

# **JAS PARTNERS**

## **CHARTERED ACCOUNTANTS**

**BUSINESS ADVISERS – TAXATION PROFESSIONALS – SUPERANNUATION CONSULTANTS**

### **PERSONAL PROPERTY SECURITIES ACT - TRANSITIONAL PROVISIONS WILL END SOON**

The last point in time at which a transitional security interest may be registered is immediately before midnight (Canberra time) on 31 January 2014.

The aim of the transitional provisions was to protect certain transactions or arrangements already in place prior to 30 January 2012 and to allow businesses sufficient time to comply with the legislation, they were given up to two years to register their security interests on the Personal Property Securities Register (the PPS register). During this two year period, businesses could claim to have temporary security over their assets, subject to certain conditions.

With regard to new security arrangements and transactions that took place after 30 January 2012, the transitional provisions do not apply.

Under this legislation, the Act deemed certain transactions to be security arrangements that included:

- Goods that were supplied on credit terms and subject to retention of title
- Goods that were supplied on consignment
- Assets that were leased or hired out to other parties, including related entities

The two year transitional period expires on 31 January 2014. Any person with a non-migrated transitional security interest must make sure that they perfect their interest (by registration, control or possession) on or before this date or risk losing the ability to claim protection over their assets.

The transitional provisions however, do not provide an automatic right to protection, and there has been an element of confusion as to its operation as was seen in the recent case of Maiden Civil v Queensland Excavation Services (QES). The Maiden Civil Case has considered the implications of perfecting an interest in personal property through registration, and not perfecting an interest in personal property.

Maiden Civil leased three earthmoving vehicles from QES in 2010 (ie. prior to the commencement of PPSA), and there was no doubt that QES were the legal owner of the vehicles. Maiden Civil subsequently borrowed funds from a financier, Fast Financial Solutions (Fast Financial) and in order to secure the loan, it provided Fast Financial with security over all of its assets. This security arrangement was properly secured and validly registered on the PPS register. Unfortunately, Maiden Civil defaulted on its loan and Fast Financial appointed Receivers and Managers over Maiden Civil and the NSW Supreme Court was asked to determine whether or not the three earthmoving vehicles belonging to QES fell within Fast Financials security.

One argument raised by QES was that it was entitled to rely on the transitional provisions. It claimed that given the lease of the vehicles was entered into before the commencement of PPSA, QES had a period of up to two years to lodge a registration of security interest over the vehicles. In the interim, it was also claimed by QES that the vehicles should have been protected under the transitional provisions and could not possibly fall within Fast Financials security.

The Court found otherwise. Even though it was conceded by Fast Financial that QES's interest over their vehicles could be deemed to be a transitional security interest, there was an exception to that rule. QES was still required to have lodged its interest on a transitional register being the Northern Territory Register of interests in Motor Vehicles and Other Goods, but it failed to do so.

As a consequence, that slip up meant that the Receivers and Managers were allowed to sell those vehicles and account those proceeds to Fast Financial.

When the transitional period expires on 31 January 2014, businesses that do not register their security interests prior to that date will no longer be able to rely on this temporary protection or raise this possibility as a defence.

### **What does this mean for businesses?**

If you have not already done so, it is important to review your existing arrangements with your customers and other parties, and consider your own business structure before 31 January 2014.

It is important that businesses take the following steps, as a minimum, to protect their assets:

- The transitional provisions may not provide absolute protection in respect to transactions or arrangements that were in place prior to 30 January 2012. Businesses should look to register those arrangements on the PPS Register to secure their interests before the expiry of the two year period ie. 31 January 2014.
- In relation to transactions that have occurred after 30 January 2012, review your trading activities to determine whether or not you need to register a security interest over your customers, particularly where you sell goods on retention of title terms, have items on consignment, or where your business hires or leases out assets.
- If you have any asset protection strategies in place, particularly where assets are being leased or hired out to related entities you must secure the lease arrangement by lodging your security interest on the PPS Register. These assets may be at risk if the entity that has possession of those assets is placed into external administration, despite not having legal title. The decision in Maiden Civil has made the outcome clear.

The consequences of not registering your security interests over such arrangements could mean that you may lose those assets to another party that has an existing and prior ranking security interest.