Explanatory Memorandum
Personal Property Security Act

Prepared by

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Executive Summary

The purpose of the Personal Property Securities Act (PPSA) is to increase economic activity in Samoa. The Act facilitates this by creating a framework that will make it easier and less expensive to obtain credit by providing an efficient means by which movable property may serve as collateral for a loan. The Act accomplishes this by providing for the creation of what are called "security interests" in movable collateral in favor of secured parties, typically institutional lenders. These security interests are then recorded into a centralized electronic registry where "Notices" of security interests may be filed. This allows other lenders to determine whether a proposed debtor has previously pledged collateral to secure a prior loan. The ability to perform this sort of search against a would-be borrower results in lenders feeling more confident about extending credit, knowing that the collateral for their loan has not been previously pledged. The Act provides clear rules for establishing priority between parties that may have competing interests in the collateral, thus bringing certainty to lending transactions. The Act also provides for simplified, expedited enforcement against collateral when a debtor defaults. The Act repeals the Chattels Transfer Act and those sections of the Companies Act which pertain to company charges. The Act shall be administered by the Ministry for Commerce, Industry and Labour.

The following is a high-level narrative of the major elements of the Samoa PPSA.

Creation of Security Interests in Movable Property

The PPSA sets out rules for the creation of "security interests" in movable property that can be used as collateral. Movable property is defined broadly and can include not only tangible things such as inventory and equipment, but also intangible property like accounts receivable, patents and property to be acquired in the future. The intent of the Act is to be applied as broadly as possible, covering a variety of types of property and transactions. However, it is crucial to note that the Act does not apply to land (immovable property).

The Act does not intrude into the business deal to be struck between the parties. The parties to the transaction are free to set the terms of their underlying contract as they see fit, including setting the payment terms, designation of the collateral and the definition of default.

Application to various transactions

The PPSA applies to all transactions that have traditionally been used to create a charge over (or security interest in) personal property. These transactions include such things as: company charges, hire-purchase arrangements, chattel mortgage, retention of title financing, other forms of dealer/seller financing, bills of sale and pledges. Note that the terminology used no longer matters: if movable property is used to secure payment or performance, this Act will apply.

Establishing "Priority" in Collateral

The PPSA sets out specific rules for establishing priority in collateral. "Priority" is a term that means one party has first rights in the collateral over all others. Consider the situation where a business becomes insolvent. It is likely such a business will have many creditors. The creditor with "priority" will have the first claim on the debtor's collateral. The PPSA contains clear priority rules covering a multitude of possible business scenarios, which is extremely important as this brings clarity and certainty to lending transactions. When lenders are confident that no other creditors can jump ahead of them in the event of a default they are more likely to extend credit.

In practice, by far the most common method of establishing priority in collateral is through filing a "Notice" of security interest in the online electronic registry created under the Act. The registry will be discussed in more detail in the next section below.

The Registry and its Contents

The PPSA provides for the establishment of an online, exclusively electronic registry where Notices of security interests are filed. By filing a Notice the secured party sets its priority as of the date and time of filing. All filings made into the registry are completed by the users (i.e., the lenders), not by registry staff. This means that filings can be made in real time and are automatically uploaded to the live database once submitted. This also means that searches can be conducted in real time as all Notices filed in the registry are public records and may be searched via the internet.

The PPSA requires only limited information to be provided in the Notices that are filed in the registry. The concept is that the registry should only collect enough information as is necessary to announce to a searcher that a particular debtor and some of their personal property may be subject to a security interest. This means that a Notice filed in the registry need only identify the debtor, the secured party and the collateral. There is absolutely no requirement to supply the confidential details of any loan transaction, including the amount of the debt and the payment terms. Unlike with company charges, the underlying loan documents are not filed. This will greatly simplify the administrative side of fully documenting loans.

In most cases a general description of the collateral is sufficient. For example, a Notice stating that "all movable property now or hereafter owned by Company ABC is subject to this security interest" would be sufficient to create a blanket charge over all over ABC's movable property. However, with regard to motor vehicle financing, the serial number (VIN) of the motor vehicle will need to be entered into the registry database to ensure priority. The reason why is because

the serial number is a searchable field in the registry, making it very easy to learn if a particular car has a charge over it.

The online registry

The technology inherent in modern registry systems allows frequent users of the registry (like institutional lenders) to establish client accounts with the registry website. Each client account may have one or more individual users who may file Notices or request certified search reports and otherwise use the account. The client account also serves as a tool by which clients may monitor the status of their filings and reconcile their own records as the registry will generate and maintain information about each client's own activities within the registry.

Filing Notices within the registry is straightforward and intuitive, and with minimal training users will be able to easily navigate their way around the registry interface.

Enforcement

The PPSA sets out a means by which to enforce interests against the collateral in the event of default by a debtor. The following enforcement mechanisms are available:

i. All rights contained in the security agreement (i.e., the loan documents) may be deployed;
ii. The secured party has the right to possess or control the collateral;
iii. The secured party has the right to sell the collateral and apply the proceeds against the debt; and
iv. Any other rights provided in this Act *or under any other law of Samoa*.

The italicized text above is important: the PPSA remedies do not replace the body of law in Samoa pertaining to enforcement of debts, but rather adds to it. Therefore, the current practices in use today can continue, such as proceeding under the Judgment Summons Act 1965.

With regard to the sale of collateral after it has been seized, the PPSA provides that the secured party may act in any "commercially reasonable" manner. To protect the debtor and other creditors, the PPSA requires a secured party to give notice of proposed sale to the debtor, other secured parties of record and any other persons known to have an interest in the collateral. The Act protects debtors by granting them the right to redeem (buy back) the collateral at any time prior to its sale by paying the costs of enforcement and fulfilling the remaining obligation on the underlying transaction. Once there is no remaining dispute about rights in the collateral, the secured party may distribute the proceeds of the foreclosure sale in the order of priority established by the law. The PPSA sets out the distribution scheme according to the relative priorities of all interested parties in the collateral.

The transition period

There are pre-existing transactions that will now fall within the PPSA, and those existing transactions must be migrated into the PPSA registry in a fair way so as not to prejudice the rights of the parties to these earlier transactions. The Act contains transition rules that will permit the lender in a prior transaction to file a Notice of that prior transaction in the registry within **90 days** from the commencement of the Act. If a secured party in a prior transaction files a Notice within this 90-day transition period, then that Notice will establish the lender's priority as it existed under the prior law. In other words, if the transition filing is made within these 90 days, the lender will be given the same priority as it already had—it will relate back in time to the original priority date. However, if the Notice is filed after the transition period, priority will date from the date of filing. *It is therefore strongly recommended that all entities that hold a pre-existing security interest in collateral should file a Notice for that transaction during the 90-day transition period.*

Section-by-Section Analysis of PPSA

The following text provides a section-by-section narrative analysis of the Act. However, this information is not intended as legal advice. You should consult with your own legal advisors prior to relying on the information contained in this Explanatory Memorandum. Making a legally effective loan and submitting a proper Notice to the registry is the responsibility of the lender, and the Registrar's Office will not be reviewing loan documents or filings for accuracy, completeness or legal compliance. Under the Act, filers truly control their own destiny by their actions.

Section 1, Short title and commencement. This Act may be cited as the Personal Property Securities Act 2013 and shall commence when Notice of commencement is published in the Savaii by the Minister of the Ministry of Commerce, Industry and Labour.

Section 2, Interpretation. This provides an overview of the different Parts of the Act.

> Commentary. There are many definitions in this Section. This Act is highly technical and very specific to the financial industry, so it is important that many terms are properly defined. The definitions are crucial as any priority analysis of an issue under the PPSA begins with determining what sort of property is serving as collateral as different rules can apply based upon the collateral's classification. Thus, the definitional section is long and detailed.

Example: consider how a motor vehicle could be classified depending upon its status-in-time—

- A car sitting on a car dealer's lot for sale is "inventory."
- A car used by a construction company is likely "equipment."
- A car owned by an individual is just a car.

Section 3, Overview. This section contains a summary of the various parts of the Act.

Section 4, Act binds the Government. The provisions of this Act shall bind the government.

Section 5, Application. This provides for the scope of the law with regard to the types of transactions that are subject to the Act.

Commentary. The PPSA applies to traditional borrower-lender transactions. However, the Act will also apply to other transactions that have sometimes been used to create an interest in personal property despite not being called loans. These transactions include such things as title retention, hire-purchase, pledge, chattel mortgage, and company charges. Note that the terminology used no longer matters: if the reality of the transaction is that movable property is used to secure payment or performance, this Act applies.

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

For purposes of Notice and priority, the PPSA also applies to liens. "Liens" are defined as "a right in property which is created by an Act, other law, an order of a court or other legal authority, or by the authority of an administrator in an insolvency proceeding." This would include court judgment holders, bankruptcy trustees, taxing authorities and company liquidators.

There are a few exceptions to the application of the Act. Most importantly, it will not apply to transactions or interests involving land. It also does not apply to ships registered under The Shipping Act nor to interests registered under the International Companies Act.

Section 6, Obligations. This lists the types of obligations that can be secured under the Act, which may include monetary and/or non-monetary obligations.

> Commentary. The payment of money is the most common obligation secured under the PPSA, but other obligations may also be secured (such as the obligation to sign documents or transfer shares in a company upon the occurrence of an event). This Act gives wide discretion to the parties in describing the type of obligation that is secured, both as to type of obligation and as to when the obligation comes into existence.

Section 7, Security interests in consumer goods. Consumer goods are items that are for household use, such as a stove or refrigerator. This contains a special rule with regard to consumer goods intended to protect consumers, namely, that consumer goods are not allowed to be pledged as collateral to secure a general loan.

> Commentary. It is bad public policy to allow a person to pledge their household items to secure a loan for their business, for if that business was to fail then the household goods could be seized, depriving the family of their means to live. In only one limited case may a consumer good stand as collateral. That is when the loan is for the purchase of the consumer good itself. For example, a hardware store that elects to self-finance the purchase of a stove may take a security interest in that stove to secure repayment. That same hardware store could not take an effective security interest under the PPSA in other household goods already owned by the buyer.

Section 8, Description of collateral. This sections sets out the rules with regard to how collateral is to be described in Notices filed in the registry.

> Commentary. The security agreement (i.e., the loan documents) must list or describe the collateral. Similarly, a filed Notice of security interest must describe the collateral sufficiently to inform a person searching the registry whether a particular item of movable property has been pledged. A collateral description may be general or specific. This means that a description which merely states that "all of the debtor's movable property now owned or hereafter acquired" is valid without the need to detail every individual piece of movable property.
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> There are three special rules to be aware of when preparing a collateral description for a Notice to be filed in the registry. They are:
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> i. If a specific motor vehicle is part of the collateral, its VIN (chassis number) should be included in the specific field designated for VINs.
>
> ii. If movable property that is to be attached to land is part of the collateral (termed a

"fixture" under the PPSA), then the Notice "must describe the immovable property" (the land) on which it is located for the lender to achieve the highest protection. See Section 34(1)(b).

iii. If collateral includes consumer goods, a specific description is required, such as a serial number for a refrigerator used when financing the sale of that refrigerator.

Section 9, Attachment of security interest. A security interest is enforceable when it "attaches" to the collateral. This sets out the rules pertaining to how an interest may "attach." Attachment occurs: i) when there is a signed security agreement; 2) value is given by the secured party; and 3) the debtor must have rights in the collateral. These three conditions may be met in any order.

Commentary. 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. Later in the PPSA the related concept of "perfection" is addressed. "Perfection" is the term that marks when a secured party's claim in the collateral becomes superior against 3rd parties.

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. However, Lender A may not have priority over third parties given that there has been no registration (perfection).

The form of the value given by the secured party to the debtor is not important; that is, it may be money, property, services or a promise of future performance such as future advances. The debtor's rights in the collateral need not be ownership rights; they may be only leasehold rights, license rights or other rights against which the secured party may enforce in the event of default.

Unless the description of collateral in a security agreement explicitly excludes proceeds, a security interest automatically includes proceeds of the collateral. Thus, if a borrower were to sell the collateral, the security agreement automatically attaches to the sale proceeds. This allows borrowers that have a rolling inventory such as a supermarket to obtain financing as a lender's interest will attach to the proceeds of the sale of the inventory.

Section 10, **Notice to account debtors not required**. This section contains a special rule with regard to a special class of persons called "account debtors." An "account debtor" is a person who is obligated to pay the debtor.

Commentary. 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 and 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.

Section 10 eliminates any requirement that Notice of an assignment of their account be given to the account debtors. If after a default the secured party exercises its right to receive payment from the account debtors, it will give written Notice directly to the account debtors to make payments to it (the secured party) and not to the debtor.

Section 11, Continuity of security interest. This provides that a security interest held by a lender will continue in the collateral after it is transferred.

Commentary. This section states the general rule that a security interest follows the collateral into the hands of transferees. This protects lenders from having their debtors transfer collateral to try to defeat the validity of the charge. There are a few exceptions to this rule, including a transfer with consent of the secured party or a transfer in the ordinary course of business, such as the sale of inventory to a store's customers.

Section 12, Request for accounting or statement of account. This allows debtors to obtain an accounting of their debt from the secured party.

Commentary. Debtors have the right to obtain up-to-date information about their loan (or other obligation) from their secured party, including a statement of the amount owed and the collateral covered by the security agreement. However, the section strikes a balance in that debtors may only make one such request once every six months without charge, and any other requests may result in a reasonable fee being charged by the secured party for compiling this information.

Section 13, Security agreement. This defines what the security agreement is and contains rules on how it may operate between the parties.

Commentary. A "security agreement" is simply the term used in the PPSA to describe the loan document or other documents that create the obligation. This first subsection provides that a security agreement must be in a "written form or electronic form that may be printed," so this requirement may be met by means other than a signed paper. It could

be met by an exchange of e-mail messages that together constitute an agreement, provided that the intent of both parties is clear from the totality of the messages.

The remaining subsections provide technical rules on what may be contained within a security agreement. The two most important subsections state that:

i. a security agreement may provide that it covers future advances. Thus, a new Notice need not be filed each time new monies are extended under a line of credit; and

ii. the security agreement will define what constitutes an event of default and what the possible remedies will be for an event of default.

Subsection (6) provides some enhanced protections for creditors. It states that a secured party may accelerate payment of a debt based on a determination that the collateral or payment of the debt is "at risk." A secured party may have grounds to accelerate the debt in this situation even though there has not yet been a default. To do so there must be "commercially reasonable grounds" for that determination, and if challenged, the burden of proving that the loan is "at risk" is upon the secured party. This subsection (6) might be used, for example, where company may be current on its debt payment obligations but has entered into receivership, casting doubt on its viability.

Section 14, Perfection of security interests. This section sets out the four methods by which a secured party may make its rights in the collateral superior to other third parties so as to protect its interest in the collateral. This is called "perfection" of the security interest.

Commentary. Security interests can be "perfected." A security interest is perfected when it has attached to collateral and a method of perfection has been completed. A perfected security interest is a security interest that has maximum enforceability against third parties, such as buyers of collateral and other creditors. Normally a secured party must take a positive step to achieve "perfection," and by far the most common step is to file a Notice in the PPSA registry. There are three other methods by which a security interest may be perfected.

i. Possession. If the collateral consists of goods, instruments, documents or a secured sales contracts, perfection may be achieved by the secured party taking possession of the collateral. For cash other than cash proceeds, possession is the only means of perfection.

ii. Automatic. There are two instances in which a security interest is perfected automatically at the time it attaches to the collateral. The first is a security

interest in consumer goods, which must be via a "purchase money security interest." The reasons for automatic perfection in consumer goods are that they are generally of low value and often involve large numbers of transactions, making payment of a filing fee each time an item is sold impractical. The second instance is a security interest in proceeds of the sale of collateral when there is a perfected security interest in the original collateral. See Section 15(f) for further details concerning perfection in proceeds.

iii. Control. A security interest deposit account can be perfected by "control." So, a bank that is a secured party and that holds a deposit account of its debtor is perfected in the funds in that account. Also, a bank, the secured party and the debtor may agree that the bank will comply with the secured party's instructions to dispose of the funds in the account. It is also possible to have a secured party named on the account with the consent of the debtor or by order of a court. In the case of securities, control of a certificated security is by possession of the certificate and, if it is in registered form, endorsement. See also Section 15(e).

Section 15, Means of perfection in special cases. This explains the manner in which "perfection" may occur in certain specified cases related to different types of collateral.

Commentary. By far the most common method of perfection is by filing a Notice into the registry established by this law. This Section 15 lists the permissible and mandatory alternatives to filing a Notice. In most cases, possession of the collateral by the secured party is an acceptable alternative to filing. The cases of mandatory use of another means of perfection are self-explanatory.

It is important to note that, as to motor vehicles, obtaining perfection over future buyers or lessees of the vehicle requires that the Notice that is filed includes the VIN (serial or chassis number). By requiring the VIN to be entered onto the registry, all doubt is removed as to whether a vehicle has a charge against it or not, and searchers can easily find out if a car has a "clean" title.

Section 16, Meaning of "possession" in certain cases. This defines what is meant by "possession" of certain specific items that may serve as collateral, such as instruments and stock certificates.

Commentary. Taking possession of collateral is one means by which a secured party may perfect its interest in that collateral. This Section defines what constitutes "possession" in various situations with differing types of collateral.

Section 17, Perfection by different means. This states the rule that once perfection is achieved by one method, it can later be perfected by another method as well, and the status of perfection continues.

> Commentary. It is not uncommon for the means of perfection to change over time. So long as there is no point at which there is a break in perfection, the perfection date relates back to the initial date of perfection. For example, if a secured party perfects a security interest in goods by taking possession and then files a Notice of the interest before delivering possession to the debtor, perfection is continuous from the first date of perfection by possession.

Section 18, Assignment of security interest. This explains that an assignment of a security interest can be made between secured parties (i.e., usually institutional lenders) without the need to file an amendment.

> Commentary. Though a secured party may assign its perfected security interest without filing a Notice, an amended Notice may optionally be filed to indicate the assignee as the secured party. While it is prudent for the assignee to file an amended Notice indicating the assignment, whether or not an amended Notice is filed, perfection is continuous from the date of the initial perfection.

Section 19, Lapse of perfection. A filed Notice is effective for five years. This period may be extended by filing a "continuation." If no continuation is filed, then the Notice lapses. This Section tells how "perfection" in collateral may lapse and the effect of such lapse.

> Commentary. If there is a break in perfection and then re-perfection after such break, the re-perfection establishes a new perfection date. That is, the new perfection does not relate back to the first perfection date after a gap in perfection. The reason is that there is no Notice of the security interest to buyers or other secured parties during the gap. Since third parties may act in reliance on the lack of Notice, it would be unfair to permit a re-perfection after the gap to relate back to the initial perfection date.

Section 20, General priority rules. This sets out the general rules regarding which entity has priority rights in property that has been pledged as collateral. The general rule is that the first secured party to perfect their interest has priority in the collateral if the debtor defaults. Subsequent Sections contain specific rules that arise in limited instances.

> Commentary. The general rule is that the first to file or otherwise perfect has the first priority in the collateral.

Example

Lender 1 registers a financing statement in respect of Borrower's present and after-acquired property. Later, Lender 2 registers a financing statement 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.

A secured party is permitted to file a Notice of its security interest before the interest attaches, and to have priority from the time of filing rather than the time of perfection, which brings certainty to lending transactions. In a typical case, the debtor will apply for a loan, and the bank loan officer will search the records of the filing office for prior filed Notices. If there are none, and if the debtor consents, the loan officer can file a Notice to secure the bank's first priority. After the bank is assured of its priority, the decision to lend may be made and money advanced. Since the bank may not advance the money for some time after the filing, it is critical that the priority runs from the time of filing.

If there are two or more unperfected security interests in the same collateral, and if there are no perfected security interests, priority is determined by the first security interest to have attached to the collateral.

Finally, it is important for a prospective buyer or secured party to know about all types of interest in collateral, not just other security interests. Therefore, the priority scheme of the law includes not just security interests, but liens as well. There are special rules around loans which involve future advances and how they interact with a lien holder. Basically, a lender that is funding ongoing operations with periodic loan disbursement should check the registry prior to each disbursement to see if any intervening lien holder has asserted intervening rights against the debtor.

Section 21, Priority continues in proceeds. This lists the priority rules with regard to the proceeds of a sale of collateral. When a debtor disposes of collateral in which there is a perfected security interest, there is a perfected security interest in the proceeds of the disposition.

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 <u>and</u> in the money received by Borrower's from the sale of the car.

<u>Commentary</u>. This rule allows lenders to extend credit to entities that have inventory continuously being purchased by the public. The collateral in such case would be the inventory, and then the proceeds from the sale of the inventory.

Practice tip. When financing inventory, lenders should consider making the borrower maintain their deposit account with the lender (in the case of a licenced financial

institution) or with an account under the control of the lender (in the case of a non-licenced lender) so as to monitor the receipts logged by the borrower.

Section 22, Purchase of secured sales contracts and instruments. This contains special priority rules with regard to the purchase and sale of instruments.

Commentary. This section establishes an exception to the general rule that the order of perfection or filing governs priority. In order to encourage secondary financing, this section grants "buyers in the ordinary course of business" priority over prior perfected security interests in the secured sales contracts or instruments, *provided* two conditions are met. First, the buyer must give new value for the secured sales contracts or instruments and take possession of them. Second, the secured sales contracts or instruments must not include a notation of the security interest. This means that financers who take security interests in secured sales contracts or instruments should either: (1) perfect by possession; or (2) perfect by filing a Notice and also annotate the secured sales contracts or instruments with a clear indication of the security interest.

Section 23, Transferee exceptions. The general rule is that a security interest follows the collateral into the hands of a transferee. This explains the special rules governing when a buyer or other transferee of movable property that has been pledged to stand good for a debt may obtain such property free of the charge.

Example.
Lender has a security interest in Debtor's printing press. Debtor sells it to Buyer. Unless an exception to the general rule applies, Buyer takes the printing press subject to Lender's security interest and Lender may repossess it from Buyer if Debtor does not pay off the debt.

Commentary Under the general rule, a person takes collateral free of a security interest if the person: (1) has no knowledge of the security interest, (2) has no knowledge that the acquisition violates the secured party's rights, and (3) *the security interest has not been perfected*. In other words, lenders protect themselves by perfecting (usually via filing a Notice).

Example
Lender has a security interest in person Borrower's car. The security interest has attached but has not yet been perfected. Borrower sells the car to Buyer, and Buyer acquires the car before Lender registers a financing statement in respect of the car.
Buyer takes the car free of Lender's security interest

This Section 23 sets out specific exceptions to the general rule. Most of the exceptions are self-explanatory, and often they do not occur frequently. The most important rules are discussed below.

1) The "ordinary course of business" exception applies if the seller or lessor is in the business of selling or leasing the kind of goods sold or leased. For example, if a hardware store has pledged all of its inventory to stand good for a loan, the people who buy goods from that store do not take them subject to the charge: they take those goods free and clear of the charge as the 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, in other words, the cash. This allows commerce to flow without any interruption. Practice note: smart lenders that are financing a business with inventory will either require the borrower to bank with them so as to be able to monitor the daily cash deposits or otherwise exercise control over the borrower's deposit account held by a financial institution.

2) There is a special rule for automobiles. In order to have maximum priority in a motor vehicle, the serial number (also commonly known as the VIN, or chassis number) must be entered into the registry. If the serial number is not entered, a third party will take the car free of a security interest even if a Notice has been filed. For example, suppose a Buyer wants to buy an automobile advertised by a private-party 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 has a specific search field for searching serial numbers making it very easy to determine if a vehicle has a charge over it.

Compare this to a case where a lender is financing all of the inventory of a car dealership. It would be very difficult for a lender to constantly update its Notice to include the serial number for every car that comes on the lot. In this case, the cars on the lot are "inventory." When the dealer sells these cars, the transaction is "in the ordinary course of business" and the buyers take free of the security interest. Here, the lender's charge automatically attaches to the proceeds of the sale.

3) A lien holder such as a plaintiff who seizes property takes free of a security interest if the interest was not perfected at the time of seizure of the property. Looking at it from the other side, a perfected security interest will have priority over a later court judgment.

4) If a security interest has not been perfected by the time an insolvency administrator or liquidator takes custody or control of the assets in insolvency proceedings against the debtor, the administrator or liquidator takes the collateral free of the security interest.

Special Note – "Purchase-Money Security Interests"

A "purchase-money security interest" (PMSI) is a security interest given by a debtor to a secured party to secure a loan that is used to purchase specific goods. 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. In general, *the PMSI interest will take priority over a prior charge by another lender even if that prior charge was over "all the debtor's equipment now owned or later acquired."* Why? There are two main justifications for this "super-priority" status. The first is that as new money is being provided to the debtor for new property, any prior lender would not have relied on this new property serving as collateral when it made its loan. Therefore, the old lender is not put at a material disadvantage. The second reason is that this rule allows debtors to shop around for lower interest rates when they need new financing for new capital expenditures. Without such a rule, debtors would be at the mercy of their existing lenders. Therefore, this rule promotes the free-flow of commerce at a macro-economic level, and also encourages competition in the lending marketplace.

Section 24, Purchase money security interest. This section creates a narrow exception to the general rule that the first secured party to perfect has priority in collateral.

Commentary. The following examples will illustrate how PMSI financing works in different situations.

A PMSI in *equipment* and other *goods* has priority over a conflicting security interest if the purchase money security interest is perfected when the debtor receives possession of the equipment or within 10 days from receipt.

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 self-finances the deal. Seller registers a financing statement in respect of the bulldozer 7 days after Borrower took possession of the bulldozer.
Seller's security interest in the bulldozer has priority over Lender's prior general security interest in all of Borrower's property.

There is a special priority rule for PMSIs in *inventory* (and livestock). This rule gives a purchase money financer of inventory or livestock priority over existing perfected security interests in the same collateral only if: 1) the purchase money security interest is perfected when the debtor receives possession of the collateral; and 2) the purchase money secured party gives written Notice to the prior secured party within 10 days describing the specific items or classes of collateral for which purchase money financing is given. The reason for the Notice is that a general creditor who finances inventory is

likely to be making regular advances and may want to reconsider in the event that a new super-priority in some inventory has been created.

Section 25, Priority in fixtures. This Section explains the special rules governing "fixtures." A security interest in a fixture may be created, perfected and enforced under the PPSA.

Commentary. "Fixtures" are goods that are fixed or intended to become fixed to immovable property such that a right in the goods may arise under the laws governing land. An example of a fixture is an air conditioner installed via a wall mount. "Fixtures" does not include building materials, readily removable factory machines, office machines, and domestic appliances.

In essence, this means that this Section 25 clarifies the rights of the land mortgage holder vs. the movable property charge holder when an item of movable property becomes affixed to the land. The rules of priority are:

1) If the security interest in the movable item is unperfected, the land mortgage holder has priority over the movable property security interest.

2) If the movable property secured party files a Notice either before or within 10 days after the movable property is attached to land, the movable property secured party has priority in the fixture.

3) If a land mortgage arises after the fixture becomes attached to the land, and if the movable property secured party has previously filed a Notice, then the movable property secured party has priority.

This Section also provides that if a movable property secured party removes the property from the land after a default, it must do so in a manner that causes as little damage as possible and must reimburse the land mortgage holder for any damages to the land. This does not include any reduction in value of the land due to the absence of the movable property.

Section 26, Crops. This explains the special rules governing crops and the relationship between a lender on the crops and an existing holder of a mortgage on the land on which the crops are grown.

Commentary. A security interest may be taken in crops, and the security interest may run from before the seeds are planted until after the crop is harvested. It is not uncommon in other jurisdictions for a bank to secure a farmer's annual line of credit with the crops to

be grown, and the first advance on the line of credit may be to purchase seeds. Therefore, a security interest may attach and be perfected before the crops are growing.

Important note: a perfected security interest in crops only has priority over a pre-existing mortgage interest in the land if the mortgagee has consented in writing to the security interest in the crops.

Section 27, Right of retention. This provides for a “right of retention” under which a person who repairs an item of movable property may retain such property until they are paid for their services.

Commentary. The “right of retention” arises automatically in favour of a person who cares for, maintains, repairs or improves the goods of another. The right of retention is for the purpose of securing payment for the services rendered by the person. The most common case is where a mechanic repairs a car engine of another and holds onto the car until paid. The mechanic’s right of retention has priority over a perfected security interest in the goods while the mechanic still has possession of the vehicle.

Section 28, Accessions. This explains the priority rules for “accessions,” which are items of movable property that are attached to other items of personal property, such as engines placed inside factory equipment, or a motor attached to a boat.

Commentary. An accession is an identifiable component of an item of movable property. For example, a business may have machines that are powered by electric motors. If the motor in one machine fails, a replacement motor would have to be obtained and installed. When installed, the new motor is an accession. If the business has financed the purchase of the motor, and if the financer has taken a security interest in the motor and perfected it, the perfected security interest in the motor continues after it becomes an accession. If the business defaults on payment for the motor, the financer may recover against the motor by removing it from the machine, provided the security interest in the motor has priority over other interests in the whole machine.

Example 1
Lender has a security interest in 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 PPSA registry. The motor is installed in Owner’s car. Lender later takes a security interest in Owner’s car and perfects its security interest by registering.

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

Priority between security interests in accessions and security interests in the whole is determined under the rules applicable to security interests generally. That is, the first to file a Notice or to perfect its interest prevails unless there is an exception to the general rule, such as that for a purchase money security interest. For example, if a financer takes and perfects a security interest in all the equipment of a debtor, and another financer later takes and perfects a purchase money security interest in a motor that becomes an accession to a piece of equipment, the security interest in the motor would have priority because it is a purchase money security interest.

If the debtor defaults, the holder of the accession security interest may remove the accession, and subsections within this Section 28 set out the procedure for the accession-lender to follow. Importantly, this Section gives a secured party with an interest in "the whole" (the item to which the accession is attached) several protections, including the optional right to pay off the accession security interest so that the accession remains attached. This protects lenders with an interest in the whole in that if a key piece of equipment was about to lose its engine, that lender could pay off the accession lender so that the business can keep going.

Section 29, Commingled goods. This sets out the rules pertaining to "commingled goods," which is defined as "fungible goods that are physically united with other fungible goods in a way that their identity is lost in a product or mass." An example would be rice that has been harvested from different locations and stored in a central bin.

Commentary. A security interest may not be given in a quantity of goods after they have been commingled, because they are not identifiable. However, that does not mean that a security interest in a document representing the quantity of commingled goods may not be taken. For example, if a farmer puts 10 tons of copra into common storage and receives a warehouse receipt for 10 tons of copra, the farmer may not give a security interest in the commingled copra, but the farmer can give a security interest in the warehouse receipt (and the lender should take possession of the receipt, not just rely on a filed Notice).

The basic rules relating to priority of commingled goods are:

1) If the interest was perfected in the goods before they were commingled, perfection continues in the mass.

2) A security interest in goods that was not perfected at the time the goods were commingled cannot be perfected in them after they are commingled. However, perfection can occur with respect to a document pertaining to the commingled goods, such as a warehouse receipt.

3) Priority of the security interest in the commingled mass dates from the time of perfection in the goods before they were commingled.

4) A security interest that is perfected in goods before they are commingled has priority over unperfected security interests in the mass.

5) If there are multiple perfected security interests in the mass, and if the value of the mass is less than the sum of all perfected security interests, they will have equal priority in the value of the mass in proportion to the value of the goods when they became commingled.

Example
Lender has registered a financing statement 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.

Section 30, Subordination. This allows one lender to subordinate their claim in the debtor's property to another lender.

Commentary. In some situations, it is advantageous for a secured party who has priority to subordinate (make lower in priority) its security interest to that of another secured party. Such agreements are enforceable as with any other contract. Filing of a Notice of the subordination is not required: this is a private matter between secured parties.

Section 31, Knowledge. This defines the meaning of "knowledge" and sets out the standards for when individuals and organizations are deemed to have knowledge of a fact.

Commentary. Subsection 31(2) deserves special discussion as it is counter-intuitive. Although Notices filed in the registry are public information, the presence of a filed Notice does not constitute "constructive Notice" to the world for the purpose of the judicial doctrine of constructive Notice. This requires some explanation given the emphasis placed on filing in the registry.

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

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

Lawyers in other jurisdictions trying to fight this bright line rule on behalf of an unsecured creditor have tried to attack it on the grounds that the filed Notice was defective in some way. The unsecured creditor will argue to the judge (in expensive litigation) that secured creditor's Notice contained some little mistake. This is where the concern over including a judicial doctrine enters, because judges have power to grant exceptions to judicial doctrine, including the doctrine of constructive Notice. Judges could be persuaded to grant an exception, saying that while Notices constitute constructive Notice, "in this particular case with these parties and facts, the unsecured creditor was misled."

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

New Zealand and Canadian law contain this exact same text. In both countries, registration of a financing statement in the registry is not constructive Notice or knowledge of its existence or contents to any person. The official commentary accompanying the text in the United States also states that a filing is not constructive Notice.

Section 32, Establishment of electronic filing Registry. This establishes the electronic registry into which Notices of charges are filed. The registry will be maintained by the Ministry of Commerce, Industry and Labour.

Commentary. An online, fully electronic registry is established by this section. The registry receives Notices of security interests and the interests of lien holders (such as the winners of court judgments). Filers submit their own filings online which are fed directly to the registry database, meaning, the Ministry 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.

Section 33, Public record. This makes clear that the information contained in the electronic registry is a public record and available for inspection.

Commentary. Any person may search the records of the filing office via the internet. This will allow people to quickly check, for example, whether a motor vehicle is subject to an existing charge.

Section 34, Initial Notice. This defines the contents of the Notice that is filed in the electronic registry.

Commentary. The standards in this section establish the minimum information for filing a legally sufficient Notice. The person who files a Notice is responsible to ensure that information "substantially complies" with this section, not the filing office maintained by the Ministry. The Notice filed in the registry need only identify the debtor (see Section 35), the secured party and the collateral. *There is absolutely no requirement to supply the confidential details of a loan transaction, including the amount of the debt and the payment terms, and this information should not be placed into this public registry*. The following rules apply to the Notice to be filed:

1) The debtor must authorize filing of a Notice in writing. However, the Notice itself is not signed. Rather, the signature is on a separate writing, usually the security agreement (i.e., the loan documents).

2) Filing of a Notice may come before the conclusion of the security agreement and attachment of the security interest, provided the debtor has authorized it in writing. This is commonly done during the loan application process to permit the secured party to ensure its priority in the collateral before it commits to advancing credit.

3) A lien holder may file a Notice of the lien without the consent of the lien debtor. A lien holder may ensure its priority in movable property pending its seizure by filing a Notice when the lien is established. If the lien holder does not file a Notice, it establishes its priority at the time it seizes the collateral. That is, the act of seizure constitutes perfection by possession.

4) The Notice that is filed must adequately describe the collateral. See Section 8 for details on how to make a proper collateral description.

5) The purpose of the substantial compliance requirement is to forgive small errors that do not preclude meaningful Notice. For example, if there is a minor error in the address of the secured party, there still is substantial compliance.

2013 Amendment to the PPSA. An amendment was made to Section 37 of the PPSA in 2013.

Commentary. In the original Act subsection 34(7) provided:

> "A notice substantially complying with the requirements of this Division is effective unless it is seriously misleading by not providing the identification number of the debtor."

The 2013 Amendment changed this text and added a new subsection (8), which together now read:

> "(7) A notice substantially complying with the requirements of this Division is effective unless it is seriously misleading.
>
> (8) A notice that does not provide the name of the debtor such that it is retrievable by a search of the registry is treated as seriously misleading."

There are two important points. First, the standard set out in subsection (7) is that the Notice must "substantially comply" with the requirements of Section 37. The purpose here is to allow for minor errors in a Notice that do not affect the ability of a searcher to find and understand the Notice.

Subsection (8) then states a rule that the Notice must get the debtor's name right. This is because the key search criteria to find a Notice is via the debtor's name. If there is even one letter out of place the Notice will not be findable. If the reader of this Explanatory Memo forgets everything else, remember this: **FILERS MUST GET THE DEBTOR NAME EXACTLY RIGHT.** Section 35 provides the rules for how to enter the debtor name.

Section 35, Name of debtor and secured party. This sets out the rules on how to properly include the name of the debtor and the secured party in the Notice that is filed in the electronic registry. A single Notice may contain many debtors.

Commentary. As seen in the discussion above around Section 34(7) and (8), if the identification information for the debtor is incorrect or incomplete, the Notice is misleading and, therefore, insufficient. This section provides the standard by which a debtor's name should be listed.

- For entities incorporated in Samoa (like companies), the proper name is the one that appears on their registration document.
- For individuals that are citizens of Samoa:
  - Enter the name as it appears on their National Provident Fund registration, together with their birth date.
  - If they have no NPF registration, use their birth certificate name or their marriage certificate name, together with their birthdate.
  - If they have no NPF, birth or marriage certificate, then some other government-issued ID and birth date.
  - The filing must include any Matai titles as well.
- For individuals that are not citizens, enter their passport name.
- For overseas entities doing business in Samoa, the name that appears on their registration document authorizing them to transact business in Samoa.

Important note. Entering a trade name or "d/b/a" is not sufficient. You must enter the names of the actual owners of the trade name as the use of a trade name does not create a separate, distinguishable legal entity.

Section 36, Effectiveness of notice. This explains when a Notice is effective against future searchers of the electronic registry.

Commentary. A Notice is only effective when it can be found in a search of the filing office records. The primary search criteria is debtor name, so the name must be entered exactly right.

A Notice is effective for 5 years, after which it lapses. However, an extension of time may be filed, called a "continuation."

Section 37, Change in circumstances. This sets out the rules pertaining to the Notices filed in the electronic registry when persons that are debtors change their names.

Commentary. Secured parties are obligated to file an amendment to their Notice when a debtor changes it name. Secured parties are given a six-month grace period in which to make this filing. The reason this requirement is placed in the law is that without it, future

searchers may be misled when they conduct searches against what they think is the proper debtor name.

Section 38, Amendment of Notice. This explains how to file an amendment to an existing charge within the electronic registry.

Commentary. A filed Notice of security interest may be amended when the information on the Notice changes, such as an address change or a release of certain collateral. An amended Notice is added to the existing record established in the registry by the initial Notice, so a viewer may easily see the state of the record at earlier times.

If an amendment adds collateral or a debtor, the debtor must authorize filing of the amended Notice in writing (i.e., the loan documents).

An amended Notice must identify the secured party or parties who authorize its filing. The reason is that an amended Notice is effective only as to a secured party who authorizes its filing. This requirement is important if there are multiple secured parties on one transaction, since a secured party who does not authorize an amended Notice is not subject to its terms.

An amendment does not extend the duration of the Notice. These “Continuations” are filed under Section 39.

Section 39, Continuation. A Notice filed in the registry is effective for five years. It may be renewed, or “continued” for another five years.

Commentary. This Section explains the requirement to file a continuation prior to the expiration of the Notice of charge that is held within the electronic registry. One item of note is if there happens to be two secured parties on the same Notice. In this case one secured party could file a Continuation and the other not file, in which case only the priority of the first secured party would be continued.

Section 40, Termination. This requires secured parties to file a “termination” into the electronic registry when the debtor has paid the debt or otherwise satisfied their obligation.

Commentary. When an obligation that is the subject of a filed Notice of security interest is extinguished and there is no commitment to make future advances or give other value, the secured party should file a termination Notice.

The registry software is constituted such that only a person with a secret PIN number associated with the original filings may file a termination. Thus, a secured party need not worry about debtor's improperly filing terminations.

If a secured party fails to file a termination Notice, the debtor may demand in writing that it do so. If there is no outstanding obligation or commitment to make future advances or give other value, the secured party must file a termination Notice within 30 days after receiving the demand. If the secured party fails to do so, the debtor may bring an action to compel the filing of the termination, and the secured party may face financial penalties for the failure to file the termination.

Section 41, Notice of objection. This allows any person that believes they have been wronged in some way by a filing within the electronic registry to file their own "Notice of objection" setting forth the reasons for their protest.

Commentary. A Notice of objection serves only to make the debtor's objection available in the record of the initial Notice. It does not affect the effectiveness of the Notice.

Section 42, Appointment of the Registrar. This calls for the appointment of a Registrar to oversee the electronic registry.

Commentary. The duties of the Registrar are administrative, and by filing a Notice or refusing to file a Notice, the Registrar does not determine the sufficiency, correctness, authenticity, or validity of the Notice or any information contained in the Notice.

No person shall have a claim against the Registrar or the Ministry for errors in registry records committed by a person who files a Notice, or for failure to provide registry services for reasons beyond the control of the Ministry.

Section 43, Registrar duties. This sets out the duties of the Registrar with respect to the Act and the electronic registry.

Commentary. Because filers complete their own data entry and submit filings directly to the registry database, in practice the duties of the Registrar are handled by the software. The registry software will automatically assign a unique file number to each initial Notice, and this number will be used to connect all subsequent related Notices to the initial Notice. Each subsequent related Notice will also have a unique file number, and will be connected to the initial Notice in the archive. Each Notice will be marked with the date and time of filing.

Section 44, Refusal to file a notice. This establishes the grounds upon which the Registrar may refuse to file a Notice into the electronic registry.

Commentary. This section sets forth the criteria under which a notice can be rejected, including such things as the failure to name a debtor, the failure to name any collateral, and the failure to pay the filing fee. As a practical matter, 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 or for legal sufficiency: it is up to the filer to review their own work.

Section 45, Search of filing office records and certified report. This provides that the electronic registry is searchable and that the Registrar may provide certified copies of information from the registry.

Commentary. Information in the filing office is available to any person. The filing office will provide for searching of the filing archive by file number of a Notice, the name of a debtor, or the serial number of a motor vehicle.

The filing office will provide a certified report of a search upon request. The certified report will be a printable certificate returned electronically from the online registry, so there is no need to visit the Ministry. A record of the certified report will be retained by the filing office, identified by a unique number, so that it can be reproduced by the filing office if it is questioned.

Section 46, Fees set by regulation. This allows filing fees to be set by regulation. The fees will be available on the Registry website.

Special Note – Enforcement

The PPSA contains its own enforcement mechanisms. In general, after a default (or a finding that the collateral is "at risk" under Section 6), the secured party is allowed to seize the collateral, sell it, and apply the sale proceeds to the debt. There are numerous rules around how this works in practice that are set out in the following sections, including allowing the secured party to act against certain collateral types without first having to obtain court permission. A secured party may also exercise rights under any other law, and may enforce any additional rights agreed to by the debtor in the security agreement.

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

Section 47, Secured party rights upon default by the debtor. This lists the actions that may be taken in the event of a default by the debtor, including seizing the collateral and later selling it to satisfy the debt.

Commentary. If the debtor defaults on the obligation, the secured party may enforce against the collateral. The rights of the secured party set out in this Section and the ones that follow are cumulative, and are not exclusive. That is, the parties may agree in their security agreement to other remedies which may be enforced under this law.

Two special rules apply.

- If the collateral consists of goods that are hard to move, the secured party may seize the collateral without actually removing it, and then conduct its sale where it is located.
- If the same obligation is secured by a land mortgage as well as a PPSA interest, the secured party may proceed under the PPSA or under the land law.

Section 48, Recover without judicial process in certain cases. This allows for the recovery of certain limited types of collateral such as bank accounts and payment intangibles in an expedited manner without judicial intervention in certain limited instances.

Commentary. This section provides for direct action by the secured party to enforce without resort to judicial action in cases where: (1) the collateral involves a right of the debtor to receive payments, such as in the case of accounts, secured sales contracts, instruments and payment intangibles; (2) perfection is by possession of a document that entitles its holder to delivery of goods; and (3) perfection is by control, as for a deposit account.

With respect to accounts that are collateral, the secured party may collect the accounts directly if possible, or notify account debtors to pay the secured party rather than the debtor. Proceeds may also be collected. Money collected may be applied to the expenses of enforcement and the secured obligation.

If the collateral is a "document" (like a document of title) and if the secured party is in possession of the document, the secured party may act directly under the document.

If the collateral is a deposit account, and if the secured party has control over the account (either as the bank holding the account or by being the holder of the account) the secured party may proceed directly against the account.

Section 49, Expedited possession by secured party. This sets out the general rules on how collateral can be seized. If collateral can be seized without a breach of the peace, then the secured party may proceed directly. If this is not possible, then the secured party must seek a court order to seize the collateral.

> Commentary. When the debtor has possession of the collateral, the secured party may take possession or control of the collateral without judicial intervention if: (a) the debtor consents in writing to the transfer of possession after the default; or (b) the security agreement provides that the secured party may take possession or control upon default, *and* the secured party can take possession or control without a breach of the peace, whether or not the debtor consents. "Breach of the peace" is defined as:
>
> > (a) entering the building of the debtor without permission; or
> > (b) resorting to physical violence or intimidation; or
> > (c) being accompanied by a police officer when taking possession or confronting the debtor.
>
> In other words, if the collateral is sitting in a public place where the secured party can seize it without breaching the peace, the secured party may do so. Practical note: one group of lenders that often take advantage of this clause, are those that finance vehicles.
>
> If the debtor does not consent to the transfer, or if possession or control cannot be taken peaceably, the secured party may obtain an order of possession or control in an expedited judicial proceeding that is limited to the issues of the existence of the security interest and the fact of default. The court may, upon application by the secured party, authorize disposition of the collateral, provided it is not irreplaceable. If the court authorizes disposition of the collateral before a final judgment is entered, the secured party must retain the proceeds of the disposition until final judgment is entered. An appeal of the order does not stay the enforcement against the collateral.
>
> Alternatively, under subsection 49(5), the secured party may elect not to exercise its rights under this article and proceed to judgment and enforcement under the Judgment Summons Act 1965.
>
> Importantly, under subsection 49(6) it is an offence to attempt to obstruct a secured party from seizing collateral, punishable by a fine and even prison.

Section 50 This allows the secured party to sell or otherwise dispose of the collateral so as to obtain as much money as possible to satisfy the outstanding debt.

Commentary. The secured party has wide discretion in the manner of disposition of the collateral, and is not prohibited from buying the collateral in a sale. This should be read in conjunction with Section 51.

Section 51 This requires any sale or other dispensation of the collateral to be in a commercially reasonable manner.

Commentary. Though the secured party has broad discretion in disposing of collateral, it must behave reasonably in doing so. A sale is not commercially unreasonable just because a higher price might have been obtained. So long as the secured party's conduct is in conformity with commercial practices, the sale will be valid.

Section 52 This requires a secured party to give prior notice of any sale of the collateral to the debtor and to any other secured parties.

Commentary. The secured party must give notice of the proposed sale of the collateral to the debtor, other secured parties who have filed a Notice of security interest in the registry over the same collateral, and other parties with an interest in the collateral who have given notice to the secured party. Subsection 52(3) sets forth the precise contents of the notice that must be given to third parties with an interest in the collateral. The notice requirement may be bypassed if the collateral is perishable or subject to very rapid depreciation in value, or if there is a recognized market for the type of goods to be disposed.

Section 53 This sets out the rules pertaining to the time when a secured party is in possession of collateral.

Commentary. A secured party must exercise care when in possession of collateral to protect it from loss. The reasonable expenses for the care of the collateral can be charged back to the debtor in default. The secured party may also repair collateral to ready it for sale, and the costs of such repair are chargeable to the debtor.

Section 54 This sets out the procedural rules governing how to handle the proceeds after the sale of collateral.

Commentary. Once a sale of collateral has occurred, the secured party must give notice to the debtor and any other secured parties of the pending distribution of the proceeds. These other parties may file a claim in the proceeds if appropriate to do so (i.e., if there are funds left over after the secured party has been paid).

Section 55 This sets out the rules for how any money realized in the sale of collateral must be allocated between the secured party, the debtor, and any other secured parties.

> Commentary. This section lays out the distribution priority for the proceeds of disposition and requires an accounting to the debtor for any surplus. The debtor remains liable for any deficiency. This section details how the proceeds from the sale of the collateral are allocated, which are as follows:
>
> - First, the reasonable expenses incurred by the secured party;
> - Second, to pay off any senior debt;
> - Third, to pay off the debt of the foreclosing secured party;
> - Fourth, to any junior creditors; and
> - Fifth, any surplus goes to the debtor.
>
> Under subsection (2) the secured party must provide an accounting of all expense and sale proceeds to the debtor and any other person entitled to receive notice of the sale of the collateral. Under subsection (3), when collateral is sold in compliance with this law, the purchaser takes the property free of the debtor's interest and security interests of the secured party and any subordinate interests, even if the enforcing secured party fails in its duty to distribute sale proceeds to subordinate secured parties or the debtor.

Section 56, Retention of collateral by secured party. This allows the secured party to retain collateral it has seized in satisfaction of the debt if the debtor agrees to this proposal.

> Commentary. If the secured party wants to retain possession of the collateral in full or partial satisfaction of the secured obligation, it must give notice of its proposed retention of the collateral to the debtor, other secured parties who have filed a Notice of security interest in the collateral, and other parties with an interest in the collateral who have given notice to the secured party. If any of those parties object to retention by the secured party, the secured party must dispose of the collateral or challenge the objection in court. If no objection is received, the secured party may retain the collateral in satisfaction of the obligation as proposed.

Section 57, Debtor's right to reinstate. This section allows the debtor to reinstate the security agreement after a default and seizure of the collateral by tendering payment to the secured party of all amounts then owed. The ability to reinstate is not allowed after the collateral has been sold to a third party.

> Commentary. This section gives a debtor the right to reinstate a security agreement by tendering the amount of arrearages, remedying any other breach, and paying all

associated expenses. This is a powerful right in that the debtor is not required to pay the full amount due, but only catch up on any missed payments. Under subsection (3) the debtor is only permitted to reinstate once every 12 months, else the law might encourage debtors to make late payments.

Section 58, Consequences of reinstatement. This provides the rules governing the consequences of a reinstatement of a security agreement after default by the debtor.

Commentary. Once a debtor reinstates a security agreement, the secured party must return the collateral to the debtor, and the parties return to being governed by the contractual obligations contained in the security agreement before the breach occurred.

Section 59, Redemption. This allows a debtor to redeem–buy back—collateral after it has been seized but before it has been sold by the secured party. Redemption requires tender of performance of all secured obligations and payment of outstanding amounts. The amount that must be paid is the amount of the debt plus any expenses incurred by the secured party in seizing the collateral.

Commentary. This right to redeem extends to other persons so that junior creditors or other secured parties may also buy back the collateral.

Section 60, Remedies for secured party noncompliance. This sets out penalties for a secured party that fails to follow the rules for seizing and selling collateral.

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

Section 61, Preemption of conflicting Acts. This provides for a general pre-emption of other laws that speaks to the same issues as this Act.

Section 62, Regulations and orders. This allows for the issuance of regulations under the Act. The regulations include the setting of fees.

This provides for a transition period after the commencement of the Act and the electronic registry during which all pre-existing debts can be registered into the electronic registry.

Section 63, Offences. This section sets out certain criminal offences under the Act.

Commentary. Certain violations under the Act can result in criminal charges. These offences include: making false filing into the registry with malicious or fraudulent intent; and tampering with the registry (hacking);

Section 64, Repeal and transitional. This sections set out the consequential amendments to other existing law of Samoa so as to be harmonized with the PPSA. It also establishes the manner in which to transition existing loan transactions into the new PPSA regime.

Commentary. The Chattels Transfer Act 1975 is repealed upon the commencement of this Act.

There must be an organized and disciplined method to transition from the current manner in which charges over personal property are recorded and the new PPSA regime. The rule is that if a secured party in a prior secured transaction files a Notice in the PPSA registry within an initial 90-day transition period, that Notice will continue the lender's priority in the collateral as it stands under pre-existing law. In other words, *the new PPSA will not affect priority of prior transactions so long as they are filed within the 90 days after the PPSA registry goes live*. This is proper: it would be unfair to pass a law today that adversely affects anyone related to a transaction made in the past. If the Notice is filed after the transition period ends, priority will date from the date of filing under the PPSA. Finally, if a Notice of a prior transaction is not filed under the PPSA, it will be considered to not have priority against a security interest that has been filed within the transition period.

Example
Assume the transition period begins February 27, 2016, and extends for 90 days. Borrower approaches Bank 1 on March 1 seeking new money. Bank 1 conducts a search of the PPSA registry and does not find any evidence of prior charges being filed against Borrower, and thus provides money to Borrower. Bank 1 files a Notice against Borrower on March 30 when loan proceeds are given to Borrower. Later, on April 15, 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 1's new loan.

As can be seen, there can be a dampening effect on lending during the transition period, for lenders are at risk of their priority under a new loan being superseded by an old loan. However, current lenders can protect themselves by searching the company charge and Chattels Transfer registries during this 90- day period. Further, note that it is still possible to lend during the transition period using PMSI financing as the PMSI rules allow new value given for the purchase price of many types of collateral and those provisions of the Companies Act 2001 that relate to company charges are repealed as of

the commencement of the PPSA to achieve priority over pre-existing charges.

Section 65, Consequential amendments. This calls for the amendment and/or repeal of certain other legislations in Samoa: i) the Companies Act 2001 (with regard to company charges), ii) the Chattels Transfer Act 1975, iii) the Mercantile Law Act 1975, iv) the Sales of Goods Act 1975, and v) the Industrial and Provident Societies Act 1968, so as to be harmonized with this Act.