

## PPSA: Transition Period Expires



The *Personal Property Securities Act 2009* ('PPSA') came into effect on 30 January 2012 and has a wide-ranging impact on both commercial and personal transactions in Australia. The two year transition period will expire on 30 January 2014 and failure to register a transitional security agreement could result in a secured party losing their rights to another registered secured party or an insolvency practitioner.

### What is Personal Property?

Personal property is any kind of tangible or intangible property other than land or real property. Personal property includes motor vehicles, water craft and vessels, aircraft, inventory, plant and equipment, livestock, crops, accounts receivable, stock and intellectual property, whether used in business or domestically.

### What is a transitional security agreement?

Section 307 of the PPSA defines a transitional security agreement as a 'security agreement that is in force immediately before the registration commencement time, and that continues in force after that time.'

During the two year transitional period, transitional security interests were temporally perfected allowing pre-PPSA security interests to maintain their priority against post-PPSA security interests.

This protection will cease on 30 January 2014 and failure to perfect your pre-PPSA security agreements may result in:

- You or your business losing priority (first rights to) personal property to another secured party with interests in the same collateral;
- A third party purchasing the asset free of your interest;
- In the event of an insolvency of a grantor, the personal property vesting in the grantor and you being unsecured as against the insolvent entity.

### Does PPSA apply to you?

Amazingly there is still a perception that the legislation only affects banks and other financiers when in truth its reach is far broader. Arrangements that were not previously considered as security agreements now fall within the scope of PPSA.

While the application of PPSA may vary for different types of transactions, broadly speaking the PPSA will apply in the following circumstances:

- You have entered into a transaction with another party;
- The transaction seeks to secure payment or performance of an obligation against personal property (excluding land and the limited section 8 exclusions);
- The personal property is in the possession or control of the other party to the transaction; and
- The parties to the transaction or the personal property being used as collateral for the transaction have sufficient nexus with Australia.

The PPSA does not seek to impose contractual obligations between the parties to the transaction. The issue is enforcing one's rights against a third party, and may only come to the fore if an insolvency practitioner is appointed to that party.

### The concept of title is irrelevant

The definition of a security interest expressly states that if the substance of the transaction is to secure payment or performance of an obligation, the form of the transaction or the identity of the person who has title to the property is irrelevant.

The PPSA then goes one step further and specifically identifies certain transactions that will be deemed to be security interests, whether or not the transaction secures payment or performance of an obligation. They include:

- the interest of a transferee under a transfer of an account or chattel paper;
- the interest of a consignor who delivers goods to a consignee under a commercial consignment;
- the interest of a lessor or bailor of goods under a PPS lease.

Not surprisingly, it has been the obvious disregard for the nemo dat principle, the principle that one cannot give any better title than one has, that has caused the most angst for suppliers, lessors and consignors.

### Priority

The Act dictates the order of priority amongst creditors who all claim to have an interest in the same collateral. The general rule is that the first registered security interest will take priority over all other security interests.

The main exception to this rule is a validly registered Purchase Money Security Interest which commonly occur in transactions such as car finance and supplies made with retention of title conditions.

### What you need to do?

Review your arrangements and ensure that any agreement granting a security interest in collateral in possession of another are registered on the Personal Property Securities Register.