

## Bringing more complication to real estate transactions

The Personal Property Securities Act 2009 (Cth) ["PPS Act"] while ostensibly not affecting real estate will affect many real estate transactions, buy/sell and leasing transactions. The PPS Act will commence operation on 30 January 2012.

### The Effects in Summary

In simple terms, the effect of the PPS Act is that in respect of many real estate transactions, it will be necessary to carry out a Personal Property Securities Register search and take appropriate action when a relevant registered security is found.

While this sounds simple and inexpensive, it is a procedure that is likely to be often overlooked by many with resulting costly consequences for sellers, buyers and tenants and, possibly also, landlords.

Additionally, the resulting action that may have to be taken if a relevant registered security is located may involve one or more of the parties to the transaction in additional expense.

### The Technical Stuff

Under the PPS Act:

- *Personal Property* does not include Land or Fixtures;
- *Personal Property* does include all Goods not being Fixtures.

Under common law, most fixtures are treated as part of the land and buildings they are attached to - the English translation of the relevant Latin maxim being "whatever is fixed to the land becomes part of it".

The difficulty, however, is defining what is at law a fixture and what is personal property in any particular case.

### Practical Issues and Concerns

#### For a seller of land

As most contracts of sale require the seller to transfer the Property to the buyer at settlement (that is, transfer the land and the goods sold) free of "mortgage encumbrances and similar", the seller should by settlement obtain releases and discharges of any securities granted - and, in particular, registered securities - in respect of goods sold that are personal property.

Given the difficulty of defining an item at law as a fixture or personal property, in almost all transactions the seller should consider items sold as personal property and obtain releases and discharges as may be necessary.

Where the seller is subject to a fixed and floating security in respect of all its assets, this could be of particular importance.

#### For the buyer of land

A buyer of land should - in addition to title searches, property information searches and (where the seller is a company) ASIC searches - carry out a Personal Property Securities Register search to determine if any personal property sold with the land under the relevant contract of sale (often included as "Goods" in contracts of sale of land) is subject to a security registered under the PPS Act.

If a registered security is discovered, the buyer should (if the contract allows it) require that a discharge or release of the security, insofar as it affects the goods sold, be handed over at or before settlement.

Failure to do so may mean that the secured party is able, after settlement has taken place, to take the goods secured if the seller fails to meet its commitments to the secured party.

## **For tenants**

A prospective tenant should - in addition to carrying out a title search regarding the Land - carry out a Personal Property Securities Register search in respect of any chattels (but not fixtures).

Often in leases, chattels and/or fixtures that will form part of – or be included in - the premises leased are called “plant and equipment”, “fittings” or “landlord’s installations”.

Again - because of the possible difficulty of determining if a particular item is at law a chattel (personal property) or a fixture - a Personal Property Securities Register search should be carried out in almost all transactions.

If any chattels are found to be subject to a registered security, the tenant should require the landlord to obtain an appropriate consent from the secured party.

That consent should also contain agreement by the secured party that, while the tenancy

continues, the secured party will not remove those chattels .

## **For landlords**

To satisfy tenants’ demands for consent, landlords will have to incur the cost of obtaining the secured party’s consent unless the relevant lease agreement provides that the tenant is to pay for that consent.

Where the lease is governed by the Retail Leases Act 2003, a landlord is prohibited from recovering from a tenant the cost of obtaining the “mortgagee’s” consent.

The Act does not define “mortgagee” but it may be applied to a party who holds security over chattels.

A landlord will probably face substantial liability to the tenant for breach of the landlord’s obligation to give the tenant quiet enjoyment of the leased premises if a secured party removes from the premises, because of some default by the landlord, chattels leased to the tenant as part of the premises.

## **Contact:**

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