



THE PERSONAL PROPERTY SECURITIES ACT AND THE PURCHASE OF LAND

Purchase of Real Property

The introduction of the Personal Properties Securities Act 2009 (*Cth*) (PPSA) has created the online Personal Property Securities Register (“PPSR”), which came into operation on 30 January 2012. Under this mechanism, a holder of a security interest in personal property must register this interest to ensure they have a priority claim in law to that property.

A security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).

The PPSA includes most forms of tangible and intangible property owned by any type of legal entity including money, goods, motor vehicles, hire purchase agreements, retention of title and long term leases.

The PPSA excludes dealings in land, fixtures or “real property”, including matters relating to the sale and ownership of land and the buildings attached to the land.

Land includes more than simply real property. Items classified as assets for capital gains tax purposes, if attached to land, will also be included.

Under the PPSA an item is considered a fixture when it is permanently affixed to land in order to improve the land or the buildings on the land. The purpose for which an item is affixed to the land is determined objectively not by the intention of the party.

The PPSA provides that purchase of personal domestic or household property such as carpets, light fittings and white goods valued less than \$5,000.00 will be free from any security interest. The purchaser of the goods must intend to use to personal property for personal, domestic or household purposes.

A “profit á prendre” is related to land and can be protected by lodging a caveat. Hence, it will fall outside of the category of personal property as defined by the PPSA.

Examples of securities and transactions that are included in the PPSA:

1. fixed charge;
2. a floating charge;
3. a chattel mortgage;
4. a lease of tangible property;
5. an assignment; and
6. a transfer of title.



The PPSA indicates that a transfer of rights under a loan (including a real property mortgage loan) may be a "deemed" security interest under the PPSA. This means that a financing statement should be registered in respect of that security interest.

The PPSA Regulations provide that the PPSA applies to a "mortgage-backed security" and to a real property mortgage loan if transferred to a person in connection with the issue by the person of a mortgage-backed security.

Legal advice must be sought when dealing with commercial property transactions as they will be affected by the PPSA with respect to acquiring and leasing.

The complexities in the general registration requirements of the PPSA may ultimately lead to one party creating a superior interest in preference to purchaser or landlord.

Contracts for Sale

Under a contract for sale, many issues relating to the specific registration requirements under the PPSA must be considered. For example, a purchase of real property will generally include the purchase of other property such as equipment, furniture and other chattels.

Purchasers of real property should ensure they explore the Personal Properties Securities Register (PPSR) to discover any interests which may have been registered.

The PPSA excludes security interest relating to deposits, where there is a "connection with an interest in land". It is unclear whether this connection includes a contract of sale of land and personal property.

However, where the PPSA applies, the purchaser's deposit (which will be held on trust by the vendor) will not take a priority security interest over a "prior" registered security interest, despite being registered in accordance to the timeframes provided in the PPSA.

Deposits

Generally, under a contract of sale, the deposit by the purchaser will be paid to a third party stakeholder and where this occurs, a security interest does not arise in relation to the deposit. In these instances, most deposits paid under a contract of sale do not apply to the PPSA.

Options

A call option is normally paid to the person granting the option, (the grantor") being the vendor of the option. Normally a security interest does not arise in relation to the option fee, and as such it does not apply to the PPSA.



In a situation where the purchaser and the grantor of the option agree that the option fee is to be applied towards a deposit and in the event that the option is exercised, similar consideration apply to the deposit and the to option fee.

A purchaser should include the following as part of their normal due diligence when considering a contract of sale:

1. the risks associated with any security interest that should be registered on the PPSR , but has not been registered;
2. identify which security interest is required to be transferred to the purchaser at settlement; and
3. consider any items that are registered against the vendor which are required to be discharged upon the property being sold.

As a result of the PPSA, the process of a vendor providing ASIC form 312 is no longer possible. A purchaser requesting a release of discharged of a relevant security interest may request an undertaking from a secured party to lodge a discharge on the PPSR.

There is currently no prescribed form for such a release of a security interest. Certain groups have developed models that a purchaser may consider obtaining for the release of the security interest.

The purchaser needs to consider that extinguishment rules may also apply in certain situations.

Due to the PPSR being so complex in nature and the repercussions involved for registering a security interest incorrectly, legal advice is highly recommended prior to any property sale and/or registrations of security interests.

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