

PPSA – the changes in the law since 20 May 2017

Your Association successfully lobbied Government to protect the hire industry from the draconian effects of the *Personal Property Securities Act 2009* (Cth) (**PPSA**) which had dogged the industry since 2012.

Changes were made to the Act from May 20, 2017. The changes cut down the scope of the 'PPS lease' definition and greatly reduce the kinds of hires that can be deemed to be 'security interests' by falling into that definition.

Hires now only fall into the 'PPS lease' definition when:

- the **agreed term** of the hire and any options actually **exceeds two years**; or
- the hire **actually extends for more than two years**. The two year threshold replaces the current one year or period in the current PPSA.

Critically, the **amendments removed hires 'for an indefinite term'** from the PPS lease definition. A lease for an unspecified term will now not be caught unless and until it actually lasts more than two years.

Most members only do short term hire business and will now be outside PPSA. However the amendments don't take the whole hire industry entirely out of PPSA. The legislation will still catch any hire or similar arrangement which is in substance functioning as a security – such as a rent-to-buy or a deferred purchase agreement. PPSA will still apply to finance leases of the kind written by the finance industry. And some hire agreements can in practice exceed two years. Those cases would all still be caught.

It is important to note that the **changes to the law were not retrospective**. For hires that started before 20 May, 2017, the old much wider PPSA definition of PPS lease applies.

The **Association Guidance Note** on PPSA has been updated to reflect the changes. Members should seek legal advice if in any doubt about their own position. Below are some frequently asked questions and their answers.

FAQs

1. ***Can I agree to hire for up to two years and not worry about the PPSA?***

Yes – as long as the agreed hire term is not more than two years and the hire doesn't actually last more than two years.

2. ***Can I make indefinite hires without worrying about PPSA?***

Yes – but only up to the point the hire looks set to exceed two years and see further below.

3. ***At what point in time should I register on the PPSR?***

You should register:

- as soon as the hire is agreed and also before you deliver the equipment if you think there is any real chance that the hire might go for more than two years including any options. This may be because the hire has a term of more than two years in the contract or because you know the customer may well need the equipment for that long.

- before **18 months** pass from the date you delivered the equipment if the hire is lasting longer than you originally thought it might, and it might go for more than two years. The 18 month period is recommended for technical reasons under the Corporations Act as it is better to be registered six months before the two year threshold is crossed.

4. What about my purchase money security interest (PMSI) priority if I end up hiring for more than two years?

As explained in the Guidance Note, to be sure of PMSI priority for your interest as against your customer's bank you do normally need to register as a PMSI before *delivery to the grantor*. As explained in 3. above if the contract (including extension options) is more than two years, or if you think your hire could last more than two years you should register at the outset of the hire – before delivery and as soon as you agree the hire.

However, it can sometimes happen that the hire is indefinite but goes for a lot longer than you expected. You might then be in a position where the hire looks like it could go for more than two years, even though you didn't think that could happen at the beginning. You then need to make a registration on the PPSR without any delay.

The better view is that your customer is not a 'grantor' in PPSA terms until the hire actually turns into a PPS lease. Before that point, the better view is that the whole arrangement is outside PPSA. Based on that view you don't have to register before original delivery to the customer to get PMSI priority.

In summary - register as soon as you think the hire could go for more than two years. It is best to register before the expiry of 18 months from the commencement of the hire unless you are absolutely sure that the hire won't last more than two years.

5. If I look like I am going to get to the two years can I just take the equipment back for a short time and avoid PPSA?

No - that is not safe. The PPSA looks at the aggregate period of your customer's 'substantially uninterrupted possession'. Taking the equipment back for a short time doesn't substantially interrupt possession.

6. Can I offer rent-to-buy or similar arrangements up to two years with customers and not worry about PPSA?

No – rent-to-buy and similar arrangements and anything which is equivalent to providing finance to your customer is always caught by PPSA regardless of how short or long the term is.

7. Will I need to change the hire agreement that I use?

The Association's template hire agreement terms were drafted in 2016 so that they would accommodate any change in the law but before the exact amendments were known. They have now been updated to refer to the two year period. The revised agreement forms with the new clause 2 are available on the HRIA website.

Further information

For further information please contact James Oxenham.