

Article Information

Authors: Kara Pennisi, Andrew MacGillivray, Marya Atmeh

Service: Personal Property Securities

Amendments to the definition of a “PPS Lease” and the effect on current and future hire agreements

On 20 May 2017, the Personal Property Securities Amendment (PPS Leases) Act 2017 (Cth) was passed into law. This amendment to the Personal Property Securities Act 2009 (Cth) (PPS Act) extends the period of time before a lease or bailment is considered to be a “PPS Lease” from 1 year to 2 years (Amendment)

Background

Section 13 of the PPS Act governs when an operating lease or bailment is deemed to be a “PPS Lease”, and therefore a registrable security interest.

If an owner/lessor of personal property does not register their interest in the leased property, they then run the risk of losing title to their property.

Upon the introduction of the PPS Act, this created a significant administrative hurdle on short-term hire companies to maintain and monitor registrations over their hired equipment. The hire industry have raised a number of concerns over these deeming provisions.

The Amendment seeks to relieve the administrative hurdle for short-term hires by extending the period of time before a lease is considered to be a PPS Lease.

What has changed?

The Amendment only affects the operation of section 13(1) of the PPS Act which defines a “PPS Lease”.

Extended period before PPS Lease is deemed

The PPS Act now captures a lease or bailment of goods:

- for a term of more than 2 years;
- for an initial term of less than 2 years, if the entire term of the lease might exceed 2 years following an automatic renewal or the parties exercising an option to renew the term (therefore making this subject to the terms of the contract); or
- for a term of up to 2 years or an indefinite term where the lessee retains uninterrupted possession of the leased or bailed property for a period of more than 2 years after the day the property was first acquired.

Repeal of section 13(1)(b)

The Amendment also repealed section 13(1)(b) of the PPS Act which had provided:

“A PPS lease means a lease or bailment of goods: [...]

(b) for an indefinite term (even if the lease or bailment is determinable by any party within a year of entering into the lease or bailment);”

This section was flagged as an issue within the short-term hire industry, because the effect was that a fixed term hire of 2 months was unlikely to be a PPS Lease, whereas a hire expressed to be for an indefinite period, which in fact only ran for 2

months, would be considered a PPS Lease.

With these amendments, a hire for an indefinite term will only be considered to be a PPS Lease once the lessee's possession of the hired equipment exceeds 2 years.

How will the changes affect our existing and future leases?

- The Amendment only applies to operating leases or bailments entered into on or after 20 May 2017. Leases entered into prior to this date remain subject to the earlier wording of section 13(1) of the PPS Act as it was prior to 20 May 2017.
- For operating leases that do not meet the definition of a "PPS Lease", owners/lessors may not need to register their interest on the Personal Property Securities Register, but as a risk mitigation measure may decide to register in any case.
Hirer's should bear in mind that even where no security interest arises under the PPS Act, owners/lessors may still find that equipment which was in the possession of their customer may be able to be retained by an insolvency practitioner until such time as owners/lessors can prove their title or right to possession of the equipment (in the event of an insolvency).
Steps that owners/lessors can take in this regard include keeping a record of title documents and invoices, placing an identifying mark on the hired equipment (e.g. ownership plates), and identifying the hired goods in the hire contract.
Owners/lessors should also consider their rights to terminate and recover the equipment in circumstances of the customer's breach.
- These amendments do not affect finance leases or other arrangements that remain registrable security interests on the basis that they "*in substance, secure payment or performance of an obligation*".

Should you require further information or assistance with regards to this article please feel free to contact the authors or our Personal Property Securities team who can assist you further.