

PPSA OPINIONS

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INTRODUCTION

1. The Personal Property Securities Act 1999 ("PPSA") came into force on 1 May 2002. Since then, New Zealand lawyers have been requested by financiers to provide opinions on security agreements which purport to create security interests over personal property of a debtor. The purpose of this paper is to:
2. consider the purpose for a financier requesting an opinion and the role of the lawyer in providing it;
3. describe the principal provisions of opinions which New Zealand lawyers have given in relation to security agreements since the PPSA came into force; and
4. discuss whether these opinions should extend to the priority of a security interest ("priority opinion").
5. For the purposes of this paper, a fairly high level of understanding of the PPSA is assumed as the workings of the PPSA is a comprehensive topic in itself. Certain of the sections of the PPSA referred to in this paper are set out in Appendix A. The party providing the opinion is referred to as the "provider" and the parties requesting or receiving the benefit of it, the "secured party". Other expressions used in this paper (such as debtor, security agreement, security interest, personal property and collateral) are intended to have the meanings given to them in the PPSA. Further, it is assumed that the security transaction is an entirely domestic transaction where all the documents are governed by New Zealand law and the collateral is entirely located in New Zealand.
6. An example of an opinion typically provided in respect of a security agreement is set out in Appendix B.

THE ROLE OF A LEGAL OPINION

7. Before reviewing PPSA opinions on security agreements, it is worthwhile first considering the principal objectives of opinions relating to secured financing transactions, the respective roles of the provider and the secured party, and the degree to which the opinions achieve these objectives.
8. A security agreement provides a secured party with two different types of legal rights. First, the secured party obtains personal rights against the debtor. For instance, a security agreement typically would include both positive and negative covenants in relation to the collateral. Secondly, a security agreement provides the secured party with property rights against the collateral. That is, if the debtor defaults, the secured party is able to apply or sell the collateral to satisfy the secured obligations.
9. The principal objective of a legal opinion in relation to a security agreement is to provide the secured party with assurances that it is able to enforce its personal rights against the debtor and that it has an effective security interest that it is able to enforce over the collateral. These assurances typically take the following form:
 - an opinion that the obligations of the debtor under the security agreement are enforceable ("enforceability opinion");
 - an opinion that a valid security interest has been created over the collateral ("creation opinion"); and

- an opinion that the security interest has been perfected ("perfection opinion").
10. A further objective of a legal opinion of this nature is to describe the nature and scope of the security interest taken, the (largely factual) assumptions fundamental to the validity and effectiveness of the security, and the circumstances in which it may not be enforceable or in which its enforceability may be restricted. That forms a basis on which the secured party can determine the value of the security from a legal perspective and the degree to which it can rely on it. There is sometimes a misconception as to the true purpose of opinions of this nature. They should not be viewed as a form of additional security or insurance.
11. As discussed in more detail below, the assumptions are, properly, matters for the secured party to be satisfied are correct and a matter of its due diligence. In most cases, the assumptions are a question of fact on which the provider is not in a position to make an assessment as to their veracity. In other cases, they are a mix of fact and law, in relation to which the secured party has either previously taken advice or may require specific additional advice from the provider, in order to assess the veracity of the assumption.
12. One of the key qualifications relating to factual matters is as to the ranking of the security interest. For the reasons discussed later in this paper, unlike a registered mortgage over land, it is doubtful that a New Zealand lawyer can properly give any useful opinion as to the precise ranking of a security interest in relation to collateral which is subject to the PPSA.
13. In this respect there is a reasonably clear division between the provider and the secured party of their respective roles and responsibilities in relation to a legal opinion. In order to ensure that the principal objectives of an opinion are achieved, these need to be kept in mind.
14. There are other subsidiary opinions relating to such matters as tax, stamp duty and similar aspects which are not covered in this paper.
15. The form and content of the opinion should usually be discussed with the secured party as early in the transaction as is possible, so that the assumptions and any limitations or qualifications can be brought to the secured party's attention and verified by the secured party to the extent required.

THE ENFORCEABILITY OPINION

16. Financiers and finance lawyers will be familiar with the enforceability opinion. It is the opinion which confirms that the obligations of the obligor are enforceable. It is also the opinion which is most qualified, notably by reference to insolvency laws and other laws affecting creditors' rights generally and by general principles of equity. It is the opinion which financiers tend to look for first.
17. However, in the context of a security agreement, the enforceability opinion is more limited than a secured party might often think. The enforceability opinion confirms that the debtor's *obligations* are enforceable, but it does not confirm that a security interest has been created, the ranking of the security interest or that a secured party will have recourse to the collateral. To the extent these opinions are able to be given, they are covered by the creation opinion and the perfection opinion.
18. An example of an enforceability opinion is:

The Security Agreement constitutes legal, valid, binding and enforceable obligations of the Debtor.

19. To be able to give this opinion in relation to a security agreement, the provider will need to conduct the same review as for any other finance document. In other words, the provider must be satisfied that all the requirements of contract law are satisfied, and that there is nothing which would affect the enforceability of the debtor's obligations, other than those matters covered by the usual enforceability qualifications. An enforceability opinion can only meaningfully be given if the governing law of the security agreement (as opposed to the law

governing the validity, perfection and the effect of perfection or non-perfection¹⁾ is New Zealand law. For the purposes of this paper it is assumed the debtor is a New Zealand party. However, it is possible for an enforceability opinion to be given in relation to non-New Zealand debtors, provided appropriate assumptions are included relating to the debtor's home jurisdiction.

20. To give an enforceability opinion, the provider must be able to confirm that the debtor exists, that it has the capacity and authority to enter into the security agreement, and that the security agreement has been properly executed. It also requires careful consideration of the terms of the security agreement.
21. The enforceability of obligations may be affected by a number of factual matters or circumstances beyond the provider's knowledge. For this reason, it is appropriate that an opinion that obligations are enforceable should be qualified. For instance, if the debtor is insolvent at the time it enters into the security agreement, the security agreement may be voidable under sections 292 or 293 of the Companies Act 1993 for having preferential effect. Similarly, the secured party may be estopped from strictly enforcing its rights under the security agreement because of representations which it may have made to the debtor. For these reasons, enforceability opinions typically are qualified by reference to insolvency laws and other laws affecting creditors' rights generally and by general principles of equity. These qualifications are appropriate, and are invariably accepted by financiers without comment.
22. In the context of a security agreement, the provider must also have regard to any limitations on enforceability contained in the PPSA. In particular, a provider should have regard to:
 - *section 25(1) of the PPSA* - the requirement that all rights, duties or obligations under a security agreement must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice; and
 - *Part 9 of the PPSA* - which regulates the enforcement of security interests.
23. To cover certain circumstances specified under the PPSA in which the debtor's obligations may not be enforceable, a general qualification along the following lines is usually included:

The PPSA imposes certain obligations on secured parties which cannot be varied by contract, and which may also affect the enforceability of certain rights and remedies contained in the Security Agreement to the extent that those rights and remedies are inconsistent with or contrary to certain provisions of the PPSA.
24. However, secured parties may require the opinion to more specifically describe those circumstances. For instance, if the debtor has waived any of its rights which are not permitted to be waived by section 107 of the PPSA, then these should be specified.

THE CREATION OPINION

25. The creation opinion provides a secured party with an assurance that the technical requirements of the PPSA for the creation of a valid security interest have been met. An example of the creation opinion is as follows:

The Security Agreement creates a valid security interest in favour of the Secured Party in the personal property described in the Security Agreement in which the Debtor now has rights, and is sufficient to create a valid security interest in favour of the Secured Party in the personal property described in the Security Agreement in which the Debtor hereafter acquires rights when those rights are acquired by the Debtor.

¹ The conflict of laws provisions are contained in sections 26-33 of the PPSA.

26. The starting point is to determine whether the PPSA applies to the creation of the security interest. This will require an examination of section 23 of the PPSA, which excludes certain rights from the PPSA (such as the creation of an interest in land), and the conflict of laws provisions in sections 26 - 33 of the PPSA. These provisions in turn require consideration of the following:

- What type of security interest is being created?
- What type of collateral is it?
- Where is the collateral located and will it be moved?
- Is it a possessory or a non-possessory security interest?
- What is the governing law of the security agreement?
- Where is the debtor located?

27. Once it has been established that the PPSA will apply (bearing in mind that this is not always an easy task), the requirements for the creation of a valid security interest must be addressed. These are:

- That a "security interest" within the meaning of section 17 of the PPSA exists.
- That the security agreement is enforceable against third parties for the purposes of section 36 of the PPSA.
- That the debtor has rights in the collateral.

28. In a transaction in which the debtor grants security over all of its present and after-acquired property there will not normally be much difficulty in determining whether or not a security interest exists. However, this fundamental requirement should not be overlooked, particularly in transactions involving unusual security arrangements. In particular, for a security interest to exist, there needs to be an interest in personal property, not merely a contractual right to have money paid or property transferred. The distinction is not always clear, as is illustrated by the debate as to whether certain outright transfers of money or investment securities constitute security interests, such as occurs in repo transactions or ISDA collateral support agreements.

29. To be enforceable against third parties, the collateral must either be in the possession of the secured party or the debtor must have signed (or otherwise assented to) a security agreement which contains a description of the collateral which meets the requirements of section 36(1)(b) of the PPSA. Again, in a transaction in which a debtor grants security over all of its present and after-acquired property, it should not be difficult to determine that the security agreement is enforceable against third parties. However, care needs to be taken that all of the requirements of section 36(1)(b) are met, such as that the debtor has signed or assented to the security agreement.

30. It will generally not be appropriate to opine that a valid security interest has been created solely in reliance on section 36(1)(a) of the PPSA (ie that the collateral is in the possession of the secured party). In an ordinary financing transaction, it is relatively rare for the financier to be in possession of the collateral from the outset. Also, even if the provider is satisfied that he or she has actual knowledge or relies on a certificate from the secured party that this is the case, or makes an appropriate assumption regarding possession, the arrangements between the parties may be such that secured party may not always continue in possession.

31. In relation to specific security agreements, in order to rely upon section 36(1)(b), particular care needs to be taken that the agreement contains an adequate description of the collateral

by item or kind to enable it to be identified. Regard should be had to the rules regarding the adequacy of collateral descriptions contained in sections 37-39 of the PPSA.²

32. To give a creation opinion, the requirement in section 40(1)(b) of the PPSA that the debtor has rights in the collateral must be addressed. Again, this is largely a factual matter and the provider will be unlikely to know whether or not, as a question of fact, the debtor has and will continue to have rights in the collateral. For this reason, the creation opinion contains an effective assumption that the debtor actually has rights in the collateral.
33. While the secured party may require additional advice as to precisely what constitutes sufficient rights in the collateral as a question of law, the secured party should rely primarily on its own due diligence and on the representations given by the debtor in the security agreement for comfort that the debtor has these rights. The rule in section 40(3) of the PPSA, which specifies when a debtor obtains rights in certain transactions (such as a lease), does not affect this. The determinative factor in section 40(3) is that the debtor obtains possession, which is a factual matter outside the knowledge of the provider.
34. Regard also should be had to section 40(2) of the PPSA. An opinion that a valid security interest has been created cannot be given if the security agreement contains a provision that the security interest attaches at a later specified time.

THE PERFECTION OPINION

35. The perfection opinion provides the secured party with an assurance that its interest in the collateral is enforceable against third parties. It does not mean that the secured party has priority over other competing parties. Perfection can occur by possession or by the registration of a financing statement on the Personal Property Securities Register ("PPSR"). In the overwhelming majority of secured financing transactions, perfection will occur by registration.
36. To give a perfection opinion, it must first be determined whether the PPSA applies to the perfection of the security interest. This is discussed in relation to the creation opinion in paragraph 26. The next step is to be satisfied that the requirements of section 41 of the PPSA have been met. Section 41 provides that a security interest is perfected when:
 - the security interest has attached; and
 - either a financing statement has been registered in respect of the security interest on the PPSR or the secured party, or another person on its behalf, has possession of the collateral.
37. Briefly, attachment occurs when value has been given by the secured party, the debtor has rights in the collateral, and the security agreement is enforceable against third parties within the meaning of section 36 of the PPSA.³ A perfection opinion is typically given in conjunction with a creation opinion. The creation opinion will address all of the requirements of attachment, other than that value has been given by the secured party. Similar to the issue of whether a debtor has rights in the collateral, the issue of whether value has been given is substantially a factual matter and also a matter within the control of the secured party (although the secured party may require advice as to what constitutes value for the purposes of the PPSA⁴). A provider will be unlikely to know as a matter of fact whether, or when, value

² Section 37 provides that a description is inadequate if it describes the collateral as consumer goods or equipment without further reference to the item or kind of collateral. Section 38 provides that a description of collateral as inventory is adequate only while it is held by the debtor as inventory. Section 39 provides that a security interest in proceeds is enforceable against a third party whether or not the security agreement contains a description of the proceeds.

³ Section 40(1) of the PPSA.

⁴ Value is defined in section 16(1) to mean consideration that is sufficient to support a simple contract and includes an antecedent debt or liability.

is given by the secured party or the debtor has rights in the collateral, so the perfection opinion effectively assumes that these requirements have been met.

38. An example of the perfection opinion is as follows:

When value is provided to the Debtor, the financing statement registered in relation to the Security Agreement will perfect the security interest in the personal property described in the Security Agreement in which the Debtor now has rights, and is sufficient to perfect a security interest in the personal property described in the Security Agreement in which the Debtor hereafter acquires rights when those rights are acquired by the Debtor.

39. In giving a perfection opinion, it is unlikely to be appropriate that reliance should be placed on section 41(1)(b)(ii) of the PPSA (ie that the secured party, or another person on its behalf, has possession of the collateral), for the reasons discussed in paragraph 30 above. For that reason, an opinion that a financing statement has been registered is usually included.
40. In giving such a filing perfection opinion, the provider will first need to be satisfied that the financing statement complies with the PPSA and, in particular, is not misleading for the purposes of section 149 of the PPSA. Section 149 provides that a registration of a financing statement may be invalid if it contains a defect, irregularity, omission or error which is seriously misleading.⁵ This will require an examination of the description in the financing statement of both the original collateral and of the proceeds. The requirements of a financing statement are contained in the Personal Property Securities Regulations 2001 ("Regulations").
41. Secondly, the provider will need to ensure and confirm that a financing statement has been registered in relation to the security interest. Such confirmations may take this form:

We have registered a financing statement in relation to the security interest expressed to be created by the Security Agreement on [specify date], the verification statement in respect of which shows the time of registration as [specify time] am/pm and the registration number as [specify financing statement number]. The registration has a life of 5 years from the date of registration.

42. A number of New Zealand financiers attend to their own registration of financing statements on the PPSR. If this is the case, the opinion will instead include an assumption to the effect that a financing statement has or will be registered.
43. However, perfection is not a continuous state. An opinion that a security interest will be perfected does not mean that the security interest will be continuously perfected. As noted above, this is particularly so in the case of perfection by possession, but also applies to perfection by registration. Section 153 of the PPSA provides that a financing statement expires five years after the date of registration. For this reason, perfection opinions are given only as at the time the debtor obtains rights in the collateral, and typically a statement is included that the life of the registration is only five years and that the opinion provider is not responsible for either advising the secured party of the impending expiry or for renewing the registration. Furthermore, if the provider has not prepared or reviewed the financing statement, any opinion given on the perfection of the security interest should state this, and be given on the assumption that the financing statement complies with the requirements of the PPSA and PPSR.
44. The form of the collateral may also change over time. Section 45(1)(b) provides that a security interest in collateral that is dealt with or otherwise gives rise to proceeds extends to the proceeds. A provider needs to have regard to the definition of proceeds in section 16 of

⁵ Section 150 provides that a registration will be invalid if there is a seriously misleading defect, irregularity, omission or error in the name of the debtor or the serial number of collateral that is consumer goods or equipment which is required by the regulations to be described by serial number in a financing statement. Section 150 does not limit the circumstances in which a registration will be invalid.

the PPSA, and also to section 46 of the PPSA which describes the circumstances in which a security interest in proceeds is continuously perfected. A qualification should be included in the opinion relating to proceeds which are not identifiable or traceable or capable of being described in the financing statement.

45. Perfection provides only limited protection for a secured party. Perfection does not, for instance, mean that the secured party will defeat the interests of all competing parties. The limitations of the perfection opinion should be brought to the attention of the secured party. These are discussed below.
46. While the registration of a financing statement will perfect a security interest in negotiable instruments, investment securities, negotiable documents of title and chattel paper, it will not be sufficient to defeat certain competing interests.⁶ For example, a purchaser (which by definition includes another secured party) of an investment security who gives value, is not aware of the existing security interest at the time of purchase, and takes possession, will take priority over a security interest perfected by registration. While a general qualification to this effect may be appropriate in the case of security granted over all of a debtor's present and after-acquired property, it may be appropriate to make particular reference to the relevant provisions of the PPSA in the case of a specific security agreement over any of these types of collateral.
47. Similarly, regulation 9 of the Regulations requires that goods which are prescribed by the Regulations to be serial numbered goods must be perfected by the registration of serial numbers and other specified information (unless perfection occurs by possession). If the provider is aware that the collateral consists of, or includes, serial numbered goods, the perfection opinion should specifically address this point. In other cases, a general qualification is appropriate.
48. If a debtor changes its name or transfers its interest in any personal property which is intended to remain subject to a security interest created by the security agreement, that security interest will become unperfected unless a financing change statement is registered within the specified period.⁷ Again, this should be brought to the attention of the secured party by an appropriate statement in the opinion.
49. Most importantly, the perfection opinion does not give the secured party an assurance that its security interest has priority over any competing interest. Again, this should be stated in the opinion.

PRIORITY OPINION

50. A priority opinion would seek to provide the secured party with an assurance that it has a superior interest in the collateral to all, or certain specified, other persons. A priority opinion typically is not given in New Zealand (other than in relation to property which is secured by a registered mortgage of land), particularly if the security agreement is in respect of all of the debtor's present and after-acquired property. Arguably, there may be greater scope for a priority opinion if a debtor grants security over only a specific asset, as it may be easier to eliminate circumstances in which the secured party's interest could be defeated. However, any such opinion would still need to be based on a number of assumptions which would be likely to detract from its value to the secured party. Those assumptions would need to address the matters described in paragraph 51 below, to the extent relevant to the transaction in question.
51. Because there are numerous ways in which a perfected security interest may be defeated by a competing interest, it is difficult for a priority opinion to be given in relation to personal

⁶ Sections 96-99 of the PPSA.

⁷ Sections 87-92 of the PPSA.

property under the PPSA. It is a daunting task to eliminate all of these competing interests, including:

- a purchase money security interest ("PMSI") will defeat a non-PMSI if perfected within a specified period⁸;
- the rules in the PPSA relating to accession and processed or commingled goods;⁹
- buyers or lessees of goods take free of security interests in certain circumstances;¹⁰
- liens have priority over perfected security interests relating to the same goods;¹¹
- purchasers of money, negotiable instruments, investment securities and chattel paper have priority in certain circumstances;¹²
- preferential creditors under paragraph 9 of schedule 7 of the Companies Act have priority over a secured party with a security interest over accounts receivable and inventory in certain circumstances.

52. While New Zealand opinions typically do not include a priority opinion, it is usually appropriate for any other secured parties who may have a prior ranking claim as at the date of the opinion to be identified. This is achieved by conducting a PPSR search and advising the secured party of the results. This statement takes the following form:

There are no current registrations recorded against the Debtor (under its current name and company incorporation number) as debtor prior to [insert time and date of search] other than the following: [specify PPSR results].

53. This enables the financier to make further enquiries of the debtor if the search discloses a security interest which may take priority and to enter into appropriate priority arrangements. However, a search will not reveal a prior ranking security interest such as a PMSI granted less than 10 working days before the search, nor security interests perfected by possession.
54. If this statement is included, an assumption should be made that the records of the PPSR are complete, accurate and up-to-date, and that the Registrar of the PPSR has not suspended the operation of the PPSR. Again, these are factual matters beyond the knowledge of the provider.
55. The statement as to current registrations only provides an historical record, disclosing any financing statements which have been filed prior to the secured party's security interest. Importantly, the statement does not provide any assurance against any future filings (such as PMSIs) or undisclosed security interests (which may be perfected by possession) which may subsequently take priority.

CONCLUSION

56. There has been remarkably little controversy surrounding the PPSA opinions which New Zealand lawyers have given since 2002. To our knowledge, there have been few queries regarding the opinions which have been given, and the associated assumptions and

⁸ Sections 73-77 of the PPSA.

⁹ Sections 78-86 of the PPSA.

¹⁰ Sections 52-56 of the PPSA.

¹¹ Section 93 of the PPSA.

¹² Sections 96-99 of the PPSA.

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qualifications. Nor has there been pressure to give priority opinions. Hopefully, this reflects both that the balance of the opinions is correct and the high level of understanding of the PPSA on the part of New Zealand financiers.

**APPENDIX A
SECTIONS OF PPSA**

"Proceeds"

- (a) Means identifiable or traceable personal property:
 - (i) that is derived directly or indirectly from a dealing with collateral or the proceeds of collateral; and
 - (ii) in which the debtor acquires an interest; and
- (b) includes:
 - (i) a right to an insurance payment or other payment as indemnity or compensation for loss of or damage to the collateral or proceeds; and
 - (ii) a payment made in total or partial discharge or redemption of chattel paper, an intangible or investment security, or a negotiable instrument; but
- (c) does not include animals merely because they are the offspring of the animals that are collateral.

Section 17. Meaning of "security interest":

- (1) In this Act, unless the context otherwise requires, the term ``security interest'':
 - (a) means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to:
 - (i) the form of the transaction; and
 - (ii) the identity of the person who has title to the collateral; and
 - (b) 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).
- (2) A person who is obligated under an account receivable may take a security interest in the account receivable under which that person is obligated.
- (3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

Section 23. When Act does not apply:

This Act does not apply to:

- (a) the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods;

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- (b) a lien (except as provided in Part 8), charge, or other interest in personal property created by any other Act [(other than section 169 of the Tax Administration Act 1994 and sections 169 and 184 of the Child Support Act 1991)] or by operation of any rule of law;
- (c) any right of set-off ([but without limiting the effect of] section 102), netting, or combination of accounts;
- (d) repealed.
- (e) an interest created or provided for by any of the following transactions:
 - (i) the creation or transfer of an interest in land;
 - (ii) a transfer of a right to payment that arises in connection with an interest in land, including a transfer of rental payments payable under a lease of or licence to occupy land, unless the right to payment is evidenced by an investment security;
 - (iii) a transfer of an unearned right to payment under a contract to a person who is to perform the transferor's obligations under the contract;
 - (iv) a transfer of present or future wages, salary, pay, commission, or any other compensation for labour or personal services of an employee;
 - (v) an assignment for the general benefit of creditors of the person making the assignment;
 - (vi) a transfer of an interest or claim in or under a contract of annuity or policy of insurance, except as provided by this Act with respect to proceeds and priorities in proceeds;
 - (vii) a transfer of a right to damages in tort;;
 - (viii) an assignment of accounts receivable made solely to facilitate the collection of the accounts receivable on behalf of the person making the assignment;
 - (ix) an assignment of a single account receivable or negotiable instrument in whole or in partial satisfaction of a pre-existing indebtedness;
 - (x) a sale of accounts receivable or chattel paper as part of a sale of a business, unless the seller remains in apparent control of the business after the sale;
 - (xi) a transfer, assignment, mortgage, or assignment of a mortgage of a ship (within the meaning of the Ship Registration Act 1992) that exceeds 24 metres register length (within the meaning of that Act), or any share of such a ship;
 - (xii) a transfer, mortgage, or licence of any management rights (within the meaning of the Radiocommunications Act 1989);
 - (xiii) a transfer or other transaction by way of security in respect of individual transferable quota or transferable term quota (within the meaning of the Fisheries Act 1983) or a transaction of quota or annual catch entitlements (within the meaning of the Fisheries Act 1996).

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Section 26. When New Zealand law applies:

- (1) Except as otherwise provided in this Act, the validity, perfection, and the effect of perfection or non-perfection of a security interest in goods or a possessory security interest in chattel paper, an investment security, money, a negotiable document of title, or a negotiable instrument, is governed by the law of New Zealand if:
 - (a) at the time the security interest attaches to the collateral, the collateral is situated in New Zealand; or
 - (b) at the time the security interest attaches to the collateral, the collateral is situated outside New Zealand but the secured party has knowledge that it is intended to move the collateral to New Zealand; or
 - (c) the security agreement provides that New Zealand law is the law governing the transaction; or
 - (d) in any other case, New Zealand law applies.
- (2) For the purposes of subsection (1), an investment security that is not in the form of a security certificate is situated where the records of the clearing house or securities depository are kept.

Section 30. Validity, perfection, etc, of security interests in intangibles, movable equipment, etc

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

- (a) a security interest is an intangible;
- (b) a security interest in goods that are of a kind that are normally used in more than 1 jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others;
- (c) a non-possessory security interest in chattel paper, an investment security, a negotiable document of title, money, or a negotiable instrument.

Section 36. Enforceability of security agreements against third parties:

- (1) A security agreement is enforceable against a third party in respect of particular collateral only if:
 - (a) the collateral is in the possession of the secured party; or
 - (b) the debtor has signed, or has assented to by letter, telegram, cable, telex message, facsimile, electronic mail, or other similar means of communication, a security agreement that contains:
 - (i) an adequate description of the collateral by item or kind that enables the collateral to be identified; or
 - (ii) a statement that a security interest is taken in all of the debtor's present and after-acquired property; or
 - (iii) a statement that a security interest is taken in all of the debtor's present and after-acquired property except for specified items or kinds of personal property.

- (2) To avoid doubt, a security agreement may be enforceable against a third party in respect of particular collateral even though the security agreement is not enforceable against a third party in respect of other collateral to which the security agreement relates.

Section 40. Attachment of security interests generally:

- (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).

Section 41. When security interest perfected:

- (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.

Section 45. Continuation of security interests in proceeds:

- (1) Except as otherwise provided in this Act, a security interest in collateral that is dealt with or otherwise gives rise to proceeds:
- (a) continues in the collateral, unless the secured party expressly or impliedly authorised the dealing; and
 - (b) extends to the proceeds.

- (2) The amount secured by a security interest in collateral and the proceeds is limited to the value of the collateral at the date of the dealing that gave rise to the proceeds, if the secured party enforces the security interest against both the collateral and the proceeds.

Section 46. When security interest in proceeds is continuously perfected:

A security interest in proceeds is a continuously perfected security interest in proceeds if the security interest in the original collateral is perfected by registration of a financing statement that:

- (a) contains a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind; or
- (b) contains a description of the original collateral, if—
 - (i) the proceeds are of a kind that are within the description of the original collateral; or
 - (ii) the proceeds are cash proceeds; or
 - (iii) the proceeds consist of a payment made in total or partial discharge or redemption of an intangible, a negotiable instrument, an investment security, or chattel paper; or
 - (iv) the proceeds consist of a right to an insurance payment or any other payment as indemnity or compensation for loss or damage to the collateral or proceeds.

Section 107. When contracting out of certain provisions in this Part permitted:

- (1) The parties to a security agreement may contract out of sections 108, 109, 111(1), 112, 114(1)(a), 117(1)(c), 120(1), 122, 133, and 134.
- (2) The parties to a security agreement may contract out of the debtor's right to:
 - (a) receive a statement of account under section 116;
 - (b) recover surplus under section 119;
 - (c) receive notice of a secured party's proposal to retain collateral under section 120(2);
 - (d) object to a secured party's proposal to retain collateral under section 121;
 - (e) not have goods damaged when a secured party removes an accession under section 125;
 - (f) not be reimbursed for damage caused when a secured party removes an accession under section 126;
 - (g) refuse permission to remove an accession under section 127;
 - (h) receive notice of the removal of an accession under section 129;
 - (i) apply to the Court for an order concerning the removal of an accession under section 131;

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- (j) redeem collateral under section 132.
- (3) The parties to a security agreement may contract out of the secured party's right to apply to a court for an order in respect of the removal of an accession under section 128.

APPENDIX B

PPSA Opinion on Security Agreement

To: Secured Party

DEBTOR - SECURITY AGREEMENT

1. INTRODUCTION

1.1 This opinion is issued in connection with:

- (a) the Loan Agreement dated [•] 2004 between the Debtor and the Secured Party; and
 - (b) the General Security Agreement ("Security") dated [•] 2004 granted by the Debtor in favour of the Secured Party,
- (collectively the "Documents").

2. JURISDICTION

2.1 This opinion relates only to the laws of New Zealand in force and effective as at the date of this opinion and is given on the basis that it will be construed in accordance with those laws. We have made no investigation of, and express no opinion as to, the laws of any other jurisdiction.

3. DOCUMENTATION AND SEARCH RESULTS

3.1 For the purposes of giving this opinion, we have examined the following:

- (a) An executed original of each of the Documents.
- (b) A certificate dated [•] 2004 given by a director of the Debtor.
- (c) Our search of the public records:
 - (i) on the Companies Office website (www.companies.govt.nz), carried out on [•] 2004;
 - (ii) on the nationwide Ministry of Justice Case Flow Management System (CMS), carried out at the High Court at [•] am/pm on [•] 2004;
 - (iii) on the Personal Property Securities Register ("PPSR") carried out at not later than [•] am/pm on [•] 2004 by reference to the Debtor's current name and its company incorporation number; and
- (d) The originals or copies, certified or otherwise identified to our satisfaction, of such certificates and other documents as we have deemed necessary or appropriate to enable us to render our opinion.

4. ASSUMPTIONS

4.1 We have made the following assumptions:

- (a) All signatures on the Documents are genuine.
- (b) All documents provided to us are:
 - (i) if originals, authentic and in full force and effect; and
 - (ii) if copies, true copies of original documents, that are in full force and effect.
- (c) All facts provided to us by or on behalf of any person, including those set out in any document or certificate, are correct.
- (d) The Documents have been authorised, executed and delivered by, and are within the capacity and powers of the parties to each of them (other than the Debtor) and constitute legal, valid and binding obligations of those parties.
- (e) The Debtor has received, or will receive, fair value under the Documents for its obligations under the transactions contemplated by the Documents and the execution and performance of the Documents is for the corporate purposes and in the best interests of the Debtor.
- (f) The value of the consideration or benefits being received, or to be received, by the Debtor under the transactions contemplated by the Documents is not less than the value of the consideration provided, or to be provided, by the Debtor under those transactions.
- (g) At the times the Documents and the transactions contemplated by the Documents were or are entered into, the Debtor was solvent.
- (h) All necessary directors' and shareholders' resolutions of the Debtor have been properly passed in accordance with the constitution of the Debtor and the Companies Act 1993, and remain in full force and effect without modification as at the date of this opinion.
- (i) The Debtor has entered into the Documents as principal and not in the capacity of an agent or as the trustee of any trust or settlement.
- (j) The records on the Companies Office website and on the Case Flow Management System referred to in paragraph 3.1(c) are complete, accurate and up to date. We note that records disclosed by the search referred to in paragraph 3.1(c)(i) may not be complete or up to date and that an application to liquidate a company, or notice of a liquidation order or resolution for the appointment of a receiver or for the liquidation of a company, may not be filed with the Registrar of Companies immediately or, even if filed, may not be available for public inspection.
- (k) The records of the PPSR are complete, accurate and up to date and that the Registrar of the PPSR has not suspended the operation of the PPSR.

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5. REGISTRATION

- 5.1 We have registered a financing statement in relation to the security interest expressed to be created by the Security on [•] 2004, the verification statement in respect of which shows the time of registration as [•] am/pm and the registration number as [•]. The registration has a registration life of 5 years from the date of registration.
- 5.2 We do not maintain a diary system for registrations and will not renew this registration unless provided with instructions to do so prior to the expiry date.

6. OPINION

6.1 In our opinion:

- (a) The Debtor is a company registered under the Companies Act 1993.
- (b) The Debtor has:
- (i) corporate power to enter into and perform its obligations under the Documents and to undertake all matters required to be undertaken by it under, in respect of, and for the purposes of implementing, the transactions contemplated by those Documents; and
 - (ii) taken all necessary corporate action to authorise the entry into, and execution of, the Documents and the performance of its obligations thereunder and the undertaking by it of all matters required to be undertaken by it under, or in respect of, the transactions contemplated by those Documents.
- (c) The Documents have been executed in accordance with the Companies Act 1993.
- (d) The Documents constitute legal, valid, binding and enforceable obligations of the Debtor.
- (e) The Security creates a valid security interest in favour of the Secured Party in the personal property described in the Security in which the Debtor now has rights, and is sufficient to create a valid security interest in favour of the Secured Party in the personal property described in the Security in which the Debtor hereafter acquires rights when those rights are acquired by the Debtor.
- (f) When value is provided to the Debtor, the financing statement referred to in paragraph 5.1 will perfect the security interest in the personal property described in the Security in which the Debtor now has rights, and is sufficient to perfect a security interest in the personal property described in the Security in which the Debtor hereafter acquires rights when those rights are acquired by the Debtor.
- (g) The Security extends to all assets and undertakings of the Debtor, including its personal property. With respect to that personal property, the financing statement referred to in paragraph 5.1 has been registered. With respect to property of the Debtor other than its personal property (particularly interests in land), the charge created by the Security over the other assets has not been registered.
- (h) The execution and performance of the Documents by the Debtor, and the compliance by the Debtor with the terms and provisions thereof, do not and will

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not violate any law of New Zealand by which the Debtor is bound or any provision of its constitution.

- (i) The legal consequences of the execution, delivery and performance by the Debtor of the Documents are governed by private law. The Debtor, its properties and its assets have no immunity from the jurisdiction of any New Zealand Court or from legal process under the laws of New Zealand.
- (j) There are no current registrations recorded on the PPSR against the Debtor (under its current name and company incorporation number) as debtor prior to the registration of the financing statement referred to in paragraph 5.1 other than as set out in the Schedule.
- (k) It is not necessary or advisable in order to ensure the legality, validity, enforceability or admissibility of any of the Documents that:
 - (i) any document be stamped; or
 - (ii) other than as specified in paragraph 5.1, any document be filed, recorded or registered, or that any other similar action be taken in relation to the same.

7. QUALIFICATIONS AND RESERVATIONS

7.1 This opinion is subject to the following qualifications and reservations:

- (a) We express no opinion as to:
 - (i) the title of the Debtor to, or rights of the Debtor in, any of the property in respect of which a security interest or charge is created under the Security;
 - (ii) the priority of any security interest created under the Security;
 - (iii) the validity or effectiveness of any security interest or charge created in relation to property located outside New Zealand; or
 - (iv) the validity of any security interest expressed to be created in any proceeds of personal property which are not identifiable or traceable or capable of being described in the financing statement relating to the security interest expressed to be created under the Security.
- (b) Other than as provided to us for the purpose of giving this opinion, any security interest created by the Security in any goods that are prescribed by the Personal Property Securities Act 1999 ("PPSA") regulations to be serial numbered goods have not been perfected by registration of serial numbers and other specific information as required by the regulations under the PPSA.
- (c) Notwithstanding that registration will perfect the security interests created by the Security in collateral consisting of negotiable instruments, investment securities, negotiable documents of title and chattel paper, only the continued possession of such collateral by or on behalf of the Secured Party is sufficient to defeat the interests of certain specified parties under the PPSA.
- (d) If the Debtor changes its name or transfers its interest in any of the personal property which is and is intended to remain subject to a security interest created

by the Security, that security interest created in favour of the Secured Party will become unperfected unless a financing change statement is registered within the applicable period specified in the PPSA.

- (e) The obligations of the Debtor are subject to all insolvency, moratorium, reorganisation or similar laws affecting creditors' rights generally and may also be, or become, subject to limitation of action by the effluxion of time, or to set-off, or counterclaim.
- (f) The Loan Agreement is a "credit contract" within the meaning of the Credit Contracts Act 1981. Accordingly, the Loan Agreement may not be enforceable in accordance with its terms to the extent that a Court holds such terms, or the exercise by the parties to the Loan Agreement of any of their rights and powers thereunder, to be oppressive, or to the extent that the Company has been induced to enter into the transactions by oppressive means. In this context, the expression "oppressive, harsh, unjustly burdensome, unconscionable or in contravention of reasonable standards of commercial practice".
- (g) If any director of a company is interested in a transaction then, unless the company receives fair value under that transaction or all entitled persons of the company have concurred in the transaction under section 107 of the Companies Act 1993, the company may avoid the transaction at any time prior to the expiration of the three month period after that transaction is disclosed to all the shareholders of the company.
- (h) Under section 129 of the Companies Act 1993, if any transaction constitutes a "major transaction" (as defined), entry into that transaction is required to be approved by a special resolution of the shareholders of the company. Consequently:
 - (i) if no special resolution has been passed, the relevant transactions may be set aside or other remedies exercised under sections 164 or 174 of the Companies Act 1993;
 - (ii) if a special resolution has been passed but was not assented to by all the shareholders of the company, the dissenting shareholders may give notice to the company requiring it to purchase their shares (or to arrange for some other person to purchase those shares) in accordance with the provisions of sections 110 to 113 inclusive of the Companies Act 1993. Those sections operate to require the company to purchase the relevant shares unless it obtains an order from the Court under section 114 or 115 of the Companies Act 1993.
- (i) Obligations that are regarded as penalties will not be enforceable.
- (j) As used in this opinion the term "enforcement" (and cognate expressions) means that each obligation or document is of a type and form enforced by the New Zealand Courts. It is not certain, however, that each obligation or document will be enforced in accordance with its terms in every circumstance. Enforcement of the Documents may be limited by general principles of equity, by public policy, or by statutory provisions. In particular:
 - (i) the PPSA imposes certain obligations on secured creditors which cannot be varied by contract, and may also affect the enforcement of certain rights and remedies contained in the Security to the extent that those rights and remedies are inconsistent with or contrary to certain provisions of the PPSA;

- (ii) the remedy of an order for specific performance or the issue of any injunction by a New Zealand Court is available only at the discretion of such Court, and is not usually ordered or granted, where damages would be an adequate alternative;
 - (iii) a provision which purports to excuse or protect a party for, or to apply regardless of, that party's negligence, default or breach of duty, may not be enforceable;
 - (iv) the enforcement of the Documents in the Courts of New Zealand against the Debtor will be subject to the rules of civil procedure as applied by those Courts;
 - (v) enforceability of the Security is subject to general law duties, obligations and limitations;
 - (vi) enforcement of the Documents is subject to rights arising in relation to representations, acts or omissions of a party which may preclude, limit or affect the ability of that party to enforce against the other party the obligations of that other party under the Documents. We have made no investigation as to whether any such representations, acts or omissions have been made or done;
 - (vii) a New Zealand Court may not give effect to any severability provisions contained in the Documents;
 - (viii) a New Zealand Court may not give effect to an indemnity for legal costs incurred by an unsuccessful litigant or where the Court itself has made an order for costs;
 - (ix) a provision in a Document requiring amendments and waivers to be in writing may not prevent the parties effectively agreeing that oral or other modifications, amendments or waivers may be made.
- (k) A determination, calculation or certificate may not be conclusive if, for example, the matter or thing involved could be shown to have been determined, calculated or certified on an unreasonable, arbitrary, fraudulent or manifestly incorrect basis.
- (l) A New Zealand Court may decline to hear an action or to give effect to any provision of the Documents if it is contrary to public policy to do so, or would involve or result in the Court making a fresh contract between the parties, or if it is not the proper forum to hear such action, and may stay an action if concurrent proceedings are being brought elsewhere.
- (m) A provision in a Document that any amount is payable upon demand may be construed as requiring reasonable notice.
- (n) Discretions may be required to be exercised reasonably and opinions are required to be based on proper grounds.
- (o) Admissibility of documents may be limited by general rules of evidence.
- (p) Written authorisation from the Prime Minister or the Minister of Finance (as the case may be) is required prior to making property, or financial or related services, available to terrorist entities and associated entities designated as such under the Terrorism Suppression Act 2002, or other parties to whom financial sanctions apply.

8. BENEFIT

- 8.1 This opinion is addressed to you and may not, without our prior written consent, be:
- (a) relied upon by, or disclosed to, any other person; or
 - (b) filed with a governmental or other agency or quoted or referred to in a public document.
- 8.2 This opinion is strictly limited to the matters stated herein and does not apply by implication to any other matter or matters.

Yours faithfully

Schedule
Prior Registered Security Interests

Prior Registered Security Interests on PPSR				
Date of registration of financing statement (or registration if created pre May 2002 and perfected)	Date of expiration	Name of Secured party	Type of collateral (Goods (motor vehicles, aircraft, livestock, crops or other), Investment Securities, Negotiable Instruments, Documents of Title, Chattel Paper, Money, Intangibles, All Present and After Acquired Property or All Present and After Acquired Property, except....)	Description of collateral