



## Can you afford to ignore the effect of the Personal Property Securities Act 2009 (Cth)?

Do you or does your company purchase or lease plant and equipment? Do you supply temporary works like scaffolding or fencing to building sites? Do you supply plant or equipment on “credit” with a “retention of title” clause? Do your contracts provide that you can take over work from an underperforming sub contractor?

If so, you need to know about the *Personal Property Securities Act 2009* (Cth) (PPSA) and in particular, that the new national register of Personal Property Security Interests (PPSR) commenced operation on 30 January 2012. It's one of the biggest changes to affect the construction world in recent years.

Under the PPSA – even if you think you own goods until you are paid or under a lease agreement, you might find out someone else has a better claim or “title” to those goods, and can effectively treat them as their “own”, resulting in you losing your goods, and payment for them.

### PPSA and the Construction Industry

The PPSA provides a single national law governing security interests and similar transactions with respect to many different kinds of tangible (like plant or equipment) and intangible property (like copyright) , other than real property (land).

The PPSR is the national register for personal property securities, with the aim of better helping Australian consumers and businesses to ensure that the property they buy doesn't have a security interest over it.

You can use the new national register to check that used goods that you are buying, such as a car, boat or machinery, or almost anything other than real estate, doesn't have a security interest over it, and you should consider registering interests in personal property in order to protect them.

### Security interests and personal property

A *security interest* is an interest in personal property created by a transaction that secures payment for goods or the performance of a contractual obligation.

*Personal property* includes most forms of personal property (excluding land and buildings) such as stock and equipment, (e.g. plant or goods sold), intellectual property and contractual rights.





## Common transactions – application of the PPSA

The broad application of the PPSA means there are many common transactions in the construction world which are likely to fall within its scope. To ensure that your title (and in effect, ownership) to goods, or plant or equipment is best protected, you should consider registering your interest. Importantly, the construction industry commonly features precisely the sorts of transactions that are considered *security interests* under the PPSA.

However, it is not necessary to register every security interest, and companies should exercise commercial judgement in considering whether to register interests that are intended to be of short duration and/or where the interest secured is of low value. There is a fee of around \$130 for each registration.

### **Sellers of Goods and Retention of Title**

Retention of title clauses provide that title to goods will not pass to the purchaser until payment has been received by the seller. However under the PPSA, if a seller of goods tries to rely on retention of title arrangements in the event a buyer does not pay (e.g. the buyer becomes insolvent), the seller may find that a third party has *better title* to or might even own the goods. The seller's interest must therefore be registered to avoid this scenario.

### **Retention Monies and Bank Guarantees**

In the event that cash retention is provided for under a contract, unless there is a specific asset over which a personal right can be registered, there is unlikely to be a proper security interest capable of registration under the PPSA. However, the law on this issue is not certain and remains to be clarified.

Bank guarantees provided under a contract are undertakings by a bank or financial institution and are unlikely to be considered personal property under the PPSA.

### **Hire/lease of temporary works**

You should consider registering all 'on hire' arrangements on the PPSR, regardless of the duration of the hire agreement, and certainly if the arrangement is longer than 1 year, although, if the duration is very short (a matter of days) then as Owner of the goods you may decide it is not necessary to do so. If the same piece of equipment is being hired to a series of different hirers, each hire transaction will need to be registered. It is not the "goods" or "plant" or "equipment" that needs to be registered, but the interest arising out of the hire transaction.





## Principal's Rights

Construction contracts often provide a right for the principal to take over the contractor's work, including the contractor's plant and equipment on site, for example in the event of the contractor's insolvency.

The contract might also allow the principal to sell the equipment to recover its losses. However if the principal does not register its *security interest* and the contractor does become insolvent, the principal might find that someone else owns or has registered its rights to the equipment and the principal cannot sell it or use it to complete the work, thus defeating the purpose and intention behind the clauses of the contract.

## Registration

The process of registering involves lodging a financing statement with the applicable registration fee. The financing statement must contain the particulars of parties, details of the transaction giving rise to the security interest, a description of the collateral (ie the goods to which the security interest attaches) and details of the security interest.

Once registered, that registration remains effective for either 7 years (in the case of consumer property) or in some cases 25 years or indefinitely (in the case of commercial property) unless or until an application to de-register is made.

## Lessons from Overseas

The PPSA has its origins in similar legislation in Canada and New Zealand. Whilst it is not certain that such cases would necessarily be decided the same in this country, two noteworthy decisions from the Courts of Canada and New Zealand illustrate the potential risks of not registering or failing to register correctly under the PPSA.

In *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528 Portacom leased five buildings to NDG Pine Limited (NDG). NDG granted a debenture to a bank, which was registered on the equivalent New Zealand personal property securities register. Portacom did not register its interest in the buildings. The bank subsequently appointed receivers and managers of NDG's assets, who claimed the right to sell the buildings. The Court held that Portacom had effectively lost the ownership of its own buildings, as a result of its failure to register its security interest.

In *Fairbanx Corp v Royal Canada* [2010] ONCA 385 the Ontario Court of Appeal considered a contest between two competing registrations of security interests. Fairbanx had attempted to register its interest on the security register, but failed to correctly spell the debtor's name. The correct spelling of the debtor's name was "Friction Technology Consultants Inc.", spelling the word "technology" without the "h". The debtor had carried on its business using the incorrect spelling of the name in entering agreements and also on its letterhead and invoices.





The debtor later approach a bank for a loan, who conducted a search of the register, which did not disclose Fairbanx's claimed interest. The bank in turn registered its financing statement, using the legally correct spelling, without the 'h'. The Court held that the bank's perfected security interest took priority over Fairbanx's interest so even though Fairbanx thought it was "first in the queue", by failing to register correctly, it lost its place in the "queue".

These cases illustrate the potential importance of valid registration to protect a security interest under the PPSA

## How to Protect Your Rights

We recommend that businesses consider the potential impact of the PPSA and:

1. Review contractual and other arrangements to identify security interests and seek appropriate advice as to whether such interests may need to be registered;
2. Consider and take advice on what steps, procedures or processes should be put in place to best protect security interests under the PPSA.

Please note that this summary is provided for your information only. It is not legal advice. Each transaction needs to be reviewed on a case by case basis to ascertain whether the PPSA applies and whether you have a security interest that may need to be registered.

***If you are in any doubt about whether or not the PPSA applies to your business, call Jackson McDonald and speak to one of our infrastructure and construction lawyers.***



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