

PRACTITIONER’S GUIDE TO THE MALAWI WAREHOUSE RECEIPTS ACT 2014-RECONCILING THE
WAREHOUSE RECEIPTS ACT AND PERSONAL PROPERTY SECURITY ACT

THE WAREHOUSE RECEIPTS ACT 2013 The Warehouse Receipts Act 2014 (the “WR Act”) provides a strong and proven legal platform to facilitate the trade and financing of agricultural commodities and other goods held in warehouses within the boundaries of Malawi.

Any commercial warehouse in Malawi may issue warehouse receipts covered by the WR Act, and any tangible goods capable of being stored may be covered by warehouse receipts. Warehouse receipts may be issued to the depositor or to any person nominated by the depositor, and once issued the warehouse receipt may be negotiated or transferred to any person. Warehouse receipts may be paper or in electronic form, may be negotiable or non-negotiable, and once issued may be re-issued in another form. The WR Act facilitates transfer of title and pledge of the goods *in situ* without complicated formalities, and depending on the form of the receipt and status of the holder, the WR Act provides a high degree of legal protection to the holder against others claiming title to the goods and against creditors of the warehouse operator, seller or borrower.

Although codified rules governing warehouse receipts first appeared in the late 19th century, the jurisprudence underlying warehouse receipts and documents of title to goods has its roots in commercial practices that have developed over many hundreds of years in agrarian economies and in international trade. The Malawi Warehouse Receipts Act draws on these traditional concepts and practices as well as modern drafting style.

PERSONAL PROPERTY SECURITY ACT 2013 The Malawi Personal Property Security Act 2013 (the “PPSA”) provides a means for financiers and other creditors to obtain security over personal property, including goods and documents of title, in accordance with detailed procedures contained in the PPSA. The PPSA is codified law based largely on concepts developed in the mid-20th century in the United States, Canada, Australia, and New Zealand, and more recently adopted in China and certain other Asian jurisdictions. Like the WR Act, the PPSA is broad in scope and covers all types of personal property situated in Malawi and any personal may give and obtain a security interest for any reason.

RELATION BETWEEN THE WR ACT AND THE PPSA The PPSA was adopted before the WR Act, and so the PPSA does not contemplate all of the procedures, priorities, and interests contemplated under the WR Act. The draftsmen of the PPSA foresaw the possibility of future laws dealing with particular types of security and transactions, and in Section 3(5)(a) allowed for the adoption of separate rules if expressly required under any other Act.¹

The WR Act avails itself of the opportunity occasioned by Section 3(5)(a) of the PPSA to adopt particular procedures for the perfection and priorities of security interests over

¹ PPSA, s. 3(5)(a) “This Act shall not apply to a lien, charge, or other interest in personal property created by any other Act or by operation of any written law;”

warehouse receipts and goods covered by warehouse receipts and to resolve conflicts between secured creditors and purchasers of collateral covered by warehouse receipts. These special WR Act rules take precedence over the PPSA and must be taken into account by practitioners in fashioning secured financing² and trading facilities using warehouse receipts in Malawi. As a general observation, the WR Act is much less complex and more straightforward than the PPSA, which should not be surprising when considering the long history of the warehouse receipt in commercial practice. The WR Act also includes concepts that are steeped in tradition, such as negotiability, which are referred to by not treated in detail in the PPSA.

SPECIFIC INSTANCES OF OVERLAP The PPSA includes several concepts in particular that overlap with and are treated somewhat differently by the WR Act.

Document of Title The PPSA definitions section includes “document of title,” meaning “a writing issued by or addressed to a bailee... (a) that covers goods in possession of the bailee and are identified or are fungible portions of an identified mass; and (b) in which it is stated that the goods identified in it will be delivered to a named person, or a transferee of that person, or to a bearer or to the order of a named person.” “Personal Property” includes documents of title,” and “security interest” includes a property right in personal property.³ The PPSA expressly covers all security interests except those which are specifically excluded.⁴ A warehouse receipt covered by the WR Act would qualify as a document of title under the PPSA, and a document of title under the PPSA, if issued by a commercial warehouse operator, would also qualify as a warehouse receipt under the WR Act.⁵

Temporary Perfection The PPSA includes various provisions for short term continuation of a security interests in a negotiable document of title or goods which are surrendered to the debtor for purposes of sale or processing.⁶ This is not inconsistent with any provision in the WR Act and so Section 19 of the PPSA would apply equally to a warehouse receipt that was issued pursuant to the WR Act and goods covered by a non-negotiable receipt if surrendered to the debtor in the circumstances mentioned in that Section.

Warehouseman’s Lien Rights The WR Act follows the customary practice of allowing a warehouseman to require payment of storage and other fees prior to releasing the goods from the warehouse,⁷ and for the recovery of unpaid fees by sale of the goods if necessary.⁸ The PPSA also recognises a lien to providers of goods and services in respect of

² Including facilities structured as purchase/repurchase or “repo” transactions

³ Each of these concepts is found in the definitions of the PPSA.

⁴ PPSA s. 3. As previously mentioned, interests created under separate Act (such as the WR Act, are excluded to the extent the separate Act so provides.

⁵ A “warehouse” is defined in the WR Act as “a person engaged in the business of storing goods for hire.” WR Act S. 102 (o).

⁶ PPSA, s. 19

⁷ WR Act s.19(2)

⁸ WR Act s. 15

goods in their possession.⁹ While the substantive rights of lien holders are not materially different under the PPSA and the WR Act, the enforcement procedures under the WR Act are simplified and abbreviated in comparison to the PPSA. The reason for this is that the PPSA enforcement procedures are designed to deal with security interests held by banks in the context of financing, while the WR Act procedures are intended to provide warehouse operators with leverage to collect their fees and to avoid the need to require depositors to pay storage fees in advance. Rarely will storage fees approach the value of the stored goods, thus in practice the resort to sale of goods to collect fees is rare in the context of storage of commercial goods. More abbreviated enforcement procedures are therefore appropriate.

Under the PPSA, the possessory warehouseman's lien has priority to any security interest provided that the warehouseman has no knowledge that creation of the lien is prohibited under the security agreement.¹⁰ The WR Act provides that the lien has priority so long as the depositor would have had the legal power to pledge the goods to a good faith purchaser for value,¹¹ that is, unless the deposited goods have been stolen.¹² In practical terms, the lien priorities granted to a warehouse operator are the same under the PPSA and WR Act. Only the enforcement mechanisms are somewhat different.

SPECIFIC INSTANCES OF INCONSISTENCIES

Perfection by Control The PPSA provides that perfection of a security interest by "control" is possible only in the case of deposit accounts and investment securities.¹³ The WR Act, by comparison, provides that an expanded process of "control" is applicable to the transfer and security over intangible (i.e., electronic) warehouse receipts.¹⁴

Electronic Warehouse Receipts The PPSA does not deal expressly with the purchase or pledge of intangible documents of title. By contrast, the WR Act provides that transfer and security interest perfection of electronic warehouse receipts may be achieved either through exclusive "control" of the document on the relevant database and platform or by registration.¹⁵ In the event of conflict between a purchaser (including a secured party) that has control and a secured party who has filed a registration statement, the WR Act provides that the person with control will have priority, regardless of whose interest is first in time.¹⁶

⁹ PPSA s. 41

¹⁰ PPSA s. 41(c). Of course any well-drafted security agreement would prohibit the creation of such lien rights and this practice would be well-known to all commercial warehouse operators.

¹¹ The PPSA would determine whether a debtor is able to pledge them to a good faith secured party for value. A simple security agreement is enough to create an unperfected security interest in whatever interest the debtor may have or later acquire, regardless of possession. PPSA s.4. The PPSA does not presume bad faith on the part of a secured party simply because the secured party is aware of a prior claim by a third party. PPSA s. 5(2).

¹² WR Act s. 15(6)(a). These provisions do not mention stolen goods, but as a practical matter the only situation in which none of these provisions would apply is the case where the goods have been stolen by the bailor.

¹³ PPSA s 9 (b)(iii).

¹⁴ WR Act, s. 6

¹⁵ WR Act s. 6, 32

¹⁶ WR Act s. 32

Perfection of Security in Documents and Goods The PPSA provides that where the goods are in the possession of a bailee (i.e., a warehouse), a security interest may be perfected by registration of a financing statement covering the goods, *or* possession of a negotiable document of title by the secured party, *or* issuance of a non-negotiable document of title by the bailee in the name of the secured party or other confirmation by the bailee that the goods are being held on behalf of the secured party.¹⁷ Priority among secured creditors is determined by order of perfection.¹⁸

The WR Act similarly allows for perfection of security interests in warehouse receipts and goods by registration (filing of a financing statement under the PPSA registry)¹⁹, *or* possession²⁰ of a negotiable warehouse receipt by the secured party²¹, *or* issuance of a non-negotiable warehouse receipt in the name of the secured party,²² *or*, in the case of a non-negotiable receipt, delivery of the non-negotiable receipt to the secured party²³ *and* notification to the warehouse that the receipt has been transferred or pledged to the secured party.²⁴ The WR Act includes a separate rule for the perfection of security in an electronic warehouse receipt (registration or transfer of control²⁵ to the secured party).^{26 27}

The Super-Priority Concept of “Due Negotiation” The WR Act includes a concept which is unknown in the PPSA, namely the rights accruing to purchasers²⁸ who take possession of negotiable warehouse receipts by “due negotiation.” Buyers and secured parties meeting the requirements of Section 21(1)(d) acquire near absolute title to the goods and the document even if the negotiable receipt or goods had been transferred by the prior holder in breach of a duty to a prior owner or secured party, or if the receipt was stolen or acquired or issued by fraud or mistake, or the receipt or goods are covered by a prior perfected security interest in the goods or the warehouse receipt.²⁹ To be “duly negotiated,” the negotiable receipt must be properly endorsed to the holder (if a “to order” receipt) or simply delivered to the holder (if a bearer receipt or endorsed in blank), value must have been paid by the holder, and there must not have been actual notice to the holder of any claim to the goods or the document on the part of any third party. Finally, the goods must have been purchased or financed by the holder in the ordinary course of the business³⁰ of the holder.³¹

¹⁷ PPSA s. 16

¹⁸ PPSA s. 20 (1)(b)

¹⁹ WR Act s. 30, 31 (a)(3), 32

²⁰ Possession of a negotiable warehouse receipt can occur either by negotiation (WR Act s. 21) or other form of assignment.

²¹ WR Act s.30

²² WR Act s. 31 (a)(1)

²³ WR Act s. 24 (1)

²⁴ WR Act s. 31 (2)

²⁵ Control of electronic warehouse receipts is defined in Section 6 of the WR Act.

²⁶ WR Act s. 32

²⁷ In Malawi, electronic warehouse receipts are used for grain trading on the two commodity exchanges however it is likely that additional platforms for EWR will be developed.

²⁸ Including banks holding warehouse receipts as secured parties

²⁹ WR Act s. 22 (2).

³⁰ That is, the business of trading in the goods or financing

³¹ WR Act s. 21 (1)(e).

Exception for Stolen Goods The WR Act follows the conventional rule of protecting buyers and secured creditors from loss of their rights in cases where the goods have been deposited in warehouses by persons who have acquired the goods without the knowledge or complicity or acquiescence of the rightful owner or the secured creditors.³² In practical terms, this exception covers mainly the case where the goods are stolen and deposited in the warehouse by the thief who obtains and sells a negotiable warehouse receipt. In such cases, both the rightful owner and any secured creditors are protected against claimants holding warehouse receipts, even where duly negotiated.

Rights of Transferees The WR Act provides more limited protection to buyers and secured parties who take their receipts other than by “due negotiation.” These transferees include purchasers and secured parties holding negotiable warehouse receipts without qualifying for “due negotiation,” for example, though a failure to obtain a necessary endorsement on a negotiable receipt, and buyers or secured parties holding non-negotiable receipts.³³ The WR Act provides simply that such persons acquire whatever title their transferor had or had authority to convey.³⁴ The PPSA, by contrast, has no express rules concerning the rights of transferees of documents of title apart from priorities of secured parties among themselves and as between secured parties and purchasers, discussed below.

Priority Among Secured Parties The PPSA provides that priority is given to competing secured creditors according to time of perfection.³⁵ The WR Act also recognizes security by registration under the PPSA, however due negotiation of a negotiable receipt to a bank trumps a prior filing by another bank both as to the warehouse receipt and the goods,³⁶ and a security interest perfected in the warehouse receipt trumps a security interest perfected in the goods during the time the goods are in the warehouse.³⁷ Moreover, if non-negotiable warehouse receipts are involved, registration as to the warehouse receipt alone is ineffective to perfect security over the goods.³⁸ In the case of non-negotiable receipts, security over the goods is accomplished by registration of security over the goods, or issuance of the warehouse receipt in the name of the secured party, or notification to the warehouse of the claim of the secured party.³⁹ The WR Act provides that in the case of electronic warehouse receipts, perfection by control trumps prior perfection by registration, even in the case of non-negotiable warehouse receipts.⁴⁰

³² WR Act s. 23 (1)

³³ WR Act s.24

³⁴ WR Act s. 24

³⁵ PPSA s. 20 Means of perfection of security in warehouse receipts and goods covered thereby under the PPSA is discussed above.

³⁶ WR Act s. 33(e), PPSA 39

³⁷ WR Act s. 30

³⁸ PPSA s. 16; WR Act s. 31. This is a distinction without practical importance, since no lender would file a registration statement against a warehouse receipt without including the goods in the description of security.

³⁹ WR Act s. 31 (a).

⁴⁰ WR Act s. 32.

Priorities as between Warehouse Receipt Purchasers and Secured Parties

The PPSA includes three sections dealing with priorities as between purchasers of collateral and creditors holding security interests in the same collateral.

Section 44 deals with purchasers of documents of title, and provides that a good faith⁴¹ purchaser for value of a document of title takes priority over the holder of a security interest in the document.⁴²

Section 47 provides complete protection to buyers of goods which are subject to an unperfected security agreement, whether or not the buyer is aware that a security agreement has been executed.

Section 48 provides that a buyer of goods in the ordinary course of business of the seller takes priority over the holder of a security interest in the goods.⁴³

Although the result is broadly the same under both Acts, the WR Act deals only with warehouse receipts and goods in warehouses and clarifies and refines a number of important priority issues that are particular to warehouse receipts. These need to be examined in some detail.

Section 33(a) of the WR Act provides that if a purchaser for value (other than a secured party) without actual knowledge of the conflicting security agreement takes possession or control of a negotiable warehouse receipt or takes possession of the goods or causes a non-negotiable receipt to be re-issued in the name of the buyer, the purchaser will take the goods prior to any unperfected security interest in the goods or the warehouse receipts. This provision is identical in effect to Section 47 of the PPSA.

Section 33 (b) of the WR Act provides that if a purchaser⁴⁴ for value of a negotiable warehouse receipt takes possession or control of the document without actual knowledge that the transaction is in breach of a security agreement, the purchaser shall have priority over a prior perfected security interest⁴⁵. This provision is very similar to PPSA Section 44, although the PPSA provision covers both negotiable and non-negotiable warehouse receipts. Under the WR Act, mere possession or control of a non-negotiable warehouse receipt issued to a third person would not confer priority rights as against a perfected security interest in the underlying goods.

⁴¹ Good faith, in this case, meaning without actual knowledge of the security agreement, but of course if the security interest is not perfected because it is unregistered, there will normally be no means for the purchaser to acquire knowledge.

⁴² Section 44 also requires that to gain seniority the purchaser must take physical possession of the document of title, but is silent on the subject of formalities of negotiation for negotiable documents or re-issue of non-negotiable documents.

⁴³ Technically s. 44 only applies to documents of title and s. 48 only applies to "goods," however as a practical matter any secured party financing goods covered by warehouse receipts will take security over both documents and goods. Therefore both sections will apply in any situation involving warehouse receipts.

⁴⁴ Including a secured party

⁴⁵ If the document is duly negotiated, this priority would be achieved over both the negotiable receipt and the underlying goods, since a negotiable receipt confers title to both the document and to the goods.

Section 33 (c) of the WR Act provides that if a purchaser (other than a secured party) takes delivery of goods⁴⁶ from a warehouse that is in the business of buying and selling such goods and without notice that the transaction is in breach of a security agreement, a purchaser takes free of a prior perfected security interest. This provision is very similar to PPSA Section 48, save for the requirement under the WR Act that the purchaser takes actual delivery of the goods.

Section 33 (d) provides that the fact that a security interest has been registered will not by itself constitute notice to a purchaser that a security agreement has been signed or of its terms. A secured creditor would be required to show that the purchaser had actual knowledge of the existence of the security agreement and of its terms in relation to the debtor's authority to sell the goods.

Section 33(e) underscores that the conditions and qualifications contained in Part V are not intended to qualify or to limit in any way the super-priority rights acquired by purchasers of negotiable warehouse receipts that have been duly negotiated.

Distinctions between Part V of the WR Act and Sections 44 and 48 of the PPSA

Section 44 of the PPSA requires that the purchaser of the document of title must "take possession of the ... document of title." Section 33 (a) of the WR Act requires that in the case of negotiable receipts the purchaser must take possession or control,⁴⁷ but provides that for non-negotiable receipts the receipt must be issued or reissued in the name of the purchaser.⁴⁸ Alternatively, if the goods have actually been delivered by the warehouse operator to the purchaser, there is no possibility for confusion as to the purchaser's entitlement and so the need for possession of a document in the name of the purchaser is no longer necessary under Section 33.

Section 48 of the PPSA protects buyers⁴⁹ of goods in the ordinary course of business from claims by secured creditors absent knowledge that the sale is in breach of an undertaking by the seller. In the case where a buyer had purchased goods covered by a warehouse receipt and a secured party whose interest is perfected after purchase, the purchaser will prevail.⁵⁰ The PPSA has a very similar, but not identical, provision.⁵¹ Both the PPSA and the WR require the purchaser to have taken possession of the document of title, however the WR Act clarifies that the document of title, if in electronic form, may be held through control, and if the tangible receipt is in non-negotiable form, mere possession would

⁴⁶ Note that actual delivery of goods is required; so long as the goods remain in the warehouse the prior perfected security agreement will continue to attach to the goods. Section 48 requires only that the goods be "sold" in order to extinguish the perfected security interest.

⁴⁷ Control is required for electronic warehouse receipts, whether negotiable or non-negotiable.

⁴⁸ If the goods are covered by a non-negotiable receipt the warehouse operator would be free to deliver the goods to the secured party unless it is aware that the goods have been sold by the depositor to the purchaser. The requirement that the warehouse receipt is re-issued to the purchaser ensures that the warehouse operator is notified.

⁴⁹ Not "purchasers," thus secured parties are excluded, unlike in Section 44.

⁵⁰ WR Act s. 33(a)

⁵¹ PPSA s. 44

be ineffective to convey title to the purchaser unless the receipt is issued or re-issued in the name of the purchaser.⁵² The WR Act further provides that if the goods are delivered to the purchaser by the warehouseman prior to perfection of the security interest, priority of the purchaser is also respected, even if the warehouse receipt remains outstanding.⁵³ These refinements, which are consistent with traditional practice, do not exist in Section 44 of the PPSA.

⁵² Mere possession of a non-negotiable warehouse receipt by a transferee would convey no title or interest in goods under the WR Act.

⁵³ WR Act . 33 (a)