

## PPSA and PPS Leases

Gareth Johnson BEC LLB DIP ED

David Nicoll LLB B APP SC

The information in this document is for general information only and cannot be relied on as a substitute for appropriate professional advice relevant to your specific circumstances.

This commentary was prepared on 23 January 2012.

Document provided by

**TOWNSENDS BUSINESS & CORPORATE LAWYERS**

Tel 02 8296 6222 [www.townsendslaw.com.au](http://www.townsendslaw.com.au)

**1. What is this guide about?**

- 1.1. This guide reviews whether the lease or bailment of personal property is governed by the Personal Property Securities Act 2009 (Cth) or 'PPSA' and what the parties must therefore do as a result.

**2. What is 'personal property'?**

- 2.1 Personal property is effectively all property other than interests in land, and includes goods, plant and equipment, shares, intellectual property such as trademarks and copyright, negotiable instruments, debts, as well as many other kinds of property.
- 2.2 Some types of security interests in personal property are not covered by the PPSA; for example liens.

**3. What are the differences between 'lease' and 'bailment'?**

- 3.1 A person who owns goods and leases them to another is known as 'the lessor'. The person who has possession of those goods and actual use of them is known as 'the lessee'.
- 3.2 A bailment is where one person ('the bailee') comes into possession of goods belonging to another ('the bailor') on the understanding that the goods will be returned or disposed of as agreed. For example, people (bailors) give possession of their goods to a bailee when they leave:
- (a) their car at a garage for repairs;
  - (b) goods with a courier for transport; or
  - (c) clothing with a dry cleaner.
- 3.3 A PPS lease is a lease or bailment of goods or equipment:
- (a) for an indefinite term; or
  - (b) for a duration that exceeds a specific term ie one year or more, for goods able to be described by a serial number (eg motor vehicles, boats and aircraft), or 90 days for other goods (eg – leasing the office photocopier).
- 3.4 A PPS lease does NOT cover a number of situations, including:
- (a) a lease by a lessor who is not regularly engaged in the business of leasing goods; and
  - (b) a bailment by a bailor who is not regularly engaged in the business of bailing goods.
- 3.5 So, if a finance company leases equipment to a customer under a PPS lease, the finance company as lessor will be the secured party and the customer as lessee will give the security over the equipment.
- 3.6 PPS leases are a deemed security interest under PPSA. This means that although they may not in substance secure performance of an obligation, the lessor/bailor's interest in the leased property must still be protected by registration - ownership of the goods will not be sufficient protection.

3.7 The lessor/bailor's interest in leased or bailed goods under a PPS lease is called a Purchase Money Security Interest or 'PMSI'. This applies even if the goods also secure the purchase price, for personal, domestic or household purposes and are described by a serial number eg a motor vehicle for household use.

#### **4. What do you register on PPSR?**

4.1 To ensure maximum protection, the lessor/bailor should register its interest as a PMSI on the Personal Property Securities Register or 'PPSR'. In doing so, the lessor/bailor would get a super-priority over other registered security interests.

4.2 This means that, once it has registered its PMSI, the lessor/bailor's PMSI defeats all other registered security interests in the goods leased, even registered security interests created and registered beforehand.

#### **5. How and when do you register a PPS lease on the PPSR?**

5.1 The lessor/bailor registers on the PPSR by properly completing a financing statement and lodging it with the PPSR.

5.2 To obtain the maximum protection for a PPS lease and a super-priority as a PMSI, the lessor/bailor must register the PPS Lease within 15 business days of the lessee/bailee obtaining possession of the goods which are not inventory.

5.3 Specific legal advice should be sought in relation to what is inventory.

#### **6. How much does it cost to register a PPS lease on the PPSR?**

6.1 It costs \$7.40 to register online a financing statement on PPSR for seven years while it costs \$130.00 to register online a financing statement with no end date.

#### **7. What happens if the lessor/bailor registers its PPS lease on the PPSR?**

7.1 If the lessor/bailor registers its PPS lease as a PMSI on the PPSR within the 15 business days period, the lessor/bailor will get a super-priority for its PMSI.

#### **8. What happens if the lessor/bailor doesn't register its PPS lease on the PPSR or doesn't register within the required time?**

8.1 If the lessor/bailor doesn't register its PPS lease on the PPSR within the required time, it loses its priority against registered PMSIs but its PMSI is still validly created and will have priority in accordance with the default priority rules.

- 8.2 The default priority rules are generally as follows:
- (a) a perfected security interest takes priority over an unperfected security interest;
  - (b) if there are two or more perfected securities, the earlier or first perfected security wins out over the second or later perfected security; and
  - (c) if there are two or more unperfected security interests, again the first or earlier unperfected security interest wins out over the second or later unperfected security interest.

8.3 These rules of priority are subject to more specific rules about priority in PPSA and PMSI super-priority.

## **9. How does the lessor/bailor enforce its PMSI?**

9.1 The lessor/bailor can enforce its PMSI by seizing the leased or bailed goods from the lessee/bailee or from any party who has the goods and has a lower priority than the lessor/bailor.

9.2 Once the lessor/bailor has obtained possession of the goods, as the owner of the goods it can deal with them as it sees fit.

9.3 The enforcement provisions in the PPSA do not replace, but rather complement, other rights and remedies available. These additional rights may be contained in statute law, common law or equity.

9.4 If the goods are NOT used predominantly for personal, domestic or household purposes (ie it is used for business purposes), the parties may contract out of most of the enforcement provisions of the PPSA.

9.5 The enforcement provisions do NOT apply where a receiver or controller has been appointed to deal with property under Part 5.2 of the Corporations Act (Cth).

9.6 Parties to a lease or bailment should always seek and rely on specific legal advice before they take any enforcement action or attempt to defend such an action.

## **10. Transition arrangements**

10.1 The lessor/bailor has a transition period of 24 months after the registration commencement date (RCD) ie the date of commencement of PPSA (currently 30 January 2012) to register its interest in the PPS lease on the PPSR.

10.2 The lessor/bailor's PPS lease must be dated before the RCD, in order to be covered by, and take advantage of, the transition period, even if the supply of the goods occurs after the RCD.

10.3 If the PPS lease is dated after the RCD, it must be registered in accordance with the requirements set out above.

**11. Other information**

- 11.1 The PPSA does NOT require the lessor/bailor to register each lease or bailment contract it has with the lessee/bailee. A single registration may cover subsequent security interests in property that is supplied under later agreements.

For more information, please contact:

**TOWNSENDS BUSINESS & CORPORATE LAWYERS**

Tel: +61 (02) 8296 6222

Email: [info@townsendslaw.com.au](mailto:info@townsendslaw.com.au)

[www.townsendslaw.com.au](http://www.townsendslaw.com.au)