

# HIRE AND RENTAL INDUSTRY ASSOCIATION

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## Personal Properties Securities Reform Update

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### **Introduction**

The *Personal Property Securities Act 2009 (Cth)* (PPSA) commences in May 2011. This Act will bring the different Commonwealth, State and Territory laws regarding personal property security (PPS) interests under one national system. From May 2011 there will be one national PPS law and one national PPS register.

This reform makes fundamental changes to the way in which securities are taken and enforced over property other than land. Significantly for those involved with the construction and hire industries the law affects 'retention of title' clauses and rights over temporary works and contractors' equipment.

Failure to register your security interests may result in a hire company being unable to recover its equipment in the event of insolvency of the hiring party.

### **NZ example of a failure to register a security interest**

#### Case:

*Graham and Gibson v Portacom New Zealand Limited, High Court, Auckland 2004*

#### Facts:

*NDG Pine Limited leased 5 portacoms (portable buildings) from Portacom between April 1998 and September 2002. The PPS Act came into force in New Zealand on 1 May 2002. On 28 May 2002 the Hong Kong and Shanghai Banking Corporation registered a general security interest in the assets of NDG. NDG was placed in receivership on 26 June 2003. Portacom had not at any stage registered its interest in the buildings.*

#### The Court determined:

- *The PPS Act applied*

- *The bank had registered its security under the Act and Portacom had not*
- *The bank's security had interest over Portacom's unregistered security interest*
- *The receiver had the power to sell the buildings for the benefit of the bank*

In short the registration of an interest in personal property will give the secured party priority in situations where interests compete such as in the Portacom case.

### **Some relevant terminology explained**

*Personal property* means property (including a licence) other than land, fixtures or certain rights granted by legislation. This includes:

- goods
- vehicles
- financial property
- agricultural property
- intangible property such as intellectual property and licences
- certain personal and/or contractual rights; and
- proceeds of personal property

*Grantor* is the person granting a security interest over personal property to another party. Grantors include those who receive property under a 'retention of title' arrangement or lease personal property from another party on a retention of title basis for an extended period (PPS lease).

*Collateral* is a personal property over which the security interest is attached

*Secured party* is the person who has a security interest in a grantor's collateral including a lessor of goods on a retention of title basis.

*Buyer* is anyone who buys or invests in some form of personal property. Buyers will use the PPS register to make sure that the property that they are buying does not have a security interest over it. For example if you buy a car that has money owing on it the car can be repossessed by the person who lent the money against it.

*Attachment* means that the grantor has rights in the collateral and the secured party gives value (such as delivery of goods) or the grantor does an act by which the security interest arises (such as entering a contract).

*Enforceability* of a security interest against a third party requires attachment and one of the following: possession, control or a signed security agreement.

*Perfection* is a means of describing the priority status of a security interest as there may be more than one security interest with different secured parties. Perfection of collateral (goods) requires attachment and one of the following: registration, or possession. For example possession of the goods by the secured party is sufficient to perfect the security interest.

### **What is a security interest?**

The PPSA basically takes an approach that regulates transactions that are not always thought of as creating security interests.

The following are typical examples of arrangements that are security interests:

- fixed and floating charges, mortgages and pledges;
- hire purchase agreements
- conditional sale agreements including agreements to sell subject to a retention of title;
- consignments;
- lease of tangible property (PPS lease).

A PPS lease is defined as a lease or bailment of goods for more than one year or an indefinite term, or 90 days for serial numbered goods. This does not include arrangements where the lessor is not regularly engaged in the business of leasing goods.

A PPS lease covers operating leases as well as finance leases. It includes the situation where equipment or goods like scaffolding or construction equipment are part of a service and the customer obtains possession of the equipment.

### **Examples of security interests in the construction industry**

The main areas that are common in contracts related to the construction industry that may fall within the scope of the PPSA are:

- Retention of title (Romalpa) clauses.  
These clauses are normally within procurement contracts and state that ownership does not pass to the customer until the price is paid.
- Contractor's rights over temporary works.  
Typically formwork and scaffolding left on a site where the title never passes to the principal.
- Principal's rights over construction plant on take out.  
Where the principal takes work out of the contractor's hands following default and seizes the contractor's plant and equipment to complete the work. This is often extended to the right to sell and use the proceeds to compensate the principle.

The important issue is that previous contract clauses that have provided protection of ownership in the past may now be overridden because the interest triggers the application of the PPSA and unless they have been registered the goods can be lost on insolvency or to other secured creditors.

### **The PPS register**

The new regime provides a national on-line system for the registration of security interests in personal property. It also provides rules for determining priority of security interests in a particular asset, enforceability of a security and how it can be enforced, and when a security interest will be extinguished.

The PPSA establishes an on-line register for the registration of security interests in personal property. Some security interests currently registered under existing Federal

or State registers that are being replaced by the new system will be migrated to the new national register.

### **Degree of protection**

The new system introduces the national system for the registration of security interests and default rules for determining priority.

There are three steps to complete before a security interest reaches the highest degree of protection:

- attachment,
- enforceability against third parties; and
- perfection.

### **Example**

A retention of title (Romalpa) clause that is not registered may still be enforceable against the 'grantor' (purchaser of the goods) as it is 'attached' when the goods are delivered. The problem is that mere 'attachment' does not make the clause enforceable against a third party such as a liquidator if the 'grantor' becomes insolvent. Where the clause has been 'perfected' by registration, enforcement against third parties is protected.

Under the default rules provided by the PPSA:

- perfected security interests have priority over unperfected security interests;
- priority between perfected interests is determined on a first-in-time basis;

A secured party can make a registration on the PPS register to protect their priority. Through registration of their security interest in the collateral, the secured party 'perfects' their security interest and can gain priority over later secured parties.

### **What should members do?**

When the PPSA was introduced in NZ parties needed more time than they thought to prepare for the reforms, therefore the industry needs to begin preparations for the PPSA regime to protect its interests and minimise the disruption to its businesses before it takes effect in May 2011.

Consideration should be given to:

- Planning the dimension of the task to review existing contracts to identify security interests that need to be registered such as PPS leases.
- Where necessary prepare new policies as to the requirements for transactions and documentation. For example it may be prudent to ensure that some leases are less than 1 year or, if not, attend to registration under the new regime.
- Redrafting agreements and charges
- Identifying assets that are affected.

### **Further information**

Complete details including current news related to the Personal Property Security Register is available on the following Government website: [www.ppsr.gov.au](http://www.ppsr.gov.au)