



CTI Lawyers Series: Session 8

Basic Concepts and Application of
the *Personal Property Security Act*
2009 (Cth)



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Webinar Agenda

1. Key Concepts
2. Security Interest
3. PPS Lease
4. Bailment in PPSA Context
5. Secured Party or Grantor
6. Purchase Money Security Interest
7. Collateral
8. Importance of PPSA
9. Re Maiden Civil Case
10. Examples of Typical Transactions
11. Case Studies

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1. Key Concepts



Personal Property Security Act 2009

- The PPSA was enacted in 2009 and became operational in October 2011. The PPSA established a single national online register of security interests in personal property.
- Key Terms
 - Personal Property
 - Security Interest

Key Concepts

Personal Property

- All property other than land
- Cars, equipment, any goods, products, cables, tools, plant
- Both tangible and intangible
- Debts, contractual rights, company shares
- Excludes any FIXTURES





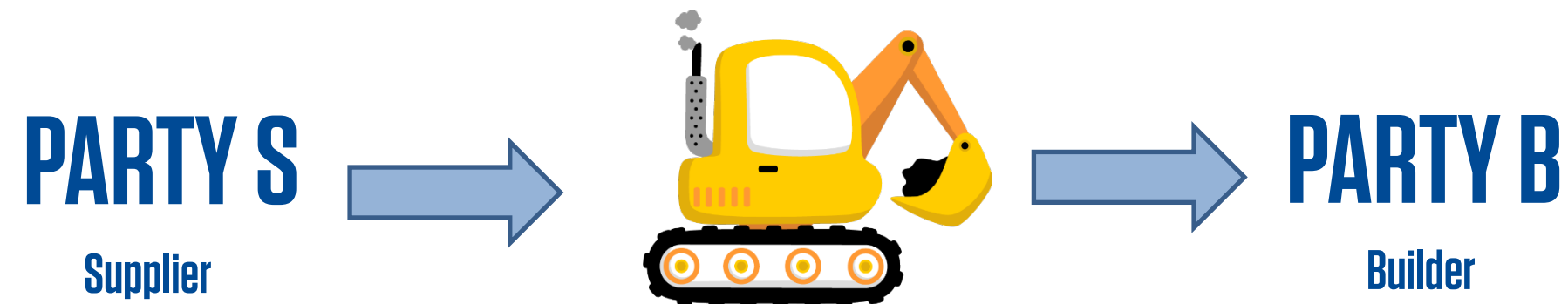
Are you Protected under the PPSA?

How can we ensure that we are adequately protected under the PPSA?

REGISTER YOUR SECURITY INTERESTS ON THE PERSONAL PROPERTY SECURITIES REGISTER!

Registering your security interest on the PPSR is the most effective way you can ensure protection of your rights to the property.

Example 1: Party S supplies an excavator to Party B and Party B becomes insolvent



Let's say that PARTY S has not registered their security interests in the excavator on the PPSR.
Who is entitled to the property if PARTY B becomes insolvent?

In the case that PARTY B becomes insolvent, the excavator (property) will belong to PARTY B.

The only way that PARTY S can ensure it has protected its rights to recover the excavator should PARTY B become insolvent is to register on the PPSR (Purchase Money Security Interest).



Example 2: Party S sells property to Party B with a Retention of Title Agreement



Let's say that PARTY S has not registered their security interests in the excavator on the PPSR but has a Retention of Title clause in the sale agreement.

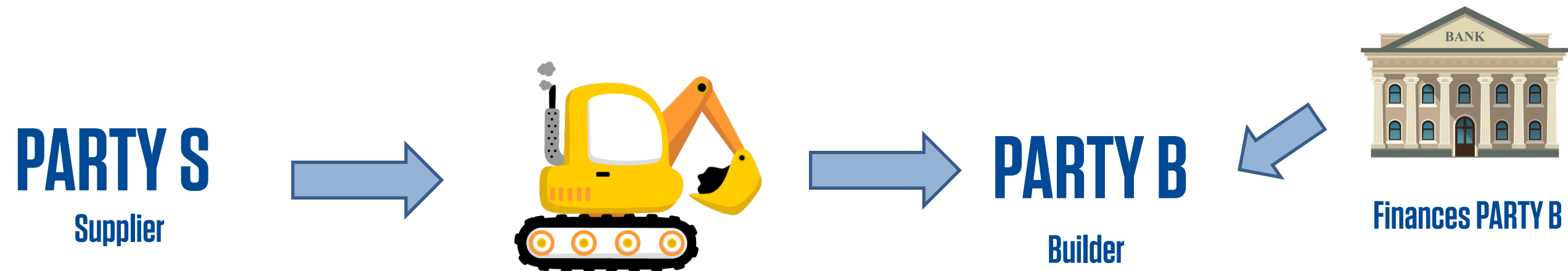
Who is entitled to the property if PARTY B becomes insolvent?

PARTY B WILL STILL BE ENTITLED TO THE PROPERTY.

It is important to note that a Retention of Title clause has very limited effect without the party registering their interests on the PPSR.



Example 3: Party S sells property to Party B who is financed by a bank



What if a bank provides financial assistance to PARTY B?

Should the bank take security over PARTY B's assets (All Present & After Acquired Property Interest) for the money that the bank has contributed, and PARTY B becomes insolvent, the bank will recover the property.

HOWEVER, should PARTY S have registered their security interest under the PPSR, they will be able to recover the property, not the bank.



2. Security Interest



Security Interest

Section 12 of the PPSA definition:

An interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation

Security interest also includes:

- Interest of transferee – transfer of account
- Interest of consignor – goods on consignment commercial agreement
- Interest of lessor or bailor of goods under PPS Lease



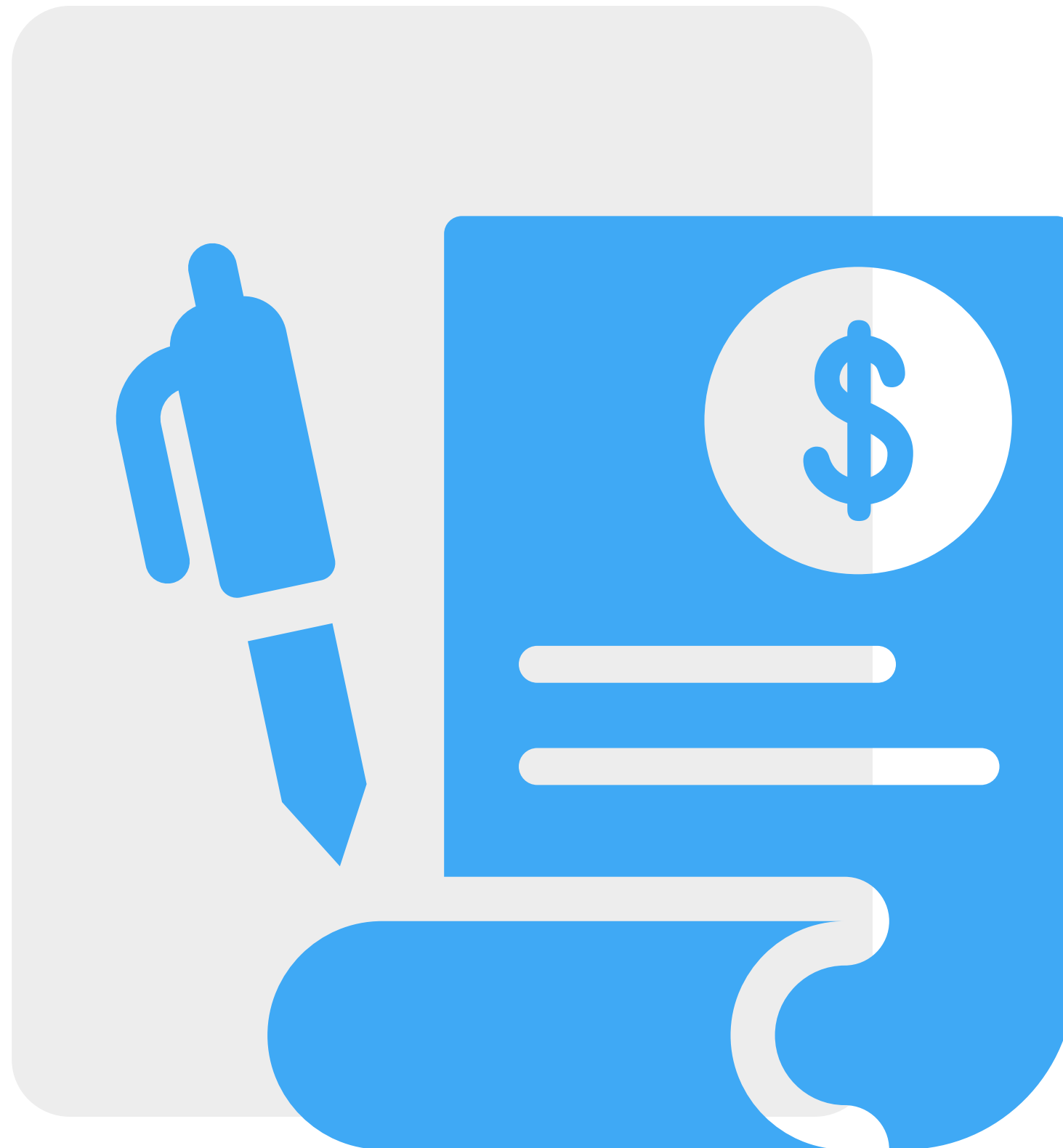
3. PPS Lease



PPS Lease

S 13- PPS Lease – means a lease or bailment of goods:

- For a term of more than 2 years; or
- For a term of up to 2 years that is automatically renewable at the option of one of the parties; or
- For a term of up to 2 years, or a lease for an indefinite term, and lessor/bailee retains uninterrupted possession for more than 2 years.



4. Bailment in PPSA Context

Bailment

Bailment – Definition

- Delivery of personal property or goods to a third party (Bailee) without transfer of ownership,
- By Agreement / Duty of Care
- For specified purpose
- Gratuitous / Payment
- Returned on completion



5. Secured Party or Grantor?



Secured Party or Grantor?

Secured Party

- Holder of security interest for own benefit or as trustee

Grantor

- Person who has the interest in personal property
- to which security interest is attached
- Person who receives goods on consignment
- Lessee under a PPS Lease
- Transferor of an account





6. Purchase Money Security Interest



Purchase Money Security Interest

Purchase Money Security Interest (PMSIs)

- Special type of security interest which provides the holder with “super priority” over other security interests, but must be registered in time

S 14- PMSI includes any of the following:

- A security interest taken in collateral, to extent that it secures all or part of purchase price;
- A security interest taken in collateral by a person who gives value, to the extent that value is applied to acquire those rights;
- The interest of a lessor or bailor of goods under a PPS lease;
- The interest of a consigner who delivers goods to a consignee under a commercial consignment.



7. Collateral



Collateral

Collateral is personal property to which security interest attach.

How personal property is described in PPSA

- Collateral type / Collateral Classes
 - Consumer – held by individual solely for private use
 - Commercial – held by company or sole trader for business use either solely or partly





Collateral

Broadly Four Collateral Classes for purpose of Registration in PPSR

- Tangible Property – property you can see or feel- includes motor vehicles and other goods
- General Property
- Intangible Property – property that you cannot see or feel but is not financial property
- Financial Property – financial instruments and documents such as cash and shares



8. Importance of PPSA



Why is PPSA important for me?

- Liquidation – possible loss of equipment
- Section 267(2) of PPSA provides that an unperfected (ie unregistered) security interest in personal property will vest in the grantor in the event of insolvency or appointment of an administrator.
- *Re Maiden Civil (P&E) Pty Ltd* [2013] NSWSC 852



9. Re Maiden Civil Case



Re Maiden Civil 2013

Facts

- Queensland Excavation Services (QES) leased two CAT excavators and a loader to Maiden
- No written agreement
- Maiden financed lease by loan from Fast Financial and granted security to Fast over all Maiden's property
- Fast Financial registered its security interest under PPSR
- Liquidation of Maiden – Dispute about ownership of vehicles



Re Maiden Civil 2013

Decision

- Fast had priority over QES legal ownership, because Fast perfected its security interest by registration under the PPSR



10. Examples of Typical Transactions





E.g. Contracts for Supply & Install

- Retention of Title in equipment until payment
 - Substations
 - Cable
 - Switchboards
- Remember PPSA does not apply to fixtures/real property
- Once any equipment/cable/goods have been installed and become fixed to land it is likely that the PPSA may not provide any protection

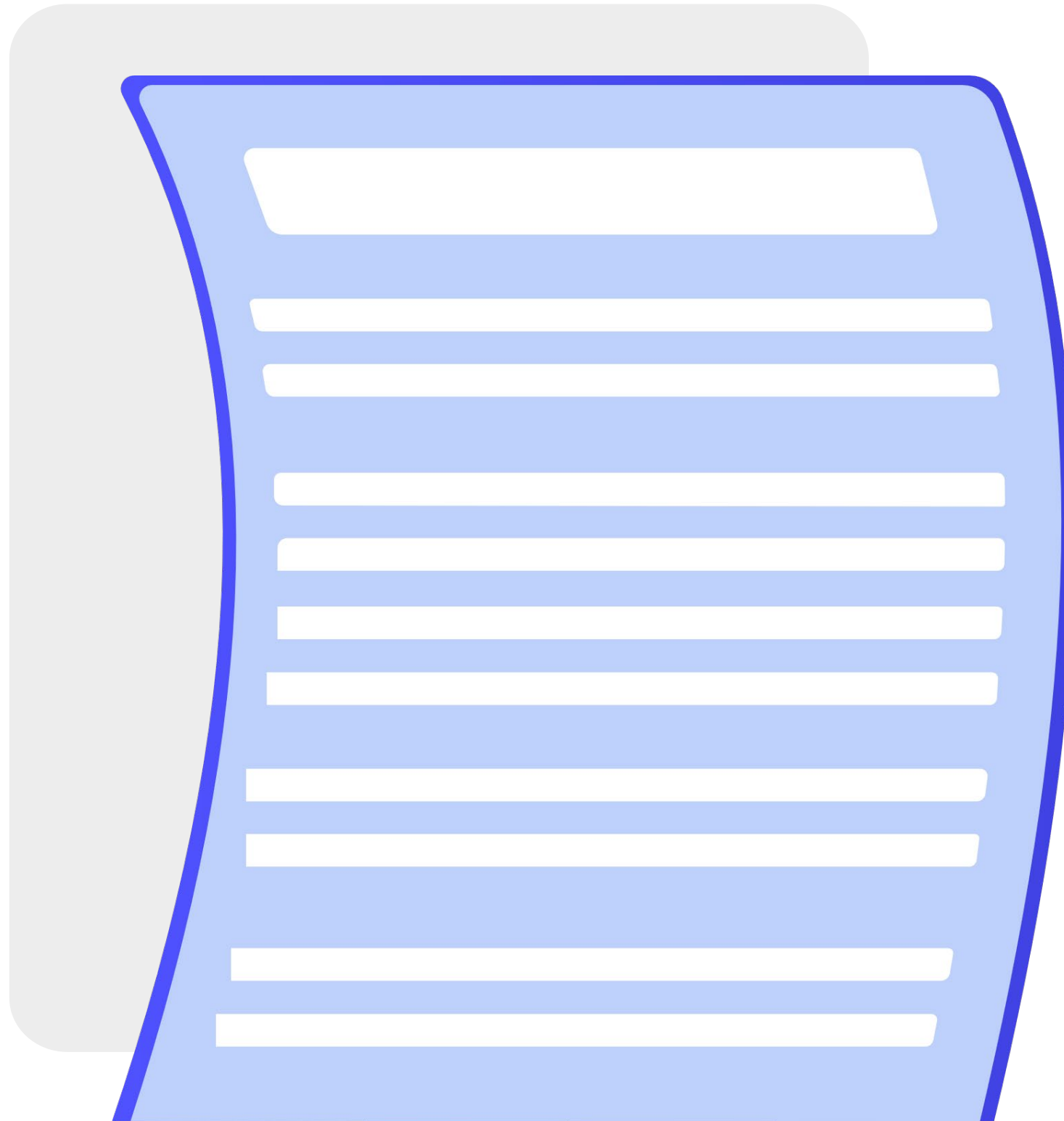


E.g. Fixtures or Chattels

Forge Group Power P/L v General Electric [2016] NSWSC 52

Facts

- Forge contract with Horizon power station at Port Hedland
- Forge rented/leased two Mobile Gas Turbine Generators from General Electric for a fixed term longer than 1 year – value - \$33 Million
- General Electric failed to register its security interest on PPSR
- Forge appointed administrators



11. Case Studies/ examples



Supply of materials - unincorporated

Supplier supplies materials to a contractor on a retention of title (ROT) basis.

Supplier registers this ROT interest on the PPSR as a PMSI before delivering the materials to the contractor.

Contractor fails to pay for the materials supplied.

Under the priority rules, the supplier would be able to recover possession of the materials not yet incorporated into the works.



Supply of materials – incorporated/ commingled

Developer enters into a contract with contractor to construct a building.

Contractor is responsible for sourcing materials. The developer has a security interest in all building materials in the possession of the contractor and registers that interest on the PPSR.

After the developer registers a security interest, the contractor's bank also registers a security interest over the contractor's property.

Contractor uses materials to make prefabricated building components which it stores at its yard.

Contractor defaults. The developer has priority over the bank as it registered its security interest first, even though the materials have not been incorporated into the building.



'Step in' rights

Contractor enters into a contract with a subcontractor. The contract contains a standard 'step in' clause.

The subcontractor also enters into a security arrangement with its financier (a bank) and provides the bank a security interest over all its current and future assets. The bank registers this interest on the PPSR.

The subcontractor places equipment on site and defaults under the contract.

Who is entitled to the equipment? The bank with a security interest or the contractor with a contractual step-in right?

Answer: the bank's interest will prevail



Q & A



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