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# The perils of tardy PPSR registration: Pozzebon (Trustee) v Australian Gaming and Entertainment Ltd

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The recent decision of *Pozzebon (Trustee) v Australian Gaming and Entertainment Ltd*<sup>1</sup> serves as a cautionary tale to secured lenders. It illustrates how a failure to register a security interest on the Personal Property Securities Register (PPSR) within 20 business days of execution may have dire consequences, rendering the security worthless if the corporate security provider enters external administration.

## Facts

The applicants, Mr and Mrs Pozzebon (the Pozzebons), were joint trustees of a self-managed superannuation fund. On 24 December 2013, they agreed to lend \$250,000 to Australian Gaming and Entertainment Ltd (AGE). The loan was documented and supported by a security agreement over all present and after-acquired property of AGE in favour of the Pozzebons.

Although the security agreement was executed on 24 December 2013, it was not registered on the PPSR until 19 May 2014. Only days later, AGE was put into voluntary administration. On 1 July 2014, a liquidator was appointed.

Critically, this meant that the security interest was registered:

- more than 20 days after the agreement giving rise to the security interest (for the purposes of s 588FL(2)(b)(ii) of the Corporations Act 2001 (Cth)); and
- less than six months before commencement of the administration (being the “critical time” for the purposes of s 588FL(2)(b)(i)).

Therefore, unless the Pozzebons could establish that the security interest was also perfected by a means other than registration, the security interest would vest in AGE and the Pozzebons would find themselves unsecured creditors in accordance with s 588FL of the Corporations Act.<sup>2</sup>

## Issue

The facts were not in dispute. The sole issue before the court was the proper interpretation of s 21(1) of the

Personal Property Securities Act 2009 (Cth) (PPSA) and s 588FL(2) of the Corporations Act.

Section 21(1) prescribes the means by which a security interest may be perfected. Section 588FL(2) sets out the circumstances in which PPSA security interests will vest in the company if they have not been registered within the specified time periods and are not perfected by another means.<sup>3</sup>

The Pozzebons pursued a novel, yet tenuous, argument that s 588FL(2)(a) did not apply because the security interest had been perfected not only by registration, but also by:

- attachment;<sup>4</sup> and
- enforceability.<sup>5</sup>

They noted that under s 21(1)(a), attachment and enforceability are not always required for perfection to occur, citing as an example the temporary perfection of security interests also under the PPSA.<sup>6</sup>

## Decision

Although this line of argument was creative, it demonstrated a fundamental misunderstanding of both the PPSA and the purpose of the vesting provisions in the Corporations Act.

As Collier J succinctly stated:

In my view the position adopted by the applicant in this proceeding is misconceived and misapprehends the meaning and purpose of both s 21(1) of the PPSA and s 588FL(2) of the Corporations Act. That this is so becomes obvious once the sections are examined carefully.<sup>7</sup>

## Section 21 of the PPSA

The court held that, under the PPSA, attachment and enforceability are fundamental prerequisites to perfecting a security interest. Once these requirements are satisfied, perfection may then be completed by way of:

- registration;
- possession; or
- control (in relation to certain types of collateral).

This interpretation is further supported by the Outline of the Replacement Explanatory Memorandum to the Personal Property Securities Bill 2009 (Cth), which states:

Perfection would occur when a security interest attaches to personal property and the secured party takes possession and/or control of the property or registers it on the PPS Register. The Bill would also provide short term “temporary perfection” following certain events involving the collateral.<sup>8</sup>

The Pozzebons did not attempt to argue, nor could they, that the security interest was perfected by either possession or control for the purposes of s 21(2). Similarly, there was no attempt to claim that the security interest benefited from any form of temporary perfection.

While the PPSA does allow temporary perfection, this is in very limited circumstances pending steps being taken to ensure perfection of the security interest in the normal manner — that is, by registration, possession or control within the meaning of s 21 of the PPSA. These limited circumstances offered no safe harbour for the Pozzebons and there was no compelling reason why the provisions regarding temporary perfection should in any way influence the interpretation of s 21(1) of the PPSA or s 588FL of the Corporations Act.<sup>9</sup>

## Section 588FL of the Corporations Act

The court held that when s 588FL(2)(a)(ii) refers to the security interest being perfected by registration and by no other means, that section is distinguishing registration as a means of perfection from the alternative means of perfection — possession and control. It is not distinguishing registration from attachment and enforceability.<sup>10</sup>

This is reflected in Note 4 to s 588FL(2) of the Corporations Act, which expressly states that the PPSA provides for “perfection by registration, possession or control, or by force of that Act (see s 21 of that Act)”.<sup>11</sup>

This is also consistent with the purpose of s 588FL, which Collier J noted was included to:

...prevent security interests being granted fraudulently by corporations with knowledge of an imminent administration, liquidation or deed of company arrangement, and to avoid property falling into the estate of a trustee or administrator or otherwise being claimed by unsecured creditors (Explanatory Memorandum, Personal Property Securities (Corporations and Other Amendments) Bill (Cth) 2010 clause 6.2).<sup>12</sup>

## Statutory review

While the Pozzebons paid the price for failing to register within the time limits prescribed by s 588FL, there is some prospect of future relief.

The provisions of s 588FL are in addition to the deadlines and vesting provisions under the PPSA (ss 267 and 267A); however, they only apply to certain corporate grantors.<sup>13</sup> As part of the current statutory review of the PPSA, various submissions have called for the

removal of the 20 business day period for registering security interests against corporate grantors.<sup>14</sup>

While it is often said that s 588FL simply reflects the old registration requirements under the now repealed Pt 2K.2 of the Corporations Act (which required registrable charges to be lodged with the Australian Securities and Investments Commission within 45 days of creation), the new provisions are broader in scope, applying to all security interests,<sup>15</sup> not just registrable charges. Among other things, it has been said that there is no good policy reason to discriminate between individual and corporate grantors, particularly as it departs from an otherwise uniform policy approach to “in substance” security interests under the PPSA.

## Implications for secured parties

This judgment is a timely reminder to secured parties that:

- attachment and enforceability are prerequisites to a security interest being perfected — registration alone is not enough;
- security interests can be perfected in three ways — by registration, possession or control — however, in most instances, the nature of the security means that registration is the only practical alternative; and
- secured parties must have reliable processes in place to ensure that their security interests are registered promptly and within the 20 business day period.



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## Footnotes

1. *Pozzebon (Trustee) v Australian Gaming and Entertainment Ltd (in liq)* [2014] FCA 1034; BC201407897.
2. Above, n 1, at [34].
3. The time periods under s 588FL of the Corporations Act only apply to companies and registered “registrable bodies”. Vesting provisions applicable to all grantors are contained in s 267 of the PPSA.
4. Attachment occurs when a security interest “attaches” to the collateral in accordance with s 19 of the PPSA.
5. This refers to satisfaction of certain requirements under s 20 of the PPSA which allow a security interest to be enforceable against a third party.

6. Above, n 1, at [35]. See also s 21(1)(a) of the PPSA, which refers to a security interest being “temporarily perfected, or otherwise perfected, by the force of this Act”.
7. Above, n 1, at [36].
8. Above, n 1, at [49]. The court also referred to cl 2.25 of the Replacement Explanatory Memorandum.
9. Above, n 1, at [43]. Justice Collier noted that a detailed explanation of the provisions for temporary perfection is provided by Professor Duggan and Associate Professor Brown: see A Duggan and D Brown *Australian Personal Property Securities Law* LexisNexis 2012 pp 108–9.
10. Above, n 1, at [41].
11. Above, n 1, at [6].
12. Above, n 1, at [48].
13. Companies incorporated in Australia and registered “registrable bodies”.
14. B Whittaker *Review of the Personal Property Securities Act 2009: Interim Report* 31 July 2014. The report notes that suggestions for reform include repealing s 588FL of the Corporations Act on the basis that it is superseded by the PPSA. See also first round submissions to the statutory review of the PPSA: 009 — Mr Craig Wappett; 029 — Allens, Ashurst, Herbert Smith Freehills, King & Wood Mallesons and Norton Rose Fullbright Australia, available at [www.ag.gov.au](http://www.ag.gov.au).
15. Section 588FL of the Corporations Act applies to “PPSA security interests”, as defined in s 51, subject to certain exceptions under s 588FN.