

EXPLANATORY STATEMENT

Personal Property Securities (Priority of Statutory Interests) Instrument 2011

Summary

The *Personal Property Securities (Priority of Statutory Interests) Instrument 2011* (the Instrument) is made under subsection 73 (4) of the *Personal Property Securities Act 2009* (the PPS Act) by the Attorney-General. The Instrument declares that certain statutory interests created, arising or provided for under the *Corporations Act 2001* and *Bankruptcy Act 1966* are of a kind to which subsection 73 (2) applies. The effect of the Instrument is that those Acts will determine the relative priority between statutory interests provided for by those Acts and security interests under the PPS Act.

Background

Generally, the PPS Act's detailed provisions governing the priority of competing interests in the same collateral only pertain to security interests within the meaning of section 12. The PPS Act specifically does not apply to a number of interests; in particular, it excludes a lien or charge that is created, arises or is provided for under a law of the Commonwealth, unless the person who owns the property in which the interest is granted agrees to the interest (paragraph 8 (1)(b)). However, the table in subsection 8 (2) of the PPS Act provides that certain provisions of the PPS Act are applicable to otherwise excepted interests. Relevantly, item 1 provides that section 73 applies to a lien or charge described in paragraph 8 (1)(b).

Under subsection 73 (2), a Commonwealth, a State or a Territory law may determine the priority between a statutory interest arising under that law and a security interest in the same collateral. However, the relevant law must declare that subsection 73 (2) applies. In the absence of such a declaration the Minister may by legislative instrument declare that subsection 73 (2) applies to statutory interests of a kind to which that subsection refers (subsection 73 (4)).

A key intention of PPS reform was to maintain existing rights in the absence of sound policy reasons to alter them. To this end, this Instrument is intended to maintain the priorities that existed under the *Corporations Act* and *Bankruptcy Act* in relation to an administrator's lien and a controlling trustee's lien provided for, respectively, under those Acts.

Notes on Sections

Section 1 – Name of Determination

Section 1 provides for the citation of the Determination as the *Personal Property Securities (Priority of Statutory Interests) Instrument 2011*.

Section 2 – Commencement

The Instrument commences on 30 January 2012.

Section 3 – Interpretation

This section provides that the definition of *Act* is the *Personal Property Securities Act 2009*.

Section 4 – Priority between security interests and declared statutory interests

The Corporations Act, as amended by the *Personal Property Securities (Corporations and Other Amendments) Act 2010* (the PPS (CoA) Act), provides that an administrator's right of indemnity under section 443D has priority over certain debts of the company secured by a circulating security interest in property of the company (section 443E).

Subsection 443F (1) of the Corporations Act provides that the administrator's indemnity is secured by a lien over the company's property. Under that Act the lien has priority over a security interest to the extent that the right of indemnity has priority over debts secured by the security interest (subsection 443F (2)).

As the lien is created by a Commonwealth law it is generally excluded from the application of the PPS Act (paragraph 8 (1)(b)); however, it is a statutory interest for the purposes of subsection 73(2). Paragraph 4(a) of the Instrument provides that subsection 73 (2) applies to a lien that arises under subsection 443F (1) of the Corporations Act. The effect of this declaration is that priority between a security interest and a lien under section 443F in the same property is to be determined by the Corporations Act.

Similarly, the effect of paragraph 4(b) is that it provides that the Bankruptcy Act will be the law that determines the priority of the statutory interest, the controlling trustee's lien created by section 189AC of that Act, and a security interest in the same property.

Consultation

Consultation in regard to PPS reform has been extensive with the Department working closely with key stakeholders including banks, equipment financiers and information brokers. In the explanatory memorandum to the PPS (CoA) Act, the Department indicated that an Instrument of this kind would be made rather than by including a declaration in the relevant Act. As the Instrument is designed to maintain certain aspects of the existing law, insolvency practitioners have indicated their support.

Regulatory Impact Analysis

The Office of Best Practice Regulation has previously advised that the personal property securities reforms do not require a Regulatory Impact Statement because the reforms do not involve compulsion and it will be a commercial decision whether businesses register. It is not designed to impose any additional compliance costs on business or individuals or have any adverse impacts on competition.