



**Law
Commission**
Reforming the law

Replacing bills of sale: a new Goods Mortgages Bill Consultation on draft clauses Summary

**Accompanying notes on draft clauses
July 2017**

Introduction

- 1.1 The Law Commission is consulting on draft clauses intended to form part of a new Goods Mortgages Bill. Goods mortgages would replace “bills of sale”, which allow individuals to use goods they already own as security for loans.
- 1.2 Bills of sale are currently governed by two Victorian statutes, passed in 1878 and 1882. They are mainly used for “logbook loans”, where a borrower grants security over their existing vehicle. The borrower may continue to use the vehicle while they keep up the repayments, but if they default they can lose it relatively easily, without some important protections that apply to hire-purchase transactions.

THE LAW COMMISSION’S RECOMMENDATIONS

- 1.3 We consulted on reforming the Bills of Sale Acts in 2015¹ and published a report in 2016.² We concluded that the current law is archaic, and wholly unsuited to the 21st century. We recommended that the Bills of Sale Acts should be repealed and replaced with a “Goods Mortgages Act”, to allow individuals to use their existing goods as security while continuing to use the goods.
- 1.4 We recommended that the new legislation should:
 - (1) protect vulnerable borrowers, so that vehicles are not seized too readily;
 - (2) protect innocent private purchasers who buy vehicles without realising that they are subject to a security interest;
 - (3) remove unnecessary restrictions on secured lending to more sophisticated borrowers, such as high net worth individuals and unincorporated businesses; and
 - (4) save costs caused by unnecessarily complex registration arrangements.

TOWARDS A GOODS MORTGAGES BILL

- 1.5 A Goods Mortgages Bill was announced in the Queen’s speech in June 2017. We hope that it can be introduced through the special Parliamentary procedure for uncontroversial Law Commission Bills.
- 1.6 The clauses which accompany this consultation are very much in draft form, and do not cover all the provisions which would need to be in the Bill. In particular, we have not included clauses on registration of goods mortgages. We hope to consult on

¹ Bills of Sale (2015) Law Commission Consultation Paper No 225, accessible at http://www.lawcom.gov.uk/wp-content/uploads/2015/09/cp225_bills_of_sale.pdf.

² Bills of Sale (2016) Law Com No 369, accessible at http://www.lawcom.gov.uk/wp-content/uploads/2016/09/lc369_bills_of_sale.pdf.

registration separately over the course of the summer. However, we think it is important to seek views on other key clauses now, so that the final provisions of the Bill are informed by stakeholders' views.

WHAT WE WANT TO KNOW

- 1.7 This is a limited consultation. We wish to know whether the draft clauses successfully implement the recommendations we made in our 2016 report, but we are not consulting again on the main policy questions.
- 1.8 We are also interested in comments on the structure and accessibility of the draft clauses.
- 1.9 In some cases we have modified our policy in the light of further discussions and issues raised in the drafting process. We ask specific questions about those changes – several of which are technical or legally complex.
- 1.10 In this summary we list our specific questions and provide a brief explanation of each. We then cross refer to the longer discussion in the full consultation document. We hope this will allow consultees to identify those questions which are of particular interest to them, and then to find the relevant material in the consultation document.

1.11 Please send your comments by **Monday 7 August 2017** to bills_of_sale@lawcommission.gsi.gov.uk. If responding by post, please address any comments to John Williams, Commercial and Common Law Team, Law Commission, 1st Floor, Tower, Post Point 1.53, 52 Queen Anne's Gate, London SW1H 9AG.

- 1.12 This summary sits alongside the draft clauses and full consultation document available at <http://www.lawcom.gov.uk/project/bills-of-sale/>, which also provides access to our 2015 consultation paper and 2016 report.

Questions about policy developments

2.1 The main consultation document explains each provision of the current draft Bill in turn. In this document we look only at issues which may require further thought or development, and on which we have asked specific questions. We list and explain the questions set out in the main consultation document so that consultees can identify issues of interest.

WHICH BORROWERS NEED ADDITIONAL PROTECTION?

2.2 Our 2016 report distinguished between sophisticated borrowers who could obtain suitable advice and vulnerable borrowers who needed additional protections. These protections include the right to demand a court order before having goods repossessed after paying at least a third of the loan, and the right to hand over the goods and walk away from any further liability under the agreement.

2.3 In our 2016 report we recommended that the additional protections should apply to “regulated credit agreements” under the Consumer Credit Act 1974 (CCA), but not to obligations which were not regulated under the CCA because they were:

- (1) loans of more than £25,000 taken out for business purposes; or
- (2) loans of more than £60,260 to high net worth individuals.

2.4 During the drafting process, it has become apparent that it would be inappropriate to replicate the CCA concept of a regulated credit agreement in its entirety. Instead, we have taken the simpler course, which is to apply the protections to all goods mortgages, unless:

- (1) the “high net worth conditions” are met. Individuals are of “high net worth” if they have a net income totalling at least £150,000 in the preceding financial year, or net assets³ with a total value of at least £500,000; or
- (2) the “business credit conditions” are met. These apply to loans which exceed £25,000 made wholly or predominantly for the purposes of the borrower’s business.

2.5 In either case, the borrower would also need to “opt-out” of the protections of the draft Bill. The goods mortgage must include a declaration to this effect.

2.6 The main change from our 2016 report is that, under the draft Bill, *all* goods mortgages granted by high net worth individuals will be exempt, provided that the individual agrees to forgo the protections and the mortgage meets the prescribed requirements. There is no longer a requirement that the loan must exceed £60,260.

³ Excluding primary residence, life or endowment policies and pension arrangements.

Consultation Question 1.

- 2.7 Do consultees agree that high net worth individuals should be able to opt out of protections even if the loan does not exceed £60,260?

2.8 *For further discussion see from paragraph 2.5 of the consultation document.*

CHARGE OR TRANSFER?

- 2.9 Under a bill of sale the borrower transfers title to the property to the lender. Under the draft Bill, the security created over the goods is a statutory charge, rather than a transfer of ownership. This aligns goods mortgages with mortgages of land, ships and aircraft, all of which are best characterised as charges. It also avoids some complexities in the transfer-of-title model where a borrower creates more than one security interest over the same property.
- 2.10 In our 2016 report, we suggested that a goods mortgage may take effect either as a true mortgage or as a charge, depending on the choice of the parties. We now think that this is unnecessarily complex, adding to the length of the legislation without providing any benefits to either lenders or borrowers.

Consultation Question 2.

- 2.11 Do consultees agree that it is right to characterise a goods mortgage as a “charge”, in accordance with all other commonly-used modern security interests?

2.12 *For further discussion see from paragraphs 3.9 of the consultation document.*

WHO SHOULD BE ENTITLED TO GRANT A GOODS MORTGAGE?

- 2.13 Under clause 2 of the draft Bill, a goods mortgage can be granted by an individual who “owns” qualifying goods.
- 2.14 The definition of ownership would include trustees, who hold the legal title to the goods. However, we do not think that it should extend to a beneficiary under a trust.
- 2.15 Our reason is that it may cause difficulties if both trustees and beneficiaries were able to grant a mortgages over the same goods. Furthermore, a beneficial interest does not amount to ownership of tangible, moveable goods. We have concluded that a beneficiary with only subordinate rights (that do not necessarily include a right to take possession) or mere expectations should not be able to enter into a transaction which could result in the lender taking physical possession of the goods.

Consultation Question 3.

2.16 Do consultees agree that beneficiaries under trusts should not be able to grant goods mortgages?

2.17 *For further discussion see from paragraph 3.17 of the consultation document, and in particular from paragraph 3.23.*

GROWING CROPS AND FIXTURES

2.18 Growing crops and fixtures are goods for some purposes and land for others. There are good policy reasons to include both in the draft Bill. However, this could lead to difficult issues of priority where the goods are fixed to land which is subject to a land mortgage. We welcome views.

Growing crops

2.19 A separate statutory regime exists to allow farmers to grant charges over crops, stock and other agricultural assets. However, it is currently also possible for farmers to use a bill of sale to borrow money on agricultural assets (including growing crops). It appears that some farmers do use bills of sale, possibly because agricultural charges must be granted to a bank and they wish to borrow from other lenders.

Fixtures

2.20 The current bills of sale legislation specifically refers to fixtures. It includes

- (1) trade machinery, even if fixed to land; and
- (2) other fixtures, when assigned or charged separately from the land.

2.21 There may be some demand to grant goods mortgages over (for example) trade machinery which is bolted to the floor, or to a statue which are fixed to a plinth in the garden.

Priority between goods mortgages and land mortgages

2.22 Under the current law, a land mortgage lender is entitled not only to the land itself, but also to any crop or fixture attached to it. The land mortgage trumps any security over the goods, even if the security over the goods was created first, or if the item was only attached to the land after the land mortgage was created. This seems unfair.

2.23 In the draft Bill we suggest a tentative solution to this issue. We propose that a land mortgage lender should have priority to any item which was already fixed to or growing on the land when the goods mortgage was created, provided that land mortgage was created first. However, a goods mortgage lender would have priority if :

- (1) The goods mortgage was created first; or
- (2) The item was only fixed to the land after the goods mortgage was granted.

Consultation Question 4.

- 2.24 Do consultees agree with our proposed scheme of priority between a goods mortgage over fixtures and growing crops and a land mortgage?

Consultation Question 5.

- 2.25 If not, would it would be preferable to take out fixtures and growing crops from our definition of “goods” so that they could not be made subject to a goods mortgage at all?

2.26 *For further discussion see from paragraph 3.36 of the consultation document.*

SHIP MORTGAGES NOT REGISTRABLE ELSEWHERE

- 2.27 At present, all ship mortgages are excluded from the scope of the Bills of Sale Acts. Instead, most ship mortgages are registered in the central register for ships, set up under the Merchant Shipping Act 1995 and associated regulation.
- 2.28 The central register is divided into separate parts. The 1995 Act sets out a scheme for the registration of mortgages, which applies to ships registered under Part 1 and to fishing vessels with full registration. However, there is no provision to register mortgages against small ships, fishing vessels with only simple registration or unregistered ships.
- 2.29 This can lead to problems. It is possible to create a legal mortgage over these vessels at common law, but there is no obligation to register that mortgage. Purchasers are subject to the mortgage, but have no way of finding out about it.
- 2.30 In most cases, mortgages on ships are registered – either because the owners are incorporated or because they register their ship under Part I or Part II with full registration. Nevertheless, there are situations in which third party purchasers of the ships fall victim to the gap in the law, leading to criticism by judges and academics.
- 2.31 The draft bill excludes any ship mortgage which must be registered on the central ship register. However, other ship mortgages granted by an individual would come within the scope of the draft Bill. The effect would be that all ship mortgages would have to be registered, either in the central ship register or as a goods mortgage.

Consultation Question 6.

- 2.32 Do consultees consider that ship mortgages which are not covered by the specialist ship mortgage regime could be brought within the scope of the draft Bill without causing difficulty to the existing regime for ship mortgages?

2.33 *For further discussion see from paragraph 3.57 of the consultation document.*

WHAT OBLIGATIONS CAN BE SECURED BY A GOODS MORTGAGE?

- 2.34 Under the Bills of Sale Acts, a security bill document must include the loan amount, the repayment instalments and the date by which repayment is to be made. We were told that this hampers the ability of unincorporated businesses to borrow money on the security of their goods. In particular, they cannot use goods as security for overdrafts or other “running account” credit facilities, where the borrower is free to borrow different amounts from time to time up to a maximum limit. It also causes problems where company directors are asked to guarantee their company’s loans and wish to use their own goods to secure the guarantee.
- 2.35 In 2016 we recommended that at least for more commercially-aware borrowers, the legislation should be written in broad terms, to allow individuals to use goods to secure a wide range of obligations.
- 2.36 Following our 2016 report, advice agencies expressed concern that borrowers could be exploited if goods mortgages were used too widely. We have therefore adapted our policy in the light of these concerns.

Guarantees

- 2.37 Citizens Advice drew our attention to the rising number of people seeking their help with problems over “guarantor loans”. This is where “the borrower gives the name of a guarantor, normally a friend or family member, who is then pursued for payment if the borrower can’t repay”. Advice agencies told us that these loans carry a substantial risk that the guarantors will be faced with unexpected demands for payment, but people were often unaware of this danger. They thought that the problems would be aggravated if vulnerable guarantors also risked losing valuable goods, such as a car.
- 2.38 The draft Bill therefore prevents a goods mortgage from being used to secure a guarantee, unless the mortgage is granted by a high net worth individual.⁴

⁴ Individuals who are not “high net worth” would not be able to use goods to secure guarantees, even if the guarantee is for a business loan over £25,000. This is because an individual who guarantees a business loan is acting in a personal as well as a business capacity. They put their own property on the line and may be particularly vulnerable in the event of a default.

Consultation Question 7.

- 2.39 Do consultees agree that only high net worth individuals should be able to use goods mortgages to secure guarantees?

Running account credit

- 2.40 Consumer advice agencies were also concerned that consumers might be asked to provide vehicles as security for overdrafts or credit card debts. These credit arrangements could last for years. While borrowers are in work they might grant a goods mortgage with little thought, and this might come back to haunt them several years later when their circumstances change.
- 2.41 Under the draft Bill, only sophisticated borrowers would be able to use goods mortgages to secure running account credit. This includes high net worth individuals and businesses borrowing over £25,000.

Consultation Question 8.

- 2.42 Do consultees agree that only high net worth individuals and businesses borrowing over £25,000 should be able to use goods mortgages to secure running-account credit?

- 2.43 *For further discussion see from paragraph 3.67 of the consultation document.*

Obligations to perform services

- 2.44 Our starting point is that, at least for more commercially-aware borrowers, the legislation should be written in broad terms, to allow individuals to use goods to secure a wide range of obligations. Not all the obligations will necessarily be to pay money; examples of non-monetary obligations include obligations to return shares under a stock lending agreement and obligations to supply stock or commodities.
- 2.45 This raises questions about whether there should be any prohibitions on the types of obligations which individuals can secure under a goods mortgage. We seek views about whether there is a need to prevent goods mortgages from being used to secure obligations to perform services. During our 2015 consultation, it was suggested that people might be exploited if unscrupulous persons were able to take goods mortgages to secure the personal performance of services. It was said that compelling an individual to perform services under the threat of losing essential property might be akin to “trucking, bondage or slavery”.
- 2.46 We have no evidence to suggest that bills of sale or any similar security interests have been used to exploit people in this way. Furthermore the groups we consulted who were concerned with labour exploitation did not think that there was a real risk of goods mortgages being used in this way. However, there is at least a theoretical risk.

Consultation Question 9.

- 2.47 We welcome views about whether it is necessary to prevent goods mortgages from being used to secure the performances of services.

Consultation Question 10.

- 2.48 We welcome comments on any disadvantages of a restriction which prevents goods mortgages being used to secure non-monetary obligations (such as an obligation to return shares in stock lending), either in a consumer or business context.

- 2.49 *For further discussion see from paragraph 3.85 of the consultation document.*

PLEDGES WHERE THE BORROWER IS GIVEN CUSTODY OF THE GOODS

- 2.50 The draft Bill is not intended to affect any “possessory” security (such as pledges and liens) where the lender is in possession of the goods. However, we are aware of a form of pawn-broking in which the lender allows the borrower to continue to use the goods. The lender takes possession of the goods and then hands back custody to the borrower. There are various legally creative ways to do this, including “trust receipts” and “pledges by attornment”.
- 2.51 Arrangements of this type have the same practical effect as goods mortgages. We are concerned that they could be used as a way to avoid the protections provided in the legislation, including the borrower’s right of voluntary termination, and the requirement that the lender must seek a court order before taking possession. They also create a risk for purchasers who buy the goods, who have no way of finding out about the lender’s interest.
- 2.52 Under the draft Bill, arrangements of this type are rendered void if they do not comply with the requirements for a goods mortgage. We welcome views on whether this is the right approach.

Consultation Question 11.

- 2.53 Do consultees agree that pledges and other possessory security arrangements should become void if the borrower is given custody of the goods?

- 2.54 *For further discussion see from paragraph 3.102 of the consultation document.*

PROMINENT WARNINGS

- 2.55 In our 2016 report we said that a goods mortgage document should include prominent warnings that borrowers may lose the goods if they do not keep up the repayments. We also thought that the document should warn borrowers that they may be guilty of a criminal offence if they sell the goods before paying off the loan – that is, if they sell the goods without telling the purchaser about the existence of the goods mortgage.
- 2.56 We recommended that different statements should apply to mortgages over vehicles and mortgages over other goods. For vehicles we recommended statements along the following lines:

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

IF YOU SELL THE VEHICLE BEFORE YOU PAY OFF YOUR LOAN, YOU MAY BE GUILTY OF A CRIMINAL OFFENCE

- 2.57 We welcome views on the wording of these warnings.

Consultation Question 12.

- 2.58 Do you consider the wording of these warnings to be appropriate?

- 2.59 As well as being required to tell a prospective purchaser about the existence of the goods mortgage, owners must also disclose the existence of a goods mortgage to another lender.

- 2.60 We welcome comments on whether the document should also contain a warning to this effect. We do not wish to include unnecessary warnings – as prominence given to one issue always distracts from the prominence given to another.

Consultation Question 13.

- 2.61 Do you think it is necessary to include a prominent warning for borrowers that they should not seek a second loan on the vehicle without disclosing the existence of a first loan?

- 2.62 *For further discussion see from paragraph 4.1 of the consultation document.*

DOCUMENT REQUIREMENTS

- 2.63 In our 2016 report we argued that a goods mortgage was a significant transaction. We thought that there was still a need for a written document, signed by the borrower in the presence of a witness.
- 2.64 We said that the witness should state their name, address and occupation. However, we have been unable to find other statutes requiring the witness' occupation to be stated (even in respect of documents with rigid formality requirements, such as wills). Given the strict sanction for non-compliance with formalities for goods mortgages (invalidity of the mortgage), we no longer consider that the witness' occupation should be required by the draft Bill or associated regulations. The parties may still state the occupation of the witness if they wish.

Consultation Question 14.

- 2.65 Do you agree that it is unnecessary for the mortgage document to require the occupation of the witness?

- 2.66 *For further discussion of the document formalities, see Chapter 4 of the consultation document.*

REGISTRATION OF GOODS MORTGAGES

- 2.67 The current system of registration for bills of sale is a paper-based system at the High Court. The High Court register cannot be searched by asset, so logbook lenders also register their interests voluntarily with commercially-run asset finance registers. In practice, logbook lenders and vehicle dealers rely on these commercial registers to find out whether a vehicle is subject to a logbook loan.
- 2.68 When we consulted in 2015, several consultees argued for a new comprehensive electronic securities register. However, we considered that a new comprehensive register was unlikely to be achieved as part of the reform of bills of sale.
- 2.69 We recommended that, for the purposes of registration, vehicle mortgages should be distinguished from goods mortgages on other assets: vehicle mortgages should be registered at suitable private asset finance registers, to be designated by HM Treasury; goods mortgages over other assets should remain registered at the High Court.
- 2.70 We are currently in discussions with the Treasury about these recommendations and their practical implications. The Treasury is considering the best way to ensure a comprehensive system of registration based on the following principles:
- (1) goods mortgages must be registered in order to be enforceable against third parties and trustees in bankruptcy; and
 - (2) where two or more goods mortgages are created over the same goods, those mortgages have priority according to the times at which they were registered.

2.71 This consultation does not include detailed provisions on registration. We hope to consult separately on detailed registration provisions shortly. If you wish to be involved in that consultation, please let us know by email as soon as possible at bills_of_sale@lawcommission.qsi.gov.uk.

Consultation Question 15.

2.72 If you have particular concerns about the practical consequences of dividing goods mortgages between the High Court register and private asset finance registers, we would welcome your comments.

2.73 *For further discussion see from paragraph 5.1 of the consultation document.*

Definition of vehicle

2.74 If the registration requirements distinguish between vehicle goods mortgages and goods mortgages over other types of goods, there must be a clear definition of vehicle. In 2016 we recommended that “vehicle” should be defined as any vehicle registered with the Driver and Vehicle Licensing Agency (DVLA).

2.75 We now think that a broader definition would be preferable because not all cars are registered with the DVLA. For example, vehicles which are brought to England from the EU may not be initially registered with the DVLA. Other vehicles may have been deliberately taken off the road and may no longer be registered with the DVLA.

2.76 We now think that the definition of “vehicle” should have two limbs to cover:

- (1) all vehicles with a DVLA registration (that is, under the Vehicle Excise and Registration Act 1994); and
- (2) any vehicle intended for use on public roads which has a Vehicle Identification Number (VIN) or other unique identifier (such as a serial number).

2.77 We welcome views on this definition. We wish to know whether both limbs are required. We wonder, in particular, whether it is necessary to include DVLA registered vehicles which do not have a unique identifier?

Consultation Question 16.

2.78 Do consultees have experience of registering a vehicle which has been registered at the DVLA but does not have a VIN or other unique identifier?

Consultation Question 17.

2.79 Do consultees agree that the definition of “vehicle mortgage” is sufficiently clear and wide to cover the types of vehicles over which a goods mortgage is likely to be granted?

2.80 *For further discussion see from paragraph 5.11 of the consultation document.*

Data sharing

2.81 Under the current arrangements, the order of priority of multiple bills of sale granted over the same vehicle is determined by the order of registration at the High Court. If vehicle mortgages were no longer registered at the High Court, questions of priority would be determined by the time at which such mortgages were registered on a designated asset finance register.

2.82 This could lead to problems if lenders have the option of registering in more than one register and data sharing is not simultaneous. A lender may register a goods mortgage over a vehicle with register “A”, but a subsequent lender may not discover that interest when they check the vehicle with register “B”.

2.83 We have been told that asset finance registers currently share data overnight. Data received by one register by 6 pm is reflected on all registers by 8 am the following morning.⁵ This leads to period of up to 38 hours during which the asset finance registers may hold inconsistent information. We have been told that this is not a widespread problem in practice but we would welcome views.

Consultation Question 18.

2.84 We welcome comments on how often lenders and registers are faced with multiple registrations of interests over the same vehicle within a short timeframe, and the impact of this.

2.85 There are several alternative approaches:

- (1) Impose a requirement for real-time data sharing between the designated asset finance registers. We understand that this may require substantial investment in new systems;
- (2) Require lenders to register with all registers. This would increase costs;
- (3) Provide an indemnity or insurance against the small number of cases in which the invisibility period caused loss to a lender. All asset finance registers currently offer an indemnity or data guarantee, though it is not clear whether all

⁵ FLA *Best Practice on Asset Registration* (August 2016) para 6.10.

the indemnities offered also cover loss to lenders caused by inaccurate or incomplete information.

Consultation Question 19.

2.86 We welcome consultees' views on the different options for ensuring adequate data-sharing.

2.87 *For further discussion see from paragraph 5.32 of the consultation document.*

TACKING

2.88 The draft Bill allows borrowers to grant multiple goods mortgages over the same goods. Priority between multiple mortgages will generally be determined by the time of their registration, but this rule is qualified by the rules on "tacking" outlined in the draft Bill.

2.89 Tacking occurs where a prior lender makes further advances, such as a top-up loan. If a prior lender can "tack" further advances on to the first goods mortgage, they could seek repayment of those further advances in priority to a subsequent lender – even if the subsequent lender made a loan before the further advances were made.

2.90 There are already detailed rules on this issue for land mortgages, which are broadly followed in clause 12 of the draft Bill.

2.91 In practice this issue is mainly relevant to running-account lenders who lend against valuable goods, such as art works, which might have enough value for more than one lender.

Consultation Question 20.

2.92 Do consultees agree with our proposed provisions on tacking? If not, do consultees think that our Bill should forbid tacking for goods mortgages?

2.93 *For further discussion see from paragraph 5.45 of the consultation document.*

DEFINING A "DISPOSITION"

2.94 One of the key protections in the draft Bill is for private purchasers who act in good faith without notice of the goods mortgage. Clause 15 states that following a "disposition" of the goods mortgage to such a purchaser, the goods mortgage will "cease to exist".

2.95 A "disposition" is defined in clause 34. It has two limbs.

- (1) Clause 34(1)(a) refers to a “contract for sale”, where the seller transfers or agrees to transfer ownership to the buyer for a money consideration, called the price.
- (2) Clause 34(1)(b) follows section 8 of the Consumer Rights Act 2015. It applies where the owner transfers or agrees to transfer ownership for some other consideration, as in part-exchange or barter contract.

Consultation Question 21.

2.96 Do consultees think that clause 34 clearly expresses the concept of a contract to transfer ownership of goods for value?

2.97 *For further discussion see from paragraph 6.29 of the consultation document.*

TAKING POSSESSION FROM “PREMISES”

2.98 Clause 19 of the draft Bill replicates section 92 of the CCA. It states that, in order to enter “any premises” to take possession of mortgaged goods, a lender must obtain a court order. Clause 29(3) of the draft Bill, which is itself modelled on section 173 of the CCA, extends this and allows lenders to enter when they have the consent of the relevant person.

2.99 It is not clear from case-law under the CCA whether the relevant consent is that of the borrower or of the occupier of the premises from which the goods are being taken (or both). We think it may be helpful to clarify whose consent is needed in order to enter premises. In our view, it should be the consent of the occupier of the premises.

2.100 The purpose of this clause is to prevent lenders from trespassing on or breaking into premises to recover goods, rather than to protect the borrower. There are other protections to stop lenders from taking goods they are not entitled to, primarily the requirement for a possession notice. Where the lender is otherwise fully entitled to the goods under the draft Bill but the goods are on premises, the borrower’s consent is not necessary (and it would cause lenders to waste costs in applying for a court order).

Consultation Question 22.

2.101 Do consultees think that the draft Bill should specify whose consent is needed for clause 19?

Consultation Question 23.

2.102 Do consultees agree that the occupier of the premises (rather than the borrower) should be the person required to consent to the lender entering premises to repossess the goods?

2.103 *For further discussion see from paragraph 7.8 of the consultation document.*

A FIVE DAY DELAY BETWEEN SEIZURE AND SALE

2.104 Under the 1882 Act, a lender must leave a period of five clear days between taking possession of the secured goods and selling them. The draft Bill preserves this protection whenever a lender takes possession without a court order.

2.105 Clause 26 requires the lender who is in possession to wait for five working days before selling the goods. During this period, the borrower may apply to the court for the goods to be returned to them. If the reasons for taking possession no longer apply, the court may order the return of the goods.

2.106 Any further period of delay involves costs (including mounting interest and storage costs). We welcome views on whether this protection is still required. We are particularly interested in whether the five day delay is needed even if borrower has received a possession notice and asked for a 28 day stay to seek advice, but has not taken any further action.

Consultation Question 24.

2.107 Do consultees think that it is desirable to prevent lenders from selling goods for five working days after taking possession without a court order? If so, is this protection necessary in all such circumstances?

2.108 *For further discussion see from paragraph 10.10 of the consultation document.*

MORTGAGES OVER SHARES IN GOODS

2.109 The draft Bill is designed to work with undivided shares in goods, including in relation to taking possession. A lender with a mortgage over a share in goods owned in common would have the same rights and obligations as any other lender with a goods mortgage.

2.110 They would still need to establish a right to take possession (under one of the grounds in clause 18) before they can do anything with the share or the goods. Once the right to possession is established, they may not need to take physical possession in order to sell the goods: they could also just sell the share or agree with the other owners in common to sell the whole good and split the proceeds of sale. Otherwise, a lender

with a mortgage of a share can apply to court to be permitted to sell the share or the goods (in order to obtain the value of the share).

Consultation Question 25.

2.111 Do consultees agree that the draft Bill works for shares in goods?

2.112 *For further discussion see from paragraph 11.9 of the consultation document.*