

The PPSA's temporary perfection period is nearly over: are you prepared?

It has been almost two years since the Australian Personal Property Securities Act 2009 (Cth) (PPSA), and the register that it established (the PPSR), came into force.

This client briefing discusses transitional security interests under the PPSA and the key considerations for holders of transitional security interests including as a result of the pending termination of the PPSA's temporary perfection period.

Background

To preserve existing rights and priorities and ensure a smooth transition to the new securities law regime, the PPSA contains various transitional provisions with which PPSA stakeholders need to familiarise themselves.¹

These include, subject to certain exceptions, the temporary perfection of transitional security interests for 24 months from 30 January 2012 (ie until midnight on 31 January 2014) (the Temporary Perfection Period).²

Given this date is fast approaching, transitional security interest holders should take all necessary steps to ensure that:

- any current perfection is not lost after 31 January 2014; and
- they hold the best possible priority in relation to their transitional security interests.

What are transitional security interests?

A transitional security interest is a security interest (as defined under the

PPSA) arising pursuant to a security agreement³ created before 30 January 2012 (the Registration Commencement Time) or, which arises after then from a security agreement entered into prior to the Registration Commencement Time.⁴ Transitional security interests can be further classified into:

- migrated transitional security interests (security interests already registered under pre-PPSA legislation where that register was migrated to the PPSR); and
- non-migrated transitional security interests (security interests which were not required to be registered on a migrating register at the Registration Commencement Time, noting this includes transactions not treated as security interests under pre-PPSA laws).

Migrated transitional security interests obtain perfection immediately before the Registration Commencement Time and their temporary perfection

Key issues

- what are transitional security interests?
- impact of not perfecting a transitional security interest
- non-migrated transitional security interests - issues to be aware of
- migrated security interests – issues to be aware of

was replaced by perfection via registration at the Registration Commencement Time.⁵ This is not the case for non-migrated transitional security interests and their temporary perfection will cease on 31 January 2014 unless action is taken to perfect prior to that time.

Who will this affect?

This affects all holders of transitional security interests. The PPSA's "functional" approach to security interests in personal property (which focuses on the substance rather than the form of a transaction) has resulted in a broadening of the types of

interests covered by Australian securities law. Specifically, those affected include:

- holders of migrated transitional security interests; and
- holders of non-migrated transitional security interests, typically being:
 - holders of security interests not registrable pre-PPSA such as security interests arising under retention of title, some consignment and some leasing arrangements;
 - holders of pre-PPSA security interests on registers that did not migrate to the PPSR such as security interests relating to intellectual property on the patents, trade marks and designs registers;
 - companies who were not required to register their pre-PPSA security interests on the ASIC Register of Company Charges given they were not companies registered under the Corporations Act 2001 (Cth) (Corporations Act) or a registerable body registered under Division 1 or 2 of Part 5B.2 of the Corporations Act; and
 - charges granted by individuals.

Impact of not perfecting a transitional security interest by 31 January 2014

If a transitional security interest is not perfected by a method stated in s 322 of the PPSA by 31 January 2014, it will continue to be deemed to have attached (making it enforceable against the grantor) and will be enforceable against third parties to

the extent that it was enforceable under the law pre-PPSA.⁶

However, it will become an unperfected security interest and therefore:

- lose priority against a perfected security interest regardless of whether the transitional security interest was created earlier in time; and
- vest in the grantor upon the grantor's insolvency (meaning the security party will become an unsecured creditor).

If the temporary perfection under the PPSA is replaced by another form of perfection within the Temporary Perfection Period, the security interest will remain continuously perfected from before the Registration Commencement Time.⁷

If a transitional security interest is perfected by registration after 31 January 2014, its priority time will be the date of registration on the PPSR rather than the date it arose under the relevant security agreement.

How can perfection be achieved?

A security interest can be perfected by a secured party taking:

- control of the collateral;
- possession of the collateral; or
- by registration on the PPSR.

Given that control or possession may not always be possible, registration may be the only available method of perfection.

No fees will apply when registering transitional security interests on the PPSR during the period of temporary perfection. After this time, fees will be payable. A schedule of registration fees can be found at <http://www.ppsr.gov.au/AbouttheRegister/AboutFees/Pages/default.aspx>.

Non-migrated transitional security interests – potential issues

Even within the Temporary Perfection Period, it is important to be aware that your transitional security interest may not be considered perfected if an exception to temporary perfection applies.

In *Maiden Civil (P&E) Pty Ltd; Richard Albarran and Blair Alexander Pleash as receivers and managers of Maiden Civil (P&E) Pty Ltd & Ors v Queensland Excavation Services Pty Ltd & Ors*⁸ (*Maiden*), in an attempt to prevent certain heavy vehicles vesting in the lessee upon the lessee's voluntary administration, the owner and lessor of the heavy vehicles under a pre-PPSA lease, sought to rely on the Temporary Perfection Period.

It was held that whilst the owner/lessor's interest was a transitional security interest for the purposes of the PPSA, it did not obtain the protection of the temporary perfection given the lease was registrable on a register whose data was migrated to the PPSR upon commencement of the PPSA (in this case, a Northern Territory vehicle register under Northern Territory legislation) prior to the Registration Commencement Time and was not so registered.⁹

Consequently, the owner/lessor's security interest was unperfected and therefore vested in the lessee upon the lessee's administration, meaning the owner/lessor no longer had an interest in the heavy vehicles.

Whilst not directly relevant for present purposes, in *Maiden* the lessee's interest in the goods was subsequently subject to the perfected security interest of the lessee's financier pursuant to a general

security agreement covering the heavy vehicles.

In light of this case, it is important that transitional security interest holders ensure as soon as possible that their transitional security interests are properly perfected.

It is also worth noting that the PPSA's transitional provisions create some ambiguity in relation to umbrella agreements concerning leases or terms of supply of goods including retention of title and entered into before the Registration Commencement Time.

It is unsettled whether such agreements will result in a transitional security interest attaching retrospectively in respect of all transactions entered into pursuant to that agreement after the Registration Commencement Time (and therefore benefitting from transitional perfection) or whether a new (non-transitional) security interest will arise each time after Registration Commencement Time.

A recent judgment of the Western Australian Supreme Court provides some indication that umbrella agreements may satisfy the requirements for a transitional security agreement.¹⁰

Accordingly, any such security interests should be registered as soon as possible and at any rate, prior to the expiration of the Temporary Perfection Period to avoid loss of priority.

Migrated security interests – potential issues

Despite the migration of migrated transitional security interests to the PPSR, further action may be required by holders of such security interests for perfection and priority purposes as

well as to deal with those security interests.

In order for a migrated transitional security interest holder to amend or discharge their security interest, they will first need to participate in a "Find and Claim" process. This process is initiated by application to the PPSR and enables the migrated registrations to be transferred to a new secured party group on the PPSR which has the correct contact details.

In the absence of a migrated transitional security interest holder updating their contact details in respect of that registration, its contact details will default to enquiries@ppsr.gov.au.

In the migration process, 27,000 charges registered on the ASIC Register of Company Charges with multiple chargees were migrated onto the PPSR showing only one secured party.

The administrator of the PPSR, the Australian Financial Security Authority (AFSA) (formerly known as the Insolvency and Trustee Service Australia) has confirmed that these migrated registrations are still effective given the additional secured parties will be noted in the underlying security documents in the migrated attachment.

Despite this, it is prudent for secured parties not listed on a registration to amend the registration as soon as possible to avoid any potential amendment or discharge of the security interest by the noted secured party in the absence of consent of the other secured parties.

Additionally, approximately 6000 charges registered on the ASIC Register of Company Charges were

not migrated to the PPSR due to unresolved technical issues. A secured party in relation to such a charge is able to re-register on the PPSR at no cost until 31 January 2014 and if registered by then, the priority of the security interest will be maintained. After 31 January 2014, the non-migrated charges will no longer be temporarily perfected.

A list of the charges described above can be found at:

<http://www.ppsr.gov.au/AbouttheRegister/MigratedRegistrations/Pages/MigratedRegistrations-knownissuesbeingprogressed.aspx>

Finally, even if a migrated transitional security interest appears to have migrated successfully, additional steps may be required to ensure the highest level of priority. For example:

- lodging an additional financing statement in the case of a purchase money security interest or personal property which must be registered by serial number;
- taking control of an ADI account or any financial property (as defined in the PPSA) capable of being controlled under the PPSA; or
- possession of certificated investment instruments.¹¹

If relevant, these steps should be taken as soon as possible.

¹These are contained in ch 9 of the PPSA.

²See PPSA s 322.

³Note that a security agreement includes a written agreement and act by which a security interest is created: PPSA s 10.

⁴PPSA s 308.

⁵PPSA ss 322(2)(a) and 333.

⁶PPSA ss 321, 311.

⁷PPSA s 322.

⁸[2013] NSWSC 852.

⁹Personal Property and Security Regulations 2010 (Cth) r 9.2.

¹⁰See *Industrial Progress v Wilson & Ors* [2013] WASC 255 for further information.

¹¹Note that registration of a migrated transitional security as a purchase money security interest may not be possible if short time limits specified ss 62 and 63 of PPSA have already lapsed.

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