Banking & Finance | Restructuring & Insolvency Australia

Legal Alert

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Contents

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Personal Property Securities Act: Final chance to preserve priority of transitional security interests

The two year transitional period under the Personal Property Securities Act 2009 (PPSA) ends on 31 January 2014. After this date, any remaining transitional security interests (TSIs) that have not been registered on the Personal Property Securities Register (PPSR) will no longer have their pre-PPSA priority, which could result in a secured party losing priority to other secured creditors or losing its interest in the secured property altogether if the grantor becomes bankrupt (if an individual) or is placed into administration or liquidation (if a company).

You should act now if you have not already reviewed your position and decided whether or not to register any unregistered TSIs that you may have.

> Back to top

What is a transitional security interest (TSI)?

A TSI is a security interest in personal property created or provided for under a security agreement in existence before 30 January 2012 (whether or not the security interest arose before or after 30 January 2012).

> Back to top

Implications of the end of the transitional period

TSIs not registered on the PPSR by 31 January 2014 will become "unperfected" for the purposes of the PPSA (if they are not already unperfected). This could have two key potential consequences.

First, the TSI will lose priority to other perfected security interests over the same personal property (including TSIs which were perfected by registration before the end of the transition period), even though the now unperfected TSI may have been created earlier.

Secondly, if you have a TSI granted by a person who later becomes bankrupt or by a company who is later wound up or has an administrator appointed, and that TSI has not been registered on the PPSR, you may lose your security interest and only have rights against the person or company as an unsecured creditor. For example, where the security interest is a retention of title arrangement, title in the goods will effectively be transferred to the

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insolvent grantor and you will only be left with an unsecured claim against the grantor (usually in respect of the unpaid invoices secured by the retention of title arrangement). Limited exceptions to this principle apply to certain deemed security interests which do not secure payment or performance of an obligation including commercial consignments and certain "PPS leases" (such as equipment leases where the goods leased may or must be described by serial number and are for a term of between 90 days and 1 year).

> Back to top

Migrated TSIs

Some TSIs which arose before the commencement of the PPSA and were recorded on a relevant register were automatically migrated onto the PPSR.[1] No action is required in relation to TSIs which were automatically migrated in this way.

Security interests involving leases and hiring arrangements, retention of title supplies, equipment or chattel mortgages or a security granted by a foreign entity grantor over secured property in Australia were generally not registrable security interests under the pre PPSA law and are unlikely to have been previously registered and migrated across to the PPSR.

It is therefore vital to consider what form of TSIs you have (whether or not your TSIs have already been migrated to the PPSA) and what, if any action you need to or want to take to protect your interest before 31 January 2014.

> Back to top

What happens to unperfected TSIs?

It is still possible to perfect a TSI by registration after the end of the transitional period but its priority will be affected.
Note however that the PPSA transitional provisions have not provided for the temporary perfection of TSIs during the transition period in circumstances where a TSI was capable of being registered on a pre-PPSA register, but had not been so registered.[2] These TSIs are and always have been unperfected and while registration prior to the end of the transitional period may afford some protection, it will not offer the same benefits as the registration prior to 31 January 2014 of TSIs which have been temporarily perfected during this period.

> Back to top

What should you do?

Given the end of the transitional period is rapidly approaching, this presents a good opportunity to review your PPSA regime and in particular consider:

- if any of your arrangements give rise to "security interests" for the purposes of the PPSA;
- if so, and if these arrangements are, or may be, TSIs, whether they have already been registered (either via migration from another register or via a bulk registration made just prior to 30 January 2012 or otherwise);
- if any security interest is, or may be a TSI and it has not yet

been registered on the PPSR, if you wish to protect that interest including by registering the interest prior to 31 January 2014 (and if it has not had the benefit of the temporary perfection rules, if anything can be done to try to improve your priority position); and

- if any interest may be a TSI and has already been registered as such, but there is uncertainty as to whether it is in fact a TSI, looking at other ways to try to protect that interest (which may for example include ensuring that you also register a non-TSI).

> Back to top

For more information

If you have any questions in relation to the above, or would like assistance with complying with the new guidance, please contact one of the lawyers listed to the left.

> Back to top

[1] The registers include ASIC's Register of Company Charges, the Australian Register of Ships, the Fisheries Register, state and territory bills of sale registers, and the state and territory registers of encumbered vehicles.

[2] For a recent example of this see Albarran (as recrs and mgrs. of *Maiden Civil (P&E) Pty Ltd v Queensland Excavation Services Pty Ltd* [2013] NSWSC 852.

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