

Property Alert

PPSA – Does it affect real property?

February 2012

On 30 January 2012 the *Personal Property Securities Act 2009 (Cth)* (**PPSA**) commenced operation. The PPSA replaces the existing legislation regarding registration of security interests in personal property and introduces the Personal Property Securities Register (**PPSR**).

While real property is specifically excluded, most other types of personal property are included such as cars, boats, machinery, equipment, shares, intellectual property and contract rights. To ensure priority against competing claims, security interests in personal property will now need to be registered on the PPSR (or 'perfected' by another method).

Although compliance with the PPSA is not mandatory, the failure to register a security interest could have significant adverse consequences. In particular, the PPSA abolished the *nemo dat* rule, which provides that a person cannot give better title than the person had. This means that unless a security interest is registered by the owner, a person in possession of goods (such as a lessee or hirer of goods) can pass good title to a third party even though the person in possession does not own the goods.

Impact on Property Transactions

Despite land being excluded, the PPSA has some unexpected consequences for the property industry. It will be important that the parties involved in property transactions are aware of the effect of the PPSA and

importantly, when to register an interest on the PPSR and when to check that register.

Below are some practical examples of when a person should either register an interest on the PPSR or inspect the register.

When to Register

Lease that includes a lease of 'goods'

While the PPSA does not apply to fixtures, what happens when an occupation lease includes the use of the landlord's machinery, equipment, furnishing or fittings in the premises that fall within the PPSA?

Example:

Dr X Pty Ltd leases premises within a hospital that includes ultrasound equipment owned by the Landlord. Dr X Pty Ltd takes out a loan from the bank to fund his new practice and subsequently defaults on its loan. The Landlord has not registered its security interest in the equipment on the PPSR, but the bank has registered its interest in the equipment in Dr X Pty Ltd's possession. Who has the best claim to the ultrasound equipment?

Despite the equipment being owned by the Landlord, the bank's interest (having been perfected by registration on the PPSR) is likely to take priority over the Landlord's interest in the equipment.

Under the old law, the bank would not have any right to any of the assets which Dr X Pty Ltd did not own. Now, the pool of assets available to the bank is potentially larger.

To avoid this scenario, it is critical that all landlords consider the following:

- Is there any 'personal property' included in an occupation lease?
- Is the value of the goods sufficient to warrant protection by way of registration on the PPSR?

In this scenario, if Dr X Pty Ltd became insolvent and a receiver, administrator or liquidator was appointed and the receiver, administrator or liquidator took possession of the equipment, the bank's interest in the equipment would be secured whereas the Landlord would be an unsecured creditor, despite the fact that the Landlord owns the legal title in the equipment.

The PPSA is based on similar legislation which has been operating in New Zealand. Courts in New Zealand have held that, as per the above example:

- a Landlord which has failed to perfect its interest by registration will lose priority to a secured creditor which has perfected its interest by registration; and
- property which the Landlord owns that is in the possession of the Tenant and over which the Landlord has not perfected its security interest will vest in a receiver, administrator or liquidator of the Tenant on the Tenant entering into receivership, administration or liquidation for that receiver, administrator or liquidator to deal with and sell as it sees fit.

Lease Incentives and Ownership of a Fitout

While incentives under an occupation lease can take many forms, of particular importance under the PPSA is a landlord's contribution towards a tenant's fitout in the premises. This is important to the extent that the fit out includes personal property, such as furniture and fittings.

It is common for landlords to retain ownership of the fitout which has been paid for with the incentive, during the term of the lease.

If the landlord retains ownership in the fitout and fails to register its interest in the fitout on the PPSR as a security interest, then the landlord takes the risk that a person with a registered security interest against the tenant, will have a superior interest and priority against the landlord in a dispute about the ownership of the fitout.

It is also possible that a lease may provide for a landlord to take ownership of a tenant's fitout at the end of the lease, rather than include an obligation on the tenant to 'make good'. This may be of substantial benefit to a landlord where the fitout is desirable for a future tenant's use. In this situation, the landlord should consider registering its security interest to ensure access to the fitout at the end of the lease is not compromised.

When to inspect the Register

Abandoned Goods

Most commercial leases contain a provision which permits a landlord, at its discretion, to deal with any goods which are left in premises by a tenant after the tenant has vacated. These clauses normally are utilised where a tenant leaves items such as furniture and equipment (but not fixtures).

In some cases the landlord may dispose of the goods, in others, the landlord may keep them in the premises for use by a future tenant. Often the value in the abandoned goods, when sold, will help to repay some of a tenant's unpaid rent, costs or expenses.

However, following the introduction of the PPSA, the landlord will need to ensure that it inspects the PPSR prior to dealing with the goods. Should the landlord discover that a third party has an interest in those goods, it will not be able to dispose of them at its discretion and should contact the third party prior to dealing with the goods.

Distrain

Unique to South Australia and Tasmania are provisions of the *Landlord and Tenant Act 1936 (SA)* and the *Landlord and Tenant Act 1935 (TAS)* respectively (**LTAs**), which permit a landlord to enter the premises, take goods in the possession of the tenant and sell them to recover unpaid rent. Under the LTAs, third party owners of distrained goods have a right to the release of their goods if the tenant has no legal or beneficial title and a claim is made before the landlord exercises its statutory power of sale. Prior to PPSA, equipment lessors could make such claims, however their right to do so may now be clouded by the PPSA regime.

It will be interesting to see how the provisions of the LTAs interact with the PPSA. For example, the PPSA may

generate a windfall for the landlord by making it harder for third party owners to claim that the tenant has no legal or beneficial interest in the goods. On the other hand, landlords will need to exercise caution before selling distrained goods to ensure they do not inadvertently violate PPSA entitlements.

Purchase of Property

Often when acquiring a freehold interest in property, certain property such as equipment, fitout owned by the vendor, development approvals and furniture are included in the sale.

In addition, often when acquiring a business not only is a leasehold interest included in the sale but also fitout, equipment and inventory owned by the vendor.

It is essential that a purchaser in these situations inspects the register to ensure that there are no third parties with interests in the items which are included in the sale. If the purchaser discovers that a third party does have such an interest, it should ensure that the vendor provides it with an appropriate deed of release and financing change statement in relation to that interest, at settlement. This form of release will replace the previous Form 312 Release of Company Charge which was previously required on settlement.

Two year transitional window

Some security interests which are in existence prior to the introduction of the PPSA will have the benefit of a 2 year window in which that interest will be protected despite not being perfected by registration. However, this will not apply to all interests including some of those discussed in this paper. If you would like to know whether an interest will obtain the benefit of the 2 year window, please contact us.

If you have any queries in relation to the PPSA or how it may affect you, please do not hesitate to contact us.

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