Law Commission

Reforming the law

Bills of Sale

Law Com No 369

The Law Commission

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BILLS OF SALE

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THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 22 July 2016.

The text of this report is available on the Law Commission's website at http://www.lawcom.gov.uk/project/bills-of-sale/.

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, such as a solicitor
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 converted into money and distributed among their creditors to satisfy debts
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 type of security interest over goods. When a person (A) charges their goods to a lender, A retains ownership and possession of the goods, but grants the lender the right to have the proceeds of sale of the goods to repay the loan. Goods can be subject to multiple charges granted to different lenders
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. Consideration does not need to be monetary and can take any form
Constructive notice	A legal presumption that a person has knowledge of facts if that person can discover those facts by due diligence or inquiry into public records
Creditor (or lender)	A person to whom another person owes money or its equivalent

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
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 attaches to 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, such as by way of sale
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 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 uses this to recoup the money that it advanced plus charges. The surplus is returned to the business
Security bill of sale	A bill of sale granted to secure the repayment of a loan
Sub-prime	Credit or loans for borrowers with a poor credit history, typically with unfavourable conditions such as high interest rates
Trustee in bankruptcy	A person that takes control of an insolvent person's assets in order to sell them and share the proceeds of sale 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
CLLS	City of London Law Society
CONC	FCA's rulebook dealing with consumer credit
DVLA	Driver and Vehicle Licensing Agency
FCA	Financial Conduct Authority
FOS	Financial Ombudsman Service
FSB	Federation of Small Businesses
HCSTC	High-cost short-term credit
OFT	Office of Fair Trading
STR	Secured Transactions Law Reform Project. The aim of the STR is to examine the English law relating to secured transactions and to consider the need and shape of future reform

THE LAW COMMISSION

BILLS OF SALE

To the Right Honourable Elizabeth Truss MP, Lord Chancellor and Secretary of State for Justice

CHAPTER 1
INTRODUCTION

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 Concern about the way in which bills of sale were used by money lenders in the nineteenth century led to two Victorian statutes: the Bills of Sale Act 1878 and the Bills of Sale Amendment Act 1882.[1] These pieces of legislation have been criticised for over a hundred years, but they continue to be in force.

1.3 In this report we recommend that the Bills of Sale Acts should be repealed and replaced with modern legislation that imposes fewer burdens on lenders and provides more protection to borrowers.

BILLS OF SALE IN THE TWENTY-FIRST CENTURY

Logbook loans

1.4 For much of the twentieth century, bills of sale were hardly used. However, they have now 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.

1.5 The legal effect is produced by a document called a "bill of sale" which must meet the complex requirements of the 1882 Act.[2] The logbook lender must then register the bill of sale at the High Court, in accordance with archaic Victorian procedures, at substantial cost in time and money. If the bill of sale does not satisfy the requirements of the 1882 Act, or is not registered at the High Court, there are severe consequences for the logbook lender.[3]

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

[2] Bills of Sale (2015) Law Commission Consultation Paper No 225, Appendix C reproduces the standard form required by the 1882 Act.

[3] See paras 2.16 to 2.20 in Chapter 2.

1.6 Consumer groups have voiced 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 can sometimes be faced with stark and unpalatable 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.

A curb on secured lending to unincorporated businesses

1.7 The second contemporary effect of the Bills of Sale Acts is that they restrict the way in which unincorporated businesses can use goods as security for loans. In our visits to the High Court, we found a few examples where sole traders and partnerships borrowed money on the security of goods, such as hotel furniture. However, the technical requirements of the Bills of Sale Acts have discouraged this form of lending.

1.8 One particular restriction is that bills of sale can only be used to secure loans of a fixed amount. Revolving credit facilities and overdrafts cannot therefore be secured on goods owned by the unincorporated business. The Bills of Sale Acts also prevent partners and company directors who give personal guarantees from securing those guarantees on goods such as artworks or antiques. Reform would open up the market for business loans secured on goods.[4]

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.[5] 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.[6] Accordingly, this is not a joint project with the Scottish Law Commission and we make recommendations for England and Wales only.

[4] The Bills of Sale Acts also inhibit the ability of unincorporated businesses to access the value in their book debts. We discuss this in Chapter 9.

[5] 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.

Our work so far

1.11 On 9 September 2015, we published our consultation paper on bills of sale.[7] The consultation paper set out the problems with the current law and made provisional proposals for reform.

1.12 The consultation period closed on 9 December 2015. We received 38 responses, which can be broken down into the following categories:

Logbook lenders	5
Industry representatives	4
Consumer interests/protection	7
Academics	4
Registries	2
Lawyers	10
Other	6

1.13 A full list of consultees is included in Appendix A. Some responses went into great detail. We are extremely grateful to all those who responded.

1.14 We now make recommendations for reform. We have not been asked to draft a Bill at this stage. However, it is clear from consultees' responses that there is an appetite for reform and a desire that this happens sooner rather than later. We think that that our recommended legislation would be suitable for introduction into Parliament through the special procedure for uncontroversial Law Commission Bills.[8] If this route is chosen, the next step would be for the Law Commission to draft legislation.

A LONG-STANDING PROBLEM

1.15 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:

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

[7] Bills of Sale (2015) Law Commission Consultation Paper No 225.

[8] This is a parliamentary procedure specifically for Law Commission Bills. An explanation of the procedure can be found in Commons Briefing Note SN/PC/7156, available at: http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07156.

> 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.[9]

1.16 In the past 50 years, the Bills of Sale Acts have been examined four times. Each review made major criticisms of them, but failed to effect reform.

Earlier reviews

1.17 In 1971 and 1986, two major reviews on credit law commissioned by the Governments at the time 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.[10]

1.18 In 1986, the Diamond report concluded:

> The time has come to repeal the Bills of Sale Acts.[11]

1.19 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. However, our final report on registration of security interests was confined to those granted by companies.[12]

Consultation on logbook loans in 2009

1.20 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.[13]

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

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

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

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

12 In the report, we argued that there is almost certainly a case for replacing the Bills of Sale Acts but that more time was needed to look in detail at this issue with a focus on consumer credit law. See Company Security Interests (2005) Law Com No 296, p 16, para 1.53.

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

> 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.[14]

1.22 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.[15]

1.23 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".[16] Nor did BIS propose 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.[17]

1.24 Instead, BIS saw a voluntary code of practice as the solution.[18] This led to the introduction of the Consumer Credit Trade Association (CCTA) code of practice for logbook lenders (the CCTA Code).

THE USES MADE OF BILLS OF SALE

1.25 The use of bills of sale has grown dramatically this century, from 2,840 in 2001 to 52,580 in 2014. As we discuss below, the vast majority of bills of sale are used for logbook loans though a few are used to secure loans on other goods, such as wine or artworks. In addition, the High Court registers general assignments of book debts made by unincorporated businesses "as if they were" bills of sale.[19]

[14] Above, p 6, para 1.

[15] BIS, *A better deal for consumers: consultation on proposals to ban the use of bills of sale for consumer lending* (2009), p 7, para 5.

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

[17] Above, p 11, para 41.

[18] Above, p 11, para 37.

[19] Insolvency Act 1986, s 344.

1.26 The following table shows the number of bills of sale and general assignments of book debts registered in 2014. For the purposes of this project, we looked through a sample of registered bills of sale to estimate how many were registered against vehicles and how many against other goods.[20]

Table 1.1 Bills of sale and general assignments of book debts registered in 2014

Bills of sale registered against vehicles	52,223
Bills of sale registered against other goods (estimate)	260
General assignments of book debts	97
Total	**52,580**

Logbook loans

1.27 Logbook loans account for the vast majority of bills of sale. Most of these loans are secured against a vehicle which the borrower already owns. In a few cases bills of sale may be used to buy second hand vehicles, as a direct alternative to hire purchase. This evades the protections available to hirers in hire purchase law.

Loans secured on other goods

1.28 In our 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.[21]

1.29 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. The High Court register does not record the purpose of the loan, but some were clearly made for business purposes.[22]

1.30 A High Court Master told us that 20 years ago, it was more common for bills of sale to be granted over the contents of public houses. We have also heard of bills of sale granted over musical instruments.

[20] 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.

[21] This estimate is based on our two samples of bills of sale registered in 2014.

[22] We make this inference from the loan amount, interest rate, type of goods and nature of the borrower.

General assignments of book debts

1.31 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 Bills of Sale Act 1878. Otherwise it is ineffective against a trustee in bankruptcy.[23]

1.32 We consider this issue in detail in Chapter 9.

Absolute bills

1.33 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".[24]

1.34 During the course of this project, we found no evidence that any absolute bills have been registered at the High Court in recent years. In Chapter 10, we recommend that absolute bills should no longer be regulated.

PROBLEMS WITH THE CURRENT LAW

Undue complexity

1.35 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 documentary requirements it sets out. In his response to the consultation paper, Guy Skipwith, a consumer adviser, wrote:

> I believe that the current law (the Bills of Sale Acts) is outdated, extremely complex, written in archaic language and impenetrable.

1.36 In our consultation paper we proposed that the law of bills of sale should be reformed. 29 (85%) out of 34 consultees agreed.

Technical document requirements

1.37 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 confuse the borrower than to warn them about the consequences of a bill of sale.

1.38 In our consultation paper we proposed to simplify the document requirements so that it is easier for lenders to comply with the legislation; unincorporated businesses have more borrowing options; and consumers have more clarity. 20 (77%) out of 26 consultees agreed with the contents of our simplified documentation.

[23] Insolvency Act 1986, s 344.

[24] We discuss absolute bills in further detail in Chapter 10.

The registration regime is in need of modernisation

1.39 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.

1.40 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.

1.41 In our consultation paper we proposed that logbook loans should no longer be registered at the High Court. 21 (91%) out of 23 consultees agreed.

The current law offers little protection to borrowers

1.42 Logbook loans are subject not only to the Bills of Sale Acts, but also to consumer credit law, Financial Conduct Authority 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.[25]

1.43 Under hire purchase law, hirers in default have some protection against repossession of goods.[26] Where the hirer has paid at least 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.

1.44 A broad range of consultees agreed that borrowers who have evidenced an intention to repay should have the right to court protection before facing repossession. In addition to consumer groups, industry representatives such as the Federation of Small Businesses, the Retail Motor Industry Federation and some logbook lenders were also supportive.

The current law offers no protection to purchasers

1.45 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.

1.46 Again, this contrasts with hire purchase law.[27] 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.[28] Similar provisions do not apply to bills of sale.

[25] 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.

[26] This protection also applies to conditional sale.

[27] This protection also applies to a purchaser who buys goods subject to a conditional sale agreement.

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

1.47 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.[29]

1.48 Three logbook lenders, AutoMoney, Mobile Money and DTW Associates Limited, agreed with our proposal to extend the protection given to purchasers in hire purchase law to bills of sale. There was also support from consumer groups and academics.

THE STRUCTURE OF THIS REPORT

1.49 This report is divided into 11 further chapters.

1.50 Chapter 2 provides a brief introduction to the current law. Readers who wish to know more are referred to the consultation paper.[30] Chapter 3 sets out the case for reform, discussing why bills of sale should not be "banned" and the law reformed instead.

1.51 The following seven chapters discuss consultees' responses to the proposals in the consultation paper and our final recommendations for reform:

(1) Chapter 4 considers the scope of the legislative regime that should replace the Bills of Sale Acts;

(2) Chapter 5 sets out how the document requirements should be simplified;

(3) Chapter 6 looks at how the registration regime should be modernised;

(4) Chapter 7 discusses what protections should be introduced to protect borrowers with regulated credit agreements such as logbook loans;[31]

(5) Chapter 8 looks at how purchasers should be protected;

(6) Chapter 9 considers how the recommendations to reform the law of bills of sale impact on the growing industry of invoice financing; and

(7) Chapter 10 looks at absolute bills of sale.

1.52 We consider the impact of our recommendations in Chapter 11. Finally, Chapter 12 lists our recommendations for reform.

[29] 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 losses from the borrower, the borrower will normally be untraceable or else unable to compensate the purchaser.

[30] Bills of Sale (2015) Law Commission Consultation Paper No 225, Chapters 3 and 4.

[31] For further detail on the concept of a "regulated credit agreement", see paras 2.41 to 2.43.

THANKS AND ACKNOWLEDGEMENTS

1.53 Throughout this project, we have been greatly assisted by consumer groups, lenders, registries, regulators and academics with an interest in logbook loans or secured transactions more generally. We are extremely grateful for their invaluable advice.

1.54 We offer our warm thanks to the members of our advisory group from whom we have received very valuable help throughout the course of this project. We have benefited greatly from their expertise and advice. The members are: Sue Edwards and Michael Kelly representing Citizens Advice, Senior Master Fontaine and Master Leslie representing the High Court registry, Roger Gewolb representing the Campaign for Fair Finance, Graham Haxton-Bernard representing the CCTA, Jeff Longhurst representing the Asset Based Finance Association (ABFA), John McCloskey representing AutoMoney, Duncan Sheehan of the University of Leeds, Barry Shorto representing HPI, Guy Skipwith, previously of Citizens Advice, and Peter Tutton and Laura Rodrigues representing StepChange.

1.55 We thank those organisations that have so generously hosted events which enabled us to present our proposals for discussion and feedback. These are the CCTA who in October 2015 organised a seminar for logbook lenders; and ABFA who in October 2015 gave us the opportunity to speak at its Joint Forum.

CHAPTER 2
THE CURRENT LAW

2.1 A bill of sale is a document by which a person transfers ownership of goods to another while nevertheless retaining possession of the goods. Most often, bills of sale are used as security for loans. They 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 consumers and unincorporated businesses.

2.2 Bills of sale that are used as security for loans are known as "security bills". In the twenty-first century, security bills are overwhelmingly used in the form of "logbook loans". Borrowers transfer ownership of their existing vehicle to the logbook lender while continuing to use it. When the logbook loan is repaid, the borrower regains ownership of the vehicle.

2.3 Bills of sale used for purposes other than borrowing money are known as "absolute bills". Like a security bill, an absolute bill allows a person to transfer ownership of goods to someone else while retaining possession of the goods. The distinction is that absolute bills are not used to secure loans. Whatever use has been made of absolute bills over the years, they appear to be extremely rare in modern times.[2]

2.4 In this chapter, we first give a brief overview of the evolution of the legislation regulating bills of sale. We then consider five key problems with the legislation and the impact of those problems on logbook loans.

2.5 Finally, we discuss the impact of modern consumer credit regulation on bills of sale. Providing consumer credit is a highly regulated activity. Despite there being a considerable volume of regulation, it often does not go far enough to protect borrowers and those who innocently buy goods subject to a bill of sale.[3]

[1] Hire purchase is, strictly, not a form of security but a functional equivalent.

[2] See Chapter 10, paras 10.9 to 10.10.

[3] For a more detailed discussion of the current law and the problems it poses, see Bills of Sale (2015) Law Commission Consultation Paper No 225.

EVOLUTION OF THE BILLS OF SALE ACTS

2.6 The Victorians introduced two pieces of legislation to regulate the use of bills of sale: the Bills of Sale Act 1878 and the Bills of Sale Amendment Act 1882.[4] We refer to these as the 1878 Act and the 1882 Act respectively. The Bills of Sale Acts have been criticised almost since their enactment, but they remain in force.[5]

2.7 While bills of sale had existed at common law since at least the Middle Ages, they became much more widely used in the Victorian era. As the general population began to own more personal goods, it became common to see lenders extending credit on the security of small personal items. 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 borrower still owned the goods.

2.8 The 1878 Act was introduced to prevent fraud on potential purchasers and potential lenders. It requires the registration of bills of sale at the High Court so that interested parties can check whether goods are already subject to a bill of sale.

2.9 The 1878 Act led to a rise in the use of security bills. It became a concern that borrowers were being coerced into granting security bills the effect of which they did not understand. The 1882 Act regulates only security bills and was introduced in response to this emerging need for consumer protection.

PROBLEMS WITH THE BILLS OF SALE ACTS

2.10 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. Absolute bills are governed only by the 1878 Act.

2.11 As we discuss below, the Bills of Sale Acts suffer from five key defects:

(1) they are unduly complex;

(2) they require highly technical documentation;

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

(4) they offer little protection to borrowers; and

(5) they offer no protection to purchasers.

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

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

Undue complexity

2.12 The Bills of Sale Acts are particularly opaque pieces of Victorian legislation. The 1878 Act contains lengthy and convoluted definitions for both "bill of sale" and "personal chattels".[6] Both these phrases and their definitions are more likely to confuse rather than enlighten modern readers.

Exclusions

2.13 Section 4 of the 1878 Act specifically excludes certain documents from the definition of "bill of sale". Transactions in the ordinary course of business, transfers of ships and aircraft and agricultural charges all fall outside the scope of the Bills of Sale Acts.[7]

2.14 The definition of "personal chattels" excludes land, stocks and shares, intellectual property and other "choses in action", which are not tangible goods.[8]

2.15 These are important exclusions from the scope of the Bills of Sale Acts. The complex and archaic language of the legislation fails to make them readily apparent.

Technical document requirements

2.16 The Bills of Sale Acts require both absolute bills and security bills to contain certain information. We refer to this prescribed information as the "document requirements".

2.17 The document requirements for security bills are particularly onerous. All security bills must be made in accordance with a standard form set out in a schedule to the 1882 Act.[9]

2.18 The standard form is archaic, and is more likely to confuse borrowers than to inform them. Research by the Financial Conduct Authority (FCA) found that borrowers did not examine the detail of logbook loan paperwork, which consists of "complex, lengthy documents, often not written in 'plain English'".[10]

2.19 The 1882 Act sets out no fewer than 12 separate document requirements for security bills. Many no longer serve a useful purpose. For example:

6 1878 Act, s 4. Bills of sale can only be granted over "personal chattels" as defined in the 1878 Act. The complex definition broadly captures tangible moveable goods.

7 Aircraft mortgages created after 1 October 1972 are excluded by article 16 of the Mortgaging of Aircraft Order 1972 SI 1972 No 1268. See paras 4.34 to 4.38 in Chapter 4 for further discussion of ships, aircraft and agricultural charges.

8 Individuals may use land, shares or intellectual property as security, but these arrangements fall outside the scope of the Bills of Sale Acts and this project.

9 1882 Act, s 9.

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

(1) the loan amount must be at least £30.[11] This threshold has now been rendered meaningless by inflation;[12] and

(2) the document must contain a statement of the loan amount, the rate of interest and the repayment instalments, including the date by which repayment is to be made. This information would usually already be included in a separate credit agreement.

2.20 For lenders, failure to comply with the document requirements carries a harsh sanction: the security bill is completely void against all third parties and the borrower. The lender not only loses any right to the goods, but also the right to sue the borrower for repayment of the loan.[13] This extremely severe sanction appears disproportionate given how difficult compliance is. In one recent case, even a solicitor fell foul of the standard form.[14]

The effect on unincorporated businesses

2.21 The document requirements also pose problems 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, such as a revolving credit facility or an overdraft. In both a revolving credit facility and an overdraft, the unincorporated business has the flexibility to decide when it wants to draw on the loan and in what amounts, up to the prescribed limit. An overdraft also does not need to be repaid at a specified time and in specified instalments. For these flexible loan facilities, it is not possible to state the amount of the loan and the date of repayment as required by the standard form for a security bill. The practical effect for unincorporated businesses is that it is not possible to use a security bill to secure revolving credit facilities or overdrafts.

2.22 Where a small business takes out a loan, a common practice is for a director to promise, or guarantee, to repay the loan if the business fails to do so. 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. As the director may never need to repay the loan if the business does not default, this arrangement is incompatible with the requirement that the bill of sale must include the date of repayment.

[11] 1882 Act, s 12.

[12] If this had kept pace with inflation since 1882, the minimum loan amount would now be over £3,000. In our survey of bills of sale registered at the High Court in 2014, the loan amounts ranged from £100 to £3,500, with a mean of £844.

[13] 1882 Act, s 9. See also *Davies v Rees* (1886) 17 QBD 408 which confirms that when the standard form is breached then the entire security bill, including repayment provisions, is void.

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

2.23 The legislation also in effect prevents unincorporated businesses from using future goods as security.[15] Unlike their incorporated counterparts, unincorporated businesses are unable to grant floating charges. We consider this further in Chapter 4.

The registration regime is in need of modernisation

2.24 Registration was introduced by the Bills of Sale Acts to enable third parties to check if the goods they are about to deal with are already subject to a bill of sale. If a security bill is not registered, the security is void against third parties and the borrower.

2.25 The Bills of Sale Acts require all bills of sale to be registered at the High Court. However, the High Court registration regime is seriously out-of-date and in urgent need of modernisation.

2.26 Once a logbook loan has been concluded, the signed security bill must be sent to the High Court, together with: a copy; a £25 fee; and a sworn affidavit from the witness to the signature of the security bill. In practice, the witness is usually an agent or employee of the logbook lender who visits a solicitor to swear the affidavit. The agent or employee then posts the documents by special delivery to the High Court.

2.27 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 on to a spreadsheet (including the name and postcode of the borrower). The copy is then put into a box, in number order.

2.28 The High Court must receive and stamp the security bill within seven days of the date of signature.[16] This short period may be difficult to meet. If the seven day period is missed, the logbook lender may apply for late registration, which costs an additional £50.

2.29 The High Court registration regime is now unfit for purpose, for seven reasons:

(1) **Cost:** the cost of registering a logbook loan at the High Court is between £35 and £51.[17] Even if this cost is initially met by the logbook lender, it is still borrowers who bear the cost in the end.

(2) **Seven day time limit:** this is particularly a problem over Christmas, when the post is delayed and the High Court registry is closed. Where the time limit is missed, the logbook lender must make an application before a Master of the High Court to allow registration out of time. Such applications are generally granted, but take court time and cost logbook lenders an additional £50 each.

[15] 1882 Act, s 5.

[16] The legislation refers to "seven clear days". This means that the security bill must be stamped by the seventh day after the date of signature (eg, if signature was on 1 September, registration must take place on 8 September).

[17] See table 11.1 in Chapter 11.

(3) **Priority between competing security bills:** it is possible for a fraudulent borrower to grant two or more logbook loans over the same vehicle. The rule is clear but arbitrary: the security bill with the earlier stamp has priority.[18] Where two security bills over the same vehicle are in the same bundle of post, the security bill which is signed and posted first may be stamped second and so lose priority.

(4) **Error:** the document-heavy regime is susceptible to error. For example, one logbook lender told us that it had received stamped security bills which should have been sent to a competitor.

(5) **Removing security bills from the register:** 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. An application costs £50 if both parties consent, while a contested application costs £480. Perhaps due to these costs, one High Court Master told us that he had dealt with only one application in five years. Another indicated that she had seen none in 12 years. The result is that many of the security bills recorded at the High Court may no longer be relevant.

(6) **County court registers:** where the borrower or vehicle is located outside London, the legislation states that the High Court should forward a copy of the security bill to the county court that presides over the area where the borrower or vehicle is located.[19] This is an obsolete requirement: county courts do not maintain registers of security bills; nor does the High Court forward any security bills.

(7) **Searches:** the High Court registers a security bill against the borrower, not the vehicle. To search the register, a third party needs the name and postcode of the borrower, and must pay a £50 fee.[20] We were told that logbook lenders do not check the High Court register before agreeing a logbook loan.

2.30 The High Court register no longer fulfils the purpose of putting third parties on notice. 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 but which is otherwise completely superfluous.

2.31 Commercially-run asset finance registries now serve the purpose of putting those in the motor industry on notice of logbook loans.

[18] *Nine Regions Ltd (trading as Logbook Loans) v OFT* [2010] UKFTT 643 (GRC) at paras 172 to 173.

[19] 1882 Act, s 11.

[20] It is also possible to search for free using the registration number of the bill of sale, but only the lender would know that number.

The current law offers little protection to borrowers

2.32 Although the 1882 Act was intended to be an early form of consumer protection, it does little to prevent the logbook lender from seizing and selling the borrower's vehicle. It imposes only two restrictions: the logbook lender may only seize the vehicle for a specified reason; and it must wait five days before selling it.[21]

2.33 At common law, once a logbook loan is concluded, the logbook lender is the owner of the vehicle and so has an immediate right of possession.[22] The 1882 Act limits this right by permitting the logbook lender to seize the vehicle for one of four specified reasons.[23] Among these reasons is default in repayment of the loan, which is the most likely ground for repossession for logbook loans.

2.34 The logbook lender's right of sale is unfettered at common law. The 1882 Act puts a limited restriction on this right by requiring the logbook lender to wait five days after repossession before selling the vehicle.[24]

2.35 The five day wait before sale is, in practice, of limited use to borrowers. During this time, the borrower may apply to court for an order restraining the sale of the vehicle.[25] In reality, most borrowers are unlikely to be in a position to act so rapidly. One logbook lender we spoke to mentioned two cases in three years. Even if the borrower does make an application, a strict reading of the legislation means that they would only be entitled to relief where the loan has been, or will immediately be, repaid in full. A borrower in default is unlikely to be in a financial position to repay the loan in full, and so will find it difficult to obtain an order restraining sale.

2.36 Many concerns have been expressed about the lack of effective borrower protection against repossession and sale under the Bills of Sale Acts, especially where borrowers are vulnerable.

The current law offers no protection to purchasers

2.37 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.

2.38 The detriment suffered by purchasers is particularly acute. Logbook lenders usually offer the purchaser three choices: pay off the logbook loan; buy the vehicle at a discount; or surrender the vehicle. From the purchaser's point of view, all these options are unfair.

[21] 1882 Act, s 7 and s 13. The legislation refers to "five clear days". See ftn 16 in para 2.28. The five day period is extended to 14 days by a voluntary code of practice for logbook lenders. See para 7.22 in Chapter 7.

[22] 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).

[23] 1882 Act, s 7.

[24] 1882 Act, s 13. The legislation refers to "five clear days". See ftn 16 in para 2.28.

[25] 1882 Act, s 7.

2.39 The position of innocent purchasers has led to much criticism from consumer groups and the press. The Independent has reported:

> Under current law, motorists can have their car taken away if it has a logbook loan on it – even if they didn't take out the loan. Some people have been known to sell their car without informing the buyer that there's a loan on it, leaving them to face the aggressive collection practices of some firms.[26]

CONSUMER CREDIT REGULATION

2.40 The Bills of Sale Acts are now supplemented by more modern consumer credit regulation, particularly in relation to logbook loans.

"Regulated credit agreements"

2.41 A key concept in consumer credit law is the "regulated credit agreement". Under the Consumer Credit Act 1974 (CCA 1974), all credit agreements made with individuals are regulated credit agreements, subject to certain exceptions. The two exceptions relevant for logbook loans are:

(1) business loans of more than £25,000; and

(2) loans to high net worth individuals of more than £60,260.[27]

2.42 In this report, we use the term "regulated credit agreement" to refer to all credit granted to individuals which does not fall within one of the exceptions.

2.43 There is no requirement that the lender enters into the transaction as part of a business. A loan granted by a friend or family member is still a regulated credit agreement, though for some purposes it would be treated as a "non-commercial" agreement and exempt from certain rules.[28]

FCA authorisation

2.44 FCA regulation of consumer credit 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.

2.45 Logbook lenders were one of the first groups to undergo the authorisation process. Applications had to be submitted to the FCA by 31 March 2015. Given the onerous application process, it was expected that some smaller logbook lenders would not be able to comply and would have to stop trading.

[26] Available at http://www.independent.co.uk/money/loans-credit/five-questions-on-logbook-loans-9270226.html.

[27] Bills of Sale (2015) Law Commission Consultation Paper No 225, p 37, paras 4.13 to 4.15.

[28] CCA 1974, s 189. It is exempted from certain provisions, such as most of those relating to the form and content of the credit agreement contained in Part V of the CCA 1974.

2.46 The FCA has now authorised nearly all of the logbook lenders that applied. The size of this market is small; only around 15 to 20 applications were made. As part of its authorisation process, the FCA believes that logbook lenders may have changed business practices resulting in a positive impact on the sector.

Protections in consumer credit regulation

2.47 Consumer credit regulation is intended to provide a comprehensive consumer protection regime. Five areas are relevant to logbook loans:

(1) the borrower's pre-contractual understanding;

(2) the cooling off period;

(3) protections when borrowers default;

(4) the rebate on early settlement; and

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

These provisions are described in Chapter 4 of the consultation paper and referred to in this report where relevant. Although they require logbook lenders to notify borrowers in default, they do not prevent them from repossessing vehicles.

THE FINANCIAL OMBUDSMAN SERVICE

2.48 The Financial Ombudsman Service (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.

2.49 Borrowers with a logbook loan may complain to FOS if a logbook lender has acted unfairly. However, a FOS determination takes time and is not sufficiently quick to prevent repossession.

2.50 In Chapter 8 we discuss the position of a private purchaser who buys a vehicle without realising it is subject to a logbook loan. It appears that these purchasers cannot complain to FOS if the vehicle is repossessed from them, even if it is done in an unfair way.

SELF-REGULATION BY LOGBOOK LENDERS

2.51 The Consumer Credit Trade Association represents the great majority of logbook lenders. From 1 February 2011 logbook lenders who are members have undertaken to comply with a code of practice (the CCTA Code).

2.52 The CCTA Code supplements legislation relating to logbook loans. Importantly, it gives borrowers the right to terminate a logbook loan voluntarily by handing the vehicle back to the logbook lender. We consider this further in Chapter 7.

REGULATION THAT DOES NOT APPLY TO BILLS OF SALE

Hire purchase

2.53 Like bills of sale, hire purchase is a way in which consumer credit can be secured on goods. The main difference is that hire purchase is used to buy goods on credit whereas bills of sale are mainly used to borrow money on the security of goods already owned by the borrower.

2.54 The CCA 1974 includes specific provisions to prevent a hire purchase lender from repossessing goods inappropriately. There are two key protections:

(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 obtaining a court order.

(2) **Voluntary termination:** the hirer can return the goods to the lender at any time and remain liable for just one half of the hire purchase price.

2.55 The Hire Purchase Act 1964 also protects private purchasers who innocently buy vehicles that are subject to outstanding hire purchase finance. Such purchasers become the owner of the vehicle and the lender loses all rights to it.[29]

2.56 These protections do not apply to bills of sale, leading to considerable criticism.

Price cap for payday loans

2.57 Since 2 January 2015, the price of payday lending has been capped.[30] This price cap does not apply to logbook loans. The FCA considered whether to include logbook lending in the price cap 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.[31]

The FCA also felt that our consultation on bills of sale may "change business models" in the logbook loan industry.[32]

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

[30] Before the price cap, interest rates in payday lending were typically 1000% to 6000% per year (http://www.bbc.co.uk/consumer/24746198). In our survey of bills of sale registered at the High Court in 2014, the lowest interest rate was 60% per year and the highest was 443% per year (with the most common yearly rates at 120% and 187%).

[31] FCA, *Policy Statement PS14/16: Detailed rules for the price cap on high-cost short-term credit* (2014), p 23.

[32] Above, p 23.

2.58 Complaints about payday lending have significantly decreased since the introduction of the price cap.[33] In the consultation paper, we said that there may be a case for the FCA to introduce a cap on default charges for logbook loans. We discuss this further in Chapter 7.

CONCLUSION

2.59 Loans secured by bills of sale are regulated by a mixture of Victorian legislation and more modern consumer credit regulation.

2.60 The Bills of Sale Acts are complex. They are written in impenetrable language and require detailed documentation. They also impose a costly paper-based registration regime. Despite their complexity, however, the Bills of Sale Acts offer very little protection to borrowers and no protection to purchasers. Lenders may repossess vehicles or other goods without court supervision.

2.61 In modern times, the bill of sale is most likely to be a logbook loan to which consumer credit regulation also applies. While this is an improvement on the Bills of Sale Acts, it does not do enough to resolve the problems we describe in this chapter. Significant protections in hire purchase law such as the court order and voluntary termination do not apply.

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

CHAPTER 3
THE CASE FOR REFORM

3.1 There was strong agreement from consultees that the law of bills of sale should be reformed. One logbook lender, AutoMoney, wrote that it is:

> an undeniable fact that the Bills of Sale Act is out of date and should be replaced with a new body of law that more effectively facilitates the use of personal property as collateral.

3.2 The Financial Services Consumer Panel similarly said:

> The current law, based on Victorian legislation, is out of date and no longer fit for purpose, especially taking into account the increase in recent years in the use of bills of sale. Borrowers need greater protection, as do innocent private purchasers who may be unaware the vehicle they are buying is subject to a logbook loan.

3.3 In this chapter, we first discuss the problems caused by the Bills of Sale Acts. We see that they fail lenders, borrowers and private purchasers alike. They also restrict some forms of lending to unincorporated businesses.

3.4 We then set out consultees' views on our proposed approach to reform. We did not propose to "ban" or "abolish" bills of sale. We thought that borrowers should continue to be able to borrow money on the security of their existing goods while retaining possession of them. Instead, we argue that the Bills of Sale Acts should be repealed in their entirety and replaced with modern legislation.

BURDENS ON LENDERS

Expensive and cumbersome registration

3.5 The Bills of Sale Acts impose unnecessary burdens on logbook lenders. The first problem is the requirement to register bills of sale with the High Court. As we discussed in Chapter 2, the system is expensive, paper-based and in urgent need of modernisation. The register is so difficult to search that it fails to fulfil its original purpose. As the Consumer Credit Trade Association (CCTA) said:

> The register is not fit for purpose and does not provide any benefits to lenders or borrowers.[1]

3.6 It costs between £35 and £51 to register a logbook loan at the High Court. In Chapter 11 we estimate the wasted costs of registration to the logbook loan industry to be around £2 million each year. Logbook lenders also find the registration regime cumbersome to operate.[2]

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

[2] See Chapter 2, paras 2.24 to 2.31.

3.7 The High Court register is a debtor register, that is, it is only possible to search using the borrower's name and postcode at a cost of £50. Searches are rare.[3] As it cannot be searched by vehicle, logbook lenders also routinely register with commercially-run asset finance registries.

Unnecessary document requirements

3.8 As we discussed in Chapter 2, the 1882 Act requires that all security bills comply with a complex standard form with no fewer than 12 separate document requirements.[4] One logbook lender described the standard form as "horrific".

3.9 Failure to comply with the document requirements carries a heavy sanction. Lenders not only lose any rights over the goods but are also not entitled to recover the loan amount owed to them. Given this sanction, logbook lenders are understandably reluctant to change the standard form to make it more accessible for borrowers.

HARDSHIP FOR BORROWERS

Unnecessary document requirements

3.10 The complex and archaic document requirements are also a problem for borrowers. In its research into the logbook loan industry, the Financial Conduct Authority (FCA) found that many borrowers do not "really think" about the implications of a logbook loan.[5] 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]

3.11 The standard form does little to enlighten borrowers. The CCTA said that the paperwork:

> does not satisfy the modern requirement that documents should be written in plain and intelligible language that an ordinary person could easily understand.[7]

Lack of protection against repossession

3.12 FCA rules require lenders to treat borrowers in arrears with forbearance and due consideration. This might include taking token repayments for a time, or reducing or waiving interest payments.[8]

[3] It is possible to search for free using the registration number of the bill of sale, but only the lender would know that number. From January to August 2016, only 10 searches of the register were made without the registration number.

[4] See paras 2.16 to 2.20 in Chapter 2.

[5] FCA, *Consumer Credit Research: Payday Loans, Logbook Loans and Debt Management Services* (2014), p 27. We discuss this research in detail in the consultation paper (Bills of Sale (2015) Law Commission Consultation Paper No 225).

[6] Above, p 27.

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

[8] FCA consumer credit sourcebook (CONC), para 7.3.

3.13 Logbook lenders are required to have robust policies to deal with default, particularly where borrowers are vulnerable.[9] The lenders we spoke to emphasised that they would prefer to agree alternative repayment plans and treat repossession as a last resort. It appears, however, that lenders differ in their approach to repossession. While some lenders seize and sell vehicles in less than 3% of loans, others may do this in up to 10% of loans.[10]

3.14 There are complaints that some lenders use the threat of repossession to demand unreasonable and unaffordable sums. 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.[11]

3.15 In some cases, lenders may repossess vehicles from those in temporary financial difficulties, even if the loan is substantially paid off and the borrower is making efforts to meet the outstanding amount. 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.
>
> 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.[12]

[9] CONC, para 7.2.

[10] See paras 11.17 to 11.22 in Chapter 11.

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

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

3.16 FOS may provide redress after the event, but it is not able to prevent repossessions from taking place. By contrast, for hire purchase, once the hirer has paid one third of the total hire purchase price, the lender must seek a court order before repossessing the goods. The court may require an alternative repayment plan or suspend an order for repossession while the hirer makes payments. This protection does not apply to bills of sale.

3.17 Logbook loans are mostly used by consumers, but self-employed people may also borrow money in this way.[13] Our survey of bills of sale registered at the High Court found examples where market traders, builders or plumbers had used logbook loans to borrow money on the security of their vans. The Federation of Small Businesses commented that small traders often depend on their vehicle:

> FSB believes borrowers need stronger protection. For some smaller businesses, a vehicle could be integral to the business and the prospect of repossession could be disastrous.

3.18 The ability to repossess vehicles is a powerful weapon. Greater protection is needed to ensure that lenders use it as a last resort, bringing the practice of lenders with high repossession rates into line with best practice.

HARDSHIP FOR PRIVATE PURCHASERS

3.19 The law offers no protection to those who buy goods subject to a bill of sale, even if the purchaser acted in good faith and without notice.

3.20 Those who buy a second-hand car without realising that it is subject to a bill of sale face unpalatable choices: pay off someone else's loan, risk losing the car, or pay for it again. The Money Saving Expert website gives the following example:

> 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.[14]

[13] One logbook lender had estimated in 2010 that 25% of its logbook loans by number and 40% by value were for business purposes (Department for Business, Innovation and Skills, *Government response to the consultation on proposals to ban the use of bills of sale for consumer lending* (2011), p 42, para 12).

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

3.21 The issue is small in volume. One logbook lender told us that out of 1,500 to 2,000 logbook loans issued each month, between 20 and 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, some purchasers suffer serious hardship. The issue also generates bad publicity for logbook lenders, bringing the industry into disrepute.

ACCESS TO FINANCE FOR UNINCORPORATED BUSINESSES

3.22 There have been many complaints that the technicality of the Bills of Sale Acts restricts the ability of unincorporated businesses to access finance. 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.[15]

3.23 Here we highlight two examples where the Bills of Sale Acts restrict the ability of unincorporated businesses to access finance. The first derives from the document requirements in the 1882 Act. The second is the requirement to register general assignments of book debts as if they were absolute bills.

The restrictions imposed by the document requirements

3.24 The document requirements in the 1882 Act mean that it is not possible for unincorporated businesses to use goods to secure a revolving credit facility or overdraft.

3.25 The standard form also prevents a director from using their own goods to secure a guarantee of business debts. This scenario not only applies to unincorporated businesses but also to incorporated businesses. The guarantee represents a promise by the director to repay a loan owed by the business if the business defaults. However, if the business does not default, the director may never need to pay anything. It is therefore not possible to comply with the requirement to state the repayment instalments in advance.

3.26 As one practitioner explained, there does not appear to be any way around this requirement:

> 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.

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

3.27 Two law firms responded to our consultation to say that with appropriate reform, they anticipated a significant expansion of loans secured on goods other than vehicles. There was thought to be particular scope for loans secured on artworks, for example, to guarantee a business's debts. Boodle Hatfield LLP wrote:

> Given its share of the global market, it is surprising that the UK does not have a stronger art lending market.

Problems in registering general assignments of book debts

What is a general assignment of book debts?

3.28 The term "book debts" means sums due to a business. 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.

3.29 Over the past few decades, invoice financing has been a growing source of working capital for small and medium sized businesses.[16] It can be structured in a variety of ways. Under a "whole turnover agreement", the business agrees to sell and the invoice financier agrees to purchase all present and future book debts. This is referred to as a "general assignment".

The registration process

3.30 General assignments of book debts given by sole traders or partnerships must be registered as if they were absolute bills of sale under the 1878 Act. If they are not registered they are invalid on bankruptcy.[17]

3.31 The procedure under the 1878 Act is even more cumbersome than the procedure applicable to logbook loans. It normally requires three solicitors' firms: one to prepare the paperwork for the invoice financier; a second to advise the business and witness its signature; and a third to administer an affidavit from the business's solicitor.

3.32 It can cost anywhere between £480 and £1,735 to register a general assignment of book debts at the High Court. Registration can take three to five working days, even when carried out promptly. For unincorporated businesses, a delay in funding, even by a matter of days, may have serious consequences.

3.33 Such is the burden of registration that some invoice financiers do not register at all, and take their chances on bankruptcy instead. Reform is needed to reduce unnecessary costs and delay and to provide invoice financiers with the security they need on bankruptcy.

[16] Growth may further increase in light of a proposed ban on anti-invoice finance terms in contracts due to come into force in 2016. For further details, see https://www.gov.uk/government/news/restrictions-lifted-on-invoice-finance-to-help-small-firms-grow. The power to impose a ban is contained in section 1 of the Small Business, Enterprise and Employment Act 2015 but has not yet been exercised.

[17] Insolvency Act 1986, s 344.

WHY BILLS OF SALE SHOULD NOT BE BANNED

3.34 Over the years there have been many calls for bills of sale to be banned. When the Department for Business, Innovation and Skills consulted on the matter in 2009, its initial proposal was to ban the use of bills of sale for consumer lending.[18]

3.35 In the consultation paper, we said that we were not persuaded that the case for a ban had been made out. We gave three reasons:

(1) Logbook loans provide an important source of credit for many borrowers. They allow access to larger sums over a longer period than payday loans. Without logbook loans, borrowers may either have to pay higher interest rates for unsecured lending, or be denied credit altogether.

(2) Where an economic need exists, attempts to ban an activity will inevitably lead to avoidance or evasion. Banning logbook loans may encourage borrowers to use illegal and unregulated forms of lending.

(3) It seems illogical to allow the widespread use of mortgages on land, but to deny them on goods.

Consultees' views

3.36 29 (88%) out of 33 consultees agreed that bills of sale should not be "banned" or "abolished". There was widespread agreement that bills of sale serve a useful purpose. HPI commented:

> Security interests over a vehicle that can be enforced following default by the debtor can, when properly regulated, promote lending in the sub-prime market of car finance and make a contribution to social mobility.

3.37 Many consultees echoed the need for appropriate regulation. The debt advice agency, StepChange, wrote:

> We accept that in principle there is nothing inherently wrong with borrowers raising money on personal property as long as there are adequate protections in place for these borrowers.

3.38 In respect of small businesses, the Federation of Small Businesses indicated that there is an opportunity to improve access to credit if there are stronger borrower protections:

> It is important to have strong protections for borrowers such as smaller businesses as losing their vehicle could have a significant impact on the viability of the business. There is a real opportunity to develop the market for loans secured on goods for unincorporated businesses if the right protections are in place.

3.39 Graham McBain emphasised the importance of personal freedom:

[18] Department for Business, Innovation and Skills, *A better deal for consumers: consultation on proposal to ban the use of bills of sale for consumer lending* (2009), p 4.

> People should be free to secure their goods in a democratic society.

3.40 The consultees that thought that bills of sale should be banned focused on the detriment caused to consumers. For example, Money Advice Trust wrote:

> The lending products offered using bills of sale are both oppressive and enforced unfairly. Consumer protection is inherently untenable given the nature of the legislation.

Our views

3.41 There was a high level of support for retaining the ability to secure loans on goods. We remain persuaded that, if properly regulated, it should be open to individuals to use existing goods as security while retaining possession of them. We think that the concerns of those consultees who favoured abolition can be addressed through a new legislative framework that contains appropriate protections for consumers, so remedying the current problems around unfair enforcement.

THE NEED FOR REFORM

3.42 In our consultation paper, we proposed that the law of bills of sale should undergo wholesale reform to create an effective modern legislative framework.

Consultees' views

3.43 29 (85%) out of 34 consultees agreed. A logbook lender, Mobile Money, referred to the potential of reform of the law to enhance consumer protection:

> There are many potential consumer benefits in reforming the law, not least in reducing cost, improving clarity and encouraging new entrants and innovation.

3.44 StepChange similarly emphasised the need for consumer protection:

> The current law is antiquated, difficult to understand and fails consumers. The law is not providing appropriate consumer protections when a borrower falls into payment difficulties. Nor does it protect innocent private purchasers.

3.45 As we discussed above, Money Advice Trust wrote that it would prefer abolition of bills of sale. Expanding on this, it said that, in the alternative, it would support reform of the existing law of bills of sale.

Our views

3.46 We have concluded that there is an urgent need for reform in this area. Modern legislation is required to properly regulate the use of bills of sale. In Chapter 4 we recommend that the Bills of Sale Acts should be repealed in their entirety and replaced with new legislation.

3.47 **We recommend that consumers and unincorporated businesses should continue to be able to use their existing goods as security while retaining possession of them but that the current law in this area should be reformed.**

CHAPTER 4
A NEW LEGISLATIVE FRAMEWORK

4.1 The Bills of Sale Acts are written in obscure, archaic language, using words such as "witnesseth" and "doth". In this chapter we explain why the Bills of Sale Acts should be repealed and replaced with a new Goods Mortgages Act. We look at the scope of the new legislation and at how a goods mortgage should take effect. We also consider whether there are any uses of goods as security which should not be allowed.

4.2 Finally, we look at how the new legislation would fit within the regime of consumer credit regulation. We explain that some issues fall outside of our remit, such as a cap on the price of logbook lending. These issues rest with the Financial Conduct Authority (FCA).

REPEAL OF THE BILLS OF SALE ACTS

4.3 In the consultation paper we proposed that the Bills of Sale Acts should be repealed in their entirety. They should be replaced with new legislation to regulate how individuals may use their existing goods as security while retaining possession of them. Out of 32 consultees who expressed views, 24 (75%) agreed.

4.4 Many consultees referred to the problems with the current law. Gregory Hill noted that "the existing legislation is bad beyond the possibility of tinkering". Guy Skipwith said "because the Bills of Sale Acts are clearly not fit for purpose, they should be repealed and replaced with new legislation".

4.5 By contrast, the Campaign for Fair Finance felt that the current legislation should be amended. Iyare Otabor-Olubor, an academic, wrote that it would be unwise to create new legislation from scratch.

4.6 Our view is that the Bills of Sale Acts are too opaque to serve as the basis of modern legislation. The definition of a "bill of sale", for example, is a single sentence of 218 words, and impenetrable to a modern reader.[1] There is an urgent need for new legislation.

NEW TERMINOLOGY

4.7 The terms "bill of sale", "security bill" and "personal chattels" convey little to a modern reader. In the consultation paper, we proposed that they should be replaced. Instead:

(1) "goods mortgage" should be used to refer to loans secured over goods generally; and

(2) "vehicle mortgage" should be used to refer to loans secured over vehicles.[2]

[1] Bills of Sale Act 1878, s 4.

[2] See para 6.10 in Chapter 6.

4.8 In the consultation paper we discussed other possible terms.[3] However, they all had drawbacks. For example, consumers may think that a "charge" is simply another word for a fee, or that "security" means that they or their goods will be secure. "Collateral" tends to be used in the banking industry rather than by individuals.

4.9 Of the various options available, we thought that "goods mortgage" and "vehicle mortgage" were the most attractive. We argued that most people are familiar with the concept of a mortgage over land. We also thought that the term "mortgage" conveys a degree of seriousness to the transaction.

4.10 Consultees agreed that the current terminology is poorly understood. Citizens Advice wrote that "these terms are archaic and need to be replaced with more easily understood terms". Similarly HPI responded "it is wholly appropriate to eschew redundant terminology poorly understood by the general public".

4.11 In respect of both "goods mortgage" and "vehicle mortgage", some consultees expressed concern that the term "mortgage" could be confusing. As Money Advice Trust put it:

> We do not believe that the proposed terms of "goods mortgage" or "vehicle mortgage" will mean much to most consumers. Most people do not think of their house as belonging to the mortgage lender when they have a mortgage. This term is more likely to mislead a borrower into thinking that they still own their car but that the lender has a charge or security in relation to the car.

4.12 The General Council of the Bar of England and Wales (the Bar Council) made a similar point but noted that the proposed terminology is clearer than the current terminology.

4.13 Other consumer groups were in favour of the proposed terminology. Citizens Advice commented that it "would give consumers a better idea about the nature of the credit they have taken out". StepChange wrote "we believe the terms 'goods mortgage' and 'vehicle mortgage' are adequate and simple terms for describing this type of borrowing".

4.14 Those in the motor industry favoured the term "vehicle mortgage". The Retail Motor Industry Federation said that it "strongly encourages the use of the term 'vehicle mortgage' when referring to secured loans over vehicles". HPI wrote that "vehicle mortgage" is "an elegant description of the reality of the bills of sale transaction".

4.15 We conclude that the term "mortgage" is the clearest word available to convey the concept of security for a loan. We accept that borrowers will need further explanation of the consequences of entering into a "vehicle mortgage" and we address this in Chapter 5.

4.16 **We recommend that the Bills of Sale Acts should be repealed and replaced with a new Goods Mortgages Act.**

[3] Bills of Sale (2015) Law Commission Consultation Paper No 225, p 97, paras 8.9 to 8.10.

4.17 **We recommend that the new legislation should use the term:**

(1) "goods mortgage" to refer to loans secured over goods generally; and

(2) "vehicle mortgage" to refer to loans secured over vehicles.

THE SCOPE OF THE NEW LEGISLATION

4.18 In the consultation paper we proposed that the new Goods Mortgages Act would apply where:

(1) an individual;

(2) uses goods;

(3) that the individual already owns;

(4) as security for a loan or non-monetary obligation; and

(5) retains possession of the goods.

4.19 19 (83%) out of 23 consultees agreed with the proposed scope of the new legislation. Below we consider the issues raised in this definition.

An "individual"

4.20 Many consultees sought clarification that the term "individual" includes unincorporated businesses. Mobile Money noted:

> We would welcome the opportunity to help lessen the shortage of commercial finance by lending to businesses against business assets.

4.21 Our intention has always been for the new legislation to cover unincorporated businesses. By "individual", we mean any natural person, that is, any unincorporated entity. This includes consumers, sole traders and general partnerships.[4]

4.22 We were told during the course of this project that some lenders try to register security granted by overseas companies over assets located in England and Wales as bills of sale. Such security cannot be registered at Companies House which applies only in respect of companies incorporated in England and Wales. Our aim is that the new legislation should put beyond doubt that the goods mortgage regime does not apply to any corporate entities.

Distinction between goods mortgages and hire purchase

4.23 Consumer groups agreed that the new legislation should apply only to goods which the borrower already owns to avoid confusion with hire purchase. As Money Advice Trust put it:

[4] Limited liability partnerships would be excluded from being "individuals".

It is sensible to exclude transactions that provide for the purchase of new goods on credit, and that this legislation should apply where the loan is secured on goods the borrower already owns. This should help to avoid the use of bills of sale to avoid taking out hire-purchase agreements to buy items on credit.

Non-monetary obligations

4.24 In the consultation paper, we proposed that it would be possible to use a goods mortgage to secure the performance of a non-monetary obligation.

4.25 The Bar Council questioned whether there is a need to regulate such transactions, which appear to be rare. The City of London Law Society (CLLS) expressed more serious concerns. It thought that the ability to secure non-monetary obligations could lead to consumers being "unable to escape from the constant threat of repossession of essential goods". The CLLS made reference to the use of goods mortgages to secure service contracts, leading to "trucking, bondage or even slavery". We have not seen such abuses nor do we think that they would be likely. It is certainly not our intention to permit such practices.[5]

4.26 Even shortly after the Bills of Sale Acts were passed, it was reported that bills of sale to secure non-monetary obligations were rare.[6] During the course of this project, we did not come across any such bills of sale registered at the High Court. Given their apparent rarity, and the CLLS' concerns if such goods mortgages were permitted, we have been persuaded that goods mortgages should not be capable of being used to secure non-monetary obligations.

4.27 Instead, we think that goods mortgages should be used to secure loans and other monetary obligations, including obligations that can be expressed in money's worth. This would include, for example, the payment of a pre-existing debt. It would also include an obligation to return shares under a stock lending agreement.[7]

"Possession"

4.28 The Bills of Sale Acts do not apply where the lender's security is possessory, that is, where the lender takes possession of goods. We thought that the new legislation should similarly exclude possessory security, such as pawnbroking.

4.29 We proposed that goods should be considered to be in the possession of the borrower if they remain under the borrower's control. This would deal with instances where the goods are located in a specific place such as, for example, gold held in a vault.

[5] Such contracts would in any case be unenforceable. It is a criminal offence under section 1(1)(b) of the Modern Slavery Act 2015 if a person requires another person to perform forced or compulsory labour. At common law, a contract is unenforceable if by its terms it would require the commission of a criminal offence.

[6] J Weir, *Law of Bills of Sale* (1896), p 1.

[7] This is an agreement under which the owner of shares agrees to lend some or all of its shares to a borrower for a specified period of time. The borrower has an obligation to return equivalent shares at the end of an agreed period.

4.30 There was broad consensus with our proposal; 15 (71%) out of 21 consultees agreed. The Chancery Bar Association (ChBA) disagreed, considering it unnecessary to define "possession":

> We would point out that there are different types of possession in English law, and that the borrower does not therefore need to be in actual possession. You give the example (para 8.28) of security bills over wine held in a specialist store. In such circumstances the owner may be in possession of the wine – albeit constructive possession – having attorned to the storeholder. On the basis of current understandings of possession this would be covered and we see no reason for special provision to make this clear.

Similarly, the Secured Transactions Law Reform Project (STR) thought that "it would be unwise to attempt to define in legislation such a nebulous term as possession".

4.31 We have given this matter further consideration. Rather than state that the legislation should only apply where the borrower retains possession, we now think it would be sufficient to say that the legislation does *not* apply where the *lender* has possession. This would be a simpler test to apply. It would not matter whether the borrower retained possession or had granted possession to a third party, such as an art gallery. However, pawn broking and other forms of security where the lender takes possession of the goods would be excluded from the scope of the Goods Mortgages Act.

Exclusions

Intangible goods

4.32 We proposed that the new legislation would not apply to dealings with intangible goods. A goods mortgage is predicated on the borrower retaining possession of goods, a concept that is incompatible with intangible goods.

4.33 It is already possible for individuals to grant security over intangible goods, such as shares and intellectual property rights. As the Bills of Sale Acts do not apply to intangible goods, it is in fact easier for individuals to use them as security. We do not propose to change this position.

Ships and aircraft

4.34 Dealings with ships and aircraft are outside the scope of the Bills of Sale Acts.[8] Such transactions are subject to their own regulatory regimes. In the consultation paper, we proposed that the new legislation should not apply to ships or aircraft. 13 (93%) out of 14 consultees agreed. The Bar Council answered "other", raising a question about mortgages over certain marine vessels.[9]

[8] 1878 Act, s 4; Mortgaging of Aircraft Order 1972 SI 1972 No 1268, art 16.

[9] The United Kingdom Ships Register is split into three Parts. Only mortgages over vessels within Parts 1 and 2 are registrable under the statutory scheme. The Bar Council was concerned that mortgages over vessels within Part 3 would not be registrable anywhere. However, if the owner of a vessel within Part 3 wishes to register a mortgage over that vessel, it can be registered within Part 1.

Agricultural charges

4.35 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. Agricultural charges are deemed not to be bills of sale, and will take effect despite the provisions of the Bills of Sale Acts.[10]

4.36 The agricultural charges registry is based in Plymouth and administered by the Land Registry. Around 800 agricultural charges are registered each year, mainly by the five big banks and some rural solicitors. The number of registrations is declining. Both registrations and searches are conducted manually on paper.

4.37 The existence of multiple registries creates a "visibility problem" for third parties who may not be aware of the need to search more than one registry. Where a farmer grants an agricultural charge to a bank, it would have to be registered with the agricultural charges registry. Where the farmer grants a bill of sale to another type of lender, it could be registered at the High Court. As the STR noted in its response: "the key issue is not to ask those registering security and those searching the register to have to do the same thing twice".

4.38 The agricultural charges regime has been in place for many decades. We understand that it serves the needs of those that use it. It is outside the scope of this project to seek to amend the Agricultural Credits Act 1928, and so we propose to leave the current regime as it is. We acknowledge that this is not the ideal solution for the reason given by the STR. We think there is a case for addressing the agricultural charges regime in the future, but that is separate from this project.

4.39 **We recommend that the new Goods Mortgages Act should apply where an individual uses goods that they already own as security for a loan or other monetary obligation (including obligations that can be expressed in money's worth), while retaining possession of the goods.**

4.40 **We recommend that the new legislation should not apply to:**

(1) dealings with intangible goods;

(2) dealings with ships and aircraft; or

(3) agricultural charges.

HOW WOULD A GOODS MORTGAGE TAKE EFFECT?

4.41 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 take possession of the goods for one of four specified reasons.[11] Secondly, ownership is transferred back to the borrower once the loan is repaid.

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

[11] 1882 Act, s 7. We discuss this at para 4.53.

4.42 In the consultation paper, we proposed that a goods mortgage should continue to take effect by transferring ownership to the lender unless the parties agree that it should take effect as a charge instead. A charge gives lenders a more limited interest in the goods. The lender is at no point the owner of the goods. Instead, 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.

Consequences of a transfer of ownership and a charge

4.43 It is often difficult to distinguish between security interests which take effect as transfers of ownership (a "true mortgage") and those which take effect as charges. This is partly because the two terms are sometimes used interchangeably, and partly because the common law consequences of mortgages and charges are now overlaid by statute. The new goods mortgage regime we recommend will, for the three issues we identify below, be a self-contained statutory scheme, with the outcomes for lenders, borrowers and third parties set out in statute rather than governed by common law concepts.

4.44 We have considered three possible differences between mortgages and charges:

(1) whether it is possible to grant more than one security interest over the same goods;

(2) whether the lender can repossess without a court order. Where the lender has taken a charge, it would generally need a court order to repossess goods; and[12]

(3) whether a purchaser can acquire ownership of the goods.

4.45 We discuss these below

More than one security interest

4.46 In the consultation paper we suggested that one practical difference between a transfer of ownership and a charge is that it is possible to grant more than one charge over the same goods, whereas a borrower may only use a bill of sale to transfer ownership of goods once.

4.47 The ChBA pointed out that it is in fact possible to grant multiple bills of sale. Once ownership has been transferred, the borrower retains the ability to redeem the goods upon repayment of the loan, otherwise known as the "equity of redemption". Although section 5 of the 1882 Act requires the borrower to be the "true owner" of the goods, it has been held that this condition is still satisfied when the borrower only has the equity of redemption.[13]

4.48 For most logbook loans, the idea that the same vehicle could be used for multiple loans is somewhat fanciful. However, Boodle Hatfield LLP thought that "in the context of valuable artwork it may well be useful to be able to charge the same goods more than once". Constantine Cannon LLP agreed.

[12] Unless the parties have agreed otherwise.

[13] *Thomas v Searles* [1891] 2 QB 408.

4.49 In light of the ChBA's response, we agree that it would be possible to grant multiple goods mortgages over the same goods, irrespective of whether the security interest takes effect as a transfer of ownership or a charge. It may be helpful for the new legislation to clarify that it is possible to grant multiple "goods mortgages" over the same goods, but those with a lower priority would be subject to those with a higher priority.

Other differences

4.50 On the other two differences, we propose to set out clear statutory rules. The question of whether the lender can seize goods without a court order is discussed in Chapter 7 and the position of purchasers is discussed in Chapter 8.

4.51 We recommend that where the goods mortgage secures a regulated credit agreement, in some circumstances the lender will only be entitled to repossess goods with a court order. Generally, for non-regulated credit agreements (such as business loans of more than £25,000) the lender could repossess without a court order. Some unincorporated businesses may not wish to borrow money using its goods as security if the lender could seize the goods in the event of any default. We think that unincorporated businesses should be entitled to contract for the sort of protection that they would receive if they had granted the lender a charge over the goods.[14]

Grounds for repossession

4.52 We proposed that the new legislation should continue to specify that the lender is not entitled to repossess goods except for a specified reason.

4.53 The 1882 Act permits repossession for one of four reasons: default on payment; default on maintenance; fraudulently removing the goods; or bankruptcy of the borrower.

4.54 We proposed to retain three of the reasons but questioned whether fraudulent removal of the goods should be a ground for repossession. We thought that its meaning is unclear and that the lender is in any event unlikely to be aware of any fraudulent removal unless the borrower has also defaulted. 13 (57%) out of 23 consultees agreed.

4.55 Boodle Hatfield LLP suggested that fraudulent removal would be a useful ground for repossession in the art market:

> it is possible that a borrower could fraudulently remove the artwork and place it for sale, say, in an art fair, in a gallery, at an agency or another location not approved by the lender. The unique nature of many artworks means that a lender could easily become aware of such a fraudulent removal but, without this protection, would not be entitled to repossess the goods.

Constantine Cannon LLP referred to a similar protection in the United States.

[14] Under a charge, court and out of court processes for appointing an administrator apply. It would be open to the unincorporated business to specify that these processes apply to the goods mortgage.

4.56 We agree that it would be helpful if lenders could repossess artworks where they fear that the borrower is seeking to defeat their interests. "Fraudulent removal" is, though, a difficult concept. It is not clear when taking goods outside the country might or might not amount to "fraud". We think that it is intended to capture offering the goods for sale or moving the goods in breach of a term of the agreement. We recommend that the legislation should use this wording.

4.57 **We recommend that for all goods mortgages (whether or not securing a regulated credit agreement), the new legislation should:**

(1) prevent lenders from repossessing the goods except for one of four specified reasons:

(a) default on payment;

(b) default on maintenance or insurance of the goods;

(c) offering the goods for sale or moving the goods in breach of a term of the agreement; or

(d) bankruptcy of the borrower; and

(2) specify that ownership is automatically transferred to the borrower once the loan is repaid.

SHOULD ANY GOODS MORTGAGES BE PROHIBITED?

4.58 The Bills of Sale Acts currently prohibit two types of transaction: security bills granted for small amounts; and security bills granted over future goods.

Goods mortgages for small amounts

4.59 Under the 1882 Act, security bills are not permitted to secure loans of less than £30.[15] If the amount had kept pace with inflation, it would now be over £3,000.

4.60 In the consultation paper, we acknowledged that imposing a minimum loan amount 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.

4.61 There are two arguments in favour of a minimum loan amount:

(1) The only purpose of securing a loan is to allow for the possibility of repossession; yet for small amounts the costs of repossession appear to be out of proportion to the amount of the loan. The costs of repossession and sale will be at least £400.[16] We came across a security bill registered at the High Court securing a sum as little as £100.

(2) If a borrower cannot borrow small sums using an unsecured loan, it is doubtful that they should be able to do so using a secured loan.

[15] 1882 Act, s 12.

[16] 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.

4.62 On the other hand, there are two strong reasons that can be put against requiring a minimum loan amount:

(1) It may encourage borrowers to borrow more than they need.

(2) Secured lending is generally cheaper than unsecured lending. Introducing a minimum loan amount may force borrowers to turn to more expensive unsecured loans.

4.63 On balance, we felt that borrowers should be able to make their own choices. 14 (64%) out of 22 consultees agreed. Gregory Hill argued that parties should have autonomy to decide the basis on which they contract.

4.64 Several consumer groups argued for a minimum loan amount. Money Advice Trust thought that there should be more borrower protection to prevent people from securing loans over goods the value of which far exceed the loan amount. StepChange worried that the costs of repossession would be out of proportion to the amount of the loan. Citizens Advice wrote:

> We often see clients who face loss of their vehicle for relatively small loans. Loss of a car has an impact on our clients' ability to carry on with day to day life – particularly where they have jobs where a car is essential or if they live in rural areas where public transport is poor or non-existent.

4.65 We appreciate the arguments in favour of a minimum loan amount. However, choosing a minimum loan amount would be an arbitrary exercise. Like the £30 figure in the 1882 Act, it would quickly become redundant unless reviewed, which is unlikely to happen. On balance we think that the arguments against a minimum loan amount outweigh the arguments in favour. In particular, we do not wish to encourage borrowers to borrow more than they need. We think that the borrower protections outlined in Chapter 7 will guard against the problem of costly repossession for tiny amounts.

4.66 The CLLS raised a related issue. It was concerned about the potential for oppressive security over essential household goods for very small loans. There is little indication that lending secured on essential household goods is, or would become, commonplace. Nevertheless, we think it may be helpful to include a regulation-making power in the new legislation prohibiting borrowers from granting security over specified essential household goods should abuses arise.

4.67 **We recommend that:**

(1) a goods mortgage should be available to secure loans of any amount with no minimum; and

(2) the new legislation should contain a regulation-making power prohibiting borrowers from granting security over specified essential household goods.

Goods mortgages over future goods

4.68 Future goods are goods which the borrower does not own at the time of the loan but may own in the future.

4.69 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.[17] This, together with the requirements that the goods must be specifically described and that the borrower should be their true owner, means that it is effectively impossible to grant security over future goods.[18]

4.70 In the consultation paper, we argued that security over future goods has the potential to be exploitative. We thought that borrowers should not be permitted to grant security over future goods. We do not wish to prevent loans to buy goods and so proposed an exception for such transactions.

4.71 14 (58%) out of 24 consultees agreed. Consumer groups supported the proposal. Money Advice Trust wrote that it "would be an extremely retrograde step to allow future goods as security".

4.72 Some consultees thought that the use of future goods as security should be considered for unincorporated businesses. In Appendix D of the consultation paper we discussed the possibility that unincorporated businesses could give floating charges over goods, including those they may acquire in the future. Although this idea has attractions we concluded that it would have far reaching implications beyond the law of bills of sale, and would need to be considered carefully.[19] It would require a separate project.

4.73 **We recommend 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.**

INTERACTION WITH THE CONSUMER CREDIT REGIME

4.74 As we discussed in Chapter 2, the Bills of Sale Acts are part of a wider regime of consumer credit regulation, including the Consumer Credit Act 1974 and FCA authorisation, supervision and rules. Where a vehicle mortgage or goods mortgage secures a regulated credit agreement, it will also be subject to the consumer credit regime.

Adopting the concept of a "regulated credit agreement"

4.75 Our intention is to tie the new Goods Mortgages Act to other concepts within the consumer credit regime. In particular, some of the borrower protection measures we recommend in Chapters 5 and 7 would only apply to regulated credit agreements.

[17] 1882 Act, s 5.

[18] A specific description of the goods is required by the standard form for a security bill. Failure to specifically describe goods renders the security bill void: 1882 Act, s 9.

[19] Bills of Sale (2015) Law Commission Consultation Paper No 225, p 85, para 6.63.

4.76 Under the Consumer Credit Act 1974, all credit agreements made with individuals are regulated credit agreements, subject to two main exceptions:

(1) loans taken out for business purposes of more than £25,000; and

(2) loans to high net worth individuals of more than £60,260.

4.77 The concept of a "regulated credit agreement" is particularly appropriate to goods mortgages as it covers not only consumers but also small loans made to sole traders and general partnerships. As we explained in the consultation paper, logbook loans are mostly used by consumers, but self-employed people also borrow money in this way. For example, market traders, builders or plumbers may borrow money on the security of their vans to buy materials.[20] It is important that they receive appropriate protection.

4.78 The CLLS asked whether protection would extend to those borrowing from friends and family. As we explained in Chapter 2, private loans would be covered as they fall within the definition of a "regulated credit agreement".[21]

Problems outside our remit

4.79 The new legislation would sit alongside FCA authorisation and supervision of the logbook loan industry. Several of the problems that consultees referred to in their responses cannot be addressed by legislation alone. In particular, under its supervisory pillar, the FCA can ensure that 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.

If logbook lenders fail in these duties, the FCA has power to take action against them under its enforcement pillar.

4.80 Consumer groups have expressed concerns about the high interest rates and default charges in logbook lending. A price cap on payday lending came into force in January 2015. In the consultation paper, we said that there might be a case for the FCA to introduce a cap on default charges for logbook loans.

4.81 The issue of a price cap on logbook loans is one for the FCA. It is outside the scope of this project and our recommended Goods Mortgages Act.

STRUCTURE OF THE GOODS MORTGAGES ACT

4.82 The new legislative framework we have discussed in this chapter makes two key distinctions between:

(1) vehicle mortgages and mortgages on other goods; and

[20] For a discussion of this issue, see Bills of Sale (2015) Law Commission Consultation Paper No 225, p 16, paras 2.20 to 2.22.

[21] See para 2.43 in Chapter 2.

(2) regulated credit agreements and non-regulated credit agreements.

4.83 The table below gives an overview of the structure of the recommended Goods Mortgages Act.

Table 4.1 Structure of recommended Goods Mortgages Act

	Regulated credit agreements	**Non-regulated credit agreements**
Vehicle mortgages	***Quadrant 1: logbook loans*** Registered with designated asset finance registry Borrower protection provisions apply	***Quadrant 3*** Registered with designated asset finance registry Borrower protection provisions do not apply
Mortgages over other goods	***Quadrant 2*** Registered with High Court Borrower protection provisions apply	***Quadrant 4: secured lending to unincorporated businesses*** Registered with High Court Borrower protection provisions do not apply

4.84 At present, the most significant use of bills of sale is for Quadrant 1, that is, logbook loans. This is where a vehicle mortgage is used to secure a regulated credit agreement. In practical terms, this is where our recommendations will have the greatest immediate effect.

4.85 We also hope that our recommendations will increase lending in Quadrant 4, by facilitating greater secured lending to unincorporated businesses. We think that most goods mortgages in this quadrant will secure business loans of more than £25,000, and will be secured over a variety of business goods. Alternatively, they may secure loans to high net worth individuals of more than £60,260, where the security is high value goods, such as valuable artwork.[22] This is a very different market from logbook lending and requires fewer borrower protections. Our hope is that an expansion in secured lending will allow unincorporated businesses to access cheaper credit than unsecured lending.

[22] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 SI 2001 No 544, paras 60C(3) and 60H

4.86 By contrast, very little lending takes place in Quadrant 2 (mortgages over other goods that secure regulated credit agreements) and we do not anticipate an increase. Most people own few goods that could serve as security – though in some circumstances a business may use goods for a small loan. We certainly do not wish to encourage consumers to put their essential household possessions at risk of repossession in the event of default, and have recommended a regulation-making power to prevent this if required.

4.87 This leaves Quadrant 3, where vehicle mortgages are used to secure large loans. We found some bills of sale of this type at the High Court. In the consultation paper we reported one case where a loan of over £20 million was partly secured on a classic car collection.[23] We hope that our recommendations will reduce the current legal complexity involved in these loans.

[23] Bills of Sale (2015) Law Commission Consultation Paper No 225, p18, para 2.30.

CHAPTER 5
SIMPLIFYING THE DOCUMENT REQUIREMENTS

5.1 The document requirements for security bills in the 1882 Act are particularly onerous, with a harsh sanction for non-compliance.[1] In the consultation paper, we made proposals to simplify these document requirements. Our aims were to:

(1) make it easier for lenders to comply with the legislation;

(2) enable unincorporated businesses and directors to use goods mortgages to secure overdrafts, revolving credit facilities and guarantees, where the amount of the loan and the date of repayment cannot be specified in advance; and

(3) provide clear warnings to borrowers who are consumers or small businesses about the consequences of a goods mortgage.

5.2 In this chapter, we briefly set out the current law. We then discuss consultees' views on our proposals before making recommendations for reform.

5.3 Broadly, we think that a goods mortgage should be set out in a written document signed by the borrower in the presence of a witness. Unlike the rigid document requirements under the 1882 Act, we recommend that there should be more flexibility over the content of the written document.

STANDARD FORM UNDER THE 1882 ACT

5.4 The standard form of a security bill is highly complex, consisting of no fewer than 12 separate requirements.[2]

5.5 Contemporary debates in the House of Commons indicate that the policy rationale for introducing the standard form was to protect borrowers. It sought to warn borrowers against entering into a transaction that could lead "thousands of honest and respectable people to their ruin".[3] Unfortunately, the standard form is written in archaic language; it is now much more likely to confuse borrowers than to inform them.

5.6 Logbook lenders follow the standard form closely. This is because the sanction for non-compliance is severe: not only is the security over the vehicle void, but the logbook lender also loses its right to repayment of the loan.

5.7 The document requirements also have a substantive effect on some forms of business lending. 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 credit facilities and guarantees.

[1] See paras 2.16 to 2.20 in Chapter 2.

[2] Bills of Sale (2015) Law Commission Consultation Paper No 225, p 28, para 3.39.

[3] Hansard (HC), 8 March 1882, vol 267, cc 393-402.

The application process for logbook loans

5.8 Typically, potential borrowers contact logbook lenders by telephone or through a website. In the initial telephone call, the borrower is generally asked to provide details about the vehicle and the desired loan amount.[4]

Face-to-face meetings

5.9 The next stage is a face-to-face meeting. One 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 café.

5.10 As the Bills of Sale Acts require the borrower to sign the security bill in the presence of a witness, who must then swear an affidavit, this necessitates a face-to-face meeting.

5.11 There are also other reasons for a face-to-face meeting. One reason is to allow the lender to assess the vehicle. Another is that the Financial Conduct Authority's (FCA) consumer credit sourcebook (CONC) requires lenders to give borrowers adequate explanations about the key features of a credit agreement before they enter into it.[5] Such a requirement is more easily satisfied face-to-face.

Our views on face-to-face meetings

5.12 We see good reasons for preserving a face-to-face meeting before a borrower takes out a logbook loan. It allows logbook lenders to fulfil their obligations under CONC and prevents borrowers from taking out logbook loans late at night or while drunk. As a matter of commercial practice, a face-to-face meeting is also an opportunity for the logbook lender to assess the vehicle.

5.13 We hope that for logbook loans, face-to-face meetings will continue following our reforms. However, we do not wish to be too prescriptive. We appreciate that for some larger loans in a business context a face-to-face meeting may be unnecessary. We have these considerations in mind when making our detailed recommendations below.

A GOODS MORTGAGE SHOULD BE IN WRITING

5.14 In the consultation paper, we proposed that a goods mortgage should only be valid if it is set out in a written document signed by both parties, with the borrower's signature being witnessed. As granting a goods mortgage is a serious transaction, with implications not only for the borrower but also for third parties, we thought it important that it should be in writing.

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

[5] CONC 4.2. Under CONC 4.2.5, lenders must discuss with borrowers any features of the credit agreement that could have a significant adverse effect on the borrower in a way that the borrower is unlikely to foresee; and the principal consequences of default, including repossession of the borrower's property.

5.15 In order to reinforce the importance of a goods mortgage, we proposed that it should be evidenced in a separate document from the credit agreement. We noted that for a consumer mortgage of a home, the borrower signs a separate mortgage deed.

Consultees' views

5.16 There was general consensus that a goods mortgage should be in writing; 21 (88%) out of 24 consultees agreed. There was support from both logbook lenders and consumer groups. However, many separate issues were raised about the details of our proposal.

The lender's signature

5.17 The Secured Transactions Law Reform Project (STR) and Dennis Rosenthal questioned the need for the lender's signature. Dennis Rosenthal argued that "ordinarily a mortgagee is not required to sign a mortgage".

5.18 We wish to keep formalities to a minimum and agree that it is not necessary for the lender to sign the document.

The borrower's signature in the presence of a witness

5.19 14 (58%) out of 24 consultees agreed that the borrower should have to apply a physical signature in the presence of a witness. However, two logbook lenders, Mobile Money and DTW Associates Limited, argued that electronic signatures could improve customer service. Mobile Money wrote:

> E-signing of credit agreements is common practice and we would hope to extend this to the vehicle mortgage document.

5.20 A goods mortgage is an important transaction and we think that it should be treated with some formality. The requirement that borrowers should sign in the presence of witness prevents the most serious excesses, such as where borrowers may be tempted to take out a loan online while alone and drunk. However, we think it would be overly prescriptive to attempt to specify what type of signature is required. Some e-signatures can be witnessed and may be suitable for business loans.

5.21 We have therefore concluded that the legislation should specify that the borrower signs the document in the presence of a witness. It should not specify the type of signature or who that witness should be. The FCA will need to ensure that logbook lenders continue to comply with the requirements in CONC.

A separate goods mortgage document

5.22 Consumer groups were generally in favour of a separate goods mortgage document. Money Advice Trust wrote that:

> It is very important that the goods mortgage should be in a separate document from the credit agreement as this will help to reinforce the significance of the document.

5.23 The STR saw an advantage in having a separate document in a commercial context. Where the mortgage document is placed on a public register, the parties may wish to preserve the confidentiality of the fuller credit agreement:

> the credit agreement may contain sensitive information and their redaction would involve unnecessary cost at little benefit.

5.24 The STR suggested, though, that parties should have more flexibility outside the consumer context. A document should not be invalidated because it contained too much information.

5.25 Other consultees expressed a similar view. Constantine Cannon LLP thought that the parties should have autonomy. The General Council of the Bar of England and Wales (the Bar Council) and the City of London Law Society similarly thought that separate documents should be optional.

5.26 We agree. We envisage that the goods mortgage document would be a short document containing only six pieces of key information.[6] Often, the lender may find it more convenient for the goods mortgage to be in a separate document. However, we do not think that the goods mortgage should be invalidated if the parties choose to include more information or to prepare only one document.

5.27 **We recommend that:**

(1) a goods mortgage should only be valid if it is set out in a written document signed by the borrower;

(2) the borrower's signature should be made in the presence of a witness; and

(3) the goods mortgage may be in a separate document from the credit agreement, but this is not compulsory.

CONTENTS OF A GOODS MORTGAGE DOCUMENT

5.28 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. Our aim was to simplify the document requirements so that a goods mortgage would be more suitable for business borrowing, while still providing adequate warnings to consumers.

5.29 We proposed that a goods mortgage document should contain only six pieces of key information:

(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;

[6] See para 5.39 for further details.

(4) a statement that ownership of the goods is being transferred to the lender in order to secure the obligation;

(5) the name, address and occupation of the witness; and

(6) a specific description of the goods.

5.30 By contrast, we did not think it necessary that the goods mortgage document should contain:

(1) a fixed sum in respect of the monetary obligation. This would allow borrowers to use goods mortgages to secure revolving credit facilities, overdrafts and guarantees; or

(2) a specific description of the goods in a separate schedule. Goods could be described in the body of the goods mortgage document if the parties so agreed.

Consultees' views

5.31 20 (77%) out of 26 consultees agreed with our proposed content of a goods mortgage document. StepChange emphasised that the goods mortgage document should be as clear and as concise as possible so that borrowers can read and fully digest the information in a short space of time.

5.32 Constantine Cannon LLP commented that specific description of the goods is essential for artworks. However, there was general agreement that it is not necessary to require this description to be in a separate schedule. As Guy Skipwith put it:

> As details of the goods secured by a goods mortgage will be included in the mortgage documentation, I do not see any necessity to include it in a schedule. As long as the goods are adequately described in the goods mortgage documentation, this is sufficient.

5.33 Mobile Money thought that the name, address and occupation of the witness were not necessary. The STR agreed that the witness' occupation should not be required.

5.34 There was some concern about our proposal that it would not be necessary to include a fixed sum. The Chartered Trading Standards Institute thought that this might be suitable for business lending but not for consumer lending.

Our views

5.35 We aim to keep the goods mortgage document as short as possible and to keep regulation to a minimum. For this reason, we propose that the goods mortgage document must contain only the six pieces of key information we proposed.

5.36 The goods mortgage document would sit alongside a highly regulated credit agreement. The Consumer Credit (Agreements) Regulations 2010 prescribe in great detail the information that a regulated credit agreement must contain.[7] This includes, among other things, the interest rate, a description of the type of credit, the addresses of the borrower and lender, the duration of the agreement, the total amount payable under the agreement and the amount of each repayment to be made. We think that the combination of the regulated credit agreement and goods mortgage document will adequately protect the borrower.

5.37 In order to be able to trace the witness, we think that it is essential to include their name and address. Their occupation could also be helpful, particularly if the witness is an employee of the logbook lender.

5.38 One of the aims of our proposals was to give unincorporated businesses more flexible borrowing options. We continue to think that it should not be necessary to include a fixed sum in the goods mortgage document. In respect of consumers, the FCA can monitor logbook lender conduct to ensure that there are no abuses.

5.39 **We recommend 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 in order to secure the obligation;

(5) the name, address and occupation of the witness; and

(6) a specific description of the goods.

PROMINENT STATEMENTS IN LOGBOOK LOANS

5.40 Most goods mortgages will be vehicle mortgages used to secure a regulated credit agreement. For such transactions, we proposed that the vehicle mortgage document should contain two prominent statements:

YOU TRANSFER OWNERSHIP OF YOUR VEHICLE TO US UNTIL YOU HAVE REPAID YOUR LOAN

YOUR VEHICLE MAY BE REPOSSESSED IF YOU DO NOT KEEP UP REPAYMENTS ON YOUR LOAN

We thought that these are two important consequences of a vehicle mortgage that should be made clear to borrowers.

[7] SI 2010 No 1014.

Consultees' views

5.41 There was broad support from both logbook lenders and consumer groups in favour of including the prominent statements in the vehicle mortgage document. Consumer groups pointed to current consumer confusion. Citizens Advice wrote:

> Our evidence suggests consumers commonly fail to understand the terms and conditions of logbook loans – particularly not always realising they no longer own the property on which their loan is secured, and that missing repayments could result in repossession.

5.42 A number of consultees pointed to the need for clarity and simplicity in the prominent statements. The Bar Council suggested that the prominent statement in relation to ownership could be further simplified. It suggested "We will own the vehicle until you have repaid your loan".

5.43 The Campaign for Fair Finance thought that there should be a prominent statement to dissuade the borrower from selling the vehicle. We discuss this in further detail in Chapter 8.

5.44 Citizens Advice suggested that graphics could help to reinforce the messages. StepChange thought that the prominent statements should include signposts to free debt advice.

5.45 Most consultees thought that the prominent statements should also appear on websites and advertising. Mobile Money described this as "an absolute requirement".

Our views

5.46 As we discussed in the consultation paper, our formulations are for guidance only. Before settling on final formulations, we think that there should be research into what words to use and whether graphics would be helpful.

5.47 In respect of mortgages on homes, the FCA has prescribed warnings which must be set out in both pre-application material and in the mortgage offer document. These warnings are contained in the FCA's sourcebook on conduct of business in mortgages (MCOB).[8] Part 9A of the Financial Services and Markets Act 2000 gave the FCA the power to make such rules. We think that the legislation should operate similarly for goods mortgages, so that the Goods Mortgages Act gives the FCA the power to prescribe the wording of the prominent statements. The prominent statements could then be set out in, for example, CONC.

[8] MCOB 5.6.124R and 6.4.1R(1).

5.48 CONC already contains rules relating to financial promotions. There is a general rule that a communication or financial promotion must be clear, fair and not misleading.[9] In addition, the benefits of a product should not be emphasised without also giving "a fair and prominent indication of any relevant risks".[10] The prominent statements would need to be compliant with this existing CONC regime.

5.49 **We recommend that where a regulated credit agreement is secured on a vehicle:**

(1) the vehicle mortgage document should include prominent statements that:

(a) the lender owns the vehicle until the loan is repaid; and

(b) in the event of default, the borrower risks losing possession of the vehicle;

(2) the prominent statements should appear on websites and advertising; and

(3) the FCA should have a regulation-making power to prescribe the wording of the prominent statements.

5.50 **We recommend that research should be conducted with consumers to decide upon the final formulations of the prominent statements.**

PROMINENT STATEMENTS FOR OTHER LOANS

5.51 Where the lender takes security over goods other than a vehicle in order to secure a regulated credit agreement, we proposed that adapted versions of the prominent statements should appear on the goods mortgage document. 13 (93%) out of 14 consultees agreed.

5.52 We did not think that the prominent statements should be required for goods mortgages that do not secure regulated credit agreements. Borrowers in such cases are considered to be less in need of legislative protection and so the prominent statements may appear paternalistic.

5.53 Several consultees felt that it would do no harm to include the prominent statements even where the credit agreement is not regulated. Mobile Money noted that inclusion would "aid clarity and improve general practice". To give the parties autonomy, we do not propose to mandate that the prominent statements be included, though we have no objection if parties choose to do so where the credit agreement is not regulated.

5.54 **We recommend that:**

[9] CONC 3.3.1R(1).

[10] CONC 3.3.1R(1A).

(1) adapted versions of the prominent statements should be required for regulated credit agreements secured on goods other than vehicles; and

(2) it should not be mandatory to include the prominent statements for goods mortgages which do not secure regulated credit agreements.

SANCTION FOR FAILURE TO COMPLY

5.55 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 goods but also loses the right to sue the borrower for repayment of the loan.

5.56 We proposed a different sanction in the consultation paper: the lender would still be entitled to repayment of the loan, but the goods mortgage itself would be void.

5.57 14 (64%) out of 22 consultees agreed. Those consultees that did not agree either wanted a harsher sanction or a more lenient one. For example, Citizens Advice thought that the proposed sanction would not be a sufficient deterrent and that lenders should be limited to recovering only the principal loan amount. On the other hand, Constantine Cannon LLP wrote that the sanction is "excessively formalistic". The Bar Council similarly cautioned against an inflexible sanction.

5.58 The goods mortgage document deals only with the grant of security, not the loan itself. Non-compliance should therefore only result in the loss of the security. We think that it would be inappropriate in the event of non-compliance for the lender also to lose the right to sue the borrower for repayment of the loan. Loss of the right to sue the borrower for repayment of the loan should be a consequence that follows breach of the credit agreement.

5.59 The goods mortgage document under our recommendations would be a short simple document that contains information that it is essential for the borrower to know. Lack of compliance would therefore be likely to cause detriment to borrowers. Compliance would also be easier to achieve. In light of this, we think that loss of the lender's security is a proportionate sanction.

5.60 **We recommend that the sanction for failure to comply with the document requirements should be that the lender loses any right to the goods, both as against the borrower and as against third parties.**

CHAPTER 6
MODERNISING THE REGISTRATION REGIME

6.1 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 difficult to search that logbook lenders also register voluntarily with commercially-run asset finance registries. In practice, other lenders and trade buyers rely on these commercially-run asset finance registries to discover whether a vehicle is already subject to a logbook loan or other finance.

6.2 In the consultation paper, we proposed a distinction between how vehicle mortgages and other goods mortgages should be registered. We proposed that there should be no requirement to register vehicle mortgages at the High Court. Instead, logbook lenders would be required to register with a designated asset finance registry. For other goods, registration at the High Court would continue, but would be significantly simplified.

6.3 In this chapter, we first set out the current law on registration of security bills. We then consider consultees' responses to the proposals on registration in the consultation paper.

6.4 One common thread in many responses was a desire to see much more radical reform of how security interests are registered in England and Wales. Many consultees referred to an electronic register recording all forms of security interests. We discuss why this is not an immediate option for reform, but might be in the future.

THE CURRENT LAW

6.5 As we saw in Chapter 2, all security bills must be registered at the High Court if the lender's security is to be valid.[1] The registration regime is complex:

(1) a credible witness who is not a party to the security bill must witness its signature; and

(2) within seven days after the date of signature, the following documents must be filed with the High Court:

(a) the security bill;

(b) a true copy of the security bill, including the signature of the witness; and

[1] The registration regime is set out in section 10 of the 1878 Act and sections 8 and 10 of the 1882 Act.

(c) an affidavit of the date and time the security bill was granted.[2] The affidavit must also state that the security bill was properly signed and witnessed and include a description of the residence and occupation of the borrower and the witness.[3]

6.6 If a lender fails to register a security bill in accordance with the legislation, its security is void as against all third parties and also as against the borrower. The lender may still sue the borrower for repayment of the loan.

6.7 Registration of the security bill must be renewed every five years. If the lender fails to do this, then registration lapses and the security will be void as against all third parties and the borrower.

Problems with the registration regime

6.8 We describe the registration regime in detail in the consultation paper and summarise the main problems with it in Chapter 2 of this report.[4] It is paper-based, expensive and cumbersome. For logbook loans it no longer serves any useful purpose. As the Consumer Credit Trade Association (CCTA) said:

> The register is not fit for purpose and does not provide any benefits to lenders or borrowers.[5]

6.9 To provide notice to motor traders and other lenders, logbook lenders also register with commercially-run asset finance registries. Registration is generally free and can be done online. These registries are widely searched by motor traders and lenders. They have become such an important part of motor finance that the CCTA code of practice requires its members to register logbook loans with an asset finance registry within 24 hours of the documentation being signed.[6]

REGISTERING VEHICLE MORTGAGES

6.10 Our recommendations for reform distinguish between mortgages secured on vehicles and those secured on other goods. We define a "vehicle" as any vehicle registered with the Driver and Vehicle Licensing Agency, which broadly covers motor vehicles used on roads. All these vehicles can be identified by a unique vehicle identification number and a registration number.

2 An affidavit is a written statement of fact that is sworn before a person authorised to administer affidavits, such as a solicitor. For security bills, this means that the witness must swear the affidavit before a solicitor who administers the affidavit.

3 If the security bill is subject to any condition, that condition must be included in the security bill before registration and also set out in the true copy.

4 See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 57, paras 5.18 to 5.42 and paras 2.24 to 2.31 in Chapter 2.

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

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

6.11 In the consultation paper, we proposed that the requirement to register vehicle mortgages with the High Court should be abolished. We estimated that this would save logbook lenders around £2 million a year with no loss of protection to the borrower.[7]

6.12 Under our recommendations, registration of vehicle mortgages would continue to have legal consequences. The logbook lender would be entitled to enforce a vehicle mortgage against a borrower whether or not it is registered. However, logbook lenders would not be entitled to enforce the vehicle mortgage against third parties, including trustees in bankruptcy, unless it had been registered with a designated asset finance registry.

Consultees' views

6.13 There was widespread consensus that High Court registration of logbook loans serves no purpose. 21 (91%) out of 23 responses agreed that it would be wrong to perpetuate the practice. As Guy Skipwith put it:

> High Court registration is expensive and cumbersome for lenders, and adds to the cost of loans secured by the bills/mortgages. Also, because the register does not provide for checks against the vehicles concerned, I see no benefit in requiring vehicle mortgages to be registered at the High Court.

Similarly, Money Advice Trust wrote:

> It is very difficult to search and the process is obscure, expensive and so complex that no one can properly comply.

6.14 21 (91%) out of 23 responses also agreed that, instead, logbook lenders would not be entitled to enforce a vehicle mortgage against third parties unless it had been registered with a designated asset finance registry. Both asset finance registries that responded to the consultation paper agreed. HPI wrote:

> In terms of the priorities regime we consider that registration is the key to establishing perfection against third parties.

6.15 Cheshire Datasystems Limited (CDL) noted that:

> Lenders should be ensuring their assets are registered with all 3 asset finance registries… otherwise this limits consumer options as to which company they should be conducting a provenance check with.

6.16 All five logbook lenders that responded to the consultation paper agreed that vehicle mortgages should be registered with designated asset finance registries rather than the High Court. Mobile Money wrote that:

> Registration in the High Court provides benefit to neither the lender nor consumer.

[7] This is based on 47,723 vehicle mortgages with an average High Court registration cost of £42 each (£2,052,089). See Chapter 11 for further details.

Our views

6.17 As we discussed in Chapter 2, the High Court registration regime is now completely unfit for purpose.[8] It is costly, paper-based and in urgent need of modernisation. Further, logbook lenders do not search the High Court registry before agreeing a logbook loan. That function is provided by commercially-run asset finance registries such as HPI, Experian and CDL.

6.18 We recommend that there should be no requirement to register vehicle mortgages at the High Court. Instead, logbook lenders would only be entitled to enforce their security against third parties and trustees in bankruptcy if they register the vehicle mortgage with a designated asset finance registry. We discuss designated asset finance registries in further detail later in this chapter.

Priority

6.19 In the consultation paper, we proposed that priority would be determined by the date and time that the details of the vehicle mortgage become publicly available. There would be no time limit for registering, but any third party who acquired an interest in the vehicle before registration would take free of the vehicle mortgage.

6.20 20 (87%) out of 23 consultees agreed that priority should be determined by the date and time that the details of the vehicle mortgage become publicly available. Two other points for determining priority were suggested:

(1) HPI and the City of London Law Society thought that priority should be determined from the date and time the documents are filed for registration; and

(2) the Secured Transactions Law Reform Project (STR) thought that the date and time the vehicle mortgage is entered on the register should determine priority.

6.21 This is a fine point that largely turns on how asset finance registries operate. There are a number of ways of registering a vehicle mortgage with an asset finance registry. Submitting the documents for registration and the vehicle mortgage appearing on the register should usually take place at the same time, though this may not be the case if the asset finance registry has technological difficulties.

6.22 From the logbook lender's point of view, once it has submitted the information to the asset finance registry, it has done all it can to ensure that third parties are aware of the vehicle mortgage. For this reason, we think that this should be the point at which priority is determined.

6.23 **We recommend that:**

(1) there should be no requirement to register vehicle mortgages at the High Court;

[8] See paras 2.24 to 2.31 in Chapter 2.

(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; and

(3) priority should be determined by the date and time that the logbook lender submits the details of the vehicle mortgage for registration.

DESIGNATING ASSET FINANCE REGISTRIES

6.24 In the United Kingdom, registration of finance interests over vehicles is left to three private firms: HPI, Experian and CDL. In the consultation paper, we proposed that a government body should designate suitable registries for vehicle mortgages.

6.25 The aim of the designated asset finance registries would be (at least in the first instance) to provide information to motor traders and other lenders, rather than private purchasers.[9] In light of this, we proposed 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.

Consultees' views

6.26 15 (68%) out of 22 responses agreed that a government entity should designate asset finance registries. Those consultees who disagreed generally preferred a central asset finance registry run by Government. We consider this in further detail later in this chapter.

6.27 There was consensus among consultees that our proposed criteria for designation are appropriate. 18 (82%) out of 22 consultees agreed. The Retail Motor Industry Federation noted that HPI, Experian and CDL would likely be the initially designated asset finance registries:

> There are a number of existing vehicle finance registries that are already fully established and operating effectively, notably HPI, Experian and CDL. These organisations offer a robust and reliable data source for checking outstanding finance on a particular vehicle. The RMI suggests that HPI, Experian and CDL are included as designated registers.

6.28 Asset finance registries suggested some amendments to our criteria. HPI commented that the current industry standard, the ISAE3000 audit, would be a reasonable minimum standard.[10] CDL felt that data-sharing should take place within 24 hours.

[9] In Chapter 8, we look in detail at the position of private purchasers.

[10] The ISAE3000 audit is issued by the International Federation of Accountants. It stands for the International Standard on Assurance Engagements and relates to non-financial information.

Our views

6.29 Commercially-run asset finance registries have a wealth of experience in the motor trade. Designating existing providers would retain this expertise while also allowing more expeditious reform. Her Majesty's Treasury (HMT) now has policy oversight of consumer credit and so may be best placed to carry out the designation process. We think that this process need not be arduous.

6.30 HMT has experience in designating banks and credit reference agencies. The Small and Medium Sized Business (Credit Information) Regulations 2015 (the 2015 Regulations) give HMT the power to designate banks and credit reference agencies.[11] These designated bodies are then placed under obligations to share credit information with finance providers with the aim of improving access to credit for businesses.

6.31 Like our proposed registration regime for vehicle mortgages, the 2015 Regulations set out criteria for banks and credit reference agencies wishing to be designated. HMT was helped in the application process by the British Business Bank which has relevant expertise in the area.

6.32 The alternative to designation would be to set up a central Government asset finance register for vehicle mortgages. We do not think that the time and expense of establishing a central Government asset finance register would be justified by the benefits it would provide. It would also lose the private sector's skills in running asset finance registries that have developed over many years.

Criteria for designation

6.33 We are cautious of being overly prescriptive in the criteria for designation. Our proposed criteria should satisfy the needs of traders and lenders while still allowing flexibility for the market to develop. We recommend four criteria:

(1) **Data-sharing**: there is currently some uncertainty over how far HPI, Experian and CDL share data. To avoid logbook lenders being required to register and search more than one registry, we think that any asset finance registry seeking designation should show that it shares data with others in the industry.

(2) **Cost structure**: it is important that the cost structure does not discourage searches. At present, traders and lenders tend to negotiate their own deals, with high-volume users paying less than £3 for each search. Asset finance registries seeking designation would need to ensure that the price for a search is reasonable, particularly for smaller traders and lenders.

(3) **Robust technology and indemnities**: any asset finance registry seeking designation would need to show that it has robust technology that could deliver the service. If the technology failed, so that a third party was not notified of a registered vehicle mortgage, we think the third party should take free of the interest. The asset finance registry should then be required to indemnify the logbook lender for its loss.

[11] SI 2015 No 1945.

(4) **Complaints system**: some logbook lenders may attempt to abuse asset finance registries by registering vehicle mortgages that they do not have.[12] A designated asset finance registry would need to have a complaints system in place to deal with disputes about the validity of vehicle mortgages between traders, lenders, third parties and borrowers.

6.34 **We recommend that:**

(1) Her Majesty's Treasury should designate asset finance registries as suitable to register vehicle mortgages; and

(2) 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.

Pre-emptive registration

6.35 Two logbook lenders, Mobile Money and DTW Associates Limited, raised the issue of pre-emptive registration and wanted the practice banned. DTW Associates Limited explained the problem as follows:

> a customer may obtain a quote from various companies whilst exploring the market. A few lenders will register their security on the vehicle at this point, claiming that the customer has an appointment to sign an agreement with them. At the point when another lender does a HPI check, the customer is made aware of this but given the complications in requesting its removal, they often feel trapped into completing the loan with the company that wrongfully registered their interest.

6.36 There is already legislation that deals with this behaviour. Under the Consumer Protection from Unfair Trading Regulations 2008, it is a criminal offence to carry out an aggressive practice.[13] The Regulations are enforceable by Trading Standards and other regulators.[14]

6.37 Regulation 7 deems a commercial practice to be "aggressive" if:

(1) it significantly impairs or is likely to impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and

[12] See paras 6.35 to 6.39.

[13] SI 2008 No 1277.

[14] Above, reg 19.

(2) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.

6.38 Regulation 7(3) goes on to define "undue influence" as:

> Exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision.

6.39 We think that pre-emptive registration constitutes an aggressive practice under regulation 7 and do not propose to introduce further legislation regulating this practice. As we discussed above, it would also be possible to complain to designated asset finance registries about pre-emptive registration.[15]

MORTGAGES ON OTHER GOODS

6.40 In the consultation paper, we proposed that a goods mortgage would be enforceable against the borrower whether or not it has been registered. However, a goods mortgage would only be enforceable against third parties if it has been registered.

6.41 As we explain below, we think there is a need to continue to register mortgages on other goods to prevent detriment to third parties. The question is where that registration should take place.

6.42 Some of the security bills we found at the High Court registry were over a very wide variety of goods, such as the furniture and fittings of a hotel, fine wine and art. We estimated in the consultation paper that there are around 260 security bills over goods other than vehicles registered each year. Given that the number of registrations is so low, and in the absence of any online registers capable of dealing with such varied items, we proposed that the requirement to register with the High Court should remain for the time being. We saw simplifying the High Court registry as the pragmatic solution. In the long-term, we hope that there is scope to move such registrations to an electronic register.

THE NEED FOR REGISTRATION

Consultees' views

6.43 The purpose of registration is to give notice to third parties. In the consultation paper we proposed that mortgages on goods other than vehicles should only be enforceable against third parties or trustees in bankruptcy if they had been registered. Most consultees who addressed this point (10 out of 13) agreed. Guy Skipwith wrote:

> Registration is an important safeguard for third parties and provides trustees in bankruptcy with necessary information about a bankrupt's estate (assets).

[15] See para 6.33(4).

6.44 The majority of consultees (12 out of 14) also agreed that goods mortgages should be enforceable against the borrower whether or not they have been registered. Guy Skipwith commented that there should be symmetry between mortgages over vehicles and other goods.

Our views

6.45 In the consultation paper, we identified three reasons for registration of mortgages over goods other than vehicles:

(1) notice to third parties;

(2) where a lender is providing substantial sums to an individual with apparently valuable assets, it might have more incentive to search the register; and

(3) to determine priority issues between competing lenders.

6.46 These reasons for registration all relate to third parties. It is difficult to see how the borrower would suffer detriment from an unregistered goods mortgage.

6.47 **We recommend that mortgages on goods other than vehicles:**

(1) should not be enforceable against a third party or trustee in bankruptcy unless they have been registered; and

(2) should be enforceable against the borrower whether or not they have been registered.

AN ELECTRONIC REGISTER OF SECURITY INTERESTS?

Consultees' views

6.48 In responding to our proposals for modernising the registration regime, many consultees expressed a desire for an electronic register of security interests. This was particularly the case when consultees discussed mortgages over goods other than vehicles, where it was felt that the High Court is inadequate as a registry.

6.49 Two law firms argued that an electronic register would expand the art lending market in the United Kingdom. Constantine Cannon LLP wrote:

> We expect that as soon as new legislation is introduced, there will be a significant rise in the registration of security interests in goods other than vehicles, provided that a register that is fit for purpose is in place… the Government should not base its decision to implement an electronic public-facing registry on the current registration figures.

6.50 The STR argued for an electronic register more generally:

> To replace registration at the High Court with asset finance registries is to miss an important opportunity to introduce an electronic register of security granted by individuals and groups of individuals. Not only does the suggested reform not go far enough but it is also likely to place English law of secured transactions behind other jurisdictions where security can be registered electronically.

6.51 A number of common law jurisdictions, including Australia, New Zealand and some Canadian provinces, have implemented electronic registers of security interests granted by incorporated and unincorporated borrowers.

6.52 Registration of security interests in England and Wales is highly fragmented. Incorporated borrowers use Companies House; individuals and other unincorporated borrowers must use the High Court; and there are further specialist registries for, among other things, aircraft, ships and agricultural charges. The introduction of an electronic register of security interests could, depending on its scope, have the benefit of consolidating all these registries into one single registry that could be searched online.

Our views

6.53 We fully appreciate the advantages of an electronic register of security interests. However, there is little Government appetite at this time for the implementation of such a register. Even with Government motivation, such a register is unlikely to be achieved as part of the bills of sale project. As an example of the likely timeline, Australia began to seriously consider reform of securities law in 2005; the Personal Property Securities Act was passed in 2009 and eventually came into effect in 2012. The need for reform of the Bills of Sale Acts is urgent, and we do not think that such a delay would be justifiable.

6.54 Instead, we make recommendations that can be more quickly implemented to provide much needed modernisation of the registration regime. We therefore propose to retain the High Court register in the short-term. But our view is that the implementation of an electronic register of security interests is highly desirable.

6.55 In the long-term we are sympathetic to a general register covering all security interests. We make a recommendation that there should be a regulation-making power to allow for this. In the medium term we can see advantages in a more limited electronic register covering mortgages on goods other than vehicles and general assignments of book debts. Several consultees anticipated that both areas would expand following our reforms. Companies House already operates an electronic registration regime for companies and limited liability partnerships. It would be well placed to register goods mortgages and general assignments of book debts should they be moved from the High Court.

6.56 We think a register run by Companies House covering goods mortgages and general assignments of book debts would be useful in itself, and would be a step towards a more unified regime. We therefore recommend that the new legislation should include a regulation-making power to allow for this in the future.

6.57 **We recommend that:**

(1) mortgages on goods other than vehicles should continue to be registered at the High Court;

(2) the legislation should include a regulation-making power allowing goods mortgages and general assignments of book debts to be registered with Companies House in the future; and

(3) the legislation should include a regulation-making power allowing for the implementation of an electronic register of security interests in the future.

SIMPLIFYING THE HIGH COURT REGISTRY

6.58 Given the small volume of security bills currently registered at the High Court over goods other than vehicles, we did not think that the costs of establishing an electronic register would be justified. In the consultation paper, we proposed changes to make the High Court registry more user-friendly.

6.59 We proposed that:

(1) lenders should be able to email documents to the High Court for registration;

(2) priority should be determined by the date and time of submission of documents for registration. When documents are emailed to the High Court for registration, an automatic reply would be generated confirming the date and time of registration. Priority between competing goods mortgages would be determined by the earlier automatic reply;

(3) there should no longer be a requirement to file original documents with the High Court;

(4) there should no longer be a requirement to file affidavits with the High Court;

(5) lenders should be required to email a registration form listing key details of the goods mortgage together with a copy of the goods mortgage document to the High Court;

(6) there should be no statutory time limit for registration; and

(7) there should be no requirement for the High Court to send goods mortgage documents to county courts.

Consultees' views

6.60 Aside from calls for an electronic register, consultees were generally in favour of our proposed reforms. 10 (56%) out of 18 consultees agreed.

6.61 A number of consultees made further suggestions for reform:

(1) Dr Akseli and Dr Thomas of Durham Law School, Boodle Hatfield LLP and Constantine Cannon LLP all wanted the registration form to record the location of the goods; and

(2) Gregory Hill thought that paper registration should still be permissible in case of technological failure.

Our views

6.62 Though we are aware of the benefits of an electronic register, we would, as already indicated, not wish to delay urgent, and simple, reform of the High Court registry. Until an electronic register is reasonably in prospect, we think it pragmatic to recommend modernisation of the High Court registry instead.

6.63 Though we envisage that registration and search requests will be by email most of the time, we think it sensible to retain the option of paper registration and search requests. As Gregory Hill suggested, registration and search requests in person would be particularly important if technology fails.

6.64 Currently, those who wish to search the High Court register give High Court staff (in person or by post) the details that they wish to search against. High Court staff then conduct the search by checking a spreadsheet.[16] The process would remain the same under our recommendations, except that it would also be possible to give High Court staff details by email.

Documents required for registration

6.65 In the consultation paper, we proposed that lenders would have to email the following documents to the High Court:

(1) a registration form listing the key details of the goods mortgage, such as the date, parties, the obligation that is being secured and category of goods secured. High Court staff would use the registration form to enter details on to the spreadsheet; and

(2) a copy of the goods mortgage document, which should reduce the scope for confusion as third parties would be able to access the full document.[17]

6.66 The mechanics of registration are primarily a matter for the High Court and would be set out in court rules. To ease the administrative burden on staff, we think that the documents submitted for registration should clearly indicate the information that is required for the spreadsheet.

6.67 As we envisage the goods mortgage document to be a short simple document, it could potentially be the registration form. In this case, we see no need to submit both a registration form and a copy of the goods mortgage document.

6.68 In other cases, parties may wish to include more information, such as the location of the goods. We do not propose that registration should be invalidated merely because the documents submitted for registration contain more information than High Court staff need. However, in such cases, we think that a separate registration form should be required to ensure that the essential details needed for the spreadsheet are clearly visible.

[16] When High Court staff register a bill of sale, they enter some basic details on to a spreadsheet (including the name and postcode of the borrower).

[17] See paras 5.14 to 5.26 in Chapter 5.

6.69 **We recommend that for registration of mortgages on goods other than vehicles at the High Court:**

(1) registration can be by email;

(2) priority should be determined by the date and time of submission of documents for registration;

(3) original documents should no longer be required;

(4) an affidavit should no longer be required;

(5) lenders should submit documents that clearly indicate the information required by High Court staff;

(6) there should not be a statutory time limit; and

(7) the High Court should not be obliged to send goods mortgage documents to county courts.

ENSURING THE ACCURACY OF THE REGISTERS

6.70 It is important that designated asset finance registries and the High Court registry contain accurate records of vehicle mortgages and goods mortgages. Registers are only useful to third parties if the information contained on them is up-to-date and accurate.

6.71 In the consultation paper, we proposed three measures to ensure 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; and

(3) re-registration of vehicle mortgages and goods mortgages should be required every 10 years.

Consultees' views

6.72 19 (83%) out of 23 consultees agreed that lenders should be required to enter notices of satisfaction. CDL remarked that:

> The removal of a vehicle mortgage, once the loan has been repaid, is as important as registering the loan.

6.73 The Finance & Leasing Association (FLA) agreed with the proposal and noted that asset finance registries already provide this function:

> Lenders already delete finance interests. Asset registration agencies are also directed by lenders to auto-delete on the date the agreement is due to expire.

Mobile Money, a logbook lender, made a similar point.

6.74 Consultees expressed concern with the proposal that borrowers should be able to enter notices of satisfaction. Mobile Money argued that there is no need for this measure since asset finance registries already have adequate ways of ensuring that logbook loans are deleted upon expiry. The FLA was worried that the proposal could facilitate fraudulent behaviour by some borrowers. It noted that there are already regulatory incentives in place to encourage lenders to enter notices of satisfaction.

6.75 There were mixed responses to our proposed 10 year re-registration period. A number of consultees argued for a shorter re-registration period, particularly in relation to vehicle mortgages. Guy Skipwith wrote:

> Many vehicle mortgages are for terms of less than 10 years. Therefore, the requirement to register every five years should be retained whether the registration is with the High Court or an asset finance register.

6.76 Other consultees questioned the need for re-registration at all. The STR said:

> Where the lender is required to register a notice of satisfaction, the risk that registration against vehicles would be 'empty' (ie visible on the register but not in fact securing any debt) is significantly reduced.

6.77 Similarly, CDL wrote:

> We are not sure that this would be a requirement if the lender is registering and removing the loan from asset registration agencies.

Our views

6.78 As asset finance registries and the High Court registry differ so markedly in their operation, different rules are required to ensure their accuracy.

Asset finance registries

6.79 Asset finance registries operate a number of different ways of deleting logbook loans. We are conscious of the need not to impose rules that frustrate a regime that already appears to operate efficiently.

6.80 We understand that there are two means of cleansing asset finance registries of satisfied logbook loans:

(1) logbook loans may be marked for automatic deletion upon expiry of the term of the loan; or

(2) logbook lenders can instruct the asset finance registry to delete the logbook loan.

6.81 We think that the obligation on the logbook lender should be to ensure that satisfied vehicle mortgages are removed from asset finance registries by any means available. This would avoid unnecessary regulation of an area that already operates well.

6.82 Where a logbook lender fails or refuses to remove a satisfied vehicle mortgage, the borrower should have recourse to the asset finance registry's complaints system.[18] Systemic failure or refusal to remove satisfied vehicle mortgages could also be addressed by the Financial Conduct Authority under its supervisory and enforcement pillars. Such behaviour is likely to fall foul of the logbook lender's obligation to treat customers fairly.[19]

6.83 As there are effective methods of removing satisfied vehicle mortgages from asset finance registries, a re-registration period should be unnecessary.

6.84 **We recommend that to maintain the accuracy of designated asset finance registries:**

(1) logbook lenders should be required to remove satisfied vehicle mortgages from asset finance registries by any means available; and

(2) it is not necessary to require re-registration of vehicle mortgages.

High Court registry

6.85 For the High Court registry, manual processes for cleansing the register continue to be necessary. In the absence of any efficient means of removing satisfied goods mortgages from the register, we think that a 10 year re-registration period is helpful in keeping the register manageable.

6.86 **We recommend that to maintain the accuracy of the High Court registry:**

(1) lenders should be required to enter notices of satisfaction in respect of satisfied 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; and

(3) re-registration of goods mortgages should be required every 10 years.

[18] A complaints system is one of our criteria for designation.

[19] Treating customers fairly is one of the Financial Conduct Authority's principles of good regulation for businesses. Principle 6 states that a "firm must pay due regard to the interests of its customers and treat them fairly".

CHAPTER 7
PROTECTING BORROWERS

7.1 Borrowers currently have very little protection under the Bills of Sale Acts. 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.

7.2 In the consultation paper, we proposed that where goods mortgages secure regulated credit agreements, borrowers should have access to both the court order and voluntary termination. The court order aims to protect a borrower who can pay but who has encountered temporary financial difficulties and needs additional time to pay. By contrast, a borrower with no realistic prospect of paying off the loan would benefit from the right of voluntary termination.

7.3 Our proposal for a court order was similar, but not identical, to the court order under hire purchase law. Our proposal for voluntary termination was based on the provisions of the code of practice for logbook lenders drafted by the Consumer Credit Trade Association (the CCTA Code).

7.4 Consultees were generally supportive of both the court order and voluntary termination. We received a helpful response from AutoMoney, which drew on its experience in the United States to suggest how we could refine our recommendation for a court order. We are also extremely grateful to the consumer groups who gave us the benefit of their experience about how to encourage borrowers to engage with the court process in a way that prevents repossession.

THE CURRENT LAW

7.5 Under the Bills of Sale Acts, 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 restrictions derive from consumer credit legislation: the lender must issue two notices, a notice of sums in arrears and a default notice, and give the borrower a 14 day grace period after the issue of the latter in which to remedy the default.[1]

7.6 The 1882 Act then requires the lender to wait a further five days before selling the goods.[2] For logbook loans, the CCTA Code extends the five day grace period to 14 days.[3]

[1] See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 43, paras 4.42 to 4.48 for further details.

[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.

Time orders

7.7 The Consumer Credit Act 1974 (CCA 1974) additionally gives borrowers the right to apply to court for a time order asking for more time to pay. Both the notice of sums in arrears and the default notice inform borrowers that they may apply for a time order.[4]

7.8 A time order is designed to help borrowers in temporary financial difficulties who could repay the loan if given sufficient time. It is unlikely that the court would grant a time order where it doubted the borrower's ability to resume repayments even after being given more time.[5]

7.9 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. The court also has power to alter the terms of the credit agreement, for example by reducing the rate of interest.[6] In *Director General of Fair Trading v First National Bank plc*, 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.[7]

Problems with time orders

7.10 Reliance on time orders is unsatisfactory for three reasons:[8]

(1) Applications to court are costly. The burden of applying for a time order rests on the borrower, who must pay a £280 court fee. Borrowers in arrears are unlikely to be able to afford such a fee.

(2) Lenders need wait only 14 days from issuing a default notice before seizing goods. Borrowers may have insufficient time to submit their claim for a time order and arrange a hearing date.

(3) Borrowers are unlikely to be well informed enough to make an application for a time order within the strict deadlines and using the correct procedure unless they have consulted lawyers. The application must follow a prescribed form, which involves setting out detailed information in precise sequential order.[9]

7.11 Applications for time orders appear rare. 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 burden is on borrowers to apply to court.

4 CCA 1974, s 129.

5 *Southern & District Finance plc v Barnes and Another* [1996] 1 FCR 679.

6 CCA 1974, s 136.

7 [2001] UKHL 52, [2002] 1 AC 481, Lord Bingham at para 29.

8 See Bills of Sale (2015) Law Commission Consultation Paper No 225, pp 44 to 46, paras 4.49 to 4.59 for further details.

9 Civil Procedure Rules, Practice Direction 7B, para 7.3.

THE ENFORCEMENT PROCESS FOR LOGBOOK LOANS

7.12 Problems in enforcement most commonly arise in the context of logbook loans. For this reason, we focus on how the enforcement process currently works in this sector.

7.13 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.

7.14 The Financial Conduct Authority's (FCA) consumer credit sourcebook (CONC) requires logbook lenders to "establish and implement clear, effective and appropriate policies and procedures" for dealing with borrowers in arrears. Borrowers should be treated with "forbearance and due consideration". Logbook 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".[10]

7.15 In practice, 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 lender about any problems and discuss an alternative repayment plan.

Voluntary termination

7.16 The CCTA Code allows borrowers "to voluntarily surrender the assigned vehicle in full and final settlement of all claims".[11] In other words, the borrower may give the vehicle to the lender and walk away from the loan. This option has no statutory basis but is simply part of self-regulation under the CCTA Code.

7.17 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 lender to repossess the vehicle and then face a shortfall they cannot pay, the borrower can take some control of the loan.

7.18 We welcome the CCTA Code provisions on voluntary termination. As we explain below, we think this right should be better known and given a statutory basis.

Repossession

7.19 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.

[10] CONC 7.2 and 7.3.

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

7.20 Logbook lenders said that they would only issue a default notice if attempts to negotiate an alternative repayment plan fail. 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. During this time, logbook lenders said they would continue to try to reach alternative arrangements. After the default notice has expired, the lender may proceed to repossession, though some send an additional letter or "seizure notice" at this point.

7.21 Some 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.

7.22 Following repossession, the 1882 Act requires lenders to wait five days before sale.[12] The CCTA Code extends this period to 14 days.[13] During this time, borrowers may apply to court for relief, though this happens extremely rarely. One logbook lender mentioned two cases in three years.

The costs of default, repossession and sale

7.23 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. For this reason, 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.

7.24 Some lenders see the logbook loan as a loan on the vehicle. Once the vehicle is repossessed, the lender has no further claim and so does not pursue the borrower for any shortfall. Others continue to pursue borrowers. There was recognition that very little money is usually recovered, but an attempt is nevertheless made to recover some.

Problems with the repossession process

7.25 Many families are dependent on a vehicle, for example to get to work or to carry on a business. Repossessing the vehicle is therefore a major step. Even the threat of repossession can be used to extract excessive sums. Where repossession takes place, it often deprives borrowers of a vehicle they need, adds costs and leaves a substantial shortfall. As one logbook lender put it, "repossession is never a pleasant experience" for either party. There are stories of abuse by both logbook lenders and borrowers.[14]

[12] 1882 Act, s 13.

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

[14] See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 66, paras 5.62 to 5.64 for further details.

7.26 It is therefore worrying that some logbook lenders appear to repossess much more readily than others. While some lenders quoted a repossession rate of no more than 2% to 3% others mentioned rates of 10%. Although many logbook lenders have strict procedures requiring forbearance, others take a less patient approach. We think that more is needed to ensure that all lenders treat borrowers with forbearance and due consideration, allowing time to pay and reducing interest payments where necessary.

EXTENDING COURT ORDERS TO GOODS MORTGAGES

7.27 Under hire purchase law, a borrower (or "hirer") has some protection in the event of a default. If the hirer has paid one third of the hire purchase price, the lender is required to obtain a court order before seizing the goods. The process requires the lender to issue court proceedings and attend a court hearing.

7.28 In the consultation paper, we proposed similar protections for borrowers with goods mortgages. We said that where a goods mortgage secures a "regulated credit agreement" as defined by the CCA 1974, the lender should be required to seek and obtain a court order before repossession where the borrower has paid one third of the total loan amount. The court would have similar powers to those it has on a time order, to provide more time to pay or alter the terms of the credit agreement. If the borrower succeeded, the lender would pay the costs. If not, the borrower would be liable for the court fee, but not the lender's legal costs.

7.29 We received detailed comments on this, and have since explored our developing thinking with our advisory group and consumer groups.[15] We look at the issues below.

7.30 We start by considering the arguments in principle for and against court orders. Concerns were expressed that court orders could become an expensive rubber stamping exercise. As we outline below, we have responded to these concerns by recommending an opt-in procedure. In this chapter, we look at each element of our recommendation. We start by discussing how borrowers can be encouraged to engage with the opt-in procedure. We then explain the reasoning behind the "one third" threshold; who would bear the costs of a court order; how court orders would be enforced; and borrowers' liability for shortfall.

7.31 As problems in the enforcement process are currently felt most acutely in the logbook loan industry, much of the discussion focuses on how our recommendations apply to vehicle mortgages. All goods mortgages are in substance the same transaction, and so we envisage that the recommendations would also apply in those rare circumstances where mortgages over other goods secure regulated credit agreements.

7.32 Consumer groups expressed a degree of concern about an opt-in procedure. They were worried that asking borrowers to actively opt in to a court process would be ineffective at protecting borrowers:

[15] We are particularly grateful to Sue Edwards and Michael Kelly of Citizens Advice, Laura Rodrigues of StepChange, Meg van Rooyen of Money Advice Trust and Guy Skipwith who met us on 16 June 2016, and provided us with detailed comments on how borrowers could be encouraged to respond to the opt-in procedure.

In our experience, borrowers are often disengaged and frightened of court procedures. It is unlikely that borrowers will make a positive decision to opt into court action at the default stage.

7.33 In the light of these concerns, we have looked again at the details of the opt-in procedure, to find ways to encourage borrowers to seek advice and make an active and informed choice. This has the potential to substantially reduce the current high rate of vehicle repossessions, to the benefit of borrowers and lenders alike.

COURT ORDERS IN PRINCIPLE

What we said in the consultation paper

7.34 In the consultation paper, we gave five reasons in favour of a court order:

(1) Hire purchase lenders indicated that the court process can open dialogue with the hirer. 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.

(2) Consumer groups highlighted the impartiality of the court process. The role of the judge as an impartial adjudicator may provide a degree of comfort to the borrower, particularly if they have already had experience of the court process.

(3) The requirement for a court order addresses the concern that logbook lenders are sometimes too quick to initiate repossession. By asking them to seek a court order, logbook lenders will be prevented from using repossession too readily.

(4) Some borrowers have experienced logbook lenders using repossession as a threat to demand lump repayments that are perceived as unfair and unaffordable.[16] A judge would be able to oversee any repayment arrangements to ensure that they are fair and realistic.

(5) Repossession is a serious act that should be subject to the supervision of the court.

7.35 We also noted two main problems with court orders, namely cost and delay:

(1) The lender must pay the court fee, which is set to rise to £355, but this may end up being payable by the borrower. There are then further ancillary costs, such as legal fees.

(2) 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. During this time, arrears tend to mount, adding to any shortfall.

[16] See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 64, para 5.53 for further details.

7.36 We said that the costs may well be justified if borrowers are able to explain their individual circumstances to the courts and the court scrutinises whether repossession is indeed being used as a last resort. However, if the borrower fails to engage, the court order may become an expensive rubber stamp. We noted evidence from the hire purchase industry that 80% of hirers do not turn up on the day of the court hearing. In these cases, the court provides little additional protection.

Consultees' views

7.37 Consultees were split on this issue: 15 (58%) out of 26 consultees agreed that lenders should not repossess goods from the most vulnerable borrowers without a court order.

7.38 Consumer groups supported this protection. Citizens Advice wrote:

> It is unfair that consumers with loans secured by bills of sale do not have the same protections as those who have hire purchase or conditional sale agreements. Logbook lenders' unfettered rights to repossess the goods drives bad lending and harsh debt collection practices – these reforms should go some way to encouraging better practice by firms.

7.39 Some industry representatives were also supportive. The Retail Motor Industry Federation said:

> The RMI is in full agreement that the requirement for a court order before repossession should be extended to all regulated credit agreements… RMI members have consistently struggled with this situation and their customers.

7.40 In respect of small businesses, the Federation of Small Businesses said:

> FSB supports there being a court order before repossession on the basis that it is desirable to have impartial oversight of the repossession process… It is important to have stronger protections for borrowers such as small businesses as losing their vehicle could have a significant impact on the viability of the business.

7.41 AutoMoney did not oppose the court order in principle, but suggested that there should be a procedure to address borrowers who do not engage with the court process:

> Logbook loans involve small loans on older vehicles. The cost of a court order is more damaging than in hire purchase… The LC's own research shows that borrowers don't engage with court. The LC should propose a process that affords borrowers the right to request the involvement of the court if they want the court's assistance.

7.42 Three consultees who answered "no" did so on the basis that the court order should not apply in all circumstances, but only where the borrower has paid one third of the total loan amount. For example, Mobile Money supported the requirement for a court order "in limited circumstances, for example where a borrower has made substantial repayments".

7.43 Other logbook lenders were sceptical of the court order in principle. V5 Loans wrote:

> The introduction of court orders will inhibit the lenders' forbearance, as they will be put at risk, if the borrower defaults later during the loan term. Introducing court orders will increase repossessions as a result, benefiting neither lender nor borrower.

Our views: an opt-in procedure

7.44 This issue involves a careful balance. We think for those borrowers who engage with the process, court oversight provides an important protection. However, if borrowers fail to engage, it is costly and provides few benefits.

7.45 To ensure that only those borrowers who will participate in the court process incur the additional costs, AutoMoney suggested that there should be an opt-in procedure. If the borrower has paid one third of the total loan amount when they default, the lender should send a notice informing the borrower that they have the right to request that the lender seek a court order. Only if the borrower responds to this notice indicating that they would like to apply for a court order would the lender be required to go through the court process.

7.46 The state of Wisconsin in the United States introduced the opt-in procedure in 2006. Under this law, a lender may not take possession of a motor vehicle used as security unless the borrower is given, by mail, a notice informing them of the right to opt in. The opt-in is exercised by the borrower notifying the lender in writing within 15 days of receipt of the notice. The lender is presumed to have given notice if it is sent by certified or registered mail.[17]

7.47 As we discussed above, the consumer advisers on our advisory group doubted the effectiveness of an opt-in procedure at protecting borrowers. They thought that many borrowers will fail to opt in to the procedure, and will therefore forgo court protection. Instead, consumer groups suggested an opt-out procedure as this:

> would protect borrowers more effectively, whilst allowing them to avoid liability for court costs if they felt nothing could be gained from a court hearing.[18]

[17] Wisconsin Statutes, s 425.205(1g)(c).

[18] Citizens Advice, email of 24 May 2016.

7.48 We fear that those who fail to opt out will also be very unlikely to engage with the court. They will incur the cost of a court order without obtaining any benefit from it. On balance, we have reached the conclusion that court oversight is beneficial, but only to those who actively engage with the process by opting in. To meet advisers' concerns and encourage engagement, opting in should be made as easy as possible. The process should also encourage borrowers at risk of repossession to seek advice.

7.49 We explain how we see the opt-in procedure working below. It is more accessible than the Wisconsin system. For example, it requires two notifications and allows borrowers to indicate their preference for a court order by a variety of means. It would also allow borrowers to choose voluntary termination or indicate that they are seeking debt advice.

7.50 Although our recommendations do not go as far as some consumer advisers may wish, the new procedure will provide much more protection than the current system. At present, if a borrower seeks a time order, the borrower must pay an upfront fee and complete complex forms. Under the opt-in procedure, borrowers will be told their rights and need only indicate that they wish the case to be put before a judge. The lender must then complete the court forms and pay the fee. We also recommend that the legislation should provide that where the opt-in procedure applies, it is mandatory. Any term of the credit agreement or goods mortgage that deprives the borrower of the right to opt in should be void.[19]

A NEW OPT-IN PROCEDURE: HOW WOULD IT WORK?

Sending the opt-in notice

7.51 We think that forbearance between lenders and borrowers in default should be encouraged. Repossession should be an option of last resort. For this reason, it is important that the opt-in notice is not sent too early in the process.

7.52 We recommend that the default notice should inform borrowers of the right to opt in to a court order and give them the first opportunity to do so. This allows borrowers to take action when the lender first indicates an intention to begin the enforcement process. Often, a period of further negotiation follows the issue of the default notice. We recommend that when the lender is on the cusp of enforcement action, they should send a standalone formal opt-in notice to the borrower. In our discussions with Loans2Go, it suggested that a second opt-in notice would also be helpful to avoid borrowers claiming that they had not received an opt-in notice at all.

7.53 For the opt-in notice, we recommend that the lender would need to prove delivery.[20] This could be done by various means, including:

(1) a signature from the borrower by using registered post;

(2) delivery by hand to the borrower;

[19] CCA 1974, s 173(1) sets out a similar provision in relation to hire purchase.

[20] This displaces the general rule under section 7 of the Interpretation Act 1978.

(3) calling the borrower to confirm receipt; or

(4) a read receipt where the opt-in notice is emailed to the borrower.

7.54 The lender would be able to choose its own means of proving delivery. It would only be necessary for the lender to show that the borrower received the opt-in notice, not that they opened, read or understood it. If the borrower does not engage with the opt-in notice, then they are unlikely to engage with the court.

Content of the opt-in notice

7.55 The opt-in notice should be as clear and as easy to understand as possible. We think that it should be in a prescribed form that has been researched with consumers to find out what is effective in practice.

7.56 We discussed with consumer groups the information that they thought the opt-out notice should contain. Much of this information would also be helpful in an opt-in notice. Subject to the research with consumers, we recommend that the opt-in notice should set out:

(1) details of the borrower's current arrears;

(2) a statement that the borrower may require the lender to go to court to repossess the vehicle or other goods;

(3) the costs the borrower would incur if they choose to opt in;

(4) tick-box options, allowing the borrower to:

(a) opt in to the court order;

(b) voluntarily terminate by handing the vehicle or other goods to the lender in full and final settlement of the loan; or

(c) seek debt advice with a stay on further proceedings;

(5) an email address, postal address and telephone number for the borrower to contact the lender;

(6) the timescales for returning the opt-in notice and stay on further proceedings; and

(7) a warning about the consequences of failing to respond.

7.57 Where the borrower does not wish to opt in, their best option may be to exercise the right of voluntary termination.[21] We are conscious that many borrowers will need to seek advice before deciding whether to opt in. For this reason, we think that there should be a third option on the opt-in notice, allowing the borrower to indicate that they are seeking debt advice with a stay on further proceedings.

[21] See paras 7.101 to 7.124 for further detail on voluntary termination.

7.58 It would be sufficient for the borrower to opt in by any means, including an email or telephone call. To make this as easy as possible, the opt-in notice should provide a variety of means for returning the tick-box form, including an email address and postal address as well as a telephone number for the borrower to indicate their preference orally.

Time limits

7.59 The time limits for returning the opt-in notice and seeking debt advice are largely a practical matter. We understand that it is not uncommon to have to wait four weeks to see a debt adviser. As an initial suggestion, we think that 14 days to return the opt-in notice with a further 28 day stay if the borrower is seeking debt advice are reasonable deadlines. On this basis, we tentatively recommend that where the borrower indicates an intention to seek debt advice, the lender should not take action to repossess for six weeks from delivery of the opt-in notice.

7.60 This further stay will encourage borrowers to seek debt advice, which has advantages not just for borrowers but also for lenders. Lenders are more likely to receive the vehicle by voluntary termination (with keys which adds to the vehicle's value) or, alternatively, to agree an alternative repayment plan. Where borrowers are appropriately advised, we think the vast majority of cases can be resolved without either court proceedings or involuntary repossession.

7.61 Consumer groups stressed that the time limits must be realistic. They must be based on evidence of how long it actually takes to get an appointment to see a debt adviser. They thought that the time limits should be set out in regulations rather than primary legislation. This gives greater flexibility to adjust the time limits so that they are realistic in practice, providing borrowers with an opportunity to obtain advice while not unduly prejudicing the right of lenders to repossess the vehicle. We therefore recommend that a regulation-making power should allow the time limits to be adjusted.

7.62 Inevitably, there may be occasions where the borrower has failed to take action before the deadline to return the opt-in notice or during the stay period. Where the lender has not already repossessed the vehicle, we think that it should treat requests to extend time favourably. We think that there should be a provision in CONC to this effect.[22] If the lender does not comply, it would be open to the borrower to seek a time order, or complain to the Financial Ombudsman Service (FOS).[23]

[22] See also CONC 7.3.11 which provides that "a firm must suspend the active pursuit of recovery of a debt from a customer for a reasonable period where the customer informs the firm that a debt counsellor or another person is acting on the customer's behalf or the customer is developing a repayment plan". A "reasonable period" is defined as thirty days.

[23] See Chapter 2, paras 2.48 to 2.50 for further detail on FOS.

The court's powers

7.63 If the borrower does opt in, the court should have the same powers to protect the borrower as it has for time orders. The court could provide for the borrower to make repayment of the sum owed in such instalments and at such times as the court deems reasonable. It could also amend the credit agreement in any way it considers just to both parties, including reducing the rate of interest.

Wrongful repossession without a court order

7.64 Where the lender wrongfully repossesses without a court order, the borrower will have recourse to FOS. If the borrower complains, the lender would need to prove delivery of the opt-in notice to FOS' satisfaction. If FOS finds against the lender, it has the power to award compensation, including for distress and inconvenience, up to a maximum of £150,000.[24]

7.65 The borrower may also go to court to claim that their goods have been unlawfully repossessed. Under the CCA 1974, where the hire purchase lender wrongfully repossesses goods, the credit agreement terminates. The hirer has no further obligation to repay any outstanding loan amount and is entitled to recover all sums they have already repaid.[25] We think that, where appropriate, there should be symmetry with the hire purchase regime.

7.66 For a goods mortgage, the goods originally belonged to the borrower. We think that the sanction for wrongfully repossessing goods should recognise this. We recommend that the goods should be returned to the borrower where they are wrongfully repossessed.[26] As in hire purchase legislation, we recommend that the credit agreement should terminate and that the borrower should have no further liability to repay any outstanding loan amounts. There could also be a case for damages for distress and inconvenience, but we think this should be left to the court's discretion.[27]

7.67 The sanction for wrongful repossession has a punitive element. We think that this is appropriate given the detriment that borrowers suffer if a lender wrongfully repossesses without a court order. Not only would the borrower have been deprived of their vehicle or other goods, but they would have had to incur the cost of making an application to court in circumstances where their own financial resources are limited.

7.68 Finally, any systemic abuse involving a failure to send opt-in notices or to respond to opt-in requests would be an issue for the FCA.

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

[25] CCA 1974, s 91.

[26] Sometimes, it may not be possible to return the goods to the borrower. For example, the lender may have already scrapped or sold the goods. In these circumstances, we think the borrower should be entitled to compensation.

[27] The borrower may also have an action in conversion, but this would not be more advantageous than the specific remedy we recommend.

Repossession from private premises

7.69 The opt-in procedure envisages goods being repossessed from public places. Consumer groups said that where goods are located on private premises, the Goods Mortgages Act should replicate section 92 of the CCA 1974. This provides that lenders must obtain a court order if they seek to repossess from private premises. Failure to do so is a breach of statutory duty.[28]

7.70 We have drawn from, and where appropriate replicated, hire purchase legislation in finalising our recommendations for the court order. We think that an equivalent of section 92 of the CCA 1974 should be set out in the Goods Mortgages Act.

THE ONE THIRD THRESHOLD

7.71 In hire purchase legislation, where 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. "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.[29]

7.72 The policy behind the one third threshold is 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.

What we said in the consultation paper

7.73 In the consultation paper, we argued that the one third threshold strikes an appropriate balance between those borrowers who have demonstrated an intent to repay and those who have not. Where borrowers have repaid one third of the total loan amount, we thought that they should have the right to a court order if a change in their financial circumstances makes it difficult for them to keep up with repayments. However, if a borrower defaults early in the process, the lender should be free to seize the goods without a court order.

Consultees' views

7.74 A majority of consultees that expressed views on this proposal (13 out of 22) agreed that the point at which a lender should be required to seek a court order is when one third of the total loan amount has been repaid. Gregory Hill pointed to the clarity and fairness that consistency with hire purchase legislation would offer:

[28] To bring a successful action for breach of statutory duty, the claimant must satisfy the court that the legislation confers private law rights and that the defendant's conduct in breaching the duty has caused them damage. The claimant must prove the extent of their losses. The court may then award compensation.

[29] CCA 1974, s 189(1).

> As far as possible, borrower protection (and third-party protection) provisions relating to goods mortgages should be the same as those relating to hire-purchase – even if the hire-purchase rules were thought to be less than ideal, there would still be considerable benefit in not creating further distinctions between different classes of what are all in substance consumer credit transactions.

7.75 On the other hand, V5 Loans argued that the one third threshold would have a detrimental effect on forbearance practices:

> The introduction of court orders will inhibit the lenders' forbearance, as they will be put at risk, if the borrower defaults later during the loan term. Introducing court orders will increase repossessions as a result, benefiting neither lender nor borrower.

7.76 Two consumer groups, Money Advice Trust and StepChange, wanted the requirement for a court order to apply in all cases.

Our views

7.77 We discussed in paragraph {●} the policy behind the one third rule in hire purchase legislation. The rationale applies equally to goods mortgages. Where the borrower has repaid less than one third of the total loan amount, the judge would probably grant a court order. The borrower would have incurred the additional expense of the court process for no protection while the lender's right to repossess would have been unnecessarily delayed.

7.78 We are not persuaded that the one third threshold would have a detrimental effect on forbearance practices. Lenders would still be subject to the CCA 1974 and CONC, both of which require them to show forbearance towards borrowers in default.

7.79 We think the one third point draws the right balance between protecting borrowers while still allowing lenders to run a commercially viable business. The right would apply where the borrower has paid at least one third of the total loan amount (defined as the principal sum, interest and additional charges, but not penalties payable on default).

WHO BEARS THE COSTS?

What we said in the consultation paper

7.80 Hire purchase lenders put the cost of a court order to be anywhere between £400 and £1,000. We thought that lenders should be able to pass on some of this cost, but not all. The court process should provide effective protection for borrowers. The prospect of a substantial costs order might cause the court process to be merely a theoretical protection.

7.81 We proposed that, if a judge gives the lender permission to repossess the goods, the lender should be able to pass the court fee on to the specific borrower in question. Sometimes, the judge may grant a suspended court order while the borrower makes payments. In these cases, we thought the lender should only be able to pass on the court fee if the goods are eventually repossessed.

7.82 We proposed that no other costs, such as legal fees, should be passed on to the borrower. This would encourage lenders to curb the legal costs involved.

Consultees' views

7.83 13 (68%) out of 19 consultees agreed with our proposal. The General Council of the Bar of England and Wales (the Bar Council) disagreed, arguing that costs should be a matter of court discretion:

> We do not see a particular justification for confining the Court's discretion as to costs in this manner. There are many other areas where borrowers who are in debt could legitimately argue that it would be harsh to award costs but this is in our view best left to the discretion of the Court.

Our views

7.84 In other contexts, the general rule that the losing party pays the successful party's costs has been disapplied. This is the case in Employment Tribunals.[30] We remain persuaded that this should also be the case for goods mortgages; borrowers with goods mortgages are unlikely to have substantial means and may only feel able to opt in to a court order if they can be sure that they are shielded from paying all of the lender's costs.

7.85 We think that the court fee can be left to the court's discretion. We recommend that the legislation should provide that legal fees and other ancillary costs, such as travel and postage costs, may not be passed on to the borrower.

ENFORCING THE COURT ORDER

What we said in the consultation paper

7.86 Where the court grants an order, hire purchase lenders have two options for enforcing it. The first is to use its own employees or to instruct debt collectors. The second is to use an enforcement agent authorised by the county court. The second option is more cumbersome and we suspect rarely used. We proposed that lenders taking goods mortgages should be given the same freedom as hire purchase lenders, that is, they should be able to use their own employees or debt collectors to enforce court orders.

Consultees' views

7.87 Most consultees that responded on this point (16 out of 18) agreed. Citizens Advice wrote:

> Given that hire purchase lenders already use their own debt collectors to repossess goods rather than use county court enforcement agents, we have no objection to logbook lenders having similar rights.

[30] 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.

7.88 Money Advice Trust expressed doubts about the proposal, arguing that section 90 of the CCA 1974 in effect requires lenders to use county court authorised enforcement agents. The law on this point is ambiguous. In respect of hire purchase lenders, National Debtline told us that it is not necessary to use county court authorised enforcement agents. Accept Car Credit, a hire purchase lender, thought the same.

Our views

7.89 In practice, we understand that hire purchase lenders do use their own employees or debt collectors to enforce court orders. Having been through the court process, it is right that lenders should be able to enforce the court order without expending significant additional time or resources. By this stage, the lender may have already had to wait several months since the borrower's initial default. We recommend that the legislation makes it explicit that the lender can use its own employees or debt collectors to enforce court orders.

SHORTFALL

7.90 Any court process involves delay. Borrowers should not be able to exploit this inherent delay to retain the goods for several months while arrears build up until the eventual court hearing. In the consultation paper, we proposed that once the lender initiates the court process, the borrower should be liable for any further arrears that accrue. Lenders should be entitled to pursue borrowers for any shortfall after the goods have been repossessed and sold. Most consultees (19 out of 22) agreed with our proposal. Dr Akseli and Dr Thomas noted that this would mirror the position in mortgages of real property.

7.91 In line with normal practice for recovery of a debt, lenders would need to make a money claim in the county court for the amount of the shortfall.

Default charges

7.92 StepChange suggested that there should be limitations on the amount of shortfall that the lender could pursue as:

> One reason why there might be a shortfall after sale of repossessed goods is where the lender has imposed additional interest, default fees and charges that take the outstanding balance over the value of the vehicle.

7.93 In the consultation paper we noted that logbook lenders charged for pursuing arrears: at £12 for each telephone call or letter, costs could accrue quickly.[31] CONC states that default charges must be no higher than the reasonable costs to the lender.[32] For payday lending the FCA has gone further and imposed a £15 cap on the total default charges a firm can impose. As we discussed in Chapter 3, there have been calls for the FCA to impose a similar cap on default fees in logbook lending.

[31] Bills of Sale (2015) Law Commission Consultation Paper No 225, p 67, paras 5.68 to 5.69.

[32] CONC 7.7.5.

7.94 We are sympathetic to these concerns, but they are a matter for the FCA rather than one to be addressed in the Goods Mortgages Act.

Charging orders

7.95 A charging order is an order granted by the court that secures a debt against the borrower's home. In theory, lenders may seek charging orders to secure shortfalls. However, this is prohibited under the CCTA Code unless the shortfall is at least £500 and the borrower has either shown bad faith or the lender has not been able to obtain possession of the vehicle.[33] In the consultation paper, we discussed whether this provision should be reflected in statute.

7.96 Even where the logbook lender obtains a charging order, the CCTA Code prohibits it from seeking an order for sale of the borrower's home.[34] Again, we considered whether we should follow the CCTA Code on this point.

7.97 Several consultees did not see the need for any special provision on charging orders. Gregory Hill noted that the remedies that apply to recovery of ordinary liabilities should apply to goods mortgages, subject to consumer credit legislation.

7.98 At common law, a charging order is likely to be refused if it would be oppressive, such as if the debt is too small to justify the remedy.[35] CONC emphasises that lenders "must not take disproportionate action against a customer in arrears or default".[36] CONC 7.3.17R further provides that a lender "must not take steps to repossess a customer's home other than as a last resort, having explored all other possible options".

7.99 After further consideration, we think that the current law and regulatory framework would suffice to prevent abuse of borrowers, both in respect of charging orders and orders for sale. We are not persuaded that we need to make special provisions on these points.

7.100 **We recommend that:**

(1) The requirement for a court order before repossession should be extended to regulated credit agreements secured by a goods mortgage.

(2) Where the lender wishes to repossess goods from private premises, it should always be required to seek a court order.

(3) In other cases, 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.

[33] CCTA, *Code of practice: bills of sale for consumer lending regulated under the Consumer Credit Act 1974* (2015), para 4.8.10.

[34] Above, para 4.8.9.

[35] *Civil Procedure* (White Book) (2016), para 73.4.2.

[36] CONC 7.3.14R(1).

(4) It should be mandatory for lenders to notify borrowers of their right to a court order both on the default notice and by means of a separate opt-in notice issued immediately before taking enforcement action.

(5) The opt-in notice should be in a prescribed form that has been researched with consumers.

(6) Subject to this research, the opt-in notice should set out:

- **(a)** details of the borrower's current arrears;
- **(b)** a statement that the borrower may require the lender to go to court to repossess the goods;
- **(c)** the costs the borrower would incur if they choose to opt in;
- **(d)** tick-box options, allowing the borrower to:
  - **(i)** opt in to the court order;
  - **(ii)** voluntarily terminate by handing the goods to the lender in full and final settlement of the loan; or
  - **(iii)** seek debt advice with a stay on further proceedings;
- **(e)** an email address, postal address and telephone number for the borrower to contact the lender;
- **(f)** the timescales for returning the opt-in notice and stay on further proceedings; and
- **(g)** a warning about the consequences of failing to respond.

(7) Lenders must prove delivery of the opt-in notice.

(8) Where the borrower indicates an intention to seek debt advice, the lender should not take action to repossess for six weeks from delivery of the opt-in notice.

(9) There should be a regulation-making power to adjust the time limits for:

- **(a)** borrowers to return the opt-in notice; and
- **(b)** the stay on further proceedings if borrowers wish to seek debt advice.

(10) In deciding whether to grant an order for repossession, the courts should have similar powers to those available to them when making a time order.

(11) Where the lender has wrongfully repossessed goods without a court order, the legislation should provide that the sanction is that the credit agreement terminates and that:

(a) the goods should be returned to the borrower; and

(b) the borrower has no further liability for any outstanding loan amounts.

(12) The legislation should provide that lenders are not permitted to pass on to the borrower any legal or other ancillary fees and costs associated with the court order.

(13) Lenders should be permitted to use their own employees or debt collectors to repossess goods.

(14) Following repossession, borrowers should remain liable for any shortfall.

VOLUNTARY TERMINATION

7.101 The requirement for a court order protects borrowers who could pay off the loan if they were allowed 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.

7.102 The right of voluntary termination is an established part of hire purchase law and is already an important part of the CCTA Code.[37] Below we compare the two regimes.

A comparison with hire purchase law

7.103 In hire purchase law, the hirer who has paid half the hire purchase price may return the vehicle or other goods and walk away from the agreement.[38]

7.104 In the hire purchase context, this right has proved controversial. This is because new vehicles depreciate so rapidly. Once a hirer has paid half the hire purchase price, it is relatively common for a vehicle to be worth less than the hirer has left to pay.[39] A sophisticated hirer may take advantage of this by handing the vehicle back at the halfway point and buying another one. As a review put it in 2004:

[37] It also applies to conditional sale.

[38] CCA 1974, ss 99 and 100.

[39] See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 145, para 11.50 to 11.54 for further details, where we illustrate this point with examples and graphs.

> 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.[40]

7.105 The position for logbook loans is different for two reasons. First, logbook lenders typically lend a smaller proportion of the vehicle's value. Secondly, used vehicles depreciate much more gradually.

7.106 As a result, the CCTA Code provides more generous rights to voluntary termination than those in hire purchase law. Under the CCTA Code, borrowers may terminate at any stage, up until the point at which repossession agents have been instructed. Borrowers may surrender the vehicle to the logbook lender:

(1) immediately, without any proportion of the total loan amount having been repaid;

(2) in full and final settlement of both the loan amount and any arrears which have accrued; and

(3) in the vehicle's current condition, unless there has been malicious damage or a significant lack of care.

7.107 For logbook loans, voluntary termination appears uncontroversial. The great majority of lenders already follow the code.

A legal right of voluntary termination

7.108 In the consultation paper, we proposed that where a regulated credit agreement is secured by a goods mortgage a legal right of voluntary termination should apply. The right we proposed was based on the provisions of the CCTA Code. As with the CCTA Code, it should apply immediately. It should also be in full and final settlement of both the loan amount and any arrears which have accrued.

7.109 The great majority of those consultees that responded on the point (21 out of 23) agreed that where a goods mortgage secures a regulated credit agreement, borrowers should have a statutory right of voluntary termination. Most consultees that expressed views on the proposal (15 out of 20) agreed that voluntary termination should be available immediately. They also agreed that voluntary termination should be in full and final settlement: once the borrower has handed back the vehicle they can walk away from any further liability.

7.110 StepChange emphasised the importance of giving borrowers control:

[40] Department of Trade and Industry, *Consumer credit law: a consultation on voluntary termination of hire purchase and conditional sale agreements under the Consumer Credit Act 1974* (2004), p 8.

> We believe voluntary termination does give borrowers some control over their borrowing and that this important safeguard should be given a statutory basis as it has under consumer protections for hire purchase.

7.111 The proposal was uncontroversial among logbook lenders. As the Campaign for Fair Finance put it:

> I cannot see an issue with this as it would only really affect non CCTA members.

7.112 The great 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. Like the opt-in procedure, where voluntary termination is available to the borrower, it is a mandatory right. Any term of the credit agreement or goods mortgage that deprives the borrower of this right would be void.[41]

At what point should the borrower lose the right of voluntary termination?

7.113 In the consultation paper, we proposed that borrowers would be able to exercise the right of voluntary termination up until the point at which the lender has incurred costs to repossess the goods. 13 (72%) out of 18 consultees agreed.

7.114 Guy Skipwith suggested that the right should be available until the goods mortgage has been terminated by the lender following a default notice. He thought it would otherwise be too easy for a lender to incur costs early in the process.

7.115 We think it is right that borrowers should be able to voluntarily terminate a goods mortgage up until the point at which the lender has incurred costs related to enforcement action. This allows a lender who has incurred such additional expense to pursue the borrower for any shortfall. We think that there are three points at which the lender could incur enforcement costs, depending on whether the lender requires a court order before repossession:

(1) when the lender has instructed repossession agents;

(2) when the lender's employees have visited the borrower to repossess their vehicle; or

(3) when the lender has issued proceedings for a court order.

We recommend that the right of voluntary termination would be available up until the earliest of these three points.

[41] The FCA took over responsibility for regulating consumer credit in April 2014. As part of the transfer of regulation, Parliament repealed some provisions of the CCA 1974, and some of these were replaced by FCA rules. The FCA is required to undertake a review in relation to the remaining CCA 1974 provisions and to report to HM Treasury by 1 April 2019. This may include recommendations for legislative change in respect of the provisions in the CCA 1974 relating to voluntary termination.

Condition of the vehicle on voluntary termination

7.116 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 borrower has contravened the obligation to take reasonable care of the vehicle to the extent that the contravention adversely and significantly affects the resale value.[42]

7.117 In hire purchase, the law on this issue is far from clear, which has resulted in different practices among lenders.[43] We thought that the CCTA Code establishes a much clearer regime by allowing voluntary termination except where certain ascertainable conditions have not been fulfilled.

7.118 15 (75%) out of 20 consultees agreed that the new legislation should follow the provisions of the CCTA Code. Most logbook lenders and consumer groups agreed with the proposal.

7.119 We asked for 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. Consumer groups had expressed concern that, under the CCTA Code, a borrower whose vehicle has been vandalised in the street loses the right of voluntary termination, even if the borrower was not at fault.

7.120 Mobile Money wrote that proving who caused the malicious damage would be difficult and that, in any case, insurance would cover the cost of repair. DTW Associates Limited, the Bar Council and HPI similarly remarked that adequate insurance cover is generally required as a condition of lending. On balance, we think that the position in the CCTA Code should be preserved. The industry has grown accustomed to the provision as it stands.

7.121 While we wish to preserve the position in the CCTA Code, we think that the word "malicious" is not easily understood. We note that "malicious damage" is no longer a concept in criminal law. Reintroducing the phrase in the Goods Mortgages Act may be unhelpful and out of step with modern legal language. We propose to refer to "intentional damage" instead.

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

[43] See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 147, paras 11.60 to 11.61 for further details.

Mortgages over other goods

7.122 The CCTA Code applies only to logbook lenders and so its provisions refer only to vehicles. We envisage that the legislative provisions would apply to all goods mortgages that secure a regulated credit agreement. The ability of the borrower to voluntarily terminate is likely to make lenders reluctant to accept the use of certain goods, such as white goods, as security. In practice, as is the case in hire purchase, we think that voluntary termination will most commonly be exercised by borrowers with logbook loans.

7.123 **We recommend that for regulated credit agreements secured by a goods mortgage:**

(1) borrowers should have a mandatory right of voluntary termination by handing over the goods; and

(2) the right for borrowers to terminate voluntarily should be available up until:

(a) the lender has instructed repossession agents;

(b) the lender's employees have visited the borrower to repossess their goods; or

(c) the lender has issued proceedings for a court order,

whichever is earliest.

7.124 **We recommend that the approach of the CCTA Code should be adopted so that voluntary termination:**

(1) is available at any point, without requiring any percentage of the loan amount to have been repaid;

(2) effects a full and final settlement of all outstanding amounts; and

(3) is available except where:

(a) it is established that the goods have sustained intentional damage of whatever nature; or

(b) it is evident that the borrower has contravened the obligation to take reasonable care of the goods to the extent that the contravention adversely and significantly affects the resale value.

SECURED LOANS TO BUY VEHICLES

7.125 Security bills are occasionally used to grant security for the purchase of new vehicles on credit. To comply with the terms of the 1882 Act, 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.[44] Such a transaction performs the function of a hire purchase agreement, but allows the lender to evade the borrower protections applicable to hire purchase (namely the court order and voluntary termination).

7.126 We thought it highly undesirable to allow lenders to evade long-established hire purchase protections in this way. However, we did not think that the problem would persist following our proposed reforms, since the main differences between hire purchase and bills of sale would be removed. We concluded that no further intervention is needed.

7.127 Most consultees (6 out of 8) agreed that our proposals for reform would address the problem. Money Advice Trust wrote:

> It would appear unlikely that lenders would want to use vehicle mortgages to secure the purchase of new vehicles on credit as the perceived advantages of a bill of sale over a hire purchase agreement would have disappeared.

7.128 We remain persuaded that no further intervention is needed.

NON-REGULATED CREDIT AGREEMENTS

7.129 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.

7.130 In the consultation paper, we thought that this rationale also applies in respect of our proposed borrower protections. We proposed 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.

7.131 There was little substantive comment on this point. Some consultees thought that the court order and voluntary termination should still apply since small unincorporated businesses may be just as vulnerable as consumers.

7.132 The main calls for reform of borrower protection have been in the context of logbook loans. In the absence of any indication that abuses are prevalent for non-regulated credit agreements, we think that freedom of contract should prevail.

7.133 **We recommend that where a goods mortgage secures a loan which is not a regulated credit agreement:**

[44] See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 17, paras 2.24 to 2.27 for further details.

(1) goods may be repossessed without a court order; and

(2) there should be no statutory right of voluntary termination.

CHAPTER 8
PROTECTING PRIVATE PURCHASERS

8.1 Unlike hire purchase legislation, the current law of bills of sale does not provide purchasers with any protection, even when they buy vehicles subject to a logbook loan for private purposes in good faith and without notice. This has led to cases of hardship, generating much criticism of the logbook loan industry. 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.[1]

8.2 Citizens Advice has raised concerns about the position of innocent purchasers. It notes on its website:

> Some people who have taken out a logbook loan sell the car on without informing the buyer of the loan secured against it. The buyer stands to lose both the car and the money they paid for it if the lender decides to take possession of the asset – which is within their power. In these cases innocent third party consumers who have bought the car in good faith have few rights and their only access to redress would be to sue the person from whom they bought the car.[2]

We understand that innocent purchasers now account for most of Citizens Advice's cases on logbook loans.

8.3 In hire purchase legislation, a purchaser who buys a vehicle for private purposes in good faith and without notice of the hire purchase agreement becomes owner of the vehicle.[3] We proposed in the consultation paper that similar protection should apply in relation to goods mortgages.

8.4 Consultees, including logbook lenders, were generally supportive of the proposal. In this chapter, we set out the current law, consider responses and make recommendations for reform.

1 http://www.independent.co.uk/money/loans-credit/logbook-loans-leave-second-hand-car-buyers-at-risk-9556757.html. See also http://www.dailymail.co.uk/news/article-2665347/Buy-car-inherit-debt-Thousands-motorists-having-vehicles-seized-loan-arrears-racked-previous-owner.html.

2 https://www.citizensadvice.org.uk/about-us/campaigns/current_campaigns/recent-campaigns/logbook-loans-campaign/.

3 Hire Purchase Act 1964, ss 27 to 29. See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 155, paras 12.12 to 12.25 for further details.

THE CURRENT LAW

8.5 The Bills of Sale Acts offer no protection to purchasers. Even where the purchaser buys goods subject to a bill of sale for private purposes in good faith and without any notice, they will not acquire ownership of the goods. The lender retains ownership and, as owner, can repossess the goods from the innocent purchaser at will. This is particularly a problem in the logbook loan industry.

8.6 In the law of hire purchase certain purchasers receive legislative protection. 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.

8.7 There are five key concepts: "disposition", "vehicle", "private purchaser", "notice", and "good faith":

(1) **Disposition**: this term captures a sale, a contract of sale or a hire purchase agreement. For a "sale", there must be a monetary element. The protection would not apply to a gift or to an exchange.

(2) **Vehicle**: the hire purchase protection applies only to vehicles and not to other goods.

(3) **Private purchaser**: this is defined negatively, as someone who is not a "trade or finance purchaser". A "trade purchaser" is one who carries on a business which consists, wholly or partly "of purchasing motor vehicles for the purpose of offering or exposing them for sale".[4] A "finance purchaser" is one who provides hire purchase finance.[5] This means that a business that buys a vehicle for its own use is protected as a private purchaser.

(4) **Notice**: a purchaser acts 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".[6] If the private purchaser has actual notice of the hire purchase interest, they will not be protected.

(5) **Good faith** is not defined. It is a test of how honestly the private purchaser acted in the circumstances.

LOGBOOK LENDERS' PROCESSES

8.8 Asset finance registries alert logbook lenders if there is activity concerning a vehicle, including a change of registered keeper.

[4] Hire Purchase Act 1964, s 29(2)(a).

[5] Hire Purchase Act 1964, s 29(2)(b).

[6] Hire Purchase Act 1964, s 29(3) and confirmed in *Barker v Bell* [1971] 1 WLR 983.

8.9 When notified of a change of registered keeper, logbook lenders said that they usually contacted the purchaser and attempted to come to some arrangement. Sometimes they decided 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, the logbook lender offers the purchaser three choices: pay off the logbook loan; buy the vehicle at a discount (one said it would offer to sell at 85% of trade value); or surrender the vehicle.

8.10 All these options seem unfair to a purchaser who has acted in good faith and without notice. The choice is between repaying someone else's loan; paying again for the vehicle; or losing it. In some cases, logbook lenders repossess the vehicle without making contact. Citizens Advice gives the following example:

> 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.[7]

8.11 The issue of innocent private purchasers is small in volume but serious in effect. One lender told us that out of 1,500 to 2,000 logbook loans issued each month, between 20 and 30 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. It also brings the logbook loan industry into disrepute.

PRIVATE PURCHASER PROTECTION FOR GOODS MORTGAGES

8.12 In the consultation paper, we proposed that the law should be reformed to give private purchasers legislative protection, as applies in hire purchase law. We asked consultees if they agreed that a private purchaser who acts in good faith and without actual notice of a goods mortgage should acquire ownership of the goods.

Consultees' views

8.13 A majority of consultees that responded on the point (20 out of 30) agreed with our proposal. This included two logbook lenders, Mobile Money and DTW Associates Limited. Mobile Money wrote:

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

> We recognise the impact acting under the current legislation can bring about on innocent third parties. Such powers are inappropriate in a modern marketplace.

8.14 Consumer groups supported the proposal, noting the hardship the current law causes. StepChange wrote:

> This is an important protection for innocent purchasers of second hand vehicles who find that they either have to pay off a logbook loan they did not take out or have to give up their recently purchased vehicle.

8.15 There was also academic support. Dr Akseli and Dr Thomas wrote that the protection "must be drawn broadly, and strongly".

8.16 Arguing against the proposal, V5 Loans, a logbook lender, thought that it would encourage fraud as "unscrupulous borrowers will 'sell' the vehicle to a friend, knowing their debt could not be pursued".

8.17 Two logbook lenders answered "other". AutoMoney agreed that private purchasers who act in good faith and without actual knowledge should receive protection, but thought that a deterrent should be put in place in order to dissuade borrowers from engaging in fraud. Similarly, Loans2Go did not oppose the proposal but thought that:

> The approach to this would need to be robust and thorough – how do we establish that a private party has acted in 'good faith'?

8.18 A number of consultees that answered "other" pointed to registration as a means of putting purchasers on notice. The Campaign for Fair Finance thought that searching an asset finance register should be a compulsory part of purchasing a vehicle. Dennis Rosenthal argued that registration with a designated asset finance registry should be deemed to put third parties on notice.

Our views

8.19 The protection for private purchasers in hire purchase legislation was introduced in response to a specific problem. As it was put to the House of Commons by Edward Heath:

> 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.

> 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.[8]

8.20 An innocent private purchaser who buys a vehicle subject to a logbook loan encounters the same problem. Given the parallels between hire purchase and logbook loans in this area, we think that a similar protection should apply.

8.21 We start by explaining the details of this recommendation. We then consider why, as things currently stand, it is not realistic to expect private purchasers to search asset finance registers. This view may alter if vehicle provenance checks were to become cheaper and more common.

8.22 We appreciate logbook lenders' concerns that unscrupulous borrowers should not be allowed to sell vehicles to others to avoid repayment. We therefore recommend clarifying that this behaviour is fraudulent. We think that borrowers should be warned of the consequences. We discuss this issue in further detail later in this chapter.

PROTECTING PRIVATE PURCHASERS: OUR RECOMMENDATION

8.23 We recommend that a private purchaser who acts in good faith and without actual notice of the goods mortgage should acquire ownership of the goods. The protection should apply to all forms of goods where the purchaser pays money or makes some other form of payment, such as exchange.

Vehicles or all goods?

8.24 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. This is also the case for bills of sale and so much of the discussion in this chapter relates to logbook loans.

8.25 In the consultation paper, we proposed that the protection should apply to all goods mortgages. We thought that private purchasers of other goods would be in equal need of protection. In the absence of an asset register, they may indeed be in more need of protection, as they would have little practical ability to discover that the goods are subject to a mortgage.

8.26 Most consultees that expressed a view on this proposal (14 out of 16) agreed, noting that all goods mortgages are essentially the same type of transaction and so should be treated in the same way. We therefore recommend that the protection should apply to all goods.

[8] Hansard (HC), 18 February 1964, vol 689, cc1035-149.

A "disposition"

8.27 The protection for hirers in hire purchase legislation applies only to a "disposition". This is defined as:

(1) a sale;

(2) a contract of sale; or

(3) a hiring under a hire purchase agreement.[9]

8.28 We asked for views on whether the protection we propose for goods mortgages 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.

Consultees' views

8.29 HPI did not see a compelling case for extending the protection, as it was not aware of any significant difficulties outside of sale. It thought it was important that adequate value could be demonstrated as this goes to good faith. Similarly Citizens Advice agreed that sale appears to be the main problem, noting that all the cases it had dealt with had involved purchasers.

8.30 On the other hand, the General Council of the Bar of England and Wales (the Bar Council) commented that it could see the rationale for extending the protection to exchanges.

Our views

8.31 In the context of private purchasers, we think that sale will be the most common transaction. We propose to adopt the definition in the Sale of Goods Act 1979, which provides that a "sale" is:

> a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.[10]

This definition is well-known and well understood.

8.32 Unless the borrower is dealing with a motor trader, it is unlikely that the transaction would be anything other than a sale. However, to capture transactions such as part exchange, we propose to extend the protection to any contract which transfers goods for consideration.[11] The Consumer Rights Act 2015 uses the concept of a "contract for transfer of goods", which includes barter and exchange. It is defined as follows:

[9] Hire Purchase Act 1964, s 29(1).

[10] Sale of Goods Act 1979, s 2(1).

[11] "Consideration" is a legal term that refers to the inducement for parties to enter into a contract. In a contract for the sale, one party must give money. However, a purchaser may give other forms of value, such as another vehicle in full or part exchange.

> a contract to supply goods is a contract for transfer of goods if under it the trader transfers or agrees to transfer ownership of the goods to the consumer and the consumer provides or agrees to provide consideration otherwise than by paying a price.[12]

We recommend that a similar definition should apply in goods mortgage legislation, though the distinction between "trader" and "consumer" would not be necessary. This would capture transfers where the purchaser provided value, but would not cover gifts.

8.33 **We recommend 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; and

(3) the protection should apply to a "sale" as defined by the Sale of Goods Act 1979 and a "contract for transfer of goods" based on the definition in the Consumer Rights Act 2015.

PROBLEMS WITH VEHICLE PROVENANCE CHECKS

8.34 Those in the motor trade habitually conduct vehicle provenance checks before buying second-hand vehicles. A vehicle provenance check provides a wide range of information about the vehicle, including whether it has been stolen and whether it is subject to a finance interest such as hire purchase or a logbook loan.[13]

8.35 In the consultation paper, we explained why, at present, private purchasers cannot reasonably be expected to carry out vehicle provenance checks. There were four reasons:

(1) Unlike those in the motor trade, awareness of vehicle provenance checks among consumers is low. 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.

(2) Consumers are confused by cheaper checks, which fail to reveal logbook loans. On an internet search for "vehicle provenance check", HPI, Experian and Cheshire Datasystems Limited (CDL) do not appear first. Instead consumers are faced with a large number of "text check" providers, who offer to provide a text check for as little as £3, communicating the result by text message. Although these text checks appear attractive, they do not tell consumers about logbook loans.

[12] Consumer Rights Act 2015, s 8.

[13] Typically, a vehicle provenance check draws information from many sources, including the Driver and Vehicle Licensing Agency, the Motor Insurance Anti Fraud and Theft Register and asset finance registers, to give a comprehensive picture of the status of a vehicle.

(3) The cost of vehicle provenance checks is too high. The temptation to opt for a text check is all the greater given the relative costs involved. Whereas traders may pay less than £3 for each vehicle provenance check, consumers pay £12.99 for CDL and £19.99 for HPI and Experian. If a second-hand vehicle costs less than £1,000, the additional expense of a vehicle provenance check can seem disproportionate.

(4) Consumers confuse bills of sale with hire purchase. 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 and offers no protection.

8.36 For these reasons we do not think that the fact that a lender has registered a vehicle mortgage with a designated asset finance registry is currently enough to put a private purchaser on notice. As we explain below, however, this might change if logbook lenders and asset finance registers were to act together to make vehicle provenance checks more accessible.

A possible long-term solution?

8.37 In the longer term, it is possible that vehicle provenance checks may become a normal and routine part of buying a second-hand vehicle. If so, then it would no longer be necessary to protect private purchasers. Instead, the fact that a vehicle mortgage is registered could be considered enough to give all purchasers sufficient notice. In these circumstances, one could argue that a purchaser who failed to check should suffer the consequences.

8.38 In the consultation paper we said that it would no longer be necessary to protect private purchasers if:

(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.

8.39 We proposed to include a regulation-making power in the new legislation so that if this situation were achieved, the protection for private purchasers of vehicles could be repealed.

Consultees' views

8.40 Around half of consultees (11 out of 20) agreed. HPI noted that:

> It is vital that checking an asset register should be a routine part of acquiring a motor vehicle. This is especially the case in respect of logbook loans in the subprime context where lending by reference to a security interest on a motor vehicle is a key part of the lending decision.

8.41 The Chancery Bar Association (ChBA) wondered whether private purchasers would be sufficiently motivated to conduct vehicle provenance checks if the new legislation provides them with protection.

8.42 Two consumer groups also questioned the proposal. Citizens Advice doubted whether consumers would ever carry out enough vehicle provenance checks. StepChange believed that the regulation-making power is unnecessary. It said that even if vehicle provenance checks were free, private purchasers should be protected where they do not check. It was concerned that an advertising campaign would be unlikely to generate the publicity required.

Our views

8.43 We think that it lies in logbook lenders' and asset finance registries' hands to bring about the changes we set out in the consultation paper. It would require a change to the pricing structure, a major advertising campaign and the end of misleading text checks.

8.44 If those circumstances were achieved, we think it right that registration with a designated asset finance registry should then constitute sufficient notice.

8.45 **We recommend that the new legislation should contain a regulation-making power to repeal 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.**

DOES THE BORROWER COMMIT FRAUD?

8.46 AutoMoney agreed that private purchasers who act in good faith and without actual knowledge should receive protection. Like V5 Loans though, it raised the issue of unscrupulous borrowers who sell vehicles subject to logbook loans. It thought that a deterrent should be put in place to prevent this behaviour:

> The company is very concerned that publicity surrounding the new right will lead to a wave of abuse if more is not done to also penalise the wrongful sale of mortgaged goods by borrowers… The LC should propose that the [Goods Mortgage] Act provide very clear penalties.

8.47 The law on this issue is not as clear as it ought to be. Section 1 of the Fraud Act 2006 sets out the offence of fraud. There are three ways of committing this offence. Those that are relevant here are:

(1) fraud by false representation under section 2; and

(2) fraud by failing to disclose information under section 3.

8.48 If the borrower has made an explicit statement to the purchaser that they own the goods this is clearly fraud under section 2. However, in some cases the borrower may merely have kept quiet, failing to disclose that the vehicle is subject to a logbook loan. In these circumstances, the question arises whether this constitutes fraud under section 3.

8.49 Section 3 of the Fraud Act 2006 states that:

A person commits this offence if he:

(1) dishonestly fails to disclose to another person information which he is under a legal duty to disclose; and

(2) intends, by failing to disclose the information

(a) to make a gain for himself or another, or

(b) to cause loss to another or to expose another to a risk of loss.

8.50 The legal duty to disclose could derive from several sources, including an express or implied term of a contract, practice in a particular trade, or legislation.

8.51 Where a borrower sells a vehicle without disclosing that it is subject to a logbook loan, most of these requirements are met. The borrower acts dishonestly, intending to make a gain, or to cause loss to the lender or purchaser. However, for the borrower's conduct to fall within the scope of section 3, there must be a legal duty to disclose.

8.52 To put beyond doubt that dishonestly failing to disclose the existence of a goods mortgage when selling the goods is a criminal offence under section 3 of the Fraud Act 2006, we recommend that the new legislation should impose a duty on the borrower to make such a disclosure. The effect is that selling a vehicle which is subject to a logbook loan without disclosing that fact would constitute fraud, provided the borrower has acted dishonestly.

Prominent statement in the vehicle mortgage document

8.53 In relation to logbook loans, the Campaign for Fair Finance thought that the vehicle mortgage document should include a prominent statement to dissuade the borrower from selling the vehicle. We agree, and our recommendations in respect of prominent statements in Chapter 5 should also apply here. Again, we think that there should be research with consumers into what words to use. An example formulation could be:

IF YOU SELL THE VEHICLE BEFORE YOU PAY OFF YOUR LOAN, YOU MAY BE GUILTY OF A CRIMINAL OFFENCE

8.54 **We recommend that:**

(1) the new legislation should impose a legal duty on borrowers to disclose a goods mortgage when selling the goods;

(2) the goods mortgage document should include a prominent statement that the borrower may be committing a criminal offence by selling the goods; and

(3) the Financial Conduct Authority should have a regulation-making power to prescribe the wording of the prominent statement.

PRIVATE PURCHASERS WHO DO NOT ACT IN GOOD FAITH

8.55 In the consultation paper, we asked whether it is necessary to have specific provisions to deal with cases where the lender alleges that the private purchaser did not act in good faith or had actual notice.

8.56 In its response, the Bar Council noted that such issues usually require adjudication. The ChBA agreed that such issues normally end up in court and thought that there was no need for special provision on the point as a result.

8.57 In hire purchase law, technically the "burden of proving good faith and absence of notice appears to rest upon the purchaser".[14] However, we were told that wrongful repossession from a private purchaser could have serious consequences for a hire purchase lender, including potential allegations of theft or conversion, with consequential recovery of damages and costs. For this reason, a hire purchase lender would not repossess from a private purchaser without a court order.

8.58 We agree with the ChBA. We do not think that the new legislation need contain specific provisions on this point. We understand that the practice is for hire purchase lenders to go to court and we see no reason why a different practice would or should develop among logbook lenders.[15]

THE ROLE OF THE FINANCIAL CONDUCT AUTHORITY

8.59 The Financial Conduct Authority (FCA) considers that its scope to act in respect of the treatment of private purchasers is limited.[16]

8.60 We thought that it would be beneficial for the FCA to have the jurisdiction to supervise logbook lender behaviour towards private purchasers.[17] Most consultees (16 out of 21) agreed. StepChange noted:

> Private purchasers are placed in the position of consumers of logbook loans and should be given the protection and forbearance afforded to consumers by FCA rules.

Among those consultees that agreed were two logbook lenders: Mobile Money and DTW Associates Limited.

[14] *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.

[15] See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 157, paras 12.22 to 12.24 for further details.

[16] Above, p 162, para 12.49.

[17] The legislation would extend the FCA's jurisdiction to all lenders that it supervises, but the issue currently only arises in relation to logbook lenders.

8.61 The FCA has expressed agreement in principle with the proposal to extend its jurisdiction. This would have to take effect by way of legislative amendment to the Financial Services and Markets Act 2000 and the Regulated Activities Order.[18] The amendment would extend the definition of "consumer" to cover private purchasers who are not customers of the lender but who are pursued by the lender, either for the payment of money or possession of the goods.

8.62 **We recommend that the FCA should be given jurisdiction to curb abuses in the way that lenders treat private purchasers.**

THE ROLE OF THE FINANCIAL OMBUDSMAN SERVICE

8.63 The Financial Ombudsman Service (FOS) has limited power to hear complaints about how logbook lenders treat private purchasers. FOS may hear complaints from consumers and microbusinesses who are treated as if they were customers of the lender. This has been interpreted to mean that where a logbook lender has tried to recover payment from the purchaser, FOS can hear the complaint. Recovering money is to treat someone as if they were a customer. However, it would not cover a situation where a logbook lender has tried to repossess a vehicle without trying to recover any payment.

8.64 We thought that private purchasers who have been treated badly by a logbook lender should have the right to complain to FOS, regardless of whether or not the logbook lender has tried to recover payment.[19] The majority of consultees (17 out of 20) agreed. Mobile Money wrote:

> without this recourse the private purchaser is left with little alternative than to pay for legal advice or let the matter drop.

8.65 FOS itself indicated that any change to its jurisdiction would fall to the FCA. The FCA is required by the Financial Services and Markets Act 2000 to consult on any changes to its rules and to conduct a cost benefit analysis. The FCA has indicated that it is willing to consider rule changes that would enable FOS to take jurisdiction over disputes involving private purchasers.

8.66 **We recommend that the FCA should consider amendments to its rules to give FOS jurisdiction to hear complaints against lenders made by private purchasers.**

[18] The Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 SI 2001 No 544.

[19] Provided that they qualify as a consumer or micro-business. See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 71, para 5.89 for further details. FCA rules would extend FOS' jurisdiction to all lenders that fall within its remit, but the issue currently only arises in relation to logbook lenders.

CHAPTER 9
GENERAL ASSIGNMENTS OF BOOK DEBTS

9.1 Where a business provides goods or services on credit, the customer owes the business a book debt. That book debt is an asset with a value that can be realised by selling it to an invoice financier.

9.2 In law, the sale of a book debt is known as an "assignment". An assignment of book debts is "general" where a business assigns a class of book debts, both present and future, to the invoice financier.[1]

9.3 Under insolvency law, a general assignment of book debts made 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.[2] This means that the extremely cumbersome registration procedure under the 1878 Act applies.

9.4 In the consultation paper, we argued that there is a case for continuing to require registration of general assignments of book debts made by unincorporated businesses. We proposed to streamline the registration regime in line with our suggested reforms for the High Court register for goods mortgages.

9.5 In this chapter, we start by discussing the current law. We see that the current regime for registering general assignments of book debts is unnecessarily expensive and complex. We then consider consultees' views on our proposals, before making our recommendations for reform.

THE CURRENT LAW

9.6 Section 10 of the 1878 Act sets out the registration regime for absolute bills.[3] The Insolvency Act 1986 provides that the same registration regime also applies to general assignments of book debts made by unincorporated businesses. Registration involves the following steps:

(1) a solicitor must explain the effect of a general assignment to the business before the business signs the paperwork. That solicitor must witness the business' signature; and

(2) within seven days after the date of signature, the following documents must be filed with the High Court:

(a) the general assignment document;

(b) a true copy of the general assignment document, including the signature of the witness; and

[1] For further details, see Bills of Sale (2015) Law Commission Consultation Paper No 225, pp 76 to 83, paras 6.19 to 6.54.

[2] Insolvency Act 1986, s 344.

[3] For further details, see Bills of Sale (2015) Law Commission Consultation Paper No 225, p 31, para 3.50.

(c) an affidavit of the date and time the general assignment was made.[4] The affidavit must also state that the general assignment was properly signed and witnessed and include a description of the business and the witness.[5]

9.7 The registration regime normally involves three solicitors. The invoice financier's solicitor prepares the paperwork and sends it to the business's solicitor, who must explain the effect of the general assignment to the business and witness its signature. The business's solicitor must then swear an affidavit before a third solicitor.

9.8 The registration regime suffers from five significant defects:

(1) **Expense**: we estimated in the consultation paper that the cost of registering each general assignment of book debts is between £480 and £1,735.

(2) **Delay in funding**: registration, even when carried out promptly, can take three to five working days. Invoice financiers generally withhold funding until they have confirmation of registration. Without such confirmation, the invoice financier cannot be confident that the general assignment will be valid in the event of a bankruptcy. Delay in funding, even by a matter of days, may have serious consequences if a business has an urgent need for working capital.

(3) **Re-registration**: the 1878 Act requires re-registration every five years. Most general assignments have a longer term and so registration with all its attendant problems is a process many invoice financiers need to repeat.

(4) **Difficulties in searching**: invoice financiers do not necessarily search the High Court register before concluding a general assignment of book debts. The register is paper-based, which makes it difficult to search. Further, most invoice financiers have other ways of conducting due diligence on the book debts that they wish to purchase.[6]

(5) **Non-registration**: registration is so burdensome and expensive that some invoice financiers do not register at all. They take their chances on bankruptcy instead.

9.9 The number of registered general assignments of book debts has fallen steadily over the last six years, from 221 in 2010 to a mere 68 in 2015. We were told that this reflects the difficulties of registration.

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

[5] If the general assignment is subject to any condition, that condition must be included in the general assignment document before registration and must also be set out in the true copy.

[6] For further details, see Bills of Sale (2015) Law Commission Consultation Paper No 225, p 82, paras 6.49 to 6.50.

9.10 Instead, invoice financiers may use facultative agreements. As we explained in the consultation paper, it is possible to structure a general assignment as a facultative agreement so as to avoid the need for registration. In a facultative agreement, 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. There are drawbacks to facultative agreements: the invoice financier must rely on the business to notify it of newly created book debts. There is a risk that the business may sell the book debt to another invoice financier, or else sell only low-quality book debts to the invoice financier, while retaining high-quality book debts for itself.[7] Alternatively, invoice financiers may choose not to register general assignments and simply take their chances on bankruptcy. Neither solution is optimal.

THE CASE FOR REGISTRATION

9.11 In the consultation paper, we argued that registration of general assignments of book debts serves, in principle, a useful purpose in putting third parties on notice. In particular, we noted that the long-term aim of the Asset Based Finance Association (ABFA) – the trade association that represents over 95% by turnover of invoice financiers – is to achieve a unified register for general assignments of book debts made by both unincorporated and incorporated businesses.

9.12 In its response to the consultation paper, ABFA noted:

> If the law is ever changed as a result of the Secured Transactions Law Reform Project so that assignments or undertakings to assign by corporate customers will be required to be notified to Companies House as "quasi securities", with an online search facility, then the ABFA would welcome a unified system for both unincorporated and corporate customers.

Consultees' views

9.13 We asked consultees if they agreed that registration of general assignments of book debts serves, in principle, a valuable purpose. All 15 consultees who responded to this question agreed.

9.14 Several consultees added a proviso that the register must be user-friendly. ABFA supported continued registration only if:

> notice filing is easy; the index of such assignments is clear and easy to access either in person or electronically; the index is updated in real time; an easy system is introduced to enable notices to be withdrawn upon termination of financing.

Similarly, Dr Akseli and Dr Thomas of Durham Law School wrote that a transparent registration regime could assist unincorporated businesses to release financial information.

[7] For further details, see Bills of Sale (2015) Law Commission Consultation Paper No 225, p 78, paras 6.29 to 6.39.

Our views

9.15 Without registration of general assignments of book debts, third parties would have little practical ability to investigate whether an unincorporated business has transferred away the value in its book debts. Further, continuing to require registration is consistent with ABFA's long-term goal of a unified register for general assignments of book debts made by both unincorporated businesses and incorporated businesses. For these reasons, we think that it is right to require the registration of general assignments of book debts made by unincorporated businesses.

9.16 **We recommend that general assignments of book debts made by unincorporated businesses should continue to be registered.**

SIMPLIFYING THE HIGH COURT REGISTRY

9.17 In the consultation paper, we made proposals to simplify the registration of general assignments of book debts in line with our proposals in respect of goods mortgages. Our rationale for doing so was the same: though an electronic register would be the ideal solution, considerable benefits could be achieved much more quickly with less radical reform.

9.18 Importantly, our recommendations for reform are consistent with, and represent incremental steps towards, an electronic register of security interests. Looking forward in the long-term, we think that such a register should be the eventual goal.

9.19 We made six proposals to simplify the High Court registration regime:

(1) the business should sign the assignment document in the presence of a witness, but the witness would no longer need to be a solicitor. Any witness would suffice, provided they state their name, address and occupation on the assignment document;[8]

(2) there should be no requirement for an affidavit;

(3) the invoice financier should email documents to the High Court, with the fee being paid online;

(4) there should be no time limit for registration;

(5) the registration is valid from the date and time of submission of documents; and

(6) re-registration should be required every 10 years.

Consultees' views

9.20 Consultees were generally supportive of our proposals, with seven (54%) out of 13 responses agreeing with them. The Insolvency Lawyers' Association wrote:

[8] See paras 5.19 to 5.21 in Chapter 5.

> we can see advantages in simplifying the associated formalities, and of permitting registration (and the submission of searches) by email.

9.21 ABFA did not feel that re-registration should be required:

> Renewal of registration does not exist for company charges. For Bills of Sale it serves no useful purpose and is merely a trap for the unwary. The need for renewal should be abolished as 10 year limits will easily be overlooked.

Our views

9.22 As with mortgages over goods other than vehicles, we think that registration and search requests can take place by email. If there is a technological failure, or if any invoice financier so wishes, registration and searches can still be carried out on paper.

9.23 While we envisage invoice financiers and third parties being able to register and search by email, the High Court registry will nevertheless continue to rely on High Court staff manually processing registration and search requests. For this reason, we think it is important that the High Court registry stays within manageable bounds and that general assignments of book debts are removed from the register after 10 years.

9.24 **We recommend that for registration of general assignments of book debts at the High Court:**

(1) the business should sign the assignment document in the presence of a witness, but the witness need not be a solicitor;

(2) the witness should state their name, address and occupation on the assignment document;

(3) an affidavit should no longer be required;

(4) registration can be by email;

(5) there should not be a statutory time limit;

(6) registration should be valid from the date and time of submission of documents; and

(7) registration should be renewed every 10 years.

9.25 We think that these recommendations should result in cheaper registration and less delay in financing.[9]

Documents required for registration

9.26 Currently, invoice financiers must register the entire general assignment document at the High Court. ABFA has argued strongly against this:

[9] See paras 6.58 to 6.86 in Chapter 6 for further discussion of the recommendations to simplify the High Court registration regime.

> a great deal of commercially sensitive information… 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]

9.27 We proposed that the parties would sign a short, simple assignment document, similar to the goods mortgage document we proposed in the consultation paper. The invoice financier would then email the assignment document to the High Court, together with a registration form.

The registration form

9.28 Like registration of mortgages over goods other than vehicles, the purpose of the registration form is to ease the administrative burden on High Court staff, who would use the form to enter details on to a spreadsheet.

9.29 In the consultation paper, we envisaged that the registration form would be even simpler than the assignment document. 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.

Consultees' views

9.30 ABFA supported the suggestion that only a notice of assignment would be registered. It felt, though, that it is unnecessary to file both an assignment document and a registration form:

> The need for two documents to be sent to the Registry is not understood and merely adds to the bureaucracy involved…
>
> The ABFA is firmly of the view that all that is needed to make third parties aware of a prior assignment is notice filing of this fact which would be available to searchers.

9.31 The Chancery Bar Association made a similar point, arguing that only a registration form should be required.

Our views

9.32 We do not think that it is necessary to prescribe the content of an assignment document. Our recommendations mean that it would be sufficient to send a relatively short document, containing the names and addresses of the parties, a statement that book debts are assigned, a date and (if applicable) the duration. The only formality prescribed in the Goods Mortgages Act would be that the document is signed by the business in the presence of a witness who provides their name, address and occupation.

[10] ABFA, email of 19 June 2015.

9.33 As with registration of mortgages over goods other than vehicles, the mechanics of registration of general assignments of book debts will primarily be a matter for the High Court. Again, we do not wish to be overly prescriptive on this issue.

9.34 It should be possible for the invoice financier to submit only one document for registration, provided that the document clearly indicates the information that is required for the spreadsheet maintained by High Court staff. This information should be visible on the front page.

9.35 In other cases, parties may wish to include more information in the assignment document. We do not propose that registration should be invalidated merely because the document submitted for registration contains more information than High Court staff need. However, in such cases, we think that a separate registration form should be required to assist High Court staff.

9.36 **We recommend that for registration of general assignments of book debts at the High Court invoice financiers should email documents that clearly indicate the information required by High Court staff.**

CHAPTER 10
ABSOLUTE BILLS OF SALE

10.1 The Bills of Sale Acts classify bills of sale into two types: security bills and absolute bills. This report has so far primarily addressed reform of the law relating to security bills, which we recommend should be renamed "goods mortgages".

10.2 In this chapter, we consider absolute bills of sale. A bill of sale is a document that transfers ownership of goods from one person to another, while allowing the former owner to retain possession of the goods. An absolute bill is a bill of sale granted for any purpose other than to secure a monetary obligation. Potentially, this could cover a wide range of transactions including sales, gifts and exchanges.

10.3 Absolute bills appear to be rare. In our visits to the High Court registry during the course of this project, we found no examples of absolute bills being registered. Further, we came across only three cases involving absolute bills. Two were in a family context, dating from 1940 and 1966; the other was a 2015 case with very unusual facts.[1]

10.4 Given the obscurity and the lack of registration of absolute bills, we proposed to abolish registration, and indeed any regulation, of them. Some consultees felt that registration of absolute bills should continue; in the absence of any evidence that registration is carried out commonly or at all, we do not feel that it is justifiable to perpetuate such a requirement. This is particularly the case given the Government's commitment to removing unnecessary red tape.[2]

10.5 In this chapter, we briefly set out the current law relating to absolute bills. We then discuss consultees' responses to the questions in the consultation paper relating to absolute bills. Finally, we set out our reasons for recommending the deregulation of absolute bills.

THE CURRENT LAW

10.6 Absolute bills are regulated by the 1878 Act, which imposes both document and registration requirements. The document requirement is light touch. The 1878 Act requires only that absolute bills state the consideration for which they are granted.[3]

10.7 Registration in accordance with the 1878 Act is extremely burdensome. It is the same as for general assignments of book debts. We mentioned in Chapter 9 that registration involves three sets of solicitors, at a cost of between £480 and £1,735.[4]

1 *Youngs v Youngs* [1940] 1 KB 760; *Koppel v Koppel* [1966] 1 WLR 802; and *Halberstam v Gladstar Ltd* [2015] EWHC 179 (QB). See para 10.10 for further details.

2 The Conservative Party Manifesto 2015, p 19, available at https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf.

3 1878 Act, s 8.

4 See paras 9.6 to 9.10 in Chapter 9.

10.8 Failure to comply with the document or registration requirements 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.[5]

Use of absolute bills

10.9 When Parliament passed the 1878 Act, the underlying concern appears to have been about money lending. Most Victorian transactions would have involved the transfer of ownership of goods as security for a loan and would be classified as security bills. In some cases, people would sell their goods outright to a lender while retaining possession, possibly with a view to repurchasing them at a later date. Such outright transfers would be classified as absolute bills. They were used to achieve the same end as security bills and so were also regulated.

10.10 In more recent times, absolute bills have appeared twice in a family context as a means of preventing third parties from seizing goods. In the consultation paper, we referred to two cases from 1940 and 1966 in which former wives had attempted to enforce judgments against their former husbands by seizing goods.[6] In both cases, the former husbands had granted unregistered absolute bills that their former wives sought to defeat.[7] The High Court also considered absolute bills in a 2015 case.[8] This case involved such unusual facts that we do not think a similar situation would arise again.[9]

CONSULTEES' VIEWS

10.11 In the consultation paper, we made two proposals relating to absolute bills and asked consultees whether they agreed that:

(1) the requirement to register absolute bills should be abolished. 14 consultees responded to this question: nine agreed, three disagreed and two answered "other"; and

(2) absolute bills should no longer be regulated. 10 consultees answered this question: six agreed, two disagreed and two answered "other".

10.12 Consultees that felt that registration and regulation of absolute bills should be retained argued that:

5 1878 Act, s 8.

6 *Youngs v Youngs* [1940] 1 KB 760 and *Koppel v Koppel* [1966] 1 WLR 802.

7 For further details, see Bills of Sale (2015) Law Commission Consultation Paper No 225, p 173, paras 14.13 to 14.15.

8 *Halberstam v Gladstar Ltd* [2015] EWHC 179 (QB). See paras 10.19 to 10.20 for further details.

9 For a more detailed discussion of the complex facts of this case, see Bills of Sale (2015) Law Commission Consultation Paper No 225, p 173, paras 14.16 to 14.18.

(1) registration would protect creditors;

(2) registration would protect purchasers; and

(3) if absolute bills were deregulated, they might be used to circumvent the proposed legislation for goods mortgages.

REGISTRATION TO PROTECT CREDITORS

10.13 In the consultation paper, we pointed to provisions of the Insolvency Act 1986 that could be used to protect creditors if registration of absolute bills were no longer required.[10] The Insolvency Act 1986 contains "clawback" mechanisms to protect creditors in a situation where the individual has transferred away valuable goods before becoming bankrupt.

10.14 First, the transaction may be avoided as a preference. 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 is put in a better position than they otherwise would have been without the preference.[11]

10.15 Secondly, the transaction may be challenged as a transaction at an undervalue. A transaction between the bankrupt individual 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 which is significantly less than its value.

The trustee in bankruptcy can apply for an order restoring the position to what it would have been without the transaction at an undervalue.[12]

10.16 Constantine Cannon LLP was not persuaded that these provisions give sufficient protection:

> because whilst they afford a degree of post-ex-facto protection to creditors, they require creditors to take action to claw back or invalidate a transfer at an undervalue after the debtor has gone insolvent. The advantage of registering sales or gifts with the seller or donor remaining in possession is to help creditors make informed decisions on whether to extend further credit in the first place.

[10] Bills of Sale (2015) Law Commission Consultation Paper No 225, p 175, paras 14.24 to 14.31.

[11] Insolvency Act 1986, s 340.

[12] Insolvency Act 1986, s 339.

10.17 There is no evidence that absolute bills are commonly registered or searched for. In these circumstances, the requirement to register merely operates as a means of defeating an unregistered absolute bill. It does not offer any form of positive protection by enabling third parties to search for absolute bills. There is so little awareness of the need to register that perfectly legitimate absolute bills may be challenged as void for lack of registration. The Insolvency Act 1986 similarly provides protection after the event, but in a more appropriate manner. It allows creditors to challenge transactions only where they have genuinely suffered detriment.

10.18 In the two family law cases from 1940 and 1966, the former husbands were not bankrupt. Though the Insolvency Act 1986 would not assist in these circumstances, it appears that modern family lawyers have little awareness of absolute bills in any case. Resolution told us:

> bills of sale issues are really so rarely encountered by family lawyers that [its Property, Tax and Pensions Committee] cannot see your proposal being of concern in the family law context.[13]

REGISTRATION TO PROTECT PURCHASERS

10.19 In the consultation paper, we argued that section 24 of the Sale of Goods Act 1979 could be relied on to protect purchasers.[14] This section protects second purchasers where they buy goods in good faith and without notice from sellers in possession. 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.

10.20 Importantly, the seller in possession must have delivered or transferred the goods to the second purchaser for the protection to apply. There is some debate about the meaning of these words.[15] In the consultation paper, we discussed *Halberstam v Gladstar Ltd*, a case from 2015 which had involved an unregistered absolute bill.[16] While the extremely unusual facts of *Halberstam v Gladstar Ltd* may mean that Gladstar could not have availed itself of the protection in section 24, we think that it would operate in most cases to protect second purchasers.

[13] Resolution, email of 1 October 2015.

[14] The application of section 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.

[15] *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* [1987] HCA 30; (1987) 163 CLR 236.

[16] [2015] EWHC 179 (QB).

CIRCUMVENTION OF GOODS MORTGAGES

10.21 Another argument consultees made for the continued regulation of absolute bills is the risk that unscrupulous lenders might use deregulated absolute bills as a means of evading the proposed legislation for goods mortgages.

10.22 Bills of sale do not exist in Scotland. In its response to the consultation paper, the Society of Chief Officers of Trading Standards in Scotland described how, in Scotland, logbook lenders had attempted to structure logbook loans as sale and leaseback transactions. In one case, the Court of Session struck down such transactions as:

> the agreements were substantially loan transactions which were void in so far as they attempted to create a security over the vehicles in question without their delivery.[17]

10.23 We think it likely that the courts in England and Wales would similarly take a "substance over form" approach if a lender attempted to use absolute bills to evade goods mortgages legislation. To put this beyond doubt, we envisage that the Goods Mortgages Act should specify that any transaction that is in substance a goods mortgage will fall within its scope.

CONCLUSION

10.24 There is little evidence that absolute bills are commonly used. It appears that they have fallen out of use in the family context and the facts of *Halberstam v Gladstar Ltd* are highly unusual.

10.25 To the extent that they are used, registration of absolute bills appears to afford little greater protection than other legislative provisions. Like the relevant provisions in the Insolvency Act 1986 and the Sale of Goods Act 1979, it is primarily used after the event to defeat an unregistered absolute bill. The requirement to register is so obscure that it does not give third parties any positive protection by allowing them to search for absolute bills before entering into a transaction. Without any positive reason for continuing to require it, our view is that it is better to abolish an expensive and burdensome registration regime. As Graham McBain put it:

> 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.[18]

10.26 Registration is the most onerous form of regulation of absolute bills. In abolishing it, we see little sense in retaining any further regulation of absolute bills. We think it better to deregulate absolute bills entirely.

[17] *Scottish Transit Trust Ltd v Scottish Land Cultivators Ltd and another* [1995] SLT 417.

[18] G McBain, "Repealing the Bills of Sale Acts" (2011) 5 *Journal of Business Law* 475 at 502.

10.27 **We recommend that:**

(1) the requirement to register absolute bills should be abolished; and

(2) the use of absolute bills should be deregulated.

CHAPTER 11
ASSESSING THE IMPACT OF REFORM

11.1 Our aim is to remove the unnecessary burdens imposed by the current law. In this chapter we look at the benefits and costs of our recommended reforms. Some changes will have an immediate quantifiable deregulatory effect. In particular, abolishing the requirement to register logbook loans with the High Court is estimated to save the industry around £2 million each year. In other cases, the reforms will remove existing barriers impeding small businesses from borrowing on the security of goods. It is anticipated that this will lead to greater lending: the benefit is difficult to quantify, but may be substantial.

11.2 We look first at how our recommended reforms for vehicle mortgages will affect the logbook loan industry. We start with the effect on logbook lenders and then consider the effect on borrowers. The following sections examine the effect of our recommendations on other goods mortgages and general assignments of book debts.

THE IMPACT ON LOGBOOK LENDERS

11.3 The main benefit for logbook lenders is that they will no longer need to register logbook loans at the High Court. This will be partially offset by a new requirement to obtain a court order before repossession in some circumstances, and increased protection for private purchasers who act in good faith and without actual notice (innocent private purchasers).

Benefits

11.4 In the consultation paper, we estimated that the cost of registering each logbook loan at the High Court is £35 to £51. Two logbook lenders, Mobile Money and DTW Associates Limited, agreed with our estimate.

11.5 The largest logbook lenders are likely to incur the lowest costs through economies of scale. With a sufficient throughput of cases, staff can swear affidavits in batches, can negotiate low rates with solicitors, and can post several bills of sale to the High Court at once. Thus AutoMoney estimated that its cost of registering a logbook loan is only £35. However, the seven day deadline means that smaller logbook lenders may need to visit a solicitors' office and incur the cost of registered post for a single logbook loan. For these smaller logbook lenders, the costs are towards the top of our estimate.

11.6 The breakdown of costs is shown in table 11.1 below. Logbook lenders also described a "hassle factor", where (for example) documents were lost or delivered or stamped out-of-time.[1] The staff time spent sorting out these problems would be in addition to the costs listed below.

[1] See Bills of Sale (2015) Law Commission Consultation Paper No 225, p 60, paras 5.29 to 5.33. Logbook lenders said that they may receive bills of sale which should have been sent to a competitor or late registration orders without a Master's signature.

Table 11.1: Costs associated with registration of a logbook loan at the High Court

Type of fee	Cost
High Court registration fee (if within seven 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 logbook loan
Total cost for registering each logbook loan	**£35 to £51**

The number of logbook loans in which these costs are incurred

11.7 Table 11.2 shows the number of bills of sale registered at the High Court from 2011 to 2015. The vast majority of these registrations were logbook loans. Our survey of bills of sale registered at the High Court in 2014 estimated that only 260 out of 52,483 bills of sale were granted over goods other than vehicles.

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

Table 11.2: Bills of sale registered at High Court from 2011 to 2015

Year	Number of bills of sale
2011	36,829
2012	41,123
2013	49,745
2014	52,483
2015	37,708

11.8 The table shows a rise until 2014, followed by a fall in 2015, when logbook lenders were required to obtain authorisation from the Financial Conduct Authority (FCA). Several reported that this was a stringent process. It is not clear how far this chilling effect is temporary. Now that logbook lenders have completed the FCA authorisation process, the market may expand once more.

11.9 To estimate the savings to the logbook loan industry, we have taken an average from the last three years. The mean number of bills of sale registered from 2013 to 2015 was 46,645, of which all but 260 were likely to have been granted over vehicles. This gives a figure of **46,385**.

Total saving to logbook lenders from abolishing the requirement to register at the High Court

11.10 On this basis we can estimate the total savings to the logbook loan industry resulting from abolishing the requirement to register logbook loans at the High Court as follows:

46,385 logbook loans x £35 to £51 = £1.62m to £2.37m.

11.11 We have taken a best estimate between these two figures of **£2 million**.

Transitional costs

11.12 Any legal change involves some transitional costs. For logbook lenders the main transitional costs would be in training staff about the provisions of the new legislation; and developing a new standard goods mortgage document.

11.13 In the consultation paper we estimated that the transitional costs would be less than £50,000 for each logbook lender. Mobile Money and DTW Associates Limited both agreed with this estimate.

11.14 We have therefore put the transitional costs for logbook lenders at **£500,000**.

Annual costs 1: Obtaining a court order

11.15 We recommend that borrowers who have paid at least one third of the total loan amount should be given additional protections. These borrowers would be entitled to require the logbook lender to obtain a court order before repossessing the vehicle.

11.16 We estimate the cost of this protection below, looking at both the number and cost of court orders.

Estimating the level of repossession after the one third point

11.17 In the consultation paper we noted that repossession rates among logbook lenders ranged from 2.2% to 5%. We commented that most repossessions took place early – before the one third point had been reached. Only a minority of repossessions (late repossessions) would therefore qualify for this new protection.

11.18 Mobile Money agreed that the level of late repossessions is low. It said that it had been monitoring its repossession rate carefully from January to September 2015. Out of 1,000 active logbook loans, 2.8 vehicles were repossessed on average each month. Of these, 24% took place after one third of the total loan amount had been repaid. If one assumes that each logbook loan lasts for a year, this would suggest that the court order requirement would apply in 0.8% of logbook loans.

11.19 Other logbook lenders, however, gave higher figures. V5 Loans said that its repossession rate was "around 10%". Loans2Go said that its repossession rate was "lower than 10%". Meanwhile, Automoney said that 40% of its repossessions occurred after the one third point. This suggests a wide variety of approaches.

11.20 The FCA's consumer credit sourcebook (CONC) requires logbook lenders to treat borrowers with "forbearance and due consideration".[3] Logbook lenders should take account of temporary financial difficulties by, for example, giving more time to pay or where necessary reducing or waiving interest payments. The wide variation in repossession rates suggests that logbook lenders are interpreting CONC differently. The purpose of the reform is to provide court scrutiny of these practices – ensuring that logbook lenders with the highest repossession rates adopt the forbearance practices of more compliant logbook lenders.

11.21 We estimate that following the reforms those few logbook lenders with a repossession rate of 10% will reduce their repossession rates to 9% – with no more than 3% after the one third point.

11.22 This would give a late repossession rate of **0.8% to 3%**.

[3] CONC 7.3.4.

An opt-in procedure

11.23 Unlike our provisional proposal, our final recommendation for the court order involves an opt-in process. We recommend that logbook lenders should notify borrowers of their right to a court order both on the default notice and in a separate opt-in notice. Borrowers would then be able to require that the logbook lender obtains a court order. However, if the logbook lender can prove that the opt-in notice was delivered, and if the borrower does not ask for a court order, the logbook lender may repossess without one.

11.24 This is intended to ensure that only those borrowers that will engage with the court process incur the associated additional expense. Hire purchase lenders told us that only around 20% of hirers turn up on the day of the court hearing.

11.25 Automoney, a logbook lender with operations in the United States, told us about its experience of the opt-in process in Wisconsin. Wisconsin introduced the opt-in process in 2006. Since then, Automoney had been to court there around six times.

11.26 Where logbook lenders are successful in obtaining a court order, they would be entitled to pass the court fee (but not the legal costs) on to borrowers. Borrowers therefore have a strong incentive to ensure that court orders are not used as rubber stamps. Borrowers will only opt in if they wish to put a positive case to the court. Based on the experience of hire purchase lenders we estimate that borrowers will opt in to the court process in around **20% of late repossessions.**

Estimating the cost of a court order

11.27 In the consultation paper we estimated that each court order would cost around £600 in court and legal fees. Loans2Go commented that "this seems to be an accurate figure based on current civil court fees". DTW Associates Limited thought the cost might be higher, estimating "between £600-800". Meanwhile, Mobile Money thought that it would be lower:

> We would expect in most cases to incur only the associated court fee, which would be c. £450 for an average value loan. This estimate is based on a £280 non-money county court claim fee plus a £170 hearing fee.

11.28 V5 Loans simply said that the cost would be £1,000, without giving further justification. This seems an unduly high figure. We think that logbook lenders will rapidly acquire expertise in the legal formalities and should be able to handle much of the work in-house in a routine way.

11.29 We accept, however, that there may be a wide range of costs, depending on the size of the logbook lender. While the cost may be £450 for larger logbook lenders, smaller logbook lenders may need to instruct lawyers, incurring additional costs of up to £350. We have therefore used a range of **£450 to £800**.

11.30 Our recommendations would not affect the costs of repossessing the vehicle: repossessions will continue to be carried out by debt collectors or employees and the costs will remain the same.

The costs of delay

11.31 In the consultation paper we noted that a court order may result in delay. We asked if this delay would lead to costs, such as any cost the logbook lender would incur in borrowing money from its own financiers. Logbook lenders did not think that a period of delay in repayment from borrowers would result in any costs. Mobile Money wrote:

> We do not believe this would be a significant issue. Adequate liquidity and funding is considered by FCA in conjunction with lenders' business plans.

Total costs of the requirement to seek a court order

11.32 The total costs of the court order for the logbook loan industry may be calculated as follows:

Table 11.3: Costs of recommended court order for logbook lenders

	Lowest estimate	**Highest estimate**
Late repossession rate where logbook lenders repossess vehicle after borrower has repaid one third of total loan amount	0.8%	3%
Number of logbook loans involving late repossession	46,385 x 0.8% = 371	46,385 x 3% = 1,392
Percentage likely to opt in to court order	20%	20%
Likely number of court orders each year	74	278
Cost per court order	£450	£800
Total annual cost	**£33,300**	**£222,400**

11.33 The best estimate between these two figures would be **£127,850**.

Annual costs 2: Protecting innocent private purchasers

11.34 We recommend new protection for innocent private purchasers. At present, logbook lenders may require innocent private purchasers to pay them again for the vehicle, repay the borrower's logbook loan or else face losing the vehicle. Under our recommendations, it will no longer be possible for logbook lenders to repossess vehicles from, or to reach financial settlements with, such purchasers.

11.35 In the consultation paper we noted that there are relatively few disputes involving 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.

11.36 We asked how much money logbook lenders secured from private purchasers each year. Mobile Money was the only logbook lender that gave details of its dealings with private purchasers. In 2014, it received £25,757 in third party payments and £31,166 from recoveries (that is, £56,923 in total).

11.37 Our survey of bills of sale registered at the High Court in 2014 showed that 22% were registered by Mobile Money. On this basis, recoveries obtained from private purchasers by the whole logbook loan industry would be in the region of £258,740.

11.38 The loss to the logbook loan industry may be less: in some cases the private purchaser may not have been innocent. We also intend to clarify that it is fraudulent for a borrower to sell a vehicle subject to a logbook loan without disclosing it, which may reduce the problem. For the purposes of this assessment, however, we estimate a cost to the logbook loan industry of **£258,740**.

The impact on logbook lenders

11.39 In summary, the net annual benefit to logbook lenders as a result of our recommendations would be around **£1.6 million per year**.

11.40 This represents the saving in abolishing High Court registration (£2 million) less the costs of the court order (£127,850) and the costs of protecting innocent private purchasers (£258,740).

THE IMPACT ON BORROWERS OF LOGBOOK LOANS

11.41 Borrowers would benefit from additional protections against repossession, particularly the right to require the logbook lender to obtain a court order before repossession. It provides the opportunity for the borrower to explain their financial situation to an independent arbiter, allowing the court to set out an alternative repayment plan, and to avoid unnecessary repossession. The aim is to ensure compliance with the existing requirement on logbook lenders to act with forbearance and due consideration – not only for the minority of cases that go to court, but more widely. To avoid the risk of losing in court, logbook lenders are expected to adjust their repossession practices for all borrowers.

Small business borrowers

11.42 The impact will be particularly significant for small business borrowers. It is not known how many logbook loans are to businesses, though it may be substantial. In 2010, one logbook lender estimated that 25% of its logbook loans by number and 40% by value were for business purposes.[4] Our survey of bills of sale registered at the High Court in 2014 found examples where market traders, builders and plumbers use logbook loans to borrow money on the security of their vans, though the bill of sale did not record the purpose for which the logbook loan was taken out.[5]

11.43 As the Federation of Small Businesses pointed out, small businesses are particularly vulnerable to repossession. Once the vehicle is lost, the business may cease to be viable.

11.44 Small business borrowers will therefore benefit from a final chance to prevent repossession. On the basis that 20 small businesses with a turnover of £25,000 a year are able to operate for another year, our recommendations would preserve economic activity of **£500,000**.[6]

THE IMPACT ON MORTGAGES OVER OTHER GOODS

11.45 In the consultation paper, we estimated that 260 of the bills of sale registered at the High Court each year are granted over goods other than vehicles. Boodle Hatfield LLP and Constantine Cannon LLP both commented that modernisation of the registration regime would result in increased use of goods other than vehicles as security.

Benefits

11.46 We estimated in the consultation paper that our proposals to simplify the High Court registry would save between £23.10 and £50 per registration.

11.47 On the basis of 260 registrations each year, our recommendations would save lenders between **£6,006 and £13,000** each year.

11.48 The main benefits, however, would be from removing the existing obstacles in the way that unincorporated businesses can borrow money secured on goods. Our recommendations would, in particular, remove the legal obstacles to using goods to secure overdrafts, revolving credit facilities and guarantees and reduce the complexities involved in this form of lending more generally.

[4] Department for Business, Innovation and Skills, *Government response to the consultation on proposals to ban the use of bills of sale for consumer lending* (2011), p 42, para 12.

[5] Many self-employed people may not distinguish between a loan for personal or for business purposes. Instead, those in financial difficulties often juggle their money, using whatever money is available to meet the debt which is most pressing.

[6] We have estimated between 74 and 280 court orders a year. This figure assumes that 25% of court orders will relate to small business borrowers, of whom half will be successful in preventing repossession.

11.49 The improved ability of unincorporated businesses to provide security for borrowing will in turn have two benefits: it makes lending cheaper; and it allows some unincorporated businesses to obtain finance which would not otherwise be available.

11.50 We have not been able to quantify these benefits, though they could be significant.

Costs

11.51 Our recommendations in respect of court orders and voluntary termination only apply to goods mortgages securing regulated credit agreements. Our recommendation to protect innocent private purchasers would apply to all goods mortgages. We did not receive any evidence from consultees that these would be issues in respect of mortgages over goods other than vehicles.

GENERAL ASSIGNMENTS OF BOOK DEBTS

Benefits

11.52 In the consultation paper we estimated that the total cost of registering each general assignment of book debts at the High Court is £480 to £1,735 (excluding VAT). The Asset Based Finance Association (ABFA) agreed with this estimate. A table showing the estimated costs is set out below.

Table 11.4: Costs associated with registration of a general assignment of book debts at the High Court

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

11.53 ABFA estimated that the cost of compliance with the streamlined High Court registration regime would be around £125. This represents a saving of £355 to £1,610 for each registration.

11.54 The number of registrations of general assignments of book debts at the High Court from 2010 to 2015 is shown in table 11.5 below.

Table 11.5: General assignments of book debts registered at High Court from 2010 to 2015

Year	Number of general assignments of book debts
2010	221
2011	179
2012	161
2013	143
2014	97
2015	68

11.55 The table shows a sharp decline in the number of general assignments of book debts registered over the last six years. We were told that this does not reflect a decline in the industry. Instead, the complexities of the registration process have discouraged registration. Some invoice financiers would prefer to take their chances on bankruptcy. One invoice financier told us that it now only registers where the unincorporated business's facility limit is £100,000 or above.

11.56 We think that the benefits of our recommendations would be felt by all those who would gain protection from registration. In the absence of other estimates we have taken the 2010 figure of 221 registrations, though it was suggested that the importance of invoice financing to unincorporated businesses has increased since then. In each of these cases, the invoice financier would obtain a benefit of between £355 to £1,610, either in saved costs or in the additional protections provided by registration.

11.57 On this basis, our recommendations would save the invoice financing industry between £78,455 and £355,810 each year. We have taken a best estimate between these two figures of **£217,133**.

Costs

11.58 Our recommendations relate only to registration, so we do not anticipate other costs.

CONCLUSION

11.59 Our best estimate of the quantified annual benefits of our recommendations is **£2.32 million**, summarised in table 11.6 below. However, the main benefits lie in the increased access to secured finance for unincorporated businesses, which it has not been possible to quantify.

Table 11.6: Summary of annual benefits and costs for each group affected by our recommendations (£ millions)

Group	Benefits	Costs	Net benefit
Logbook lenders	Abolition of High Court registration: £2m	Court orders: £0.13m Innocent private purchaser protection: £0.26m	£1.6m
Small business borrowers of logbook loans	£0.5m	–	£0.5m
Others	Easier registration of mortgages on other goods and general assignments of book debts: £0.22m	–	£0.22m
Total			**£2.32m**

CHAPTER 12
LIST OF RECOMMENDATIONS

We make the following recommendations.

CHAPTER 3: THE CASE FOR REFORM

1. Consumers and unincorporated businesses should continue to be able to use their existing goods as security while retaining possession of them but the current law in this area should be reformed [para 3.47].

CHAPTER 4: A NEW LEGISLATIVE FRAMEWORK

2. The Bills of Sale Acts should be repealed and replaced with a new Goods Mortgages Act [para 4.16].

3. The new legislation should use the term:

   (1) "goods mortgage" to refer to loans secured over goods generally; and

   (2) "vehicle mortgage" to refer to loans secured over vehicles [para 4.17].

4. The new Goods Mortgages Act should apply where an individual uses goods that they already own as security for a loan or other monetary obligation (including obligations that can be expressed in money's worth), while retaining possession of the goods [para 4.39].

5. The new legislation should not apply to:

   (1) dealings with intangible goods;

   (2) dealings with ships and aircraft; or

   (3) agricultural charges [para 4.40].

6. For goods mortgages (whether or not securing a regulated credit agreement), the new legislation should:

   (1) prevent lenders from repossessing the goods except for one of four specified reasons:

      (a) default on payment;

      (b) default on maintenance or insurance of the goods;

      (c) offering the goods for sale or moving the goods in breach of a term of the agreement; or

      (d) bankruptcy of the borrower; and

   (2) specify that ownership is automatically transferred to the borrower once the loan is repaid [para 4.57].

7. We recommend that:

   (1) a goods mortgage should be available to secure loans of any amount with no minimum; and

   (2) the new legislation should contain a regulation-making power prohibiting borrowers from granting security over specified essential household goods [para 4.67].

8. 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 [para 4.73].

CHAPTER 5: SIMPLIFYING THE DOCUMENT REQUIREMENTS

9. We recommend that:

   (1) a goods mortgage should only be valid if it is set out in a written document signed by the borrower;

   (2) the borrower's signature should be made in the presence of a witness; and

   (3) the goods mortgage may be in a separate document from the credit agreement, but this is not compulsory [para 5.27].

10. 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 in order to secure the obligation;

    (5) the name, address and occupation of the witness; and

    (6) a specific description of the goods [para 5.39].

11. Where a regulated credit agreement is secured on a vehicle:

    (1) the vehicle mortgage document should include prominent statements that:

        (a) the lender owns the vehicle until the loan is repaid; and

        (b) in the event of default, the borrower risks losing possession of the vehicle;

    (2) the prominent statements should appear on websites and advertising; and

(3) the Financial Conduct Authority should have a regulation-making power to prescribe the wording of the prominent statements [para 5.49].

12. Research should be conducted with consumers to decide upon the final formulations of the prominent statements [para 5.50].

13. We recommend that:

(1) adapted versions of the prominent statements should be required for regulated credit agreements secured on goods other than vehicles; and

(2) it should not be mandatory to include the prominent statements for goods mortgages which do not secure regulated credit agreements [para 5.54].

14. The sanction for failure to comply with the document requirements should be that the lender loses any right to the goods, both as against the borrower and as against third parties [para 5.60].

CHAPTER 6: MODERNISING THE REGISTRATION REGIME

15. We recommend 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; and

(3) priority should be determined by the date and time that the logbook lender submits the details of the vehicle mortgage for registration [para 6.23].

16. We recommend that:

(1) Her Majesty's Treasury should designate asset finance registries as suitable to register vehicle mortgages; and

(2) 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 [para 6.34].

17. Mortgages on goods other than vehicles:

(1) should not be enforceable against a third party or trustee in bankruptcy unless they have been registered; and

(2) should be enforceable against the borrower whether or not they have been registered [para 6.47].

18. We recommend that:

(1) mortgages on goods other than vehicles should continue to be registered at the High Court;

(2) the legislation should include a regulation-making power allowing goods mortgages and general assignments of book debts to be registered with Companies House in the future; and

(3) the legislation should include a regulation-making power allowing for the implementation of an electronic register of security interests in the future [para 6.57].

19. For registration of mortgages on goods other than vehicles at the High Court:

(1) registration can be by email;

(2) priority should be determined by the date and time of submission of documents for registration;

(3) original documents should no longer be required;

(4) an affidavit should no longer be required;

(5) lenders should submit documents that clearly indicate the information required by High Court staff;

(6) there should not be a statutory time limit; and

(7) the High Court should not be obliged to send goods mortgage documents to county courts [para 6.69].

20. To maintain the accuracy of designated asset finance registries:

(1) logbook lenders should be required to remove satisfied vehicle mortgages from asset finance registries by any means available; and

(2) it is not necessary to require re-registration of vehicle mortgages [para 6.84].

21. To maintain the accuracy of the High Court registry:

(1) lenders should be required to enter notices of satisfaction in respect of satisfied 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; and

(3) re-registration of goods mortgages should be required every 10 years [para 6.86].

CHAPTER 7: PROTECTING BORROWERS

22. We recommend that:

(1) The requirement for a court order before repossession should be extended to regulated credit agreements secured by a goods mortgage.

(2) Where the lender wishes to repossess goods from private premises, it should always be required to seek a court order.

(3) In other cases, 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.

(4) It should be mandatory for lenders to notify borrowers of their right to a court order both on the default notice and by means of a separate opt-in notice issued immediately before taking enforcement action.

(5) The opt-in notice should be in a prescribed form that has been researched with consumers.

(6) Subject to this research, the opt-in notice should set out:

(a) details of the borrower's current arrears;

(b) a statement that the borrower may require the lender to go to court to repossess the goods;

(c) the costs the borrower would incur if they choose to opt in;

(d) tick-box options, allowing the borrower to:

(i) opt in to the court order;

(ii) voluntarily terminate by handing the goods to the lender in full and final settlement of the loan; or

(iii) seek debt advice with a stay on further proceedings;

(e) an email address, postal address and telephone number for the borrower to contact the lender;

(f) the timescales for returning the opt-in notice and stay on further proceedings; and

(g) a warning about the consequences of failing to respond.

(7) Lenders must prove delivery of the opt-in notice.

(8) Where the borrower indicates an intention to seek debt advice, the lender should not take action to repossess for six weeks from delivery of the opt-in notice.

(9) There should be a regulation-making power to adjust the time limits for:

(a) borrowers to return the opt-in notice; and

(b) the stay on further proceedings if borrowers wish to seek debt advice.

(10) In deciding whether to grant an order for repossession, the courts should have similar powers to those available to them when making a time order.

(11) Where the lender has wrongfully repossessed goods without a court order, the legislation should provide that the sanction is that the credit agreement terminates and that:

(a) the goods should be returned to the borrower; and

(b) the borrower has no further liability for any outstanding loan amounts.

(12) The legislation should provide that lenders are not permitted to pass on to the borrower any legal or other ancillary fees and costs associated with the court order.

(13) Lenders should be permitted to use their own employees or debt collectors to repossess goods.

(14) Following repossession, borrowers should remain liable for any shortfall [para 7.100].

23. For regulated credit agreements secured by a goods mortgage:

(1) borrowers should have a mandatory right of voluntary termination by handing over the goods; and

(2) the right for borrowers to terminate voluntarily should be available up until:

(a) the lender has instructed repossession agents;

(b) the lender's employees have visited the borrower to repossess their goods; or

(c) the lender has issued proceedings for a court order,

whichever is earliest [para 7.123].

24. The approach of the CCTA Code should be adopted so that voluntary termination:

(1) is available at any point, without requiring any percentage of the loan amount to have been repaid;

(2) effects a full and final settlement of all outstanding amounts; and

(3) is available except where:

(a) it is established that the goods have sustained intentional damage of whatever nature; or

(b) it is evident that the borrower has contravened the obligation to take reasonable care of the goods to the extent that the contravention adversely and significantly affects the resale value [para 7.124].

25. Where a goods mortgage secures a loan which is not a regulated credit agreement:

(1) goods may be repossessed without a court order; and

(2) there should be no statutory right of voluntary termination [para 7.133].

CHAPTER 8: PROTECTING PRIVATE PURCHASERS

26. We recommend 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; and

(3) the protection should apply to a "sale" as defined by the Sale of Goods Act 1979 and a "contract for transfer of goods" based on the definition in the Consumer Rights Act 2015 [para 8.33].

27. The new legislation should contain a regulation-making power to repeal 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 [para 8.45].

28. We recommend that:

(1) the new legislation should impose a legal duty on borrowers to disclose a goods mortgage when selling the goods;

(2) the goods mortgage document should include a prominent statement that the borrower may be committing a criminal offence by selling the goods; and

(3) the Financial Conduct Authority should have a regulation-making power to prescribe the wording of the prominent statement [para 8.54].

29. The Financial Conduct Authority should be given jurisdiction to curb abuses in the way that lenders treat private purchasers [para 8.62].

30. The Financial Conduct Authority should consider amendments to its rules to give the Financial Ombudsman Service jurisdiction to hear complaints against lenders made by private purchasers [para 8.66].

CHAPTER 9: GENERAL ASSIGNMENTS OF BOOK DEBTS

31. General assignments of book debts made by unincorporated businesses should continue to be registered [para 9.16].

32. For registration of general assignments of book debts at the High Court:

    (1) the business should sign the assignment document in the presence of a witness, but the witness need not be a solicitor;

    (2) the witness should state their name, address and occupation on the assignment document;

    (3) an affidavit should no longer be required;

    (4) registration can be by email;

    (5) there should not be a statutory time limit;

    (6) registration should be valid from the date and time of submission of documents; and

    (7) registration should be renewed every 10 years [para 9.24].

33. For registration of general assignments of book debts at the High Court invoice financiers should email documents that clearly indicate the information required by High Court staff [para 9.36].

CHAPTER 10: ABSOLUTE BILLS OF SALE

34. We recommend that:

    (1) the requirement to register absolute bills should be abolished; and

    (2) the use of absolute bills should be deregulated [para 10.27].

(Signed) DAVID BEAN, *Chairman*
NICK HOPKINS
STEPHEN LEWIS
DAVID ORMEROD
NICHOLAS PAINES

PHIL GOLDING, *Chief Executive*
22 July 2016

We would like to thank the team involved in this project: Tamara Goriely (team manager), Fan Yang (team lawyer), Sophia Hurst (research assistant 2014-15) and Robert Ward (research assistant 2015-16).

APPENDIX A
PEOPLE AND ORGANISATIONS WHO RESPONDED TO THE CONSULTATION PAPER

A.1 The following people and organisations responded to the consultation paper. We are extremely grateful for their responses and the information they provided.

	Name	Category
1	AutoMoney	Logbook lender
2	DTW Associates Limited	Logbook lender
3	Loans2Go	Logbook lender
4	Mobile Money	Logbook lender
5	V5 Loans	Logbook lender
6	Asset Based Financing Association	Industry representative
7	Federation of Small Businesses	Industry representative
8	Finance & Leasing Association	Industry representative
9	Retail Motor Industry Federation	Industry representative
10	Chartered Trading Standards Institute	Consumer interests/protection
11	Citizens Advice	Consumer interests/protection
12	Community Investment Coalition	Consumer interests/protection
13	Financial Services Consumer Panel	Consumer interests/protection
14	Money Advice Trust	Consumer interests/protection
15	Guy Skipwith	Consumer interests/protection
16	Society of Chief Officers of Trading Standards in Scotland	Consumer interests/protection
17	StepChange Debt Charity	Consumer interests/protection
18	Dr Orkun Akseli and Dr Sean Thomas	Academic
19	Professor Sir Roy Goode QC	Academic
20	Dr Graham McBain	Academic

	Name	Category
21	Iyare Otabor-Olubor	Academic
22	Cheshire Datasystems Limited	Registry
23	HPI	Registry
24	Boodle Hatfield LLP	Lawyer/law firm
25	Chancery Bar Association	Lawyer/law firm
26	City of London Law Society	Lawyer/law firm
27	Constantine Cannon LLP	Lawyer/law firm
28	General Council of the Bar of England and Wales	Lawyer/law firm
29	Roger Hawkins	Lawyer/law firm
30	Gregory Hill	Lawyer/law firm
31	Insolvency Lawyers' Association	Lawyer/law firm
32	Dennis Rosenthal	Lawyer/law firm
33	Simmons & Simmons LLP	Lawyer/law firm
34	Campaign for Fair Finance	Other
35	Financial Ombudsman Service	Other
36	Mark Holland	Other
37	Queen's Bench Division	Other
38	Secured Transactions Law Reform Project	Other

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