Law Commission
Reforming the law

BILLS OF SALE

A summary of the Law Commission's recommendations to reform the law of logbook loans and of other loans secured on goods

Law Com No 369 (Summary) – September 2016

THE LAW COMMISSION

Bills of Sale

OVERVIEW

This document summarises Law Commission report No 369, Bills of Sale.

The Bills of Sale Acts are archaic Victorian statutes, which are wholly unsuited for modern credit arrangements such as logbook loans. They should be repealed in their entirety.

The Law Commission recommends a new Goods Mortgages Act to:

- Provide appropriate protection to borrowers, so that vehicles are not seized too readily;
- Protect innocent purchasers who buy vehicles without realising that they are subject to a bill of sale;
- Save £2m of costs caused by unnecessary registration and red tape; and
- Remove unnecessary restrictions on secured lending to small businesses.

If the Government accepts these recommendations, the next stage would be for the Law Commission to draft a Bill. We hope this Bill could be introduced into Parliament under the special procedure for uncontroversial Law Commission Bills.

A copy of the full 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

TABLE OF CONTENTS

1. INTRODUCTION

WHAT ARE BILLS OF SALE?

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

1.2 Concern about the way in which bills of sale were used by money lenders in Victorian times led to two statutes: the Bills of Sale Act 1878 and the Bills of Sale Amendment Act 1882.[1] The Bills of Sale Acts have been criticised for over a century but they are still in force today.

LOGBOOK LOANS

1.3 For much of the twentieth century, bills of sale were hardly used. They have now been revived in the form of "logbook loans". The market for logbook loans has grown from under 3,000 in 2001 to over 37,000 in 2015.

1.4 When a borrower takes out a logbook loan, they transfer ownership of their existing car, van or motorcycle to the logbook lender, while continuing to use it. The logbook loan must be registered at the High Court by means of an expensive and cumbersome procedure.

1.5 If the borrower fails to keep up with repayments, the logbook lender may seize the vehicle. The Bills of Sale Acts do not provide adequate protections to borrowers, who risk having their vehicles seized too readily, without a court order. Furthermore, the legislation fails to protect those who buy a second hand vehicle without realising that it is subject to a logbook loan. These purchasers are left with three unpalatable choices: pay off a loan they did not take out; pay the logbook lender again for the vehicle; or lose it to the logbook lender.

A CURB ON SECURED LENDING TO UNINCORPORATED BUSINESSES

1.6 The Bills of Sale Acts also restrict the way in which unincorporated businesses can use goods as security for loans. Lenders are deterred by the legislation's impenetrable language and cumbersome procedures.

1.7 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.[2] Nor can directors who give personal guarantees for business loans secure those guarantees on goods. Reform of the law would open up the market for unincorporated businesses to use goods as security for loans.[3]

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

[2] A revolving credit facility allows a borrower to access funding at any time over the duration of the facility, up to an agreed limit.

[3] The Bills of Sale Acts also inhibit the ability of unincorporated businesses to access the value in their book debts. We discuss this in Part 2.

THIS PROJECT

1.8 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.

1.9 On 9 September 2015, we published a consultation paper and received 38 responses. We are extremely grateful to all those who responded.

1.10 We now make recommendations for reform. We have not been asked to draft a Bill at this stage. 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 our recommended legislation would be suitable for introduction into Parliament through the special procedure for uncontroversial Law Commission Bills. If our recommendations are accepted, the next step would be for the Law Commission to draft legislation.

OUR RECOMMENDATIONS

1.11 In brief, we think that individuals should continue to be allowed to borrow money on the security of their goods. However, the Bills of Sale Acts no longer provide an appropriate legal regime. They should be repealed and replaced with a new "Goods Mortgages Act" to govern the way that individuals may use goods they already own as security for loans, while retaining possession of them.

2. THE CASE FOR REFORM

2.1 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.

2.2 The debt advice charity, StepChange, agreed:

> 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.

2.3 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.

UNDUE COMPLEXITY

2.4 The Bills of Sale Acts are particularly opaque pieces of Victorian legislation. The definition of "bill of sale" in the 1878 Act, for example, is a single sentence of 218 words. Such highly technical and legalistic language is impenetrable for modern readers.

TECHNICAL DOCUMENT REQUIREMENTS

2.5 The 1882 Act sets out a standard form for bills of sale that are used to grant security for a loan. The bill of sale must satisfy 12 separate requirements. Many no longer serve a useful purpose. For example, the bill of sale 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 is clearly necessary and would usually already be included in a separate credit agreement.

2.6 If a bill of sale breaches any of the 12 requirements, the lender loses all rights to the goods and may no longer sue the borrower for repayment of the loan. This severe sanction appears disproportionate.

2.7 The document requirements cause problems in both logbook loans and in larger, more sophisticated business loans.

Document requirements and logbook loans

2.8 Research by the Financial Conduct Authority (FCA) found that logbook loan paperwork consists of "complex, lengthy documents, often not written in 'plain English'". Logbook lenders were more direct: one described the standard form required under the 1882 Act as "horrific". The Consumer Credit Trade Association (CCTA), the trade association that represents the large majority of logbook lenders, said that the standard form:

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

Document requirements and business loans

2.9 The document requirements restrict the way in which lenders can take security for loans to unincorporated businesses. In particular, the Bills of Sale Acts prevent unincorporated businesses from using goods as security for flexible loan facilities such as a revolving credit facility or an overdraft. This is because it is not possible to comply with the requirements to specify the loan amount and the date of repayment in advance.

2.10 The Bills of Sale Acts also prevent a director from using their own goods to secure a guarantee of business loans. A guarantee is a promise by the director to repay a loan owed by the business if the business defaults. As the business may never default, the repayment date cannot be specified in advance.

2.11 Two law firms, Boodle Hatfield LLP and Constantine Cannon LLP, anticipated that appropriate reform of the law might lead to a significant expansion of business loans secured on goods. They pointed in particular to the potential for loans secured on artwork. For example, a business may be able to access cheaper borrowing if the director's personal guarantee could be secured on a valuable painting.

HIGH COURT REGISTRATION

2.12 Victorian legislation introduced a registration regime to allow third parties to find out about existing bills of sale over goods. High Court registration fails to fulfil this function for logbook loans. The CCTA said:

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

Logbook loans

2.13 The legislation requires the signed bill of sale to be sent to the High Court together with a copy, a £25 fee and a sworn affidavit from the witness.[1] In practice, following a face-to-face meeting, the witness (who is usually an agent or employee of the lender) will visit a solicitor to swear an affidavit. Logbook lenders then post the documents by special delivery to the High Court.

2.14 Registration must take place within seven days. This is particularly a problem over Christmas, when the post is delayed and the High Court registry is closed. If the deadline is missed, the lender must apply for registration out-of-time, paying an additional fee of £50. The paper-based system is also susceptible to error, for example when documents are returned to the wrong lender.

2.15 It is possible to search the High Court register using the borrower's name and postcode at a cost of £45.[2] Searches are difficult to conduct and extremely rare. The High Court register therefore no longer fulfils its original purpose of putting third parties on notice.

2.16 The High Court registration regime is expensive, costing between £35 and £51 to register each bill of sale. We estimate that the unnecessary costs of High Court registration to the logbook loan industry are around £2 million each year.

Asset finance registries

2.17 To put third parties on notice, logbook lenders also register with asset finance registries. These are commercially-run electronic registers that record information about vehicles from many sources (including hire purchase and stolen vehicle records). Registration is generally free and can be done online. There are three main providers: HPI, Experian and Cheshire Datasystems Limited (CDL).

2.18 Asset finance registries can be searched relatively easily, by entering the vehicle's registration number. Motor traders usually conduct a "vehicle provenance check", which provides considerable data about the vehicle, including information about a logbook loan. Logbook lenders also conduct a vehicle provenance check before agreeing a logbook loan, generally paying between £1.70 and £3 each time.

2.19 Consumers may also carry out vehicle provenance checks, but they pay more. For a consumer, a vehicle provenance check costs £12.99 from CDL and £19.99 from HPI and Experian. In practice, it is unusual for consumers to carry out these checks: HPI told us that out of seven million used vehicle transactions each year, only half a million vehicle provenance checks are conducted by consumers. Many consumers are also confused by the presence of cheaper "text checks" which do not provide information about logbook loans.

[1] An affidavit is a written statement of fact that is sworn before a person authorised to administer affidavits, such as a solicitor.

[2] 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.

General assignments of book debts by unincorporated businesses

2.20 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 is an asset with a value that can be realised by selling it to an invoice financier. Where a business agrees to sell and the invoice financier agrees to purchase all present and future book debts, that is referred to as a "general assignment".

2.21 General assignments of book debts by unincorporated businesses must be registered with the High Court as if they were bills of sale, under the regime set out in the 1878 Act. If they are not registered, they are void on the unincorporated business's bankruptcy.

2.22 The registration regime under the 1878 Act is even more cumbersome than that for logbook loans. It normally requires three sets of solicitors: one to prepare the paperwork for the invoice financier; a second to advise the unincorporated business; and a third to administer an affidavit from the unincorporated business's solicitor. It can cost between £480 and £1,735.

2.23 Even when carried out promptly, registration takes three to five working days. For unincorporated businesses, a delay in funding, even by a matter of days, may have serious consequences.

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

LACK OF BORROWER PROTECTION AGAINST REPOSSESSION

2.25 The Bills of Sale Acts do little to protect borrowers from having their goods repossessed on default. Under the 1882 Act, the lender is permitted to repossess the goods for one of four specified reasons, one of which is that the borrower has defaulted.

2.26 After repossessing the goods, the 1882 Act requires lenders to wait five days before selling them. During this period, the borrower may apply to court for an order restraining sale.

2.27 Important protections which apply to hire purchase agreements do not apply to bills of sale. For hire purchase:

(1) once the hirer has paid one third of the hire purchase price, the lender may not repossess the goods without a court order; and

(2) the hirer can return the goods to the lender at any time, paying one half of the hire purchase price and any arrears. This is known as "voluntary termination".

2.28 Logbook lenders that are members of the CCTA have agreed to allow borrowers to hand over the vehicle and walk away from the logbook loan, but this is not a legal right.

Logbook loans

2.29 Logbook lenders are not just subject to the Bills of Sale Acts. They must also be authorised and supervised by the FCA, and comply with consumer credit legislation.

2.30 The FCA's rulebook on consumer credit requires 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. Lenders are required to have robust policies to deal with default, particularly where borrowers are vulnerable.

2.31 The logbook lenders we spoke to emphasised that they would prefer to agree alternative repayment plans and treat repossession as a measure of last resort. It appears, however, that lenders differ in their approach to repossession. While some logbook lenders repossess and sell vehicles in less than 3% of cases, others may do this in up to 10% of cases.

2.32 There are complaints that some logbook lenders use the threat of repossession to demand unreasonable and unaffordable repayments. FCA research found that:

> 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.

2.33 In other cases, logbook lenders 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.

2.34 Consumer credit legislation provides consumers with only limited ways to dispute the repossession, and argue that they should be given more time to pay. The time order procedure is so expensive and cumbersome that it is hardly used. The Financial Ombudsman Service may provide redress after the event, but it is not able to prevent repossessions from taking place.

2.35 Logbook loans are mostly used by consumers, but self-employed people also borrow money in this way. Our survey of bills of sale registered at the High Court in 2014 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.

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

PRIVATE PURCHASERS

2.37 Bills of sale law offers no protection to those who buy goods subject to bills of sale. This is mainly a problem in the logbook loan industry. Even where the purchaser bought the vehicle for private purposes in good faith and without notice of the logbook loan, they do not acquire ownership of the vehicle. The logbook lender can repossess the vehicle from the purchaser at will.

2.38 In that event, 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. 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.

2.39 This contrasts with the position for hire purchase. If a vehicle subject to a hire purchase agreement is sold, the law protects private purchasers (who are not acting as trade or finance purchasers) who act in good faith and without notice of the hire purchase agreement. Such purchasers become the owner of the vehicle and the hire purchase lender loses all rights to it.

The scale of the problem

2.40 Logbook lenders described this a relatively small issue, One 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.

2.41 On the other hand, research by Citizens Advice shows that the issue continue to cause public disquiet. In an analysis of 238 logbook loan cases brought to them in 2014 and 2015, 121 involved a third party purchaser.[3] Some purchasers suffer serious hardship. The issue also generates bad publicity for logbook lenders, bringing the industry into disrepute.

[3] Citizens Advice evidence on bills of sale consumer lending, January 2016 Update. The 238 cases revealed 339 issues, of which 121 (36%) concerned third party purchasers.

3. A NEW GOODS MORTGAGES ACT

3.1 Over the years, there have been many calls for bills of sale to be abolished. When the Department for Business, Innovation and Skills consulted on the matter in 2009, its initial proposal was to abolish the use of bills of sale for consumer lending.

3.2 In our consultation paper, we said that we were not persuaded that the case for abolition had been made out. Most consultees agreed. 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.

3.3 We think that, if properly regulated, it should be open to borrowers to use existing goods as security while retaining possession of them. However, new legislation is necessary to provide this regulation.

3.4 Here we outline how the new legislation would apply. We set out our recommendations to simplify the documentation and modernise registration. We consider protection for borrowers in Part 4 and protection for private purchasers in Part 5.

A NEW LEGISLATIVE FRAMEWORK

Repeal of the Bills of Sale Acts

3.5 Many consultees referred to the need to repeal the current law. Gregory Hill, a barrister, said "the existing legislation is bad beyond the possibility of tinkering". Guy Skipwith, a consumer adviser, wrote "because the Bills of Sale Acts are clearly not fit for purpose, they should be repealed and replaced with new legislation".

3.6 We recommend that the Bills of Sale Acts should be repealed and replaced with new legislation regulating how individuals may use goods they already own as security while retaining possession of them.

New terminology

3.7 The terminology in the Bills of Sale Acts is antiquated, using terms such as "bill of sale", "security bill" and "personal chattels". As Citizens Advice put it, "these terms are archaic and need to be replaced with more easily understood terms".

3.8 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.

3.9 We discussed other possible terms, but noted that they all had drawbacks.

3.10 We think that "mortgage" is the clearest word available to convey the concept of security for a loan. We recommend that the new legislation should use the terms "goods mortgage" and "vehicle mortgage".

The scope of the new legislation

3.11 The new Goods Mortgages Act would apply where an individual uses goods they already own as security for a loan or other monetary obligation, while they retain possession of those goods.

3.12 The definition of "goods mortgage" is in five parts:

(1) *An individual*: this includes both consumers and unincorporated businesses (such as sole traders and partnerships). The Goods Mortgages Act would not apply to companies or limited liability partnerships, which may grant company charges.

(2) *Goods*: the Goods Mortgages Act would not apply to security over land or over intangibles such as shares. Using shares as security is relatively easy, and not subject to the Bills of Sale Acts.

(3) *Already owns*: this would differentiate a goods mortgage from hire purchase and conditional sale agreements, which are used to buy new goods on credit.

(4) *Security for a loan or other monetary obligation*: following consultation, we think it should not be possible to use a goods mortgage to secure a non-monetary obligation, such as an obligation to provide services.

(5) *Retaining possession*: this distinguishes goods mortgages from pawnbroking, when the lender takes possession of the goods.

3.13 The legislation would exclude ships, aircraft and agricultural charges, which are all subject to their own regimes.

Absolute bills of sale

3.14 The 1878 Act requires the registration of "absolute bills". These are bills of sale granted for purposes other than borrowing money, such as where a person gives or sells goods but retains possession of them. In our visits to the High Court registry, we found no examples of absolute bills being registered.

3.15 We argued in the consultation paper that absolute bills should no longer be registered. Instead, they should be deregulated entirely. The majority of consultees who responded on this point agreed. We recommend that the Goods Mortgages Act should not cover absolute bills.

Adopting the concept of a "regulated credit agreement"

3.16 Our intention is to tie the Goods Mortgages Act to the consumer credit regime. 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.

3.17 The borrower protection measures we recommend would apply to any goods mortgages used to secure a regulated credit agreement.

SIMPLIFYING THE DOCUMENT REQUIREMENTS

3.18 A goods mortgage is an important transaction that should be treated with some formality. We think it should be set out in a written document signed by the borrower in the presence of a witness.

3.19 We do not intend to replicate anything as complicated as the standard form under the 1882 Act. Consumer credit legislation already requires that borrowers with regulated credit agreements are given a prescribed document setting out the loan amount, annual percentage rate and other details. The goods mortgage document should sit alongside this document and not replicate its contents.

The borrower's signature in the presence of a witness

3.20 The requirement that borrowers should sign in the presence of a witness guards against the most serious excesses, such as where the borrower may be tempted to take out a loan online late at night or while drunk. For most logbook loans we envisage that the borrower would sign in a face-to-face meeting.

3.21 Consultees asked if e-signatures would be permitted. We do not wish to be overly prescriptive and specify what type of signature is required. It is likely that most borrowers of logbook loans would still use a "wet-ink" signature but e-signatures may be suitable for loans for business purposes. The only requirement is that the borrower must sign in the presence of a witness.

Simplifying the goods mortgage document

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

3.23 In particular, we do not think that it should be necessary for the goods mortgage document to state a fixed loan amount or repayment instalments. This would allow goods mortgages to be used to secure revolving credit facilities, overdrafts and guarantees.

Warnings to borrowers with regulated credit agreements

3.24 Most goods mortgages will be vehicle mortgages used to secure a regulated credit agreement. In these circumstances we provisionally 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**

3.25 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 borrower 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.

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

3.27 Our formulations for the prominent statements are for guidance only. Before settling on final formulations, we recommend that there should be research into what words to use and whether graphics would be helpful. Following this research, we think that the Financial Conduct Authority should have the power to prescribe the wording of the prominent statements in both the vehicle mortgage document and in advertising.

3.28 We recommend that adapted versions of the prominent statements should be used where other goods are used to secure a regulated credit agreement.

Sanction for failure to comply

3.29 We recommend that if the goods mortgage fails to comply with statutory requirements, the lender should lose any right to the secured goods, both against the borrower and against third parties. This would be a significant sanction which would ensure compliance.

3.30 The goods mortgage document deals only with the security, not the loan itself. The lender would still be entitled to repayment of the loan.

MODERNISING THE REGISTRATION REGIME

3.31 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, 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.

Vehicle mortgages

Abolishing High Court registration

3.32 There was widespread consensus that High Court registration of logbook loans serves no purpose. As Mobile Money put it, "registration in the High Court provides benefit to neither the lender nor consumer".

3.33 We recommend that there should be no requirement to register vehicle mortgages at the High Court. This will remove a burden on business, saving the logbook loan industry around £2 million a year.

Requiring registration with a designated asset finance registry

3.34 At present, logbook lenders register their logbook loans with asset finance registries. Motor traders and other lenders rely on this information, but the regime is purely voluntary. A lender that fails to give information to an asset finance registry is still entitled to seize the vehicle, even though the third party had no way of finding out about the logbook loan.

3.35 We recommend that a lender should not be entitled to seize a vehicle from a motor trader or other lender unless it has registered the vehicle mortgage with a designated asset finance registry. There would be no time limit for registering, but any third party who acquired an interest in the vehicle before the mortgage had been registered would take free of the mortgage.

3.36 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 recommend that HMT should designate asset finance registries as suitable to register vehicle mortgages. There should be four main criteria for designation: adequate data-sharing; a suitable cost structure; robust technology (coupled with indemnities); and a complaints system.

3.37 At least in the first instance, this registration regime is designed to meet the needs of motor traders and other lenders. We discuss the position of private purchasers in Part 5.

Mortgages on other goods

3.38 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.

3.39 Goods which are not vehicles rarely have a unique identifier such as a registration number, so it is much more difficult to establish an asset register. At present, the only way in which people can know about a bill of sale on other goods is to search for the borrower's name and postcode in the High Court register. As the High Court register is paper-based rather than electronic, this process is expensive and cumbersome.

An electronic register of security interests?

3.40 Many consultees argued for an electronic register of security interests. Although the current number of loans secured on other goods is small (under 300 each year), consultees thought that this has the potential to increase with reformed legislation and an electronic register. Constantine Cannon LLP wrote:

> the Government should not base its decision to implement an electronic public-facing registry on the current registration figures.

3.41 We 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 this project.

3.42 We recommend that, in the short-term, the High Court register should be retained for mortgages on goods other than vehicles. In the long-term, we see benefits in an electronic register of security interests. We recommend that there should be a regulation-making power to allow for this.

Simplifying the High Court registry

3.43 We think that significant benefits can be implemented quickly with some small changes to the High Court registration regime. Our recommendations to simplify the High Court registry include:

(1) allowing lenders to email documents to the High Court for registration;

(2) removing the requirement for an affidavit; and

(3) abolishing the time limit for registration.

General assignments of book debts

3.44 In the consultation paper, we argued that, in principle, registration of general assignments of book debts serves a useful purpose: it can put third parties on notice.

3.45 All consultees who responded to this question agreed, though several added a proviso that the register must be user-friendly. These included the Asset Based Finance Association, the trade association that represents over 95% by turnover of invoice financiers.

3.46 In the long-term, the solution is to establish an electronic register. In the short-term, we recommend simplifications to the High Court registration regime. Our recommendations include the following:

(1) the business would sign the assignment document in the presence of a witness, but the witness would no longer need to be a solicitor;

(2) an affidavit would no longer be required;

(3) the invoice financier would be able to email documents to the High Court;

(4) the time limit for registration would be abolished; and

(5) re-registration would be required every 10 years, rather than every five years as under the current law.

4. PROTECTING BORROWERS

4.1 Hire purchase legislation gives hirers two key protections: the court order and voluntary termination. We recommend that similar protections should apply where goods mortgages are used to secure regulated credit agreements.

4.2 The court order aims to protect a borrower who can pay but who has encountered temporary financial difficulties and needs additional time. The right of voluntary termination helps those with no realistic prospect of paying off the loan.

COURT ORDER

4.3 In the consultation paper, we proposed that where a goods mortgage secures a "regulated credit agreement" as defined by consumer credit legislation, the lender should be required to obtain a court order before repossession where the borrower has paid at least one third of the total loan amount.

Consultees' views

4.4 Consultees were split on this issue. Consumer groups fully supported a court order. As Citizens Advice put it:

> 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.

4.5 The Retail Motor Industry Federation was also supportive:

> 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.

4.6 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.

4.7 On the other hand, logbook lenders expressed concern about the cost and delay of a court order, especially where borrowers failed to engage with the process. Experience in hire purchase is that only around 20% of hirers turn up on the day of the court hearing.

4.8 One logbook lender, AutoMoney, did not oppose a court order in principle, but suggested an opt-in procedure. This is based on its experience in Wisconsin.

Arguments for and against an opt-in procedure

4.9 In broad outline, an opt-in procedure requires that before repossessing vehicles, lenders should send a notice informing borrowers that they have the right to require the lender to seek a court order. If the borrower responds to this notice indicating that they wish to challenge the repossession, the lender would be required to make an application to the court.

4.10 Consumer groups doubted the effectiveness of an opt-in procedure at protecting borrowers. They thought that many borrowers will fail to opt in and will therefore forgo court protection.

4.11 On balance, we have reached the conclusion that court oversight is beneficial, but only to those who actively engage with the process. For those who fail to respond to notices, a court order provides little protection. Instead it is an expensive rubber-stamping exercise. Court fees are now set to rise to £355, which can add substantially to the shortfall borrowers may be required to pay.

4.12 Much more should be done to encourage borrowers at risk of repossession to seek advice. Where borrowers who have already made significant repayments encounter temporary financial difficulties, lenders should give more time to pay, suspending interest payments where necessary. We think that borrowers in this position should be entitled to have their case heard by a court, to ensure that lenders are not demanding excessive sums or repossessing too readily.

4.13 The success of an opt-in procedure will depend crucially on the details of how it is implemented. We have discussed the procedure with consumer groups in depth, to ensure that it encourages borrowers to engage with the process.

Our recommended opt-in procedure

4.14 We recommend that a borrower who uses a goods mortgage to secure a regulated credit agreement should have a right to require the lender to seek a court order before repossessing the goods, provided that one third of the total loan amount has been repaid.

Sending the opt-in notice

4.15 Borrowers should be given two opportunities to require a court order. The default notice should inform borrowers of the right to opt in to the court order. This gives borrowers the opportunity to take action when the lender first indicates an intention to begin the enforcement process.

4.16 Often, a period of further negotiation follows the issue of the default notice. When the lender is on the cusp of enforcement action, they should send a further standalone formal opt-in notice. The lender would need to prove delivery of the opt-in notice, but would be able to choose its own means of doing this.

Content of the opt-in notice

4.17 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.

4.18 Among other things, we recommend that the opt-in notice should contain:

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

(a) require the lender to seek a court order (with an indication of the likely costs);

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

(c) indicate a desire to seek debt advice, which would place a stay on further proceedings; and

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

4.19 The borrower may indicate a preference for one of these options by any means, including by email or telephone.

Time limits

4.20 As an initial suggestion, we think that borrowers should return the opt-in notice within 14 days. However, a borrower who requests more time to seek debt advice should be entitled to a further 28 day stay to decide how to proceed.

4.21 Consumer groups stressed that time limits 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 in regulations rather than primary legislation, so that they can be adjusted to be realistic in practice. We agree and make a recommendation to this effect.

Sanction for wrongful repossession without a court order

4.22 Under consumer credit legislation, where a hire purchase lender wrongfully repossesses goods without a court order, the hirer has no further obligation to pay any outstanding amount and is entitled to recover all sums they have already paid. This is a serious sanction, designed to prevent wrongful repossession.

4.23 We think a similar principle should apply to goods mortgages: the goods should be returned to the borrower and the borrower should have no liability to repay any outstanding loan amounts. In some cases, damages for distress and inconvenience might also be appropriate.

Who bears the costs of a court order?

4.24 Borrowers with goods mortgages are unlikely to have substantial means. They 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.

4.25 Although borrowers who opt in to a court order and lose will normally be liable for the court fee, we recommend that lenders' legal fees and other ancillary costs should not be passed on to borrowers.

Enforcing the court order

4.26 Having obtained a court order, lenders should be able to enforce it without expending significant additional time or resources. It can be difficult to enforce a court order effectively using county court authorised enforcement agents. We recommend that the legislation makes explicit that the lender can use its own employees or debt collectors to enforce court orders.

No repossession from private property without a court order

4.27 For hire purchase agreements, the one third rule applies only where goods are repossessed from public places. If lenders wish to repossess goods from private premises, they must always obtain a court order. We think that the same rule should apply to goods mortgages.

A mandatory opt-in procedure

4.28 The legislation should provide that where the opt-in procedure applies, it is mandatory. Any term of the agreement that deprives the borrower of the right to require a court order should be void.

VOLUNTARY TERMINATION

4.29 The requirement for a court order protects borrowers who could pay off the loan with additional time. It does little to help those with no realistic prospect of repaying the loan and may simply end up increasing the expense the borrower must bear. These borrowers should have the right of voluntary termination to release themselves from a loan they can no longer afford by surrendering the goods to the lender.

4.30 We proposed that borrowers should have a clear legal right of voluntary termination where they have used a goods mortgage to secure a regulated credit agreement. Logbook lenders who are members of the Consumer Credit Trade Association (CCTA) already provide this on a voluntary basis.

4.31 Our proposal was modelled on the CCTA code of practice for logbook lenders (CCTA Code), which provides a more generous right of voluntary termination than that in hire purchase law. Hirers only have a right to voluntarily terminate if they have paid half the total hire purchase price. By contrast, the CCTA Code allows borrowers to voluntarily terminate immediately, without paying a set proportion of the total loan amount.

4.32 In supporting the proposal that borrowers should have a right of voluntary termination, StepChange emphasised the importance of giving borrowers control:

> 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.

4.33 In a hire purchase context, voluntary termination is controversial because new vehicles depreciate so rapidly. However, it was uncontroversial among logbook lenders, where older vehicles are much less likely to depreciate so quickly and significantly. As the Campaign for Fair Finance put it:

I cannot see an issue with this as it would only really affect non CCTA members.

Our recommendation

4.34 We recommend that where a goods mortgage secures a regulated credit agreement, borrowers should have a right of voluntary termination.

4.35 As with the CCTA Code, the borrower should be entitled to hand the vehicle or other goods to the lender, in full and final settlement of all outstanding amounts. This right should apply from the start of the credit agreement. It should be available until the lender has issued court proceedings or (if court proceedings are not needed) instructed repossession agents or used its own employees to repossess the vehicle or other goods.

4.36 The right to voluntarily terminate should not depend on the condition of the vehicle or other goods. Instead it should apply unless the vehicle or other goods have sustained intentional damage or the borrower has failed to take reasonable care of them to an extent that adversely and significantly affects the resale value.

5. PROTECTING PRIVATE PURCHASERS

5.1 In the consultation paper, we proposed that a private purchaser who acts in good faith and without actual notice of the goods mortgage should acquire ownership of the goods. A "private purchaser" would be defined as someone who is not a trade or finance purchaser.

5.2 This is similar to the protection provided under hire purchase law. However, the hire purchase protection is confined to vehicles. We proposed that the protection would apply to all goods mortgages.

Consultees' views

5.3 A majority of consultees that responded on this issue agreed with our proposal. This included two logbook lenders: Mobile Money and DTW Associates Limited. Mobile Money wrote:

> We recognise the impact acting under the current legislation can bring about on innocent third parties. Such powers are inappropriate in a modern marketplace.

5.4 AutoMoney agreed that private purchasers who act in good faith and without actual notice 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"?

5.5 Others argued that registration should be used as a way 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, a barrister, argued that registration with a designated asset finance registry should be deemed to put third parties on notice.

Our views

5.6 We remain persuaded that private purchasers who act in good faith and without actual notice of the goods mortgage should acquire ownership of the goods. The protection should apply to all goods where the purchaser pays money or makes some other form of payment, such as exchange.

5.7 We appreciate logbook lenders' concerns that unscrupulous borrowers should not be allowed to fraudulently sell vehicles to avoid repayment or repossession. We therefore recommend that the new legislation should provide that failing to disclose a logbook loan when selling a vehicle could constitute fraud. We also think that there should be a prominent statement to warn the borrower of the consequences. An example formulation could be:

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

Problems with vehicle provenance checks

5.8 At present, we do not think that it is realistic to expect all private purchasers to carry out vehicle provenance checks for four reasons:

(1) Consumers are not aware of the need to check.

(2) Even where consumers are aware of the need to check, they are confused by cheap "text checks" which do not reveal logbook loans.

(3) The cost is too high. Whereas those in the motor trade may pay less than £3 for a vehicle provenance check, consumers must pay between £12.99 and £19.99.

(4) Consumers confuse bills of sale with hire purchase, where private purchasers are already protected.

A possible long-term solution?

5.9 In the long-term, we believe that these problems could be overcome. Logbook lenders and asset finance registries would need to act together to make vehicle provenance checks cheaper, advertise the need to conduct them and prevent confusing alternatives. Around half of the consultees that responded on this point agreed with us.

5.10 We recommend that the legislation should include a regulation-making power so that if this situation were achieved, the legislation could be amended. Private purchasers who then failed to carry out a vehicle provenance check would no longer be protected.

The Financial Conduct Authority (FCA) and the Financial Ombudsman Service (FOS)

5.11 There is currently some confusion about whether the FCA has jurisdiction to supervise the way that lenders treat private purchasers; and how far private purchasers have the right to complain to FOS about unfair treatment. We recommend that the remit of both the FCA and FOS should be extended to cover lenders' unfair treatment of private purchasers.