

PERSONAL PROPERTY SECURITIES BILL 2017
(BILL NO. 38 OF 2017)

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BILL NO. 38 OF 2017**A BILL****FOR AN ACT TO REGULATE THE LENDING OF MONEY SECURED
BY PERSONAL PROPERTY AS COLLATERAL**

ENACTED by the Parliament of the Republic of Fiji—

PART 1—PRELIMINARY*Short title and commencement*

- 1.—**(1) This Act may be cited as the Personal Property Securities Act 2017.
(2) This Act comes into force on a date or dates appointed by the Minister by notice in the Gazette.

Interpretation

- 2.** In this Act, unless the context otherwise requires—
- “accession” means goods that are installed in or affixed to other goods in such a manner that the identity of the goods is not lost;
 - “account debtor” means a person who is obligated under an account receivable, secured sales contract, intangible or chattel paper;

“account receivable” means a monetary obligation, whether or not earned by performance, that is not evidenced by chattel paper or an instrument, but does not include a deposit account, letters of credit or an investment property;

“advance” means the payment of money, the provision of credit or the giving of value, and includes any liability of the debtor to pay interest, credit costs and other charges or costs payable by the debtor in connection with an advance or the enforcement of a security interest securing the advance;

“after-acquired property” means property acquired after the time that a security agreement is concluded that covers the property;

“as-extracted collateral” means—

- (a) minerals and petroleum that are subject to a security interest that is created by a debtor having an interest in the minerals or petroleum before extraction, and that attaches to the minerals and petroleum as they are extracted; and
- (b) payment obligations arising out of the sale at the minehead or wellhead of minerals or petroleum in which the debtor had an interest before extraction;

“attachment” means completion of all conditions necessary under section 12 of this Act to make a security interest enforceable against the debtor with respect to the collateral;

“building” means a structure, erection, mine or work that is built or constructed on or opened in land;

“building materials” means materials that are incorporated into a building, and includes goods attached to a building so that their removal—

- (a) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building, apart from the loss of value of the building resulting from the removal; or
- (b) would result in weakening the structure of the building or exposing the building to weather damage or deterioration,

but does not include—

- (i) heating, air conditioning or conveyancing devices;
- (ii) machinery installed in a building or on land for use in carrying on an activity in the building or on the land; or
- (iii) a fixture;

“buyer of goods in the ordinary course of business” means a person who buys goods from a person in the business of selling goods of that kind, if the buyer buys in good faith and without knowledge that the sale violates the rights of another person in the goods;

“cash” means the physical currency, whether in paper form or coins, authorised as a medium of exchange by the laws of Fiji or any other country;

“chattel paper” means one or more writings that evidence both a monetary obligation and—

- (a) a security interest in, or lease of, specific goods; or
- (b) a security interest in, or lease of, specific goods and accessions;

“collateral” means present or future personal property that is subject to a security interest;

“commercial consignment” means a transaction, regardless of the form or terminology used in the agreement, in which a person (the consignor) delivers goods for the purpose of sale to a merchant (the consignee) that deals in goods of that kind under a name other than that of the consignor, but the term excludes a transaction in which—

- (a) goods are delivered to an auctioneer; or
- (b) consumer goods are delivered to a seller;

“commingled goods” means fungible goods that are physically united with other fungible goods in a way that their identity is lost in a product or mass;

“consumer goods” means goods that are used or acquired for use primarily for personal, family or household purposes, but the term does not include a serial numbered vehicle;

“creditor” includes an assignee for the benefit of creditors, an executor, an administrator, a committee or a property guardian of a creditor;

“crops” means crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots including roots if able to be used as root-stock or otherwise transplanted or forming part of trees or plants attached to land, and includes trees only if the trees—

- (a) are being grown as nursery stock;
- (b) are being grown for uses other than the production of lumber and wood products; or
- (c) are intended to be replanted in another location for the purpose of reforestation;

“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;
- (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;
- (c) a seller of accounts receivable, chattel paper, intangibles, or promissory notes;
- (d) a consignee under a commercial consignment; or
- (e) a lessee under a lease for a term of more than one year;

“default” means the failure to pay or otherwise perform the obligation secured when due, or the occurrence of an event that, under the security agreement, gives the secured party the right to enforce the security;

“deposit account” means a demand, time, savings, passbook or similar account maintained with a financial institution;

“document of title” means a writing, such as a bill of lading or warehouse receipt, issued by or addressed to a bailee—

- (a) that covers goods in the bailee’s possession that are identified or are fungible portions of an identified mass; and
- (b) in which it is stated that the goods identified in it will be delivered to a named person, or to the transferee of that person, or to the bearer or to the order of a named person;

“equipment” means goods that are held by a debtor other than as inventory, crops, livestock or consumer goods;

“execution creditor” means—

- (a) a person who causes or may cause personal property or fixtures to be seized under legal process to enforce a judgment or legal obligation, including execution, attachment or garnishment, or who has obtained or may obtain a charging order or equitable execution that affects or relates to the collateral;
- (b) a trustee in bankruptcy;
- (c) a receiver or manager;
- (d) a liquidator;
- (e) any taxing authority under the laws of Fiji, where a person liable to pay a tax neglects or refuses to pay the tax after demand, and the amount, including any interest and assessable penalty, together

with any costs that may accrue, is a charge in favour of the taxing authority for the State upon all collateral belonging to the delinquent taxpayer, subject to this Act; or

- (f) the Fiji National Provident Fund where a lien arises as a result of the failure to pay a contribution under section 108 of the Fiji National Provident Fund Act 2011”;

“financial institution” means any financial institution within the meaning of the Banking Act 1995, credit union registered under the Credit Unions Act 1954, any friendly society registered under the Friendly Societies Act 1878, the Fiji Development Bank and such other persons as prescribed by regulations;

“fixtures” means goods that have become so related to real property that an interest in them arises under real property law but fixtures do not include building materials and readily removable factory machines, office machines and domestic appliances;

“future advance” means—

- (a) the payment of money, the provision of credit, or the giving of value secured by a security interest, occurring after the security agreement has been signed, whether or not provided or given under an obligation; and
- (b) includes advances, reasonable costs incurred, and expenditures made for the protection, maintenance, preservation, or repair of the collateral, or for the enforcement of the security interest;

“goods” means all things that are tangible personal property when a security interest attaches, and includes—

- (a) equipment;
- (b) inventory;
- (c) consumer goods;
- (d) fixtures;
- (e) standing timber that is to be cut and removed under a conveyance or contract for sale;
- (f) minerals and petroleum, but only from the time of extraction;
- (g) livestock, including the unborn young of livestock;
- (h) crops; and
- (i) manufactured or demountable homes,

but the term does not include accounts receivable, deposit accounts, chattel paper, documents of title, instruments, investment property or money;

“instrument” means—

- (a) a bill of exchange within the meaning of the Bills of Exchange Act 1891 note or cheque;
- (b) any other writing that evidences a right to payment of money and that is of a type that, in the ordinary course of business, is transferred by delivery with any necessary endorsement or assignment; or
- (c) a letter of credit or an advice of credit, if the letter of credit or advice of credit states on it that it must be surrendered on claiming payment,

but does not include—

- (i) chattel paper, a document of title or an investment property; or
- (ii) a writing that provides for or creates a mortgage or charge with respect to an interest in land that is specifically identified in the writing;

“intangible” means personal property that is not goods, chattel paper, a document of title, an instrument, money or an investment property, and includes an account receivable, a deposit account, intellectual property and a licence;

“inventory” means—

- (a) goods held by a person for sale or lease, or that have been leased by that person as lessor;
- (b) goods to be furnished by or on behalf of a person, or that have been furnished by or on behalf of that person, under a contract of service;
- (c) raw materials or work in progress; or
- (d) materials used or consumed in a business;

“investment property” means—

- (a) a security;
- (b) a security entitlement;
- (c) a securities account;
- (d) a futures contract; or
- (e) a futures account;

“lease for a term of more than one year” includes a lease of goods—

- (a) for a stated duration of more than one year;
- (b) for an indefinite term;

- (c) for an initial term of one year or less if the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for more than one year after the lessee first acquired possession of the goods, but the lease does not become a lease for a term of more than one year until the lessee's possession extends beyond one year; or
- (d) for a term of one year or less where the lease provides that it is renewable for any period that would cause the actual term of the lease to exceed one year,

but does not include a lease of goods—

- (i) involving a lessor who is not regularly engaged in the business of leasing goods; or
- (ii) a lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land;

“lessee of goods in the ordinary course of business” means a person who, in good faith and without actual knowledge that the lease is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, leases in the ordinary course from a person in the business of selling or leasing goods of that kind;

“licence” means a right, whether or not exclusive—

- (a) to manufacture, produce, sell, transport or deal with personal property; or
- (b) to provide services,

that is transferrable by the grantee with or without restriction or the consent of the grantor of the licence;

“minerals” means minerals as defined in the Mining Act 1965;

“Minister” means the Minister responsible for finance;

“money” means any item used as a medium of exchange, including cash, checks on demand, deposit cheques, money orders, or other credit arrangements;

“notice” means (except in the context of a notification delivered to a debtor, secured party, or person other than the Registry) a writing registered in the Registry, and includes an initial notice, amendment, continuation, and termination;

“perfection” means optimisation of a secured party's rights in collateral against third parties such as buyers, other secured parties, execution creditors, lien holders, liquidators and insolvency administrators;

“personal property” means goods, chattel paper, investment property, a document of title, an instrument, money or an intangible;

“petroleum” means petroleum as defined in the Petroleum (Exploration and Exploitation) Act 1978;

“proceeds” means identifiable or traceable personal property that is derived directly or indirectly from dealing with collateral or the proceeds of collateral and in which the debtor acquires an interest, and includes whatever is acquired upon sale, lease or other disposition of collateral, or whatever is collected on or distributed with respect to collateral, including without limitation—

- (a) a right to an insurance payment or any other payment as indemnity or compensation for loss of or damage to the collateral or proceeds of the collateral;
- (b) a payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or investment property;
- (c) rights arising out of, or property collected on, or distributed on account of, collateral that is investment property;
- (d) property exchanged for the original collateral; or
- (e) property purchased with money proceeds,

but does not include animals merely because they are the offspring of animals that are collateral;

“purchase money security interest” means—

- (a) a security interest taken in collateral, other than investment property, to the extent that it secures all or part of its purchase price;
- (b) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights;
- (c) the interest of a lessor of goods under a lease for a term of more than one year; or
- (d) the interest of a consignor who delivers goods to a consignee under a commercial consignment,

but does not include a transaction of sale and the lease back to the seller and, for the purposes of this subparagraph, “purchase price” and “value” include credit charges and interest payable for the purchase or loan credit;

“purchaser” means a person who takes personal property by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction that creates an interest in personal property;

“Registrar” means the Registrar of the Personal Property Securities Act 2017 as designated by this Act or the regulations hereunder;

“Registry” means the electronic registry established under this Act;

“secured party” means a lender, seller or other person in whose favour a security interest is created or provided for under a security agreement, including a person to whom account receivables or chattel paper have been sold, and a consignor or lessor of goods, including the representative of any such person or groups of persons, and includes for the purposes of priority determination and filing only, a buyer of accounts receivable or secured sales contracts and a lessor of goods under a lease for a term of more than one year;

“secured sales contract” means a contract for the sale of goods on credit that includes a security agreement creating a security interest in the sold goods;

“security” means—

- (a) a writing (whether or not in the form of a security certificate) that is recognised in the place in which it is issued or dealt with as evidencing a share or a warrant or option, a right to participate, a derivative, or other interest in property or an enterprise, or that evidences an obligation of the issuer and that, in the ordinary course of business, is transferred or withdrawn by—
 - (i) delivery with any necessary endorsement, assignment or registration in the records of the issuer or the issuer’s agent;
 - (ii) an entry in the records of the clearing house or securities depository; or
 - (iii) an entry in the records maintained for that purpose by or on behalf of the issuer or by or for a nominee; but
- (b) does not include a writing that evidences a monetary obligation secured by land;

“security agreement” means a writing that creates or provides for a security interest;

“security interest” means—

- (a) a legal interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to the form of the transaction or identity of the person who has title

to the personal property, and includes the interest created or provided for by a—

- (i) transfer of an account receivable or chattel paper;
 - (ii) a lease for a term of more than one year; and
 - (iii) a commercial consignment (whether or not the transfer, lease or consignment secures payment or performance of an obligation);
- (b) without limiting paragraph (a), and to avoid doubt, this Act applies to a transaction termed a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment or a flawed asset arrangement, that secures payment or performance of an obligation;

“serial number” means the vehicle identification number assigned to a vehicle by its manufacturer under standards adopted by the International Organization for Standardization;

“serial numbered vehicle” means a motor vehicle identifiable by a serial number and held by a debtor primarily for personal use that is subject to a security interest;

“signed” means—

- (a) to physically execute a signature; or
- (b) to execute or otherwise adopt a symbol, or encrypt or similarly process a writing in whole or in part, with the present intent to identify the person and adopt or accept a writing, whether in physical or electronic format;

“supporting obligation” means a right in a letter of credit or secondary obligation that supports a right to payment or performance of an account receivable, chattel paper, a document of title, an instrument, an intangible or investment property;

“value” means any consideration that is sufficient to support a contract and includes an antecedent debt or liability; and

“writing” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; the term includes a photocopy, facsimile copy and electronic mail.

Meaning of “possession” in certain cases

3.—(1) For the purposes of this Act, a person takes possession of an investment property if—

- (a) in the case of an investment property that is evidenced by a security certificate, the person takes physical possession of that certificate;

- (b) in the case of an investment property that is traded or settled through a clearing house or securities depository, the clearing house or securities depository, as the case may be, records the interest of the person in the investment property;
 - (c) in the case of an investment property that is not evidenced by a security certificate and that is not traded or settled through a clearing house or securities depository, the records maintained by the issuer, or on behalf of the issuer, record the interest of the person in the investment property; or
 - (d) in the case of an investment property that is held by a nominee, the records of the nominee record the interest of the person in the investment property.
- (2) For the purposes of this Act, a person takes possession of an instrument if—
- (a) the person takes physical possession of the instrument; or
 - (b) in the case of an instrument that is traded or settled through a clearing house or securities depository, the clearing house or securities depository, as the case may be, records the interest of the person in the instrument.
- (3) For the purposes of this Act, a secured party is not in possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor’s agent.

Meaning of “knowledge”

- 4.—(1) For the purposes of this Act—
- (a) a natural person knows or has knowledge of a fact in relation to a particular transaction when that person has actual knowledge of the fact or receives a notice stating the fact;
 - (b) an organisation knows or has knowledge of a fact in relation to a particular transaction when—
 - (i) the natural person within the organisation with responsibility for matters to which the transaction relates has actual knowledge of the fact; or
 - (ii) the organisation receives a notice stating the fact; or
 - (iii) the fact is communicated to the organisation in such a way that it would have been brought to the attention of the natural person with responsibility for matters to which the transaction relates if the organisation had exercised reasonable care;
 - (c) a Government department knows or has knowledge of a fact in relation to a particular transaction when that fact has been brought to the attention of the permanent secretary responsible for the Government department with responsibility for the matters to which the fact relates, under circumstances in which a reasonable person would take cognisance of it.

Description of collateral in a security agreement or notice

5.—(1) A description of collateral in a security agreement or notice is sufficient, whether it is specific or general, if it—

- (a) describes collateral by item or kind in a manner that enables the collateral to be identified;
- (b) consists of a statement that a security interest is taken in all of the debtor's present and after-acquired property; or
- (c) consists of a statement that a security interest is taken in all of the debtor's present and after-acquired property except for specified items or kinds of personal property.

(2) A collateral description may provide the serial number of a serial numbered vehicle in a field prescribed by the Registrar.

(3) A notice may provide a reasonable description of the location of the relevant real property if the notice covers fixtures, timber to be cut, or as-extracted collateral.

(4) To be sufficient, a description of consumer goods requires a specific description.

Classification of goods

6. Unless otherwise provided in this Act, the determination of whether goods are consumer goods, inventory or equipment is to be made as of the time when the security interest in the goods attaches.

Proceeds traceable

7. Proceeds are traceable whether or not there is a fiduciary relationship between the person who has a security interest in the proceeds and the person who has rights in or has dealt with the proceeds.

PART 2—APPLICATION OF THE ACT

Transactions subject to this Act

8.—(1) Subject to subsection (4), this Act applies—

- (a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral;
- (b) without limiting the generality of paragraph (a), to any transaction nominally called a chattel mortgage, hire-purchase, conditional sale, floating charge, fixed charge, pledge, trust indenture, trust receipt, debenture secured by collateral, and the like, or to an assignment, consignment, lease, trust or transfer of chattel paper that secures payment or performance of an obligation; and
- (c) without limiting the generality of paragraph (a), to a security interest granted by a person to a financial institution in a deposit account maintained by the financial institution.

(2) The retention of title by a seller of goods has no effect other than the taking of a security interest in the goods.

(3) Except as provided in section 88, this Act applies—

- (a) to a transfer of an account receivable or chattel paper, to a lease for a term of more than one year and to a commercial consignment that does not secure payment or performance of an obligation; and
- (b) to the interest of an execution creditor.

(4) 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.

Transactions not subject to this Act

9.—(1) Except as otherwise provided in this Act, this Act does not apply to—

- (a) the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services, other than fees for professional services;
- (b) a transfer of an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract;
- (c) the creation or transfer of an interest in real property including a lease of real property, including a transfer of rental payment payable under a lease for land unless the right to payment is evidenced by an investment property, but this Act does apply to an interest in crops, fixtures, timber to be cut, or as-extracted collateral;
- (d) a sale of accounts receivable or chattel paper as part of a sale of a business out of which they arose, unless the seller remains in apparent control of the business after the sale;
- (e) a transfer of accounts receivable that is made solely to facilitate the collection of accounts receivable for the transferor;
- (f) an assignment for the general benefit of creditors;
- (g) a transfer of an interest in a superannuation fund;
- (h) the creation or transfer of an interest in a tenement governed by the Mining Act 1965;
- (i) the creation or transfer of an interest in a licence governed by the Petroleum (Exploration and Exploitation) Act 1978;
- (j) a transfer, assignment, mortgage, or assignment of a mortgage of a ship that is subject to registration under the Maritime Transport Act 2013 or any other written law of Fiji;

- (k) a transfer, assignment, mortgage, or assignment of a mortgage of an aircraft that is subject to mandatory registration under any other written law of Fiji in order to secure a charge over such aircraft.

(2) The application of this Act to a security interest in an intangible is not affected by the fact that the intangible is secured by a transaction or interest to which this Act does not apply.

Act to bind the State

10. This Act binds the State.

PART 3—SECURITY AGREEMENTS, ATTACHMENT OF SECURITY INTERESTS AND SECURED OBLIGATIONS

Effectiveness of security agreement, security interest and stamp duty

11.—(1) Except as otherwise provided in this or any other Act, a security agreement is effective—

- (a) according to its terms;
- (b) against purchasers of the collateral; and
- (c) against execution creditors.

(2) A security interest is not invalid or fraudulent against creditors and other third parties because—

- (a) the debtor has the right or ability—
 - (i) to use, commingle, or dispose of all or part of the collateral, including returned or repossessed goods;
 - (ii) to collect, compromise, enforce, or otherwise deal with collateral;
 - (iii) to accept the return of collateral or make repossessions; or
 - (iv) to use, commingle, or dispose of proceeds; or
- (b) the secured party fails to require the debtor to account for proceeds or replace collateral.

(3) A security interest may not be taken in the consumer goods of a debtor except for a purchase money security interest in the consumer goods.

(4) The provisions of the Stamp Duties Act 1920 pertaining to the payment of stamp duty applies to security agreements under this Act, and the procedure to ensure stamp duty is paid is set out in regulations made under this Act.

Attachment of security interest to collateral and proceeds

12.—(1) Subject to subsection (5), a security interest attaches to collateral and is enforceable against the debtor and third parties as provided in this Act, when—

- (a) value is given by the secured party;

- (b) the debtor has rights in the collateral; and
- (c) one of the following conditions is met—
 - (i) the debtor has signed a security agreement that provides a description of the collateral;
 - (ii) the collateral is in the possession of the secured party and is of a type that may be perfected by possession; or
 - (iii) the collateral is in the control of the secured party and is of a type that may be perfected by control.

(2) For the purposes of subsection (1)(b) and without limiting other rights that the debtor may have in the collateral, a debtor has rights in goods that are leased to the debtor under a lease for a term of more than one year, consigned to the debtor under a commercial consignment, or sold to the debtor under a conditional sale agreement (including an agreement to sell subject to retention of title) no later than when the debtor obtains possession of the goods.

(3) For the purposes of subsection (1)(b), a debtor has rights in timber to be cut when the timber is cut, and in as-extracted collateral at the time that the collateral subject to the security interest is extracted.

(4) Unless otherwise agreed by the debtor and secured party—

- (a) the attachment of a security interest in collateral gives the secured party the right to proceeds of the collateral, even if the security agreement is silent about proceeds;
- (b) the attachment of a security interest in collateral is also attachment of a security interest in a supporting obligation for the collateral; and
- (c) the attachment of a security interest in a right to payment or performance secured by a security interest in collateral is also attachment of a security interest in the collateral.

(5) Subsection (1) does not apply if the parties to a security agreement have agreed that a security interest attaches at a later time, in which case the security interest attaches at the time specified in the security agreement.

Attachment of obligation to after-acquired property

13.—(1) Where a security agreement provides for a security interest in after-acquired property, the security interest attaches without specific appropriation by the debtor unless the after-acquired property are consumer goods.

(2) Where the after-acquired property is consumer goods, a written confirmation must be made by the debtor personally or by the debtor's agent for the consumer goods to be after-acquired property.

Future advances in a security agreement

14. A security agreement may provide for future advances, and a security interest has the same priority in respect of all advances, including future advances.

PART 4—RIGHTS, DUTIES AND OBLIGATIONS OF THE DEBTOR AND THE SECURED PARTY

Secured party's duty to preserve collateral

15.—(1) A secured party must take reasonable care in the custody and preservation of collateral in the possession of the secured party.

(2) Unless the parties agree otherwise, in the case of an instrument or chattel paper, reasonable care includes taking necessary steps to preserve rights against other persons.

(3) Unless the parties agree otherwise, where collateral is in the secured party's possession—

- (a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral, are chargeable to the debtor and are secured by the collateral; and
- (b) the risk of loss or damage, except where caused by the negligence of the secured party, is on the debtor to the extent of any deficiency in any insurance coverage.

(4) Unless the parties agree otherwise, the secured party—

- (a) may hold as additional security any increase or profits received from the collateral;
- (b) must either apply money or funds received from the collateral to reduce the secured obligation or remit such money or funds to the debtor; and
- (c) must keep the collateral identifiable, but fungible collateral may be commingled.

(5) Subject to subsection (1), a secured party may use the collateral—

- (a) in the manner and to the extent provided in the security agreement;
- (b) for the purpose of preserving the collateral or its value; or
- (c) under an order of the court.

Investment property in control of secured party

16.—(1) Unless otherwise agreed by the parties and notwithstanding section 15, a secured party having control of investment property as collateral—

- (a) may hold as additional security any proceeds received from the collateral; and

- (b) must either apply money or funds received from the collateral to reduce the secured obligation or remit such money or funds to the debtor.

(2) Notwithstanding subsection (1) and section 17, a secured party that has control of investment property as collateral may sell, transfer, use or otherwise deal with the collateral in the manner and to the extent provided in the security agreement.

(3) Within 14 days after receiving a demand in the form of a signed writing by the debtor, a secured party that has control of investment property must send to an interested intermediary a signed writing that releases the intermediary from any further obligation to comply with orders or directions originated by the secured party.

(4) Subsection (3) applies only if—

- (a) there is no outstanding secured obligation; and
- (b) the secured party is not committed to make advances, incur obligations, or otherwise give value.

Duties of secured party in control of deposit account

17.—(1) This section applies only if—

- (a) there is no outstanding secured obligation; and
- (b) the secured party is not committed to make advances, incur obligations, or otherwise give value.

(2) Within 14 days after receiving a demand in the form of a signed writing by the debtor, a secured party that has control of a deposit account other than a secured party that is the financial institution with which a deposit account is maintained must send to the financial institution with which the deposit account is maintained a signed writing that releases the financial institution from any further obligation to comply with instructions originated by the secured party.

(3) Within 14 days after receiving a demand in the form of a signed writing by the debtor, a secured party that has control of a deposit account and that is the financial institution with which a deposit account is maintained must—

- (a) pay the debtor the balance on deposit in the deposit account; or
- (b) transfer the balance on deposit into a deposit account in the debtor's name.

Duties of secured party if account debtor has been notified of assignment of payments

18.—(1) Except as otherwise provided in subsection (3), this section applies if—

- (a) there is no outstanding secured obligation; and
- (b) the secured party is not committed to make advances, incur obligations or otherwise give value.

(2) Within 14 days after receiving a demand in the form of a signed writing by the debtor, a secured party must send to an account debtor that has received notification of an

assignment to the secured party (as assignee) a signed writing that releases the account debtor from any further obligation to the secured party.

(3) This section does not apply to a sale of an account receivable or chattel paper.

Debtor's request for accounting

19.—(1) A debtor may request—

- (a) an accounting of the unpaid obligations secured by collateral;
- (b) that a secured party approve or correct a list of what the debtor believes to be the collateral securing an obligation; or
- (c) that a secured party approve or correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date.

(2) A secured party must comply with a request under subsection (1) within 14 days after receipt.

Acceleration of payment or performance

20.—(1) A security agreement may provide that the secured party can accelerate payment or performance by the debtor when—

- (a) the debtor is in default;
- (b) the secured party reasonably believes that the collateral is at risk; or
- (c) the secured party reasonably believes that payment or other performance is at risk.

(2) In this section the term “at risk” means that the secured party has commercially reasonable grounds to believe that—

- (a) the collateral has been or will be destroyed, damaged, endangered, disassembled, removed or concealed contrary to the provisions of the security agreement; or
- (b) the debtor is or will be unable to pay or perform the debtor's obligations under the security agreement,

provided, the burden of proving the existence of these grounds is on the secured party.

PART 5—PERFECTION OF SECURITY INTERESTS

Perfection of a security interest

21. A security interest is perfected when it has attached and a method of perfection authorised under this Act has been completed, regardless of the order of occurrence.

Perfection by registration of a notice

22. Subject to section 21, registration of a notice perfects a security interest in collateral other than money, except that registration of a notice perfects a security interest in money that is proceeds.

Perfection by taking possession of collateral

23.—(1) Subject to section 21, possession of the collateral by the secured party, or by another person on the secured party’s behalf, perfects a security interest in—

- (a) chattel paper;
- (b) goods;
- (c) an instrument;
- (d) a document of title; and
- (e) money,

except where possession is a result of seizure or repossession.

(2) For the purposes of subsection (1), a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor’s agent.

Perfection by control of deposit accounts and investment property

24.—(1) Subject to section 21, a security interest in a deposit account or in investment property may be perfected by control.

(2) A security interest in investment property is perfected by control from the time the secured party obtains control and remains perfected by control until—

- (a) the secured party does not have control; and
- (b) one of the following occurs—
 - (i) if the collateral is a security evidenced by a certificate, the debtor has or acquires possession of the certificate;
 - (ii) if the collateral is an uncertificated security, the issuer of the security has registered or registers the debtor as the registered owner; or
 - (iii) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

Continuity of perfection

25.—(1) A security interest is continuously perfected for the purposes of this Act, if—

- (a) the security interest is perfected under this Act;
- (b) the security interest is subsequently perfected in another way under this Act; and
- (c) there is no intervening period during which the security interest is unperfected.

(2) A transferee of a security interest has the same priority with respect to perfection of the security interest as the transferor had at the time of the transfer.

Temporary perfection

26.—(1) A security interest perfected by possession remains perfected, notwithstanding section 25, for 7 days after the collateral comes under the control of the debtor, where the collateral is—

- (a) an instrument or a security evidenced by a certificate that a secured party delivers to the debtor for the purpose of ultimate sale or exchange, presentation, collection, renewal, or registration of a transfer; or
- (b) a document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of sale, exchange, loading, unloading, storing, shipping manufacturing, processing, packaging, or otherwise dealing with the goods in preparation for their sale or exchange.

(2) After the expiration of the 7 day period, the security interest is subject to the provisions of this Act relating to the perfection of a security interest.

Perfection of security interest in goods held by a bailee

27.—(1) Subject to section 23, a security interest in goods in the possession of a bailee is perfected by—

- (a) the issuance of a document of title by the bailee in the name of the secured party;
- (b) the perfection of a security interest in a negotiable document of title to the goods where the bailee has issued one;
- (c) a possession on behalf of the secured party under section 23; or
- (d) the registration of a notice relating to the goods.

(2) The issuance of a negotiable document of title covering goods does not preclude any other security interest in the goods from arising during the period that the negotiable document of title is outstanding.

(3) A perfected security interest in a negotiable document of title covering goods takes priority over a security interest in the goods otherwise perfected after the goods become covered by the negotiable document of title.

Perfection of security interest in proceeds

28.—(1) Except as otherwise provided in this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest—

- (a) continues in the collateral unless the secured party expressly or impliedly authorises the dealing; and
- (b) extends to the proceeds.

(2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected by registration of a notice that—

- (a) contains a description of the proceeds that would be sufficient to perfect a security interest in the original collateral of the same kind;
- (b) covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral; or
- (c) covers the original collateral, if the proceeds consist of money, cheques or deposit accounts.

(3) A security interest in proceeds is temporarily perfected until the expiration of 14 days after the security interest in the original collateral attached to the proceeds, if—

- (a) the security interest in the original collateral is perfected; and
- (b) the security interest in the proceeds is not continuously perfected under subsection (2).

Perfection of security interest in goods returned or repossessed

29.—(1) Where a debtor sells or leases goods that are subject to a security interest under circumstances in which the buyer or lessee takes the goods free of the security interest, the security interest reattaches to the goods if—

- (a) the goods are returned to, seized or repossessed by the debtor or by a transferee of chattel paper created by the sale or lease; and
- (b) the obligation secured remains unpaid or unperformed.

(2) Where a security interest reattaches under subsection (1), the perfection of the security interest and the time of registration or perfection are determined as if the goods had not been sold or leased, if—

- (a) the security interest was perfected by registration at the time of the sale or lease; and
- (b) the registration is effective at the time of the return, seizure or repossession.

(3) A security interest in goods given by a buyer or lessee of the goods under subsection (1) that attaches while the goods are in the possession of the buyer, lessee or debtor and that is perfected when the goods are returned, seized or repossessed has priority over a security interest in the goods arising under this section.

PART 6—PRIORITY OF SECURITY INTERESTS AND RIGHTS OF THIRD PARTIES

Division 1—General Priority Rules

General priority rules

30.—(1) If this Act provides no other way of determining priority between security interests in the same collateral—

- (a) a perfected security interest has priority over an unperfected security interest in the same collateral;
- (b) priority between perfected security interests in the same collateral (where perfection has been continuous) is to be determined by the order of whichever of the following first occurs in relation to a particular security interest—
 - (i) the registration of a notice;
 - (ii) the secured party, or another person on the secured party’s behalf, taking possession of the collateral (except where possession is a result of seizure or repossession);
 - (iii) the temporary perfection of the security interest in accordance with this Act;
- (c) priority between unperfected security interests in the same collateral is to be determined by the order of attachment of the security interests.

(2) For the purpose of this section, a continuously perfected security interest is to be treated at all times as perfected by the method by which it was originally perfected.

Time of priority of security interests in proceeds

31. Subject to section 28 and for the purposes of section 30, the time of registration or perfection of a security interest in original collateral is also the time of registration or perfection of the security interest in its proceeds.

Priority of an execution creditor

32. A security interest in collateral is subordinate to the interest of an execution creditor if the security interest is not perfected at the time that a notice of the interest of the execution creditor is registered.

Priority in future advances

33.—(1) Subject to subsection (3), the time of priority that a security interest has under section 30 applies to all advances, including future advances.

(2) Where a debtor transfers rights in collateral that, at the time of the transfer, is subject to a perfected security interest, that security interest has priority over any other security interest granted by the debtor before the transfer.

(3) A perfected security interest has priority over the interests of an execution creditor only to the extent of advances made—

- (a) before the secured party acquired knowledge of the interest of the execution creditor; or
- (b) before a notice of the interest of the execution creditor is registered.

Agreement to subordinate priority

34.—(1) A secured party may, in a security agreement or otherwise, subordinate the secured party's security interest to any other interest.

(2) An agreement to subordinate a security interest is effective according to its terms between the parties and may be enforced by a third party if the third party is the person, or one of a class of persons, for whose benefit the agreement is intended.

(3) A security interest is not created only by an agreement or undertaking to postpone or subordinate the following—

- (a) the right of a person to performance of all or any part of an obligation to the right of another person to the performance of all or any part of another obligation of the same debtor; or
- (b) all or any part of the rights of a secured party under a security agreement to all or any part of the rights of another secured party under another security agreement with the same debtor.

Division 2—Priority of Purchase Money Security Interests

Meaning of “possession” in this Division

35. For the purposes of this Division only, where goods are shipped by a common carrier to a debtor or to a person designated by the debtor, the debtor does not obtain possession of the goods until the debtor or a third party at the request of the debtor obtains actual possession of the goods or a document of title to the goods, whichever is earlier.

Status of purchase money security interest

36. In a transaction other than a consumer goods transaction, a purchase money security interest remains a purchase money security interest even if—

- (a) the purchase money collateral also secures an obligation that is not a purchase money obligation;
- (b) collateral that is not purchase money collateral also secures the purchase money obligation; or
- (c) the purchase money obligation has been renewed, refinanced, consolidated or restructured.

General rule on priority of purchase money security interests

37. A purchase money security interest in collateral, other than inventory, livestock or intangibles, has priority over a non-purchase money security interest in the same collateral

given by the same debtor if the purchase money security interest in the collateral or its proceeds is perfected not later than 7 days after the day on which the debtor, or the debtor's agent, obtained possession of the collateral, whichever is earlier.

Priority of purchase money security interests in inventory, livestock and intangibles

38.—(1) A purchase money security interest in inventory or livestock and their proceeds has priority over a non-purchase money security interest in the same collateral given by the same debtor if the purchase money security interest in the inventory or livestock and their proceeds is perfected at the time the debtor, or the debtor's agent, obtains possession of the collateral.

(2) A purchase money security interest in an intangible or its proceeds has priority over a non-purchase money security interest in the same collateral given by the same debtor if the purchase money security interest in the intangible or its proceeds is perfected not later than 7 days after the day on which the security interest in the intangible attached.

(3) The security interest of a consignor in goods that are the subject of a commercial consignment is a purchase money security interest in inventory.

Conflicts involving purchase money security interests

39.—(1) A purchase money security interest in goods or their proceeds taken by a seller, lessor, or consignor of the collateral, has priority over any other purchase money security interest in the same collateral given by the same debtor if the first mentioned purchase money security interest in the goods or their proceeds is perfect—

- (a) in the case of inventory or livestock, at the time the debtor, or the debtor's agent, obtained possession of the collateral, whichever is earlier; or
- (b) in the case of collateral, other than inventory or livestock, not later than 7 days after the day on which the debtor, or the debtor's agent, obtained possession of the collateral, whichever is earlier.

(2) Priority between purchase money security interests in the same goods or their proceeds that have not been granted to a seller, lessor or consignor, and that have been given by the same debtor are to be determined in accordance with section 30.

(3) A non-proceeds security interest in accounts receivable that is given for new value has priority over a purchase money security interest in the accounts receivable as proceeds of inventory if a notice relating to the non-proceeds security interest in the accounts receivable is registered before a notice relating to the purchase money security interest is registered.

(4) In this section, "non-proceeds security interest" means a security interest in original collateral.

Priority of purchase money security interests against execution creditors

40. Notwithstanding section 32, a purchase money security interest has priority over the interest of an execution creditor in—

- (a) collateral, other than an intangible, if the purchase money security interest is perfected not later than 7 days after the day on which the debtor, or the debtor’s agent, obtains possession of the collateral; or
- (b) an intangible, if the purchase money security interest is perfected not later than 7 days from the day on which the security interest attaches.

Division 3—Buyers and Other Transferees of Collateral

When transferee takes collateral free of a security interest

41.—(1) A buyer or lessee of collateral who acquires the collateral for value takes the collateral free of an unperfected security interest, unless the unperfected security interest was created or provided for by a transaction to which the buyer or lessee is a party.

(2) Notwithstanding section 26 of the Sale of Goods Act 1978, a buyer of goods in the ordinary course of business, and a lessee of goods in the ordinary course of business, takes the goods free of any perfected or unperfected security interest that is given by the seller or lessor or that arises under section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

(3) A buyer or lessee of a serial numbered vehicle takes it free of a security interest perfected by registration if the buyer or lessee does not know of the security interest and if the serial number was not described or was incorrectly described, in a field prescribed by the Registrar for the collection of serial numbers, on the notice of security interest.

(4) A buyer of goods takes free of a perfected security interest in the goods if the secured party consents to the sale by the debtor.

(5) A person who receives cash for value takes free of a perfected security interest in the cash.

(6) An execution creditor who takes control of collateral or causes collateral to be seized before a security interest is perfected takes free of the security interest.

(7) A court or a liquidator of an insolvent company that takes physical custody or control of assets before a security interest is perfected in them takes free of the security interest.

Buyer or lessee of consumer goods

42. A buyer or lessee of goods that are acquired as consumer goods takes the goods free of a perfected or unperfected security interest if the buyer or lessee—

- (a) gave value for the interest acquired; and
- (b) bought or leased the goods without knowledge of the security interest.

Buyer or lessee of goods subject to temporarily perfected security interests

43. A buyer or lessee of goods takes the goods free of a security interest that is temporarily perfected under section 26 if the buyer or lessee—

- (a) gave value for the interest acquired; and
- (b) bought or leased the goods without knowledge of the security interest.

Buyer or lessee of minerals, petroleum and timber

44. A buyer or lessee in ordinary course of business of the seller or lessor takes the following goods free of an interest arising out of an encumbrance on real property—

- (a) minerals or petroleum at the minehead or wellhead, or upon extraction; and
- (b) timber, as the timber is cut.

Buyer, lessee or mortgagee of fixtures

45. A buyer, lessee or mortgagee of fixtures takes the fixtures free of a security interest perfected by registration under this Act if—

- (a) the buyer, lessee or mortgagee takes the fixtures without knowledge of the security interest; and
- (b) the notice describing the fixtures does not include a reasonable description of the location of the real property where the fixtures are located.

Priority of materials or services lien

46.—(1) A lien arising out of materials or services provided in respect of goods that are subject to a security interest in the same goods has priority over that security interest if—

- (a) the goods are in the possession of the person claiming the lien;
- (b) the materials or services relating to the lien were provided in the ordinary course of business;
- (c) the lien has not arisen under an Act that provides that the lien does not have the priority; and
- (d) the person who provided the materials or services did not, at the time the person provided those materials or services, know that the security agreement relating to the security interest contained a provision prohibiting the creation of a lien by the debtor, if any such provision exists.

(2) For the avoidance of doubt, a port management company that has a lien in relation to any dues, rates or charges payable in relation to any goods under section 19 of the Seaports Management Act 2004 has a security interest perfected by possession.

Rights of debtor in collateral may be transferred

47.—(1) In this section, “transfer” includes a sale, the creation of a security interest and a transfer under judgment enforcement proceedings.

(2) The rights of a debtor in collateral may be transferred consensually or by operation of law notwithstanding a provision in the security agreement that prohibits transfer or declares a transfer to be a default.

(3) Notwithstanding subsection (2), a transfer by the debtor does not prejudice the rights of the secured party under the security agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

Division 4—Persons to Whom Negotiable Collateral is Transferred

Where holder of money takes free of perfected security interest in money

48. A person other than the debtor who holds money that is proceeds has priority over a perfected security interest in the money if the holder—

- (a) acquired the money without knowledge that it is subject to a security interest; or
- (b) is a holder for value, whether or not the holder knew of the security interest at the time the holder acquired the money.

Priority of creditor who receives funds subject to a security interest

49.—(1) In this section, “debtor-initiated payment” means a payment made by the debtor through the use of—

- (a) an instrument;
- (b) an electronic funds transfer; or
- (c) a debit, a transfer order, an authorisation or a similar written payment mechanism executed by the debtor when the payment is made.

(2) A creditor who receives payment of a debt owing by a debtor through a debtor-initiated payment has priority, whether or not the creditor has knowledge of the security interest at the time of the payment, over a security interest in—

- (a) the funds paid;
- (b) the intangible that was the source of the payment; and
- (c) any instrument used to effect the payment.

Priority of purchasers of instruments or securities

50.—(1) A purchaser of an instrument or a security evidenced by a certificate has priority over any security interest in the instrument or security perfected by registration or temporarily perfected if the purchaser—

- (a) gave value for the instrument or security;
- (b) acquired the instrument or security without knowledge that it is subject to a security interest; and
- (c) took possession of the instrument or security.

(2) For the purposes of this section, a purchaser of an instrument or a security evidenced by a certificate who acquired it in the ordinary course of the transferor’s business has knowledge only if the purchaser acquired the interest with knowledge that the transaction violates the terms of the security agreement that creates or provides for the security interest.

(3) For the purposes of this section, a purchaser includes a person who acquires an instrument or a security evidenced by a certificate by compulsory acquisition or scheme of arrangement.

Priority of holders of negotiable documents of title

51.—(1) The interest of a holder of a negotiable document of title has priority over a security interest in the document of title that is perfected by registration or temporarily perfected if the holder—

- (a) gave value for the document of title; and
- (b) acquired the document of title without knowledge that it is subject to a security interest.

(2) For the purposes of this section, a holder of a negotiable document of title who acquired it under a transaction entered into in the ordinary course of the transferor's business has knowledge only if the purchaser acquired the interest with knowledge that the transaction violates the terms of the security agreement that creates or provides for the security interest.

Priority of purchasers of chattel paper

52. The interest of a purchaser of chattel paper who takes possession of the chattel paper in the ordinary course of the purchaser's business and for new value has priority over any security interest in the chattel paper that—

- (a) was perfected by registration, if the purchaser took possession of the chattel paper without knowledge of the security interest; or
- (b) has attached to proceeds of inventory, whether or not the purchaser took possession of the chattel paper without knowledge of the security interest.

Division 5—Assignments and Other Transfers of Accounts

Interpretation for this Division

53. In this Division, “assignee” includes a secured party.

Notice to account debtor

54.—(1) Notice to an account debtor is not required as a condition of assignment, transfer, enforcement, attachment or perfection of the security interest.

(2) Where collateral that is an intangible or chattel paper is assigned, the account debtor may make payments under the contract to the assignor—

- (a) before the account debtor receives a notice that—
 - (i) states that the amount payable or to become payable under the contract has been assigned and that payment is to be made to the assignee; and
 - (ii) identifies the contract under which the amount payable is to become payable; or

(b) after—

- (i) the account debtor requests the assignee to furnish proof of the assignment; and
- (ii) the assignee fails to furnish proof within 14 days after the day of the request.

(3) Payment by an account debtor to an assignee under a notice under subsection (2) (a) discharges the obligation of the account debtor to the extent of the payment.

Account debtor's right to assert defences and claims

55. Unless the account debtor on an intangible or chattel paper has made an enforceable agreement not to assert defences to claims arising out of a contract, the rights of an assignee of the intangible or chattel paper are subject to—

- (a) the terms of the contract between the account debtor and the assignor and any defence or claim arising from the contract or a closely connected contract; and
- (b) any other defence or claim of the account debtor against the assignor that accrues before the account debtor acquires knowledge of the assignment.

Modification or substituted contracts effective against assignee

56.—(1) A modification of or substitution for assigned contract rights made in good faith and in accordance with reasonable commercial standards and without material adverse effect on the assignee's rights under the contract is effective against the assignee.

(2) Subsection (1) applies—

- (a) to the extent that an assigned right to payment arising out of the contract has not been earned by performance; and
- (b) notwithstanding that there has been notice of the assignment to the account debtor.

(3) Where a contract has been substituted or modified in the manner described in subsection (1), the assignee obtains rights that correspond to the rights of the assignor under the substituted or modified contract.

(4) Nothing in subsections (1) to (3) affects the validity of a term in an assignment agreement that provides that a modification or substitution is a breach of contract by the assignor.

Enforceability of non-assignment clauses

57. A term in a contract between an assignor and an account debtor, or a debtor on chattel paper, that prohibits or restricts assignment of the whole of the account receivable or chattel paper for money due or to become due—

- (a) is binding on the assignor, but only to the extent of making the assignor liable in damages for breach of contract; and

(b) is unenforceable against third parties, including the assignee.

Division 6—Priority in Deposit Accounts and Investment Property

Meaning of “control” of a deposit account

58. A secured party has control of a deposit account if—

- (a) the secured party is the financial institution with which the deposit account is maintained, even if the debtor retains the right to direct the disposition of funds from the deposit account;
- (b) the debtor, secured party, and financial institution have agreed in a signed writing that the financial institution will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or
- (c) the secured party becomes the financial institution’s customer with respect to the deposit account.

Priority of security interests in deposit accounts perfected by control

59.—(1) A security interest held by a secured party having control of a deposit account has priority over a conflicting security interest held by a secured party that does not have control.

(2) Except as otherwise provided in subsections (3) and (4), security interests perfected by control rank according to priority in time of obtaining control.

(3) Except as otherwise provided in subsection (4), a security interest held by the financial institution with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.

(4) A security interest perfected by control under section 58(b) has priority over a security interest held by the financial institution with which the deposit account is maintained.

Priority of security interests in investment property

60.—(1) A security interest of a secured party having control of investment property has priority over a security interest of a secured party that does not have control of the investment property.

(2) A security interest in a security evidenced by a certificate that is perfected by taking delivery and not by control has priority over a conflicting security interest perfected by a method other than control.

(3) Except as otherwise provided in subsections (4) and (5), conflicting security interests of secured parties each of which has control rank in priority according to time of obtaining control.

(4) A security interest held by a securities intermediary in a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party.

(5) A security interest held by a futures intermediary in a futures contract or a futures account maintained with the futures intermediary has priority over a conflicting security interest held by another secured party.

(6) Conflicting security interests granted by a broker, securities intermediary, or futures intermediary that are perfected without control rank equally.

(7) In all other cases, priority among conflicting security interests in investment property is governed by the general priority rules under this Act.

Division 7—Priority in Special Classes of Tangible Collateral

Priority of security interests in fixtures

61.—(1) Subject to subsection (2), a security interest under this Act may be created in goods that are fixtures or may continue in goods that become fixtures.

(2) A security interest does not exist under this Act in ordinary building materials incorporated into an improvement on real property.

(3) A perfected security interest in fixtures has priority over a claim to the goods made by a person with an interest in the real property if, before the goods become fixtures, the security interest is perfected by any method permitted by this Act and the fixtures are readily removable—

- (a) factory or office machines;
- (b) equipment that is not primarily used or leased for use in the operation of the real property; or
- (c) replacements of domestic appliances that are consumer goods.

(4) Except as provided in this section with respect to a construction mortgage, a purchase money security interest in goods that attaches before or at the time when the goods become fixtures has priority with respect to the goods over a claim to the goods made by a person with an interest in the real property.

(5) A security interest in goods that attaches after the goods become fixtures is subordinate to the interest of a person who—

- (a) has an interest in the real property at the time when the goods become fixtures and who—
 - (i) has not consented to the security interest;
 - (ii) has not disclaimed an interest in the goods or fixtures;
 - (iii) has not entered into an agreement under which a person is entitled to remove the goods; or
 - (iv) is not otherwise precluded from preventing the debtor from removing the goods; or

(b) acquires an interest in the real property after the goods become fixtures, if the interest is acquired without fraud and before a notice of the security interest in the goods is registered.

(6) A mortgage is a construction mortgage—

(a) to the extent that it secures an obligation incurred for the construction of an improvement on real property, including the acquisition cost of the real property, if a registered mortgage so indicates; and

(b) to the extent that the mortgage is given to refinance a mortgage described in paragraph (a).

(7) Notwithstanding subsection (3), a security interest in fixtures is subordinate to a construction mortgage if the mortgage is registered before the goods become fixtures and the goods become fixtures before the completion of the construction.

(8) Nothing in this Act—

(a) prevents the creation of a mortgage in fixtures under real property law; or

(b) requires a notice of a mortgage in fixtures created under real property law to be registered under this Act to perfect or enforce the right of the mortgagee.

Secured party's right to remove fixtures

62.—(1) A secured party who, under this Act, has the right to remove fixtures from real property must exercise this right of removal in a manner that causes no greater damage or injury to the real property and to other property situated on it or that puts the occupier of the real property to greater inconvenience than is necessarily incidental to the removal of the goods.

(2) A person, other than the debtor, who has an interest in the real property at the time when the fixtures subject to the security interest are affixed to the real property is entitled to reimbursement for any damages to the interest of the person in the real property caused during the removal of the fixtures, but is not entitled to reimbursement for reduction in the value of the real property caused by the absence of the fixtures removed or by the necessity or replacement.

(3) The person entitled to reimbursement under subsection (2) may refuse permission to remove the goods until the secured party has given adequate security for reimbursement.

(4) The secured party who, under this Act, has the right to remove fixtures from the real property must give a notice of the secured party's intention to remove the fixtures to each person—

(a) who is known by the secured party to have an interest in the real property; or

(b) who has registered a notice using the name of the debtor and mentioning the fixtures in that notice.

- (5) The notice under subsection (4) is to contain—
- (a) the name and address of the secured party;
 - (b) a description of the fixtures to be removed;
 - (c) the amount required to satisfy the obligations secured by the security interest;
 - (d) the estimated market value of the fixtures;
 - (e) a description of real property upon which the fixtures are located; and
 - (f) a statement of intention to remove the fixtures on or before a specified day that is not less than 10 days after the notice is given.

(6) A notice under subsection (4) is to be given at least 10 days before removal of the fixture and must be given by a method of delivery listed in section 104.

Application to court: fixtures

63. The secured party may apply to a court for one or more of the following—

- (a) an order determining the person entitled to reimbursement under section 62;
- (b) an order determining the amount and kind of adequate security to be provided by the secured party;
- (c) an order prescribing the depository for the security;
- (d) an order enforcing the right to gain access to the land to deal with the fixture;
- (e) an order authorising the removal of the goods without the provision of adequate security for reimbursement; and
- (f) resolution of any other matters concerning the right of removal of fixtures.

Retention of fixtures by a person with an interest in related land

64. A person, other than the debtor, who has an interest in the real property that is subordinate to a security interest as provided in this Act may, before the fixtures have been removed from the real property by the secured party, retain the fixtures on payment to the secured party of the lesser of—

- (a) the amount secured by the security interest that has priority over that interest; or
- (b) the market value of the fixtures if the fixtures were removed from the real property.

Priority of security interests in crops

65.—(1) A security interest in crops is a security interest in the crops to be grown, while growing and afterwards when cut or separated from the soil.

(2) For the purpose of determining whether a security interest in crops cut or separated from the soil exists, it does not matter whether the crops are stored on the real property where the crops were grown or on any other land or premises.

(3) A perfected security interest in crops is not extinguished or prejudicially affected by a subsequent sale, lease, mortgage, or other encumbrance of or upon the land on which the crops are growing.

(4) A perfected security interest in crops growing on real property has priority over a conflicting interest of an owner, mortgagee or other person with an interest in the real property if the debtor has a registered interest in or is in possession of the real property.

Priority of security interests in accessions

66.—(1) In this section—

- (a) “other goods” means goods to which an accession is installed or affixed;
- (b) “the whole” means an accession and the goods to which the accession is installed or affixed.

(2) A security interest in goods that become an accession continues in the accession.

(3) If a security interest is perfected when the goods become an accession the security interest remains perfected in the accession and has priority over a person with an interest in the other goods or the whole.

(4) The interest of any of the following persons has priority over a security interest in goods that is attached at the time when the goods become an accession—

- (a) a person who acquires for value an interest in the whole after the goods become an accession, but before the security interest in the accession is perfected;
- (b) a person with a perfected security interest in the whole who makes an advance under the security agreement relating to the security interest after the goods become an accession, but before the security interest in the accession is perfected, and only to the extent of the advance;
- (c) a person with a perfected security interest in the whole who acquires the right to retain the whole in satisfaction of the obligation secured after the goods become an accession, but before the security interest in the accession is perfected.

(5) A security interest in goods that attaches after the goods become an accession is subordinate to the interest of a person who acquires an interest in the other goods or the whole after the goods become an accession but before the security interest in the accession is perfected.

(6) A secured party who, pursuant to this Act, has the right to remove an accession must exercise this right of removal in a manner that—

- (a) causes no greater damage or injury to the whole or to the other goods; or
- (b) puts the person in possession of the whole to greater inconvenience,

than is necessarily incidental to the removal of the accession.

(7) A person, other than the debtor, who has an interest in the other goods at the time when the goods subject to the security interest become an accession, is entitled to reimbursement for any damages to the interest of the person in the whole that is caused during the removal of the accession, but is not entitled to reimbursement for reduction in the value of the whole that is caused by the absence of the accession or by the necessity of replacement.

(8) The person entitled to reimbursement pursuant to subsection (7) may refuse permission to remove the accession until the secured party has given adequate security for the reimbursement.

(9) The secured party may apply to a court for one or more of the following—

- (a) an order determining the person who is entitled to reimbursement pursuant to this section;
- (b) an order determining the amount and kind of adequate security to be provided by the secured party;
- (c) an order authorising the removal of the goods without the provision of adequate security for reimbursement.

(10) A person who has an interest in the whole that is subordinate to a security interest in an accession as provided in this section may, before the accession has been removed from the whole by the secured party, retain the accession on payment to the secured party of the lesser of—

- (a) the amount secured by the security interest entitled to priority; or
- (b) the market value of the accession if the accession were removed from the other goods.

(11) The secured party who has a right to remove the accession from the whole must give a notice of the secured party's intention to remove the accession to each person—

- (a) who is known by the secured party to have an interest in the whole; or
- (b) who has registered a notice using the name of the debtor and mentioning the other goods and including the serial number of the other goods if they are serial numbered vehicles.

(12) The notice under subsection (11) is to contain—

- (a) the name and address of the secured party;
- (b) a description of the goods to be removed;
- (c) the amount required to satisfy the obligations secured by the security interest;
- (d) the estimated market value of the accession;
- (e) a description of the other goods or the whole; and
- (f) a statement of intention to remove the accession unless an amount referred to in subsection (10) is paid on or before a specified day that is not less than 5 days after the notice is given.

(13) A notice under subsection (11) is to be given at least 10 days before removal of the accession and must be given by one of the methods listed in section 104.

Priority of security interests in commingled goods

67.—(1) A security interest may not be created in commingled goods, however, a security interest may attach to a product or mass that results when goods become commingled goods.

(2) A security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are some manufactured, processed, assembled, or commingled that their identity is lost in the product or mass.

(3) Perfection of a security interest in goods that subsequently become part of a product or mass is to be treated as perfection of the security interest in the product or mass without the need for registering a notice, and the priority of the security interest in the product or mass is measured from the time of perfection of the security interest in the collateral that became commingled.

(4) If more than one security interest attaches to the product or mass—

- (a) a perfected security interest continuing in the product of mass has priority over an unperfected security interest continuing in the same product or mass;
- (b) if more than one perfected security interest continues in the same product or mass, each perfected security interest is entitled to share in the product or mass according to the ratio that the obligation secured by the perfected security interest bears to the sum of the obligations secured by all perfected security interests in the same product or mass; and
- (c) if more than one unperfected security interest continues in the same product or mass, each unperfected security interest is entitled to share in the product or mass according to the ratio that the obligation secured by the unperfected security interest bears to the sum of the obligations secured by all unperfected security interests in the same product or mass; and

- (d) a perfected purchase money security interest in goods that continues in the product or mass has priority over—
 - (i) a non-purchase money security interest in the goods that continues in the product or mass; and
 - (ii) a non-purchase money security interest in the product or mass given by the same debtor.

Priority of security interests in certain vessels and aircraft

68. A security interest under this Act, whether or not it is perfected, is subordinate to a mortgage, charge, lien, or other interest registered—

- (a) with respect to a vessel under the Maritime Transport Act 2013; or
- (b) with respect to aircraft under any written law of Fiji that requires the registration of charges over aircraft in order to be effective,

without regard to the time of attachment or perfection of the security interest under this Act, or the time of registration of a notice of the security interest under this Act.

PART 7—REGISTRATION

Personal Property Securities Registry

69.—(1) A Personal Property Securities Registry is established to receive, index, store and retrieve notices by electronic means delivered by secured parties and execution creditors, and to collect authorised fees.

(2) No person has a claim against the Registry for errors in Registry records committed by a person who registers a notice, or for failure to provide registry services for reasons beyond the control of the Registry.

(3) The duties of the Registrar are administrative—

- (a) by registering a notice or refusing to register a notice, the Registrar does not determine the sufficiency, correctness, authenticity, or validity of the notice or any information contained in the notice; and
- (b) the registering of a notice does not create a security interest in collateral and does not provide evidence that a security interest in collateral exists.

(4) Information contained in a filed notice is a public record and any person may inspect notices in the Registry.

(5) The Registry is to be operated at all times unless the Registrar suspends the operation of the Registry, in whole or in part, for routine maintenance or if the Registrar considers that it is not practical to provide any service relating to the Registry.

Regulations

70. The Minister may make regulations prescribing matters that are required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act, including—

- (a) a secure method for registration or lodgement of notices, including—
 - (i) identification of the person who registers a notice;
 - (ii) identification of the persons named on a notice filed in the Registry; and
 - (iii) authorisation to amend, continue, or terminate a notice; and
- (b) the method of payment of fees;
- (c) a fee for registering a notice, not to exceed a reasonable estimate of the cost of maintaining the Registry, including a reasonable reserve;
- (d) a fee for issuing a certified search report, but there must be no fee for an uncertified search report;
- (e) the maximum charge, if any, for a request by a debtor under section 19;
- (f) the requirements for a security agreement;
- (g) appointing a person to serve as the Registrar; and
- (h) the duties or additional duties to be performed by the Registrar for the purposes of this Act, including the collection and dissemination of aggregated statistics related to the use of the Registry.

Initial notice

71.—(1) An initial notice is sufficient if it—

- (a) identifies the debtor and provides a physical address; and
- (b) identifies the secured party or an agent of the secured party and provides a physical address; and
- (c) describes the collateral covered by the notice.

(2) For the purpose of subsection (1)(c), a notice that covers fixtures, timber to be cut or as-extracted collateral must include a reasonable description of the location of the real property where the fixtures, timber to be cut or as-extracted collateral is located.

(3) For purposes of this section the term “a reasonable description of the location of the real property” means a physical address where available, and if no physical address 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.

(4) A debtor must authorise the filing of an initial notice by signing a security agreement or a separate agreement.

(5) A signature may be any tangible indication of the debtor's intent to enter the security agreement.

(6) Authorisation by the debtor need not be contained in the notice, need not be disclosed to the Registrar, and may be given after registration.

(7) By signing a security agreement, a debtor authorises the registering of an initial notice covering the collateral described in the security agreement, and proceeds of the collateral, whether or not the security agreement expressly covers proceeds.

Notice of the interest of an execution creditor

72.—(1) A notice of the interest of an execution creditor must include—

- (a) identification of the execution creditor;
- (b) identification of the person owing payment or performance to the execution creditor; and
- (c) a description of property against which the execution creditor claims or may claim a right in the same manner as provided in this Act for registering a notice of a security interest.

(2) A notice may be registered by the execution creditor or, upon request of the execution creditor, by the court on behalf of at the execution creditor—

- (a) with respect to the holder of a money judgment, at the time the money judgment is entered or at any time thereafter; or
- (b) in the case of a bankruptcy trustee or a liquidator, at the time of the filing of a petition under the laws of bankruptcy or insolvency or at any time thereafter.

(3) With respect to a charge in favour of a taxing authority for the State for outstanding taxes, a notice may be registered by the taxing authority for the State after the time a demand has been made upon the taxpayer and the full amount due has not been paid in accordance with the demand.

(4) For the purposes of filing amendments, continuations and terminations, an execution creditor has the same rights and responsibilities as a secured party.

Notice registered prior to security agreement or attachment

73. A notice may be registered before a security agreement is concluded and before a security interest attaches to collateral.

Notice may apply to multiple agreements

74. A notice may relate to one or more security agreements.

Name of the debtor

75.—(1) A notice sufficiently identifies the debtor when—

- (a) in the case of an individual who is a citizen of Fiji, the notice contains the debtor's taxpayer identification number;

- (b) in the case of an individual who is not a citizen of Fiji, the notice contains the name of the person as indicated on the individual's passport;
- (c) in the case of an entity established by the Constitution or other written law of Fiji, the notice contains the name of the debtor as provided by law that established the entity;
- (d) in the case of an entity organised or authorised to do business under the Companies Act 2015 or other Act in which documents of organisation are subject to registration in the companies registry, the company number and name of the entity as it appears on the certificate issued by the companies registry;
- (e) in the case of a distinct legal entity which is not registered under the Companies Act 2015 or other Act in which documents of organisation are subject to registration, the name of the entity as it appears on the document creating the entity; or
- (f) in the case of a foreign registered entity not authorised to do business under the laws of Fiji, the notice provides the name of the debtor as shown on the appropriate registry in the country where the foreign entity is organised.

(2) A notice that sufficiently identifies the debtor is not rendered insufficient or ineffective by the presence or absence of a trade name or other alias name of the debtor.

(3) A notice that provides only the debtor's trade name or other alias but does not comply with subsection (1) does not sufficiently identify the debtor.

(4) A notice may identify more than one debtor and the name of more than one secured party.

(5) The failure to indicate on a notice that a person is a representative of the secured party does not affect the sufficiency of a notice.

Notice is effective unless seriously misleading

76.—(1) The validity or the registration of a notice is not affected by any defect, irregularity, omission or error in the notice unless the defect, irregularity, omission or error is seriously misleading.

(2) A notice that insufficiently identifies the debtor is seriously misleading.

(3) Failure to include a description of any item or kind of collateral in a notice does not affect the validity of the registration in respect of the description of other collateral included in the notice.

(4) In order to establish that a defect, irregularity, omission, or error is seriously misleading, it is not necessary to prove that any person was actually misled by it.

Effect of change of circumstances

77.—(1) A registered notice remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest continues, even if the secured party knows of or consents to the disposition.

- (2) If a debtor changes its name so that the notice becomes seriously misleading,
- (a) the notice remains effective, without amendment, to perfect a security interest in collateral acquired by the debtor for 120 days after the change of name; and
 - (b) the notice is not effective to perfect a security interest in collateral acquired by the debtor more than 120 days after the change of name unless an amendment to the notice which renders the notice not seriously misleading is filed within 120 days after the name change.

(3) Except as provided in this section for a change of debtor name, a notice remains effective if, after the notice is registered, a change of circumstances renders the notice seriously misleading.

Duration of notice and effect of lapse

78.—(1) A registered notice is effective for a period measured in years that is designated by the person who registers the notice, and lapses at the end of the designated period unless, before the lapse, a continuation is registered.

(2) Upon lapse, a notice becomes ineffective and a security interest that was perfected by the notice becomes unperfected, unless the security interest is perfected by another means permitted under this Act.

(3) If the security interest becomes unperfected upon lapse, it is deemed never to have been perfected against a purchaser of the collateral for value.

Amendment of notice

79.—(1) An initial notice may be amended by one or more amendments.

(2) An amendment must—

- (a) identify the initial notice by its registration number;
- (b) identify each secured party on the notice who authorises the amendment;
- (c) indicate that it is an amendment to the notice; and
- (d) provide all of the information required of an initial notice, completely restating the notice in a manner that reflects the amended state of the notice.

(3) If an amendment adds collateral covered by a notice, or adds a debtor to a notice, it is effective if the debtor authorises the registration in a signed writing.

(4) For the purposes of subsection (3)—

- (a) by signing a security agreement that adds collateral, a debtor authorises the registration of an amendment covering the collateral described in the security agreement, and proceeds of the collateral, whether or not the security agreement expressly covers proceeds; and

(b) by signing a security agreement, a new debtor authorises the registering of an amendment that adds the name and address of the new debtor to the notice.

(5) An authorisation by the debtor under subsection (4)—

(a) need not be contained in the amendment; and

(b) need not be disclosed to the Registrar; and

(c) may be given after registration of the amendment.

(6) An amendment that adds a debtor or adds collateral is effective as to the added debtor or added collateral only from the date of the registration of the amendment.

(7) An amendment is ineffective if it purports to delete all secured parties and fails to provide the name of a new secured party, or purports to delete the names of all debtors and fails to provide the name of a new debtor not previously named on the notice.

(8) If there is more than one secured party on the notice—

(a) any secured party or all secured parties may authorise the registration of an amendment; and

(b) an amended notice is only effective as to each secured party who authorises it.

(9) The registration of an amendment does not extend the period of effectiveness of a notice.

Continuation of notice

80.—(1) The period of effectiveness of a notice may be continued by registering a continuation that—

(a) identifies the initial notice by its registration number; and

(b) identifies a secured party on the notice who authorises the continuation.

(2) A continuation may be registered only within 6 months before the date upon which the notice would otherwise lapse.

(3) Upon timely registration of a continuation, the effectiveness of the notice continues for a period of 5 years commencing on the day on which the notice would have become ineffective in the absence of the continuation.

(4) The effectiveness of a notice is continued only with respect to the secured party who authorised the registration of the continuation.

(5) Upon the expiration of the new 5 year period—

(a) the notice lapses with respect to the secured party unless, before the lapse, another continuation authorised by that secured party is registered; and

- (b) succeeding continuations may be registered in the same manner to continue the effectiveness of the notice.

Termination of notice

81.—(1) The effectiveness of a notice may be terminated by registering a termination that—

- (a) identifies the initial notice by its registration number;
- (b) identifies a secured party on the notice who authorises the termination; and
- (c) indicates that the notice is no longer effective with respect to the interest of the secured party who authorised the registration of the termination.

(2) Within 14 days after the secured party receives a written demand by the debtor, the secured party on a notice must register a termination if—

- (a) there is no outstanding secured obligation and no commitment to make an advance, incur an obligation, or otherwise give value;
- (b) the debtor did not authorise the registration of the initial notice; or
- (c) the notice covers accounts receivable or chattel paper that have been sold but as to which the account debtor or other person obligated has discharged its obligation.

(3) A termination terminates the effectiveness of a notice with respect to a secured party on the notice only if the termination is authorised in a signed writing by that secured party.

(4) Upon the registration of an effective termination, the notice to which the termination relates becomes ineffective with respect to the authorising secured party.

Effectiveness of notice

82. An initial notice, amendment, continuation or termination is effective at the time it is available to the public by means of a search of the records of the Registry as provided in this Act.

Registrar's refusal to register a notice

83.—(1) The Registrar may refuse to register a notice only because—

- (a) in the case of an initial notice, the notice does not identify a debtor;
- (b) in the case of an amendment, the amendment does not identify the name of a debtor, does not provide the registration number of the initial notice, or the amendment identifies an initial notice whose effectiveness has lapsed;
- (c) in the case of a continuation, the continuation does not provide the registration number of the initial notice, or was not submitted within the permitted 6-month time period;
- (d) in the case of a termination, the termination does not provide the registration number of the initial notice, or the termination relates to an initial notice that has lapsed with respect to each secured party on the notice; or

- (e) less than the full registration fee is tendered, or no other arrangement has been made for the payment of the fee.

(2) If the Registrar refuses to accept a notice for registration, it must promptly communicate the fact of and reason for its refusal to the person that presented the notice.

Effect of secured party's notice on other secured parties on the notice

84. An amendment, continuation or termination authorised by one secured party on the notice does not affect the rights of another secured party on the notice.

Duties of the Registrar

85.—(1) For each notice registered, the Registrar must—

- (a) assign a unique registration number in the case of an initial notice;
- (b) assign a unique number to notices other than the initial notice;
- (c) create a writing that bears the registration number and the date and time of registration; and
- (d) maintain registered notices for public inspection.

(2) The Registrar must maintain the capability to retrieve Registry records—

- (a) by the identity of the debtor;
- (b) by the registration number of the initial notice, in a manner that associates the initial notice with all related amendments, continuations and terminations; and
- (c) by the serial number of a serial numbered vehicle, if a serial number was provided on the notice in a field prescribed by the Registrar.

(3) A notice that the Registrar fails to maintain as required in subsection (2) remains effective except against a purchaser of the collateral that gives value in reasonable reliance upon the information available from the Registry.

(4) The Registrar must maintain records of lapsed or terminated notices for a period of 10 years beyond the date of lapse or termination.

Public access to Registry records

86.—(1) Information contained in notices are public information and are the property of the State.

(2) The Registrar must communicate the following information to any person that requests it—

- (a) whether there is registered a notice that designates a particular debtor or serial number and has not lapsed with respect to all secured parties;
- (b) the registration number, and the date and time of registration of each notice;

- (c) the name and address of each debtor and secured party on each notice; and
 - (d) all of the information contained in each notice.
- (3) The Registrar may communicate information in any medium.
- (4) Notwithstanding subsection (3), if requested, the Registrar must issue a certified search report or other report as may be required and bearing a written certificate.
- (5) A copy of or extract from any document lodged with the Registry, and certified by the Registrar, is, in any proceeding, admissible in evidence as of equal validity with the original document or lodgement.
- (6) The Registrar may communicate information in bulk about some or all registered notices to interested persons from time to time, on terms agreeable to the Registrar and, notwithstanding section 70(d), including a reasonable fee for provision of the service.

Notice does not constitute constructive notice

87. Registration of a notice in the Registry is not constructive notice or knowledge of its existence or contents to any person.

PART 8—ENFORCEMENT OF SECURITY INTERESTS

Application of this Part

- 88.—**(1) This Part does not apply to—
- (a) a commercial consignment that does not secure payment or performance of an obligation;
 - (b) the interest of an execution creditor; or
 - (c) a transaction in which a person pledges property to a pawnbroker.
- (2) The rights and remedies set out in this Part are cumulative.
- (3) A security interest does not merge merely because a secured party has obtained a judgment against the debtor.

Secured party rights upon default

- 89.—**(1) If the debtor defaults on its obligation to pay or otherwise perform, or upon the occurrence of another event of default, the security interest becomes enforceable.
- (2) Upon default, the secured party must have—
- (a) the rights and remedies set forth in the security agreement;
 - (b) the right to possession or control of the collateral, even if the security agreement is silent about possession or control;
 - (c) the right to dispose of the collateral;
 - (d) other rights or remedies provided in this Act; and
 - (e) notwithstanding anything to the contrary in this Act, the rights or remedies provided in any other written law.

Recovery without judicial process in certain cases

90.—(1) Upon default, a secured party with a security interest in chattel paper, an account receivable, secured sales contract or intangible may instruct the account debtor or any other person obligated to pay to make payment to the secured party, and must apply such payment to satisfaction of the obligation secured by the security interest.

(2) Upon default, a secured party with a security interest in a document of title that is perfected by possession may proceed as to the goods covered by the document of title.

(3) If so agreed by the debtor, and in any event after default—

(a) a financial institution with a perfected security interest in a deposit account maintained by the financial institution may apply the balance of the deposit account to the obligation secured by the deposit account; and

(b) in other cases, a secured party that has a security interest in a deposit account perfected by control may instruct the bank to pay the balance of the deposit account to the secured party's account.

(4) Where the collateral is a licence, the secured party may seize the collateral by giving notice to the debtor, or to the grantor of the licence or any successor to the interest in the licence.

(5) A secured party may deduct reasonable expenses of collection under this section. from—

(a) amounts collected from a debtor or from a person obligated to pay or perform; or

(b) money held as collateral.

(6) The secured party may act under this section without judicial process, notwithstanding any other provision of this Act.

Secured party's right to take possession and dispose of collateral

91. Subject to sections 62 and 66 and any rule of law requiring prior notice, on default under a security agreement—

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law; and

(b) where the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate storage facilities are not readily available, the secured party may seize or repossess the collateral without removing it from the debtor's premises in any method permitted by law, including by which an execution officer acting under a writ of execution may seize without removal, if the secured party's interest is perfected by registration; and

- (c) where paragraph (b) applies, the secured party may dispose of collateral on the debtor's premises, but must not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal; and
- (d) if the collateral is a document of title, the secured party may—
 - (i) proceed either as to the document of title or as to the goods covered by it; and
 - (ii) a method of enforcement that is available with respect to the document of title is also available, with any necessary modification, with respect to the goods covered by it.

Manner of disposition of collateral

92.—(1) The disposition of collateral may be—

- (a) by private sale;
- (b) by public sale, including public auction or closed tender;
- (c) as a whole or in commercial units or parts;
- (d) by lease, credit sale, licence; or
- (e) other commercially reasonable manner of disposition.

(2) After seizing or repossessing the collateral, a secured party may dispose of it in its existing condition or after repair, processing or preparation for disposition, and the proceeds of the disposition must be applied consecutively to—

- (a) the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party; and
- (b) the satisfaction of the obligations secured by the security interest of the party making the disposition,

any surplus must be dealt with in accordance with section 98.

(3) The secured party may delay disposition of the collateral in whole or in part.

Duty to act in a commercially reasonable manner

93.—(1) In disposing of collateral, the secured party must act in a commercially reasonable manner.

(2) A disposition is not commercially unreasonable merely because a better price could have been obtained by disposition at a different time or by a different method from the time and method adopted by the secured party.

(3) A disposition is commercially reasonable if the secured party disposes of the collateral in conformity with commercial practices among dealers in that type of property.

(4) If a method of disposition of collateral has been approved in any legal proceeding, it is conclusively deemed to be commercially reasonable, but no such approval is required by this Act.

Obligation to give notice of disposition of collateral

94.—(1) Not less than 7 days prior to disposition of the collateral, a secured party must deliver a notice to—

- (a) the debtor;
- (b) any other person who is known by the secured party to be an owner of the collateral;
- (c) any person who has registered a notice in respect of the collateral that is effective at the time the secured party took possession of the collateral; and
- (d) any other person with an interest in the collateral who has given a written notice to the secured party of that person's interest in the collateral prior to the day on which the notice of disposition is given to the debtor.

(2) The debtor may waive the right to be notified.

(3) A notice under subsection (1), delivered by a secured party, must contain—

- (a) a description of the collateral;
- (b) the amount required to satisfy the obligations secured by the security interest;
- (c) the amount of applicable expenses or, where the amount of the expenses has not been determined, a reasonable estimate;
- (d) the day, time and place of any sale by public auction, the place to which closed tenders may be delivered and the day after which closed tenders will not be accepted, or the day after which any private disposition of the collateral is to be made; and
- (e) the name of the debtor and the secured party.

(4) A notice under this section is not required where—

- (a) the collateral is perishable;
- (b) the secured party believes on reasonable grounds that the collateral will decline substantially in value if it is not disposed of as soon as practicable;
- (c) the cost of care and storage of the collateral is disproportionately large in relation to its value;
- (d) the collateral is of a type that is to be disposed of by sale on an organised market that handles large volumes of transactions between many different sellers and many different buyers;

- (e) the collateral is money authorised or adopted by a foreign government as part of its currency;
- (f) after default, each person entitled to receive a notice of disposition consents in writing to the disposition of the collateral without compliance with the notice requirements of this section; or
- (g) for any other reason, a court on *ex parte* application is satisfied that a notice is not required.

Secured party may purchase collateral at public sale

95. The secured party may purchase the collateral or any part of it only at any public or private sale for a price that bears a reasonable relationship to the market value of the collateral.

Rights of purchasers of collateral

96.—(1) Where a secured party disposes of the collateral to a purchaser for value and in good faith and who takes possession of it—

- (a) the purchaser acquires the collateral free from—
 - (i) the interest of the debtor;
 - (ii) an interest subordinate to that of the debtor; and
 - (iii) an interest subordinate to that of the secured party whether or not the requirements of this Part have been complied with by the secured party; and
- (b) all obligations secured by the subordinate interests are deemed to be performed for the purposes of a demand to terminate a notice.

(2) This section applies regardless of the manner in which the secured party gained possession or control of the collateral.

Secured party's disposition of a licence

97. Notwithstanding any other provision of this Part, where the collateral is a licence, the collateral may be disposed of only in accordance with the terms and conditions that applied at the time that the secured party took control of the licence.

Application of proceeds and surplus or deficiency

98.—(1) The proceeds of disposition must be applied in the following order—

- (a) the reasonable expenses of retaking, holding, preparing for disposition, and disposing of the collateral, including reasonable attorneys' fees and legal expenses incurred by the secured party;
- (b) the satisfaction of obligations secured by any senior security interest or lien;
- (c) the satisfaction of the obligation secured by the security interest of the enforcing secured party;

(d) the satisfaction of obligations secured by any subordinate security interest or lien, or by a subordinate execution creditor, in the collateral if a written demand and proof of the interest are received before distribution of the proceeds is completed.

(2) The secured party must give a written accounting of—

(a) the amount received from the disposition of collateral or the amount collected under section 90;

(b) the manner in which the collateral was disposed of;

(c) the amount applied to expenses;

(d) the distribution of the amount received from the disposition or collection; and

(e) the amount of any surplus,

to a person under subsection (1) within 30 days after receipt of a written request for an accounting.

(3) Where there is a question as to who is entitled to receive payment under this section, the secured party may pay the surplus into court, and the surplus must not be paid out except on an application under section 109 by a person claiming an entitlement to it.

(4) Except as otherwise agreed or as otherwise provided in this Act or any other Act, the debtor is liable to pay the amount of the deficiency to the secured party.

Secured party's right to retain collateral

99.—(1) After default, the secured party may propose to the debtor to take all or part of the collateral in satisfaction of all or a part of the debtor's obligation, and must give notice of the proposal to—

(a) the debtor;

(b) any other secured party or lien holder who, 5 days before the notice is given to the debtor, has perfected its security interest or lien by filing;

(c) any other person with an interest in the collateral who has given a written notice to the secured party before the notice is given to the debtor.

(2) If the secured party receives objection in writing from a person entitled to receive notice under subsection (1) within 15 days after the notice was given, the secured party must dispose of the collateral as otherwise provided in this Division unless otherwise directed by the court.

(3) If no objection is received within the 15 day period, the secured party must be deemed to have irrevocably elected to retain the collateral in satisfaction of the debtor's obligation in accordance with the proposal.

(4) The secured party may request that any person mentioned in subsection (1), other than the debtor, furnish proof of that person's interest and, unless the person furnishes proof

not later than 10 days after the secured party's request, the secured party may proceed as if no objection were received from the person.

(5) The secured party may request that any person mentioned in subsection (1), other than the debtor, furnish proof of that person's interest and, unless the person furnishes proof not later than 14 days after the secured party's request, the secured party may proceed as if no objection were received from the person.

(6) On application by a secured party, the court may determine that an objection to the proposal of a secured party is ineffective on the ground that—

- (a) the person made the objection for a purpose other than the protection of an interest in the collateral or proceeds of a disposition of the collateral; or
- (b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

Debtor's right to redeem collateral

100. At any time after the secured party has taken possession of the collateral but before the secured party sells or agrees to sell the collateral or is deemed to have taken the collateral in satisfaction of the obligation secured by it, the debtor and any a person who is entitled to receive a notice of disposition under section may, unless otherwise agreed in writing after default, redeem the collateral by—

- (a) tendering fulfilment of the obligations secured by the collateral; and
- (b) a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for disposition, if those expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement.

Debtor's right to reinstate security agreement

101.—(1) At any time after the secured party has taken possession of the collateral but before the secured party sells or agrees to sell the collateral or is deemed to have taken the collateral in satisfaction of the obligation secured by it, the debtor may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by—

- (a) paying the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement; and
- (b) remedying any other default by reason of which the secured party intends to sell the collateral; and
- (c) paying a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing, and preparing the collateral for sale, if those expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement.

(2) Subsection (1) does not apply to any security agreement made or entered into before the commencement of this Act.

(3) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement—

- (a) more than once, if the security agreement provides for payment in full by the debtor not later than 12 months after the day on which value was given by the secured party; or
- (b) more than once in each year, if the security agreement provides for payment by the debtor during a period greater than one year after the day on which value was given by the secured party.

(4) Where the right to reinstate the agreement is exercised under this section—

- (a) upon the receipt of the required amount, or confirmation of the performance of the accrued obligations and the default being remedied, the secured party must forthwith return the collateral to the debtor; and
- (b) the debtor is deemed to receive and hold the returned collateral pursuant to the terms of the security agreement as if the default had not occurred and the secured party had not taken possession of the collateral.

(5) Where the collateral is returned to the debtor and a particular default has not been remedied, the secured party does not have any right, arising out of that default, to retake possession of the collateral unless—

- (a) by notice in writing served on the debtor at the time of the return of the collateral, the secured party specifies the default and requires it to be remedied; and
- (b) the debtor fails to remedy the default within a period to be specified in the notice (being a period of not less than 14 days after the service of the notice on the debtor).

Enforcement of a security interest in a mortgage

102.—(1) Subject to any other Act or rule of law to the contrary, where the same obligation is secured by an interest in a mortgage in real property and a security interest in personal property, the secured party may—

- (a) without limiting the secured party's rights, remedies and duties with respect to the land, proceed under this Part as to the personal property; or
- (b) proceed as to both the interest in the mortgage and the personal property.

(2) Subsection (1)(b) does not limit the rights of a secured party who has a security interest in personal property that is taken before or after the security interest mentioned in subsection (1).

(3) For the purpose of distributing the amount received from the sale of the real property and personal property under this section, where the purchase price is not allocated to the

real property and the personal property separately, the amount of the total price that is attributable to the sale of the personal property is the market value of the personal property at the time of sale.

Remedies for secured party non-compliance

103.—(1) If the secured party does not comply with the requirements of this Part, the court may order or restrain disposition of collateral.

(2) If disposition has occurred, the debtor or any person entitled to be informed or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with this Part.

Manner of notification to debtors, secured parties and other persons

104.—(1) Where a provision of this Act requires or permits the communication of a demand or notification to a person, the notification is effective—

- (a) in the case a natural person who is a debtor, when the notification is—
 - (i) delivered to the debtor;
 - (ii) posted by registered mail to the person’s last known postal address;
or
 - (iii) dispatched in accordance with the security agreement;
- (b) in the case of a secured party named on a registered notice, when the notification is—
 - (i) delivered to the secured party; or
 - (ii) posted by registered mail to the address on the registered notice; or
- (c) in the case of a person who has requested the notification, when the notification is—
 - (i) delivered to the person;
 - (ii) posted by registered mail to the person’s postal address as stated in the request;
 - (iii) in the case of a company, posted to the company’s registered office;
or
 - (iv) dispatched in accordance with an agreement with the person;
- (d) in the case of any other person, when the notification is—
 - (i) delivered to the person;
 - (ii) in the case of a company, posted to the company’s registered office;
or
 - (iii) dispatched in accordance with an agreement with the person.

(2) Notwithstanding subsection (1), notification to a person that is a company organised or registered under the Companies Act 2015 may be made in any manner authorised by that Act.

(3) Notwithstanding subsection (1), a notice or document served or given by electronic mail or other similar means of communication is acceptable where the recipient of the notice has agreed that electronic mail is an authorised means of communication.

PART 9—CONFLICT OF LAWS

When the laws of Fiji apply

105.—(1) Except as otherwise provided in this Act, the validity, perfection, and the effect of perfection or non-perfection of a security interest in goods or a possessory security interest in chattel paper, investment property, money, a document of title, or a negotiable instrument, is governed by the laws of Fiji if—

- (a) at the time the security interest attaches to the collateral, the collateral is situated in Fiji;
- (b) at the time the security interest attaches to the collateral, the collateral is situated outside Fiji but the secured party has knowledge that it is intended to move the collateral to Fiji;
- (c) the security agreement provides that the laws of Fiji is the law governing the transaction; or
- (d) in any other case, the laws of Fiji apply.

(2) For the purposes of subsection (1), investment property that is not in the form of a security evidence by a certificate is situated where the records of the clearing house or securities depository are kept.

Continuity of perfection where goods are moved to Fiji

106.—(1) A security interest in goods that is perfected under the law of the jurisdiction in which the goods are situated when the security interest attached and before the goods are brought into Fiji continues to be perfected in Fiji if it is perfected in Fiji by the earliest of the following—

- (a) not later than 60 days after the day on which the goods are brought into Fiji;
- (b) not later than 14 days after the day on which the secured party has knowledge that the goods have been brought into Fiji; or
- (c) before perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached.

(2) A security interest that is not perfected as provided in subsection (1) may be otherwise perfected in Fiji under this Act.

Location of debtor

107.—For the purposes of section 108—

- (a) a debtor that is a corporate body is located in the country of incorporation; and
- (b) a debtor that is not a corporate body is located at—
 - (i) the debtor’s place of business;
 - (ii) the debtor’s principal place of business if the debtor has more than one place of business; or
 - (iii) the debtor’s principal residence if the debtor has no place of business.

Validity and perfection of security interests in intangibles and certain goods

108. The validity, perfection, and effect of perfection or non-perfection of a security interest is governed by the law, including the conflict of laws rules, of the jurisdiction where the debtor is located when the security interest attaches, if the security interest is—

- (a) a security interest in an intangible;
- (b) a security interest in goods that are of a kind that are normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others; or
- (c) a non-possessory security interest in chattel paper, investment property, a document of title, money, or a negotiable instrument.

Position where debtor relocates

109. If a debtor relocates to another jurisdiction or transfers an interest in collateral to a person located in another jurisdiction, a security interest perfected in accordance with the law applicable, as provided in section 25, continues to be perfected in Fiji if it is perfected in the other jurisdiction by the earliest of the following—

- (a) not later than 60 days after the day on which the debtor relocates or transfers an interest in the collateral to a person located in the other jurisdiction;
- (b) not later than 14 days after the day on which the secured party has knowledge that the debtor has relocated or transferred an interest in the collateral to a person located in the other jurisdiction; or
- (c) prior to the day on which perfection ceases under the law of the first jurisdiction.

Priority where there is no public record of a perfected security interest

110.—(1) If the law governing the perfection of a security interest referred to in this Part does not provide for public registration or recording of the security interest or a notice relating to it, and the collateral is not in the possession of the secured party, the security interest is subordinate to—

- (a) an interest in an account receivable, chattel paper, or instrument that is payable in Fiji; or

- (b) an interest in goods, investment property, a negotiable instrument, a document of title, money, or chattel paper, acquired when the collateral was situated in Fiji.

(2) Subsection (1) does not apply if the security interest is perfected under this Act before the interest referred to in subsection (1)(a) or subsection (1)(b) arises.

- (3) A security interest to which subsection (1) applies may be perfected under this Act.

Perfection of security interest in as-extracted collateral

111. Notwithstanding anything in this Act to the contrary, the perfection and the effect of perfection or non-perfection of a security interest in as-extracted collateral is governed by the law of the jurisdiction in which the minehead or wellhead is located if the security interest—

- (a) is provided for in a signed security agreement before extraction; and
- (b) attaches to the as-extracted collateral.

PART 10—MISCELLANEOUS

Transitional

112.—(1) In this Part—

“prior lien” means the right of an execution creditor whose right arose prior to the commencement of this Act;

“prior transaction” means a transaction concluded prior to the commencement of this Act that would otherwise fall within the scope of this Act; and

“transitional notice” means notice of the interest of a person under a prior lien or prior transaction.

(2) The validity, effect and enforcement of a prior transaction or prior lien must be determined by reference to the law in effect when the prior transaction was concluded or the prior lien arose, except as provided otherwise in this section.

(3) The provisions of this Act on registration, priority, and enforcement apply to a prior transaction or prior lien only in the case of conflict between the prior transaction or prior lien and a security interest created under this Act.

(4) A creditor under a prior transaction and the holder of a prior lien may register a transitional notice at any time.

(5) A transitional notice—

- (a) may be registered in the same manner as provided for a notice of a security interest or notice of the right of an execution creditor; and
- (b) the authorisation of the debtor is not required.

- (6) If a transitional notice registered—
- (a) on or before the 180th day from the commencement of this Act, the interest subject to the transitional notice has priority over a security interest created under this Act, with priority measured from the date of the commencement of this Act; and
 - (b) after the 180th day from the commencement of this Act, the priority of the interest subject to the transitional notice against a security interest created under this Act must be determined—
 - (i) according to the priority rules established in this Act; and
 - (ii) from the date of registration of the transitional notice.

(7) Except as provided in subsection (6), if no transitional notice is registered, a security interest perfected under this Act has priority over the prior transaction or prior lien.

Offences

113.—(1) Any person who registers a notice with malicious intent or fraudulently, commits an offence and is liable upon conviction to a fine not exceeding \$50,000 or imprisonment for a term not exceeding 10 years or both.

(2) Any person who wilfully and without proper authorisation destroys or tampers with any record that is in the Registry, or attempts to destroy or tamper with any such record, commits an offence and is liable upon conviction to a fine not exceeding \$50,000 or imprisonment for a term not exceeding 10 years or both.

(3) Any person who wilfully and forcibly obstructs a secured party or a secured party's agent who is lawfully exercising any power to take possession of collateral, commits an offence against this Act, and is liable upon summary conviction to a fine not exceeding \$50,000 or imprisonment for a term not exceeding 10 years or both.

(4) Any person who attempts to conceal or otherwise alters collateral subject to a security interest hereunder with the intent to defraud or otherwise prevent a secured party of the ability to enforce its security interest commits an offence and is liable upon conviction to a fine not exceeding \$50,000 or imprisonment for a term not exceeding 10 years or both.

Consequential amendments

114. The Acts listed in the Schedule are amended as provided in the Schedule.

SCHEDULE
(Section 114)

CONSEQUENTIAL AMENDMENTS

Bankruptcy Act 1944

1. The Bankruptcy Act 1944 is amended by—

- (a) in section 2(1) in the definition of “secured creditor” after “from the debtor”, inserting “and includes a secured party as defined in the Personal Property Securities Act 2017”;
- (b) in section 40—
 - (i) in paragraph (a), deleting “and”;
 - (ii) in paragraph (b) after “;”, inserting “and”; and
 - (iii) after paragraph (b), inserting the following new paragraph—
 - “(c) personal property that is subject to a perfected security interest under the Personal Property Securities Act 2017 to the extent provided under section 45,”; and
- (c) deleting section 45 and substituting the following—

“Avoidance of security interests unless perfected

45.—(1) If a person has granted a security interest in personal property under the Personal Property Securities Act 2017 and is subsequently adjudicated bankrupt, the security interest in the personal property is void against the trustee unless the security interest in the personal property is perfected under the Personal Property Securities Act 2017 before the trustee files a notice of the bankruptcy lien on the personal property of the bankrupt in the registry established under the Personal Property Securities Act 2017.

(2) If the trustee determines that the value of the personal property subject to a perfected security interest exceeds the amount of the secured creditor’s remaining secured obligation, the trustee may redeem the collateral by paying to the secured creditor the remaining amount of the obligation.

(3) For the purpose of subsection (2), the trustee may require the secured creditor to present the security agreement as evidence of the security interest and to present evidence of the amount of the remaining secured obligation in the form of the secured creditor’s record of account.”.

Bills of Sale Act 1879

2. The Bills of Sale Act 1879 is repealed.

Companies Act 2015

3. The Companies Act 2015 is amended by—

- (a) in section 3, deleting the definition of “Charges Register”;
- (b) in section 57(2), deleting “If” and substituting “Without limiting the application of the Personal Property Securities Act 2017, if”;
- (c) in section 81(1)—
 - (i) in paragraph (b) after “;”, inserting “and”;
 - (ii) in paragraph (c), deleting “; and” and substituting “.”; and
 - (iii) deleting paragraph (d);
- (d) deleting sections 370 to 376;
- (e) in section 377—
 - (i) in subsection (1)—
 - (A) deleting “registrable charge on property” and substituting “charge on the property”; and
 - (B) deleting “documents specified in section 371(1) were lodged—
 - (a) within the relevant period; or
 - (b) at least 6 months before the critical day.”and substituting “charge is perfected by registration under the Personal Property Securities Act 2017 at least 6 months before the critical day.”;
 - (ii) in subsection (2)—
 - (A) deleting “registrable charge on property” and substituting “charge on the property”; and
 - (B) deleting “documents specified in section 371(1) were lodged—
 - (a) within the relevant period; or
 - (b) at least 6 months before the critical day.”and substituting “charge is perfected by registration under the Personal Property Securities Act 2017 and the date of variation to the terms of the charge is at least 6 months before the critical day.”; and
 - (iii) in subsection (3)—
 - (A) deleting “lodge a notice in respect of a charge, or in respect of a variation in the terms of a charge,” and substituting “perfect

the charge by registration under the Personal Property Securities Act 2017”; and

- (B) deleting “extend the period for such further period as is specified in the order” and substituting “amend the time of registration to the time specified in the order”;
- (f) deleting sections 379 to 385;
- (g) in section 435(3) after “Act”, inserting “or the Personal Property Securities Act 2017”; and
- (h) deleting section 745.

Co-operatives Act 1996

4. The Co-operatives Act 1996 is amended in section 27(1) after “Subject to” by inserting “the Personal Property Securities Act 2017 and”.

Crop Liens Act 1904

5. The Crop Liens Act 1904 is repealed.

Fiji Development Bank Act 1966

6. The Fiji Development Bank Act 1966 is amended by—

- (a) in section 2—
 - (i) in the definition of “borrower” after “Act”, inserting “or the Personal Property Securities Act 2017”; and
 - (ii) inserting the following new definition—

““collateral” has the same meaning as defined under the Personal Property Securities Act 2017;”;
- (b) in section 23—
 - (i) in subsection (1)—
 - (A) in paragraph (c) after “chattels”, inserting “, collateral”;
 - (B) in paragraph (d) after “chattels,”, inserting “collateral,”;
 - (C) in paragraph (e) before “that the farmer”, inserting “subject to the provisions of the Personal Property Securities Act 2017,”;
 - (D) in paragraph (f) before “that the farmer”, inserting “subject to the provisions of the Personal Property Securities Act 2017,”;
 - (E) in paragraph (k) after “buildings”, inserting “, collateral”;
 - (F) in paragraph (n)—
 - a. after “section”, inserting “and under any other applicable law”; and

- b. deleting “.” and substituting “; and”; and
- (G) after paragraph (n), inserting the following new paragraph—
 - “(o) that the farmer has good right and absolute priority to grant a security interest under the provisions of the Personal Property Securities Act 2017 over the collateral and that the farmer must at any time after the creation of the security interest permit, make, do and execute all such further acts, deeds and assurances for the further assurance of all or any of the said collateral unto the Bank and enabling the Bank to secure its interest in the collateral and in the event of default obtain possession of the same as may be the Bank be lawfully required.”; and
 - (ii) in subsection (2), deleting “paragraphs (a) to (n)” and substituting “paragraphs (a) to (o)”;
- (c) in section 24—
 - (i) after “this Act”, inserting “and the Personal Property Securities Act 2017”;
 - (ii) in paragraph (a), deleting “, not being deemed to be personal chattels within the meaning of the Bills of Sale Act 1879”; and
 - (iii) deleting paragraph (c) and substituting the following—
 - “(c) a charge on all collateral belonging to the farmer and specified in the notification.”;
- (d) in section 25—
 - (i) deleting the heading and substituting “Notifications”;
 - (ii) deleting subsection (1) and substituting the following—
 - “(1) The Bank may, in any case where any charge is created under the provisions of this Part over collateral, cause a notice of the security interest to be filed in the registry established under the Personal Property Securities Act 2017.”;
 - (iii) in subsection (3)—
 - (A) deleting “or of any other Act or any other provision of law or rule of equity”;
 - (B) deleting “(1)” and substituting “(2)”;
 - (C) deleting “, fixtures, chattels, crops or other property” and substituting “and other improvements thereon”;

- (iv) deleting subsection (4) and substituting the following—
 - “(4) The effectiveness, amendment, continuation and termination of a notice of a security interest made under subsection (1) relating to any collateral is governed by the Personal Property Securities Act 2017.”;
- (v) deleting subsection (5);
- (vi) in subsection (6)—
 - (A) deleting “Where” and substituting “Subject to the Personal Property Securities Act 2017, where”;
 - (B) after “any notification”, inserting “or notice of a security interest”; and
 - (C) after “the notification”, inserting “or notice of the security interest”;
- (vii) in subsection (7)—
 - (A) deleting “registered under the provisions of subsection (1)”;
 - (B) after “registration and”, inserting “filing of a”; and
 - (C) after “the notification”, inserting “ and notice of the security interest”; and
- (viii) deleting subsection (8);
- (e) in section 26—
 - (i) renumbering subsection (3) as subsection (4); and
 - (ii) after subsection (2), inserting the following new subsection—
 - “(3) Where any charge is registered under the Registrar of Titles prior to the commencement of the Personal Property Securities Act 2017, and such charge has been re-registered under the Personal Property Securities Act 2017, the Bank on repayment by a farmer of all amounts due to the Bank in respect of any advance granted under section 22, must cause a termination to be filed under the Personal Property Securities Act 2017.”;
- (f) in section 27—
 - (i) in subsection (1)(b)(iii) after “part of the”, inserting “collateral or other”; and
 - (ii) after subsection (4), inserting the following new subsection—
 - “(5) In the event the property to be sold consists of collateral subject to the Personal Property Securities Act 2017, the provisions

related to the enforcement of the security interest created under that Act are also available to the Bank, including the provision that notwithstanding anything to the contrary in the Personal Property Securities Act 2017, the rights and remedies provided in any other law including this Act, must continue to be available to the Bank.”;

- (g) in section 29(1)—
 - (i) after “chattels” wherever it appears, inserting “, collateral”;
 - (ii) renumbering paragraphs (b), (c) and (d) as paragraphs (c), (d) and (e) respectively;
 - (iii) after paragraph (a), inserting the following new paragraph—
 - “(b) secondly, with regard to collateral, to the satisfaction of any obligation secured by any security interest which has priority under the Personal Property Securities Act 2017;”;
 - (iv) in paragraph (c), deleting “secondly” and substituting “thirdly”; and
 - (v) in paragraph (d), deleting “thirdly” and substituting “fourthly”;
- (h) in section 30(3) and (4) after “crops”, inserting “, collateral”;
- (i) in section 32—
 - (i) in subsection (2), deleting “Where” and substituting “Subject to the provisions of the Personal Property Securities Act 2017 with respect to a charge over collateral, where”; and
 - (ii) in subsection (4), deleting “The” and substituting “Subject to the Personal Property Securities Act 2017, the”; and
- (j) in section 33(2)—
 - (i) in paragraph (d) after “thereof”, inserting “or that the collateral or performance of an obligation subject to a charge under the Personal Property Securities Act 2017 is at risk, as defined in section 20(2) of the Personal Property Securities Act 2017”; and
 - (ii) in paragraph (e) after “property”, inserting “or collateral”.

Fiji National Provident Fund Act 2011

7. The Fiji National Provident Fund Act 2011 is amended in section 108 after subsection (1) by inserting the following new subsection—

“(1A) If payment of any contribution, additional contribution or penalty has not been made on or before the due date, a lien shall arise over the property of the person liable to pay such amounts to secure the payment of the amount of the contribution, additional contribution or penalty, and the Board or any officer or agent authorised by the Board may file a notice of such lien in the registry

established under the Personal Property Securities Act 2017 to establish the priority date and time of such lien.”.

Indemnity, Guarantee and Bailment 1881

8. The Indemnity, Guarantee and Bailment Act 1881 is amended by—

- (a) renumbering section 56 as section 56(1); and
- (b) after section 56(1), inserting the following new subsection—

“(2) Except in relation to consumer goods as defined in the Personal Property Securities Act 2017, a pledge of goods under this Act is subject to a prior security created under the Personal Property Securities Act 2017.”.

Land Transfer Act 1971

9. The Land Transfer Act 1971 is amended in section 39(1) by—

- (a) in paragraph (c), deleting “.” and substituting “; and”; and
- (b) after paragraph (c), inserting the following new paragraph—

“(d) when an item of personal property becomes affixed to land, or to a structure that is itself attached to land, in such a way as to cause an interest in the fixture to arise in a person who has an interest in the land, priority in the fixture as between a holder of an interest in the land and a holder of an interest in the fixture shall be determined as provided by the Personal Property Securities Act 2017.”.

Land Transport Act 1998

10. The Land Transport Act 1998 is amended after section 65 by inserting the following new section—

“Security on permits

65A.—(1) Any public service permit issued under this Act, including a public service licence issued in respect of a road permit, is deemed to be personal property for the purposes of the Personal Property Securities Act 2017.

(2) Notwithstanding subsection (1), a public service permit issued under this Act, including a public service licence in respect of a road permit, may only be used as collateral for a security interest granted to a financial institution as defined in the Personal Property Securities Act 2017.”.

Marine Insurance Act 1961

11. The Marine Insurance Act 1961 is amended in section 54(2) after “agreed” by inserting “and subject to the provisions of the Personal Property Securities Act 2017”.

Property Law Act 1971

12. The Property Law Act 1971 is amended in section 67 by deleting “A” and substituting “Subject to the provisions of the Personal Property Securities Act 2017, a”.

Registration Act 1879

13. The Registration Act 1879 is amended by—

- (a) in section 10, deleting “All” and substituting “Subject to the provisions of the Personal Property Securities Act 2017, all”; and
- (b) deleting Part 4.

Sale of Goods Act 1979

14. The Sale of Goods Act 1979 is amended in section 23 by—

- (a) in paragraph (b), deleting “.” and substituting “; or”; and
- (b) after paragraph (b), inserting the following new paragraph—
 - “(c) the provisions of the Personal Property Securities Act 2017 enabling a purchaser of goods to acquire good title to the goods.”.

Stamp Duties Act 1920

15. The Stamp Duties Act 1920 is amended in the Schedule by—

- (a) in Part 1 after the row on “SETTLEMENT, Deed of”, inserting the following new row—

<i>Nature of Instrument</i>	<i>Amount of Duty</i>	<i>Persons Primarily Liable</i>
“SECURITY AGREEMENT	The like duty as for a mortgage”;	

- (b) in Part 2, deleting Item 30 and substituting the following—
 - “30. Any security agreement in relation to a security interest where the collateral is crops.”.

Sugar Cane Growers Fund Act 1984

16. The Sugar Cane Growers Fund Act 1984 is amended by—

- (a) in section 15(3), deleting “No” and substituting “Subject to any fee payable under the Personal Property Securities Act 2017, no”; and
- (b) deleting section 17.

Tax Administration Act 2009

17. The Tax Administration Act 2009 is amended in section 28 by—

- (a) in subsection (2), deleting “The” and substituting “Subject to subsection (2A), the”;
- (b) after subsection (2), inserting the following new subsection—

“(2A) If applicable, the CEO may file a notice of a charge created by this section in the registry established under the Personal Property Securities Act 2017 to establish the priority date and time of such charge, and the registry must, without fee, register the notice as if it were a registrable instrument under law.”;

- (c) in subsection (3), deleting “A” and substituting “Subject to the provisions of the Personal Property Securities Act 2017, a”;
- (d) in subsection (5) after “unregistered charge created by this section”, inserting “as of the date of registration of the charge”;
- (e) after subsection (6), inserting the following new subsection—

“(6A) With regard to personal property, if a notice of a charge under this section has been registered and the charge has been satisfied, the CEO must file with the registry established under the Personal Property Securities Act 2017 a termination of the charge, and the relevant Registrar must, without payment of any fee, register the termination as if it were a registrable instrument under law.”; and
- (f) in subsections (7) and (10), deleting “subsection (2)” and substituting “subsections (2) and (3)”.

PERSONAL PROPERTY SECURITIES BILL 2017

EXPLANATORY NOTE

(This note is not part of the Bill and is only intended to indicate its general effect)

1.0 BACKGROUND

- 1.1 In 2014, the Fijian Government initiated work on a secured transactions reform to facilitate the financing of movable or personal property, in order to provide access to credit for micro, small and medium enterprises and individuals.
- 1.2 A personal property securities law allows lenders to secure their interests in collateral concurrent with disbursement of loan funds, and also to determine without any delay whether a proposed debtor has previously pledged particular collateral to secure a previous loan.
- 1.3 The ability to perform this sort of search against a would-be borrower results in generating much greater confidence in lenders in extending credit, knowing that the collateral for their loan has not been previously pledged. Due in large part to the efficiency of this regime, most asset-based lending in developed economies is based upon personal property serving as collateral, not land.
- 1.4 By implementing this reform and the Bill, Fiji will be able to take advantage of new financing procedures and products which in turn improve the lives of ordinary Fijians without administration restrictions to accessing credit.

2.0 CLAUSES

PART 1—PRELIMINARY

- 2.1 Clause 1 of the Bill provides for the short title and commencement. If passed by Parliament, the Bill will become an Act (**‘Act’**) and the Act will come into force on a date appointed by the Minister by notice in the Gazette.
- 2.2 Clause 2 of the Bill defines key terms which are crucial as any priority analysis of an issue under the Bill begins with determining what sort of property is serving as collateral as different rules can apply based upon the collateral’s classification.

Example: consider how a motor vehicle could be classified depending upon its 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”.

2.3 Clause 3 of the Bill provides for the meaning of “possession”. There are instances where a secured party may obtain priority in certain collateral by exercising “possession” of the collateral. In this clause rules around how a secured party may take possession of investment property (stocks and bonds) is explained.

2.4 Clause 4 of the Bill defines provides for the meaning of “knowledge.” The results of several priority rules depend on whether or not buyers and others have “knowledge” of certain facts. The Bill states how one may determine whether individuals, partnerships, and companies have “knowledge” of a fact or an event.

2.5 Clause 5 of the Bill provides for the description of collateral in a security agreement or notice. Security agreements (i.e., the loan documents) and registered notices must describe the collateral. The Bill provides that collateral descriptions may be general or specific. This means that a description which merely states that “all of the debtor’s personal property now owned or hereafter acquired” is valid without the need to detail every individual piece of personal property.

2.6 This clause also introduces three specific rules for filing in the Registry based upon collateral type.

Example

- (i) If a motor vehicle is part of the collateral, its vehicle identification number (VIN) should be included.
- (ii) If personal 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 clause 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.

2.7 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.

- 2.8 Clause 6 of the Bill gives the classification of goods under the Bill. 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 Bill states that the classification of goods is determined at the time the security interest attaches to the collateral.
- 2.9 Clause 7 of the Bill provides that proceeds from collateral must be 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. The Bill also makes clear that a trust or fiduciary relationship does not prevent collateral from being considered traceable.

PART 2—APPLICATION OF THE ACT

- 2.10 Clause 8 of the Bill provides for the transactions that are covered under the Bill, that is, all transactions that have traditionally been used to create security in personal property. These transactions include pledge, chattel mortgage, hire purchase, and company charge. Note that the terminology used no longer matters: if personal property is used to secure payment or performance, this Act applies.
- 2.11 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:
- (i) a debt is owed;
 - (ii) the debtor is in control of the property; and
 - (iii) 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 Bill no matter the technicalities of the legal form.

- 2.12 The Bill 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.
- 2.13 Clause 9 of the Bill provides for the transactions that are not subject to the Act. There are several categories of transactions and/or collateral that this law will not apply to. These include:
- (i) transactions where land is used as collateral, but it 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.

2.14 Clause 10 of the Bill provides that if enacted, the Act will “bind the state.” This means that future governments are obligated to implement and adhere to the law as enacted, unless it is amended or repealed.

PART 3—SECURITY AGREEMENTS, ATTACHMENT OF SECURITY INTERESTS AND SECURED OBLIGATIONS

2.15 Clause 11 of the Bill provides that a security agreement is effective against not only the debtor but also third parties, no matter what types of rights the debtor has in the collateral. It also states the rule that 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. This is a consumer protection concept that prevents lenders from taking a blanket charge over all household assets.

2.16 Clause 12 of the Bill provides for the 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;
- (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 third parties.

2.17 Clause 13 of the Bill provides for the attachment of obligations 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.

- 2.18 The concept of “after-acquired property” also applies to proceeds from the sale or exchange of collateral.
- 2.19 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.

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 (perfection).

- 2.20 Clause 14 of the Bill provides for future advances in security agreements. 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 4—RIGHTS, DUTIES AND OBLIGATIONS OF THE DEBTOR AND THE SECURED PARTY

- 2.21 Clause 15 of the Bill provides for a secured party’s duty to reserve 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.
- 2.22 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, though the parties may agree otherwise.
- 2.23 Clause 16 of the Bill 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 publically-traded companies where this is no actual certificate, and rules must be set out for how a secured party acts against such collateral.
- 2.24 Clause 17 of the Bill sets out the duties of a secured party in control of a 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. Clause 17 also provides that when a

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

- 2.25 Clause 18 of the Bill provides the duties of a secured party if an 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.
- 2.26 Clause 19 of the Bill provides instances for a debtor’s request for accounting, that is, 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, the then-current list of collateral, and other details about the status of the secured obligation.
- 2.27 The secured party has 14 days to respond to a request made.
- 2.28 Clause 20 of the Bill provides that a secured party may accelerate payment of a debt if the debtor is in default. Clause 20 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. For example, a company may be current on its debt payment obligations but enter into receivership. A secured party may have grounds to accelerate the debt in this situation even though there has not yet been a default.

PART 5—PERFECTION OF SECURITY INTERESTS

- 2.29 Clause 21 of the Bill introduces perfection of security interests. 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.
- 2.30 Clause 22 of the Bill provides for the perfection of a security interest by registration of notice. A security interest is perfected when it has attached to collateral and a method of perfection has been completed.
- 2.31 There are three methods of perfection. First, the secured party may register a notice 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 begin clause 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.

- 2.32 Clause 23 of the Bill provides for the second means of perfection of a security interest by taking 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 hire purchase agreement ("chattel paper" under the Act) has attached. Lender A takes possession of the hire purchase agreement.

Lender A's security interest is perfected.

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

- 2.33 Clause 24 of the Bill provides for the perfection of a security interest 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.
- 2.34 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. It also allows a lender to perfect an interest in publically traded securities held by a brokerage house.
- 2.35 Clause 25 of the Bill provides for the 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.
- 2.36 Clause 26 of the Bill provides for 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.
- 2.37 However, clause 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.

- 2.38 Clause 27 of the Bill provides for perfection of a 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 notice in respect of the fruit.

- 2.39 However, note that under subclause (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.

- 2.40 Clause 28 of the Bill provides for the 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.

- 2.41 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. Subclause (3) provides that the amount secured by a security interest in the collateral and the proceeds is limited to the value of the collateral at the time of its sale, *if* the secured party enforces against both the collateral and the proceeds.

Example

Lender has a perfected security interest in Borrower's car. The car had a value of \$6,000 at the date that Lender advanced \$4,000 to Borrower as part of the purchase price. Two years later, without Lender's consent, Borrower sells the car for \$3,500, which is the value of the car at that time.

Lender enforces its security interest in the proceeds and seizes the car.

Lender can recover only \$3,500 as the amount secured by Lender's security interest.

- 2.42 Clause 29 of the Bill provides for the perfection of a security interest in goods returned or repossessed. Security interests in goods are extinguished when the goods are taken away by buyers or lessees, 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.
- 2.43 The Bill provides that the returned goods are still 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 6—PRIORITY OF SECURITY INTERESTS AND RIGHTS OF THIRD PARTIES

- 2.44 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.
- 2.45 Part 6 of the Bill sorts out conflicts between secured parties and third parties, and makes provisions governing the commingling of goods and the attachment of goods to other property.

Division 1—General Priority Rules

- 2.46 Clause 30 of the Bill provides the 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.

- 2.47 Subclause (2) makes clear that a security interest perfected in one way is treated as being continuously perfected if later another way is used.

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 covering the goods.

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

- 2.48 Clause 31 of the Bill provides that the priority date for proceeds relates back to the date of registration of the notice that perfects the security interest in the original collateral.
- 2.49 Clause 32 of the Bill provides that 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.
- 2.50 Clause 33 of the Bill provides for 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.
- 2.51 However, subclause (3) contains one exception to this rule. If an execution creditor has filed a 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.
- 2.52 Clause 34 of the Bill provides for instances where secured parties may agree to rearrange or subordinate their priority rights in collateral, where 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.

Division 2—Priority of Purchase Money Security Interests

- 2.53 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. 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 bulldozer, then a PMSI has been created.
- 2.54 In general, the PMSI interest will take priority over a prior charge by another lender even if that prior charge was over “the entire debtor’s equipment now or hereafter owned.”
- 2.55 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.
- 2.56 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.
- 2.57 Clause 35 of the Bill elaborates on the meaning in “possession” which states the rule that where goods are shipped by a common carrier to a debtor, the debtor does not, for purposes of this law, 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 clauses in this Division.
- 2.58 Clause 36 of the Bill provides for the status of a PMSI. 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.
- 2.59 Clause 37 of the Bill provides the general rule on priority of PMSIs which states that perfected PMSIs have priority over other security interests, even if a notice of a competing security interest was filed earlier than the PMSI.
- 2.60 For example, suppose Bank has a general security interest over all the assets, present and future, of Construction Co. Now suppose that Dealer would like to sell a backhoe to Construction Co. on credit, taking its 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, Dealer can provide a PMSI and 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 hire purchase from Seller, and Seller finances the deal. Seller registers a notice in respect of the bulldozer within 7 days of Borrower taking 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.

- 2.61 Note that this clause states that there are exceptions for certain collateral categories: inventory, livestock and intangibles.
- 2.62 Clause 38 of the Bill provides that 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.
- 2.63 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 proceeds from ongoing sales.
- 2.64 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 personal 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 personal property.

- 2.65 Clause 39 of the Bill covers instances where there are conflicts involving PMSIs. 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 of a construction company to purchase a grader, and an equipment dealer may simultaneously self-finance part of the purchase price. In this case there are two PMSIs secured by the same collateral. The Bill 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 notice 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.

- 2.66 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.
- 2.67 Subclause (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 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.

- 2.68 Subclause (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.
- 2.69 Clause 40 of the Bill provides for the priority of a PMSI against execution creditors. In general, perfected PMSIs also have prior over the interests of execution creditors.

Division 3—Buyers and Other Transferees of Collateral

- 2.70 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.
- 2.71 Clause 41 of the Bill provides for instances when a transferee takes collateral free of a security interest. Subclause (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

- 2.72 Subclause (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. 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." In this case, the lender's security interest in the inventory automatically converts to a security interest in the proceeds of the sales. This allows commerce to flow without any interruption.
- 2.73 Subclause (3) sets out the special rule that in order to have maximum priority in a motor vehicle, then 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.

- 2.74 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.
- 2.75 Clause 42 of the Bill provides for buyers or lessees of consumer goods. A buyer of consumer (household) goods takes the goods free of either a perfected or unperfected security interest. The practical effect of this rule is that consumer goods are not able to be effectively pledged as collateral. This is a proper consumer protection rule. 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.
- 2.76 Clause 43 of the Bill provides that a buyer or lessee of goods is subject to temporary perfected security interests. Clause 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. Clause 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.
- 2.77 Clause 44 of the Bill provides for buyers 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 Registry.
- 2.78 Clause 45 of the Bill provides that a buyer of a parcel of land would take any fixtures on that land free of a secured transaction 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 described the location of the real property upon which the fixture resides.
- 2.79 Therefore, lenders who take charges over fixtures should include a description of the land upon which the fixture sits when registering a notice. Note that clause 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 physical 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.

- 2.80 Clause 46 of the Bill provides for the priorities 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 A’s security interest.

- 2.81 Clause 47 of the Bill provides 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

- 2.82 “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.
- 2.83 In general, people who take cash or electronic funds transfers generally take the cash and funds free of a security interests. 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.
- 2.84 Clause 48 of the Bill resolves a potential dispute between a secured party that has rights in cash 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 cars held by a car dealer as inventory. Dealer sells a car for cash. 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 cash free of Lender's security interest in the cash.

- 2.85 Clause 49 provides that the same rule in clause 48 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.

- 2.86 Clause 50 of the Bill provides for rare cases of possession of certain types of collateral can trump a prior registered notice. This clause states that for instruments (example a Bill of Exchange within the meaning of the Bills of Exchange Act, or a cheque or a letter of credit) 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.

- 2.87 Clause 51 of the Bill applies the same rule under clause 50 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.

- 2.88 Clause 52 of the Bill mirrors the same rule set forth in clauses 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 hire purchase agreement, which 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.

- 2.89 If a secured party is financing inventory that is sold via dealer financing, the secured party should take steps to take physical possession of the paper each day. As an alternative, in some cases in other jurisdictions the secured party has required the dealer to use a hire-purchase form that clearly shows the secured party's interest stamped on it so that a secondary market purchaser cannot claim it acquired the paper without knowledge.

Division 5—Assignments and Other Transfers of Accounts

- 2.90 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.
- 2.91 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.
- 2.92 Clause 54 of the Bill requires notification to be given to an account debtor of an assignment, transfer, attachment, perfection, or enforcement of a security interest in an account. There are special rules under subclause (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.
- 2.93 Clause 55 of the Bill provides for an 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.

- 2.94 Clause 56 of the Bill provides for the ability of account debtors and assignors to modify existing contracts, which is important, especially in the case of government contracts and other complex contractual arrangements (like construction contracts). 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.
- 2.95 Clause 57 of the Bill provides that 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.

Division 6—Priority in Deposit Accounts and Investment Property

- 2.96 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 that is, 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.
- 2.97 Clause 58 of the Bill provides for the meaning of “control” of a deposit account. This clause 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 paragraph (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.
- 2.98 Clause 59 of the Bill provides for the priority of security interests in deposit accounts perfected by control. Paragraph (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 upon mere registration. Multiple security interests in accounts that are perfected by control have priority according to the date of control.
- 2.99 Clause 60 of the Bill provides for the 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 (example via an agent).

Division 7—Priority in Special Classes of Tangible Collateral

- 2.100 Clause 61 of the Bill provides for priority of security interests in fixtures, that is, goods which are personal property which 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.

2.101 The Bill provides that a security interest may be created in goods that become in fixtures, and that this security interest can gain priority over land interest holders in two cases:

- (i) If the secured security interests 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
- (ii) The secured 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.

2.102 Clause 62 of the Bill provides for a 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 subclauses of clause 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.

2.103 The secured party must also 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 future sale under clause 64.

2.104 Clause 63 of the Bill 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.

2.105 Clause 64 of the Bill provides for the 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.

- 2.106 Clause 65 of the Bill provides for priority of security interest in crops in 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 secured transaction crop interest.
- 2.107 Clause 66 of the Bill provides for priority interests in 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 vessel because even though fixed to the boat, the motor retains its original identity. Under the Bill a security interest in an accession continues in the goods after they become an accession.
- 2.108 The real 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 installed 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 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.

- 2.109 Subclauses (6) to (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.
- 2.110 Clause 67 of the Bill provides for 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.

- 2.111 Under the Bill 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 Baker's sugar. Baker's sugar is subsequently combined with other ingredients to become ice cream.

Lender's perfected security interest continues in the ice cream.

- 2.112 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 \$2,000 and Lender 2 gets 2/3 of \$2,000.

- 2.113 Subclause (4)(d) pertains to PMSIs that are used to obtain goods that are later comingled. Consistent with favourable treatment elsewhere for PMSIs, a PMSI in goods that are commingled 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.

- 2.114 Clause 68 of the Bill provides for priority of security interests in certain vessels and aircraft. The creation and registration of mortgages in vessels and aircraft

are provided for in the Maritime Transport Act 2013 and the Civil Aviation Act, respectively. Such a mortgage has priority over any security interest that attaches or is perfected under the Bill. Otherwise, the provisions of the Bill apply to security interests in vessels and aircraft.

PART 7—REGISTRATION

- 2.115 Clause 69 of the Bill establishes the Personal Property Securities Registry. A fully electronic online registry is established by this clause. 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.
- 2.116 Clause 70 of the Bill enables the Minister to make regulations for the purpose of this Bill regarding filing fees and other administrative matters, including how to become a registered user of the system so as to be able to make filings.
- 2.117 Clause 71 of the Bill states 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.
- No information concerning the underlying loan amount, payment terms, credit rating of the borrower, etc. are to be included in the filing.
- 2.118 If the notice covers 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.
- 2.119 Clause 72 of the Bill requires the notice filed by an execution creditor to 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.
- 2.120 Clause 73 of the Bill provides that 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.
- 2.121 Clause 74 of the Bill provides that a notice may relate to one or more security agreements.

- 2.122 Clause 75 of the Bill describes how the name of a debtor should be provided for in a notice. 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 clause 76 and jeopardise priority.
- 2.123 The Bill 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 (example a company). For individual citizens of Fiji, the "name" to be used is the assigned taxpayer identification number.
- 2.124 Subclause (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 not standing alone). Subclause (4) states that a filing may have more than one debtor. Subclause (5) authorises parties such as lawyers and accountants to file on behalf of their clients.
- 2.125 Clause 76 of the Bill provides that a notice is seriously misleading if it insufficiently provides the name of the debtor. 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."
- 2.126 Clause 77 of the Bill provides for instances when a debtor changes name. The general rule is that a notice that becomes seriously misleading because the debtor changes its name will continue to be effective for 4 months from the change of name, and will continue to be effective if the secured party, within this 4 month window, amends the notice to correct the debtor's name.
- 2.127 Note that if the debtor is a citizen of Fiji then the tax identification number ('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.
- 2.128 Clause 78 of the Bill provides for the duration of notice and the effect of a lapse. A notice remains effective for 5 years. A continuation can be filed under clause 80 to extend the effectiveness of the notice.
- 2.129 Clause 79 of the Bill sets 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 subclause (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.

- 2.130 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 clause 80.
- 2.131 Clause 80 of the Bill provides that 6 months prior to lapse of the initial 5 year term the secured party may extend the notice for an additional 5 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.
- 2.132 Clause 81 of the Bill provides for the termination of a 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 and there will be no fee for doing so. Under subclause (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.
- 2.133 Clause 82 of the Bill provides that 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).
- 2.134 Clause 83 of the Bill sets 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.
- 2.135 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.
- 2.136 Clause 84 of the Bill provides 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.
- 2.137 Clause 85 of the Bill 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 and that the Registrar does not undertake a substantive review filing for accuracy.
- 2.138 Clause 86 of the Bill provides that all information on all notices and subsequent amendments is a public record and is available to searchers for free. If required for court, a certified search result can be produced for a fee to be set by regulations.

- 2.139 Clause 87 of the Bill provides that 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.

PART 8—ENFORCEMENT OF SECURITY INTERESTS

- 2.140 This Bill 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 clauses, including allowing the secured party to act against certain collateral types without first having to obtain court permission.
- 2.141 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 third parties.
- 2.142 Clause 88 of the Bill exempts certain transactions from the Bill's 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.
- 2.143 Clause 89 of the Bill 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
- under subclause 89(2)(e), any other rights provided in the Bill or under any other law of Fiji.
- 2.144 Clause 90 of the Bill provides for the recovery process without judicial process in certain cases. 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, chapel 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 clause to the debt.

- 2.145 Clause 91 of the Bill provides for a 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.
- 2.146 Clause 92 of the Bill provides for the 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.
- 2.147 The sale may also be delayed so as to gain a better price. Under subclause (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 seen in clause 95, the secured party may purchase the collateral at a public sale.
- 2.148 Clause 93 of the Bill provides the duty of a secured party to 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 harbour" and need not fear counter-action by the debtor.
- 2.149 Clause 94 of the Bill requires the secured party to 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.
- 2.150 Subclause (3) sets out what is required to be in the notice. Subclause (4) 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.
- 2.151 Clause 95 of the Bill allows a secured party to purchase the collateral, if the sale is a public sale and the purchase price is reasonable.
- 2.152 Clause 96 of the Bill provides for the rights of purchasers of collateral. It is imperative that purchasers of collateral obtain clear title or else they would not bid on it. This clause 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.

- 2.153 Clause 97 of the Bill relates to a 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.
- 2.154 Clause 98 of the Bill details how the proceeds from the sale of the collateral are allocated:
- (i) first to the reasonable expenses incurred by the secured party;
 - (ii) second, to pay off any senior debt;
 - (iii) third, to pay off the debt of the foreclosing secured party;
 - (iv) fourth, to any junior creditors; and
 - (v) fifth, any surplus goes to the debtor.
- 2.155 Under subclause (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 subclause (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. Under subclause (4) the debtor remains liable for any deficiency.
- 2.156 Clause 99 of the Bill provides for the right a secured party has to retain collateral. The secured party may retain 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.
- 2.157 Clause 100 of the Bill 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.
- 2.158 Clause 101 of the Bill 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 subclause (3) the debtor is only permitted to reinstate once every 12 months, else the law encourage debtors to make late payments.

- 2.159 Clause 102 of the Bill provides for the enforcement of a security interest in a mortgage. 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 clause 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.
- 2.160 Clause 103 of the Bill provides that where a secured party fails to fulfil its obligations under the Bill 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.
- 2.161 Clause 104 of the Bill provides details how notice is to be delivered depending upon whether the party to be notified is an individual or a corporate entity.

PART 9—CONFLICT OF LAWS

- 2.162 Clause 105 of the Bill provides for instances when 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.
- 2.163 Clause 106 of the Bill provides for the 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) within 30 days after arrival in Fiji or no later than 7 days after the secured party learns of the move of the goods to Fiji.
- 2.164 Clause 107 of the Bill determines how the home jurisdiction of a debtor is determined. For corporate debtors it is the country of incorporation.
- 2.165 Clause 108 of the Bill provides that 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.
- 2.166 Clause 109 of the Bill provides the position where a 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.

- 2.167 Clause 110 of the Bill addresses the situation where the law of another jurisdiction where collateral is located has no secured transactions-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.
- 2.168 Clause 111 of the Bill provides for the 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 this law.

PART 10—MISCELLANEOUS

- 2.169 Clause 112 of the Bill is the transitional provision. 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.
- 2.170 In other words, the Bill will not affect priority of prior transactions so long as they are filed within the transition period. If the notice is filed after the transition period ends, priority will date from the date of filing under this law. Finally, if a notice of a prior transaction is not filed under this law, it will be considered to not have priority against a security interest that has been filed within the transition period.

Example

Assume the transition period begins January 1 2018, and extends for 6 months. Borrower approaches Bank 1 on February 1 seeking new money. Bank 1 conducts a search of the 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.

- 2.171 It is still possible to lend during the transition period using PMSI financing as the PMSI rules in the Bill typically allow new value given for the purchase price in goods to achieve priority over pre-existing charges.
- 2.172 Clause 113 of the Bill provides offence provisions. Certain violations under the Bill 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.

2.173 Clause 114 of the Bill provides for consequential amendments to other laws as set out in the Schedule to the Bill, to align to the provisions of the Bill.

3.0 MINISTERIAL RESPONSIBILITY

3.1 The Act comes under the responsibility of the Minister responsible for finance.

A. SAYED-KHAIYUM
Attorney-General