

COVID-19: (AUSTRALIA) HOW POOR PPSA HYGIENE RISKS LANDLORD EXPOSURE IN CORPORATE TENANT INSOLVENCIES

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**This information is accurate as of 10.00 am Monday 30 March 2020 and is subject to change as this situation evolves.*

Imagine for a moment...

...that you are the landlord of some leased premises, but you've just received some very bad news.

One of your better tenants went into voluntary administration, the receiver quickly came next and the liquidation is now certain to follow. Of course, you know you will need to find a new tenant, and hopefully quite soon.

Despite this, at least you have the comforts of knowing that you:

- still hold the insolvent current tenant's AUD50,000 cash security bond
- have the premises fully fitted out with equipment you own (so this will help you in the re-leasing).

But, sadly you could be very wrong about the existence of both these comforts.

How could that be?

Unfortunately, if the landlord in this example had inadvertently or unknowingly failed to register its landlord's interests in the Personal Property Security Register (PPSR), then both the AUD50,000 bond and the un-fixed parts of any landlord owned fitout are at serious risk of their ownership transferring automatically to the insolvent tenant immediately upon and because of the insolvent tenant going into voluntary administration.

And it can really happen just that quickly, and without any warning.

The same result could just as easily have occurred if the tenant in our example had first gone into either receivership or liquidation.

Unfortunately, our example above is only illustrative of some of the other many and varied circumstances in which we have found landlords' potentially Personal Property Security (PPS) registrable interests within commercial leases.

It is not uncommon to find landlords have relevant PPS registrable interests literally buried and hiding within wordy lease documents.

Some examples of such landlords' interests that can be 'lost' if not properly PPS registered can also include:

- rights under provisions that allow the landlord to sell any abandoned tenants goods to defray tenant arrears
- PPS interests that whilst initially registered against a tenant have nevertheless been omitted to be re-registered against an assignee following a lease assignment.

There are of course potentially other examples, and this all depends on the special circumstances that may apply to any given lease.

If a landlord has concerns, can anything be done?

Yes, it may not be too late for landlord's to benefit from taking some action now.

We hope this will be a timely and helpful reminder for landlords to keep up good PPSA registration hygiene as the risk of tenant insolvencies continues to grow from COVID-19 impacts.

We expect most landlords have long had their PPS registration houses in order, but for those who don't (or have slipped), there are potentially things that can still be done to reduce the risk.

Because the PPS system includes fixing latest dates for registration to occur, a failure to register by the latest time can result in the potential priority of the late registering party's interest's being trumped by the competing PPS registrable interests of other parties if those are registered in time.

Even so, it typically still remains possible to register late a landlord's PPS registrable interest.

This area of competing PPS priorities can become complex and it is beyond the scope of this Legal Insight to cover the discussion fully here. But, it suffices to say that the benefits of registration should not be overlooked or discounted as in many circumstances the risks of even late registration can still be mitigated by registration, albeit late.

The pathway to assess the risks and benefits for remediating for late or no PPS registration typically involves the following steps:

1. Identify which of the landlord's PPS registrable interests have not been duly registered (meaning they are presently not protected by registration)
2. Assess the value and importance of the landlord's PPS registrable interests
3. Identify which PPS registrable interests will be competing for priority
4. Weigh up the costs and risks equation between PPS registering late or not at all
5. Register the landlord's relevant PPS interests (including late if justified).

The simple message for landlords is:

- don't be caught out thinking you have enforceable rights when you may stand to lose them ie don't be wearing the Emperor Landlord's new clothes
- if a landlord has any concerns, our first recommendation is to seek professional advice.

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