



KEMENTERIAN PERDAGANGAN DALAM NEGERI,  
KOPERASI DAN KEPENGGUNAAN



SURUHANJAYA SYARIKAT MALAYSIA  
COMPANIES COMMISSION OF MALAYSIA  
( Agensi di bawah KPDNKK )

# **INTRODUCTION OF PERSONAL PROPERTY SECURITIES REGISTRATION LAW IN MALAYSIA**

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## **CONSULTATIVE DOCUMENT**

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**CONSULTATIVE DOCUMENT**

**INTRODUCTION OF**

**PERSONAL PROPERTY SECURITIES REGISTRATION LAW**

**IN MALAYSIA**

The Companies Commission of Malaysia (SSM) invites comments on the questions as set out in this Consultative Document by **13 October 2017**. Please provide your name and the organisation you represent (where applicable) and to provide reference on the questions you are commenting.

Comments must be forwarded by email to: [lrpia@ssm.com.my](mailto:lrpia@ssm.com.my)

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## TABLE OF CONTENTS

<b>BACKGROUND &amp; SUMMARY</b>			<b>4</b>
<b>INTRODUCTION</b>			<b>5</b>
<b>PART I</b>			
	<b>1.1</b>	<b>Introduction to security interest and the secured transaction framework</b>	<b>6</b>
	<b>1.2</b>	<b>Present Law on Registration of Charges/Securities by incorporated entities in Malaysia</b>	<b>10</b>
	<b>1.3</b>	<b>The need for Reform?</b>	<b>12</b>
	<b>1.4</b>	<b>New Zealand: A Case Study and Key Issues to be considered in assessing introduction of the Personal Property Securities Law in Malaysia</b>	<b>18</b>
<b>PART II</b>			
	<b>2.1</b>	<b>Proposal for reforms</b>	<b>26</b>
	<b>2.2</b>	<b>Main features and advantages</b>	<b>27</b>
<b>PART III</b>			
	<b>3.1</b>	<b>Consultation Question No. 1</b>	<b>30</b>
	<b>3.2</b>	<b>Consultation Question No. 2</b>	<b>31</b>
	<b>3.3</b>	<b>Consultation Question No. 3</b>	<b>35</b>
	<b>3.4</b>	<b>Consultation Question No. 4</b>	<b>36</b>
	<b>3.5</b>	<b>Consultation Question No. 5</b>	<b>37</b>
	<b>3.6</b>	<b>Consultation Question No. 6</b>	<b>39</b>
	<b>3.7</b>	<b>Consultation Question No. 7</b>	<b>41</b>
	<b>3.8</b>	<b>Consultation Question No. 8</b>	<b>44</b>
	<b>3.9</b>	<b>Consultation Question No. 9</b>	<b>46</b>
	<b>3.10</b>	<b>Consultation Question No. 10</b>	<b>48</b>

## **BACKGROUND**

This Consultative Document sets out proposals and seeks responses on the following: -

- i) the introduction of a secured transaction legal framework; and
- ii) the establishment of a unified collateral registry for Malaysia.

This Consultative Document also sets out general recommendations on the suitability to implement a security registration framework for Malaysia supported by the overall background on the proposed framework together with the proposed legal policy statements to be adopted.

## **SUMMARY**

### Introduction

Provides a general description and basic concepts on secured transaction framework.

### Part I

Describes the present system, the current legislation and practices, for the registration of charges created by companies.

### Part II

Sets out alternatives and proposals for way forward.

### Part III

Outlines the consultation questions for views and feedbacks to formulate new policies for security interests in Malaysia. In the event the proposed new policies are approved, these will be the basis for the development and drafting of the new legal framework to be introduced for the Malaysian corporate and business community.

## **INTRODUCTION**

1. The PEMUDAH Focus Group Meeting on Getting Credit (FGGC) on 16 June 2015 requested for a preliminary study to be conducted by Companies Commission of Malaysia (SSM) and Bank Negara Malaysia (BNM) to identify the gaps and make recommendations to address the shortcomings highlighted by the World Bank on Malaysia's existing legal framework with reference to security interest. Under the assessment of getting credit's indicator on Malaysia, the World Bank's Doing Business Report 2015 (WB DB Report 2015) highlighted the following two (2) main shortcomings:

- (i) The absence of an integrated or unified legal framework for secured transactions that extends to the creation, publicity and enforcement of movable assets as security interest exists in the economy; and
- (ii) The lack of a collateral registry in operation for both incorporated and unincorporated entities, which is unified by the type of assets with an electronic data base indexed by debtor's name.

2. The commissioning of the preliminary study is to provide views on the possible need for the introduction of a secured transaction legal framework and the establishment of a unified collateral registry for Malaysia by:

- (a) assessing the current legislations and practices relating to secured lending and where possible, identify gaps in the current framework; and
- (b) proposing possible recommendations to be considered and adopted as a way forward for Malaysia in this area of law.

3. The preliminary study was concluded with the recommendation for the establishment of a PEMUDAH Task Force to conduct an in-depth study on the suitable framework to be adopted for the proposed legislation on security interests in Malaysia. It was also recommended that the Task Force, among others, is to consider the adoption of New Zealand's framework and its registry on security interests with appropriate reference to UNCITRAL Model Law on Security Interests.

4. The study was presented at the PEMUDAH Meeting No. 1/2016 on 19 January 2016. Upon deliberation, PEMUDAH proposed that SSM is to undertake the registry function under the proposed framework.

## **PART I**

### **1.1 Introduction to security interest and the secured transaction framework**

5. In a broad understanding, security interest is created either by an agreement or by operation of law over assets to secure the performance of an obligation, usually for the payment of a debt<sup>1</sup>, whilst a secured transaction regime provides a system for the registration of interests by creditors or the secured party in personal property/movable assets to give notice of their interests to others and to enable others to discover the existence of such interests through a search on the register.

6. Likewise, a secured transaction regime would also allow movable assets to be used as collateral. Providing legal structures through which movable assets can be effectively used as collateral will significantly improve access to

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<sup>1</sup> Black's Law Dictionary (8th ed.) 2004

finance especially for businesses that require funds to carry out their business operations.

7. As most businesses cannot operate without some form of credit either to finance its day-to-day operations, to cover operating costs in relation to its employees, its premises or to purchase capital equipment, the secured transaction regime is critical in widening the categories of assets which may be used as collateral.

8. The most common type of collateral accepted as bank financing or consumer credit is immovable or fixed assets such as land or buildings. In economies with a modern secured transactions system, movable assets could easily be used as collateral. But in many developing economies movable property might be unacceptable to lenders as collateral, either because the law does not recognize non-possessory interests in movable collateral or the law does not provide sufficient protection for lenders accepting it. However, movable assets either tangible or intangible, often account for most of the capital stock of businesses especially SMEs. Often, in this context, the movable or intangible assets are regarded as 'dead capital'.

9. In another context, most financial institutions require collateral from their borrowers as a means for protection should the business becomes insolvent. This protection is usually sought through the taking of security, which either can be possessory (e.g. where goods are pledged, or pawned, to the creditor) or non-possessory (e.g. where the creditor takes a mortgage).

10. In the case of possessory security<sup>2</sup>, it will be clear to third parties that the debtor does not own the asset outright. However, where the loan is non-possessory, the impression that may be given is that the asset is still owned by the debtor concerned. This impression may mislead a third party on contemplation of providing further loan to the debtor against the asset that has already been subjected to a non-possessory security.

11. There are myriads of benefits from having a secured transaction framework, among others, are as follows:

- (i) Increase in access to credit and reducing the risk of credit (reduction of cost in obtaining credit) especially for unincorporated entities/SMEs;
- (ii) Addresses the lack of adequate legal framework on the registration of moveable properties for unincorporated entities e.g. restriction on types of assets, lack of clear creditor priority and enforcement issues;
- (iii) Address the lack of know-how on moveable asset lending for unincorporated entities e.g. staffs with skills;
- (iv) Diversification of assets held by financial institutions to spread risks more efficiently;
- (v) Possibility of monetization of intangible assets to form collaterals (e.g. intellectual property rights); and
- (vi) Unified registry for moveable and immovable assets for both incorporated and unincorporated entities facilitates ease of public

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<sup>2</sup> Possessory security in a general terms means a security interest in the property that is perfected by possession or control



information and provides services relating to the registration of security transactions under one roof.

12. It is submitted that there are sound justifications to support initiatives in developing adequate laws on secured transactions in any jurisdiction to allow borrowers and lenders to recognize movable assets as collateral with adequate supporting financing framework not only for recognition and protection of such assets as securities in relation to loans or debts, but also in determining or resolving priorities of competing claims between the holders of various types of securities. Additionally, the efficacy of any secured transaction law will also require an effective registration mechanism of interests in such movable assets or securities.

13. The regime also requires insolvency laws that respect rights derived from secured transactions law and set clear rules to ensure effectiveness and enforceability in insolvency proceedings.

14. For an effective secured transactions regime to derive valuable economic benefits, the regime should be structured to enable businesses to maximise the extent to which they can utilise the value in their movable assets to obtain credit.

15. At the international front, a number of initiatives are in place to address the need for an integrated legal framework for secured lending/transactions. To name a few, apart from UNCITRAL<sup>3</sup>, the IFC has also been instrumental in the initiatives with their Toolkit on Secured Transactions System and Collateral Registries.

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<sup>3</sup> UNCITRAL Legislative Guide on Secured Transactions, UNCITRAL, 2009

## **1.2 Present Law on Registration of Charges/Securities by incorporated entities in Malaysia**

16. The law on the registration of company charges is set out in sections 352-364 of the Companies Act 2016 ("CA 2016") [Act 777]. Particulars of certain categories of charges along with the statement of particulars of the charge must be delivered to the Registrar of Companies within 30 days of the creation of the charge. The Registrar then checks that the form giving the particulars has been completed, enters the particulars in the register. The company is provided with a certificate to the effect that all the requirements of registration have been complied with. The certificate is conclusive evidence that the requirements for registration have been complied with. The particulars are kept on register available for public inspection.

17. If the particulars are not properly delivered to the Registrar within a period of 30 days after the creation of a charge, the charge is void against a liquidator or against any creditor of the company. This sanction provides a powerful incentive for the chargee (i.e. the lender) to ensure registration of any applicable charges.

18. Charges over the company's registrable assets required to be registered under section 353 of the CA 2016 are as follows: -

- (i) a charge to secure any issue of debenture;
- (ii) a charge on uncalled share capital of a company;
- (iii) a charge on shares of a subsidiary of the company which are owned by the company;
- (iv) a charge or assignment created or evidenced by an instrument which is executed by an individual within West Malaysia and affecting property within West Malaysia would be invalid or of

limited effect if not filed or registered under the Bills of Sale Act 1950;

- (v) a charge on land wherever situate or any interest therein;
- (vi) a charge on book debts of a company;
- (vii) a floating charge on the undertaking or property of a company;
- (viii) a charge on calls made but not paid;
- (ix) a charge on a ship or aircraft or any share in a ship or aircraft;
- (x) a charge on goodwill, on patent or licence under a patent, on a trademark, or on a copyright or a licence under a copyright; and
- (xi) a charge on a credit balance of a company in any deposit account.

19. Under section 352(2) of the CA 2016, the charge is invalid only as against the liquidator and creditors of the company. Further, section 352(3) states that without prejudice to any contract or obligation for repayment of the money secured by the charge and that when a charge becomes void under the section, the money secured shall immediately become payable.

20. In addition, under section 362 of the CA 2016, a company is also required to keep the instrument creating any charge requiring registration under the Act or a copy of such instrument at its registered office. The company must also keep at the registered office, a register of charges, into which the company is required to enter all charges specifically affecting property of the company and all floating charges on the company's undertaking or property. The entry should give a short description of the property charged, the amount of the charge and the names of the persons entitled to it (except in the case of securities to bearer).

### **1.3 The Need for Reform?**

21. The two (2) main shortcomings as identified by the WB DB 2015 (refer to paragraph 2) are gaps in Malaysia's existing framework as regards to security interests created by unincorporated entities and persons. Both shortcomings are deliberated in the following paragraphs.

#### **Issue 1: Whether there is an integrated or unified legal framework for secured transactions that extends to the creation, publicity and enforcement of movable assets as security interest?**

22. In Malaysia, in so far as unincorporated entities are concerned (sole proprietors and partnerships), there is no legal framework that governs the creation and enforcement of assets of movable assets as security interests. The creation and enforcements of movable assets as security interests are governed by hire purchase and/or contracts laws.

23. For incorporated entities, the CA 2016 currently regulates the creation, publicity and enforcement of assets for both movable and immovable for companies (please refer to paragraph 18).

24. The creation and enforcement of assets (both movable and immovable) for limited liability partnerships, is governed under the Limited Liability Partnerships Act 2012. However, unlike a company, an LLP is not required to register the information with SSM.

25. In conclusion, in Malaysia, there is no single integrated or unified legal framework for secured transactions that extends to the creation, publicity and enforcement of movable assets as security interest.

**Issue 2: Whether there is a collateral registry in operation for both incorporated and unincorporated entities, which is unified by the type of assets with an electronic data base indexed by debtor's name?**

26. In Malaysia, there is no single collateral registry in operation for both incorporated and unincorporated entities which is unified by the type of assets with an electronic database indexed by debtors' name.

27. The charges registry for incorporated companies under SSM has been in existence since the Companies Ordinance 1948. The registry has data on registration of security interest for incorporated companies only. The following are the number of registrations SSM received annually from 2007 until 2016:-

<b>Year</b>	<b>Total new filings/registrations</b>
2016	20,764
2015	23,533
2014	25,292
2013	26,248
2012	27,657
2011	26,907
2010	22,896
2009	22,947
2008	25,066
2007	22,760

28. In addition to the collateral registry existing under the CA 2016, there are many other collateral registries to register different types of assets.

29. For example, the Road Transport Department of Malaysia (“JPJ”) manages a registry under section 5(1) of the Road Transport Act 1987 for the following movable property:

- (i) *OKU* vehicles;
- (ii) Motorcycles with less than 4 wheels;
- (iii) Heavy tractors;
- (iv) Light tractors;
- (v) Heavy motor cars;
- (vi) Motor cars;
- (vii) Heavy machinery;
- (viii) Light machinery; and
- (ix) Trailers.

30. Other movable assets are registered under different Ministries or agencies. The following is a non-exhaustive list of movable assets and the registry where information of that collateral resides:

<b>Movable asset</b>	<b>Registry</b>
Machinery and equipment	NA
Motor vehicles (land, sea and air) (e.g. helicopter, car, ship, lorry, bus)	Registry under the Ministry of Transport - JPJ
Agricultural products	NA

Livestock	NA
Investment properties (e.g. stocks and securities, options and futures, derivatives products).	Registry under the Ministry of Finance - Securities Commission
Intellectual property (e.g. patent rights, trademarks)	Registry under KPDNKK - MyIPO
Inventory (i.e. goods for sale)	NA
Membership and partnership interests in business entities and cooperatives shares	Registry available under related issuing organisations

31. However, it should also be emphasised that the movable registry under JPJ and other agencies are managed for the main purpose of registering, licensing and regulating the related movable assets in Malaysia, not for securing interests/rights.

32. In conclusion, in Malaysia, there is no collateral registry in operation for both incorporated and unincorporated entities, which is unified by the type of assets with an electronic data base indexed by debtor's name.

33. The impact of not having a single registry in operation for both incorporated and unincorporated importantly impacts priority rules that governs secured transactions. As a result, registration in separate, unlinked

registries could establish priority for competing claims against the same collateral. This could happen, for example, if the leasing law calls for registration in a different system than the one in which inventories are registered.

Types of Assets Accepted as Collateral by Banking Institutions

34. As part of the preliminary study presented to PEMUDAH, a survey was conducted by BNM amongst twenty four (24) Malaysian financial institutions, where it was revealed that secured financing ranged from 40% to 52% of the respondent commercial banks’ loan book value and from 53% to 56% of the respondent Islamic banks’ loan book value for the period from 2012 to 2014.

35. In the survey, financial institutions responded that the common types of collateral accepted by banking institutions are as follows: -

<b>Financing to incorporated entities</b>	<b>Financing to unincorporated entities</b>
Property (land and buildings)	Property (land and buildings)
Fixed deposits	Motor vehicles
Shares/stocks	Fixed deposits
Other types of assets which are also accepted are machineries, Government securities, precious metals and jewellery.	

36. The survey also revealed that the types of assets commonly accepted as collateral by the respondents are assets with the following characteristics:-



- (i) easy to value and dispose off (liquid) in the event of non-payment;  
and
- (ii) stable in value or with potential for increase in value.

37. Only three (3) respondents to the survey accepted non-tangible assets as alternative forms of collateral (e.g. intellectual property rights, receivables and goodwill).

38. Among reasons for the low level acceptance of non-tangible assets provided by the financial institutions are as follows: -

- (i) difficulty and lack of expertise in valuing the assets;
- (ii) lack of market information on the commercial value of the assets for ease of recovery; and
- (iii) internal policy that does not accept such assets as it is not within the business mandate of the financial institutions.

39. Out of twenty four (24) respondents in the BNM survey, 19 respondents or 80% are receptive to the creation of a legislation to support a collateral registry. It is understood by the respondents that the registry will address gaps in existing legal framework which currently does not address unincorporated entities. Further, it is also understood that the registry would prevent overlapping of interests and/or difficulty in recovery of assets charged.

40. The other suggestions received from the respondents are as follows: -

- (i) to establish a central registry for registration of collateral created by unincorporated entities;

- (ii) to centralise land registries and link existing various database maintained by Government agencies; and
- (iii) to establish a mortgage financing registry (for immovable property) to mitigate the risk of double financing.

41. The remaining five (5) respondents to the survey viewed the existing collateral registry for incorporated entities which is administered by SSM under Companies Act 1965 as sufficient and any improvements would be incremental.

42. The respondents provided that from the perspective of business requirement, there is no immediate need to establish a unified legal framework to support a central collateral registry for unincorporated entities.

43. However, the respondents also provided that in the medium to long term, a unified legal framework can be considered to enhance the efficiency and effectiveness of the current collateral registry (~80% of respondents are receptive to the establishment of a comprehensive collateral registry).

#### **1.4 NEW ZEALAND: A Case Study and Key Issues to be considered in assessing introduction of the Personal Property Securities Law in Malaysia**

44. New Zealand is ranked 1<sup>st</sup> in the WB DB Report for the getting credit indicator since 2015 and it is without doubt that New Zealand's framework for the personal property securities law has been successfully implemented.

45. In 2016, the Companies Office of New Zealand (authority responsible for the administration of the Personal Property Securities Registration Act 1999

[NZ PPSA]) provided a briefing to SSM on the NZ PPSA and the framework for personal property securities.

46. It was revealed that historically in New Zealand, the overall coverage for the recognition and protection of security interests in personal property was inconsistent and incomplete. For example, the laws governing such interests could be found in the NZ Companies Act 1955, the Chattel Transfers Act 1924 or the Motor Vehicle Securities Act 1989. In addition to that, the granting of a security interest in personal property also depended on a number of features including:

- (a) the nature of debtor – whether it was a company, incorporated society, or non-corporate body;
- (b) the form of the documentation – whether it was expressed as being a charge, hire purchase agreement, lease, conditional sale or other legal form of security interest;
- (c) the nature of personal property over which the security is given.

47. Given the complexity of the matter, the Law Commission of New Zealand had issued two reports for the proposal of reforms in this area of law namely Report No. 6 (“Reform of Personal Property Securities Law”) and Report No. 8 (“A Personal Properties Securities Act for New Zealand”).

48. These Reports mooted the idea of introducing a unified legislative framework to address the inconsistencies presented by the various applicable laws by adopting Article 9 of the Uniform Commercial Code (which has been adopted by all 50 states of the United States). The Reports also proposed that the new law should feature a unified collateral registry as found in the British Columbia, Canada. This approach was taken as the main trading partners of New Zealand at the time was Canada, United States and United Kingdom.

49. The introduction of the Personal Properties Securities Act 1999 has brought about the repeal of Part IV of the Companies Act (Registration of Charges) 1993, the Chattel Transfers Act 1924 and the Motor Vehicle Securities Act 1989.

50. The general features of the NZ PPSA are as follows:

- (a) Uniform Rules – PPSA creates a uniform rules for all forms of security interests. The various distinction drawn based on whether the property is under a mortgage, lease, fixed or floating charges, etc. were disregarded.
- (b) Perfection – creditors are given the option of perfecting the security interests either by way of registration of financing statements or by taking possession of the property;
- (c) Registration – as most secured transactions would involve the registration of financing statements, the establishment of a national registry is critical in ensuring that the registered security interests are searchable.
- (d) Priorities – PPSA provides a comprehensive set of rules to resolve priorities between competing interests. In most cases, priority will be determined by “first to file/register” rule.
- (e) Transactions costs – the efficient system of the PPSA has resulted in minimal transaction costs in the provisions of credit by financiers.

51. The registration of financing statements on the NZ PPSA Register is voluntary. The registration can only be done by a secured party. The approach taken by New Zealand was seen as a form of encouragement for lenders (secured party) to register their interests to enable them to recover debts in

the event of default. From the experience shared by the Companies Office, this approach has been widely acceptable.

52. Under clause 8(1) of First Schedule under the Personal Property Securities Regulations 2001, there are thirteen (13) different collateral types which are registered and governed under the NZ PPSR:-

- (i) motor vehicles;
- (ii) aircraft;
- (iii) livestock (e.g. cows, sheep, ostriches)
- (iv) crops (e.g. grape production, pip fruit, wheat production);
- (v) other;
- (vi) documents of title (e.g. bills of lading, warehouse receipts);
- (vii) chattel paper (e.g. hire purchase agreements);
- (viii) investment securities (e.g. options, shares);
- (ix) negotiable instruments (e.g. promissory notes, letters of credit);
- (x) money (e.g. a bank deposit of \$NZ8 million lodged with a bank, Japanese yen, New Zealand dollars);
- (xi) intangibles (e.g. accounts receivable, copyright, patents, trademarks);
- (xii) all present and after-acquired property; and
- (xiii) all present and after-acquired property, except.

53. A secured party<sup>4</sup> in New Zealand will register details of the security interest in the PPSR when it involves, for instance, personal property on hire purchase, or the usage of personal property as security for a loan or another

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<sup>4</sup> A secured party is defined under section 16 of the NZ PPSA as "... a person who holds a security interest for the person's own benefit or for the benefit of another person and includes a trustee where the holders of the obligations issued, guaranteed, or provided for under a security agreement are represented by a trustee as the holder of the security interest".

type of credit providing transaction. The registration will include the following details:-

- the name of the of the borrower/purchaser;
- the date of birth of the borrower/purchaser;
- the address of the borrower/purchaser; and
- a description of the personal property.

The NZ PPSR does not record financial details of the transaction, i.e. the amount borrowed or the value of the personal property. This registration is referred under the NZ PPSR as a **financing statement**.

54. The NZ PPSR provide searches on the following: -

- (i) Debtor Person Search: search for registrations against debtors who are individuals;
- (ii) Debtor Organisation Search: search for registrations against debtors who are organisations;
- (iii) Motor Vehicle Search: search using a motor vehicle's registration number or chassis number;
- (iv) Aircraft Serial Number Search: search using an aircraft's serial number; and
- (v) Financing Statement Number Search: search for a specific financing statement.

55. Under the NZ PPSA, the general rule for priority of financing statements is outlined under Section 66 where: -

- (i) a perfected security interest has priority over an unperfected security interest in the same collateral<sup>5</sup>;
- (ii) priority between perfected security interests in the same collateral (where perfection has been continuous) is determined by the time the party has taken a perfecting step (either by registration or possession)<sup>6</sup>.

56. Once the hire purchase or loan is fully settled, the secured party must discharge the registered financing statement. This means that the financing statement will no longer appear on the live register or be available for general searching. In the case of consumer goods, this should be done within fifteen (15) working days.

57. Searches for the collateral can be performed online at minimum cost.

58. As part of the reform process, the SSM team was advised to consider the following:

- To decide whether to introduce a completely new legal framework or to simply reform the current registration laws without reforming the substantive law.
- To understand that the Register forms an integral part of the new legal framework and will be heavily influenced by the form/nature of the substantive law applicable to the creation and registration of securities in Malaysia.

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<sup>5</sup> e.g. Under section 66(a) of the NZ PPSA: -

Person A's security interest in person B's car has been perfected by registering a financing statement.

Person C's security interest in person B's car has not been perfected.

Person A's perfected security interest in person B's car has priority over person C's unperfected security interest in person B's car.

<sup>6</sup> e.g. Under section 66(b) of the NZ PPSA: -

Person A registers a financing statement in respect of person B's present and after-acquired property before person C registers a financing statement in respect of the same collateral.

Person A's perfected security interest has priority over person C's perfected security interest in the same collateral.

59. In addition, it was also recommended that: -

- early involvement from the stakeholders is critical to be implemented especially the financial institutions, lawyers, accountants and judges to ensure buy-in as most lawyers and legal qualification in Malaysia are based on the English/Common-Law legal principles (Whilst, the PPSR is based on US legal principles that reflect departure from common law principles);
- to follow a successful model law and fully document, justify and explain any departure from that model; and
- to continue in educating stakeholders post-implementation especially the banking and financial industry community, professional bodies, judiciary, law schools and professional firms.

60. In conclusion, a list of main differences between the New Zealand’s secured transaction framework and Malaysia’s existing charges legal framework is highlighted as follows: -

	<b>NEW ZEALAND SECURED TRANSACTION FRAMEWORK</b>	<b>MALAYSIA’S CHARGES FRAMEWORK</b>
1	Allow security interests to be created by any lender or borrower, in any present or future property, and in all transactions.	<ul style="list-style-type: none"> <li>• Do not cover all types of movable property</li> <li>• Exclude goods that yet to exist, such as future crops.</li> </ul>
2	Apply one system of priorities to all security interests as well as to all other transactions undertaken for security.	Do not have a comprehensive priority system for all secured transactions.



3	Publicize security interest through a notice filing system that allows any potential lender to quickly determine whether collateral offered by a borrower has a prior security interest.	Have a fragmented registry system, with multiple and unlinked registries in different jurisdictions.
4	Maintain an online filing system that is user friendly, low cost and quick.	Registered user for MyCoID (for incorporated only) can submit registration for the following: a. New Registration of charges (for sections 352, 354, 356 and 357 of the CA 2016); b. Extension and Rectification (for section 361 of the CA 2016); and c. Cancellation (for section 361 of the CA 2016).
5	Allow the creditor and debtor to describe the collateral in any way they choose i.e. whether in general or specific terms.	Do not allow security agreement to describe the collateral in general terms.

## **PART II**

### **2.1 Proposal for reforms**

61. This Consultative Document seeks responses on the following approaches to be considered for adoption of future framework on the registration of secured transaction:

#### **Option A:**

##### **Maintain status quo**

Retain the present legislation for charges in Subdivision 1, Division 7, Part 3 of the CA 2016.

#### **Option B:**

##### **Introduction of new framework – personal property securities registration law**

Replacing the present “transaction” filing system (registration only after a charge has been created) with a “notice” filing system (with registration before or after creation of a charge) for companies, sole proprietorship, partnerships and limited liability partnerships. This option would entail the carving out of the existing charges provisions under Subdivision 1, Division 7, Part 3 of the CA 2016 for insertion into the proposed new Act.

#### **Option C:**

- i) Retaining the provision on registration of charges for incorporated entities relating to immovable assets in the CA 2016;

- ii) Carving out the provision on registration of charges for incorporated entities relating to movable assets from the CA 2016 to be placed in the proposed new Act; and
- iii) Introducing new provisions on registration of secured transaction for unincorporated and unregistered entities in the proposed new Act.

## **2.2 Main features and advantages of the secured transaction framework**

62. A functional registration framework should perform the following main functions:-

- (i) to provide information to persons who are thinking of extending secured lending, credit rating agencies and potential investors on the extent to which assets that may appear to be owned by the company are in fact subject to securities in favour of other parties<sup>7</sup>; and
- (ii) to determine the priority of securities.

63. In performing the first function the framework should enable interested parties to find out about securities over the company's assets, particularly ones that they are unlikely to be able to discover easily from other sources.

64. In relation to priority, the framework should enable potential secured parties to be confident –

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<sup>7</sup> Consultation Paper No. 176 (CP176), The Law Commission, 2004.

- (i) that the security can be taken without any risk that it will be subject to other existing interests of which they had no reasonable means of knowing;
- (ii) that, having checked the register, it is possible to take simple steps to ensure the priority of any security subsequently taken over one that is taken in the meantime by another party; and
- (iii) that registration will ensure the priority of the security against any subsequent security interest.

65. In gist, among others, the new legislation is to have the following proposed main features: -

- Introduce an electronic registration filing system (notice-filing) with searching to be allowed via the internet or for regular user, via direct computer links.
- Allow registration of security interests of collaterals (movable and immovable) provided by all types of entities i.e. incorporated, unincorporated, unregistered and LLPs.
- Remove the distinction between fixed and floating charge, whilst retaining the commercial advantages of the latter.
- Set out clear and precise rules on priority of competing security interests.
- Registration of the security interests would be made simpler and using electronic format<sup>8</sup>.

66. Further, among others, the new legislation is expected to provide the following advantages: -

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<sup>8</sup> Consultation Paper No. 176 (CP176), The Law Commission, 2004

- To LLPs, unincorporated and unregistered entities:  
The new legislation would allow businesses the reliability, certainty and easy accessibility to obtain secured credit.
  
- To the secured party:
  - (ii) Filing would be made simple, using only readily available information without any need for legal expertise.
  - (iii) Searching will be fast and inexpensive.
  - (iv) The rules on priority would be clearer and adapted for modern financing methods.
  
- To liquidator and creditor:  
The new legislation would make it easier to determine who has an effective security interest over which assets.

## **PART III**

### **The Way Forward**

#### **Improvements to the present system or a new framework for secured transaction?**

##### **3.1 Consultation Question 1:**

##### **Do you agree that the type of charges provided under section 353 of the CA 2016 should be widened?**

67. Currently, the list of charges under section 353 of the CA 2016 is extensive. However, it can be argued that the list is incomplete and arbitrary. There are also uncertainties whether certain charges over certain types of assets must be registered.

68. For example, the following interests are difficult to distinguish from transactions that give rise to an interest that has a security purpose and therefore clear cut registrable:-

- (i) transfer of an account receivable;
- (ii) leases that do not secure payment or performance of an obligation; or
- (iii) commercial consignments that do not secure payment or performance of an obligation e.g. where cars are consigned on a sale-or-return and the dealer paid a deposit equal to the price less tax.

69. The CA 2016 also prohibits the granting of security in future assets. Future assets in this instance needs to be distinguished from floating charge under section 353 (g) of the CA 2016.

70. Section 17(1)(a) of NZ PPSA provides that the term 'security interest' means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation with regard to the form of the transaction and the identity of the person who has title to the collateral. Further, under section 17(1)(b) of the NZ PPSA, the term 'security interest' also includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation) [reference is also made to paragraph 52 for the different collateral types that can be registered under the NZ PPSA].

71. We invite comments on whether the types of charges under the CA 2016 should be comprehensively reviewed to ensure inclusivity of related interests in the proposed framework.

### **3.2 Consultation Question 2:**

**With the new framework, do you agree that the company charges registration provisions should be extended to those created by both incorporated and unincorporated/unregistered entities?**

72. The current registration system under the CA 2016 applies to incorporated entities. As a result, there are large numbers of unincorporated (e.g. sole proprietor and partnership) and unregistered entities (e.g. entities incorporated by an Act of Parliament or public benefit corporations) that are not subjected to the system and therefore deprived from registering charges.

73. As a result, the current framework is deficient and fettering the chances for unincorporated and unregistered entities to obtain loans or raise finance. Also, it is important for secured creditors to have the same protection as those lending to corporate businesses and would require to secure the benefits of a registration system.

74. Further, in the absence of a unified register for unincorporated and unregistered entities, it is difficult to identify a debtor or whether a particular asset has been pledged as a collateral for a loan. For instance, there might be a situation where an asset is subjected to an interest by an incorporated entity and another by either an unincorporated or unregistered entity. Unless the interest by either an unincorporated or unregistered entity is included in the framework, the whole picture will not be revealed if a search on the said asset is conducted.

75. Similarly, for limited liability partnerships (LLP) which is governed under the Limited Liability Partnerships Act 2012 is recognised as a body corporate. However, unlike an incorporated company, an LLP is not required to register charges under the CA 2016.

76. In a survey<sup>9</sup> by the World Bank it was revealed that a common trend among the firm-level (micro firm) that credit applications are rejected mostly due to insufficient collateral, i.e. unacceptable or unsuitable collateral. In most cases, micro firm owners will not consider applying for loans, because they were certain that they could not meet the collateral requirements often requested by banks or financial institutions.

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<sup>9</sup> "Secured Transactions Systems and Collateral Registries", Investment Climate Advisory Services, World Bank Group, January 2010



77. It is without a doubt that the absence of a unified or integrated legal framework for the creation, publicity and enforcement of security interest on movable assets created by unincorporated or unregistered entities reflects a gap of credit information in Malaysia.

78. The current gap for security interest exists as the registry for movable property resides under several different Ministries and Agencies and that, such registries serve different purposes, which are generally in ascertaining registered ownership/title of such assets. Hence, there is vacuum as to the law and registry in ascertaining rights and priority of creditors when such moveable assets were used as collateral in securing for loans.

79. The gaps must be addressed to eliminate uncertainties with respect to claims by competing secured as well as potential unsecured creditors vis-à-vis the same collateral. The existence of a legal framework on security interest that provides for the establishment of a publicly accessible collateral registry where information on interests created in movable assets by both incorporated and unincorporated entities can be registered is timely and should be supported. The establishment of the registry is with the aims to provide public notice relating to interests in movable assets as well as in establishing priority in the assets described in the notice for secured creditors.

80. The main benefit of a collateral registry has been identified as providing wider access to finance with the capability to utilize valuable assets as collateral for loans that would generate wide ranging economic growth potential for the nation. Providing legal structures through which movable assets in emerging markets can be effectively used as collateral will significantly improve access to finance for entities that most require it.

81. The World Bank in their study for "Secured Transaction Systems and Collateral Registries" (2010) identified that economic analysis shows that in countries where there is stronger secured transactions laws and registries, the SMEs are inclined to achieve greater access to credit, better ratings of financial system stability, lower rates of non-performing loans and a lower cost of credit.

82. As such, SSM is of the view that the current registration of charges framework under the CA 2016 creates a barrier for LLPs, unincorporated and unregistered entities to raise finance flexibly. The collateral registry for these entities may be considered for Malaysia as it provides ability for these entities to seek financing for a variety of purposes.

83. On the same point, SSM also understands the following concerns for consideration:

- (i) the synchronisation of the various current different registries where the movable assets are registered;
- (ii) the willingness of the financial institutions to widen the current acceptable lists of movable assets as security rights; and
- (iii) the acceptance of the new legal framework from public (affected registries) and private sectors.

84. We invite comments on our proposal for this approach to be implemented.

### **3.3 Consultation Question 3:**

#### **With the new framework, should registration of charges on the new secured transaction framework be mandatory or voluntary?**

85. The current company charges registration system under the CA 2016 makes it mandatory for company to register charges over its property or any of its undertakings within 30 days from the creation of the charge.<sup>10</sup>

86. The main function of a Register is not only to provide information for potential secured creditors, but also to others with an interest in the financial state of the debtor. For example, if a secured creditor can protect itself by registering its security interest, it is indifferent between a system where registration of security interests is voluntary (i.e. where unregistered security interests are valid against an insolvency, the registration is a matter of choice for the secured creditor and the only result of non-registration is losing priority to other registered secured creditors) or where registration is mandatory (i.e. where unregistered interests are void against an insolvency).

87. However, from the aspect of a potential searchers, a mandatory system is preferred since this is likely to result in more security interests registered. Therefore, the Register gives a more 'complete' picture and search result of the security interests affecting the debtor's assets.

88. Ultimately, the predicament would be that a creditor who does not file a security risks the loss of priority against subsequent holders of security who file first. On that expectation, the question of whether the registration is voluntary or mandatory would become a commercial decision rather than one

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<sup>10</sup> Section 352 (1) of the CA 2016

of statutory compulsion. The NZ PPSA and the SA PPSA operates a voluntary registration system for security interests.

89. We invite comments and views on whether the registration of security interests under the new framework should be made mandatory or voluntary.

### **3.4 Consultation Question 4:**

**With the new framework, do you agree that whoever presents the particulars of a charge should be responsible for any liability arising from inaccuracies in those particulars?**

90. Currently, a company or any person interested in the charge can register (under section 352, 354 and 356 of the CA 2016), rectify (under section 361 of the CA 2016) and cancel (under section 361 of the CA 2016) a charge under SSM electronically using SSM's services under MyCoID for the Electronic Registration of Charges (eCharges). A certificate of registration of charge will be issued under the same platform upon the successful registration of the applicable charges and this serves as conclusive evidence that the requirements as to registration have been complied with under the CA 2016.

91. The registration of charges under the same platform does not place any requirement that a charge instrument is to be presented with the application for registration<sup>11</sup>. In this instance, it is compatible with modern electronic registration systems under which registrations and searches can be processed automatically by computer without human intervention.

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<sup>11</sup> Under section 362 of the CA 2016, a company is to keep the instrument creating the charge or a copy of such instrument at the registered office of the company.

92. Flowing on the same pretext for the new secured transaction framework, the present requirements translates that the role and responsibilities of SSM relating to the registration of company security interests differ significantly and subsequently if there is any liability arising from inaccuracy in the record, the liability should lie with whoever presented the information for registration. The certificate issued by the Registrar will be conclusive only so far as it is practicable for it to be so. The charge would be validly registered in respect of the asset listed in the particulars, but not in respect of any that was omitted.

93. The company or its creditor which submits the form for registering the charge should be responsible for ensuring the accuracy of the particulars. The particulars would need to be prescribed to include sufficient information to identify the chargor, the chargee, and the charge.

94. We invite comments on the issue of liability arising from inaccuracy of information presented for registration of security interests electronically.

### **3.5 Consultation Question 5:**

**With the new framework, the concept of crystallisation and floating charges is no longer significant to determine whether the security interests has attached to the collateral?**

95. A floating charge has two (2) main features. Firstly, it is a charge on present as well as future assets of the type that circulate, but it does not attach to any specific or identifiable assets until a specific crystallisation event. Secondly, before any of the event occurs, the company is free to deal with the assets in the ordinary course of business. Crystallisation means that the floating charge becomes a fixed charge with respect to the company's present

assets. Therefore, the assets subject to a floating charge is not taken as directly encumbered.

96. Adoption of the NZ PPSA will appear to diminish the concept of floating charges. In essence, the NZ PPSA does not abolish the concept of floating charges. However, it does make the prior law's distinction between fixed and floating charges irrelevant. What NZ PPSA does allow for this is the registration of security interests to be taken in after-acquired property. Therefore, the Act does not treat such an interest any differently to a security interest registered over existing asset.

97. Section 40 of the NZ PPSA<sup>12</sup> makes it clear of the abolishment of the distinction between fixed and floating charges. The security interests will 'attach' (or 'affix' as it is referred in floating charges terminology) pursuant to the general rule of attachment under section 40 of the Act and not as a result of any subsequent crystallisation event. Section 40(4)<sup>13</sup> of the NZ PPSA further states that a reference to a floating charge is not an agreement to postpone the time of attachment.

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<sup>12</sup> Section 40 of the NZ PPSA states –

“(1) A security interest attaches to collateral when—

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

(b) the debtor has rights in the collateral; and

(c) except for the purpose of enforcing rights between the parties to the security agreement, the security agreement is enforceable against third parties within the meaning of section 36.

(2) 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 agreement.

(3) For the purposes of subsection (1)(b), a debtor has rights in goods that are leased to the debtor, consigned to the debtor, 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.

(4) To avoid doubt, a reference in a security agreement to a floating charge is not an agreement that the security interest created by the floating charge attaches at a later time than the time specified in subsection (1)”

<sup>13</sup> Ibid.

98. As such, crystallisation is no longer applicable to determine whether the security interests has attached to the collateral unless the parties have expressly stated otherwise. As such, parties who wish for attachment to occur later, must enter into a specific agreement to this effect.

99. In New Zealand, one of the benefits identified with the demise of the floating charge is that documentation is no longer required to distinguish collateral subject to a fixed charge from the one subject to a floating charge or to describe precisely property subject to a fixed charge as collateral descriptions are significantly simplified under the NZ PPSA.

100. In Canada, the practice exists that a general security agreement is adopted containing a charging clause that provides for the debtor to grant to the secured party, security interests over all of the debtor's present and after-acquired property. The Canadian legislators adopted a concept of fixed charge as they are able to rely on a clear set of statutory priority rules<sup>14</sup>.

101. We invite comments on the issue of attachment and the relevancy of the concept on crystallisation and floating charges.

### **3.6 Consultation Question 6:**

**With the new framework, do you agree that all security interests should be registered except those under which the secured party has actual possession?**

102. Under the NZ PPSA, under the general rules, a security interests is 'perfected'<sup>15</sup> when the security interests has attached and one of the

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<sup>14</sup> Personal Property Security Act is in operation in all the Canadian provinces other than the civil law province of Quebec

<sup>15</sup> Section 41 of the NZ PPSA states –

perfection steps has been completed. Under section 41 of the NZ PPSA, perfection steps would be either a registration of the financing statement in respect of the security interest or the secured party (or another person on behalf of the secured party) has possession of the collateral (except where possession is a result of seizure or repossession).

103. Possession under the NZ PPSA has to be actual possession of the collateral and it is clear under section 18(3)<sup>16</sup> of the Act that a secured party is not in possession of collateral that is in actual or apparent possession of control of the debtor or the debtor's agent.

104. It is also important to note under the NZ PPSA that the security interest must be continuously perfected in order to ensure priority over intervening security interests. This in effect means that in respect to security interests perfected by possession, the date of perfection is the date that possession was obtained. However, the security interests becomes unperfected the moment the secured party surrenders possession. In this situations and to avoid losing priority, the NZ PPSA recommends that the security interests should be perfected by registration prior to the time possession is surrendered<sup>17</sup>.

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"(1) Except as otherwise provided in this Act, a security interest is perfected when—

(a) the security interest has attached; and

(b) either—

(i) a financing statement has been registered in respect of the security interest; or

(ii) the secured party, or another person on the secured party's behalf, has possession of the collateral (except where possession is a result of seizure or repossession).

(2) Subsection (1) applies regardless of the order in which attachment and either of the steps referred to in paragraph (b) of that subsection occur".

<sup>16</sup> Section 18(3) of the NZ PPSA states –

"(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".

<sup>17</sup> Section 42 of the NZ PPSA states –

"A security interest is continuously perfected for the purposes of this Act, if—

(a) the security interest is perfected under this Act; and

(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".



105. The NZ PPSA also provides for general rule of priority under section 66 that priority between perfected security interests lies in the order of either the registration of a financing statement or taking possession of the collateral and unless another rule applies, one method of perfection has no advantage over the other.

106. In the state of Saskatchewan, Canada, the Personal Property Security Act 1993 (SA PPSA) expressly provides that the following security interests under six (6) categories of collateral may be perfected by possession: -

- (i) chattel paper;
- (ii) goods;
- (iii) an instrument;
- (iv) negotiable document of title;
- (v) money; and
- (vi) a certificated security.

107. We invite comments on the issue that all perfection steps of security interests should be by registration except those under which the secured party has actual possession.

### **3.7 Consultation Question 7:**

**Do you agree that if the new framework and a notice-filing system is adopted, a late registered security interests should be void against the liquidator and other creditors where it is registered following the onset of insolvency?**

108. Under the CA 2016, the registration of charges shall be lodged with the Registrar within thirty (30) days from the creation of the charge. Late

registration requires the Court's permission<sup>18</sup>. The Court needs to be satisfied that the omission to the particular charge was accidental or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of the creditors or shareholders or that on other grounds it is just and equitable to grant relief. The company must also state that the extension is to be without prejudice to any liability already incurred by the company or any of its officer in respect of the default.

109. Under the new framework (notice-filing system), the situation is different. The Uniform Commercial Code (revised) Article 9<sup>19</sup> has no time limit for registration of the financing statement (nor did the previous version). Similarly, neither the New Zealand nor the Saskatchewan, Canada system has a time allowed for registration of the financing statement.

110. The United Kingdom's Law Commission Consultation Paper No. 164 (CP164) propose that there be no time limit for filing a financing statement. CP164 noted that the Committee on Consumer Credit (The Crowther Report, 1971)<sup>20</sup> proposed that a security interest filed more than twenty-one (21) days after execution should be void against the trustee in bankruptcy or liquidator in the event the debtor becomes a bankrupt or goes into winding up within three (3) months of the filing. CP164 also noted that the Diamond Report (1989)<sup>21</sup> proposed for no mandatory requirement to file within twenty-one (21) days on the condition that the financing statement created more than

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<sup>18</sup> Section 361 of the CA 2016

<sup>19</sup> The Uniform Commercial Code (UCC) is a large body of regulations that governs commercial business transactions in USA. The UCC was first published in 1952 and generally deals with transactions of personal property but not of real property. The UCC superseded earlier laws such as the Uniform Trust Receipts Act, The Uniform Conditional Sales Act and the Uniform Chattel Mortgage Act. Article 9 of UCC governs secured transactions in personal property (the granting of credit secured by personal property).

<sup>20</sup> <http://discovery.nationalarchives.gov.uk/details/r/C647195>

<sup>21</sup> <http://www.parliament.uk/depositedpapers?page=1437&sort=1>

twenty-one (21) days before the filing if insolvency occurs within twelve (12) months of the date of filing. However, in its Final Report, the Steering Group rejected both Reports' idea that a charge should be invalidated if not registered a certain time before the chargor's insolvency. The Steering Group elaborated that insolvency was considered to be a:

“... defined point of which the world at large, and in particular the Registrar, has notice so that they can determine whether or not the charge may still be registered”.

111. CP164 further states that section 245 of the Insolvency Act 1986 provides for the avoidance of floating charges created in favour of a connected persons within two (2) years of insolvency unless certain conditions are fulfilled (e.g. that the charge was for new value received by the company). However, the CP164 also notes that the section relates to the date of creation not the date of filing.

112. Currently, section 529 of the CA 2016 states that a floating charge on the undertaking or property of the company created within six months of the presentation of the winding up petition in Court or passing of the resolution for voluntary winding up unless it is proved that the company is solvent immediately after the creation of the charge. Similarly, section 529 of the CA 2016 relates to the date that the charge was created and not the date that the charge was registered.

113. We invite views on whether a late registered security interests should be permitted, and if so what cut-off period should be permissible.

### **3.8 Consultation Question 8:**

#### **With the new framework, whom do you consider should be deemed to have notice of a registered security interests?**

114. One of the main functions of the new framework is to give notice of the possible existence of a security interests. An important part of this notice is whether those with legal or equitable interest in the collateral should be able to demand from the secured party, information (e.g. amount due and the asset subject to the security interest) on the security interests.

115. Under section 177 of the NZ PPSA, the debtor, the judgement creditor, a person with a security interest in personal property of the debtor, or an authorised representative of any of them, may request the secured party to send or make available to any specified person any of the following: -

- (i) a copy of a security agreement that creates or provides for a security interest held by the secured party;
- (ii) a statement in writing of the amount of indebtedness and of terms of payment of the indebtedness;
- (iii) a written approval or correction of the itemised list of personal property indicating which items are collateral (unless the security interest is over all of the personal property of the debtor);
- (iv) a written approval or correction of the amount of indebtedness and of the terms of payment of the indebtedness.

116. The SA PPSA also have similar provision as section 177 of the NZ PPSA. Under section 178 of the NZ PPSA and section 18(6) of the SA PPSA, a secured party has within ten (10) days from the date of the receipt of the request/demand to comply. Under section 18(8) of the SA PPSA, the person

who makes the demand may apply to Court for an Order for the secured party to comply with the demand.

117. Currently, any person can request for information on charges for company registered with SSM under sections 352, 354, 356 and 357 of the CA 2016.

118. However, the new framework of personal property security to be proposed will be inclusive of incorporated, LLPs, unincorporated and unregistered entities (refer to paragraphs 56-61). Being unincorporated entities, sole proprietor is owned by individuals and is governed under the Registration of Businesses Act 1956 (ROBA) (Act 197). Partnership is owned by two or more persons and governed under ROBA and the Partnership Act 1961 (PA) (Act 135). Under section 47(2) of the PA, it is stated that –

“(2) Nothing in this Act shall be read to permit any association of more than twenty persons to be formed or to carry on any business in partnership ...”

119. Therefore, an application for credit would include information of the individual or two or more persons as owners of the sole proprietor and partnership respectively. Similarly, under the new framework, information entered for security interests on collaterals from a sole proprietor or a partnership would relate to those individuals or two or more persons respectively. In contrast, for incorporated entities, any information on charges would relate to the company as a corporate body.

120. Under NZ PPSA, a Debtor is identified as any individual or organisation. If the Debtor is an individual, information to be included on the financing statement are the name of the Debtor, date of birth and address. If the Debtor

is an organisation not incorporated, the registration must include name and address of the organisation. For an organisation that is incorporated, the registration must include the unique number assigned to it for incorporation. Finally, if the Debtor is an organisation, the type of organisation must be included i.e. company, incorporated society, incorporated charitable trust board, industrial and provident society, building society, partnership, friendly society, credit union or trust. If none of those apply, the secured party may select "other".

121. SSM is of the view that the system for New Zealand and Saskatchewan, which is open to any organisation or individual, is suitable for adoption. Considerations are taken into account of personal information of individuals that would need to be entered for registration on the security interests would be inclusive of the National Registration Identity Card (NRIC) Number and address of the individuals. Also, considerations have to be provided for the principles as stated under the Personal Data Protection Act 2010.

122. We invite comments on the scope of who is deemed to have notice of a registered security interests.

### **3.9 Consultation Question 9:**

**With the new framework, do you agree that provision should be made for the voluntary registration of negative pledges in Malaysia? If so, do you agree that provision should be made that notice should arise from the date of registration?**

123. Negative pledges are covenants or undertakings by the debtor to the creditor not to create other charges ranking in priority to, or equal with, the charge to which the covenants or undertakings relate. In another word, the

debtor promises that he or she will not grant a security interest to another creditor or encumber the asset.

124. A bare negative pledge is not a security interests because it does not create a proprietary interest in favour of the creditor. As the debtor simply agrees not to do a certain act, this would merely provide the creditor with a contractual right. If the debtor fails to repay the creditor, the creditor cannot automatically seize the asset as the debtor did not grant security interests to the creditor. However, certain negative pledge clauses state that if the debtor breaches the negative pledge by granting security interest in the asset, then the creditor automatically have security interest in the debtor's asset. This transaction creates a security interests but only if the debtor breaches the negative pledge.

125. Currently, negatives pledges are not expressly stated as one of the types of charges under section 353 of the CA 2016 (reference to paragraph 18).

126. The NZ PPSA allows a financing statement to be registered before or after a security interests has attached<sup>22</sup>. Therefore, a creditor can register a financing statement and to perfect at the time of registration. The creditor will then have priority as at the date of the registration rather than as at the date of the breach of the negative pledge.

127. We invite comments and views on negative pledge and if it creates a security interest, whether it could be registered under the new framework.

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<sup>22</sup> Section 146 of the NZ PPSA states that a financing statement may be registered before or after a security agreement is made or a security has attached.

### **3.10 Concluding Question**

#### **Consultation Question 10:**

**Are there any other aspects of the company charges registration system that need to be changed? If so, please indicate the changes you think is desirable with the arguments in support of such changes.**

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