

Personal Property Securities Act Update

Are your security interests registered?

The *Personal Property Securities Act 2009* (Cth) (**PPSA**) established a two year temporary protection period for security interests created before 30 January 2012. During this time, such interests are deemed to be perfected, even if they are not registered on the Personal Property Securities Register (**PPS Register**) or perfected by another means.

The temporary protection period ends on 30 January 2014, less than 10 months from now.

It is essential that you ensure all your security interests have been registered on the PPS Register before this date or you risk losing the priority of your interests. There is also the risk that the personal property the subject of the security interest will be vested in the grantor of the security interest if the grantor becomes insolvent.

Please contact us if you would like assistance registering and managing your security interests on the PPS Register.

Twenty days and twenty nights, I was wrong and the lawyers were right, all along: Register your security interest on the PPS Register within 20 business days!

Case Note: *Re Cardinia Nominees Pty Ltd* [2013] NSWSC 32

Facts of the case

Cardinia Nominees Pty Ltd (**Cardinia**) agreed to lend Inika Pty Ltd (**Inika**) the sum of \$750,000, in exchange for the issue of convertible bonds to Cardinia. The loan was secured by a charge in favour of Cardinia over the whole of Inika's assets.

There was confusion as to which party was responsible for registration on the PPS Register. Mr McGilvray, a director of Cardinia, was aware of the need to register within 20 business days, although he did not know or understand the risk of not registering within that time period.

Cardinia's security interest was registered on the PPS Register on 7 September 2012, five days after the expiration of the 20-business day period. Inika also granted a security interest to BMW Australia Finance Ltd, which was also registered on 7 September 2012.

The Law

Section 588FL of the *Corporations Act 2001* (Cth) provides, in effect, that upon a company becoming insolvent, security interests which it has granted over its property will vest in it (in other words, be extinguished) unless the security interest was registered on the PPS Register:

- more than six months prior to the company becoming insolvent; or
- if less than six months prior to the company becoming insolvent, within 20 business days after the security agreement came into force.

If the security interest is not registered within the 20-business day period, the secured party can apply to the court under section 588FM for an order fixing a later registration time, so as to avoid the security interest being extinguished should the grantor company become insolvent within the succeeding six-month period. There are three grounds upon which the court may grant an order fixing a later registration time, namely:

- the failure to register was accidental or due to inadvertence;
- the failure to register is not of such a nature as to prejudice the position of shareholders or creditors; or
- on other grounds, if the court considers it is just and equitable to do so.

Outcome of the case

Justice Black granted an order fixing 7 September 2012 as the registration time on grounds that Cardinia's failure to register its security interest in time was due to inadvertence; namely, Mr McGilvray's failure to appreciate the potentially significant consequences of a failure to register within the 20-business day period. His Honour also stated that, if necessary, he would have also granted the order on grounds that it was just and equitable to do so in the circumstances.

However, given that Cardinia did not present sufficient evidence to satisfy the court of Inika's solvency, Justice Black made the order on the basis that any liquidator, administrator or unsecured creditor of Inika could apply to the court to have the order set aside within the succeeding six-month period. Further, his Honour ordered that the extension of the registration time should not affect the priority to be afforded to the security interest granted to BMW Australia Finance Ltd.



Key messages to take away from this case

- **Register early** – Even if there are no concerns regarding the grantor company's solvency, it is good practice to develop a policy of registering all security interests within 20 business days in order to avoid the potential vesting effect of section 588FL (note that in some cases, it is necessary to register your security interest sooner than this to maintain the priority of the security interest, for example, where your security interest is a purchase money security interest or 'PMSI'). Remember, there is no need to wait until the security agreement is signed – you can register your security interest on the PPS Register as soon as you have 'reasonable grounds' to believe that you will become a secured party.
- **Section 588FM is not a sure-fire solution** – If you need to apply to the court, you will need to be able to point to an actual misunderstanding, a mistake or some other extenuating circumstances; 'whoops, I forgot' won't cut the mustard. Further, be prepared to front up to court with sufficient evidence of the grantor company's solvency. Otherwise, like Cardinia, you risk being strapped with a conditional order that can be set aside if the grantor company becomes insolvent within the succeeding six months, which takes you back to square one.

Proposed tax changes affecting limited recourse debt and special purpose vehicles

The *Taxation Laws Amendment (2012 Measures No 6) Bill* (Cth) (**Bill**) is making its way through Parliament, and is currently before the Senate. The Bill includes amendments to the definition of 'limited recourse debt', which will widen the current meaning to include arrangements where, in substance or effect, the debtor is not fully at risk in relation to the debt.

How may this affect you?

The amendments in the Bill are intended to affect the financing of projects where the borrower is a special purpose vehicle that has minimal or no other assets or income from other sources apart from the project assets. However, the amendments have been drafted very widely and may potentially apply to a wider range of financial arrangements where assets have been financed using debt. This may allow for the depreciation to be clawed back even when a debt has been repaid in full, or any time a debt is refinanced, which means that a taxable gain can arise on refinancing of debt.

What should you do?

Companies that have set up special purpose vehicles or have entered agreements which limit a creditor's right of recovery upon default should consider the potential impact of the amendments contained in the Bill on the company's taxable income.

If you have any questions about the implications of these changes, please contact Louise Boyce of our Taxation and Benefits team.



Meet our team: A minute with Mark Palermo (Senior Associate)

Practice Areas: Real Estate, Project & Infrastructure Finance, Banking & Finance and Hospitality & Leisure.

I have been at Squire Sanders for 5 years. I joined on 21 January 2008.

The thing I love most about my job is Doing deals. I like to be involved in a transaction from start to finish, and there is a big adrenaline rush from attending a complicated signing ceremony or settlement/completion. It is like the grand final for the transaction and caps off the achievement of having put in the hard work on the deal.

The legal TV show I wish I was in is Suits. Is it wishful thinking to want to be a combo of Harvey and Mike? I could dominate the TV legal landscape with those skills. Together, they are the Captain Planet of Pearson Hardman.

Outside of work I enjoy Playing and watching basketball.

My favourite joke Can I call a particular thing or person a joke? We used to call the LA Clippers a joke of a basketball team, but that title has been passed to the Sacramento Kings.

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