jersey. The main benefit is to provide one authoritative source of data for all security over personal property.

10.47 The need to reform the Bills of Sale Acts is urgent, and we fear that the process of establishing a central electronic asset finance register would unduly delay it.

10.48 Nor do we think the substantial expense of an electronic state-run register is justifiable when it is only vehicle mortgages that would be registered. Other jurisdictions register a much broader range of interests. In Australia and New Zealand, for example, the central register records all security interests over personal property. In Jersey, the aim is to establish a central register for all security interests over intangible and tangible goods.

10.49 Private asset finance registries already have a wealth of experience in providing data to lenders and traders, and are likely to have a greater understanding of the market. Designating existing providers would retain this experience and expertise.

Meeting the needs of lenders and traders

10.50 The aim of the designated asset finance registries would be (at least in the first instance) to provide information to other lenders and traders, rather than private purchasers.

10.51 In Chapter 12, we look in detail at the position of private purchasers. As we discuss, private purchasers rarely check asset finance registers. As matters currently stand, vehicle provenance checks are too expensive and insufficiently publicised. Cheaper “text checks” sometimes report “no finance recorded” when in fact the check does not encompass a search of the asset finance registers. This may mislead private purchasers who attempt to guard against existing logbook loans. We conclude that, until such time as vehicle provenance checks become a routine part of buying a second-hand vehicle, logbook lenders should not be entitled to enforce their interests against private purchasers acting in good faith and without notice.

10.52 For the present, therefore, the designated asset finance registries would need to meet the needs of lenders and traders rather than consumers.[24] In Chapter 12 we discuss what the registration scheme would need to look like if logbook lenders were to be allowed to enforce their registered interests against private purchasers.

CRITERIA FOR DESIGNATING ASSET FINANCE REGISTRIES

10.53 We do not think that the designation process need be unduly arduous. The Government would need to check that any asset finance registry seeking designation met the needs of lenders and traders who wished to discover the existence of a vehicle mortgage.

10.54 We think that there should be four main criteria for designation: adequate data-sharing; a suitable cost structure; robust technology (coupled with indemnities); and a complaints system.

10.55 As previously discussed, we expect that the designated asset finance registries will initially be HPI, Experian and CDL. We welcome views on whether there are likely to be new entrants to this market.

Data-sharing

10.56 We saw in Chapter 5 that there is some uncertainty over how far the three main asset finance registries share data among themselves. We think that any asset finance registry seeking designation should show that it shared data with others in the industry. Otherwise, it would be necessary to require logbook lenders to register with all designated asset finance registries, leading to greater costs.

Cost structure

10.57 It is important that the cost structure does not discourage searches. In other jurisdictions, the cost of operating the register is mainly met by those registering an interest. Searching is free or very cheap.

10.58 At present, lenders and traders in the United Kingdom tend to negotiate their own deals, with high-volume users paying less than £3 for each vehicle provenance check. Asset finance registries seeking designation would need to ensure that the price for a vehicle provenance check is reasonable, particularly for smaller lenders and traders.

Robust technology and indemnities

10.59 Any asset finance registry seeking designation would need to show that it has robust technology which could deliver the service. If the technology failed, so that a searcher was not notified of a registered vehicle mortgage, we think the searcher should take free of the interest. However, the asset finance registry should in that event indemnify the logbook lender for its loss.

[24] "The extent to which registration of a security interest is constructive notice is not entirely clear. The best view is that registration is constructive notice to those who would be expected to search the register, and that that class includes at least those taking a security interest in the asset, and those taking an absolute interest for financing purposes" (M Bridge, L Gullifer, G McMeel and S Worthington, *The Law of Personal Property* (1st ed, 2013), p 908, para 36-006).

Complaints system

10.60 Some unscrupulous logbook lenders may attempt to abuse asset finance registries by registering interests which they do not have. We were told that if a borrower enquires about a logbook loan, some logbook lenders may register an interest immediately, to prevent the borrower from going elsewhere.[25] Similarly, some logbook lenders may fail to remove the registration when the logbook loan is repaid.

10.61 A designated asset finance registry would need to have in place a system to resolve complaints from lenders, traders, searchers and borrowers about the validity of the interests which are registered.

QUESTION 18

Do consultees agree that:

(1) a government entity should designate asset finance registries as suitable to register vehicle mortgages?

(2) to provide an asset finance register which meets the needs of lenders and traders, asset finance registries seeking designation should meet four criteria:

(a) adequate data-sharing;

(b) a suitable cost structure;

(c) robust technology (coupled with indemnities); and

(d) a complaints system?

We welcome other comments on the registration of vehicle mortgages.

QUESTION 19

We expect that the designated asset finance registries will initially be HPI, Experian and CDL. We welcome comments on whether there are likely to be new entrants to this market.

MORTGAGES ON OTHER GOODS

10.62 Some of the security bills we found at the High Court registry were over very disparate goods, such as the furniture and fittings of a hotel, fine wine and art.[26] In the absence of any online registers capable of dealing with these varied items, we think that the requirement to register with the High Court should remain for the time being.

[25] Another logbook lender that conducts a vehicle provenance check would discover a prior logbook loan and so refuse to lend to that borrower.

[26] See also paras 8.30 to 8.31 in Chapter 8 in respect of agricultural charges.

10.63 Below we make proposals to simplify and modernise the High Court registry. Although registration would continue to impose some costs (including the £25 registration fee), other costs (such as the cost of an affidavit and postage fees) would be eliminated.

10.64 Under our proposed reforms, registration would be needed for "perfection" rather than "attachment", with the result that an unregistered goods mortgage would continue to be enforceable against the borrower. It is difficult to see how a borrower would suffer any detriment from this. However, a goods mortgage would not be enforceable against a third party or trustee in bankruptcy unless it had been registered.

Question 20

Do consultees agree that mortgages on goods other than vehicles:

(1) should be enforceable against the borrower whether or not they have been registered?

(2) should not be enforceable against a third party or trustee in bankruptcy unless they have been registered with the High Court?

SIMPLIFYING THE HIGH COURT REGISTRY

10.65 Masters of the High Court agreed with staff operating the High Court registry that an electronic public-facing online register may not be a realistic prospect. Given the small volume of security bills currently registered over goods other than vehicles, we do not think that the costs of establishing such a register would be justified.

10.66 We think that the current High Court registry could be made much more user-friendly with some small changes. These would include allowing submission by email, removing the need for an affidavit and abolishing the seven clear day time limit.

10.67 As the market and technology changes, the High Court registry may need more substantial revision. We expect that much of the process for registration could be set out in practice directions or regulations, rather than in primary legislation. This would allow for flexibility to accommodate future developments.

Submission by email

10.68 High Court staff told us that registration by email is a feasible option. We therefore propose that the High Court should establish a dedicated email address and inbox for registration of goods mortgages. Instead of lenders posting documents to the High Court, they would email documents.

10.69 Currently, the High Court bears the cost of sending stamped security bills back to lenders. Under our proposals, this would no longer be necessary. High Court staff suggested that these savings could be used to re-train staff.

Priority by time of submission

10.70 We envisage that on receipt of an email into the dedicated inbox, an automatic reply would be generated that confirms the date and time of registration.[27] Once High Court employees have processed the registration, they would send a second email confirming the unique registration number of the goods mortgage.

10.71 Importantly, we think that priority should depend on when the High Court received the registration. Therefore, it should be the date and time of the automatic reply that confirms when a goods mortgage is registered for priority purposes, not the date that a unique registration number is assigned.[28]

Removing the requirement for original documents and affidavits

10.72 The current legislation requires the original security bill to be sent to the High Court for registration.[29] This is incompatible with our proposal to permit registration by email. We therefore propose to abolish the requirement to send original documents.

10.73 We do not think that the affidavit serves a useful purpose. The witness swears before a solicitor that the security bill was duly executed. This does not protect the borrower who is not present to argue to the contrary.[30] This requirement causes delay and additional expense while offering no benefit for borrower or lender. We therefore propose to abolish the requirement to swear an affidavit.

Documents which would be required

10.74 We propose that the following documents should be emailed to the High Court:

(1) a registration form listing the key details of the goods mortgage such as date, parties, the obligation that is being secured and category of goods secured. Instead of High Court employees trying to establish these details from the goods mortgage document, they would use the registration form to enter these details onto the Excel spreadsheet; and

(2) a copy of the goods mortgage document. This means that third parties who search the High Court register would still be able to have access to the full document. This reduces the scope for third parties to be misled or confused.

We welcome views on whether the registration form should include the location of the goods. It has been suggested that very valuable goods, such as fine art, tend to remain in the same place

[27] An employee of the High Court told us that this would be easy to set up.

[28] We saw in Chapter 5 that priority determined by the date of the High Court stamp is arbitrary. Until the High Court returns the stamped documentation, the lender has no way of knowing when its security was registered (ie, when the High Court stamp was applied).

[29] 1878 Act, s 10.

[30] People may be generally disinclined to swear false affidavits, but we do not think that this is a good enough reason to perpetuate such a burdensome requirement.

Time limit for registration

10.75 As we have seen, lenders find the seven clear day time limit particularly difficult to comply with. There is a regular stream of applications for late registration, at an additional cost of £50. Masters of the High Court told us that late registration applications are routinely granted because it is difficult to see how a third party would thereby be prejudiced.

10.76 We propose that there would be no time limit for registering a goods mortgage. Under our proposals, if a goods mortgage is not registered, the lender would not be able to enforce it against any third party who had, before registration, innocently acquired an interest in the goods. It would therefore be the lender rather than the innocent third party who would suffer detriment if registration was not effected in a timely fashion. Lenders would accordingly have sufficient incentive to register as soon as possible to protect their own commercial interests.

Searching the High Court register

10.77 For goods mortgages registered at the High Court, we propose that third parties would email search requests to the High Court. High Court employees would then conduct the searches and email the results to those third parties. We expect that the costs of operating the register would be met from registration fees, and that the costs of searching would be kept low.

10.78 Clearly, emails are not as efficient as an online search. Nevertheless, we think that the small numbers involved would allow searches to be relatively quick.[31]

Registration at county courts

10.79 We saw in Chapter 5 that the 1882 Act requires the High Court to send security bills to the county court presiding over the area where the borrower or secured goods are located.[32] The High Court has not complied with this requirement for about two years.

10.80 Searching by email will eliminate the need for county court registers. We therefore propose that the High Court would not be required to send goods mortgage documents to county courts.

Question 21

Do consultees agree that for registration of mortgages over goods other than vehicles at the High Court:

(1) registration should be by email?

(2) priority should be determined by time of submission?

(3) original documents should no longer be required?

(4) an affidavit should no longer be required?

[31] See table 2.1 in Chapter 2.

[32] 1882 Act, s 11.

(5) lenders should email a registration form and a copy of the goods mortgage document? We welcome views on whether the registration form should include the location of the goods.

(6) there should not be a statutory time limit?

(7) the High Court should not be obliged to send goods mortgage documents to county courts?

We welcome other comments on the registration of mortgages over goods other than vehicles.

ENSURING THE ACCURACY OF THE REGISTERS

10.81 It is important that designated asset finance registries and the High Court registry should contain accurate records of vehicle mortgages and goods mortgages. Registers will only be useful to third parties if the information contained on them is up-to-date and accurate.

10.82 The Bills of Sale Acts deploy two methods to keep the High Court bills of sale register up-to-date: they require memoranda of satisfaction to be filed and registrations to be renewed every five years. However, neither method works well.

Memoranda of satisfaction

10.83 We saw in Chapter 5 that memoranda of satisfaction are rarely entered on the High Court register due to the costs involved.[33]

10.84 We propose to retain the obligation on lenders to enter a memorandum of satisfaction once the loan has been repaid. This could be renamed a "notice of satisfaction". Again, we expect that the costs of doing this will be kept as low as possible. Where the lender refuses to enter a notice of satisfaction, we propose that there should be a procedure for the borrower to do so.[34] Where the borrower succeeds in entering a notice of satisfaction, the lender should bear the cost. The Financial Conduct Authority could monitor lender compliance with this provision.

Renewing registration

10.85 We think that it should remain a requirement to renew registration after a certain number of years, as a means of removing satisfied vehicle mortgages and goods mortgages from registers where no notice of satisfaction has been filed.

10.86 However, five years may be too short for the longer term business loans which may be entered on the registers. We do not wish to require re-registration so often that it becomes unnecessarily burdensome. We would welcome views on whether ten years is the appropriate period for this purpose.

Question 22

Do consultees agree that to maintain the accuracy of the registers:

[33] See paras 5.34 to 5.35 in Chapter 5.

[34] For asset finance registries, under the complaints procedure we discuss at para 10.61. For the High Court registry, a Master would adjudicate on the issue.

(1) lenders should be required to enter notices of satisfaction in respect of satisfied vehicle mortgages and goods mortgages?

(2) there should be a procedure for the borrower (at the lender's cost if successful) to enter a notice of satisfaction where the lender refuses to do so?

(3) re-registration of vehicle mortgages and goods mortgages should be required every ten years?

CONCLUSION

10.87 Vehicle mortgages and goods mortgages would be forms of non-possessory security interest. Registration of such security interests serves an important purpose because it helps to put third parties on notice, avoids the false wealth problem and establishes priority.

10.88 We do not wish to perpetuate a registration regime that is excessively difficult and expensive for lenders to comply with. We wish on the contrary to create a registration regime that is fit for purpose.

10.89 We therefore propose that it would not be necessary to register vehicle mortgages at the High Court. Instead, the vehicle mortgage would not be enforceable against third parties unless it is registered with a designated asset finance registry. For mortgages secured on goods other than vehicles, we propose to preserve the High Court registry for the time being, but to simplify and modernise it, by (for example) allowing submission by email, resulting in a system that is much more user-friendly.

CHAPTER 11
PROPOSALS FOR REFORM: PROTECTING BORROWERS

11.1 In this chapter, we make proposals to provide greater protection for borrowers. Our aim is to balance two interests. If borrowers default, lenders need recourse to the secured goods for their business to be commercially viable. On the other hand, borrowers need protection to ensure that repossession is not a step that lenders take too quickly.

11.2 As we outline below, borrowers currently have very little protection under the bills of sale legislation. This contrasts with the position of hirers in hire purchase, who have two key protections. First, in certain circumstances, the hire purchase lender must seek a court order before it has the right to repossess the goods. Secondly, the hirer has a right to terminate the hire purchase agreement voluntarily by handing the goods back to the hire purchase lender, subject to certain conditions. We consider each of these protections in turn, and propose that they should apply to vehicle mortgages and other goods mortgages used to secure a credit agreement regulated by the Consumer Credit Act 1974 (CCA 1974). We seek views on whether our proposals do enough to protect borrowers while still allowing lenders to run a commercially viable business.

11.3 The two protections – the court order requirement and voluntary termination – are designed to protect different types of borrower. The court order aims to protect a borrower who can pay but who has encountered temporary financial difficulties and needs additional time and a rescheduled repayment plan. By contrast, a borrower with no realistic prospect of paying off the loan would benefit from the right of voluntary termination by handing over the goods without any further liability. We think the two rights in combination would go a long way to address the criticisms made of the current law.

THE RIGHT OF SEIZURE FOR BILLS OF SALE

11.4 Under the current legislative framework, a lender is entitled to seize the goods following a single default, even when the majority of the loan has been paid off. The only requirements are that the lender must issue a couple of notices and allow for the expiry of grace periods before taking any action.

11.5 As we saw in Chapter 4, lenders are required to issue a notice of sums in arrears followed by a notice of default and wait at least 14 days before seizing the goods.[1] The 1882 Act then requires the lender to wait a further five days before selling the goods.[2] For logbook loans, the Consumer Credit Trade Association code of practice (the CCTA Code) extends the five day grace period to 14 days.[3] During the grace periods, the borrower and lender may try to agree an alternative repayment plan, though the extent of engagement between the borrower and lender during this time is unclear.

11.6 The borrower may also apply to court for relief during the grace periods. The onus is on the borrower to seek court relief, but the reality is that few borrowers are sufficiently well-informed or in a financial position to do this.

HIRE PURCHASE: THE NEED FOR A COURT ORDER

11.7 A borrower (or "hirer") under a hire purchase agreement has some protection in the event of a default. If the hirer has paid one third of the hire purchase price, the hire purchase lender is required to apply for a court order before seizing the goods.

The "one third rule"

11.8 The policy behind the one third threshold is to seek to distinguish between those hirers who cannot pay and those who will not pay. The reasoning is that a hirer who has paid one third of the hire purchase price has demonstrated a willingness to pay and so should be given some protection. This contrasts with hirers who fail to keep up with payments before one third of the hire purchase price has been paid. Here it is thought that the hirer never intended to pay and so should not receive the benefit of court protection.

11.9 "Price" for these purposes means the total sum payable by the hirer if the hire purchase agreement runs its natural course. This includes the principal sum, interest and additional charges, but excludes penalties payable on default.[4] An example of how this applies is set out below.[5] It is based on a hire purchase agreement for five years where the hirer is required to pay a £1,000 deposit. This means that the amount outstanding on hire purchase is £12,695. The monthly payment across the five year period is £266.15 per month.[6]

1 CCA 1974, ss 87 to 88.

2 1882 Act, s 13.

3 CCTA, *Code of practice: bills of sale for consumer lending regulated under the Consumer Credit Act 1974* (2015), para 4.8.8.

4 CCA 1974, s 189(1).

5 Adapted from National Consumer Agency, *Ending a hire purchase agreement* (2012), p 3, available at www.consumerhelp.ie/media/EndHirePurchase1.pdf.

6 £13,695 (cash price) minus £1,000 (deposit) plus £3,273.75 (interest charges) then divided by 60.

Table 11.1 Example of the one third rule in hire purchase

Cash price of the goods (including £1,000 deposit)	£13,695.00
Interest charges	£3,273.75
Documentation fee	£72.00
Completion fee	£63.49
Total hire purchase price	**£17,104.24**
One third of the hire purchase price	**£5,701.41**

This means that a hirer who has kept up with payments will have paid off one third of the hire purchase price at month 18.[7]

The court process

11.10 In applying for a court order, the hire purchase lender is asking the judge to issue a return of goods order permitting it to seize the goods. The judge may grant any appropriate relief, including allowing the hirer additional time to pay.[8]

11.11 One hire purchase lender told us that around 80% of hirers do not turn up on the day of the court hearing. In these cases, the court order may be a rubber stamping exercise. However, for the 20% that do appear, the court process is often valuable. The judge can take an interventionist approach, requiring the hire purchase lender to agree to an alternative payment plan or suspending the return of goods order while the hirer makes payments. Only if the hirer defaults again would the hire purchase lender be permitted to repossess the goods.

11.12 Even if the hire purchase lender obtains a return of goods order, this does not inevitably lead to repossession. The hire purchase lender may use the return of goods order to urge the hirer to return the goods voluntarily.[9] Similarly, a return of goods order may act as an incentive for the hirer to catch up, and keep up, with the payment instalments.

11.13 Where the hire purchase lender does enforce the return of goods order, there are two possible options for it to take. The first is to use its own employees or to instruct debt collectors to seize the goods. Debt collectors are authorised by the Financial Conduct Authority (FCA), but are not authorised by the county court. The second is to use an enforcement agent authorised by the county court.[10] This option is more cumbersome and we suspect is rarely used.[11] For this, the return of goods order must first be "converted" into a warrant of delivery, which gives the county court enforcement agent authority to act.

7 £5,701.41 (one third of the hire purchase price) minus £1,000 (deposit) minus £72 (documentation fee) then divided by £266.15 (monthly payment amount).

8 CCA 1974, s 129.

9 This is to be distinguished from the right of the hirer to voluntarily terminate the hire purchase agreement. See paras 11.48 to 11.52.

10 Enforcement agents were previously known as bailiffs.

11 See para 11.29.

A long-established rule

11.14 The requirement for a court order in hire purchase dates from the 1930s, when the sale of goods on hire purchase became increasingly common. As the Crowther report noted:

> One of the most serious abuses which became apparent at an early stage was the "snatch back". Agreements would be terminated for the slightest default in payment when almost all the instalments had been paid and the owner would then repossess the goods without compensation to the hirer and dispose of them elsewhere, making a substantial and wholly unjustified profit.[12]

11.15 In response, the Hire Purchase Act 1938 prohibited the hire purchase lender from enforcing a right of repossession without first seeking a court order where the hirer had paid at least one third of the hire purchase price. When the 1938 Act was debated in the House of Lords, it was noted that:

> The object of this clause is to protect the hirer who gets into difficulties, and it provides protection if the hirer has paid one-third of the hire-purchase price. The clause goes on to provide that where this amount has been paid, and the matter comes before the Court, the Court may postpone the payments in order to assist the hirer to make good the instalments, and so on… The principle of the Bill… is that, one-third of the price having been paid, the goods cannot be recovered except by action. That is fundamental to the Bill…[13]

11.16 The requirement for a court order has now been in force for over 75 years and has become an established part of the market for hire purchase. It provides an important source of protection to engaged hirers who encounter temporary financial difficulties but who can with sufficient adjustment to their payment plan meet their payment obligations.

EXTENDING COURT ORDERS TO GOODS MORTGAGES

11.17 We think that similar protection should apply to our proposed replacement for security bills. Where a goods mortgage is used to secure a regulated credit agreement and the borrower has paid off one third of the loan amount, we propose that the lender should only be entitled to repossess the goods with a court order.

11.18 The proposal would apply to all goods mortgages securing loans which fall within the definition of a "regulated credit agreement" in the CCA 1974. This would include all consumer loans which are not within the high-net worth exemption and all small business loans of £25,000 or less, whether secured on vehicles or other goods.

[12] Report of the Committee on Consumer Credit, vol 1 (1971) Cmnd 4596, p 44.

[13] Hansard (HL), 5 July 1938, vol 110, cc516-64.

11.19 The proposal is particularly important for logbook loans. Many borrowers are vulnerable. They rely on their vehicles to get to work or carry on their businesses: if they can make repayments with additional time, they should have every opportunity to do so. We therefore concentrate on the effect of the proposal on logbook lending.

The one third rule

11.20 In our view, the one third threshold strikes an appropriate balance between those borrowers who genuinely intend to repay and those who do not. Where borrowers have repaid enough of the logbook loan to demonstrate an intention to repay, we think that they should be protected if a change in financial circumstances makes it difficult for them to keep up with repayments. However, if a borrower defaults before one third of the loan amount has been repaid, the logbook lender should be free to seize the vehicle without a court order.[14]

11.21 The equivalent of total hire purchase price in the context of logbook loans seems to be the total loan amount, assuming that the logbook loan runs its natural course. This would include any arrangement fee and interest, but exclude, for example, any default charges. An example is set out below:

Table 11.2 Example of the one third rule in vehicle mortgages

Principal amount of the logbook loan	£1,500.00
Interest charges	£2806.20
Arrangement fee	£150.00
Total loan amount	**£4,456.20**
One third of the total loan amount	**£1,485.40**

Arguments in favour of court orders

11.22 In hire purchase, we have heard that the court process can open dialogue between the hirer and the hire purchase lender. Whereas default notices and other paperwork may have been ignored, a letter notifying them of court proceedings often acts as a catalyst to encourage hirers to seek advice or open negotiations. Even if borrowers are initially impelled to seek advice through the fear of court proceedings, that fear can turn to hope when borrowers realise that an impartial adjudicator may provide a feasible solution, such as more time to repay.

11.23 Consumer groups have referred to the impartiality of the court process as being an important protection for the borrower. Where a borrower has already had experience of the court process, the role of the judge as an impartial adjudicator provides a degree of comfort.

11.24 The proposal also addresses the concern that logbook lenders are sometimes too quick to initiate repossession, despite the provision of the CCTA Code which requires logbook lenders to view repossession as a last resort.[15] The requirement for a court order will prevent logbook lenders from using repossession as anything other than a measure of last resort.

[14] Subject to the provisions of the CCA 1974.

[15] See para 5.57 in Chapter 5.

11.25 As discussed in Chapter 5, the FCA found that some borrowers had experienced logbook lenders using repossession as a threat to demand lump repayments which were perceived as unfair and unaffordable.[16] A judge would be able to oversee any repayment arrangements to ensure that they are fair and realistic.

11.26 Finally, repossession is a serious act which should be subject to the supervision of the court. Repossession is often perceived as aggressive, whether justified or not, and media accounts of traumatic repossessions do little to discourage this perception. Given the serious nature of repossession, we think that it should be subject to court supervision where the borrower has demonstrated an intention to repay.

The problems associated with court orders

11.27 However, court orders have three problems. The first is cost. The lender must pay a court fee, currently £155.[17] Hire purchase lenders told us that this fee is passed onto the specific hirer in question. There are then further ancillary costs for the hire purchase lender, such as legal fees.

11.28 Secondly, the need for a court order delays repossession. There is no prescribed time limit in which the court must hear the matter. Typically, the court process takes six weeks to two months, but it can be longer in busy county courts.

11.29 Thirdly, we have been told that it is difficult to enforce a return of goods order effectively using county court authorised enforcement agents. Once enforcement agents have a warrant of delivery authorising them to act, they must issue a notice of enforcement. The notice of enforcement must give at least seven days' notice before repossession.[18] In practice, this advance notice means that the unscrupulous hirer is able to ensure that the vehicle is not present when the enforcement agent visits. Due to these difficulties, one hire purchase lender told us that practice is for hire purchase lenders to seize the vehicle on the basis of the return of goods order, using their own employees or debt collectors.

11.30 We address each of these issues below.

Cost

11.31 We intend that overall our proposals should be broadly cost neutral. Our proposal to remove High Court registration for logbook loans will substantially reduce the cost of lending.[19] This will be offset by increased costs in the very small number of cases where logbook lenders repossess vehicles.

[16] See para 5.53 in Chapter 5.

[17] The Government intends to raise this fee to £255. See para 4.50 in Chapter 4.

[18] Civil Procedure Rules, r 83.25. The seven days does not include the day the notice is issued, the day of the visit, Sundays or bank holidays.

[19] See para 10.38 in Chapter 10.

11.32 Among the large logbook lenders we spoke to, repossession rates varied from 2.2% to 5%. Not all of these will be subject to a court order. Hire purchase lenders we spoke to indicated that most repossessions happen before the one third point has been reached, and we expect the same will be true of logbook loans. However, in the small proportion of cases that do require the hire purchase lender to seek a court order, the costs can be substantial: £155 for the court fee, plus additional legal fees. One hire purchase lender put costs at £400; another suggested £800.

11.33 We appreciate that repossession should not become so prohibitively expensive for logbook lenders that they risk being driven out of business. For this reason, we propose that, if a return of goods order is granted, logbook lenders should be permitted to pass on the court fee to the specific borrower in question. If the court hearing results in a suspended return of goods order, then the court fee should be passed on only if the vehicle or other goods are eventually repossessed. This provides borrowers with an incentive to negotiate during the court process, or to comply with a suspended return of goods order, but means that those who fail to comply bear the cost.

11.34 However, we do not think that other costs associated with the court process, such as legal fees and expenses, should be passed onto the borrower.[20] The court process needs to be a form of protection in which borrowers feel able to participate. The prospect of a hefty costs order would cause the court process to be merely a theoretical protection. This measure would also encourage logbook lenders to keep their legal costs low. The prevention of cost shifting already occurs in other areas.[21]

Delay

11.35 Logbook lenders expressed concern that borrowers could exploit the delay inherent in the court process, retaining the vehicle for several months while the arrears build up until the eventual court hearing.

11.36 For this reason, we think that once the logbook lender initiates the court process, the borrower should be liable for any further arrears that accrue. These will be added to the borrower's account. As we explain below, logbook lenders should be entitled to pursue borrowers for any shortfall after the vehicle has been repossessed and sold. The court process is primarily intended to protect borrowers in temporary financial difficulties who will, with the help of more time or a rescheduled repayment plan, be able to continue to repay the logbook loan. It is not intended to delay repossession where this is the only possible outcome for the borrower.[22]

[20] As is currently the case, logbook lenders could pass repossession charges, sale charges and other costs not associated with the court process onto borrowers.

[21] See, for example, the position in Employment Tribunals where the losing party does not automatically have to pay the successful party's costs. Costs orders may only be made in the limited circumstances set out in para 76 of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013 No 1237. Figures from Citizens Advice show costs orders are only made in less than 1% of cases (https://www.citizensadvice.org.uk/work/problems-at-work/employment-tribunals/understanding-employment-tribunals/).

[22] See para 11.46.

Enforcing a court order

11.37 We note the problems associated with enforcing a return of goods order that has been converted into a warrant of delivery. By the time that a return of goods order is issued, the parties will have had many opportunities to negotiate. If proceedings get to this stage, we think that a logbook lender should be able to enforce the order quickly to realise its security.

11.38 We propose that logbook lenders should be able to use their own employees or debt collectors to enforce return of goods orders in the same way as hire purchase lenders. If the court issues a return of goods order, the logbook lender need not convert it into a warrant of delivery. It can use the return of goods order to urge the borrower to return the vehicle voluntarily. If the borrower refuses to do so, the logbook lender can instruct its own employees or debt collectors to repossess the vehicle. Importantly, employees and debt collectors are not subject to the seven day notice requirement imposed on county court authorised enforcement agents.

11.39 We note the criticisms surrounding aggressive and traumatising repossession practices. Debt collecting is a regulated activity and firms must be authorised by the FCA in order to carry out this activity.[23] We hope that, like the authorisation process for payday lenders and logbook lenders, this raises standards in the industry.

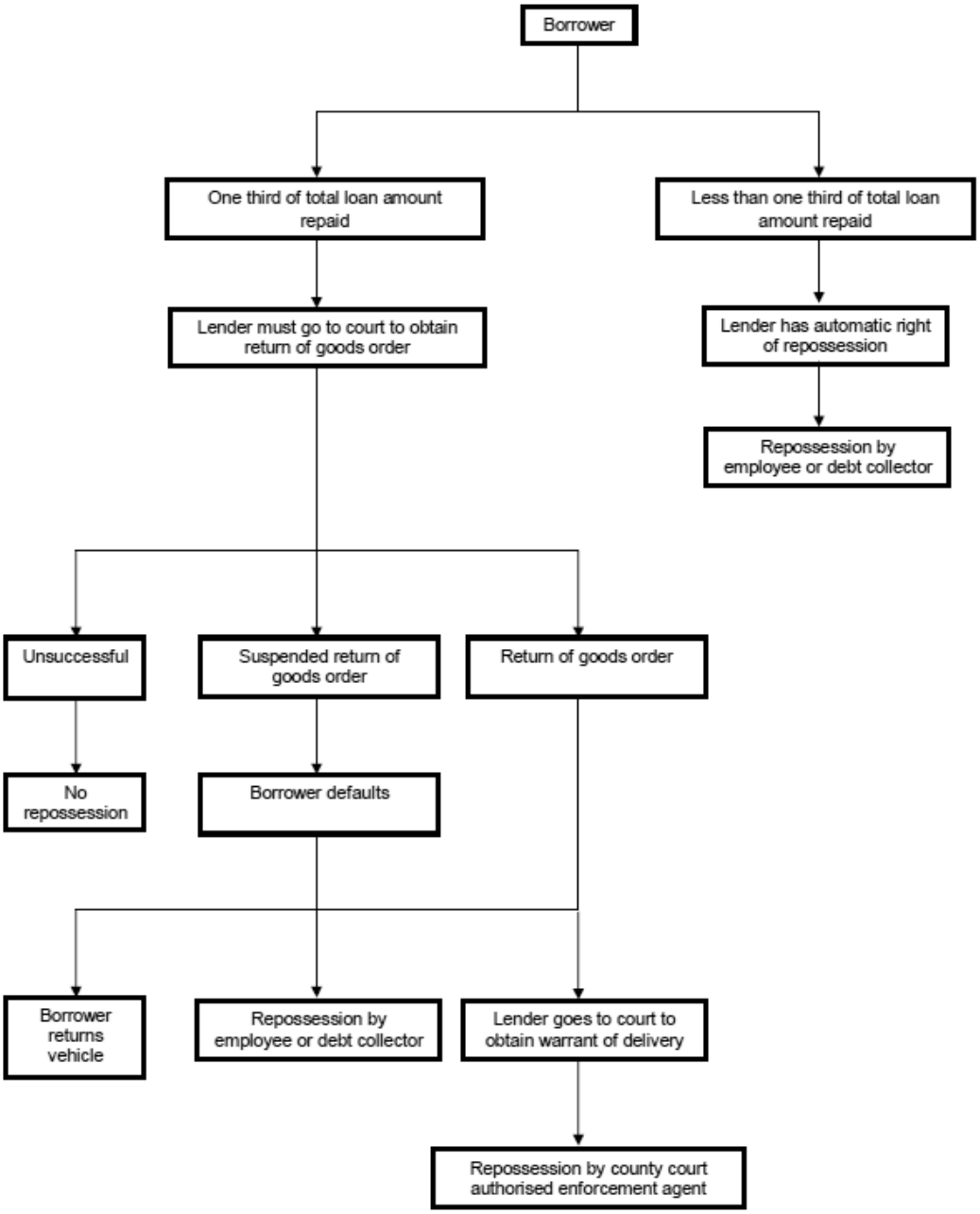
11.40 Further, the FCA's rules in relation to consumer credit (CONC) provide that the provisions of CONC 7 on arrears, default and recovery (including repossessions) apply to firms with respect to regulated credit agreements and debt collecting.[24] This means that the FCA has oversight of logbook lenders' debt collection practices towards borrowers.

11.41 The diagram shows the various routes that a logbook lender would have to repossess a vehicle from a borrower under our proposals.

[23] See para 5.62 in Chapter 5.

[24] CONC 7.1.1R. CONC 7.1.3G(1) also provides that firms must ensure that their employees and agents comply with CONC and must take reasonable steps to ensure that other persons acting on the firm's behalf act in accordance with CONC.

Chart 11.3 Routes for logbook lender repossession under our proposals



SHORTFALL

11.42 Our view is that where the logbook lender has repossessed and sold a vehicle following the issue of a return of goods order, it should be allowed to pursue the borrower for any shortfall outstanding on the total loan amount. We envisage a return of goods order being enforced only where the borrower has been unable to rectify the default and has built up substantial arrears. We do not think that borrowers should be able to exploit the court process to avoid paying any shortfall.

Charging orders

11.43 Logbook lenders will be able to seek charging orders against borrowers' homes to secure shortfalls. However, we do not think that a borrower who has acted in good faith should reach a stage in which they risk losing their home. We therefore propose strict limits on how far logbook lenders should be entitled to obtain and enforce a charging order on the borrower's home.

11.44 We think that the CCTA Code sets out a sensible position in relation to charging orders.[25] The vast majority of logbook lenders have agreed to the CCTA Code, so we see little benefit in proposing any amendments to it. We therefore propose to adopt the same approach as in the CCTA Code and allow the logbook lender to apply for a charging order on a borrower's home to secure any shortfall only where:

(1) prior to repossession, the outstanding loan amount is no less than £500 and, for whatever reason, the logbook lender is unable, following all reasonable attempts, to obtain lawful possession of the vehicle; and

(2) in other cases, the outstanding loan amount is no less than £500 and bad faith by the borrower is shown. "Bad faith" includes intent to deceive or mislead in order to gain some advantage and dishonesty or fraud in the transaction.[26]

11.45 Even where the logbook lender obtains a charging order, we propose to follow the CCTA Code and prevent the logbook lender from seeking an order for the sale of the borrower's home.[27] Like the CCTA Code, this provision would not be subject to any exceptions.[28]

Question 23

Do consultees agree that:

(1) the requirement for a court order before repossession should be extended to all regulated credit agreements secured by a goods mortgage?

(2) the point at which the lender should be required to seek a court order is when one third of the total loan amount has been repaid?

(3) lenders should be permitted to pass on the court fee to the specific borrower in question if a return of goods order is granted, or if a suspended return of goods order eventually results in repossession?

[25] CCTA, *Code of practice: bills of sale for consumer lending regulated under the Consumer Credit Act 1974* (2015), para 4.8.10.

[26] Above, para 4.8.9.

[27] Above, para 4.8.11. See also CONC 7.3.17R: "A firm must not take steps to repossess a customer's home other than as a last resort, having explored all other possible options."

[28] Sale of the borrower's home is unlikely to ever be a proportionate step given the loan amounts involved.

(4) lenders should be permitted to have recourse to borrowers for any shortfall following sale of the repossessed goods?

(5) lenders should be permitted to seek a charging order against borrowers' homes only in the limited circumstances set out in the CCTA Code?

(6) in accordance with the CCTA Code on charging orders, lenders should not be able to apply for an order seeking sale even where they have obtained a charging order against borrowers' homes?

(7) lenders should be permitted to use the return of goods order, and so their own employees or debt collectors, to repossess the goods?

VOLUNTARY TERMINATION

11.46 The requirement for a court order protects borrowers who could pay off the loan with additional time. However, it does little to help those with no realistic prospect of repaying the loan. Instead, it may simply serve to increase the expense the borrower must bear. A borrower without a realistic chance of repaying needs a way of extricating themselves from the loan by handing back the goods without further liability.

11.47 As we explore below, the right of voluntary termination is an established part of hire purchase law, though it has its own complexities and has sometimes proved controversial. We propose that a similar (but not identical) right should also apply to regulated credit agreements secured by a goods mortgage.

VOLUNTARY TERMINATION IN HIRE PURCHASE

11.48 The hirer under a hire purchase agreement has the right to terminate the agreement voluntarily.[29] A hirer who has paid half the hire purchase price, or who pays the shortfall up to this level, may return the vehicle or other goods and walk away from the hire purchase agreement.[30]

11.49 This key provision was first introduced by the Hire Purchase Act 1938. It means that hirers who have entered into a hire purchase agreement that they can no longer afford may extricate themselves without getting further into arrears and incurring the multiple penalties involved.

The "one half rule"

11.50 In hire purchase, hirers only have the right to terminate voluntarily once they have paid, or once they pay the shortfall up to, half the hire purchase price. "Price" for these purposes has the same meaning as we discussed above for court orders.[31] It means the total sum payable by the hirer if the hire purchase agreement runs its natural course.

[29] CCA 1974, s 99.

[30] CCA 1974, s 100.

[31] See para 11.9.

11.51 We provide an example of how this operates. As before, this is based on a hire purchase agreement for five years where the hirer is required to pay a £1,000 deposit. The monthly payment across the five year period is £266.15.[32]

Table 11.4 Example of the one half rule in hire purchase

Cash price of the goods (including £1,000 deposit)	£13,695.00
Interest charges	£3,273.75
Documentation fee	£72.00
Completion fee	£63.49
Total hire purchase price	**£17,104.24**
Half the hire purchase price	**£8,552.12**

This means that, assuming the hirer has kept up with payments, they will have paid off half of the hire purchase price at month 29.[33]

11.52 If the hirer has already paid more than half of the hire purchase price at the point of voluntary termination, they will not receive a refund.[34] If the hirer has not paid half of the hire purchase price, they will be liable for the shortfall up to one half. The hirer will also remain liable for any arrears.[35] If, on the other hand, the hirer has not paid, or does not pay the shortfall up to, one half of the hire purchase price, they will not have a right of voluntary termination.

The policy behind the one half rule

11.53 The 50% threshold allows for the fact that new goods depreciate in value once they have been sold. The aim was to provide a rough and ready rule which would balance the interests of hire purchase lenders and hirers.[36] It provides some compensation to hire purchase lenders who receive back less valuable second-hand goods. It also allows hirers who try (but fail) to complete a hire purchase agreement to extricate themselves from a position of possibly hopeless debt.

[32] £13,695 (cash price) minus £1,000 (deposit) plus £3,273.75 (interest charges) then divided by 60.

[33] £8,552.12 (half of the hire purchase price) minus £1,000 (deposit) minus £72 (documentation fee) then divided by £266.15 (monthly payment amount).

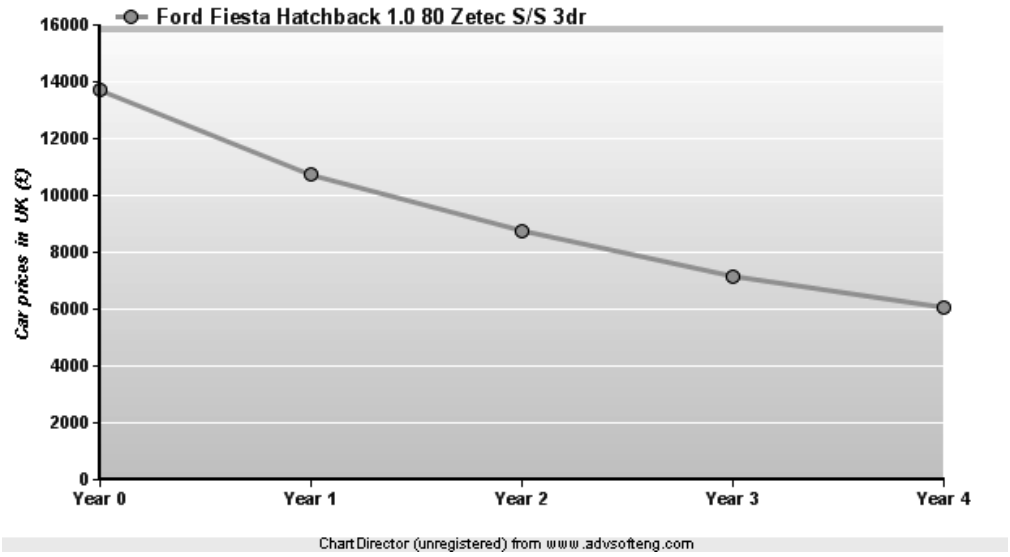
[34] Consumer Credit (Early Settlement) Regulations 2004 SI 2004 No 1483, reg 2(3).

[35] CCA 1974, s 100(1).

[36] When the Hire Purchase Act 1938 was being debated, this example was given: "The particular case which has raised a good deal of feeling is that of bicycles. It is felt that if the Clause remained as it is, bright young things could get a bicycle out for a payment of 2s. a week beginning in March, pay about one-third, covering the summer months, and gaily return the bicycle in the winter, when it is almost unsaleable, and quite legally get out another new bicycle in the following spring... the manufacturers feel that it is a distinct hardship... it was agreed that we should move an Amendment to raise the fraction from one-third to one-half". Hansard (HC), 6 May 1938, vol 335, cc1194-212.

11.54 However, the rule has proved controversial in the motor finance context because new vehicles depreciate so rapidly. The graph below demonstrates the depreciation of a Ford Fiesta hatchback bought new for £13,695.[37] After 29 months, the car would be worth around £8,000, about £500 less than what the hirer would have left to pay.[38]

Chart 11.5 Depreciation of a new Ford Fiesta hatchback between years zero and four



Possible exploitation by sophisticated consumers?

11.55 The hire purchase industry has complained that the right of voluntary termination may be exploited by sophisticated consumers. The Department of Trade and Industry consulted on the right of voluntary termination in 2004 (the DTI Consultation). It noted that:

> most of the losses incurred on [voluntary termination] are a result of sophisticated consumers, being aware of their rights, taking advantage of the provisions to change vehicles on a regular basis whilst avoiding the full cost of the credit agreements they have entered into.[39]

11.56 At the time of the DTI Consultation, the Finance & Leasing Association suggested that the motor finance industry was losing £83 million each year due to voluntary termination.[40] It argued that

[37] http://www.whatcar.com/car-depreciation-calculator/results?makeId=1&modelVersionId=1468&editionId=42290.

[38] Under regulation 2(3) of the Consumer Credit (Early Settlement) Regulations 2004 SI 2004 No 1483, the borrower is not entitled to a rebate on early settlement if they exercise the right of voluntary termination.

[39] DTI, *Consumer credit law: a consultation on voluntary termination of hire purchase and conditional sale agreements under the Consumer Credit Act 1974* (2004), p 8.

[40] Above, p 8.

> the provisions do not in fact provide any real benefit to those who are in financial difficulty, who generally need to keep a car and would be better served by reaching an agreement with the lender to reschedule payments…[41]

11.57 Conversely, consumer groups argued that voluntary termination gave hirers some control over the hire purchase agreement:

> With [hire purchase], consumers do not have control over the goods they are "purchasing". This is unlike a loan where the consumer owns the goods purchased free of any encumbrance. [Voluntary termination] gives consumers some form of "control" at a certain point in the contract.
>
> The opportunity to return the goods after making a 50% contribution to the amount of the agreement may be important to consumers who are struggling financially.[42]

11.58 Ultimately, the Government decided to retain the provisions relating to voluntary termination. It gave two reasons. First, the responses to the DTI Consultation did not present a consensus on the best way forward. Secondly, the Government felt that it would not be possible to remove the provisions on voluntary termination in isolation:

> Given their position at the heart of the law on hire purchase, to do so could call the whole concept of [hire purchase] into question. We do not therefore believe that they should be abolished without a wider consultation on the future of hire purchase and other forms of secured lending for goods and vehicles.[43]

11.59 In summary, voluntary termination is seen as an essential protection in hire purchase, but it can be controversial because sophisticated consumers may exploit the rapid depreciation of new vehicles. However, as discussed below, this does not apply to loans secured on second hand goods (which tend to depreciate much more slowly). For logbook loans, the CCTA Code already allows voluntary termination and we think that this important safeguard should be given a statutory basis.

[41] Above, p 8.

[42] Above, p 8.

[43] DTI, *Summary of responses to a consultation of 2 September 2004 on voluntary termination of hire purchase and conditional sale agreements under the Consumer Credit Act 1974* (2005), pp 1 and 2.

Condition of the goods on voluntary termination

11.60 Difficult questions arise where goods are returned in poor condition. Hire purchase legislation states that if the hirer does not take reasonable care of the goods, the hire purchase lender is entitled to compensation for any loss resulting from such failure to do so.[44] This has led to varied practice. Some hire purchase lenders we spoke to accept the vehicle unless there has been malicious damage or negligence on the part of the hirer. Others expect the vehicle to be in a "reasonable condition". In one instance, there was a detailed four page document setting out the condition the vehicle would need to be in on voluntary termination.

11.61 Where the lender imposes strict conditions on voluntary termination, it does little to protect those in financial difficulties, who cannot afford the necessary repairs.

EXTENDING VOLUNTARY TERMINATION TO GOODS MORTGAGES

11.62 We think that borrowers with a goods mortgage should also have a right of voluntary termination. As before, we propose that this right should apply to all goods mortgages securing regulated credit agreements, but it is particularly important to borrowers with logbook loans. As for hire purchase, borrowers in financial difficulties should have a means of releasing themselves from a logbook loan they can no longer afford. The argument made by consumer groups responding to the DTI Consultation that the right of voluntary termination provides hirers with a measure of control is equally valid for logbook loans.

11.63 We do not think that voluntary termination is a step that borrowers would take lightly. The comments made by the motor finance industry in the DTI Consultation that hirers will generally need to keep the vehicle and would be better served by a rescheduled payment plan have a great deal of weight in the context of logbook loans. Here, where the borrower previously owned the vehicle, it is probably even more important to them to keep possession.

CCTA Code

11.64 The CCTA Code already gives borrowers the ability to terminate voluntarily, until the point at which repossession agents have been instructed. The provisions in the CCTA Code are more favourable to borrowers than the hire purchase provisions in three ways:

(1) voluntary termination is not dependent on half the loan amount being repaid. Instead it is available immediately;

(2) voluntary termination is done in full and final settlement of both the loan amount and any arrears which have accrued; and

(3) the vehicle is accepted in its current condition, unless there has been malicious damage or a significant lack of care.

We explore these differences below.

[44] CCA 1974, s 100(4).

11.65 The CCTA Code has been drafted by the trade association representing the vast majority of logbook lenders and represents a broad consensus on this point. All of the logbook lenders we spoke to permitted borrowers to hand over the vehicle voluntarily. Where borrowers did so, they could walk away from the logbook loan without further liability. Logbook lenders with experience of doing business in the United States saw this as a natural part of the business model, as there a logbook loan is a loan against the vehicle and not a personal loan.

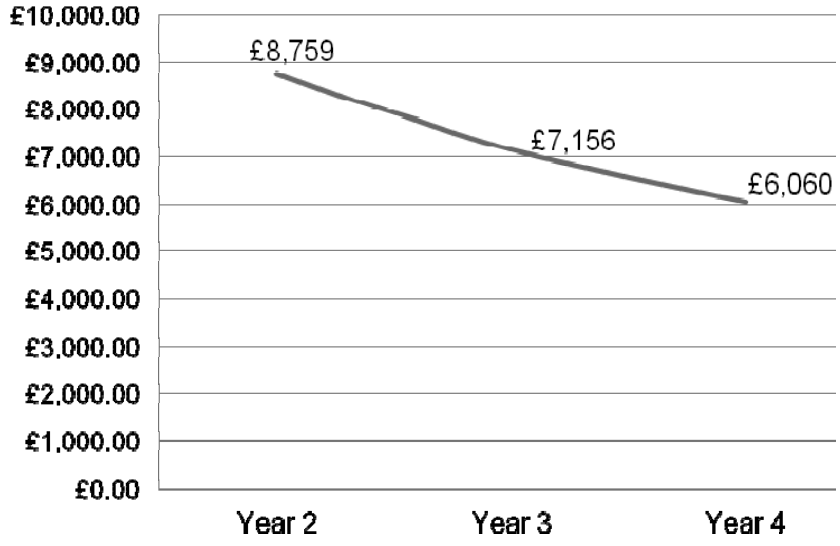
11.66 We have modelled our proposals on the CCTA Code.

No 50% rule

11.67 As we have seen, the rapid depreciation of new vehicles has led to controversy: hire purchase lenders are concerned that sophisticated consumers may exchange a vehicle which is two or three years old for a brand new one.[45]

11.68 This is not a concern for logbook lenders. The logbook lenders we spoke to would generally lend up to 80% of the value of the vehicle. Using chart 11.5, where the vehicle is worth £8,759 after two years, the most the logbook lender would lend at this time is around £7,007. We saw in Chapter 2 that the typical logbook loan has a term of 18 months.[46] After three and a half years, the vehicle will be worth around £6,500. The slower rate of depreciation means that the risk of the borrower voluntarily terminating the logbook loan during its 18 month term is much less of a concern. So long as the rate of depreciation is less than 20% over the term of the logbook loan the logbook lender will recover the loan amount.

Chart 11.6 Depreciation of a used Ford Fiesta hatchback between years two and four



[45] See paras 11.55 to 11.56.

[46] See para 2.7 in Chapter 2.

Full and final settlement

11.69 We note that our proposal for voluntary termination is more generous than in the law of hire purchase. As the position in the CCTA Code represents consensus among the vast majority of logbook lenders, we do not propose to change it in the new legislation for goods mortgages.[47]

Condition of the vehicle on voluntary termination

11.70 The CCTA Code provides that the borrower may voluntarily terminate the logbook loan except where:

(1) it is established that the vehicle has sustained malicious damage of whatever nature; or

(2) it is evident that the customer has contravened the obligation to take reasonable care of the vehicle to the extent that the contravention adversely and significantly affects the resale value.[48]

11.71 In hire purchase, the law on this issue is far from clear, which has resulted in different practice among lenders. The CCTA Code sets out a much clearer regime by preventing voluntary termination only where certain ascertainable conditions have been breached. We think the latter is the better approach.

11.72 Consumer groups expressed concern that, under the CCTA Code, a borrower whose car has been vandalised in the street loses the right of voluntary termination, even if the borrower was not at fault. We can understand logbook lenders' concerns about accepting a vehicle which has been deliberately damaged in any way. One option might be to allow borrowers to retain the right of voluntary termination if they can show that the malicious damage was not caused by them or anyone associated with them. We ask for views on this issue.

Our proposal

11.73 It is clear that the vast majority of reputable logbook lenders already provide for voluntary termination. We think this should be a clear right set out in statute and available to all borrowers who have used goods mortgages to secure regulated credit agreements.

11.74 Our proposal is modelled on the provisions of the CCTA Code. In other words, voluntary termination should be available, from the start, in full and final settlement of all outstanding amounts irrespective of the condition of the goods, provided that it meets the tests in the CCTA Code.

[47] See also para 5.73 in Chapter 5 for the approach in the United States familiar to some logbook lenders we spoke to.

[48] CCTA, *Code of practice: bills of sale for consumer lending regulated under the Consumer Credit Act 1974* (2015), para 4.8.11.

11.75 The right would be available up until the point when the lender has incurred costs to repossess the goods. Where one third of the total loan amount has not been repaid, this may be when the lender has instructed debt collectors to seize the goods. Where one third of the total loan amount has been repaid, this may be when the lender has applied for a court order.[49]

11.76 This would allow a lender who has incurred the additional expense of repossession to pursue the borrower for any shortfall.

QUESTION 24

Do consultees agree that for regulated credit agreements secured by a goods mortgage:

(1) borrowers should have the right of voluntary termination by handing over the vehicle or other goods?

(2) the right for borrowers to terminate voluntarily should be available until the lender has incurred costs to repossess the vehicle or other goods?

QUESTION 25

Do consultees agree that the approach of the CCTA Code should be adopted so that voluntary termination:

(1) is available immediately, without requiring any percentage of the loan amount to have been repaid?

(2) acts as full and final settlement of all outstanding amounts?

(3) is available except where:

(a) it is established that the vehicle or other goods have sustained malicious damage of whatever nature; or

(b) it is evident that the borrower has contravened the obligation to take reasonable care of the vehicle or other goods to the extent that the contravention adversely and significantly affects the resale value?

Where vehicles are maliciously damaged, we welcome views on whether borrowers should retain the right of voluntary termination if they can show that the malicious damage was not caused by them or anyone associated with them.

[49] And so paid the £155 court fee.

SECURED LOANS TO BUY VEHICLES

11.77 As discussed in Chapter 2, security bills are sometimes used to grant security for the purchase of new vehicles on credit. They appear to be used as a device to avoid the hire purchase protections. Under the current law, a lender who uses security bills in this way can structure a secured credit agreement which performs the function of a hire purchase agreement without being required to seek a court order to repossess the vehicle; and without providing a right of voluntary termination.

11.78 We think that it is highly undesirable to allow lenders to evade the long-established hire purchase protections in this way. However, we do not think that the problem would persist following the reforms we have proposed. Under our proposals, certain important differences in the consequences of entering into a hire purchase agreement and a security bill would be removed. In fact, we doubt that any lender would wish to supply new vehicles using the new vehicle mortgage, as the borrower would receive an immediate right of voluntary termination.

11.79 We therefore conclude that the proposals we have outlined resolve the problem. No further intervention is needed.

QUESTION 26

Do consultees agree that if the borrower protection measures we propose are enacted:

(1) vehicle mortgages would not be used to secure the purchase of new vehicles on credit?

(2) no further intervention is necessary?

NON-REGULATED CREDIT AGREEMENTS

11.80 As we have seen, exemptions from consumer credit regulation apply to business loans of more than £25,000, and to loans of more than £60,260 made to high net worth individuals. The rationale is that such borrowers are not in need of legislative protection.

11.81 This rationale, in our view, applies here. We propose that where the loan is not a regulated credit agreement, goods may be repossessed without a court order, and there would be no statutory right of voluntary termination.

QUESTION 27

Do consultees agree that where a goods mortgage secures a loan which is not a regulated credit agreement:

(1) goods may be repossessed without a court order?

(2) there should be no statutory right of voluntary termination?

CONCLUSION

11.82 We have heard many concerns about the problems faced by borrowers who default on their logbook loans. Where borrowers encounter financial difficulties, even a small loan can escalate rapidly, as borrowers face mounting arrears, interest, default charges and the costs of repossession. Borrowers can be left without a vehicle and with a large, unmanageable outstanding loan and charges. Even where borrowers seek advice, there may be no clear way out of these difficulties.

11.83 Our proposals offer a way out. Where borrowers have shown an intention to repay but have encountered temporary financial difficulties, they may negotiate repayment plans – secure in the knowledge that if the logbook lender acts unreasonably, the borrower can explain the situation to a judge who is impartial. If, however, it appears that the borrower cannot repay the logbook loan, there will be a clear statutory right of voluntary termination. The borrower may hand over the vehicle in full and final settlement of the logbook loan and walk away.

11.84 Our proposals are tried and tested. The protection of a court order for hirers who have paid one third of the hire purchase price has been in hire purchase legislation since 1938. The right of voluntary termination is set out in the CCTA Code, and is accepted by the great majority of logbook lenders. These should therefore be well-known and understood by consumer advisers and logbook lenders alike.

CHAPTER 12
PROPOSALS FOR REFORM: PROTECTING PRIVATE PURCHASERS

12.1 In Chapter 5, we highlighted the problems experienced by purchasers who buy vehicles subject to logbook loans.[1] The law does not provide purchasers with any protection, even when they buy vehicles for private purposes in good faith and without notice of the logbook loan. This has led to cases of hardship, generating bad publicity for logbook lenders and threatening to bring the industry into disrepute. In this chapter, we refer to those who buy vehicles for private purposes in good faith and without notice of the logbook loan as "innocent private purchasers".

12.2 The issue of innocent private purchasers is small in volume but serious in effect. One logbook lender told us that out of 1,500 to 2,000 logbook loans issued each month, between 20 to 30 would result in a dispute involving a purchaser. Another said that it had repossessed around 10 vehicles from purchasers in 2014. Despite these low numbers, the detriment suffered by innocent private purchasers is disproportionately great. Having already paid the borrower for the vehicle, they then have three unfair options: repay the logbook loan; pay the logbook lender for the vehicle; or lose the vehicle altogether.

12.3 We start by considering the protection given to private purchasers under hire purchase law. We then propose similar protection in relation to goods mortgages, so that an innocent private purchaser acquires ownership of the goods.

PRIVATE PURCHASER PROTECTION IN HIRE PURCHASE LAW

12.4 Hire purchase law protects private purchasers who buy vehicles in good faith and without notice of the hire purchase agreement. The law is set out in sections 27 to 29 of the Hire Purchase Act 1964 (the 1964 Act). Here we look first at the policy debates which led to these provisions. We then consider the details of the current law.

The 1964 Act: policy debates

12.5 The provisions in the 1964 Act were a response to a specific problem. As it was put to the House of Commons:

> What happens is this: a man is offered a second-hand car; he buys it, and pays for it. Later, it emerges that the car is still the subject of a hire-purchase agreement. Legally, the purchaser has no right to the car, because it belongs to a finance house, and that finance house can take it away from him.

[1] See paras 5.80 to 5.91 in Chapter 5.

> In practice, it allows him to keep it if he pays off whatever is outstanding under the hire-purchase agreement, but that may not help, because he has paid for the car once, and the outstanding balance may be substantially beyond his means, apart from the fact that he is paying twice for the car. His only remedy is to try to find the man who sold him the car and attempt to get his money back. Very often this proves to be a forlorn hope.[2]

12.6 Essentially, the problem was the same as the current difficulties experienced by an innocent private purchaser who buys a vehicle subject to a logbook loan.

The logbook as proof of ownership?

12.7 Initially, the Government considered other possibilities, including using logbooks as proof of ownership. One possible scheme was described to the House of Commons in the following terms:

> The Minister of Transport is empowered to make regulations under which a man who is acquiring a car under a hire-purchase agreement will receive from the finance house a licensing card which he will use when he renews the car's licence. The car's registration book, what we term the log book, will be kept by the finance house. Thus, a man who is acquiring a car on hire-purchase will have a licensing card and not the log book until the purchase has been completed, when it will be sent to him.
>
> Under this scheme anyone who is offered a car by a person who can produce only a licensing card will have fair warning that the car is still subject to a hire-purchase agreement, and that he should not part with his money. If a finance house fails to keep the log book, and as a result it gets into the hands of the hirer, the innocent buyer will have a good title to the car. The finance house will have to go after the fraudulent hirer to get its money back.[3]

12.8 The clear drawback of the licensing card scheme was that the logbook could easily be forged. The innocent private purchaser would again be left with no right to the vehicle and few effective ways to pursue the hirer, who usually would have disappeared. Finance houses at the time also strongly opposed the licensing card scheme:

> This scheme was criticised, particularly by finance house interests, who anticipated inconvenience and expense to themselves, and possible abuse.[4]

[2] Hansard (HC), 18 February 1964, vol 689, cc1035-149.

[3] Hansard (HC), 18 February 1964, vol 689, cc1035-149.

[4] Hansard (HL), 6 July 1964, vol 259, cc819-23.

Protection for private purchasers

12.9 Instead, the industry preferred to provide limited protection to private purchasers and this limited protection was conferred by the 1964 Act. A key factor was that the relevant provisions in the 1964 Act were "acceptable to the Finance Houses' Association, whose members conduct the greater part of hire-purchase business in cars".[5]

12.10 The 1964 Act is careful to distinguish between private purchasers and trade or finance purchasers:

> The scheme is for the protection of the public, and, quite reasonably, the finance houses did not think that motor dealers or finance houses should be so protected, since they can and should be on their guard against buying cars which are on hire-purchase.[6]

Asset finance registers

12.11 In response to the 1964 Act, the industry set up asset finance registers to protect vehicle traders and other lenders. They agreed to register their outstanding finance interests over vehicles. Prior to dealing with a second-hand vehicle, vehicle traders and other lenders could conduct a vehicle provenance check to find out whether the vehicle was subject to hire purchase.

Hire purchase: the current law

12.12 At common law, sellers "cannot give what they do not own".[7] In a hire purchase agreement, the hirer does not own the goods until they have exercised the option to purchase. Thus the common law position is that until that time hirers cannot sell the goods – and if they purport to do so, the purchaser does not acquire ownership of them. The goods continue to be owned by the hire purchase lender. The 1964 Act creates an exception to this rule to allow a purchaser to defeat the lender's ownership in certain defined circumstances.

12.13 The hire purchase protection applies only to a disposition of a vehicle to a private purchaser. A private purchaser who acts in good faith and without notice of the hire purchase agreement acquires ownership of the vehicle, as if the hirer had owned the vehicle before the disposition.

12.14 There are five key concepts: "disposition", "vehicle", "private purchaser", "good faith" and "notice". We consider each below.

A "disposition"

12.15 "Disposition" is defined as:

(1) a sale;

(2) a contract of sale; or

[5] Hansard (HL), 6 July 1964, vol 259, cc819-23.

[6] Hansard (HL), 6 July 1964, vol 259, cc819-23.

[7] This principle is still commonly expressed in Latin as *nemo dat quod non habet*.

(3) a hiring under a hire purchase agreement.[8]

12.16 If the transaction between the hirer and the private purchaser does not fall within one of these categories, there is no protection. Thus the protection would not apply to a gift or to an exchange. The disposition may either be directly from the hirer to the private purchaser,[9] or through a trader.[10]

12.17 A monetary element must be involved for there to be a "sale". In *VFS Financial Services Limited v J F Plant Tyres Limited*,[11] the purchaser tried to argue that the transfer of the vehicle to it in settlement of debts owed to it by the hirer was a sale. The judge disagreed, saying that "the concept of sale of a chattel has at common law and in statute long been associated with a money transaction."[12]

12.18 We think that "disposition" should not capture gifts or partial gifts. However, we welcome views on whether "disposition" should be broader than just sales.

Vehicle

12.19 The protection only applies to vehicles subject to a hire purchase agreement and not to other goods.

Private purchaser

12.20 A "private purchaser" is defined negatively, as someone who is not "a trade or finance purchaser". A "trade purchaser" is someone who carries on a business which consists, wholly or partly

> of purchasing motor vehicles for the purpose of offering or exposing them for sale.[13]

Similarly, a "finance purchaser" is someone who provides hire purchase finance.[14]

12.21 This means that a "private purchaser" is defined widely. It is not confined to consumers but includes any business which buys a vehicle for its own use. The issue is not whether the purchaser is a business but whether the purchase is for the purposes of resale. As Lord Justice Moore-Bick put it:

8 1964 Act, s 29(1).

9 1964 Act, s 27(2).

10 Where there is a sale by the hirer to a trade or finance purchaser that then sells the vehicle again to a private purchaser, the first private purchaser is protected (1964 Act, s 27(3)).

11 [2013] EWHC 346; [2013] 1 WLR 2987.

12 Above, at para 18.

13 1964 Act, s 29(2)(a).

14 1964 Act, s 29(2)(b).

> I do not think that an established motor trader who buys a car for his personal use is deprived of the protection of the Act just because he is a motor trader… Equally, however, I do not think that a person is necessarily to be regarded as a private purchaser simply because he has not previously bought motor vehicles with a view to selling them in the way of business.[15]

Good faith

12.22 In hire purchase law:

> [t]he burden of proving good faith and absence of notice appears to rest upon the purchaser.[16]

12.23 We understand that, in practice, hire purchase lenders are likely to go to court to seek repossession of the vehicle from a private purchaser who it alleges has acted in bad faith.[17] This is because there could be serious consequences for a hire purchase lender who wrongfully repossesses the vehicle from a private purchaser who is protected by the 1964 Act, including potential allegations of theft, conversion, damages and costs.

12.24 It seems that while in law the private purchaser must show good faith, in practice the hire purchase lender must show bad faith.

Notice

12.25 A private purchaser is said to act without notice if, at the time of the disposition, "he has no actual notice that the vehicle is or was the subject of any such agreement".[18] In other words, it is not enough for the lender to have entered the hire purchase interest on a register.[19] The private purchaser must have actually known about the interest.

[15] *GE Capital Bank Limited v Stephen Rushton and another* [2005] EWCA Civ 1556; [2006] 1 WLR 899, at para 39. In that case, the claimant bank had entered into a hire purchase agreement with T&T Motors Limited in respect of several vehicles. T&T later sold several vehicles to Mr Rushton, the defendant. Mr Rushton had no history of trading with vehicles but admitted that he had no intention of keeping these vehicles and that he intended to sell them at a profit. The bank claimed that it owned the vehicles whereas Mr Rushton claimed that he was a private purchaser acting in good faith and without notice. The Court of Appeal overturned the decision at first instance and held in favour of the bank. It held that the crucial consideration is the purpose of the transaction and whether the specific transaction in question was by a person acting in a private capacity or otherwise.

[16] *Benjamin's Sale of Goods* (9th ed, 2014), p 412, para 7-099. See also *Mercantile Credit Co Ltd v Waugh* (1978) 32(2) Hire Trading 16.

[17] On the basis of wrongful possession under the Torts (Interference with Goods) Act 1977.

[18] 1964 Act, s 29(3) and confirmed in *Barker v Bell* [1971] 1 WLR 983.

[19] Referred to as "constructive notice".

PRIVATE PURCHASER PROTECTION FOR GOODS MORTGAGES

12.26 We think that a similar protection should also apply to private purchasers who acquire goods which are subject to a goods mortgage. As in hire purchase law, protection should be granted to a private purchaser, defined as someone who is not "a trade or finance purchaser". We propose that a private purchaser who acts in good faith, without actual notice of the goods mortgage, should acquire ownership of the goods.

12.27 The proposal is particularly important for logbook loans, where there has been considerable criticism of the way innocent private purchasers are treated.[20] The acute detriment suffered by innocent private purchasers of vehicles subject to logbook loans is the same as that suffered by innocent private purchasers of vehicles subject to hire purchase agreements before the 1964 Act. Given the parallels between hire purchase and logbook loans in this area, we think that similar protections should apply.

Academic support

12.28 Providing greater protection for private purchasers has received academic support. As Duncan Sheehan put it "when a third party purchases an asset subject to security, he should not find himself bound by a security about which he knew nothing".[21]

12.29 It has also been argued that non-possessory security interests (such as hire purchase and logbook loans) require purchasers to be given particular protection.[22] Where the lender does not possess the secured goods, such as in hire purchase and logbook loans, a purchaser could easily think that they are still owned by the hirer or borrower in possession. Possessory forms of security do not present the same risks. In a pledge, the lender possesses the secured goods until the loan is repaid. A purchaser should be put on notice that something is not quite right where the purported seller of goods does not have them in their possession. For vehicles, possessory security interests are rare: "Ordinary vehicles are unlikely to be pledged".[23]

Vehicles or all goods?

12.30 The hire purchase protection is confined to vehicles. This is where the problems occur in practice and where the need for protection is most acute. We have considered whether the protection under the new goods mortgage legislation should also be confined to vehicles.

[20] See para 5.81 in Chapter 5.

[21] D Sheehan, "The abolition of bills of sale in consumer lending" (2010) *Law Quarterly Review* 356 at 360.

[22] See para 10.8 in Chapter 10.

[23] PS Atiyah, J Adams and H MacQueen, *The Sale of Goods* (11th ed, 2005), p 412.

12.31 At present, so few security bills are granted over other goods that the position of private purchasers has not become an issue. However, if the market for mortgages over other goods were to develop, private purchasers would be in equal need of protection. In fact, they may be in more need, as (in the absence of an asset register) they would have little practical ability to discover that the goods were subject to a mortgage. We therefore think that the protection should apply to all goods mortgages.[24]

Private purchasers who do not act in good faith or who have actual notice

12.32 We think that lenders who seek repossession from private purchasers should be subject to court supervision.

12.33 Where the logbook lender seeks to recover a vehicle from a private purchaser, it would have to go to court to show that the private purchaser did not act in good faith or without notice. If the logbook lender is successful, it will be able to repossess the vehicle using its own employees or debt collectors.[25]

THE ARGUMENTS PUT BY LOGBOOK LENDERS

12.34 Logbook lenders put two arguments against protecting those who purchase vehicles subject to logbook loans:

(1) private purchasers should carry out vehicle provenance checks to discover that the logbook loan exists; and

(2) providing protection will encourage collusion. Dishonest borrowers will sell vehicles, subject to logbook loans, to family and friends to prevent the vehicle from being repossessed.

12.35 Below we consider each argument in turn.

Should private purchasers carry out vehicle provenance checks?

12.36 We do not think that, at present, private purchasers can reasonably be expected to conduct a vehicle provenance check before buying a second-hand vehicle. This is unrealistic for four reasons.[26]

Consumers have little awareness of vehicle provenance checks

12.37 Among consumers, there remains little awareness of the need to conduct a vehicle provenance check before purchasing a second-hand vehicle. HPI told us that out of around seven million used vehicle transactions each year, there are only half a million vehicle provenance checks by consumers.

[24] This is wider than the law of hire purchase but it is not within the remit of this project to propose the amendment of hire purchase legislation.

[25] If the logbook lender is successful, this means that it is the true owner of the vehicle and so it is able to repossess the vehicle.

[26] It is also worth noting that asset finance registers and the vehicle provenance checks which draw on them were never intended for consumer use – see para 12.11.

Consumers are confused by cheaper checks

12.38 Even where consumers are aware of the need to conduct a vehicle provenance check, the array of options online makes it an extremely confusing process. Vehicle provenance checks offered by HPI, Experian and Cheshire Datasystems Limited (CDL) are not necessarily the most obvious options on an internet search. An internet search also reveals a large number of "text checks", where the results are communicated by text message, often for as little as £3. Although the price of these "text checks" makes them attractive, they do not reveal logbook loans.

The cost of vehicle provenance checks is too high

12.39 The temptation to opt for a "text check" is all the greater given the relative costs involved. Private individuals pay more than traders for vehicle provenance checks. Whereas traders may pay less than £3, a private vehicle provenance check costs £12.99 from CDL and £19.99 from HPI and Experian. If a second-hand vehicle costs less than £1,000, the additional expense of a vehicle provenance check can seem disproportionate.

Consumers confuse bills of sale with hire purchase

12.40 The well-known protection in hire purchase law encourages an incorrect perception among consumers that they do not need to conduct a vehicle provenance check. Few people are aware that the law of bills of sale is different.

Collusion?

12.41 We are sympathetic to concerns that if our proposals are introduced, there is a possibility that borrowers and private purchasers might collude by selling the vehicle to a friend or member of the family.

12.42 Clearly, if the logbook lender can show that the private purchaser did not act in good faith and/or without notice the protection does not apply, and the logbook lender will be entitled to repossess the vehicle from them. In some cases, the circumstances will be so suspicious that the logbook lender will be able to show this; in other cases it will be more difficult.

12.43 Consumer groups told us that consumers rarely understand the implications of a vehicle being subject to outstanding finance. They did not think that collusion would be a significant problem. If it is a problem, we think that the solution lies in the industry's hands, as we discuss below.

Readily available vehicle provenance checks?

12.44 We think that the protection our proposal provides would no longer be needed for private purchasers of vehicles if the following circumstances applied:

(1) consumers routinely conducted a vehicle provenance check before purchasing a second-hand vehicle;

(2) there was widespread knowledge of the need to check;

(3) vehicle provenance checks for consumers were free or almost free; and

(4) confusing "text checks" were no longer available.

12.45 We think that logbook lenders and asset finance registries would need to act together to bring about these changes. First, the industry would need to address its pricing structure, so that the costs of operating designated asset finance registries were primarily borne by lenders, with search fees at a nominal level (for example, less than £3). Secondly, the industry would need to mount an advertising campaign to inform the public of the need to conduct proper vehicle provenance checks.

12.46 We think that if these conditions were met, the protection would not be needed. Instead, entry on a designated asset finance register could be considered to be constructive notice to all purchasers, not just those in the trade.

12.47 We propose to include a regulation-making power in the new legislation so that if this situation were achieved, the legislation could be amended, including the repeal of the protection we propose for private purchasers of vehicles.[27] We ask for views.

Question 28

Do consultees agree that:

(1) a private purchaser who acts in good faith and without actual notice of the goods mortgage should acquire ownership of the goods?

(2) the protection should apply to all goods subject to a goods mortgage, not just vehicles?

(3) if the private purchaser did not act in good faith and/or had actual notice of the goods mortgage, lenders should only be entitled to repossess from them with a court order?

(4) the proposed new legislation should contain a regulation-making power to amend its provisions, including the repeal of the protection granted to private purchasers of vehicles, if vehicle provenance checks were to become free (or almost free) and a routine part of buying a second-hand vehicle?

Question 29

We welcome views on whether the protection should be confined to "disposition" as defined by the Hire Purchase Act 1964, or whether it should extend more widely, to include (for example) exchange and barter?[28]

[27] This would result in a different position from the law of hire purchase but it is not within the remit of this project to propose the amendment of hire purchase legislation.

[28] For example, if a collector of fine art who has granted a goods mortgage over that collection barters ownership of one piece of fine art for the restoration of another piece of fine art, should the restorer receive the protection we propose?

THE ROLE OF THE FINANCIAL CONDUCT AUTHORITY

12.48 The Financial Conduct Authority (FCA) has told us that it considers that its scope to act in respect of the treatment of private purchasers is limited.

12.49 In a consumer credit context, the FCA has a remit to protect "consumers". This term is defined in legislation and broadly refers to a person that uses, has used or may use regulated financial services.[29] For debt collecting, the definition extends to cover a person that the lender treats as a borrower.[30] The FCA's view is that if the logbook lender pursues a private purchaser, mistakenly believing that they have acquired the rights and obligations of the borrower, the logbook lender would be treating the private purchaser as the borrower. In that case, the FCA would have jurisdiction to protect them. However, where the logbook lender deliberately pursues the private purchaser, this rule does not appear to apply.

12.50 This leaves a gap in consumer protection. It means that there is no obligation enforceable by the FCA on logbook lenders to treat private purchasers fairly or to provide any information or explanations to them.

12.51 We think that our proposals to protect private purchasers will do much to curb bad logbook lender practices. Nevertheless, it would also be beneficial for the FCA to have the jurisdiction to supervise logbook lender behaviour towards private purchasers.[31] This would be another incentive for logbook lenders to refrain from poor conduct.

12.52 Furthermore, the FCA's supervisory jurisdiction would become necessary if the protection of private purchasers in legislation were to be replaced by a system of free and routine vehicle provenance checks. Even if logbook lenders were to be entitled to repossess vehicles from those who failed to carry out a vehicle provenance check, it would still be necessary to ensure that logbook lenders went through fair repossession procedures so as to protect those who might be particularly vulnerable.

Question 30

Do consultees agree that the FCA should be given jurisdiction to curb abuses in the way that logbook lenders treat private purchasers?

THE ROLE OF THE FINANCIAL OMBUDSMAN SERVICE

12.53 We saw in Chapter 5 that the Financial Ombudsman Service (FOS) has limited power to hear complaints about how logbook lenders treat private purchasers, irrespective of whether the purchasers are consumers or micro-businesses.[32]

[29] Financial Services and Markets Act 2000 (as amended by Financial Services Act 2012), s 1G.

[30] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 SI 2001 No 544, art 39M(1)(c).

[31] For private purchasers that buy goods subject to a hire purchase agreement, the FCA does not have this jurisdiction. It is not within the remit of this project to propose such a measure for hire purchase.

[32] See para 5.89 in Chapter 5.

12.54 We think that private purchasers who have been treated badly by a logbook lender should have the right to complain to FOS, provided that they qualify as a consumer or micro-business. Our proposals for reform should reduce the need for complaint. Nevertheless, there may still be complaints – for example, where a logbook lender threatens to repossess a vehicle from a private purchaser who has acted in good faith and without notice.

12.55 The FOS jurisdiction would become more important if legislative protection of private purchasers were to be replaced by a system of free and routine vehicle provenance checks.

Question 31

Do consultees agree that FOS should have jurisdiction to hear complaints against logbook lenders made by private purchasers of vehicles subject to logbook loans?

CONCLUSION

12.56 In this chapter, we have proposed that private purchasers who buy a vehicle subject to a logbook loan should acquire ownership if they acted in good faith and without actual notice. We think that this is an appropriate degree of protection given the current landscape of consumer awareness and consumer understanding. We are also persuaded that extending the hire purchase protection to logbook loans is the most appropriate measure, given the parallels between hire purchase and logbook loans in this area.

12.57 By contrast, trade and finance purchasers are able to protect themselves by carrying out vehicle provenance checks. Ideally, private purchasers would also be able to protect themselves. Current circumstances make this unrealistic in the short term, but we consider that this should be the long term goal. For this reason, we hope that the industry makes efforts to move towards a position in which legislative protection of private purchasers is no longer required.

CHAPTER 13
GENERAL ASSIGNMENTS OF BOOK DEBTS

13.1 In Chapter 6, we explained the impact of the Bills of Sale Acts on invoice finance for unincorporated businesses. For such businesses, a general assignment of book debts must be registered "as if it were" an absolute bill.[1] Otherwise, it will be invalid in the event of a bankruptcy.[2] We saw that compliance with the registration regime in the 1878 Act is a costly and burdensome process.[3]

13.2 There are two possible approaches to this problem. The first would be to abolish any requirement to register general assignments of book debts by unincorporated businesses. The second would be to continue to require registration, but to change the process to make it as cheap and as simple as possible.

13.3 We start by considering whether there is a case for continuing to require registration. Our provisional view is that there is.

13.4 We move on to discuss how the registration regime for general assignments of book debts by unincorporated businesses would be improved by our proposals to reform the High Court register for goods mortgages.[4]

THE CASE FOR REGISTRATION

13.5 When the Asset Based Finance Association (ABFA) surveyed its members that provide invoice financing, 100% of respondents supported the abolition of registration at the High Court. This demonstrates the extent of the burden that registration imposes on invoice finance for unincorporated businesses.

13.6 Nevertheless, we think that, in principle, registration of general assignments of book debts serves a useful purpose in putting third parties on notice. It is noteworthy that the invoice financing industry registers general assignments by companies at Companies House on an entirely voluntary basis.[5] This demonstrates the value the industry perceives in registration, even though there is no statutory requirement for companies' general assignments of book debts to be registered at all.[6]

1 Insolvency Act 1986, s 344.

2 There are complex rules relating to priority between competing invoice financiers but we do not consider those here. Section 344 of the Insolvency Act 1986 deals only with validity of the general assignment against a trustee in bankruptcy.

3 See paras 6.40 to 6.52 in Chapter 6.

4 In Chapter 14, we propose the abolition of any requirement to register absolute bills at the High Court. General assignments of book debts would be registered at the High Court as if they were goods mortgages under our proposals.

5 A general assignment of book debts by a company is registered as an "all assets debenture" in order to put third parties on notice and sweep up any debts that have failed to vest in the invoice financier by virtue of the general assignment.

6 As legislation does not provide for a means of registering just a general assignment of book debts at Companies House, invoice financiers have adopted the practice of registering all assets debentures.

13.7 Further, continuing to require registration of general assignments of book debts by unincorporated businesses is consistent with ABFA's long-term aim in this area. We understand that ABFA's goal is to achieve a unified register for general assignments of book debts by both unincorporated businesses and incorporated businesses.[7]

QUESTION 32

Do consultees agree that registration of general assignments of book debts serves, in principle, a valuable purpose?

REGISTRATION UNDER THE CURRENT LAW

13.8 In Chapter 6, we described the expense and difficulties associated with the current registration regime.

13.9 The process generally involves three separate firms of solicitors. Typically, the invoice financier's solicitor prepares the paperwork, which the business signs in the presence of its own solicitor. The business's solicitor must explain the effect of the paperwork to the business; and then swear an affidavit before a third solicitor. The paperwork and affidavit are returned to the invoice financier, which must then present them to the High Court. This is often done in person. The funds are only released once the paperwork has been stamped by the High Court.

13.10 This process is expensive: typically anything from £500 to £1,700. It can also lead to a delay in releasing funds. It must then be repeated every five years.

13.11 We think that there is an urgent need to simplify this process. Below we summarise the proposals we have made for the registration of goods mortgages, and then consider how these can be adapted for the registration of general assignments of book debts.

OUR PROPOSALS FOR THE REGISTRATION OF GOODS MORTGAGES

13.12 In Chapter 9, we set out new document requirements for both vehicle mortgages and mortgages on other goods. We proposed that the goods mortgage should continue to be set out in a written document which is signed by the borrower in the presence of a witness. The written document should be a short, simple document, which is separate from the credit agreement.

13.13 We discussed registration in Chapter 10. For vehicle mortgages, this document would not be registered. Instead, notice of the vehicle mortgage would be registered with a designated asset finance registry.

[7] Establishing such a unified register is outside the terms of reference of this project. See the work of the Secured Transactions Law Reform Project at http://securedtransactionslawreformproject.org/.

13.14 For mortgages on other goods, we proposed a temporary solution. In an ideal world, there would a public-facing register, which could be searched online. In line with our report on company security interests, this register would give notice of the goods mortgage, rather than be a repository of the documents themselves.[8] However, establishing such a register is not a realistic prospect, given the small volume of security bills over other goods currently registered.

13.15 Instead we concluded that the current High Court register could be made much more user-friendly, with some small changes. These include allowing submission by email, removing the need for an affidavit and abolishing the seven clear day time limit.

ADAPTING THESE PROPOSALS FOR THE REGISTRATION OF GENERAL ASSIGNMENTS OF BOOK DEBTS

13.16 We consider that similar adjustments should be made for the registration of general assignments of book debts. Again, ideally, we would establish a system of notice filing through a new online register that the public can search directly. However, this would take time and cost money. Considerable benefits could be achieved very quickly through much less radical reform.

13.17 We propose that the parties should sign a short, simple assignment document, similar to our proposed goods mortgage document. Although the business should sign in the presence of a witness, this witness need not be a solicitor, nor would the witness need to swear an affidavit.

13.18 The invoice financier would then email the assignment document to the High Court, together with a registration form listing key details. The assignment would be validly registered from the date and time of the automatic reply to the email. Registration would be renewed every 10 years.

13.19 Below we look in more detail at the proposed content of the assignment document and the registration form. We also list the ways in which our proposals would simplify the current registration regime.

13.20 We acknowledge that the registration regime we have set out is a stop-gap measure. Ideally, in the long-term, the High Court registry would be replaced with a unified online register for general assignments of book debts. ABFA has told us that:

> Ultimately it would be helpful for both corporate and unincorporated businesses to have similar systems in respect of security over personal property such as book debts.[9]

13.21 We look forward to seeing the recommendations of the Secured Transactions Law Reform Project about how to implement this wider reform.

[8] Company Security Interests (2005) Law Com No 296, p 4, para 1.9: "The principle behind notice-filing is that the creditor should file notice of a charge rather than register the charge itself. This ensures that the process of registration is simple".

[9] ABFA, email of 19 June 2015.

THE ASSIGNMENT DOCUMENT

13.22 As with goods mortgages, we think that the document effecting a general assignment should be short and simple, and separate from the full factoring or invoice discounting agreement.

13.23 ABFA argued strongly that its members should not be obliged to file the full factoring or invoice discounting agreement:

> This is important as otherwise a great deal of commercially sensitive information in the factoring and invoice discounting documents becomes instantly available to competitors searching a public registry. Bearing in mind that it is only the effect of the few words of general assignment that raises the need for public notice, it seems otiose to clog up public records with documents that can run to 40 pages or more for no useful purpose.[10]

13.24 ABFA suggested that it would be sufficient to provide only the names of the invoice financier and business, together with a description of the class of book debts assigned and the duration of the invoice financing agreement.

13.25 We propose that a general assignment of book debts should be evidenced in an assignment document which contains the following information:

(1) the names and addresses of the parties;

(2) a statement that the book debts are assigned;

(3) the date of the general assignment;

(4) sufficient information to identify the class of book debts in question;

(5) if the general assignment is time-limited, the duration;

(6) the borrower's signature in the presence of a witness; and

(7) the name, address and occupation of the witness.

13.26 We envisage that this assignment document would normally be separate from the full factoring or invoice discounting agreement, though the two documents could be combined if the parties so wished. Invoice financiers would only be required to register the assignment document, not the factoring or invoice discounting agreement.

QUESTION 33

Do consultees agree that a general assignment of book debts should be evidenced in a document which contains:

(1) the names and addresses of the parties?

(2) a statement that the book debts are assigned?

[10] ABFA, email of 19 June 2015.

(3) the date of the general assignment?

(4) sufficient information to identify the class of book debts in question?

(5) if the general assignment is time-limited, the duration?

(6) the borrower's signature in the presence of a witness?

(7) the name, address and occupation of the witness?

THE REGISTRATION FORM

13.27 We envisage that the registration form would be even simpler. It would record the names and addresses of the parties, the fact that the document submitted for registration relates to a general assignment of book debts, the date of the general assignment and (if applicable) the duration.

13.28 High Court staff would use the registration form to enter these details onto their Excel spreadsheet. The Excel spreadsheet would be for internal purposes to allow staff to identify the relevant general assignment when search requests are received. The party undertaking the search would be sent a copy of the registered assignment document.

A COMPARISON

13.29 The following table compares our proposed regime of registration with the current regime.

Table 13.1 Comparison of current and proposed registration regimes for general assignments of book debts

Current registration regime	Proposed registration regime
Borrower signs the full factoring or invoice discounting agreement in the presence of a solicitor	Borrower signs the assignment document in the presence of any witness
Borrower's solicitor swears an affidavit	No affidavit
Invoice financier posts or takes documents to High Court, with fee	Invoice financier emails documents to High Court and the fee is paid online
Seven clear day time limit for registration	No time limit (though unregistered assignment is not valid on bankruptcy)
Registration valid from date of High Court stamp	Registration valid from date and time of automatic reply to email
Search requests by post or in person	Search requests by email
Re-registration every five years	Re-registration every 10 years

13.30 We think that these proposed changes would address the industry's main concerns:

(1) **registration would be less expensive**. The business would no longer have to incur the costs of two solicitors to witness its signature and to swear an affidavit. Nor would the invoice financier's solicitor need to take documents to the High Court in person. We think the new regime would save at least £350 for each registration. There would also be fewer re-registrations;[11] and

(2) **it would reduce delay**. At present invoice financiers wait for confirmation of registration at the High Court before releasing funds.[12] Under our proposals, the invoice financier, or its solicitor, would submit documents for registration by email and receive an automatically generated reply confirming the date and time of registration. At that stage, funds could be released.

13.31 As with goods mortgages, third parties would email search requests to the High Court. Although emails are not as efficient as online searches, the small numbers involved should allow searches to be relatively quick.[13]

13.32 Given the volume of business, we do not think it is justifiable to create an entirely new online system for registration of general assignments of book debts by unincorporated businesses.[14] We think that our proposals are pragmatic and go as far as they can in creating a High Court registration regime that addresses the problems currently faced by the invoice financing industry.

QUESTION 34

Do consultees agree that the following changes should be made to the regime for registering a general assignment of book debts at the High Court:

(1) the need for an affidavit should be abolished?

(2) documents should be submitted by email?

(3) the general assignment should be validly registered from the date and time of the automatic reply to the email?

(4) the seven clear day time limit for registration should be abolished?

(5) registration should be renewed every 10 years?

[11] Even with a five year re-registration requirement, one invoice financier told us that in a sample of 20 invoice financing agreements, after five years, a number would have changed constitution or gone out of business. Around 15% to 20% would need to be re-registered after five years.

[12] See para 6.44 in Chapter 6.

[13] See table 2.1 in Chapter 2.

[14] In particular, we note that previous recommendations for a "notice filing" registration regime for charges created by companies have not been implemented. See Company Security Interests (2005) Law Com No 296, p 3, para 1.8.

We welcome other comments on the way that general assignments of book debts are registered at the High Court.

CONCLUSION

13.33 The focus of this project is the law of bills of sale. For this reason, we have not looked in detail at general assignments of book debts as a separate area of law. We think that our proposals for reform of the registration of mortgages over goods other than vehicles will have the welcome incidental effect of curing many of the practical difficulties faced by the invoice financing industry.

CHAPTER 14
ABSOLUTE BILLS OF SALE

14.1 We have seen that the Bills of Sale Acts classify bills of sale into two types: security bills and absolute bills. This consultation paper has so far primarily addressed reform of the law relating to security bills which, under our proposals, would be renamed "goods mortgages".

14.2 In this chapter, we consider absolute bills of sale. As we have seen, a bill of sale is a document which transfers ownership of goods to another, while allowing the transferor to retain possession of the goods. An absolute bill is one granted for any purpose other than to secure a monetary obligation.[1] Potentially, this could cover a wide range of transactions, including sales, gifts and exchanges.

14.3 We start by summarising the current law. We then look briefly at how absolute bills might have been used before the 1878 Act. We will see that the distinction between absolute bills and security bills is one created by legislation, not practice.

14.4 We then discuss the use of absolute bills in modern society and whether their regulation continues to be necessary. Registration of absolute bills appears to take place only rarely.[2] The only use made of the requirement to register is a negative one: where an absolute bill is not registered, certain third parties can use this as an argument to defeat it. Given the expense and burden of registration, this does not appear to be a sufficiently persuasive reason to retain this requirement. As we shall see, there are other statutory provisions to protect subsequent purchasers and creditors. We therefore propose to abolish registration, and indeed any regulation, of absolute bills.

CURRENT LAW

14.5 In Chapter 3, we saw that the 1882 Act applies to security bills. Other bills of sale are left to be regulated by the 1878 Act as absolute bills of sale.

14.6 In theory, the 1878 Act could apply to any document which transfers ownership of goods while allowing the transferor to retain possession. However, some such documents are expressly excluded from the statutory regime. This includes all transfers in the ordinary course of business, as well as transfers of ships and aircraft.[3]

14.7 The 1878 Act imposes both document and registration requirements. While the document requirement is light touch, the registration requirement is burdensome.

[1] Absolute bills that are granted to secure non-monetary obligations would be reclassified as goods mortgages under our proposals. Such goods mortgages are likely to be rare: see G McBain, "Repealing the Bills of Sale Acts" (2011) 5 *Journal of Business Law* 475 at 480.

[2] See para 2.38 in Chapter 2.

[3] See paras 3.24 to 3.26 in Chapter 3. The Merchant Shipping Act 1995 makes it compulsory to use a bill of sale to transfer or assign ships and other vessels. However, these bills of sale are exempt from the 1878 Act and we do not discuss them here.

14.8 The only document requirement is that every absolute bill of sale must set out the consideration for which it is granted.[4] The registration system is the same as for general assignments of book debts. As discussed in Chapter 6, this system involves three separate solicitors, at a cost of between £500 and £1,700.[5]

HISTORICAL PERSPECTIVE

14.9 The underlying concern appears to have been about money lending.[6] While most Victorian transactions would be classified as security bills, in some cases individuals used absolute bills as a means of raising money. People would sell their goods outright to a lender while retaining possession, possibly with a view to repurchasing them. This explains why outright transfers, as well as transfers by way of security, were regulated; they were used to achieve the same end.

14.10 The 1882 Act applies only to security bills; it was at this point that Parliament first distinguished between security bills and absolute bills. Absolute bills were unaffected by the 1882 Act and were left to be regulated by only the 1878 Act.[7]

14.11 It is possible that Victorians used absolute bills for purposes other than money lending, but this does not appear from the parliamentary record.[8] The motivation behind the distinction between security bills and absolute bills was to provide greater protection to borrowers using security bills, rather than because absolute bills were a cause for concern.

MODERN USAGE

14.12 In our visits to the High Court registry during the course of this project, we found no examples of absolute bills being registered.[9] The main use made of the registration requirement for absolute bills is a negative one. Certain third parties can use the 1878 Act to argue that an absolute bill is not valid as against them because it has not been registered.[10]

4 1878 Act, s 8.

5 For the law, see paras 3.50 to 3.52 in Chapter 3; for practice, see paras 6.40 to 6.41 in Chapter 6.

6 This is what contemporary debates regarding the 1882 Act suggest: "The persons who for the most part advanced on bills of sale were money-lenders, men who preyed upon the poverty and helplessness of persons in embarrassed circumstances". Hansard (HC), 7 March 1881, vol 259, cc525-32.

7 Even though the 1878 Act had itself been introduced primarily to regulate security bills.

8 For example, to defeat the claims of creditors.

9 A High Court Master told us that he had decided on whether the registration of a number of absolute bills should be allowed. He referred to one case in which the absolute bills were given as part of a contract of sale between two companies relating to antiques and items in certain houses. The seller remained in possession because it owned the houses containing the property. The decision was that absolute bills issued by companies could not be registered under the 1878 Act as it only applies to individuals.

10 A High Court Master told us that he had dismissed a number of claims made in "sheriff's interpleaders" brought by a new owner who has failed to register an absolute bill granted by the former owner (and judgment debtor).

Twentieth century cases

14.13 There have been two cases in which the 1878 Act has been cited in disputes where former wives have sought to enforce judgments against their former husbands by seizing goods. These date from 1940 and 1966.

14.14 In *Youngs v Youngs*,[11] a man sold his furniture to his live-in housekeeper. He gave the housekeeper a receipt and inventory. The furniture remained in the house and the man continued to make use of it. When his estranged wife obtained judgment against him for unpaid alimony, the sheriff sought to seize the furniture in the house. The Court of Appeal upheld the county court's decision that the transaction between the man and his housekeeper was a bill of sale.[12] As it had not been registered, it was void against the wife as an execution creditor.[13]

14.15 On similar facts in *Koppel v Koppel*,[14] the court reached a different conclusion on the grounds that the goods were not in the possession or apparent possession of the former husband.

A 2015 case: *Halberstam v Gladstar Ltd*

14.16 The High Court recently considered the application of the 1878 Act in *Halberstam v Gladstar Ltd*.[15] The facts of the case are complex. Mr Stern had been declared bankrupt in 1978. Following his bankruptcy, his father purchased the family home and contents, including valuable furniture and paintings, and put them in a trust for Mr Stern's children. Mr Stern retained possession of the goods. Initially this transaction had been registered as an absolute bill. Registration had been renewed several times but at the time of the events in question, registration had lapsed.[16]

14.17 The claimants in the case were Mrs Stern and Mr Halberstam, the trustee of the Stern children's trust. The defendant, Gladstar, was a company that had lent money to Mr Stern for many years after his bankruptcy. In 2013, when Mr Stern could not repay a loan, Gladstar entered into a deed in which it promised not to lend any money to Mr Stern again. Subsequently, Gladstar bought several items of furniture and paintings from Mr Stern, which had originally been subject to the absolute bill.

[11] [1940] 1 KB 760.

[12] Above, Slesser LJ at 765. The term "absolute bill" is not used in the judgment. However, the Court of Appeal found that there was "an assurance of personal chattels" coming within section 4 of the 1878 Act. It is clear from the facts of the case that the bill of sale was not given by way of security and the judgment does not refer to the 1882 Act.

[13] And so, in that case, the absolute bill was void against the sheriff executing a writ of *fieri facias* against the goods for an execution creditor, being the man's estranged wife claiming alimony. See further fn 17.

[14] [1966] 1 WLR 802.

[15] [2015] EWHC 179 (QB).

[16] In accordance with the 1878 Act, s 11.

14.18 When Gladstar attempted to seize the goods it had purchased, the claimants sought to prevent seizure. Gladstar argued that the transaction between Mr Stern and his father was an unregistered absolute bill and so unenforceable as against it.[17] Given this argument, the High Court found that the claimants could not even establish that there was a serious issue to be tried. It found in favour of Gladstar, giving it leave to seize the goods it had purchased.

14.19 One interesting aspect of the case is that the High Court considered the requirement for registration to be a form of statutory protection for the subsequent purchaser, in this case Gladstar. However, any protection for the subsequent purchaser provided by the 1878 Act is limited.[18] Where an absolute bill is registered, a subsequent purchaser obtains no protection at all. Even the chances that registration would inform them about the absolute bill are low. In fact, as we explore below, there is a separate statutory provision in the Sale of Goods Act 1979 to protect subsequent purchasers in these circumstances. We think that section could have been applied in this case to reach the same result.

14.20 The facts in *Halberstam v Gladstar Ltd* appear to be extremely unusual, and we do not think that the 1878 Act is needed to resolve them.

IS THERE A NEED TO REGISTER ABSOLUTE BILLS?

14.21 Now we turn to consider whether there is a continuing need to require registration of absolute bills. We think that there is little justification for perpetuating an expensive and highly burdensome registration regime when the evidence is that:

(1) registration is rare;

(2) the credit market has changed; and

(3) other modern legislation offers protection to third parties.

Registration is rare

14.22 As already discussed, in our visits to the High Court registry during the course of this project, we did not find a single absolute bill. It appears that registration, if it ever takes place at all, is very rare. With registration so rare, we think it most unlikely than any subsequent purchaser or creditor would search the register.

The credit market has changed

14.23 We have seen that, in 1878, most absolute bills were used as a form of credit. Whereas in Victorian times impoverished individuals would sell their goods whilst retaining possession, it is difficult to think that this would happen in the modern credit market. The primary reason for the requirement to register absolute bills in the 1878 Act is now unlikely to arise.

[17] As we discussed in para 3.52 in Chapter 3, an unregistered absolute bill is void against any person who attempts to seize goods pursuant to a court order.

[18] Although an unregistered absolute bill is void against those seizing goods pursuant to a court order, it is far from clear whether a subsequent purchaser in possession always obtains full title to the goods.

Protection given by other legislation

14.24 Two other statutory provisions protect third parties who may suffer detriment because of an existing absolute bill over goods. These are section 24 of the Sale of Goods Act 1979 and sections 339 to 340 of the Insolvency Act 1986.

Sale of Goods Act 1979, section 24

14.25 Section 24 is an exception to the general rule that sellers "cannot give what they do not own".[19] It provides that:

> Where a person having sold goods continues or is in possession of the goods… the delivery or transfer by that person… of the goods… under any sale… to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

14.26 Its effect is that:

(1) if a seller sells goods to a first purchaser;

(2) while retaining possession of those goods; and

(3) purports to sell the goods again;

(4) to a second purchaser who has acted in good faith and without notice; then

(5) the second sale takes effect as if it was authorised by the first purchaser. This means that the claim of the second purchaser defeats the claim of the first purchaser.

14.27 Section 24 applies where the unregistered absolute bill is a straightforward sale.[20] In these circumstances, registration is not necessary as subsequent purchasers could avail themselves of the protection in section 24.

Insolvency Act 1986, sections 339 and 340

14.28 One possible use of the 1878 Act would be on bankruptcy, to protect creditors against unregistered absolute bills granted by the borrower. This situation might arise where a borrower is still in possession of valuable furniture and cars, but claims to have sold these goods or given them away before becoming bankrupt. It is open to creditors to argue that the transaction is an unregistered absolute bill of sale, and therefore void.

[19] See para 12.12 in Chapter 12.

[20] The application of the Sale of Goods Act 1979, s 24 hinges on the first transaction being a sale. This means that not all bills of sale are defeated by this section. We doubt that a person transferring ownership under a security bill would be a "seller" for the purposes of section 24.

14.29 However, the "clawback" mechanisms of the Insolvency Act 1986 provide assistance in this scenario. First, the transaction may be avoided as a preference.[21] If an individual is declared bankrupt and has given a preference, the trustee in bankruptcy may apply for an order restoring the position to what it would have been without the preference. An individual gives a preference to a person if that person is one of the individual's creditors and the individual does anything (or allows anything to be done):

> which has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.[22]

14.30 Secondly, the transaction may also be challenged if it is at an undervalue.[23] A transaction between the individual adjudged bankrupt and another person is at an undervalue if:

(1) it is a gift, or on terms that the other person provides no consideration;

(2) it is in consideration of a marriage or civil partnership with that other person; or

(3) it is for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.[24]

The trustee in bankruptcy can apply to court for an order restoring the position to what it would have been had the transaction at an undervalue not been made.

14.31 We think that these provisions would be adequate to protect creditors where borrowers purport to have sold or given away their goods.

OUR PROPOSAL

14.32 We think that there is no need to require registration of absolute bills. As we have seen, absolute bills within the 1878 Act are rarely used and almost never registered.[25]

[21] Insolvency Act 1986, s 340. A transaction can be challenged as a preference if made to an "associate" of the individual within two years prior to the bankruptcy. If made to someone who is not an "associate", the relevant time period is six months.

[22] Insolvency Act 1986, s 340(3).

[23] The transaction can be so challenged as long as it took place within five years prior to the bankruptcy (Insolvency Act 1986, s 341(a)).

[24] Insolvency Act 1986, s 339(3).

[25] Though they do seem arise from time to time.

14.33 Where a third party might suffer loss due to a disposition of goods by the transferor while retaining possession of them, other, more modern, statutory provisions than the 1878 Act may suffice to address the mischief. In fact, section 24 of the Sale of Goods Act 1979 and the clawback provisions of the Insolvency Act 1986 are fairer than a system in which all unregistered absolute bills are void against certain third parties; they provide for a system in which the new owner's ownership is only defeated where third parties would otherwise suffer detriment. We do not think that the possibility of arguing that the lack of registration entitles certain third parties to avoid an absolute bill justifies the continuation of a burdensome and expensive regime.

14.34 This conclusion is supported by one academic commentator:

> The current [bills of sale] register seems to contain only security bills of sale—which suggests that absolute bills are rarely used, or that parties are disinterested in registering the same. In conclusion, any continued need to register absolute bills is not proven—not least since there does not seem to be a problem which needs addressing by way of registration.[26]

14.35 Furthermore, we think that it makes little sense to retain any further regulation of absolute bills. The only document requirement is that the absolute bill must set out the consideration for which it is given. The consideration would, in any event, invariably be included in a written agreement.

QUESTION 35

Do consultees agree that:

(1) the requirement to register absolute bills should be abolished?

(2) there is no need to continue to regulate the use of absolute bills?

14.36 We seek views on this, particularly from those who have experience of absolute bills in the context of bankruptcies.

CONCLUSION

14.37 Absolute bills are rarely registered, possibly because they are rarely used. Parties and perhaps their solicitors may also be unaware of the nature of a transaction as an absolute bill and the requirement for registration. In either case, we think that there are other more modern statutory protections for third parties. Accordingly, we do not think it is necessary to continue to require registration of, or to regulate, absolute bills.

[26] G McBain, "Repealing the Bills of Sale Acts" (2011) 5 *Journal of Business Law* 475 at 502.

CHAPTER 15
ASSESSING THE IMPACT OF REFORM

15.1 In this chapter, we summarise the main benefits and costs to logbook and other lenders and to the invoice financing industry of the proposed reforms, and ask consultees for their views.

VEHICLE MORTGAGES: BENEFITS AND COSTS TO THE INDUSTRY

15.2 We think that the main benefits and costs to the logbook loan industry arise out of our proposals to:[1]

(1) abolish the requirement to register logbook loans at the High Court;

(2) extend the requirement for a court order to vehicle mortgages; and

(3) protect private purchasers who act in good faith and without notice.

15.3 By contrast, the proposals on voluntary termination will have little direct impact, as many logbook lenders already permit borrowers to exercise this right under the Consumer Credit Trade Association code of practice.

Benefits

15.4 We estimated in Chapter 5 that the total cost of registering each logbook loan at the High Court is £35 to £51. A table showing the estimated costs is set out below. We ask for comments on these figures.

[1] Financial benefit to the logbook loan industry may result in financial benefit to borrowers if savings are passed on.

Table 15.1: Costs associated with registration of security bill documents

Type of fee	Cost
High Court registration fee (if within seven clear days)	£25
Solicitor's fee for the affidavit	£5 to £10
Staff time swearing the affidavit	£3.50 to £10
Postage fee for sending requisite documents to the High Court[2]	£1 to £5.60
Additional fee for late registration: £50 for each late registration, which is required in at least 1% of cases	Adds an average of 50p to the cost of registering each security bill
Total cost for registering each security bill document	£35 to £51

QUESTION 36

We welcome evidence on the current cost of registering a logbook loan at the High Court. We seek views on our estimate that the cost of registering a logbook loan at the High Court is between £35 and £51.

15.5 On the basis of 47,723 logbook loans registered at the High Court in 2014, our proposal to abolish the requirement to register logbook loans at the High Court would represent savings to the industry of £1,670,305 to £2,433,873 a year.

QUESTION 37

We welcome evidence on the savings to the logbook loan industry if the requirement to register logbook loans at the High Court is abolished. Do consultees agree that abolishing the requirement to register logbook loans at the High Court will save the logbook loan industry between £1.67 million and £2.43 million a year?

Costs

The number of court orders

15.6 We saw in Chapter 5 that repossession rates among logbook lenders ranged from 2.2% to 5%. We think that repossession should be a measure of last resort. Our proposal to require a court order should reduce repossession rates. If our proposals are implemented, we would anticipate repossession rates of around 2.2%.

[2] Logbook lenders use special delivery to try to ensure compliance with the seven clear day deadline. The High Court bears the postage fee of returning stamped copies to logbook lenders.

15.7 A court order would only be required in those cases where the borrower has repaid at least one third of the total loan amount. The evidence from the hire purchase industry is that most repossessions happen before the one third point when no court order would be required. As one hire purchase lender put it, "if it goes wrong, it goes wrong early".[3] We welcome evidence from logbook lenders as to the percentage of cases in which they repossess from borrowers and how many repossessions currently take place after the one third point at which a court order would become necessary under our proposals. We also seek views on whether the figures would change if our proposals are implemented. Our best estimate is that between one third and one half of repossessions would require a court order. On this basis, our initial estimate would be that between 0.7% to 1.1% of logbook loans will lead to an application for a court order for repossession; that is, between 334 to 525 applications a year. We seek views on these figures.

QUESTION 38

We welcome evidence from logbook lenders as to the percentage of cases in which they repossess from borrowers and how many repossessions currently take place after the one third point at which a court order would become necessary under our proposals.

QUESTION 39

We seek views on whether the figures would change if our proposals are implemented. We welcome views on our initial estimate that, if our proposals are implemented, between 0.7% to 1.1% of logbook loans will involve a court order before repossession.

The cost of court orders

15.8 The hire purchase lenders we spoke to gave us very varied costs for the court process. They mentioned costs ranging from £400 to £1,000.

15.9 Our proposals would not affect the costs of seizing the vehicle: seizures will continue to be carried out by debt collectors or employees and the costs will remain the same. As is currently the case, logbook lenders would be permitted to pass these costs to borrowers. The additional costs would be the court fee and the logbook lender's legal costs. The court fee is currently £155; the Government intends to raise this to £255. If the logbook lender is successful, the court fee would be passed directly to the borrower. However, we propose that logbook lenders should absorb their own legal costs, so that they have every incentive to keep these costs low.

15.10 We welcome evidence about what the costs of a court order would be. We seek views on our initial estimate that the combined cost of the court fee and legal costs would be in the region of £600 (based on a court fee of £255). On the basis of an estimate of 334 to 525 applications for a court order each year, the total cost of court orders would be between £200,400 and £315,000.

[3] For hire purchase, the use of court orders is rare: another hire purchase lender said that out of approximately 1,000 hire purchase agreements in a particular year, it might have to seek a court order two to three times (or in 0.2% to 0.3% of cases).

QUESTION 40

What are the likely costs of a court order? We seek views on the estimate that the combined cost of the court fee and legal costs would be in the region of £600.

15.11 The delay inherent in the court process would also increase costs. One hire purchase lender told us that the delay could be between six weeks and two months, but could be longer in busy county courts. Another hire purchase lender referred to delays of three to four months. During this time, the logbook lender may not receive any repayments from the borrower. Although the arrears will eventually be added to the shortfall owed by the borrower, the borrower may be unable to pay them.

15.12 We welcome evidence on the loss this may cause to logbook lenders. We do not think that logbook lenders would lose much of the interest they charge to borrowers. The interest rate represents a potential loss of profit – but the logbook lender is not likely to have made this profit even if it had repossessed immediately. The cost to the logbook lender is the cost to its own cash flow – that is, the rate of interest the logbook lender would pay to borrow money from its own financiers. We welcome evidence from logbook lenders about the rate of interest they would pay to banks and other lenders to cover this delay.

QUESTION 41

We welcome evidence from logbook lenders about the costs they would incur in borrowing money from banks and other lenders to finance a period of delay in repayment from borrowers.

Protecting private purchasers

15.13 Our proposal to protect private purchasers who act in good faith and without notice (innocent private purchasers) represents a cost to the logbook loan industry because it will no longer be possible for logbook lenders to repossess vehicles from, or to reach financial settlements with, such purchasers.

15.14 Logbook lenders told us that there are relatively few disputes involving private purchasers. One logbook lender told us that out of 1,500 to 2,000 logbook loans issued each month, 20 to 30 would result in a dispute involving a purchaser. Another told us that it had repossessed around 10 vehicles from purchasers in 2014. We have not received any information about the amount of money that logbook lenders receive each year from innocent private purchasers in respect of both settlements and sale of repossessed vehicles. We welcome evidence on this.

QUESTION 42

We seek evidence from logbook lenders about:

(1) the amount of money received in settlements from innocent private purchasers; and

(2) the value obtained from vehicles repossessed from innocent private purchasers.

15.15 In Chapter 12 we argued that private purchasers would no longer need legislative protection if vehicle provenance checks were free or almost free, and there was widespread knowledge of the need to check.[4] In practice, this would mean that the costs of operating asset finance registries were met by those registering logbook loans, rather than those searching for them; and that the industry would need to finance an advertising campaign about the need to check. We welcome views on the potential costs of this alternative approach.

QUESTION 43

We welcome views on the costs of achieving readily available vehicle provenance checks for consumers.

Transitional costs

15.16 Any legal change involves some transitional costs. The main costs would appear to be incurred in training logbook lenders' staff on the provisions of the new legislation; and developing a new standard "goods mortgage agreement". We welcome evidence from the logbook loan industry on the transitional costs of adapting to the new legislation. We seek views on our initial estimate that these costs would not be substantial – less than £50,000 for each logbook lender.

QUESTION 44

We welcome evidence on the transitional costs to the logbook loan industry of adapting to the new legislation. We seek views on an initial estimate that these costs would be less than £50,000 for each logbook lender.

MORTGAGES OVER OTHER GOODS: BENEFITS AND COSTS TO THE INDUSTRY

15.17 We estimated in Chapter 2 that 260 of the bills of sale registered at the High Court in 2014 were secured on goods other than vehicles. Most were used by unincorporated businesses and high net worth individuals.

15.18 Our proposals are designed to make it easier for unincorporated businesses to use goods as security for loans by removing unnecessary formalities. In particular, our proposals would allow goods mortgages to be used to secure guarantees, revolving facilities and overdrafts. We seek views on the use which may be made of goods mortgages if our proposals are implemented.

[4] Among other things, such as confusing "text checks" no longer being available – see paras 12.44 to 12.47 in Chapter 12.

QUESTION 45

We welcome evidence on the number of bills of sale registered at the High Court each year that are secured on goods other than vehicles. We welcome comments on the estimate that 260 of the bills of sale registered at the High Court in 2014 were secured on goods other than vehicles.

QUESTION 46

How far might such use of goods mortgages expand if our proposals are implemented? In particular, is there a demand from unincorporated businesses and high net worth individuals to use goods mortgages to secure guarantees, revolving facilities or overdrafts?

15.19 The main benefit of our reforms is that they would simplify the High Court registration regime. The main cost is that it will no longer be possible for lenders to repossess goods from, or to reach financial settlements with, innocent private purchasers.

15.20 We think that very few loans secured on goods other than vehicles are regulated credit agreements. The proposed borrower protections (the requirement for a court order and the right of voluntary termination) would not apply to credit agreements that are exempt from regulation under the Consumer Credit Act 1974. Accordingly, we expect that they will have little impact. We seek views on this point.

QUESTION 47

Are we right to think that most loans secured on goods other than vehicles are loans made to unincorporated businesses and high net worth individuals – and that relatively few are regulated credit agreements?

Benefits

15.21 Under our proposals, mortgages on goods other than vehicles would still be registered at the High Court. However, the procedure would be streamlined. It would no longer be necessary to swear an affidavit or to post paper documents to the High Court.

15.22 We think that the minimum cost associated with the current system would be £7 for the affidavit; £10 in employee time to swear the affidavit; and £5.60 postage. Late registration would add another 50p.[5] On this basis, the minimum saving per goods mortgage would be £23.10. In many cases, solicitors may not trust the post and may present the documents to the High Court in person. On this basis, we think the savings per goods mortgage may be higher: up to £50. In 260 cases, this would amount to savings of £6,006 to £13,000 a year.

[5] See table 15.1.

QUESTION 48

We welcome evidence on the savings to lenders if our proposals to streamline the High Court registration regime for goods mortgages are implemented. Do consultees agree that the proposals to streamline the High Court registration regime would save between £23.10 and £50 per goods mortgage?

Costs

15.23 We have not heard about any cases involving private purchasers of goods other than vehicles. We welcome information about whether this is ever an issue.

QUESTION 49

Do consultees have any evidence of disputes with private purchasers who have bought goods (other than vehicles) subject to a security bill of sale?

GENERAL ASSIGNMENTS OF BOOK DEBTS: BENEFITS AND COSTS TO THE INDUSTRY

Benefits

15.24 We estimated in Chapter 6 that the total cost of registering each general assignment of book debts at the High Court is £480 to £1,735 (excluding VAT). A table showing the estimated costs is set out below.

Table 15.2 Costs associated with registration of a general assignment of book debts

Type of fee	**Cost**
High Court registration fee	£25
Invoice financier's solicitor fees	£150 to £1,200 plus VAT
Business's solicitor fees	£300 to £500 plus VAT
Solicitor's fee for administering the affidavit	£5 to £10[6]
Total (excluding VAT)	**£480 to £1,735**

[6] Based on information from logbook lenders.

15.25 Our proposals to simplify the High Court registration regime mean that businesses would no longer need to employ their own solicitors in respect of registration, nor would there be a requirement to swear an affidavit. The proposals would also reduce the invoice financier's solicitor fees, who would no longer have to deal with the business's solicitor in respect of registration or take documents to the High Court in person for registration. On this basis, we think that there would be a saving of between £350 and £575 for each registration. Based on 97 general assignments of book debts registered at the High Court in 2014, the annual saving to the invoice financing industry would be approximately £33,950 to £55,775.

15.26 We expect that this reduction in cost would lead to an increase in registrations of general assignments of book debts. We welcome views on how many more general assignments might be registered.

QUESTION 50

We welcome evidence on the current cost of registering general assignments of book debts at the High Court. We seek views on our estimate that the cost of registering a general assignment at the High Court is between £480 and £1,735 (excluding VAT).

QUESTION 51

We seek views on our estimate that our proposals would reduce these costs by between £350 and £575 for each registration. How far would this reduction in costs lead to an increase in registrations of general assignments of book debts?

Costs

15.27 We do not think that there will be any costs to the invoice financing industry other than transitional costs. We welcome views from the invoice financing industry on the transitional costs of adapting to the new legislation.

QUESTION 52

Do consultees agree that the only costs to the invoice financing industry of our proposals to simplify the High Court registration regime would be the transitional costs?

QUESTION 53

We welcome views on the transitional costs to the invoice financing industry of adapting to the new legislation.

CHAPTER 16
LIST OF PROPOSALS AND QUESTIONS

This chapter brings together all of the provisional proposals and consultation questions contained in this consultation paper. We invite consultees to comment on all or some of these, as appropriate. This will greatly assist us in formulating our recommendations for reform.

CHAPTER 7: THE CASE FOR REFORM

Q1 Do consultees agree that bills of sale should not be "banned" or "abolished"?

Q2 Do consultees agree that the law of bills of sale should be reformed?

CHAPTER 8: PROPOSALS FOR REFORM: A NEW LEGISLATIVE FRAMEWORK

Q3 Do consultees agree that the Bills of Sale Acts should be repealed and replaced with new legislation regulating how individuals may use their existing goods as security while retaining possession of them?

Q4 Do consultees agree that:

(1) the phrases "bill of sale", "security bill" and "personal chattels" should be replaced?

(2) the new legislation should use the term "goods mortgage" to refer to secured loans over goods generally?

(3) the new legislation should use the term "vehicle mortgage" to refer to secured loans over vehicles?

Q5 Do consultees agree that the new legislation should regulate transactions where individuals use goods they already own as security for a loan or other non-monetary obligation and retain possession of the goods?

In particular, should the new legislation:

(1) apply only to security granted by individuals?

(2) cover transactions where the obligation secured is non-monetary?

(3) provide that goods are considered to be in the possession of the borrower if they remain under the borrower's control?

Q6 Do consultees agree that the new legislation should not apply to:

(1) dealings with intangible goods?

(2) dealings with ships and aircraft?

(3) any security interest which could be registered as an agricultural charge (with the exception of loans secured on vehicles)?

Q7 Do consultees agree that a goods mortgage should take effect by transferring ownership to the lender unless the parties agree that it should take effect as a charge instead?

Q8 For all goods mortgages (whether or not securing a regulated credit agreement, and whether taking effect as a transfer of ownership or a charge), do consultees agree that the new legislation should:

(1) prevent lenders from repossessing goods except for one of three specified reasons:

(a) default on payment;

(b) default on maintenance or insurance of the goods; or

(c) the bankruptcy of the borrower?

(2) no longer provide that fraudulently removing the goods is a specified reason that allows lenders to repossess goods?

(3) where there is a transfer of ownership, specify that ownership is automatically transferred to the borrower once the loan is repaid?

Q9 Do consultees agree that a goods mortgage should be available to secure loans of any amount with no minimum?

Q10 Do consultees agree that borrowers should not be permitted to use future goods as security for a loan, unless the loan is to be used to acquire those goods?

CHAPTER 9: PROPOSALS FOR REFORM: SIMPLIFYING THE DOCUMENT REQUIREMENTS

Q11 Do consultees agree that:

(1) a goods mortgage should only be valid if it is set out in a written document signed by both parties?

(2) the borrower's signature should be a physical signature made in the presence of a witness?

(3) the goods mortgage should be in a separate document from the credit agreement?

Q12 Do consultees agree that a goods mortgage document should contain:

(1) the date of the goods mortgage?

(2) the names and addresses of the borrower and lender?

(3) the obligation which is secured by the goods mortgage?

(4) a statement that ownership of the goods is being transferred to the lender, or that the goods are being charged in favour of the lender, in order to secure the obligation?

(5) the name, address and occupation of the witness?

(6) a specific description of the goods?

Q13 Do consultees agree that it is not necessary to require that the goods mortgage document contain:

(1) a fixed sum where the secured obligation is monetary?

(2) specific description of the goods in a separate schedule?

Q14 Do consultees agree that where a regulated credit agreement is secured on a vehicle the vehicle mortgage document should include prominent statements that:

(1) the lender owns the vehicle until the loan is repaid?

(2) in the event of default, the borrower risks losing possession of the vehicle?

Do consultees have views on:

(3) the suggested formulations for the prominent statements?

(4) whether the prominent statements should also appear on websites and advertising?

Q15 Do consultees agree that:

(1) adapted versions of the prominent statements should be required for regulated credit agreements secured on goods other than vehicles?

(2) it is not necessary to include the prominent statements for goods mortgages which do not secure regulated credit agreements?

Q16 Do consultees agree that the sanction for failure to comply with the document requirements should be that the lender loses any right to the secured goods, both as against the borrower and as against third parties?

CHAPTER 10: PROPOSALS FOR REFORM: MODERNISING THE REGISTRATION REGIME

Q17 Do consultees agree that:

(1) there should be no requirement to register vehicle mortgages at the High Court?

(2) instead, a logbook lender should not be entitled to enforce a vehicle mortgage against a third party or trustee in bankruptcy unless the vehicle mortgage has been registered with a designated asset finance registry?

(3) priority should be determined by the date and time that the details of the vehicle mortgage become publicly available?

Q18 Do consultees agree that:

(1) a government entity should designate asset finance registries as suitable to register vehicle mortgages?

(2) to provide an asset finance register which meets the needs of lenders and traders, asset finance registries seeking designation should meet four criteria:

(a) adequate data-sharing;

(b) a suitable cost structure;

(c) robust technology (coupled with indemnities); and

(d) a complaints system?

We welcome other comments on the registration of vehicle mortgages.

Q19 We expect that the designated asset finance registries will initially be HPI, Experian and CDL. We welcome comments on whether there are likely to be new entrants to this market.

Q20 Do consultees agree that mortgages on goods other than vehicles:

(1) should be enforceable against the borrower whether or not they have been registered?

(2) should not be enforceable against a third party or trustee in bankruptcy unless they have been registered with the High Court?

Q21 Do consultees agree that for registration of mortgages over goods other than vehicles at the High Court:

(1) registration should be by email?

(2) priority should be determined by time of submission?

(3) original documents should no longer be required?

(4) an affidavit should no longer be required?

(5) lenders should email a registration form and a copy of the goods mortgage document? We welcome views on whether the registration form should include the location of the goods.

(6) there should not be a statutory time limit?

(7) the High Court should not be obliged to send goods mortgage documents to county courts?

We welcome other comments on the registration of mortgages over goods other than vehicles.

Q22 Do consultees agree that to maintain the accuracy of the registers:

(1) lenders should be required to enter notices of satisfaction in respect of satisfied vehicle mortgages and goods mortgages?

(2) there should be a procedure for the borrower (at the lender's cost if successful) to enter a notice of satisfaction where the lender refuses to do so?

(3) re-registration of vehicle mortgages and goods mortgages should be required every ten years?

CHAPTER 11: PROPOSALS FOR REFORM: PROTECTING BORROWERS

Q23 Do consultees agree that:

(1) the requirement for a court order before repossession should be extended to all regulated credit agreements secured by a goods mortgage?

(2) the point at which the lender should be required to seek a court order is when one third of the total loan amount has been repaid?

(3) lenders should be permitted to pass on the court fee to the specific borrower in question if a return of goods order is granted, or if a suspended return of goods order eventually results in repossession?

(4) lenders should be permitted to have recourse to borrowers for any shortfall following sale of the repossessed goods?

(5) lenders should be permitted to seek a charging order against borrowers' homes only in the limited circumstances set out in the CCTA Code?

(6) in accordance with the CCTA Code on charging orders, lenders should not be able to apply for an order seeking sale even where they have obtained a charging order against borrowers' homes?

(7) lenders should be permitted to use the return of goods order, and so their own employees or debt collectors, to repossess the goods?

Q24 Do consultees agree that for regulated credit agreements secured by a goods mortgage:

(1) borrowers should have the right of voluntary termination by handing over the vehicle or other goods?

(2) the right for borrowers to terminate voluntarily should be available until the lender has incurred costs to repossess the vehicle or other goods?

Q25 Do consultees agree that the approach of the CCTA Code should be adopted so that voluntary termination:

(1) is available immediately, without requiring any percentage of the loan amount to have been repaid?

(2) acts as full and final settlement of all outstanding amounts?

(3) is available except where:

(a) it is established that the vehicle or other goods have sustained malicious damage of whatever nature; or

(b) it is evident that the borrower has contravened the obligation to take reasonable care of the vehicle or other goods to the extent that the contravention adversely and significantly affects the resale value?

Where vehicles are maliciously damaged, we welcome views on whether borrowers should retain the right of voluntary termination if they can show that the malicious damage was not caused by them or anyone associated with them.

Q26 Do consultees agree that if the borrower protection measures we propose are enacted:

(1) vehicle mortgages would not be used to secure the purchase of new vehicles on credit?

(2) no further intervention is necessary?

Q27 Do consultees agree that where a goods mortgage secures a loan which is not a regulated credit agreement:

(1) goods may be repossessed without a court order?

(2) there should be no statutory right of voluntary termination?

CHAPTER 12: PROPOSALS FOR REFORM: PROTECTING PRIVATE PURCHASERS

Q28 Do consultees agree that:

(1) a private purchaser who acts in good faith and without actual notice of the goods mortgage should acquire ownership of the goods?

(2) the protection should apply to all goods subject to a goods mortgage, not just vehicles?

(3) if the private purchaser did not act in good faith and/or had actual notice of the goods mortgage, lenders should only be entitled to repossess from them with a court order?

(4) the proposed new legislation should contain a regulation-making power to amend its provisions, including the repeal of the protection granted to private purchasers of vehicles, if vehicle provenance checks were to become free (or almost free) and a routine part of buying a second-hand vehicle?

Q29 We welcome views on whether the protection should be confined to "disposition" as defined by the Hire Purchase Act 1964, or whether it should extend more widely, to include (for example) exchange and barter?

Q30 Do consultees agree that the FCA should be given jurisdiction to curb abuses in the way that logbook lenders treat private purchasers?

Q31 Do consultees agree that FOS should have jurisdiction to hear complaints against logbook lenders made by private purchasers of vehicles subject to logbook loans?

CHAPTER 13: GENERAL ASSIGNMENTS OF BOOK DEBTS

Q32 Do consultees agree that registration of general assignments of book debts serves, in principle, a valuable purpose?

Q33 Do consultees agree that a general assignment of book debts should be evidenced in a document which contains:

(1) the names and addresses of the parties?

(2) a statement that the book debts are assigned?

(3) the date of the general assignment?

(4) sufficient information to identify the class of book debts in question?

(5) if the general assignment is time-limited, the duration?

(6) the borrower's signature in the presence of a witness?

(7) the name, address and occupation of the witness?

Q34 Do consultees agree that the following changes should be made to the regime for registering a general assignment of book debts at the High Court:

(1) the need for an affidavit should be abolished?

(2) documents should be submitted by email?

(3) the general assignment should be validly registered from the date and time of the automatic reply to the email?

(4) the seven clear day time limit for registration should be abolished?

(5) registration should be renewed every 10 years?

We welcome other comments on the way that general assignments of book debts are registered at the High Court.

CHAPTER 14: ABSOLUTE BILLS OF SALE

Q35 Do consultees agree that:

(1) the requirement to register absolute bills should be abolished?

(2) there is no need to continue to regulate the use of absolute bills?

CHAPTER 15: ASSESSING THE IMPACT OF REFORM

Q36 We welcome evidence on the current cost of registering a logbook loan at the High Court. We seek views on our estimate that the cost of registering a logbook loan at the High Court is between £35 and £51.

Q37 We welcome evidence on the savings to the logbook loan industry if the requirement to register logbook loans at the High Court is abolished. Do consultees agree that abolishing the requirement to register logbook loans at the High Court will save the logbook loan industry between £1.67 million and £2.43 million a year?

Q38 We welcome evidence from logbook lenders as to the percentage of cases in which they repossess from borrowers and how many repossessions currently take place after the one third point at which a court order would become necessary under our proposals.

Q39 We seek views on whether the figures would change if our proposals are implemented. We welcome views on our initial estimate that, if our proposals are implemented, between 0.7% to 1.1% of logbook loans will involve a court order before repossession.

Q40 What are the likely costs of a court order? We seek views on the estimate that the combined cost of the court fee and legal costs would be in the region of £600.

Q41 We welcome evidence from logbook lenders about the costs they would incur in borrowing money from banks and other lenders to finance a period of delay in repayment from borrowers.

Q42 We seek evidence from logbook lenders about:

(1) the amount of money received in settlements from innocent private purchasers; and

(2) the value obtained from vehicles repossessed from innocent private purchasers.

Q43 We welcome views on the costs of achieving readily available vehicle provenance checks for consumers.

Q44 We welcome evidence on the transitional costs to the logbook loan industry of adapting to the new legislation. We seek views on an initial estimate that these costs would be less than £50,000 for each logbook lender.

Q45 We welcome evidence on the number of bills of sale registered at the High Court each year that are secured on goods other than vehicles. We welcome comments on the estimate that 260 of the bills of sale registered at the High Court in 2014 were secured on goods other than vehicles.

Q46 How far might such use of goods mortgages expand if our proposals are implemented? In particular, is there a demand from unincorporated businesses and high net worth individuals to use goods mortgages to secure guarantees, revolving facilities or overdrafts?

Q47 Are we right to think that most loans secured on goods other than vehicles are loans made to unincorporated businesses and high net worth individuals – and that relatively few are regulated credit agreements?

Q48 We welcome evidence on the savings to lenders if our proposals to streamline the High Court registration regime for goods mortgages are implemented. Do consultees agree that the proposals to streamline the High Court registration regime would save between £23.10 and £50 per goods mortgage?

Q49 Do consultees have any evidence of disputes with private purchasers who have bought goods (other than vehicles) subject to a security bill of sale?

Q50 We welcome evidence on the current cost of registering general assignments of book debts at the High Court. We seek views on our estimate that the cost of registering a general assignment at the High Court is between £480 and £1,735 (excluding VAT).

Q51 We seek views on our estimate that our proposals would reduce these costs by between £350 and £575 for each registration. How far would this reduction in costs lead to an increase in registrations of general assignments of book debts?

Q52 Do consultees agree that the only costs to the invoice financing industry of our proposals to simplify the High Court registration regime would be the transitional costs?

Q53 We welcome views on the transitional costs to the invoice financing industry of adapting to the new legislation.

APPENDIX A
BILLS OF SALE ACT 1878

A.1 The original Bills of Sale Act 1878 reads as follows:

Bills of Sale Act, 1878.

[41 & 42 Vict. Ch. 31.]

ARRANGEMENT OF SECTIONS.

A.D. 1878.

[*Public.–31.*] A

CHAPTER 31.

An Act to consolidate and amend the Law for preventing Frauds upon Creditors by secret Bills of Sale of Personal Chattels. [22d July 1878.]

A.D. 1878.

WHEREAS it is expedient to consolidate and amend the law relating to bills of sale of personal chattels:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited for all purposes as the Bills of Sale Act, 1878.

Commencement.

2. This Act shall come into operation on the first day of January one thousand eight hundred and seventy-nine, which day is in this Act referred to as the commencement of this Act.

Application of Act.

3. This Act shall apply to every bill of sale executed on or after the first day of January one thousand eight hundred and seventy-nine (whether the same be absolute, or subject or not subject to any trust) whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale.

Interpretation of terms.

4. In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction; (that is to say,)

The expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be fol-

A.D. 1878.

lowed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehousekeepers certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented:

The expression "personal chattels" shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as herein-after defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale:

Personal chattels shall be deemed to be in the "apparent possession" of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person:

"Prescribed" means prescribed by rules made under the provisions of this Act.

Application of Act to trade machinery.

5. From and after the commencement of this Act trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other

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personal chattels shall be deemed to be a bill of sale within the meaning of this Act.

For the purposes of this Act—

"Trade machinery" means the machinery used in or attached to any factory or workshop;

1st. Exclusive of the fixed motive-powers, such as the water-wheels and steam engines, and the steam-boilers, donkey engines, and other fixed appurtenances of the said motive-powers; and,

2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive-powers to the other machinery, fixed and loose; and,

3rd. Exclusive of the pipes for steam, gas, and water in the factory or workshop.

The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act.

"Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say,

(*a.*) In or incidental to the making any article or part of an article; or

(*b.*) In or incidental to the altering, repairing, ornamenting, finishing, of any article; or

(*c.*) In or incidental to the adapting for sale any article.

Certain instruments giving powers of distress to be subject to this Act.

6. Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress.

Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.

A.D. 1878.

Fixtures or growing crops not to be deemed separately assigned when the land passes by the same instrument.

7. No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.

The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of this Act and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any court, which shall take place or be issued after the commencement of this Act.

Avoidance of unregistered bill of sale in certain cases.

8. Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be).

Avoidance of certain duplicate bills of sale.

9. Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior

unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the court having cognizance of the case that the subsequent bill of sale was bonâ fide given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act.

Mode of registering bills of sale.

10. A bill of sale shall be attested and registered under this Act in the following manner:

(1.) The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor:

(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed:

(3.) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void.

A.D. 1878.

In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

A transfer or assignment of a registered bill of sale need not be registered.

Renewal of registration.

11. The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void.

The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security.

Every such affidavit may be in the form set forth in the Schedule (A.) to this Act annexed.

A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale.

Form of register.

12. The registrar shall keep a book (in this Act called "the register") for the purposes of this Act, and shall, upon the filing of any bill of sale or copy under this Act, enter therein in the form set forth in the second schedule (B.) to this Act annexed, or in any other prescribed form, the name, residence, and occupation of the person by whom the bill was made or given (or in case the same was made or given by any person under or in the execution of process, then the name, residence, and occupation of the person against whom such process was issued, and also the name of the person or persons to whom or in whose favour the bill was given), and the other particulars shown in the said schedule or to be prescribed under this Act, and shall number all such bills registered in each year consecutively, according to the respective dates of their registration.

Upon the registration of any affidavit of renewal the like entry shall be made, with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal.

The registrar shall also keep an index of the names of the grantors of registered bills of sale with reference to entries in the register of the bills of sale given by each such grantor.

Such index shall be arranged in divisions corresponding with the letters of the alphabet, so that all grantors whose surnames begin with the same letter (and no others) shall be comprised in one division, but the arrangement within each such division need not be strictly alphabetical.

The registrar.

13. The masters of the Supreme Court of Judicature attached to the Queen's Bench Division of the High Court of Justice, or such other officers as may for the time being be assigned for this purpose under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, shall be the registrar for the purposes of this Act, and any one of the said masters may perform all or any of the duties of the registrar.

36 & 37 Vict. c. 66.
38 & 39 Vict. c. 77.

Rectification of register.

14. Any judge of the High Court of Justice on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or mis-statement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct.

Entry of satisfaction.

15. Subject to and in accordance with any rules to be made under and for the purposes of this Act, the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale, upon the prescribed evidence being given that the debt (if any) for which such bill of sale was made or given has been satisfied or discharged.

Copies may be taken, &c.

16. Any person shall be entitled to have an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, if any, or registered affidavit of renewal, upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice, and any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all courts and before all arbitrators or other persons, be admitted as primâ facie evidence thereof, and of the fact and date of registration as shown thereon. Any person shall be entitled at all reasonable times to search the register and every registered bill of sale, upon payment of one shilling for every copy of a bill of sale inspected; such payment shall be made by a judicature stamp.

Affidavits.

17. Every affidavit required by or for the purposes of this Act may be sworn before a master of any division of the High Court of

A.D. 1878.

Justice, or before any commissioner empowered to take affidavits in the Supreme Court of Judicature.

Whoever wilfully makes or uses any false affidavit for the purposes of this Act shall be deemed guilty of wilful and corrupt perjury.

Fees.

18. There shall be paid and received in common law stamps the following fees, viz.:

On filing a bill of sale - - - -	2*s.*
On filing the affidavit of execution of a bill of sale -	2*s.*
On the affidavit used for the purpose of re-registering a bill of sale (to include the fee for filing) - -	5*s.*

Collection of fees under 38 & 39 Vict. c. 77. s. 26.

19. Section twenty-six of the Supreme Court of Judicature Act, 1875, and any enactments for the time being in force amending or substituted for that section, shall apply to fees under this Act, and an order under that section may, if need be, be made in relation to such fees accordingly.

Order and disposition.

20. Chattels comprised in a bill of sale which has been and continues to be duly registered under this Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869.

32 & 33 Vict. c. 71.

Rules.

21. Rules for the purposes of this Act may be made and altered from time to time by the like persons and in the like manner in which rules and regulations may be made under and for the purposes of the Supreme Court of Judicature Acts, 1873 and 1875.

36 & 37 Vict. c. 66.
38 & 39 Vict. c. 77.

Time for registration.

22. When the time for registering a bill of sale expires on a Sunday, or other day on which the registrar's office is closed, the registration shall be valid if made on the next following day on which the office is open.

Repeal of Acts.

23. From and after the commencement of this Act, the Bills of Sale Act, 1854, and the Bills of Sale Act, 1866, shall be repealed: Provided that (except as is herein expressly mentioned with respect to construction and with respect to renewal of registration) nothing in this Act shall affect any bill of sale executed before the commencement of this Act, and as regards bills of sale so executed the Acts hereby repealed shall continue in force.

17 & 18 Vict. c. 36.
29 & 30 Vict. c. 96.

Any renewal after the commencement of this Act of the registration of a bill of sale executed before the commencement of this Act, and registered under the Acts hereby repealed, shall be made under this Act in the same manner as the renewal of a registration made under this Act.

Extent of Act.

24. This Act shall not extend to Scotland or to Ireland.

SCHEDULES.

A.D. 1878.

SCHEDULE A.

Section 11.

I [*A.B.*] of do swear that a bill of sale, bearing date the day of 18 [*insert the date of the bill*], and made between [*insert the names and descriptions of the parties in the original bill of sale*], and which said bill of sale [*or*, and a copy of which said bill of sale, *as the case may be*] was registered on the day of 18 [*insert date of registration*], is still a subsisting security.

Sworn, *&c.*

SCHEDULE B.

Section 12.

Satisfaction entered.	No.	By whom given (or against whom process issued).			To whom given.	Nature of instrument.	Date.	Date of registration.	Date of registration of affidavit of renewal.
		Name.	Residence.	Occupation.					

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APPENDIX B
BILLS OF SALE AMENDMENT ACT 1882

B.1 The original Bills of Sale Amendment Act 1882 reads as follows:[1]

Bills of Sale Act (1878) Amendment Act, 1882.

[45 & 46 VICT. CH. 43.]

ARRANGEMENT OF SECTIONS. A.D. 1882.

[*Public.–43.*] A i

[1] Its full title is the Bills of Sale Act (1878) Amendment Act 1882. The schedule to the Act follows in Appendix C.

CHAPTER 43.

An Act to amend the Bills of Sale Act, 1878. A.D. 1882.

[18th August 1882.]

WHEREAS it is expedient to amend the Bills of Sale Act, 1878: 41 & 42 Vict. c. 31.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as the Bills of Sale Act (1878) Amendment Act, 1882; and this Act and the Bills of Sale Act, 1878, may be cited together as the Bills of Sale Acts, 1878 and 1882. Short title.

2. This Act shall come into operation on the first day of November one thousand eight hundred and eighty-two, which date is herein-after referred to as the commencement of this Act. Commencement of Act.

3. The Bills of Sale Act, 1878, is herein-after referred to as "the principal Act," and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act; but unless the context otherwise requires shall not apply to any bill of sale duly registered before the commencement of this Act so long as the registration thereof is not avoided by non-renewal or otherwise. Construction of Act. 41 & 42 Vict. c. 31.

The expression "bill of sale," and other expressions in this Act, have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in section four of the principal Act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply.

4. Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as herein- Bill of sale to have schedule of property

attached thereto.

after mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described.

Bill of sale not to affect after acquired property.

5. Save as herein-after mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale.

Exception as to certain things.

6. Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things; (that is to say),

(1.) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

(2.) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale.

Bill of sale with power to seize except in certain events to be void.

7. Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

(2.) If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes;

(3.) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

(4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

(5.) If execution shall have been levied against the goods of the grantor under any judgment at law:

Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.

Bill of sale to be void unless attested and registered.

8. Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

Form of bill of sale.

9. A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed.

Attestation.

10. The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of section ten of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed.

Local registration of contents of bills of sale.

11. Where the affidavit (which under section ten of the principal Act is required to accompany a bill of sale when presented for registration) describes the residence of the person making or giving the same or of the person against whom the process is issued to be in some place outside the London bankruptcy district as defined by the Bankruptcy Act, 1869, or where the bill of sale describes the chattels enumerated therein as being in some place outside the said London bankruptcy district, the registrar under the principal Act shall forthwith and within three clear days after registration in the principal registry, and in accordance with the prescribed directions, transmit an abstract in the prescribed form of the contents of such bill of sale to the county court registrar in whose district such places are situate, and if such places are in the districts of different registrars to each such registrar.

32 & 33 Vict. c. 71. s. 60.

A.D. 1882.

Every abstract so transmitted shall be filed, kept, and indexed by the registrar of the county court in the prescribed manner, and any person may search, inspect, make extracts from, and obtain copies of the abstract so registered in the like manner and upon the like terms as to payment or otherwise as near as may be as in the case of bills of sale registered by the registrar under the principal Act.

Bill of sale under 30*l.* to be void.

12. Every bill of sale made or given in consideration of any sum under thirty pounds shall be void.

Chattels not to be removed or sold.

13. All personal chattels seized or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of.

Bill of sale not to protect chattels against poor and parochial rates.

14. A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates.

Repeal of part of Bills of Sale Act, 1878.

15. The eighth and the twentieth sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act.

Inspection of registered bills of sale.

16. So much of the sixteenth section of the principal Act as enacts that any person shall be entitled at all reasonable times to search the register and every registered bill of sale upon payment of one shilling for every copy of a bill of sale inspected is hereby repealed, and from and after the commencement of this Act any person shall be entitled at all reasonable times to search the register, on payment of a fee of one shilling, or such other fee as may be prescribed, and subject to such regulations as may be prescribed, and shall be entitled at all reasonable times to inspect, examine, and make extracts from any and every registered bill of sale without being required to make a written application, or to specify any particulars in reference thereto, upon payment of one shilling for each bill of sale inspected, and such payment shall be made by a judicature stamp: Provided that the said extracts shall be limited to the dates of execution, registration,

renewal of registration, and satisfaction, to the names, addresses, and occupations of the parties, to the amount of the consideration, and to any further prescribed particulars.

Debentures to which Act not to apply.

17. Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company.

Extent of Act.

18. This Act shall not extend to Scotland or Ireland.

APPENDIX C
CURRENT STANDARD FORM OF A SECURITY BILL

C.1 The current standard form of a security bill set out in the schedule to the 1882 Act reads as follows:

SCHEDULE.

FORM OF BILL OF SALE.

This Indenture made the day of , between *A.B.* of of the one part, and *C.D.* of of the other part, witnesseth that in consideration of the sum of £ now paid to *A.B.* by *C.D.*, the receipt of which the said *A.B.* hereby acknowledges [*or whatever else the consideration may be*], he the said *A.B.* doth hereby assign unto *C.D.*, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said *A.B.* doth further agree and declare that he will duly pay to the said *C.D.* the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said *A.B.* doth also agree with the said *C.D.* that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *C.D.* for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said *A.B.* in the presence of me *E.F.* [*add witness' name, address, and description*].

APPENDIX D
FLOATING CHARGES FOR UNINCORPORATED BUSINESSES

INTRODUCTION

D.1 In Chapter 6 of this consultation paper, we drew attention to the fact that one effect of the Bills of Sale Acts is to prevent unincorporated businesses from granting floating charges. In this appendix, we discuss in further detail why the introduction of floating charges for unincorporated businesses would be a major undertaking. We have therefore reached the view that it would require a separate project.

FLOATING CHARGES AND CONSUMERS

D.2 There is general consensus that consumers should not be able to grant floating charges because they are unlikely to understand the full consequences of such a transaction. Our final report on company security interests (the 2005 Report), when discussing the Bills of Sale Acts, noted:

> the requirement that all the consumer's property be listed in the documents prevents consumers from… creating a floating charge over their goods. In the CP we said that we thought these were important elements of consumer protection that should be maintained. Consultees agreed.[1]

FLOATING CHARGES FOR UNINCORPORATED BUSINESSES

D.3 By contrast, arguments have been put forward that, if incorporated businesses can give floating charges, this possibility should also be open to unincorporated businesses. For many businesses, their main asset is stock, which is bought and sold in the ordinary course of business. Such businesses would find it easier to borrow money if they could use their stock as security. Incorporated businesses routinely do this, and it has been argued that businesses should not be forced to incorporate simply to be able to borrow the money they need.[2]

D.4 The Law Commission has previously consulted twice on whether unincorporated businesses should be able to grant floating charges. The first time was in 2000 as part of the partnership law project, conducted jointly with the Scottish Law Commission.[3] The second time was in 2002 as part of the company security interests project.[4]

1 Company Security Interests (2005) Law Com No 296, pp 15 to 16, para 1.50. See also A Diamond, *A Review of Security Interests in Property* (1989) pp 85 to 86, para 16.15 and the Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558.

2 "The law of security should be neutral as between business forms" (Registration of Security Interests: Company Charges and Property other than Land (2002) Law Commission Consultation Paper No 164, p 224, para 9.13).

3 Partnership Law (2000) Law Commission Consultation Paper No 159.

4 Registration of Security Interests: Company Charges and Property other than Land (2002) Law Commission Consultation Paper No 164.

D.5 A majority of responses to both consultations supported allowing unincorporated businesses to grant floating charges. Arguments in favour of allowing unincorporated businesses to grant floating charges have also been put forward by academics.[5] However, there was not an overwhelming demand for the change. Our 2005 Report did not recommend reform in this area.[6]

D.6 Floating charges are an extremely effective form of security, which have an impact on all of the business's creditors. We think that any reform in this area would need to proceed with caution. Below we list some of the issues which would need to be considered.

ISSUES TO CONSIDER

Protecting vulnerable sole traders

D.7 The distinction between consumers and sole traders is not hard and fast. Many sole traders are as vulnerable as consumers, with limited access to legal or financial advice. Where a hobbyist makes crafts and sells them at fairs, it is difficult to say whether that hobbyist is a sole trader – and so an unincorporated business – or a consumer. There has been difficulty in other areas of law that seek to make a distinction between unincorporated businesses and consumers.[7]

Distinguishing between business assets and personal assets

D.8 The Cork committee concluded that it would be justifiable to allow unincorporated businesses to grant floating charges provided that the floating charge only extends to assets used for business purposes.[8] However, it may be difficult to identify these assets. For example, we learnt from logbook lenders that a typical scenario might be for a sole trader to take out a logbook loan for business purposes, but to grant security over a vehicle that is for personal use as well.

Reviewing insolvency law

D.9 The laws of personal bankruptcy and partnership insolvency would need detailed review to determine matters of priority between competing security interests. This was one of the reasons for rejecting floating charges for unincorporated businesses in the 2005 Report:

> If the procedure for insolvent partnerships is to recognise the rights of floating charge-holders, it will require significant reform.[9]

Partnership law

D.10 The greatest demand for floating charges would probably be from general partnerships. However, as we noted in the 2005 Report:

5 H Beale, M Bridge, L Gullifer and E Lomnicka, *The Law of Security and Title-Based Financing* (2nd ed, 2012), pp 769 to 770, para 23.73.

6 Company Security Interests (2005) Law Com No 296.

7 We have seen that the consumer credit regime is complicated in this regard.

8 Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558.

9 Company Security Interests (2005) Law Com No 296, p 17, para 1.56

> It is difficult to reconcile the idea of a partnership granting a charge with the current legal position under which partnerships do not have legal personality.[10]

D.11 At present, in English law, a general partnership is simply a collection of individuals, not a legal entity in its own right. This makes registration of security interests difficult. As we have seen, where a general partnership makes a general assignment of book debts, the assignment must be re-registered whenever the individual partners change, significantly adding to costs.

D.12 In 2003, the Law Commission and Scottish Law Commission recommended that general partnerships should have legal personality.[11] However, in 2006, the Government rejected this recommendation. We do not think that it would be possible to consider allowing general partnerships to grant floating charges without re-opening this contentious area.

The need for an electronic register of floating charges

D.13 We think that floating charges granted by unincorporated businesses would need to be registered in an effective electronic register that would put third parties on notice. This raises difficult practical issues about how to identify an unincorporated business, especially when business names, personal names and addresses are all liable to change. We noted in the 2005 Report that:

> In the absence of an existing register of unincorporated businesses, it may be difficult to identify the debtor, whether the debtor is a sole trader or partnership.[12]

D.14 One possibility might be to identify each unincorporated business by its VAT number, though not all businesses are registered for VAT, and there are always difficulties in using a system designed for one purpose for an entirely different purpose. This issue would need considerable thought.

CONCLUSION

D.15 The main impetus for this project is to reform the law relating to logbook loans. As we have argued in this consultation paper, we think that this need is urgent. Reform would be significantly delayed if we were to attempt to consider floating charges for unincorporated businesses as part of this project.

D.16 When we consult on our next programme of work in 2017, we would welcome suggestions for new projects, including a project on floating charges for unincorporated businesses.

[10] Company Security Interests (2005) Law Com No 296, p 17, para 1.56.

[11] Partnership Law (2003) Law Com No 283, p 304, para 20.12.

[12] Company Security Interests (2005) Law Com No 296, p 17, para 1.56.

APPENDIX E
STRUCTURE OF PROPOSED NEW LEGISLATION

E.1 The table below summarises the structure of the proposed new legislation to regulate goods mortgages.

	Security bills		Absolute bills	General assignments of book debts
	Credit agreement regulated by the CCA 1974	Credit agreement not regulated by the CCA 1974		
Regulated by proposed new legislation	✓	✓	×	✓ in respect of registration only
Renamed under new legislation	✓ as a "goods mortgage" and, where the goods mortgage is secured on a vehicle registered with the DVLA, a "vehicle mortgage"			
Separate goods mortgage document physically signed by both parties	✓	✓		
Goods mortgage document to contain standard prominent statements	✓	×		
Registration establishes validity of security against third parties	✓	✓		
Lender must obtain a court order to repossess the goods on default if the borrower has repaid one third of the total loan amount	✓	×		
Borrower has right of voluntary termination	✓	×		
Private purchasers protected in certain defined circumstances	✓	✓		

APPENDIX F
PEOPLE AND ORGANISATIONS WHO RESPONDED TO OUR CALL FOR EVIDENCE

F.1 In October 2014, we issued a call for evidence to collect information about how the Bills of Sale Acts are used and how far it meets the needs of users and third parties. We extend our thanks to the following people for the information they provided.

Asset Based Finance Association

Barclays Sales Finance

Berwin Leighton Paisner LLP

Chartered Trading Standards Institute

Citizens Advice

CLS Finance

Consumer Credit Trade Association

Institute of Credit Management

Loans 2 Go

Professor Iain Ramsay

Philip Rossiter

Professor Duncan Sheehan

StepChange

APPENDIX G
PEOPLE AND ORGANISATIONS WE HAVE TALKED TO

G.1 Between September 2014 and July 2015, the Law Commission met or otherwise corresponded with the following people and organisations with respect to the bills of sale project. We are extremely grateful for their time and for the information they provided.

Accept Car Credit

Arkle Finance

Asset Based Finance Association

Automoney

Professor Hugh Beale

Billing Finance

Blake Morgan LLP

Chartered Trading Standards Institute

Cheshire Datasystems Limited

Citizens Advice

Citizens Advice Cymru

Civil Enforcement Association

CLS Finance

Consumer Credit Trade Association

Department for Business, Innovation and Skills

Dunraven Finance (trading as Buy As You View)

Experian

Financial Conduct Authority

Financial Ombudsman Service

Guardian Finance

Professor Louise Gullifer

Her Majesty's Courts and Tribunals Service

Her Majesty's Treasury

Gregory Hill

HPI

Jersey Financial Services Commission

Lloyds Commercial Finance

Loans 2 Go (now merged with Logbook Loans)

Logbook Loans (now merged with Loans 2 Go)

Dr Graham McBain

Mobile Money

Money Advice Trust and National Debtline

Pounds TV

Registrars and employees of the High Court

Scottish Law Commission

Sinclair Finance and Leasing

StepChange

The Car Finance Company

Dr Sean Thomas

Which?

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