

# ELLEMWARREN LAWYERS

## PPSA DECISION – HIRE COMPANY LOSES TO RECEIVER

In June 2013, an Australian court confirmed the fears of those in the hire industry with imperfect documentation and procedures<sup>1</sup>.

Those in the vehicle-equipment hire and finance industries, and construction and resources industries, should be aware that the *Personal Property Securities Act 2009* (PPSA) created a legal concept new to Australia called a “PPS Lease”. As the name suggests, the “PPS Lease” concept applies to leases, however, it also often includes a licence, bailment, hire-purchase, consignment and/or retention of title arrangement; in fact, it covers most occasions when an asset is in the possession of a non-owner.

If the non-owner has possession of the asset for 12+ months (or 90+ days for serial numbered assets, e.g. vehicles), or is entitled to possession for an indefinite period (e.g. under a long or a renewing hire arrangement), and the true ownership of the asset is not registered properly as a security interest then receivers, liquidators, bankruptcy trustees and some secured creditors (e.g. financiers with broad-based security – fixed and floating charges in the pre-PPSA terminology) can ignore the true ownership, and seize and sell the assets.

### The Dispute

Queensland Excavation Services (QES) leased excavators and loaders to Maiden Civil (Maiden), which got into financial difficulty during the lease. This resulted in Maiden granting security over all of its assets to Fast Financial Solutions (Fast). Fast perfected its security interest by registration under the PPSA, whereas QES had not registered its interests plant.

Fast appointed receivers to Maiden. Meanwhile, QES terminated its leases to Maiden and asserted primary rights as owners. Fast’s receivers also asserted primary rights to the equipment as the sole perfected security interest holder. There

were no written leases between QES and Maiden and QES periodically invoiced Maiden for the use of the equipment.

### The Outcome

The receivers were entitled to possession of the excavators and loaders. QES and Fast each had security interests attaching to the equipment. The dispute was a PPSA priority dispute, not an ownership dispute. Since the QES lease was not perfected by PPS registration and the Fast lease was, the solution from the Court was relatively simple – despite some transitional issues, the Fast perfected security interest had priority over the QES unperfected interest.

### Was this expected?

In short, “yes”, this was a predictable outcome. The QES leases were entered into before 31 January 2013, making them transitional security leases. Most transitional leases were perfected without registration until 31 January 2014, however in this case they were not as they were capable of registration (and had not been registered) under applicable N.T. legislation.

Hire companies and their financiers need to be particularly wary. We recommend against reliance on “wet” hire distinctions, and all PPSA users should be aware of the strict time limits required to preserve a security interest. In many cases, it will be necessary to register a hire company’s ownership interest in an asset before possession passes to the hirer.

**For further information about the PPSA, or other security issues, please contact:**

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<sup>1</sup> *In the matter of Maiden Civil (P&E) Pty Ltd; Queensland Excavation Services Pty Ltd & Ors* [2013] NSWSC 852.