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**Wake up Australia- become PPSA compliant and register your interests!  
A message to owners of commercial assets who allow others to have possession of their property**

When will owners of plant and equipment and other commercial assets who allow others to hold or use their property realize they need to do a PPSR registration if they want to protect themselves? Despite repeated warnings about the risk of not registering and a number of court decisions that have made the situation clear, it appears that the message that owners need to register their security interests on the PPSR is still not getting through.

The recent WA Supreme Court decision of **Flown Pty Ltd v Goldrange Pty Ltd** ((2016 WASC 419 has once again has highlighted the problem. The case involved a commercial lease situation and certain plant and equipment that was “owned” by the lessor that was on the leased premises. The lessor had earlier provided a loan of \$460k to the Lessee for the purchase of the plant and equipment that was secured by the plant and equipment and guaranteed by the directors of the lessee.

In the Flown case, the administrator succeeded and the lessor lost its plant and equipment even though the lessor had served a notice of termination of lease and had tried unsuccessfully to re enter and take possession of the premises (and had even putting a termination notice on the tenant’s door) before the administrator was appointed. The lessor claimed it had “constructive possession” of the plant and equipment. The Court found, however, that unless the lessor had physical possession of the assets at the time of the administrator’s appointment or had registered its interest on the PPSR, it was not able to defeat the liquidator’s claim.

The Court held that lessor could have “perfected” its interest in the plant and equipment by registering its security interest on the PPSR. Because the lessor had not done this either after the execution of the loan agreement or on execution of the lease, its security interest over the assets was unperfected and pursuant to s 267 of the PPSA the assets vested in the administrator on his appointment. The lessor ended up simply as an unsecured creditor in the lessee’s administration.

The case also dealt with the issue of chattels and fixtures. The court stated that one of the tests of whether a chattel that has to some extent has been fixed to land is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for some substantial period. In this case the documents were silent on the parties’ intention and the court held that none of the assets in dispute - such as floor trolleys benches and meat display cabinets- were fixtures- all of these could be easily removed and had not become part of the property. The issue could have easily been resolved in favor of the lessor had the lessor spelt out its intention in the lease.

It should be noted that the above principles apply whether the transaction is a commercial lease involving plant and equipment and fittings, the sale of goods on a retention of title basis or the consignment, hire or storage of goods with a third party.

So if you own assets and you allow others to have physical possession of them, you need to make sure that you do three things: Firstly, you need to spell out your “security interest” rights under the PPSA in the relevant commercial documents.. Secondly, you need to make clear your intentions regarding whether the relevant collateral is to be a fixture or a chattel. Most importantly, however, you also need to register your security interest in your property on the PPSR.

If you don't do these things then, like the lessor in the Flown case, if the person or company who is possession of your property gets into financial difficulties, you may lose your property to their administrator or liquidator and simply end up as one of their unsecured creditors.

The law in Australia is clear on the rights and obligations of owners of plant and equipment and other personal assets. It continues to amaze me that those who should know better (and that includes not only lessors, suppliers and consignees of personal property but also their legal, accounting and real estate advisers) simply do not do what they need to do to protect themselves and their clients from losing their property. They simply need to get their commercial documents PPSA compliant and to register their security interests on the PPSR.

How many more Flown cases need to occur before the penny finally drops?

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**PS.** If you have any queries regarding the PPSA or wish to check whether your commercial documents are PPSA compliant, contact [Philip@PSlaw.com.au](mailto:Philip@PSlaw.com.au) or phone 0412578240 to discuss you or your clients' particular needs.