

Dealing with the Construction Contractors – Implications of the Personal Property Securities Act 2009

The Personal Property Securities Act 2009 (“Act”) fundamentally changed the system for creation and enforcement of security interests in relation to personal property. Although the Act does not apply to interests in real estate, it does apply to interests in equipment and materials on construction sites. As a result, it has important implications for developers and contractors and for owners corporations and other property owners dealing with them. Failure to get this right can have serious consequences, particularly if another party involved in the works goes into liquidation.

The Act is not about ownership or possession. It is about who has the highest priority security, which will generally be a registered interest. There are even situations, known as “PPS Leases”, in which simply allowing another party possession of your property can risk loss of the property if the arrangement is not documented and registered.

The prudent approach is, in all cases, to enter into a written agreement meeting the requirements of the Act and to register the interest created by the agreement with the Personal Property Securities Register (“PPSR”). This is done by lodging a “financing statement”, which is simple and inexpensive and can be done online.

For an owners corporation or other property owner, the main issue will concern the “take out” rights typically contained in the construction contract. This is the right of the owner, in the case of default by the contractor, to take the work out of the hands of the contractor and use the equipment and materials of the contractor to complete the work. This right is covered by the Act and to be effective must be documented and registered. Many owners will wish to go further and require the contractor to agree not to register or permit others to register competing interests.

Owners may also have issues with other party’s interests in equipment and materials on the site, such as retention of title interests suppliers may have in relation to equipment and materials, which may be at odds with the owner’s rights.

Given the complexity of these issues, an owners corporation or other property owner proposing to engage a contractor to carry out works should take legal advice to ensure that their interests are properly protected.

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