

CITY INSOLVENCY DISCUSSION GROUP

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TOPIC

Get me to the PPSR on time!

Time limits under the Personal Properties Securities Act 2009

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Get me to the PPSR on time!

**Time limits under the *Personal Property Securities Act 2009*
and *Corporations Act 2001***



Key time limits

- Overarching deadline for perfection of all security interests (*PPSA, s 267*)
- Registration of security interests granted by companies (*CA, s 588FL*)
- Registration of PMSIs (*PPSA, s 62*)
- Warehousemen's Liens
- Duration of registration of security interests



What are the time limits? – For all security interests

Section 267 of the *Personal Property Securities Act 2009* (Cth) effectively requires that security interests be “perfected” before:

- where the grantor is a company, the company enters into administration, or an order is made or resolution passed to wind up the company, or a DOCA is executed; or
- where the grantor is an individual, the person becomes bankrupt.

A security interest that attaches to collateral is “perfected” either by registration of the security interest, or by possessing (other than by seizure or repossession) or controlling the collateral.



What are the time limits? – Corporate grantors

Corporations Act 2001, section 588FL provides security interests granted by companies must be registered before the later of:

- 6 months before the “Critical Time”;
- 20 business days after the creation of the security interest or the Critical Time (if the security interest was created after the Critical Time);
- 56 days after the security interest became enforceable in Australia (if it arose under a foreign agreement); and
- a later time ordered by the Court under s588FM

“Critical Time” is the date of appointment of an administrator, or an order or resolution to wind up the company being made, or the execution of a DOCA.



What are the time limits? - PMSIs

Under section 62 of the *PPSA*, a Purchase Money Security Interest (PMSI) will have “super” priority over other security interests in the same collateral (including those granted prior to the PMSI, but not those perfected by control), if the PMSI is registered:

- where the collateral is inventory, before the grantor obtains possession (ie. before delivery);
- in all other cases, within 15 business days of the creation of the security interest or the grantor obtaining possession.



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What are the time limits? – A Warehouseman's what?

Warehousemen's Liens Act 1952 (WA)

- Applies to people lawfully in the business of storing goods as a bailee for hire or reward; and
- Gives them a lien on goods deposited with them for storage in priority to **all** other claims on the goods (including those registered on the PPSR).

The warehouseman must (for goods over \$300), within **3 months** after taking possession of the goods, give notice (in a prescribed form) of the lien to people with securities that:

- are registered on the PPSR prior to the lien; or
- the warehouseman becomes aware of within 2 months after taking possession of the goods.



What are the time limits? – A Warehouseman’s what?

PPSA, section 73(2):

“The priority between an interest in collateral (the statutory interest) that arises, by being created, arising or being provided for, under a law of the Commonwealth, a State or a Territory (the relevant jurisdiction) and a security interest in the same collateral is to be determined in accordance with that law if, and only if:

- a) that law declares that this subsection applies to statutory interests of that kind; and
- b) the statutory interest arises after the declaration comes into effect.”



What happens if I miss the deadline?



What happens if I miss the deadline?

Section 267 of the PPSA provides that, if:

- A company enters into administration, or an order is made or resolution passed to wind up the company, or a DOCA is executed; or
- A person becomes bankrupt; and
- a security interest granted by a company or bankrupt is unperfected at the time such an event occurs,

then, the security interest vests in the grantor immediately before the event occurs.



What happens if I miss the deadline?

Purchase Money Security Interests

- Section 62 of the PPSA only grants “super priority” to PMSI over other prior-registered non-PMSI security interests, if the PMSI is registered within the required time
- If fail to register within that time, the security interest is still protected and priority will be determined by reference to the date of registration (subject to the other rules regarding priority, such as security interests perfected by control)



What happens if I miss the deadline?

If:

- a security interest is not registered within the time limits under section 588FL; and
- the security interest is not perfected by some other means (such as possession or control); and
- a company appoints administrators, or an order is made or resolution is passed to wind up the company, or a Deed of Company Arrangement is executed,

then, the security interest vests in the company immediately before the Critical Time.



Security interest created

Security interest registered



Company enters administration / liquidation



6 months



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Security
interest
created

Security
interest
registered

Company enters
administration /
liquidation

< 20 business days

6 months



Security
interest
created

>20 business days

Security
interest
registered

< 6 months

Company enters
administration /
liquidation



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Security
interest
created

<20 business days

Company enters
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liquidation



Security
interest
registered



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“588 F(M)L!”

But wait, there’s still hope!



Extension of time under PPSA s293

- 1) On applications, a court may make an order extending the number of business days in a period specified in the following provisions if the court is satisfied that it is just and equitable to do so:
 - a) s62(3)(b) – perfection of PMSIs;
 - b) s63(c) and (d) – priority between PMSIs;
 - c) s64(1)(b) – priority between PMSI and non-PMSI; and
 - d) ... quite a few other time limits relating to priorities and giving of notices and information.
- 2) Court may extend the period even if it has ended.
- 3) In making order, court must take into account:
 - a) whether the need to extend the period arises as a result of an accident, inadvertence or some other sufficient cause;
 - b) whether extending the period would prejudice the position of any other secured parties or other creditors;
 - c) whether any person has acted, or not acted, in reliance on the period having ended.



Extension of time under s588FM

- 1) A company, or any person interested, may apply to the Court for an order fixing a later time for the purposes of clause 588FL(2)(b).
- 2) The Court may make the order sought if:
 - a) failure to register earlier:
 - i. Was accidental or due to inadvertence or other sufficient cause; or
 - ii. Is not of such a nature as to prejudice the position of the creditors or shareholders; or
 - b) on other grounds, it is just and equitable to grant the extension.
- 3) The Court may make orders on the terms it sees fit.



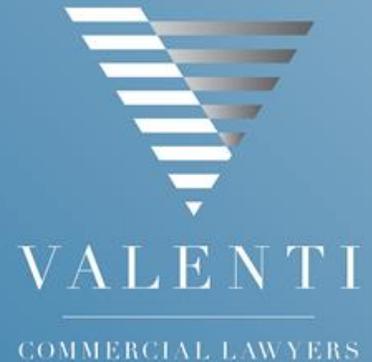
Extension of time under s588FM

- An order under section 588FM has no effect on priority of security interest (these are established under Part 2.6 of the PPSA) – it merely avoids the security interest vesting in the grantor
- An application under 588FM will not assist where the security interest was NOT registered at the critical time - it does not affect section 267 of the PPSA



Extension of time under s588FM

- 1) A company, or any person interested, may apply to the Court for an order fixing a later time for the purposes of clause 588FL(2)(b).
- 2) The Court **may** make the order sought if:
 - a) failure to register earlier:
 - i. Was **accidental or due to inadvertence** or other sufficient cause; or
 - ii. Is **not of such a nature as to prejudice** the position of the creditors or shareholders; or
 - b) on other grounds, it is just and equitable to grant the extension.
- 3) The Court may make orders on the terms it sees fit.



Re Appleyard [2014] NSWSC 782

- Applicant was foreign corporation that relied upon representation from Australian grantor that grantor would arrange perfection of security interest.
- Australian company did not perfect the security interest.
- Approximately one year later, Australian company effectively admitted insolvency and foreign corporation discovered that its security was unregistered.
- Further inquiries showed one earlier credit interest registered over the same collateral, plus two further registrations after grant to Applicant.



“Accidental or due to inadvertence”

[10] For the purpose of s 588FM(2)(a)(i), "inadvertence" includes failure to advert to or understand the requirement for registration within the specified period, and innocent error in the sense of failure to register through ignorance of the legal requirement to do so, or of the consequences of not doing so (authorities omitted)

...

[33] The period that elapsed was attributable to 123 Sweden's ignorance of the requirement for registration and the effect of non-registration, and – if the evidence of Mr Andersson remains uncontradicted – to deception by Mr Appleyard.



“Not of such a nature as to prejudice the position of creditors or shareholders”

[27] it must be born in mind that the only utility of obtaining an extension is so that, in the event of liquidation or administration, the security interest which not vest in the company but persist for the benefit of the secured creditor to the prejudice of the unsecured creditors.

[30] The type of prejudice that is of particular relevance is prejudice attributable to the delay in registration, rather than prejudice from making the order (which is inevitable). This is the type of prejudice contemplated [by] the legislation (see s 588FM(2)(a)(ii), which refers to prejudice from the failure to register earlier, not from making the order),



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Discretion

AGAINST: “It was a relatively long time – in excess of a year – that 123 Sweden’s interest remained unregistered, and it seems likely that the financial position of the company deteriorated between the date when the security interest came into force and the ultimate date of registration”

FOR: “The period that elapsed was attributable to 123 Sweden's ignorance of the requirement for registration and the effect of non-registration”

ALSO FOR: Significantly, given the subsistence of the registered NAB and CWS security interests during the period while 123 Sweden's collateral remained unregistered, it seems unlikely that unsecured creditors would have traded with the company on the faith that the collateral was unencumbered



Guardian Order

(citing *Re Guardian Securities*)

[21] “[I]n the absence of evidence of solvency and the likelihood of solvency being maintained, an extension should not be granted unless steps are taken to protect the interests of unsecured creditors, which might involve joining one or more as representative parties, or giving directions as to notification of the application with a view to their being heard in opposition if so desired, or making the order but reserving the right to apply at a later time to discharge or vary the order.”



Exercises of Discretion

CITATION	FACTS	RESULT
Re Barclays Bank [2012] NSWSC 1095	<ul style="list-style-type: none"> • Minter Ellison, acting for Barclays, overlooked registration requirement; • Registered 2 months late; • No opposition from grantor, and positive evidence of grantor's solvency 	Allowed
Re Black Opal [2013] NSWSC 1225	<ul style="list-style-type: none"> • Solicitor acting on transaction overlooked requirement to register; • Consent of grantor was "relevant, but far from decisive" consideration; • Some evidence of grantor's solvency 	Allowed
Re Accolade Wines [2016] NSWSC 1023	<ul style="list-style-type: none"> • Defect in original registration (registered under ABN; not ACN); • Plaintiffs led evidence that financiers commonly search PPSR on ABN. 	Allowed
Re 4 in 1 [2017] NSWSC 407	<ul style="list-style-type: none"> • Plaintiff was in the business of providing finance; • Plaintiff's own process-flow document misdirected its employees on how to register on PPSR; • Proceedings commenced against 255 grantors. 	Allowed



Exercises of Discretion (cont)

CITATION	FACTS	RESULT
<i>Re Kaizan</i> [2017] FCA 431	<ul style="list-style-type: none"> Plaintiff was overseas company, unaware of requirement to register; Alerted to requirement 57 days after grant and registered 33 days later. Company already in liquidation, but no evidence of unsecured creditor relying upon non-registration. 	Refused
<i>Greenlight</i> [2017] WASC 278	<ul style="list-style-type: none"> Defect in original registration (referred to only one of two secured parties); Defect arose from solicitor's failure; Plaintiffs were earth moving contractors whose inadvertence was reasonable. 	Allowed
<i>Squadron Resources</i> [2018] FCA 1292	<ul style="list-style-type: none"> Miscommunication between plaintiff and its former solicitors meant that each thought the other had registered; Delay in registering exceeded two years up to date of hearing; No notice to unsecured creditors, but no Guardian order made. 	Allowed



Some relevant factors in exercise of discretion

- Whether any unsecured creditors had in fact relied upon non-registration;
- If there had been an earlier defective registration, whether such registration was likely to be discovered by a search of the PPSR;
- Any other factors tending to affect whether a prospective creditor is likely to be misled by the incompleteness of the PPSR;
- The comparative strength of the grantor when security given as against when security registered;
- Length of delay
- Reasonableness of inadvertence
- Solvency of grantor



A word of warning

Under s 588FM, an application can be made after the critical time to fix a later registration date for a security interest registered before the critical time.

- *Hewlett Packard Australia Pty Ltd v GE Capital Finance Pty Ltd* [2003] FCAFC 256
- *Re Appleyard* [2014] NSWSC 782

However, the Court has no jurisdiction under s 588FM to allow an applicant to register a new security interest after the critical time has passed.

- *OneSteel Manufacturing Pty Ltd* [2017] NSWSC 21
- *Production Printing (Aust) Pty Ltd* [2017] NSWSC 505



Parting Observations



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Any questions?



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Next CIDG Session

Wednesday, 3 April 2019



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