

## **Personal Property Securities Act 2009 (Cth) - A brief explanation of some key terms for the hire and rental industry**

### **1. Introduction**

This factsheet contains a brief explanation of some of the key terms that are used in the Personal Property Securities Act 2009 (Cth) (*"the PPSA"*) for those that are involved in the hire and rental industry.

Please note, however that this factsheet is a general guide only. You should seek your own legal advice about the matters raised in this factsheet. You should also note that each business has its own requirements and you should seek specific advice as to how PPSA applies to your particular circumstances and needs.

### **2. Key PPSA Terms and Definitions**

#### **Secured Party**

Is the person (usually the financier, the supplier or the company hiring out the goods or equipment) who takes or holds the security interest from the Grantor.

#### **Grantor**

The person (whether an individual, company or other entity) with an interest in personal property who grants a security interest over it in favour of another party. In a sale of goods on retention of title (**"ROT"**) terms, the customer is the Grantor. In hire and rental situations, the hirer and renter is the Grantor.

#### **Collateral**

The personal property over which the security interest is taken. In a sale of goods on ROT terms, it is the goods which become the collateral.

In hire and rental situations, the collateral is the equipment that is being hired or rented. Collateral is either commercial or consumer property.

It is classified into classes including: agriculture, all present and after acquired property, financial property, intangible property, motor vehicles, other goods, watercraft and aircraft.

#### **Security Agreement**

A *"security agreement"* is the written agreement that creates or evidences a security interest between a Grantor and a Secured Party. In hire and rental situations, the security agreement is usually contained in the Hire or Rental Terms and Conditions or other documents containing a description of the goods or the equipment being hired or rented.

The agreement must:

- i)** be signed by the Grantor; or
- ii)** be adopted or accepted by the Grantor; and
- iii)** contain a description of the Collateral; or
- iv)** contain a statement that the security interest is taken in all of the Grantor's present and after acquired property.

#### **Security Interest**

The PPSA defines *"a security interest"* as an interest in property 'provided for by a *transaction that, in substance, secures payment or performance of an obligation* (without regard to the form of the transaction or the identity of the person who has title to the property).' **(S.12 (1) PPSA)**

#### **Deemed Security Interests**

Under the PPSA some transactions are deemed to be security interests whether or not the *transaction creating them secures payment or performance of an obligation*. A PPS Lease is an example of such a transaction.

Other examples of deemed security interests include:

- i)** Transfers of accounts (accounts receivable);
- ii)** Chattel paper (eg a document evidencing a lease agreement); and
- iii)** Commercial consignments.

## PPS Lease

Only certain leases or bailments are “PPS Leases” under the PPSA. PPS leases include all leases that fit within the terms mentioned below whether or not they secure payment or performance of an obligation. To be a PPS Lease the lease or bailment of the goods and equipment must be:

- i)** for a term of more than one year ;
- ii)** for a term of more than 90 days where the property being leased may or must be described by serial number, usually motor vehicles and aircraft;
- iii)** for an indefinite period (even if either party can terminate in less than a year);
- iv)** for a term of less than one year but which is automatically renewable; or
- v)** renewable at the option of the parties if the total of all terms exceed 1 year.

### Notes:

- Option terms must be taken into account in determining whether the one year or 90 day threshold is exceeded.
- Even if the hire term is fixed for less than one year or 90 days, it may turn into a PPS Lease if those times are exceeded. It is the actual period of hire that matters. Therefore, if there is a chance that the term will end up being longer than one year or 90 days, you should register your interest BEFORE the Hirer obtains possession of the Equipment.
- The lessor or bailor must be regularly engaged in the business of leasing or bailing goods.
- For bailments, the bailee must provide value. Accordingly, a purely gratuitous loan of goods may not be covered.

## Serial Numbered Property

Refers to motor vehicles, watercraft, aircraft and certain IP rights (including designs, patents, plant breeder's rights, and trademarks).

### Notes:

- For the purposes of the PPSA, if the goods are not one of these items but they carry a serial number (eg a TVs, white- goods and power tools) they will not be classified as “serial numbered goods”.
- Serial numbered consumer property leased or hired for more than 90 days are PPS Leases must be registered by their serial numbers in a PPS registration.
- Serial numbered commercial property leased or hired for more than 90 days can be registered either:
  - a) by their serial number or
  - b) in the name of the Grantor (hirer).
- If you do not register the goods correctly eg you do not register by serial number when you should have or you register the wrong number) a purchaser of the goods from the hirer may “take free” of the interest of the owner of the goods. ie. they will have priority ahead of the owner's interest.

## Consumer property

Any property held by an individual that is not used in carrying on a business to which an ABN has been allocated.

## Commercial property

Any personal property that is not consumer property.

## Motor Vehicles

Under the PPSA a “Motor Vehicle” is a vehicle is defined as one that:

- a)** can travel at a speed of at least 10km/h;
- b)** have total motor power of more than 200 w and
- c)** have either a vehicle id number or chassis number or a manufacturer's number.

### Note:

The above definition catches property that one would not normally be regarded as a “motor vehicle”- such as some motor mowers, trailers and attachments.

## Purchase Money Security Interest (“PMSI”)

PMSIs are a category of security interest that facilitates the grantor purchasing collateral to which the security interest relates. Generally, these are retention of title arrangements where goods are sold under a conditional sale agreement. The security interest is taken in collateral to the extent that it secures all or part of the purchase price. The other main type is an enabling loan which allows a new asset to be acquired.

The interest of a lessor or a bailor of goods and equipment under a PPS Lease or a hire purchase arrangement are examples of a PMSI.

### Notes:

Other examples of PMSIs include:

- i)** an interest in collateral created by a seller who secures the obligation to pay the purchase price under a ROT agreement;
- ii)** the interest of a consignor who delivers goods under a commercial assignment;
- iii)** the interest of a financier who provides finance to a Grantor to purchase equipment.

- A PMSI is said to enjoy a 'super priority' over other security interests in the same collateral and even though they may be registered second in time, they are said to be "*first in line*", i.e. they have a priority over another security interest that is not a PMSI (e.g. a registered General Security Agreement (GSA) over all present and after acquired property – even if the GSA was registered before it).
- However, to obtain "*super priority*" the PMSI must be registered within the time limits specified in the PPSA. The time limits that apply depend on the nature of the goods and equipment that are hired or rented. The rules are as follows:
  - (a)** Where the Goods/Equipment is NOT inventory:  
It must be registered within 15 business days of the grantor obtaining possession of the asset.
  - (b)** Where the goods/Equipment IS inventory:  
It must be registered before possession is taken of the goods. ie. where the owner hires equipment that is inventory, the registration must be made BEFORE the equipment is delivered to the Hirer.
- While most hires will be registered as PMSIs, the following hires will not be:
  - (a)** those that are part of a sale and lease back and
  - (b)** collateral (other than serial numbered goods) intended to be used predominately for personal, household or domestic purposes.

### Inventory

"*Inventory*" is confined to commercial property and generally means raw materials, goods/equipment to be used for work in progress, goods/equipment that are stock and other things created by or held by an entity that has an ABN to be used up, leased, hired or sold in the ordinary course of their business or used to earn income.

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#### NOTE:

This article has been prepared Philip Sheezel of PS Law (www.pslaw.com.au). For further information any of the matters raised in this article or for advice on any issues relating to the PPSA, contact Philip on 0412578240 or email: philip@pslaw.com.au. This article may not be reproduced or copied without the express authorization of the author.

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