

# HANSONS

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L A W Y E R S

## The *Personal Property Securities Act 2009* (Cth) – Are you prepared?

### Imagine this:

*Scenario 1:* You are the proud owner of a prize race horse worth over \$1 million. After many victories on the race track you decide that you have had enough of the racing game and have decided to take up sailing. As there are no immediate buyers for your horse you decide to enter into a lease to purchase your race horse with a local stable. The leasing fees should at least pay for the mooring costs for your new yacht.

The stable takes possession of your horse and begins to train it. Shortly after, the stable defaults on its payment obligations under the lease. You decide to retake possession of your horse.

After taking possession you are advised that the stable has gone into receivership and that you are required to return the horse, which is to be sold with the proceeds going to a secured creditor of the stable.

You protest emphatically, “but the horse is mine”! The receivers’ response is “Sorry, but not anymore”. As you have failed to register your security interest in the horse as required by the *Personal Property and Securities Act 2009* (Cth) the title to the horse has now vested in the receivers.

You are dismayed, how could this happen? My prize stallion is gone! Then you remember. Your lawyers sent you a recent client alert in relation to the implications of new legislation called the *Personal Property and Securities Act 2009* (Cth) but you thought that it didn’t apply to you and without reading it threw the newsletter in the garbage. You decide to call your lawyers for advice, but it is too late.

*Scenario 2:* You own and operate a business that leases portable buildings to various customers.

You decide to lease some buildings to a reliable customer under your standard conditions of hire. Foolishly you forget to register the lease on the new Personal Property and Securities Register.

Your customer has recently borrowed a considerable sum of money to assist with its cash flow as times are tough. Its financier obtained excellent legal advice and registered its security interest on the Register.

A few weeks later you are advised that your customer has gone into receivership. You are disappointed with this news as you are owed some hire fees and know it is unlikely that these fees will be recovered however you are not overly concerned as your hire agreement clearly states that you retain ownership of the hired buildings.

You contact the receivers to arrange a time to collect your portable buildings. You are surprised to learn that, the buildings will not be made available for collection. As you have failed to register your security interest ownership of the buildings vests in the receivers. As the customer’s financier registered its security interest its security interest takes priority over yours. Now it looks as though you will not only be unable to recover the outstanding hire fees but you will also lose your portable buildings.

This is tragic news, business is slow and this could ruin you.

**Note:** *The above scenarios are based on real New Zealand cases, which were held shortly after the introduction of the New Zealand Personal Property Securities legislation was enacted in 2002. The scenarios are an excellent example of how crucial it is that you are prepared for the introduction of the Personal Property and Securities Act 2009 (Cth). Do not be caught out!*

*Preparing for the PPSA gives you the perfect opportunity to review your current terms of trade and contractual agreements with customers and/or clients.*

## 1. About the *Personal Property Securities Act 2009 (Cth)* (PPSA)

The PPSA is scheduled to commence in October 2011 and will have a significant impact on the core business operations of many industries. Businesses need to review their operations now and make arrangements to ensure their interests are protected when the PPSA commences.

It is not only businesses and other commercial entities that will be affected by the PPSA. Any person who has been granted, or who may in the future be granted, an interest that constitutes a "security interest" for the purposes of the PPSA must carefully consider their position and seek advice as necessary.

The definition of "security interest" in the PPSA is wide and includes the following examples:

- Charges
- Pledges
- Assignments
- Mortgages
- Trust receipts
- Transfers of title
- Hire purchase agreements
- Consignments
- Leases of goods
- Conditional sale agreements, including retention of title arrangements
- Flawed asset arrangements (e.g. controlled/restricted bank deposits)

## 2. Legal title is not enough

The concept of "ownership" or "title" is, for all practical purposes redundant under the PPSA. In general terms, the PPSA assumes that assets subject to a security interest should be available for realisation and distribution to secured creditors, regardless of who has title to it.

For example, where goods are leased, ownership and title remains with the Lessor. The Lessee has rights to the goods but does not have title to it. Presently in the event of the insolvency of the Lessee the assets owned by the Lessor would not be available to creditors and could be retained by the Lessor.

Under the PPSA the distinction does not exist. The Lessor is required to register its security interest on the Personal Property Securities Register (even though the Lessor has legal title to the goods). Should the security interest not be registered the property will generally become available to the creditors of a security provider on its insolvency.

The same applies to suppliers who have retention of title clauses in their usual terms of trade. Previously in the event of insolvency of the customer the retention of title provision ensured that title of the goods remained with the supplier until the goods were paid for. However, under the PPSA the supplier may lose its priority and interest in the goods if it does not register its security interest even if it has a valid retention of title clause and title to the goods.

It is imperative for businesses to register a security interest under the PPSA or they could risk losing out to creditors and other registered security interests which take priority over unregistered interests.

### Further information

*The above is an excerpt of a discussion paper prepared by Ben Pike. Ben is a solicitor employed in Hanson's Lawyers Commercial and Property Team.*

*For more information on the PPSA and how it will affect you please contact our Commercial and Property Team on 4222 2666 or email [hansons@hansonslawyers.com.au](mailto:hansons@hansonslawyers.com.au).*