

EXPLANATORY NOTE – CHANGES TO NZBA DEEDS AND LETTERS OF PRIORITY

1. The NZBA deeds and letters of priority have recently undergone a review in order to identify any uncertainty in the terms of the standard form documents, particularly in light of recent court decisions concerning the interpretation of the documents. As a result, various amendments have been made to the standard forms.
2. The principle changes are set out below.
 - (a) It has been clarified that the deeds and letters of priority do not apply to a voluntary disposal of collateral¹.
 - (b) A secured party's priority entitlement for interest has been adjusted in two key respects:
 - (i) First, in order to avoid the issues that can arise where there is a need to determine the actual amount of accrued and unpaid interest (which can arise where interest has been capitalised or charged to a separate current account but left outstanding), a secured party's priority for interest is now calculated by reference to a notional amount of interest that arises over an agreed interest period (calculated by using the highest rate payable immediately prior to the first disbursement of proceeds).
 - (ii) Second, given the different interpretations applied by the courts to the definition of "Enforcement Date", the period for which a secured party can include interest in its priority amount is now no longer tied to the Enforcement Date (or any other date). Instead, it is a notional period (of a duration agreed between the parties).

Notwithstanding the notional elements to a secured party's priority entitlement for interest, a secured party will still only be able to claim the amount it is actually due (up to its priority amount)².
 - (c) The situations where a secured party must release its securities in order to allow a sale to proceed have been expanded. This is in order to deal with:
 - (i) a sale of land by a receiver (which would not automatically remove subsequent mortgages); and
 - (ii) a sale by a "First Secured Party" whose securities rank behind the "Second Secured Party" due to the First Secured Party having already received payment up to its priority amount³.

¹ For example see clause 2 of the Deed of Priority (PPSA & Non-PPSA) – Two Secured Parties (Dec 2013) and clause 15 of the Schedule – Deed or Letter of Priority (PPSA & Non-PPSA) – Two Secured Parties (Dec 2013).

² See paragraph (b) of the definition of "First Secured Party Primary Amount" in clause 25 of the Schedule – Deed or Letter of Priority (PPSA & Non-PPSA) – Two Secured Parties (Dec 2013).

³ See clause 12 and 13 of the Schedule – Deed or Letter of Priority (PPSA & Non-PPSA) – Two Secured Parties (Dec 2013).

-
- (d) It has been explicitly stated that a secured party's priority amount (insofar as it relates to principal and interest, but not costs) shall reduce after that secured party has received a distribution under a deed of priority. This is to clarify that a secured party may not receive priority distributions which, in aggregate, total more than its priority amount where there is a series of distributions (whether as a result of disposing of collateral in stages or where the proceeds of disposal are paid in instalments)⁴.
- (e) A new defined term "[First/Second] Secured Party Primary Amount" has been introduced. The [First/Second] Secured Party Primary Amount represents the principal and interest components of a secured party's priority amount and is used in the reduction clause referred to in paragraph (d) above.⁵
- (f) An application of proceeds clause has been included to clarify how the proceeds of any realisation should be applied⁶.
- (g) A turnover clause has been included⁷.
- (h) A counterparts clause has been included⁸.
- (i) A delivery clause has been included⁹.
3. Further changes have also been made to improve the wording of the documents.

⁴ See clause 20 of the Schedule – Deed or Letter of Priority (PPSA & Non-PPSA) – Two Secured Parties (Dec 2013).

⁵ See the definition of "[First/Second] Secured Party Primary Amount" in clause 25 of the Schedule – Deed or Letter of Priority (PPSA & Non-PPSA) – Two Secured Parties (Dec 2013).

⁶ See clause 16 of the Schedule – Deed or Letter of Priority (PPSA & Non-PPSA) – Two Secured Parties (Dec 2013).

⁷ See clause 17 of the Schedule – Deed or Letter of Priority (PPSA & Non-PPSA) – Two Secured Parties (Dec 2013).

⁸ See clause 21 of the Schedule – Deed or Letter of Priority (PPSA & Non-PPSA) – Two Secured Parties (Dec 2013).

⁹ See clause 24 of the Schedule – Deed or Letter of Priority (PPSA & Non-PPSA) – Two Secured Parties (Dec 2013).