



Personal Property Securities Act

Detailed Analysis of the Law

Prepared Under the Direction of

Reserve Bank of Fiji

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Introduction

The Memorandum contains a detailed section-by-section analysis of the Fiji Personal Property Securities Act 2017 (PPSA). It is intended to provide background information on the reform to assist the public in understanding how the PPSA works from both a legal and a practical perspective. The reform has been overseen by the Reserve Bank of Fiji, with assistance from the Private Sector Development Initiative, Asian Development Bank.

This Memorandum is not to be interpreted as providing legal advice. This Memorandum has been prepared solely for general informational purposes, and no person should rely on the information contained herein when making decision on how to use the PPSA or even whether the PPSA applies to a given situation. No one should proceed with any transaction that might be covered by the PPSA without the advice of local counsel. Further, given that this PPSA is new, no Fiji court has interpreted the law. The Fiji PPSA is based upon provisions and principals from other jurisdictions that already have a PPSA in place, most notably New Zealand. Practitioners should certainly look to interpretations from other jurisdictions for guidance, but it is just that: guidance, and not binding precedent in Fiji.

The following is the section-by-section analysis of the PPSA, with commentary on practical considerations where appropriate.

PART I. – PRELIMINARY

1. Short title and commencement. Note that the commencement is delayed until the Minister publishes a notice in the Gazette. The intent is to make certain that the Act, the regulations and the registry all commence on the same day.

2. Interpretation. Key terms are defined where a special understanding of a term is necessary. The definitions are crucial as any priority analysis of an issue under the PPSA begins with determining what sort of property is serving as collateral as different rules can apply based upon the collateral's classification. Thus, the definitional section is long and detailed.

Example: consider how a motor vehicle could be classified depending upon its real-world status:

- A car sitting on a car dealer's lot is "inventory."
- A car used by a construction company is "equipment."
- A car that has been shipped to Fiji and is still sitting in a warehouse awaiting customs clearance may be subject to a "document of title."
- A car that has been purchased for family use is just a car.

Take note of the definition of "debtor." It reads:

"Debtor" means –

- (a) a person who owes payment or performance of an obligation secured, whether or not

that person owns or has rights in the collateral; or

- (b) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor; or
- (c) a seller of accounts receivable, chattel paper, intangibles, or promissory notes; or
- (d) a consignee under a commercial consignment; or
- (e) a lessee under a lease for a term of more than one year.

3. Meaning of “possession” in certain cases. There are instances where a secured party may obtain priority in certain collateral by exercising “possession” of the collateral. In this section rules around how a secured party may take possession of investment property (stocks and bonds) is explained. If a lender is taking a charge over shares, to obtain the highest level of protection the lender should not only file in the registry but also take possession of the shares within the meaning of this section.

4. Meaning of “knowledge.” The results of several priority rules depend on whether or not buyers and others have “knowledge” of certain facts. The PPSA states how one may determine whether individuals, partnerships, and companies have “knowledge” of a fact or an event.

5. Description of collateral in a security agreement or notice. Security agreements (i.e., the loan documents) and registered notices must describe the collateral. The PPSA provides that collateral descriptions may be general or specific. This means that a description which merely states that “all of the debtor’s movable property now owned or hereafter acquired” should be valid without the need to detail every individual piece of movable property. This is consistent with the same sort of general language found in mortgage debentures under pre-existing law. This section also introduces three specific rules for filing in the registry based upon collateral type.

- i. If a specific motor vehicle is charged, its VIN must be included in the PPSA registry.
- ii. If movable property that is to be attached to land is included, or consists of timber or collateral extracted from land, then the notice may contain a description of the land on which it is located. Note that this provision should be cross-referenced with Section 71, which states that to achieve the highest priority protection where collateral is timber or minerals to be extracted, then the notice filed in the registry must contain a reasonable description of the pertinent land.
- iii. If collateral includes consumer goods, a specific description is required, such as a serial number for a refrigerator used when financing the sale of that refrigerator. The effect here is to disallow blanket charges over all of a household’s domestic

property.

6. Classification of goods. Some goods can be classified differently depending on the circumstances. For example, motor vehicles can be consumer goods when used by a family, equipment when used in a construction business, and inventory when held for sale at a car dealership. Priority rules vary, depending on the classification-in-time of the goods. The PPSA states that the classification of goods is determined at the time the security interest attaches to the collateral.

7. Proceeds traceable. Secured parties gain priority in both collateral and the proceeds (money or exchanged property) of the sale of collateral. Therefore, proceeds of collateral must be traceable by secured parties. There is conflict in some common law jurisdictions regarding whether proceeds are traceable when they are held by someone in trust for another. The Fiji PPSA makes clear that whether or not a trust (fiduciary) relationship exists between the debtor and the person holding the proceeds does not prevent the proceeds from being considered traceable.

PART II. – APPLICATION OF THE ACT

8. Transactions subject to this Act. The Act will apply to all transactions that have traditionally been used to create what in reality amounts to a charge over personal property. These transactions include company charges and bills of sale, and also such things as pledge, conditional sales, etc. Note that the terminology of what the transaction is called or the title on the loan documents used no longer matters: if movable property is used to secure payment or performance, this Act applies.

Sellers of goods sometimes retain ownership of the goods until they are paid for under the belief that the retention of ownership prevents this arrangement from being considered a use of property as collateral. This is a legal fiction in that in substance it is the same as a loan secured by collateral given: (1) a debt is owed, (2) the debtor is in control of the property, and (3) the “owner” (the creditor) has the right to reclaim the property upon default. A transaction that, in substance, provides for security in personal property is subject to the PPSA no matter the technicalities of the legal form.

The Act also applies to the lien obtained by an “execution creditor,” defined as “a person who causes or may cause personal property or fixtures to be seized under legal process to enforce a judgment or legal obligation....” This includes judgment holders, bankruptcy trustees and taxing authorities.

Subsection (4) sets out a special rule around sugar. The sugar industry is a regulated market and the PPSA acknowledges this fact via the following language:

For the avoidance of doubt, nothing in this Act affects the repayment of advances and other payments of whatsoever nature made to the cane growers or on the cane growers’ behalf by the Fiji Sugar Corporation Limited pursuant to the Master Award established under the Sugar Industry Act 1984.

9. Transactions not subject to this Act. There are a few categories of transactions and/or collateral that this law will not apply to based upon policy considerations. These include:

- i. Transactions where land is used as collateral,
 - a. but the PPSA does apply to an interest in fixtures (goods attached to land), timber to be cut, minerals or petroleum;
- ii. Loans secured by a pledge of wages, salary or superannuation fund benefits;
- iii. A sale of accounts receivable as part of the sale of a business.

10. Act binds the State. The Act “binds the State.”

PART III. – SECURITY AGREEMENTS, ATTACHMENT OF SECURITY INTERESTS, AND SECURED OBLIGATIONS

11. Effectiveness of security agreement. The PPSA makes clear that a security agreement is effective amongst the parties, which only makes sense as it is a contract. It is also effective against 3rd parties unless otherwise provided in the law.

The PPSA contains a special rule for consumer (household) goods. A security interest may not be taken in the consumer goods of a debtor except when the loan is financing the purchase of a specific household item. For example, if a white goods dealer sells a fridge to a family, the seller can take a charge over the fridge, but they can’t also take a charge over the family stove. This is a consumer protection concept that prevents lenders from taking a blanket charge over all household assets. It is bad public policy to allow household items like stoves and refrigerators to stand good for business debts, and the PPSA does not promote this.

12. Attachment of security interest to collateral and proceeds. A security interest is enforceable when it “attaches” to the collateral. Attachment occurs: i) when the secured party gives something of value to the debtor; ii) the debtor owns or acquires rights in the collateral; or iii) the debtor has signed a security agreement or transferred possession or control of the collateral to the secured party. Attachment of the secured party’s rights to the collateral allows the lender to enforce the obligation against the debtor, including seizing the collateral upon default. The concept of “perfection” gives priority to the secured party’s claim against 3rd parties and is discussed in a later section.

13. Attachment of obligation to after-acquired property. A security agreement may provide that it is to apply to all property then owned by the debtor and any future property acquired by the debtor.

Example

Lender A and Borrower have entered into a security agreement, which provides that Lender A has a security interest in all of Borrower’s present and after-acquired property.

After the security agreement has been entered into, Borrower purchases a computer for the office.

Lender A’s security interest in Borrower’s computer attaches when Borrower buys the computer.

The concept of “after-acquired property” also applies to proceeds from the sale or exchange of collateral.

Note that mere attachment of a secured party’s rights in collateral is enforceable against the debtor, but may not be enough to give the secured party priority over third party claims in the collateral. To obtain priority, the secured party must also achieve “perfection” of its interest, discussed later in the PPSA.

Example

Lender advances \$5,000 to Borrower in return for a security interest in Borrower’s boat and Borrower has signed a written security agreement in respect of that boat. The agreement is enforceable against Borrower, but Lender A may not have priority over third parties given that there has been no registration in the PPSA online registry (a step required for perfection).

Note that in keeping with the special treatment of consumer goods under the PPSA, no consumer good can be subject to an “after-acquired property” clause unless the debtor specifically agrees in writing.

14. Future advances in security agreement. A security agreement may call for the extension of future advances. The priority of such advances relates back in time to the original date that the security agreement was entered. So, if a filing was made to perfect the original agreement, a new filing is not needed every time an advance is made.

PART IV. – RIGHTS AND DUTIES OF THE DEBTOR AND THE SECURED PARTY

15. Secured party’s duty to preserve collateral. Debtors usually have possession of collateral in modern commercial circumstances, but there are times when the secured party takes possession of collateral, including after a default by the debtor. When the secured party has possession, the secured party must take reasonable care of the property, but may charge the expenses to the debt owed. The secured party may also keep any profits related to the collateral that arise during its possession by the secured party, though the parties may agree otherwise.

16. Investment property in control of secured party. This section sets out special rules for when the secured party is in possession of “investment property,” defined as things like stocks and futures contracts. Sometimes such property is held by third parties, such as a clearinghouse for stocks in publicly-traded companies where there is no actual certificate, and rules must be set out for how a secured party acts against such collateral.

17. Duties of secured party in control of deposit account. Sometimes a secured party will require the debtor to establish a deposit account with a bank naming the secured party as the person with control of the account, and then have all payments made to that debtor paid into that account. This is a way for the secured party to make sure it is paid back first before the debtor takes money from the account. Section 17 of the PPSA provides that when a secured debt is

paid, the secured party with control of the account must release it back to the debtor.

18. Duties of secured party if account debtor has been notified of assignment of payments. A secured party may instruct people that owe the debtor money, “account debtors,” to pay the secured party directly. When the debt has been paid, the secured party must notify these account debtors to stop paying the secured party and instead send future payments to the debtor.

19. Debtor’s request for accounting. The debtor is entitled, from time to time, to request the secured party to provide a statement of the current status of the loan, including the payoff amount, a then-current list of collateral, and other details about the status of the secured obligation. The secured party has 14 days to respond. A debtor may make such a request once every 6 months free of charge, though of course the secured party is never obligated to charge for this service.

20. Acceleration of payment or performance. A secured party may accelerate payment of a debt if the debtor is in default. This Section 20 goes one step further and allows acceleration based upon a commercially reasonable determination that the collateral is “at risk” or the loan is otherwise insecure. If challenged, the burden of proving that the loan is at risk is upon the secured party.

Example

A lender conducts a site inspection of its borrower’s job site and discovers that all the equipment pledged to stand good for a loan has disappeared.

Example

A company may be current on its debt payment obligations but then enters into receivership as other creditors are not being paid.

In cases such as these a secured party may have grounds to accelerate the debt to protect its interests.

PART V. – PERFECTION OF SECURITY INTERESTS

21. Perfection of security interest. Security interests can be “perfected.” A perfected security interest is a security interest that has maximum priority and enforceability against third parties, such as buyers of collateral and other creditors.

22. Perfection by registration of notice. A security interest is perfected when it has attached to collateral and a method of perfection has been completed. By far the most common method of achieving perfection is by filing a Notice in the PPSA registry that describes the collateral in the registry. This method is valid for all forms of collateral, though in rare cases some types of collateral have special rules where possession/control can trump registration. It is thus very important that any analysis of a priority position begins with determining the type of collateral that is being used. For example, under Section 50 a secured party that has registered a

notice indicating a charge over a shareholder's shares in a company can lose its priority if it does not take possession of the certificates themselves. In this limited case, possession trumps filing.

23. Perfection by taking possession of collateral. A second means of achieving perfection is through possession of the collateral. This means of perfection almost never applies to tangible goods like equipment or inventory, but can be important when dealing with instruments or documents of title.

Example

Lender A's security interest in Borrower's conditional sale agreement ("chattel paper" under the Act) has attached. Lender A takes physical possession of agreement.

Lender A's security interest is perfected.

In this example, if a later lender registered an interest in all of the Borrower's movable assets, Lender A would have priority over this hire-purchase agreement as it has possession.

24. Perfection by control of deposit accounts and investment property. A lender may perfect an interest in a deposit account and investment property by taking control over them. This allows a secondary lender to perfect an interest in a deposit account held with a bank so long as proper instructions are made to the bank concerning the account. This gives secondary lenders a better standing from which to finance retail sales operations as the secondary lender can control the deposit account into which daily sales proceeds are deposited. It also allows a lender to perfect an interest in publicly traded securities held by a brokerage house.

25. Continuity of perfection. A security interest may be perfected simultaneously by more than one method, and is continuously perfected so long as one method applies without a gap during which no method applies. If the secured party assigns its interest to a new secured party, that new secured party obtains the same perfection as had the old secured party. This is important if one lender acquires another.

26. Temporary perfection. Sometimes a gap in perfection is permitted for a short period to accommodate practical needs. For example, a secured party that has possession of a warehouse receipt covering goods may release it to a debtor for a short period, enabling the debtor to remove goods from the warehouse. A security interest in the warehouse receipt that is perfected by possession remains perfected while the debtor uses it for up to 7 days, after which time other provision of the Act concerning priority would apply. However, Section 43 also pertains to this situation, and it provides that a legitimate buyer acting on the collateral during this 7-day window takes the collateral free of a temporarily perfected security interest. Therefore, secured parties holding a document of title should be cautious in delivering it to their debtor. They should also make a filing into the registry that covers the goods.

27. Perfection of security interest in goods held by a bailee. A "bailee" is a person or party to whom goods are delivered for a purpose, such as custody or repair, without transfer of

ownership. It is possible to perfect an interest in goods in this case both by registering a notice covering the goods and/or by taking possession of the document of title issued by the bailee.

Example

Lender has a security interest in Borrower's fruit, which is held in cool storage on behalf of Borrower. Lender's interest has attached and becomes perfected when Lender has registered a financing statement in respect of the fruit.

However, note that under subsection (3), perfection of an interest in the document of title covering the goods takes priority over another security interest in the goods that is perfected *after* the goods are covered by a document of title. The two lessons here are: i) lenders should perfect against the document of title when goods are held by a bailee, and the best way to do this is to take possession of the document of title; and ii) if considering making a loan secured by collateral already held by a bailee, if the debtor cannot produce a document of title, the lender should be very wary as a prior lender may have possession of it and be perfected without registration.

28. Perfection of security interests in proceeds. A security interest in collateral extends to proceeds (property received in exchange for collateral). If the security interest is perfected, the security interest in proceeds is also perfected.

Example

Lender has a security interest in Borrower's car. Borrower sells the car without Lender's consent. Lender has a security interest in the car and in the money received by Borrower's from the sale of the car.

In the above example, the secured party could also seek to seize the car if the debt is not paid as the car was purchased subject to its interest.

29. Perfection of security interest in goods returned or repossessed. Security interests in goods are extinguished when the goods are purchased by "buyers in the ordinary course of business," such as when inventory is bought by regular customers. Sometimes the goods are then returned to the seller or lessor, who is still the debtor. The PPSA provides that the returned goods are returned to the status of collateral and a security interest in them re-attaches. A series of rules balances the interests of parties if intervening security interests in the goods arise.

PART VI. – PRIORITY OF SECURITY INTERESTS AND RIGHTS OF THIRD PARTIES

Secured parties may find that people other than the debtor acquire conflicting rights in collateral. For example, a debtor may give a conflicting security interest to another lender, or may sell the collateral to a buyer. The debtor may also find that a judgment holder, tax authority, bankruptcy trustee or company liquidator may take control of collateral without the debtor's consent. Problems may also arise in special circumstances, such as where collateral is commingled with, or attached to, other property. Part VI of the PPSA sorts out conflicts between secured parties and third parties, and contains provisions governing the commingling of goods

and the attachment of goods to other property.

Division 1 – General Priority Rules

30. General priority rules. The main priority rule is that the first security interest for which a notice is registered (or the first to be otherwise perfected under specific rules) has priority over other security interests. Unperfected security interests have priority by order of attachment.

Example

Lender 1 registers a Notice in respect of Borrower's present and after-acquired property. Later, Lender 2 registers a Notice in respect of the same collateral.

Lender 1's perfected security interest has priority over Lender 2's perfected security interest in the same collateral.

Subsection (2) makes clear that a security interest perfected in one way is treated as being continuously perfected if later another way is used with no gap in perfection.

Example

Lender 1 takes possession of a document of title issued by a bailee that holds goods on behalf of a borrower and is thus perfected. Later, Lender 2 registers a Notice in respect of the goods.

Lender 1 then allows Borrower to have the document of title so as to take the goods from the bailee and simultaneously files a registration Notice covering the goods.

Lender 1's perfected security interest has priority over Lender 2's perfected security interest in the same collateral. Lender 2 could have demanded to see the document of title before extending its loan, therefore it is fair to penalize it for lack of proper due diligence.

31. Time of priority of security interests in proceeds. The priority date for proceeds relates back to the date of registration of the notice that perfects the security interest in the original collateral.

32. Priority of an execution creditor. An execution creditor (judgment holder, tax authority, bankruptcy trustee or company liquidator) is treated as any other secured party: it has priority over a different security interest if the execution creditor's interest is registered by notice in the registry before the other security interest is perfected.

33. Priority in future advances. The priority date as to collateral that secures future advances dates back to the date of registration of the notice that perfects the security interest. This means that a lender need not make a new filing (or amendment to the original filing) each time it extends a new advance. However, Subsection (3) contains one exception to this rule. If an execution creditor has filed an intervening notice then the execution creditor gains priority over any future advances made from that date forward. So, lenders should always do a search of the online registry before extending new money under a future advance clause.

34. Agreement to subordinate priority. Secured parties may agree to rearrange or subordinate their priority rights in collateral, and the agreement is enforceable by and against all affected parties. A subordination agreement does not create a new security interest, so there is no need to register an additional notice mentioning this side arrangement.

Division 2 – Priority of Purchase-Money Security Interests

A “purchase-money security interest” (PMSI) is a security interest given by a debtor to a secured party to secure a loan that is used to purchase specific goods where the goods themselves are the collateral. For example, if a construction company borrows money to purchase a bulldozer and the lender takes a security interest in that one bulldozer, then a PMSI has been created. In general, the PMSI interest will take priority over a prior charge by another lender even if that prior charge was over “all the debtor’s equipment now or hereafter owned.” Why? There are two main justifications for this “super-priority” status. The first is that as new money is being provided to the debtor for new property, any prior lender would not have relied on this new property serving as collateral when it made its loan. Therefore, the old lender is not put at a disadvantage. The second reason is that this rule allows debtors to shop around for lower interest rates when they need new financing for new capital expenditures. Without such a rule, debtors would be at the mercy of their existing lenders. Therefore, this rule promotes the free-flow of commerce at a macro-economic level.

35. Meaning of “possession” in this Division. This section states the rule that where goods are shipped by a common carrier to a debtor, the debtor does not, for purposes of this Act, obtain possession until actually obtaining physical possession of the goods (or a document of title representing the goods). This rule is important as the time of possession is key in interpreting later sections in this Division.

36. Status of purchase-money security interest. A PMSI does not lose its status because the goods also secure another obligation, or because other collateral also secures the PMSI. A PMSI does not lose its status because the loan is renewed or refinanced.

37. General rule on priority of purchase-money security interest. This section states the general rule that perfected PMSIs have priority over other security interests, even if a notice of a competing security interest was filed earlier than the PMSI. For example, suppose Bank has a general security interest over all the assets, present and future, of Construction Company, and has filed a Notice stating this in the PPSA registry. Bank is perfected. Now suppose that Dealer would like to sell a backhoe to Construction Company on credit, taking the backhoe as collateral. If Dealer’s security interest in the backhoe would be junior to Bank’s general security interest, Dealer is unlikely to engage in this transaction and commerce is deterred. Therefore, this deal is a PMSI transaction and dealer may obtain priority over this particular backhoe. Note that the Dealer in this case has 7 days to file its PMSI.

Example

Lender has a perfected security interest in all of Borrower’s present and after-acquired property.

Borrower buys a bulldozer on credit from Seller, and Seller finances the deal. Seller registers a Notice in respect of the bulldozer within 7 days from when Borrower took possession of the bulldozer.

Seller's security interest in the bulldozer has priority over Lender's prior general security interest in all of Borrower's property.

Note that this section states that there are exceptions for certain collateral categories: inventory, livestock and intangibles. These are discussed in the next section.

38. Priority of purchase-money security interest in inventory, livestock and intangibles.

There are special rules for PMSIs for inventory, livestock and intangibles. For inventory and livestock, the PMSI must be filed prior to or at the time the debtor takes possession of the inventory or livestock. The reason why is because inventory and often livestock are frequently bought and sold. If a prior lender was financing inventory and livestock under a non-PMSI transaction it could check the registry to see if a new PMSI notice had been filed before making any new advances. A new PMSI might also affect the prior lender's ability to secure cash proceeds from ongoing sales.

For intangibles, to gain priority a PMSI must be filed within 7 days after the security interest *attaches*. The reason for this rule is that in many cases third parties hold intangibles, therefore the debtor does not actually gain possession.

Example

Lender 1 has a security interest in all of Borrower's present and after-acquired movable property. Lender 2 makes a loan to Borrower for the purchase of a patent (an intangible, evidenced by a registration in a patent office). Lender 2 registers a Notice in respect of the patent 5 days after Lender 2's purchase money security interest attached to the patent.

Lender 2's purchase money security interest in Borrower's patent has priority over Lender 1's general security interest in all of the Borrower's movable property.

39. Conflicts involving purchase-money security interests. A situation can arise in which there are competing PMSIs in the same collateral. For example, a bank may give funds for part of the purchase price for a construction company to purchase a grader, and the equipment dealer may simultaneously self-finance part of the purchase price. In this case there are two PMSIs secured by the same collateral. The PPSA provides that the dealer would have priority over the bank in this situation.

Example

Lender, a bank, loans Borrower the deposit for the purchase of a truck. Borrower pays the deposit to the Seller (a truck dealer) for the purchase of a new truck and the balance of the truck's purchase price is payable to Seller under a hire purchase agreement. Seller registers a financing statement in respect of the new car 5 days after the debtor takes delivery of the car.

Seller's perfected purchase money security interest in the car has priority over Lender's purchase money security interest in the car.

While this may seem like it presents risk for lenders, they can protect themselves by making sure the funds they disburse go directly to the seller/dealer as party of an arrangement whereby the full price is paid or else the seller/dealer subordinates its interest to the lender. In other words, where there are multiple financiers on a single transaction, the financiers can contractually sort out priority.

Subsection (2) provides that if there are two PMSIs from different lenders attached to the same collateral, but neither lender is a seller of the collateral, then the first to file has priority.

Example

Lender 1, a bank, loans money to Borrower for the purchase of a new car. Lender 1 registers a Notice in respect of the car.

Lender 2, another bank, loans money to Borrower for the purchase of the same car. Lender 2 registers a financing Notice in respect of the car after Lender 1 has registered its Notice.

Lender 1's perfected PMSI in the car has priority over Lender 2's PMSI.

Subsection (3) addresses the situation where there are conflicting interests in accounts receivable. Here, a non-proceeds security interest in accounts receivable has priority over a PMSI in the accounts receivable generated as a result of the sale of inventory only if the non-proceeds interest was registered before the PMSI was registered.

40. Priority of purchase-money security interests against execution creditors. In general, perfected PMSIs also have prior over the interests of execution creditors.

Division 3 – Buyers and Other Transferees of Collateral

The general rule is that people take collateral subject to any security interest in the collateral. Otherwise, borrowers could simply sell the collateral to complicit buyers to defeat the charge over the property. This Division sets out exceptions to this general rule.

41. When transferee takes collateral free of a security interest. Subsection (1) states the general rule that a person takes collateral free of a security interest if the person: (i) has no knowledge of the security interest; (ii) has no knowledge that the acquisition violates the secured party's rights; and (iii) the security interest has *not* been perfected. In other words, if a secured party fails to perfect its interest, it is at risk of losing its priority position in the collateral.

Example

Lender has a security interest in person Borrower's car. Borrower sells the car to Buyer, and Buyer acquires the car before Lender registers a Notice in respect of the car.

Buyer takes the car free of Lender's security interest

Subsection (2) sets out the very important "buyer in the ordinary course of business" exception to the general rule. An example will best illustrate this exception. Assume a lender has a security interest in all of the inventory of a hardware store. Obviously, the store is selling inventory each day. Buyers of that inventory, the customers of the store, take their goods free of the security interest as these goods were purchased "in the ordinary course of business." It

would make no sense for a lender's charge over a hammer to follow the hammer to its new home, no retail sales would ever be possible. In this case, the lender's security interest in the inventory automatically converts to a security interest in the proceeds of the sales, in other words, the cash. This allows commerce to flow without any interruption.

Subsection (3) sets out the special rule that in order to have maximum priority in a motor vehicle, the serial number (VIN) must be entered into the registry, otherwise a third party will take the car free of a security interest. For example, suppose a Buyer wants to buy an automobile advertised by Seller in the newspaper. The Buyer should find the serial number of the car and search the registry for that serial number. If the serial number is not found in the registry, the Buyer will be sure that they can purchase the auto without fear that it is subject to a security interest. The registry will have a specific search field for serial numbers making it very easy to determine if a vehicle has a charge over it.

Discussion of "serial number" and "buyer in the ordinary course" rule

Suppose in the example above that Buyer bought the car from a Dealer, rather than from a private Seller in response to the newspaper advertisement. In this case the car would be "inventory" and the Buyer would now be a "buyer in the ordinary course of business," hence there is no need for Buyer to search the registry for the automobile's serial number. This allows commerce to flow freely as buyers are confident they can obtain clear title when purchasing from commercial sellers.

42. Buyer or lessee of consumer goods. A buyer of consumer (household) goods takes the goods free of either a perfected or unperfected security interest if they have no notice of the prior interest. Note that a PMSI is effective to secure an interest in a specific consumer goods purchased with loan proceeds. So, a dealer in household goods may self-finance their sale and have priority in the good sold.

43. Buyer or lessee of goods subject to temporary perfected security interests. Section 26 provides for a rare instance when a secured party is temporarily secured after giving up possession of a document of title to a debtor. This section 43 provides that if a legitimate buyer acted upon the collateral during this 7-day window that a secured party is temporarily perfected, that buyer would take the collateral free of the security interest.

44. Buyer or lessees of minerals, petroleum and timber. A buyer in the ordinary course of business of minerals, petroleum or timber, after such items have been extracted or severed from the land, takes free of any mortgage on the land from which the goods were extracted or severed. Mortgage holders that also seek to have a charge over minerals, petroleum or timber after they have been extracted or harvested can easily protect their interest by simply making a filing in the PPSA registry.

45. Buyer, lessee of mortgagee of fixtures. This section provides that a buyer of a parcel of land would take any fixtures on that land free of a PPSA charge perfected by the registration of a notice if: i) the buyer did not have actual knowledge of the charge; and ii) the notice did not

reasonably describe the location of the real property upon which the fixture resides. Therefore, lenders who take PPSA charges over fixtures should include a description of the land upon which the fixture sits when registering a notice. Note that Sections 71(2) and (3) provide further clarification regarding what is required with regard to a notice covering fixtures (and other goods related to land). To adequately describe the location of the land a street address is sufficient, and if none is available, then another description that would allow a searcher to determine the approximate location of the land, but the term does not require a legal description sufficient to record a mortgage. This rule is in place in the event a debtor owns multiple properties.

46. Priority of material or services lien. A lien on goods has priority over a security interest if the lienholder has possession of the goods and the lien secures payment for materials or services supplied with respect to the goods. For example, if tractor repair shop has possession of the tractor, it has an automatic lien on the tractor it holds to secure payment for repair services, and that lien has priority over any other security interest in the tractor.

Example

Lender has a perfected security interest in Borrower's car. Borrower takes the car to a garage for repairs. The garage repairs the car but keeps possession of it until the garage receives payment for those repairs.

The garage's lien has priority over person Lender's perfected interest.

47. Rights of debtor in collateral may be transferred. This provision makes clear that debtors are permitted to sell collateral even if the security agreement prohibits it. The buyer would take the collateral subject to the perfected security interest, and the debtor may be liable for a breach of contract claim, but the sale is still valid.

Division 4 – Persons to Whom Negotiable Collateral is Transferred

“Negotiable collateral” is collateral that is very liquid, like cash, or which is transferable by endorsement, such as a share certificate or a document of title. Special rules apply here in order to promote the free-flow of commerce. In general, people who take cash or electronic funds transfers take the cash and funds free of a prior security interest. The same is true for people who purchase stocks, bonds, negotiable documents of title and chattel paper. Secured parties relying on these types of collateral to secure loans are well advised to not only register an interest over these properties but also to take possession or otherwise exercise control over the collateral.

48. Where holder of money takes money free of perfected security interest in money. This section resolves a potential dispute between a secured party that has rights in proceeds from the sale of collateral and a third-party that obtains the cash through its own transaction with the debtor.

Example

Lender has a perfected security interest in a cars held by a car dealer as inventory. Dealer sells a car. Lender has a perfected security interest in the cash proceeds from the sale of the car.

Dealer now uses some of the cash proceeds from the sale of the car to buy an office computer from Seller.
Seller takes the money free of Lender's security interest in the money.

49. Priority of creditor who receives funds that are subject to a security interest. The same rule stated immediately above with regard to cash also applies to cheques and other payment mechanisms.

Example

Lender has a perfected security interest in cars held by a car dealer as inventory. Lender sells a car and deposits the cash proceeds into a cheque account. The car dealer draws a cheque and pays an unsecured creditor.

The unsecured creditor's interest in the cheque has priority over Lender's security interest in the cheque.

50. Priority of purchasers of instruments or securities. In some rare cases possession of certain types of collateral can trump a prior registered notice. Section 50 states that for instruments and for securities evidenced by a physical certificate, possession of the collateral is required to achieve maximum priority protection.

Example

Lender 1 has registered a Notice in respect of all of Borrower's shares in a company. Lender 2 also takes a security interest in all of Borrower's shares, but does not know about Lender 1's security interest. Lender 2 perfects its security interest by taking possession of Borrower's share certificates.

Lender 2's security interest in Borrower's shares has priority over Lender 1's security interest in the same shares.

51. Priority of holders of documents of title. This section repeats the same rule set forth in Section 50, but applies it to documents of title.

Example

Lender has registered a Notice in respect of person Borrower's document of title to fruit held in a refrigerated warehouse. Borrower sells the fruit to Buyer who takes possession of the document of title to the fruit without knowledge of Lender's perfected-by-registration security interest in the document of title.

Buyer's interest in the document of title has priority over Lender's perfected security interest in the same document of title.

52. Priority of purchasers of chattel paper. This section basically mirrors the same rule set forth in Sections 50 and 51, but applies it to chattel paper (writings that evidence both a monetary obligation and a security interest in specific goods).

Example

Lender has registered a Notice in respect of a car dealer's inventory. Car dealer sells a car to Buyer under a credit agreement. The agreement itself is chattel paper. Car dealer then sells the hire-purchase agreement to a regular dealer in the secondary market, Paper Purchaser.

Paper Purchaser's security interest in the hire purchase agreement has priority over Lender's security interest in the same agreement as proceeds of inventory.

The lesson here is that if a secured party is financing inventory that is sold via dealer financing, then the secured party should take steps to take physical possession of the paper each day. As a clever alternative, in some other jurisdictions the secured party has required the dealer to use a credit agreement form that *clearly shows the secured party's interest on it* so that a secondary market purchaser cannot claim it acquired the paper without knowledge.

Division 5 – Assignments and Other Transfers of Accounts

An account debtor is a person who owes payment on an account, and that account may be assigned or otherwise pledged as collateral by a debtor to a secured party. For example, suppose Bank has a security interest in Dealer's inventory accounts receivables. Dealer sells inventory to Customers on credit and Customers make periodic payments to Dealer. In this case, Bank is the secured party, Dealer is the debtor, and Customers are account debtors.

As will be seen later in this EM, when the debtor goes into default the secured party may direct the account debtor to pay it directly, bypassing the debtor. In anticipation of this, the following provisions detail the relationship between the three parties.

53. Interpretation for this Division. “Assignee” includes a secured party.

54. Notice to account debtor. Under the PPSA it is unnecessary to notify an account debtor of an assignment, attachment, perfection, or enforcement of a security interest in an account. There are special rules under subsection (2) regarding payment arrangements where the collateral is an intangible or chattel paper. Basically, an account debtor who is making payments to their seller is to continue to do so until a notice is delivered to them to pay the secured party.

55. Account debtor's right to assert defences and claims. Regardless of any assignment or pledge of payment right, the underlying contract between the Dealer and the Customer remains in place. Thus, in the example above, the Customer retains its right to assert any contract claims against the Dealer arising out of the substance of the underlying sale even if the payment right has been transferred to a secured party. So, if it turns out the item sold is defective and it is returned for a refund, then the Customer will no longer be an account debtor and the Bank can't collect any payments from it.

56. Modification or substituted contracts effective against assignee. The ability of account debtors and assignors to modify existing contracts can be important. Good faith modifications to the contract between the assignor/debtor and an account debtor—the original parties to the contract—are generally enforceable against the secured party that has been assigned payment rights under the contract.

57. Enforceability of non-assignment clauses. In order to promote the free assignability of accounts, and thereby promote cash flow financing, an agreement that restricts the assignment of accounts is generally unenforceable. This is different from a non-assignment clause with respect to the actual performance of the contract, which are unaffected by the PPSA.

Division 6 – Priority in Deposit Accounts and Investment Property

Secured parties may determine to have payables to their debtors go to a single deposit account that the secured party controls. A secured party may perfect a security interest in a deposit account in one of two ways: by registering a notice that describes the account, or by taking control of the account. The general rule is that perfection by control beats perfection by filing. This means that outsiders are not able to gain control of a deposit account in a financial institution by merely filing against that account. Instead, the outsider would need to be named on the account to exercise control.

58. Meaning of “control” of a deposit account. This section sets out the rules on how various types of secured parties may gain legal control of a deposit account. If the secured party is the bank itself in which the account is located, then it has control under subsection (a). In all other cases, the debtor, secured party and bank can enter into an agreement under which the outside secured party has control of the account.

59. Priority of security interests in deposit accounts perfected by control. Subsection (a) sets out the general rule that a security interest based upon control of a deposit account trumps a security interest in the same deposit account based solely upon registration. Multiple security interests in accounts that are perfected by control have priority according to the date of control.

60. Priority of security interest in investment property. Security interests in stocks and bonds may also be perfected by registration or control. However, a security interest perfected by control has priority over a security interest perfected by registration. Further, where a share is evidenced by a certificate, then possession of the certificate trumps perfection by control (where control may be asserted by a clearinghouse or other agent).

Division 7 – Priority in Special Classes of Tangible Collateral

Sometimes goods, which are personal property, become fixed to land and buildings to an extent that causes a right to the goods to arise under the real property law. In other words, the goods may become subject to the rights of a mortgage holder. These goods are called “fixtures.” The PPSA sets out rules on how to determine if a PPSA lender against such a good has priority over a land mortgage holder.

61. Fixtures. The current PPSA provides that a security interest may be created in goods that become in fixtures, and that this security interest can gain priority over a land interest holder in two cases:

- If the PPSA security interest is perfected before the goods become fixtures and the goods consist of readily removable factory or office machines, consumer appliances, or equipment that is not essential to the operation of the real property; or
- The PPSA interest is a purchase-money security interest in the goods that become fixtures, unless the mortgage was taken for the purpose of constructing the very building to which the goods become fixtures.

For example, suppose Dealer sells a generator to Owner on credit for installation on Owner's land which is subject to Bank's mortgage. Dealer perfects a security interest in the generator at the time of the sale. Upon installation, the generator becomes a fixture and Dealer's security interest has priority over the rights of the Bank. However, if the Bank was financing a new construction via a construction mortgage, then the Dealer would not have priority.

62. Secured Party's right to remove fixtures. If a secured party has priority in a fixture, the secured party may remove the fixture upon default. The various subsections of 62 provide rules on how the removal is to occur, including the important provision that the secured party must reimburse the land mortgage holder for any damage caused by the removal, but not for the loss of value to the land interest caused by the absence of the fixture. Also, the secured party must provide notice to the person with an interest in the land of a pending removal and give that person the ability to pay off the debt and keep the fixture in place. This is an important protection for land mortgage holders who may also be contemplating a foreclosure against the non-performing debtor and want to keep the property intact for a future mortgage foreclosure sale. See Section 64 as well on this topic.

63. Application to the court: fixtures. This section allows a secured party to bring a court action to enforce its right to remove fixtures. The court is empowered to make such orders as deemed appropriate to address any issues that arise, including granting access to the land.

64. Retention of fixtures by a person with an interest in related land. A mortgage holder may pay the secured party and retain the fixtures on the land. The amount to be paid is the lesser of the amount of the debt secured by the fixtures, or the fair market value of the fixtures if removed.

65. Priority of security interest in crops. The PPSA repeals the Crops Lien Act. Therefore, agriculture loans will be subject to the PPSA. The same general rules apply to crop liens: priority amongst PPSA lenders depends upon time of perfection (filing).

The PPSA also sets out the rights of a PPSA crop lender against a person with an interest in the land upon which the crops are grown. The current PPSA provides that a perfected security interest in crops has priority over a conflicting interest of a person with an interest in the land, even if the land interest arose prior to the PPSA crop interest. While at first glance this may seem harsh to land holders, they can easily protect themselves by simply making a filing in the PPSA registry, if for example part the rental due to them by the farmer is a share of the proceeds of the sale of the crop.

Note, sugar is treated differently. Please see Section 8 above.

66. Accessions. An “accession” is a good that becomes fixed to other goods, while retaining its original identity. For example, a boat motor is an accession when installed on a boat because even though fixed to the boat, the motor retains its original identity. Under the PPSA a security interest in an accession continues in the goods after they become an accession.

The issue to address here is when there is a security interest in the whole thing to which an accession is fixed (the boat, in the example), then the interest in the accession can gain priority over a prior interest in the “whole” item *if the interest in the accession is perfected* prior to installation.

Example 1

Lender has a security interest in person Borrower’s car. Engine dealer sells a replacement motor to Borrower and registers its interest in the motor. The motor is subsequently installation in Borrower’s car.

Engine dealer’s security interest in the motor has priority over a claim to the motor made by Lender.

Example 2

Engine dealer sells a motor to Owner under a retention of title agreement, but fails to register their interest in the PPSA registry. The motor is installed in Owner’s car. Lender later takes a security interest in Owner’s car and perfects its security interest by registering.

Lender’s perfected security interest in Owner’s car, including the motor, has priority over dealer’s security interest in the motor.

Subsections (6)-(12) set out the procedure allowing the person with an interest in the accession to remove it from the whole. It follows closely the rule on how a fixture is removed from land as the two situations are analogous. Thus, the secured party is responsible for damages to the whole caused by the removal of the accession, but not for the loss of value of the whole without the accession.

67. Priority of security interests in commingled goods. Commingled goods are goods that become mixed with other goods in such a manner that the identity of the goods is lost. For example, the coffee beans of Farmer #1 are commingled goods if they become mixed in a storage bin that also holds coffee beans of Farmer #2—and perhaps many others.

Under the PPSA a security interest may not be created in goods that are already commingled. However, a security interest in goods that later become commingled continues in any product or mass of the goods that is created when the goods are commingled. This can also apply to goods that are commingled as part of a production process.

Example

Lender has registered a Notice in respect of all of a grind mill’s flour. Baker’s flour is subsequently combined with other ingredients to become cakes.

Lender’s perfected security interest continues in the cakes.

With certain provisos, in the case of separate security interests in goods that each become commingled, the priority of each security interest is shared with others in the proportion that the

secured obligation bears to the sum of obligations secured by all security interests.

Example

Baker manufactures ice cream from sugar and cream. Lender 1 loans Baker the full purchase price of the sugar, which is \$1,000. Lender 2 loans Baker the full purchase price of the cream, which is \$2,000. Both lenders have registered Notices. Baker manufactures a batch of ice cream, which sells for \$2,000.

Lenders divide the proceeds in proportion to their loans: Lender 1 gets 1/3 of \$2000 and Lender 2 gets 2/3 of \$2,000.

Subsection 67(4)(d) pertains to PMSIs that are used to obtain goods that are later comingled. Consistent with favorable treatment elsewhere for PMSIs, a PMSI in goods that are comingled prevails over a non-PMSI.

Example

Lender 1 has a perfected, non-PMSI security interest in all of Baker's sugar, which is to be manufactured into ice cream. Lender 2 loans Baker the purchase price of a specific delivery of sugar that is to be used in the manufacture of Baker's ice cream. Lender 2 registers a Notice covering this newly-acquired sugar. The sugar is manufactured into ice cream.

Lender 2's perfected PMSI in person the sugar, which continues in the ice cream, has priority over Lender 1's security interest in person B's sugar, which also continues in person B's ice cream.

68. Priority of security interests in certain vessels and aircraft. The creation and registration of mortgages in vessels and aircraft are provided for in the Marine Act and the Civil Aviation Act, respectively. Such a mortgage has priority over any security interest that attaches or is perfected under the PPSA. Otherwise, the PPSA applies to security interests in vessels and aircraft.

PART VII. – REGISTRATION

69. Personal property security register established. An online, fully electronic registry is established by this section. The registry receives notices of security interests and the interests of execution creditors (such as judgment holders, bankruptcy trustees, and liquidators). Filers submit their own filings online which are fed directly to the database, meaning, the Registrar does not review the notices for accuracy or completeness. Filers control their own destiny. All information entered into the registry is public information and may be searched. Searches are free.

70. Initial Notice. This section tells what must be included on an initial filed notice to make it legally sufficient. The information required is not voluminous: i) debtor name and address; ii) secured party name and address; iii) a description of the collateral. While this Section does not require information concerning the underlying loan amount, interest rates, etc., the Reserve Bank of Fiji requests that such information be provided on a voluntary basis so as to help assess the effects of this reform. Such information does not constitute part of the legal filing and will not be revealed to searchers: it will be held as confidential.

If the notice covers fixtures, timber or minerals to be extracted from the land, a reasonable description of where the land is located is required to give the secured party the highest level of priority protection.

71. Notice of the interest of an execution creditor. A notice filed by an execution creditor must contain the same basic information as a regular notice filed by a traditional lender. It may be filed by the execution creditor or, upon their request, by the court. Note that a bankruptcy trustee and/or a liquidator may file when the respective petition is filed in court. A tax authority may file when demand has been made upon a party for unpaid taxes.

72. Notice registered prior to security agreement or attachment. A notice may be registered before a security agreement is concluded and before a security interest attaches to collateral. This way a lender can make certain it has priority in collateral by registering a notice both prior to disbursing funds and even prior to the debtor obtaining the collateral.

73. Notice may apply to multiple agreements. A notice may relate to one or more security agreements.

74. Name of the debtor. It is absolutely critical the debtor's name be entered correctly into the register, for this is the key data under which future searchers can determine if a particular person has already pledged their collateral. The failure to enter the proper name of the debtor—with no typing errors—will render it “seriously misleading” under Section 76 and jeopardize priority.

The PPSA sets out standards for what name to use depending upon whether a debtor is a citizen of Fiji, a foreign national, or a registered business entity (like a company). The two main debtor types are:

- For individual citizens of Fiji, the “name” to be used is the assigned taxpayer identification number (TIN).
- For registered Fiji companies and for overseas companies registered to do business in Fiji, the name of the company and the registration number issued by the Fiji Company Registrar.

Subsection (3) makes clear that a trade name of a debtor, such as a d/b/a, or other alias, is insufficient. In this case the names of the actual owners must be used (the trade name can be included, but is legally ineffective if standing alone). Subsection (4) states that a filing may have more than one debtor. Subsection (5) authorises parties such as lawyers and accountants to file on behalf of their clients.

75. Notice is effective unless seriously misleading. If a notice insufficiently provides the name of the debtor then it is seriously misleading. However, other minor defects may not adversely affect the status of the notice. For example, if a debtor's name was correctly entered and their address had a minor typo, the filing would not be “seriously misleading.”

76. Effect of change of circumstances. Debtors sometimes change their names. The general rule is that a notice that becomes seriously misleading because the debtor changes its name will continue to be effective for four months from the change of name, and will continue to be effective if the secured party, within this four-month window, amends the notice to correct the debtor's name.

Note that if the debtor is a citizen of Fiji then the TIN is the debtor identifier. Given that the TIN does not change, then even if there is a change in the surname of the debtor the notice will not be rendered misleading. Further, for registered companies, their company number should remain a constant. However, RBF is mindful that there is a project seeking to put the Fiji Companies Registry online, and that project could result in new company numbers being assigned to registered entities. Unfortunately, no further information is available on this matter as of the date of publication of this Analysis.

77. Duration of notice and effect of lapse. A notice remains effective for a period set by the filer using the registry software, which may be up to 99 years in the future. A continuation can be filed under Section 79 to extend the effectiveness of the notice.

78. Amendment of notice. Situations change over time, and often a filed notice needs to be amended to keep up with current events. This section sets forth the procedure for making amendments such as address and name changes, and releases of specific collateral in the event it is sold. Note that under subsection (6) any amendment that adds collateral or adds a debtor is only effective as to that new collateral or new debtor from the date of the amendment.

Amendments do not extend the effective duration of a notice beyond the initial 5-year term. To accomplish this a "continuation" must be filed under Section 79.

79. Continuation. Six months prior to lapse of the initial effective term that has been set by the filer, the secured party may extend the notice for an additional five years. If there are multiple secured parties the continuation is only effective with regard to the secured party that filed it. So, each secured party should file its own continuation. If no continuation is filed the notice lapses. A Notice may have subsequent continuations as well.

80. Termination of notice. Once a debt is paid the secured party should terminate the notice so as to "clean up" the debtor's record. A notice may easily be terminated on the registry. Under subsection (2) a secured party *must* terminate a notice if there is no further secured obligation and the debtor makes a written demand upon the secured party to do so.

81. Effectiveness of notice. Any notice filed in the registry is effective as of the moment it is available to public searchers. Given that the registry is fully online, once the filer submits the notice it is added to the database in a few short seconds (dependent only upon internet speed).

82. Registrar's refusal to register a notice. This section sets forth the criteria under which a notice can be rejected, including such things as the failure to name a debtor, the failure to name any collateral, and the failure to pay the filing fee (if any). Given that the registry is online only, the software system will manage these rejection reasons in a manner that immediately alerts the filer if there is a problem so that it can be corrected on the spot. Note, however, that the software does not perform a substantive check on things like proper spellings or other data entry errors: it is up to the filer to review their own work.

83. Effect of secured party's notice on other secured parties on the notice. If there are multiple secured parties on one notice, each secured party is free to submit its own amendments, continuation and terminations, and each such filing is legally effective only as to the secured party that filed it.

84. Duties of the registrar. This section relates to the duty of the Registrar to properly operate the online registry. It also makes clear that the Registrar's duties are administrative only: the Registrar does not undertake a substantive review filings for accuracy.

85. Public access to registry records. All information on all notices (and subsequent amendments) is a public record and available to searchers for free. If required for court, a certified search result can be produced from the online registry (there may be a fee for a certified search, please see the regulations).

86. Notice does not constitute construction notice. Registration of a notice in the registry is not constructive notice nor does it impute construction knowledge of its existence or its contents to any person. This requires some explanation as it seems counter-intuitive given the emphasis placed on filing in the registry.

The bright line rule should be that the first person to file a notice in the registry obtains priority, end of discussion. Under this rule, there is no question of whether a particular notice did or did not constitute "constructive notice" to the world: the mere fact of making the filing secures the lender's position.

Compare this certain result with an alternative that includes a "constructive notice" concept in the Act. The term "constructive notice" is a judicial doctrine and therefore falls under the power of a court to interpret as to whether the notice given is sufficient. Thus, if the Act includes a concept of "constructive notice" then that gives a court more room to apply its own rules of interpretation. This can lead to uncertainty in the commercial world.

Clever lawyers in other jurisdictions trying to fight this bright line rule for a junior creditor have tried to attack it on the grounds that the filed notice was defective in some way. The junior creditor will argue to the judge (in expensive litigation) that senior creditor's notice contained some little mistake. This is where the concern over including a judicial doctrine

enters, because judges have power to grant exceptions to judicial doctrine, including the doctrine of constructive notice. Judges could be persuaded to grant an exception, saying that while notices constitute constructive notice, “in this particular case with these parties and facts, the junior creditor was misled.”

In short, if notices are considered to be constructive notice, litigation will be more likely in any case where two creditors compete for collateral. It only takes one adverse ruling to undermine the certainty otherwise found in a secured transaction act. Good secured transactions law says: “If you file a notice with the minimal information required by the PPSA, you have priority, regardless of the quality of constructive notice.”

Both New Zealand and Canadian law contain this exact same text. In both countries, registration of a Notice in the registry is not constructive notice or knowledge of its existence or contents to any person. While U.S. law is not explicit on the subject, the official commentary accompanying the text is that filing is not constructive notice.

PART VIII. – ENFORCEMENT OF SECURITY INTERESTS

This PPSA contains its own enforcement mechanisms. In general, after a default by the debtor, the secured party is allowed to seize the collateral, sell it, and apply the sale proceeds to the debt. There are numerous rules around how this works in practice that are set out in the following sections, including allowing the secured party to act against certain collateral types without first having to obtain court permission.

This Part also includes provisions to protect debtors that find themselves in difficult times by giving them a means to buy-back their seized collateral before it is sold to 3rd parties. See sections 99 and 100 discussed below. There are also remedies set forth for when a secured party violates its obligations under the law. See Section 102.

87. Application of this Part. This section exempts certain transactions from the PPSA enforcement rules, including: a commercial consignment that does not secure payment or performance of an obligation; and the interest of an execution creditor. Other laws and/or procedures already in place are better suited for these situations.

88. Secured party rights upon default. This section sets out the general rights of a secured party:

- i. All rights contained in the security agreement (i.e., the loan documents);
- ii. The right to possess or control the collateral;
- iii. The right to sell the collateral and apply the proceeds against the debt; and
- iv. Under subsection 88(2)(e), any other rights provided in this Act *or under any other law of Fiji*.

The italicized text above is important: the PPSA remedies to do replace the body of law

in Fiji pertaining to enforcement of debts, but rather add to it.

89. Recovery without judicial process.

Upon default, certain types of collateral may be acted upon by the secured party without the need for prior court approval. The collateral types include:

- i. accounts receivable, chattel paper and other payment intangibles, where the secured party may notify account debtors to pay the secured party directly rather than the debtor;
- ii. Documents of title, where the secured party in possession of a document of title may take the goods covered by the document of title;
- iii. A deposit account may be seized by a financial institution with whom the debtor is banking, or if the secured party is otherwise in control of the account, they may seize it.

The secured party may also add any of its expenses related to taking action under this Section to the debt.

Remember again the italicized portion found in 88(2)(e) noted above. If current Fiji law allows recovery without judicial process in certain circumstances those rights will continue after passage of the PPSA.

90. Secured Party's right to take possession and dispose of collateral. Upon default, the secured party has a right to take possession of collateral by any method provided by law. If the goods are such that they cannot be readily moved, the secured party may take control of goods at the debtor's premises and later conduct a sale there.

91. Manner of disposition of collateral. The sale or other disposal of the collateral may be by private sale, public sale, or auction, in whole or in part, or by lease or credit sale or other commercially reasonable means. The sale may also be delayed so as to gain a better price. Under subsection (2), the collateral may be sold "as-is" or after repair or preparation, in which case the expense of the repairs or preparation are added to the debt. As will be seen later in Section 94, the secured party may purchase the collateral at a public sale.

92. Duty to act in a commercially reasonable manner. The secured party must act in a commercially reasonable manner. However, just because a better price could be obtained doesn't mean that the sale was commercially unreasonable. So long as the secured party acts in conformity with the practices of dealers in that type of property then the secured party has a "safe harbor" and need not fear counter-action by the debtor.

93. Obligation to give notice of disposition of collateral. The secured party must provide 7 days advance notice of the sale of the collateral to the debtor, to any person known to be an owner of the collateral, and to any holder of a subordinate security interest that was registered

when the secured party took possession of the collateral. Subsection (3) sets out what is required to be in the notice. Subsection (5) states that this prior notice is not required where collateral is perishable, in imminent danger of decline in value, or under other circumstances that make notice impracticable or unreasonable.

94. Secured party may purchase collateral at public sale. The secured party may purchase the collateral, if the sale is a public sale and the purchase price is reasonable.

95. Rights of purchasers of collateral. It is imperative that purchasers of collateral obtain clear title else they would not bid on it. This section provides that a purchaser of the collateral takes free of any interest of the debtor or any other person with an interest that was junior to the foreclosing secured party. A person with a security interest second-in-line to the foreclosing creditor can protect its interest by purchasing at the sale, thus stepping into the shoes of the senior secured creditor.

96. Secured party's disposition of a licence. If the collateral is a licence, the secured party may only act in accordance with the licence terms.

97. Application of proceeds and surplus or deficiency. This section details how the proceeds from the sale of the collateral are allocated:

- First to the reasonable expenses incurred by the secured party;
- Second, to pay off any senior debt;
- Third, to pay off the debt of the foreclosing secured party;
- Fourth, to any junior creditors; and
- Fifth, any surplus goes to the debtor.

Under subsection (2) the secured party must provide an accounting of all expense and sale proceeds to the debtor and any other person entitled to receive notice of the sale of the collateral. Under subsection (3) the secured party may also pay any surplus into court in the event there is a dispute over how the surplus is to be divided. Finally, under subsection (4) the debtor remains liable for any deficiency.

98. Secured party's right to retain collateral. The secured party may retain collateral in satisfaction of all or part of the secured obligation in accordance with a plan agreed to by the debtor and other interested persons or approved by a court. If there is an objection raised by any other secured party or lien holder, then the regular procedure regarding the sale of the collateral is to be followed.

99. Debtor's right to redeem collateral. This Section allows a debtor to redeem—buy back—collateral that has been seized by a secured party prior to it being sold by the secured party. This right to redeem extends to other persons so that junior creditors or other secured parties may also buy back the collateral. The amount that must be paid is the amount of the debt plus any expenses incurred by the secured party in seizing the collateral.

100. Debtor's right to reinstate security agreement. This section gives a debtor the right to reinstate a security agreement by tendering the amount of arrearages, remedying any other breach, and paying all associated expenses. This is a powerful right in that the debtor is not required to pay the full amount due, but only catch up on any missed payments. Under subsection (3) the debtor is only permitted to reinstate once every 12 months, else the law might encourage debtors to make late payments.

101. Enforcement of a security interest in a mortgage. Some security interests are, in turn, also secured by mortgages. For example, a security interest may exist in a right to receive rents on real property. The right to receive rent may, in turn, be secured by a mortgage on the real property. In that case, a security interest in the account also constitutes a security interest in the mortgage. That is because a secured party may have to enforce the mortgage right to collect the account. This section provides that a secured party that must enforce mortgage rights may do so without limiting its rights to pursue any other personal property that secured the obligation.

102. Remedies for secured party noncompliance. If a secured party fails to fulfill its obligations under the Act when enforcing its claim against collateral, a court may issue an order halting the sale. If the debtor or any other interested third party has suffered a loss due to the secured party's failure to comply, the court may find the secured party liable for such loss.

103. Manner of notification to debtors, secured parties, and other interested persons. In some places the PPSA calls for a notice to be sent to various parties. This section details how notice is to be delivered depending upon whether the party to be notified is an individual or a corporate entity.

PART IX. – CONFLICT OF LAWS

Collateral and debtors may move from one jurisdiction to another, and rules are required to account for this movement. This Part sets out such rules. These rules are closely aligned with the law of New Zealand. Identical text has been adopted by Papua New Guinea, and similar language has been used in Australia. It makes sense that the four largest importers/exporters in the region would take the same approach to conflict of laws issues.

104. When Fiji law applies. Fiji law applies to security interests if nearly all collateral is in Fiji or is to be moved to Fiji, and also if the security agreement provides that Fiji law is the law governing the security agreement. If the collateral is investment property that is not in the form of a certificate, then the law of the location where the clearing house or securities

depository is located governs.

105. Continuity of perfection where goods are moved to Fiji. If goods are outside of Fiji when a security interest in them is perfected under the law of another country, and then the goods are brought to Fiji, the security interest remains continuously perfected if the interest is then perfected in Fiji by the earliest of: i) within 30 days after arrival in Fiji; or ii) no later than 7 days after the secured party learns of the move of the goods to Fiji.

106. Location of debtor. This section determines how the home jurisdiction of a debtor is determined. For corporate debtors it is the country of incorporation.

107. Validity and perfection of security Interests in intangibles and certain goods. If the collateral is an intangible or goods that are normally used in more than one jurisdiction, then the law of the jurisdiction where the debtor is located applies.

108. Position where debtor relocates. If a perfected security interest exists in collateral located in Fiji and the debtor relocates to another country, the security interest will continue to be perfected for up to 60 days from the relocation under the law of Fiji. Of course, this is not a 100% guarantee that the secured party will be able to seize the collateral as the law of the other jurisdiction might prove problematic and the collateral will be located there.

109. Priority where there is no public record of a perfected security interest. This section addresses the situation where the law of another jurisdiction where collateral is located has no PPSA-like registry. If a security interest is perfected in a country other than Fiji by a method other than public registration and the collateral is not in the possession of the secured party, the security interest is subordinate to collateral situated in Fiji.

110. Perfection of security interest in as-extracted collateral. A security interest in minerals or petroleum is governed by the law where the minerals or petroleum are extracted, even if the security interest was given under the Fiji PPSA.

PART X. – TRANSITION PROVISIONS

The PPSA must establish transition rules governing the changeover period between existing law and the new regime under the PPSA. There will be literally thousands of pre-existing transactions that will now fall within the PPSA, and those existing transactions must be filed in the PPSA registry in a fair way so as not to prejudice the rights of the parties to these earlier transactions.

112. Transitional. If a secured party in a prior secured transaction files a Notice within

the transition period, that Notice will continue the lender's priority in the collateral as it stands under pre-existing law. In other words, the new PPSA will not affect priority of prior transactions so long as they are filed within the transition period. This is proper: it would be unfair to pass a law today that adversely affects anyone related to a transaction made in the past. If the Notice is filed after the transition period ends, priority will date from the date of filing under the PPSA. Finally, if a Notice of a prior transaction is not filed under the PPSA, it will be considered to not have priority against a security interest that has been filed within the transition period. The transition period is 180 days from the commencement of the PPSA.

Example

Assume the transition period begins January 1, 2019, and extends for six months. Borrower approaches Bank 1 on February 1 seeking new money. Bank 1 conducts a search of the PPSA registry and does not find any evidence of prior charges being filed against Borrower, and thus provides money to Borrower. Later, on March 1, Bank 2 files a notice of a prior security interest against this same Borrower.

Bank 2 would have priority in Borrower's collateral as Bank 2's priority is adjudged under pre-existing law, one that pre-dates Bank A's new loan.

Importantly, note that it is still possible to lend during the transition period using PMSI financing as the PMSI rules in the PPSA typically allow new value given for the purchase price in goods to achieve priority over pre-existing charges.

112. Offences. Certain violations under the Act can result in criminal charges. For example, it will be deemed an offence if a false filing is made with malicious or fraudulent intent. Further, any person who attempts to conceal or otherwise alters collateral subject to a security interest with the intent to defraud or otherwise prevent a secured party of the ability to enforce its security interest is guilty of an offence. The appropriateness of these sections, together with specific penalties (if any) to be applied, are not yet finalized pending further discussions with Government.

113. Regulations. The Minister is authorized to make certain regulations to implement the PPSA.

114. Consequential amendments.

There are substantial interactions between this PPSA and the existing law in Fiji, and the PPSA contains a lengthy section on consequential amendments. The main laws affected by the PPSA are:

- 1) Repeal of the Bill of Sale Act
- 2) Repeal of the Crops Lien Act
- 3) Repeal of those provisions within the Companies Act 2015 that pertain to filing company charges
- 4) Significant changes to the Development Bank Act.