



Client Newsletter

Government Leasing Transactions: The Personal Property Securities Act 2009

June 2012

Introduction

If you work with government leases you need to be aware that the *Personal Property Securities Act 2009* (Cth) (**Act**) that came into effect on 30 January 2012 may affect them.

In this newsletter we explain how the Act will typically impact on government leases and the security interest issues that you need to be mindful of when negotiating government leases.

National regime for registration of security interests

The Act creates a new national regime governing security interests in *personal property*. In addition to physical items like motor vehicles, consumer goods, plant or equipment, personal property also includes 'intangible' property such as intellectual property, contract rights and company shares, but does not include land or any buildings or fixtures attached to land.

The Act creates the Personal Property Securities Register (**Register**) which is a single, national register for the registration of personal property security interests throughout Australia.

The Register replaces existing security registers such as the Vehicle Securities Register previously operated by VicRoads and the Register of Company Charges operated by ASIC. Data from all these previous registers around Australia has been 'migrated' to the new Register.

Summary

The Act applies to security interests in personal property and will affect government leases in a number of ways. For example:

It will affect a government landlord's ability to deal with any abandoned goods left at the leased premises by the tenant.

A lease generally should not allow a tenant's fitout to be left at the end of the lease if searches of the Register show another party (eg a bank) has a registered interest in those goods.

If a government landlord leases personal property in addition to the premises (eg fitout items, plant or equipment), it should register its interest in those items on the Register.

Benefits of registration

Registration of a landlord's security interest in personal property has the following important benefits:

- it prevents the landlord as a secured party from losing its priority against any other secured party with a competing interest in the same personal property; and
- it ensures that the landlord's security interest will exist despite any bankruptcy or insolvency of the tenant.

Impact on government leasing transactions

The Act will apply to leasing arrangements to the extent that a lease or a related document creates an interest in personal property. An example of this is where government provides funding for the construction of a building on Crown land that is leased, and the funding agreement with the tenant includes a provision that entitles government to take security over the assets to be constructed on the land. In this instance, the government party can have a security interest in plant, equipment and any fittings of value used by the tenant in its business. The interest can be registered as further security for the performance of the tenant's obligations under the agreement and the lease.

Abandoned goods

A lease will usually have a clause which allows the landlord to sell any property left at the premises by the tenant at the end of the lease. This is known as an 'abandonment clause'. However, the landlord's right to deal with the abandoned goods may be affected by the interest of a third party which may have a registered interest in the tenant's assets (eg the tenant's bank). If goods or equipment have been abandoned by a tenant, a government landlord should search the Register before attempting to sell these items. A search of the Register would identify the holders of any security interest in these goods or equipment.

An abandonment clause is unlikely to create a security interest in favour of a landlord unless it expressly secures the performance of the tenant's obligations under the lease. Accordingly, an abandonment clause should be clearly drafted to allow a landlord to sell any property left by the tenant and to use the proceeds of sale to meet any of the tenant's unfulfilled obligations under the lease.

Retaining the tenant's fit out

Some leases have a clause allowing the tenant's fit out to remain at the premises at the expiry of the lease if the tenant elects not to remove it.

Under such a clause, the landlord takes ownership of the tenant's fit out and the premises can be re-let with the fit out included.

Before agreeing to such an arrangement when negotiating a lease, a government landlord should search the Register to determine if a third party has a registered interest in the assets of the tenant (eg. the tenant's bank). If the search indicates for example that a financier holds a fixed and floating charge over the tenant's assets, the lease should require the tenant to remove its fit out at the end of the lease.

If a government landlord elects to take control of a tenant's fit out at the end of a lease, the government party should register its interest in those property items before re-letting the premises and handing over possession of these items to a new tenant. Care needs to be taken in the drafting of the interest to be created to ensure that it can be registered in the Register.

Security deposits, bank guarantees or personal guarantees provided by the tenant

When a government landlord receives a security deposit from the tenant which it holds on trust, it is possible to register a security interest in relation to the deposit. The security deposit secures the tenant's obligations and creates a security interest that can be registered on the Register.

However, the Act does not apply to bank guarantees which are excluded because they only create a right to payment. As a result, a bank guarantee provided by a tenant does not constitute a security interest in favour of the landlord. Therefore, a government party would not be able to register a security interest on the basis of a bank guarantee provided by a tenant.

Similarly, a director's guarantee provided by a tenant does not create a security interest in favour of a landlord unless the guarantee includes a clause which specifically creates an interest in some or all of the guarantor's personal property.

Assignments and subleases

A security interest under or in connection with a lease that has been registered by a landlord may need to be re-registered following an assignment of the lease or if the tenant grants a sublease.

This is because a landlord's security interest may not survive an assignment or sublease if this results in a change in possession of any personal property leased with the premises.

Leases of premises and personal property

Where a landlord leases personal property to a tenant in addition to the premises, the landlord's interest in that personal property will be a potential security interest under the Act. Even though the landlord is the legal owner, it should register its security interest in these items in case a third party, such as the tenant's bank, registers an interest in any of these items.

If the landlord fails to take this step, and the tenant becomes insolvent, ownership of the landlord's personal property could pass to a creditor with a registered security interest.

The leasing of personal property in addition to the premises is less likely to occur under a government leasing transaction. This practice will be more common in leases between a private landlord and tenant (eg. where a shopping centre owner provides a fitout to a tenant as a lease incentive). However, if a government party does lease personal property such as fit out items, plant or equipment with any premises, it should register its interest in those items.

How VGSO can assist

The Act is revolutionary and introduces a new scheme for registration of security interests, using many new concepts like 'perfected' and 'unperfected' interests.

We can assist you in understanding these new arrangements and whether your government leasing transactions are impacted by the Act.

We can also advise you on whether your lease documents create a security interest in personal property that can be registered on the Register.

We can also explain how the Register can be searched to find competing interest holders like banks which may have an interest in a tenant's personal property and assets.

Further information

For further information or legal advice, please contact:

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