

ALERT

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Australia's second PPSA judgment – Extension of time for registration

In short

The NSW Supreme Court recently showed some leniency in the case of Barclays Bank plc [2012] NSWSC 1095 in allowing an application for the extension of time for registration of a security interest under the *Personal Property Securities Act 2009* (PPSA).

Pursuant to the new section 588FL of the *Corporations Act 2001* (Cth) (**Corporations Act**), the applicable period for registration of a secured party's security interest in a company is 20 business days from the date that the relevant security agreement came into force (with some exceptions as discussed further below). In this case the secured party was two months late in registering its security interest.

The court allowed an extension of the time under section 588FM of the *Corporations Act* on the basis that it was satisfied that the secured party's failure to register the security interest within time was 'accidental or inadvertent'. It was pertinent to this decision that:

- the grantor of the security interest (ie debtor) did not oppose the application;

- from the end of the 20 business day registration period to the date of actual registration (**delay period**), there had been no material change in the grantor's financial position;
- the grantor had not given any security to any other party during the delay period; and
- the grantor had not incurred debt of a material amount during the delay period.

In particular, Justice Black stated: '*it will not be surprising if such errors occur during the transition to the Personal Property Securities Act 2009 (Cth) regime*'. That said, given that the error in this case occurred in April 2012 – shortly after the PPSA commenced on 31 January 2012 – there is a significant risk that less judicial tolerance will be shown in future.

The facts

Barclays Bank plc (**Barclays**) provided a loan facility to Sportingbet plc. Under this facility, Centrebet (an Australian subsidiary of Sportingbet plc) executed a general security deed (previously referred to as a fixed and floating charge) in favour of Barclays on 24 April 2012. Barclays was



advised by its Australian lawyers to register the security interest on the PPS Register within 20 business days of the 24 April 2012 agreement. Unfortunately, this advice and the potentially serious consequences of non-registration within 20 business days were not understood until after that time period. The security interest under the general security deed was not registered until 9 August 2012, some two months after the last day of the 20 business day period.

Barclays applied to the NSW Supreme Court for an order under the new section 588FM of the Corporations Act, extending the registration time to 9 August 2012.

The legal background

Section 588FL of the Corporations Act provides that unless a PPSA security interest in a company is registered within a certain timeframe, the security interest will 'vest' upon:

- an order being made, or a resolution being passed for the winding up of the grantor company;

- the appointment of an administrator to the grantor company; or
- the execution of a deed of company arrangement in relation to the grantor company,

(the **critical time**).

If the security interest vests in the grantor company, the creditor will be unsecured in respect of the debt it is owed by that company.

Previously, section 263 (which has now been repealed) of the Corporations Act provided a party with 45 days to lodge notice of a charge, failing which the charge could become void in certain circumstances. Section 263 has been replaced with section 588FL, which provides that the relevant timeframe for registration of a security interest in the collateral of a company is the latest of the following:

- 6 months before the critical time;
- 20 business days after the security agreement came into force or the critical time (where the critical time is earlier);
- 56 days after the security agreement first became enforceable in Australia if it is a foreign agreement; or
- a later time ordered by the court under section 588FM.

Consequently, if a secured party (under an Australian security agreement) fails to register within 20 business days, it runs the risk that its security interest will vest in the company if it enters external administration in the subsequent six month period.

Previously a party could apply under section 266(4) of the Corporations Act for an extension of the 45 day period for lodgment of notice of a charge. Now, section 266(4) has been replaced by section 588FM, which allows the court to make an order fixing a later time for registration in similar circumstances to those previously set out in section 266(4).

Namely, the court must be satisfied that:

- the failure to register the security interest within the allocated timeframes:
 - was accidental or due to inadvertence or some other sufficient cause; or
 - is not of such a nature as to prejudice the position of creditors or shareholders, or
- on other grounds, it is just and equitable to grant relief.

These provisions will apply to all security interests other than a transfer of account or chattel paper, some PPS leases over serial numbered goods or a commercial consignment, where the interest does not secure payment or performance of an obligation. Where a commercial consignment or PPS lease *does* secure a payment obligation, section 588FO provides some scope for a claim to damages from the grantor company.

Particular rules also apply to the subordination of debts and collateral transferred subject to PPSA security interests.

The decision

In this case, Justice Black was satisfied that the failure to register the relevant security interest was due to inadvertence, *'which includes being not properly attentive, or failing, in this case, to understand the requirement to lodge notice of a security interest within the specified period and the consequences for doing so'* (at para [13]).

The court was guided by case law on the previous section 266(4) of the Corporations Act, discussed above. The relevant factors in this case were, in particular:



- the length of the delay prior to Centrebet's registration. In this regard, the delay of two months was considered by Justice Black not to be 'a particularly long period' (at para [14]), although he noted that the applicant could have reacted more promptly upon discovering the error;
- that no other security interests were registered against Centrebet during the delay period;
- the solvency and strong financial position of Centrebet;
- an absence of risk of winding up or administration in respect of Centrebet; and
- the fact that the risk of prejudice to other creditors of Centrebet from such an order was remote.

As a result, the court was satisfied that late registration by Barclays would not 'disturb or affect an accrued or accruing right' or prejudice the position of Centrebet's creditors.

The lesson

Timing for registration is crucial.

Security interests must be registered as soon as possible, or at least within the following timeframes:

Security interest	Timeframe to register
PMSI security interest in inventory (as defined under the PPSA)	Before possession of the inventory passes
PMSI security interest in non-inventory	Within 15 business days of the commencement of the security agreement
Other security interests to which section 588FL applies	Recommended within 20 business days of the commencement of the security agreement

The 20 business day rule is only relevant if the applicable security agreement is entered into within six months before the company enters external administration (including liquidation), or within 20 business days before that six month date. Otherwise, all relevant security agreements must be registered prior to that six month date.

Notwithstanding these timeframes, we recommend that you register as soon as possible. The New Zealand Court of Appeal has recently confirmed that in a priority dispute between two registered (non-PMSI) secured creditors, the first in time to register will win (see *Healy Holmberg Trading Partnership v Damien Grant and Stephen Khov* [2012] NZCA 451). This rule is incorporated at section 55 of the Australian PPSA, which was referred to by the New Zealand Court to provide guidance.

If you do not register within the above timeframes, depending on the circumstances you risk jeopardising your

claim by reducing your priority ranking as against other creditors, or losing your security interest altogether.

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