



Update

Corporate & Commercial

25 January 2012

Transition to PPS – 30 January 2012



PDF Format

As many of our clients will be aware, the new Personal Property Securities Act 2009 (PPSA or Act) takes effect on Monday 30 January 2012.

The purpose of this note is to briefly explain the transitional arrangements and the protections afforded for existing securities, and what steps need to be taken by clients holding existing interests, or who will be taking future security interests under the new system.

But first, some brief background.

The new Act establishes a new national register of interests in “personal property” and replaces a multitude of existing registers across all states and territories. It’s called the PPS Register. The Act also clarifies the rights and priorities between third parties claiming interests in personal property – for example, when a financier gets priority against others claiming security interests, and the circumstances in which a purchaser gets title free of other interests. The Act covers just about all kinds of property including commercial and consumer property, and tangible and intangible property. There are very few exceptions, one of them being real estate – in relation to which the normal rules and processes in each state and territory continue to apply.

For those familiar with company charges registered with ASIC, these will cease to apply from the close of business on Friday 27 January 2012, and be replaced by “security agreements”. Security agreements give rise to “security interests” under the new Act which can be registered on the PPS Register from Monday 30 January 2012.

The new Act includes detailed transitional arrangements which include protection for pre-existing interests for up to 24 months, thus allowing sufficient time for holders of pre-existing interests to take steps to properly register those pre-existing interests.

Protection for pre-existing security interests

The new Act defines “transitional security interests” and gives them automatic protection for 24 months from 30 January 2012. It does this by:

- deeming those interests to have been “attached” and “perfected” immediately prior to 30 January 2012; and
- preserving the “perfection” for 24 months.

The concepts of “attachment” and “perfection” are critical elements for establishing rights and priorities under the PPSA. In short, attachment occurs when a binding obligation exists on the part of a “grantor” to grant a security interest, and perfection occurs when the interest is registered on the PPS Register (or in some cases when the secured party has possession or control of the relevant property).

For parties that hold pre-existing interests that extend beyond the initial protection period of 24 months, it will be necessary, in most cases, to properly register those interests in the PPS Register to preserve that protection beyond the initial 24 month period. Some pre-existing interests will be “migrated” to the PPS Register, but it will be necessary for secured parties to check the register to verify the accuracy of those migrated interests. These arrangements are discussed below.

In order to qualify as a “transitional security interest” the following criteria must be satisfied:

1. the interest must be one that is covered by the PPSA – for example, it must:
 - a. secure the payment of money or the performance of obligations; and
 - b. be in respect of “personal property” to which the PPSA applies; and
2. the interest can take effect before or after 30 January 2012 provided it is granted under a written agreement in force before 30 January, and which continues in force after 30 January.

Priority and enforcement of pre-existing security interests

Although the PPSA protects pre-existing security interests, it is not intended to give them any greater enforcement rights than they previously had. Accordingly the enforcement provisions contained in the PPSA do not apply to transitional security interests. This means that transitional security agreements can only be enforced against third parties (ie a purchaser or other party claiming a security interest in the same property) by application of the provisions of the relevant agreement under which the pre-existing security interest was granted, and the relevant laws that applied immediately prior to 30 January 2012.

The PPSA also clarifies the priority rights of parties that hold transitional security interests over other transitional security interests affecting the same property, and over new security interests (registered after 30 January 2012) affecting the same property. In short, providing the transitional security interest is and remains “perfected” it will have priority over the following interests:

- any security interests which are not “perfected” under the PPSA – whether granted before or after 30 January 2012; and
- any security interests granted after 30 January 2012, including those that are “perfected”.

If there is a priority issue between two transitional security interests that is not addressed by the priority provisions of the new Act, it will be determined according to the priority laws that applied immediately prior to 30 January 2012.

Migration of pre-existing securities from other registers to PPS Register

As mentioned above, the new PPS Register will replace a range of existing registers throughout the country. Where practical, pre-existing security interests registered on these registers will be migrated to the new PPS Register. There are administrative arrangements which allow the Registrar to decide what information from which registers will be migrated. For example, it is anticipated that the various state and territory registers of motor vehicle security interests will be migrated, as will all company charges currently registered with ASIC.

In the new Act, pre-existing interests that are migrated to the PPS Register are called “migrated security interests”. Importantly, these interests cannot qualify as migrated security interests unless the registration on the original register was lawful and effective prior to 30 January 2012.

Migrated security interests are a class of “transitional security interests” which means that the enforcement and priority arrangements relating to transitional security interests apply, and that they are protected for 24 months.

The Registrar can also register migrated security interests in relation to particular types of property by including the following details on the register:

- a description of the particular property or class;
- end time for the registration – being the time at which the original registration would have ended, according to the law that applied to that original register. This could be longer (or shorter) than the 24 month protection period for transitional security interests;
- no end time – if there was no end time under the original register; and
- a statement that the relevant property is covered by a transitional security agreement.

If a migrated security interest is registered in this way then the temporary protection (24 months) ceases to apply, and the interest is protected until the end time stated in the registration.

For administrative reasons the Registrar is not required to notify each secured party of these interests, but instead will simply publish a “verification statement” on the PPS Register.

Where a pre-existing charge has been granted but the time for registration on the original register has lapsed, that charge does not have the benefit of temporary protection under the PPSA. The reason is that if priority under the original register has been lost due to failure to register in time, that priority should not be re-instated by means of the temporary protection under the PPSA.

Company charges registered with ASIC

Company charges registered with ASIC are an example of security interests that are expected to be migrated to the PPS Register.

Until now, company charges have typically been in the form of either a fixed charge over specified property, or a fixed and floating charge, with the floating charge “crystallising” over certain property in certain circumstances.

Under the PPSA the concept of floating charges will disappear. Instead, the new Act adopts the concept of “circulating assets” which are essentially assets that can be dealt with in the ordinary course of business. The transitional provisions of the Act address how migrated company charges which adopt the “fixed and floating” concepts will be applied in the new PPSA regime. Accordingly, for the purposes of charges covered by the PPSA, including ASIC charges that are migrated:

- a reference to a charge over property is taken to be a reference to a security interest that has “attached” to a circulating asset and property that is not a circulating asset;
- a reference to a fixed charge over property is taken to be a reference to property that is not a “circulating asset”; and
- a reference to a floating charge over property is taken to be a reference to circulating assets.

This means that if a fixed and floating charge, registered prior 30 January 2012, is migrated to the PPS Register, then from 30 January 2012:

- to the extent it is fixed, it constitutes a security interest over all personal property (ie property covered by the PPSA) that is not a “circulating asset”; and
- to the extent it is floating, it constitutes a security interest over all “circulating assets”.

Considerable detail is contained in the transitional provisions as to exactly what a circulating asset is for these purposes of the transitional provisions. For the purposes of this summary it is sufficient to mention that circulating assets include:

1. an account arising from transactions in the ordinary course of business;
2. inventory;
3. proceeds of inventory; and
4. other property that the secured party has given the grantor express or implied authority to deal with.

Summary

In summary:

- pre-existing security interests have 24 months protection under the new Act;
- before that temporary protection expires, secured parties must register the interest properly under the Act. Once properly registered the temporary protection ends, and it is protected until the end time stated in the registration. However it continues to be treated as a “transitional security interest” for the purposes of enforcement and priority against other interests; and
- migrated interests, once registered under the migration process, lose the temporary protection and are taken to be registered until the end time stated (this data is migrated from the original registers).

What do secured parties need to do?

1. If you have a pre-existing security interest that qualifies as a “transitional security interest” you have 24 months from 30 January 2012 to register that interest on the PPS Register.
2. If you have a pre-existing security interest that has been migrated to the PPS Register, you need to:
 - a. check the PPS Register and ensure that the interest is there – ie that it has been picked up in the migration process and properly attributed to you. The Registrar has established a process under which properly authorised parties and “find and claim” migrated interests. Holding Redlich can provide assistance to clients in this regard if required;
 - b. register the security interest, if the security interest which you expected to be migrated cannot be found. We can also assist clients in this regard if required; and
 - c. access the PPS Register to identify and correct any errors in the details of the migrated interest shown on the register. We can also do this on behalf of clients.

Holding Redlich can assist clients in the process of finding and claiming migrated interests, and generally in relation to registration of transitional security interests and correction of the Register.

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