

THE KEYS TO PROPERTY

In the April 2011 *LIJ* the LPLC highlighted the importance of the *Personal Property Securities Act 2009 (Cth)*, which will operate from October 2011. There are some key concepts in the Act that all practitioners need to understand.

Key concepts – collateral

The *Personal Property Securities Act 2009 (Cth)* (“the Act”) applies to almost all personal property, i.e. any property other than land. It applies to tangible property as well as intangible property (including intellectual property, contractual rights, book debts, business inventory and company shares).

There are some types of rights in personal property to which the Act does not apply. These include liens (including solicitors’ liens), water rights and various state-based statutory rights or licences.

Personal property is known as “collateral” if a security interest is attached to it.

Special rules apply to “property that may or must be described by serial number” (“serial numbered goods”). The regulations define such property to be:

- motor vehicles;
- watercraft;
- aircraft; and
- certain IP rights.

• a lease of goods (whether or not a PPS lease). The Act clearly favours a functional approach. The substance of a transaction is all-important. The form of the transaction or the identity of the person who has title is irrelevant.

In addition, certain transactions are deemed by the Act to give rise to a security interest regardless of whether the transaction in substance secures payment or performance of an obligation. These transactions include, most notably:

- a commercial consignment; and
- a PPS lease.

The concept of a “PPS lease” is important and provides a significant extension to the operation of the Act. The necessary components are:

- It covers both leases and bailments.
- Generally, the lease or bailment must be for more than one year (including options to renew). Alternatively, if the lessee or bailee retains “substantially uninterrupted

the commercial interests of the lessor for the goods to be out on lease for as long as possible. Unless such businesses adjust their terms of trade and business processes and/or register security interests, they are at risk of having a deemed but unperfected security interest (as a lessor under a PPS lease) and could lose their property entirely if a lessee becomes insolvent.

Key concepts – secured party and grantor

Whenever there is a security interest, there is a “grantor” and a “secured party”.

In some transactions the identity of each of these parties is intuitive and straightforward. For example, when a bank lends money to a borrower and the borrower provides some security for the loan, the borrower is the “grantor” and the bank is the “secured party”.

However, in other transactions the identity of these parties is counter-intuitive and can be challenging for lawyers.

For example, when a supplier sells goods on the basis of a retention of title clause, it is the customer who is the grantor of a security interest and the supplier who is the secured party.

For anyone who is used to traditional notions of legal title it can be difficult to accept that a customer who has no title to goods can nevertheless be the “grantor” of a “security interest” to a supplier who has never given away title. However, that is how the Act operates and, challenging though it may be, it is something that all lawyers need to understand and accept.

Similarly, when a lessor or bailor provides goods on lease or bailment to a lessee or bailee, the lessee or bailee is the “grantor” of a “security interest” to the lessor or bailor. It does not matter that the lessor or bailor is at all times the owner of the goods.

Further information

For further information, see the bulletin section of the LPLC website (www.lplc.com.au). ●

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Key concepts – security interest

There are two ways for a “secured party” to obtain a “security interest” over collateral, either by agreement or simply because the Act says so.

A security interest will arise if a transaction provides for an interest in personal property that, in substance, secures payment or performance of an obligation.

Obviously a charge or chattel mortgage creates a security interest. However, the Act specifies other transactions that may give rise to a security interest including, most notably:

- a conditional sale agreement (including an agreement to sell subject to retention of title);
- a hire purchase agreement;
- a consignment of goods; and

possession” of the goods for one year or more, it will be a PPS lease regardless of what the terms say.

- For serial numbered goods, the lease or bailment (including options to renew) need only be 90 days. Alternatively, if the lessee or bailee retains “substantially uninterrupted possession” of the goods for 90 days or more, it will be a PPS lease.
- If the lease or bailment is for an indefinite term it will be a PPS lease.
- The lessor or bailor must be engaged in the business of regularly leasing or bailing goods.
- For bailments, the bailee must provide value. Accordingly a purely gratuitous loan of goods will not be caught. Many businesses that lease goods do so for an indefinite term. After all, it is generally in