

Guidance Note

Personal Property Securities Act 2009 ('PPSA') and hire businesses

Scope of this Guidance Note and Disclaimer - This Guidance Note has been prepared to assist in understanding the impacts of the PPSA. This note is only a summary. It is not legal advice or a substitute for legal advice. PPSA is a highly complex law and businesses should seek their own legal advice on specific implications for them. To the full extent permitted by law liability of any kind for any loss in respect of reliance on this Guidance Note is disclaimed.

INTRODUCTION

1. PPSA is a comprehensive Commonwealth law regulating 'security interests' in personal property. The new law commenced on 30 January, 2012. This is referred to in PPSA as the 'registration commencement time' (or **RCT**), because it is when the new PPS Register (often called the '**PPSR**') commenced. The term 'personal property' covers basically everything except land and certain statutory licences. Accordingly, PPSA covers all equipment as well as other personal property such as goods, shares and investments, intellectual property, bank accounts and accounts receivable.

Why is PPSA relevant to the hire and rental industry?

2. PPSA is not just a law about 'security interests' like mortgages or charges. An aim of PPSA is to provide a strong incentive for the owners of hired equipment to make their interest public. They can do this by registration on the new PPS Register. If they choose not to, then they face the possible loss of their equipment.
3. Hire and rental industry activities have been seen as potentially contributing to an appearance that customers own equipment when in fact the equipment is owned by a hire company or finance company. Adopting this approach, PPSA extends to some hires of equipment. PPSA actually uses the term 'lease' but that term will catch lease, rental or hire, if a customer is given possession of equipment.
4. Retention of title sales and certain consignment sales are also covered by PPSA and this may impact the way hire businesses sell their equipment.
5. Where PPSA applies it displaces some fundamental legal principles in a most surprising way. The hire industry has had to adjust to the new reality that ownership of their equipment is by itself no guarantee that they will be able to recover it in an insolvency of the customer or if the customer has wrongfully dealt with the equipment in favour of a third party.
6. Take the time to understand how PPSA can apply and it may save you losing valuable equipment!

CAN MY BUSINESS STAY OUT OF PPSA?

7. As a result of much lobbying by the Association, the PPSA was changed on 20 May, 2017 so that it will only catch hires that are more than two years in duration. This means hire businesses writing short term hires can stay out of it for hires they enter into **after that date**.
8. You can now stay out of PPSA if:
 - a. you never hire or give possession of equipment to others for more than two years and you never agree to hire for more than two years AND
 - b. you never enter into rent to buy with your customers or provide finance to them or sell on terms that you only transfer ownership once you are paid AND
 - c. you never consign your equipment to other businesses for them to sell or lease on your behalf.
9. Even if you think you can stay out of PPSA we suggest you keep reading the next section on the technical scope and operation of PPSA to make sure.
10. If you cannot remain outside the PPSA you will need to understand how the PPSA operates. The Guidance Note will assist you, but you will need to consider getting legal advice to check you are protecting your interests.

TECHNICAL GUIDANCE ON THE PPSA

PPSA terminology	
PPSA uses many terms that have special meanings. Here are some of them:	
grantor	the person or company granting a security interest – the hirer who is the customer of a hire business is a grantor
secured party	the owner or lessor of the equipment – the hire business
collateral	the hired equipment
perfection	when a security interest comprised in a hire agreement is fully validated by being registered on the PPS Register
financing statement	an online form lodged on the PPS Register to register a security interest
PPS Register or PPSR	the online register at www.ppsr.gov.au where hire and rental businesses can lodge financing statements to register their security interests in collateral

Scope of PPSA – security interests

11. The concept of a 'security interest' is central. PPSA identifies 'security interests' in two ways:
12. **First**, it applies a functional test which will catch transactions which **in substance** function as a security. Here is the definition:

an interest in personal 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).
13. This clearly covers mortgages, charges, retention of title clauses and the like. It also covers rent to buy type arrangements and it is also thought that it might also cover finance leases. (This is discussed later in this Guidance Note.) Straightforward equipment hires will normally not be 'in substance' security interests.
14. **Second**, PPSA will catch arrangements that do not pass the 'in substance' test. These 'deemed' security interests include the interest of a lessor or bailor under a '**PPS lease**' (discussed below).
15. This second kind of security interest, particularly the PPS lease, is of great relevance to the hire and rental industry. Even if they do not have 'in substance' security, all hire and rental businesses will need to assess whether they have PPS leases. If they do, then PPSA applies to those hires as 'security interests' and equipment can be lost if care is not taken to meet the demands of PPSA.

What is a PPS lease?

NB – Some hire and rental businesses will have ‘PPS lease’ security interests and the PPS lease concept is a critical one for hire businesses.

16. For hires entered into **from 20 May, 2017**, a PPS lease is a hire of goods for a term of more than two years.
17. For hires entered into before that time, a PPS lease is a hire of goods:
 - for a term of more than one year; or
 - for an indefinite term even if either party can terminate in less than a year.
18. Note that option terms must be taken into account in determining whether the time threshold is exceeded.
19. The full current definition of PPS lease is at Attachment 1. If you entered into a hire before 20 May, 2017 you need to consult the previous version of this guidance note.

Hires that exceed the time threshold become PPS leases even if they weren't to begin with

20. Even if the hire has a fixed term shorter than the PPSA time threshold, it can turn into a PPS lease when the time threshold is exceeded. **NB** It is the actual period of the hire that matters.

Example - HireCo hires a generator to Grant under an agreement that states the hire is for a fixed term of 23 months, but the hire actually continues for 26 months with HireCo's agreement. The hire becomes a PPS lease security interest when it actually exceeds two years.

Avoiding the application of PPSA may not be easy for hire businesses

21. It may not be possible to avoid PPSA by devices aimed at keeping under the time threshold.

Examples -

HireCo hires a freezer to Grant for 23 months and 25 days. HireCo tells Grant - 'Don't worry if you need it longer that won't be a problem'. This may amount to an option to go beyond two years and there could be a PPS lease and therefore a security interest.

HireCo hires a freezer to Grant for 22 months. In the 22nd month Grant tells HireCo he will need the freezer for 30 months in total. HireCo says 'You'll have to bring it in for a day or two and then check it out again so I don't have to worry about PPSA'. HireCo is wrong to think it is outside PPSA. This is because Grant will have had 'substantially uninterrupted possession' of the freezer for more than two years and there will be a PPS lease and a security interest.

Perfection

22. 'Perfection' may be thought of as making the security interest known to the world. The critical importance of perfection is that without perfection ownership of the hired asset can be lost in the insolvency of the customer. For hires, perfection is usually by registration on the PPSR.
23. A security interest cannot be perfected unless there is a 'security agreement' in writing that 'covers the collateral'. For hires that are PPS leases the security agreement is the hire agreement. The security agreement must describe the collateral. Although it is unclear exactly how specific the description needs to be, it should be sufficient to describe the collateral by reference to a class.

Example- HireCo has a master hire agreement for Grant to hire pallet trucks from time to time. The agreement can describe the collateral as 'material handling equipment'.

24. The agreement also has to be either signed or otherwise clearly accepted by the customer (grantor). Getting an authorised signature is always the recommended option.
25. If a security interest exists but the owner of equipment fails to perfect it, there are a number of significant risks:

Third parties buy or lease free of unperfected interests

Example - HireCo hires a cement mixer to Grant under a PPS lease but does not perfect this security interest by registering it on the PPS Register. Grant wrongfully sells the mixer to Buyer. Buyer takes the mixer free of HireCo's interest. It does not matter that the mixer has 'Property of HireCo Hire' painted on it.

Unperfected security interests 'vest in the grantor' on insolvency

Example - HireCo leases 10 diggers to Grant for 3 years. HireCo doesn't register this on the PPS Register. Grant is bankrupted. The security interest 'vests in' Grant. This means that the diggers belong to Grant to be sold for the benefit of Grant's creditors.

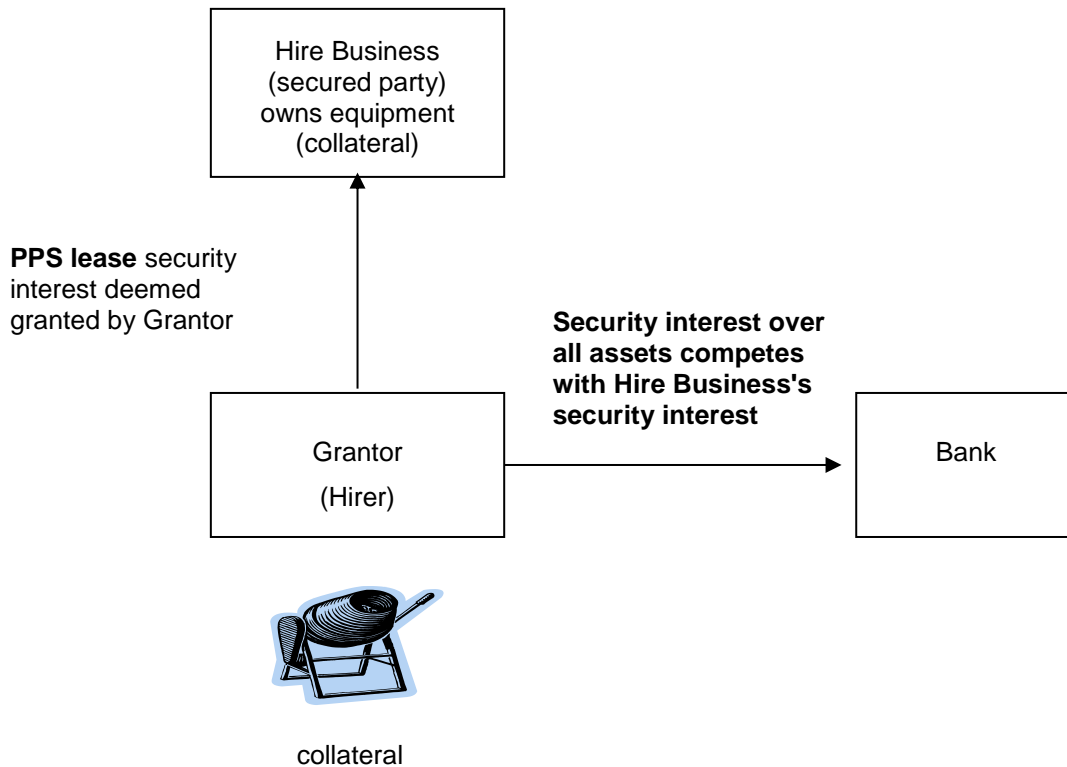
The same outcome applies in the case of corporate insolvency – liquidation or administration – if Grant is a company.

Late perfection or no perfection loses priority

PPSA's priority rules deal with the situation where there is one or more competing security interests in the same equipment. The rules are complex but key points are that:

- a perfected security interest will defeat an unperfected one; and
 - early perfection beats later perfection – with an important exception mentioned below.
26. Under PPSA ownership is now just another form of 'security interest'. Hire businesses must adjust to the idea that they may be competing with other security interest holders – for example their customer's bank. Ownership is no longer any guarantee of recovery of the equipment. The diagram below shows how hire and rental businesses will have to compete with other security interest holders:

Hire agreement as a PPS lease security interest



Purchase Money Security Interests and 'super priority'

27. PPSA does give special status (called 'super priority') to the interest of a business that has hired out its equipment. It does this by inventing a concept of 'PMSI' (purchase money security interest). A PMSI is defined to include the interest of a lessor or bailor under a PPS lease. So it covers hires. (Certain other interests can be PMSIs but that is beyond the scope of this Guidance Note.) The PMSI rules work to reinstate the significance of ownership, to something approaching the pre-PPSA position.
28. However 'PMSI' status is not itself a guarantee of super priority unless other steps are taken:
 - When registering a security interest, the financing statement must state that it is a 'PMSI'. The PMSI box must be ticked in the online form.
 - A 'PMSI' only has super priority for 'inventory' (explained further below), if the PMSI is registered **prior to the customer obtaining possession**. For equipment that is not 'inventory', PPSA allows 15 business days after the customer obtains possession to register the PMSI (but don't rely on this – see below).
29. The following illustrates PMSI super priority.

Example - In April 2012 GrantCo gives Bank a charge (general security agreement) over all its assets. Bank registers this security interest on the PPS Register. In August 2012 GrantCo takes a generator on hire for 3 years from HireCo. HireCo has registered its security interest on the PPSR as a PMSI before the generator was delivered to GrantCo. In December 2012 there is a priority dispute about the generator. HireCo's security interest has priority over Bank's charge.

This result applies even though Bank had the earlier perfected interest. The PMSI held by HireCo has 'super priority'.

30. The term 'inventory' has a wide definition in PPSA and hire businesses who hire to other businesses should normally assume that the goods are 'inventory' and make sure PMSI registration takes place before delivery to the customer. The definition of 'inventory' for PMSI purposes can be found in Attachment 4. Note however for the separate purpose of making a registration hired equipment is not usually described as inventory in the registration. This confusing issue in the legislation is discussed below.
31. Even if there might be 15 business days to register we always recommend registering:
 - a. **immediately** as soon as the hire agreement is signed; and
 - b. **before delivery** - this is because if the customer goes into insolvency at any time before registration the equipment can be lost under the vesting rules, even if it would be safe under the priority rules.
32. There are two notable exceptions from PMSI status:
 - sale and lease backs do not give rise to PMSIs; and
 - a security interest will not be a PMSI where the collateral is intended to be used *predominantly for personal household or domestic purposes*. (This doesn't apply to serial number registrable collateral.)
33. In the commercial hire context virtually all security interests that arise from hires will be PMSIs. However it is important to remember that not every hire is a PMSI. Not only does not being a PMSI mean that the interest has no 'super priority', incorrectly registering as a PMSI when the interest is not a PMSI can mean the interest is completely unperfected because the registration is not effective.

PMSI priority for hires that unexpectedly cross the PPS lease 2 year threshold

34. We recommend registering at the outset when there is an agreement that the hire will last more than two years (including options) or that looks like a real possibility.
35. But sometimes hires last for more than two years even when that wasn't contemplated at the outset. A question arises as to how one can comply with the PMSI timeframes when a hire 'becomes' a PPS lease.
36. The better view is that it is only at the two year mark that the hire becomes a security interest and the customer becomes a grantor. According to this view the customer only gains possession as a grantor at that point and registration later than the outset of the hire is still protective to give the hire business PMSI 'super priority'.

Example - HireCo hires a truck to Grant for a fixed period of 13 months. HireCo does not consider this will give rise to a security interest because the two year time threshold is not going to be reached. Just before the end of the 13th month Grant asks to have the truck for a further year and HireCo agrees.

In this case the hire becomes a PPS lease only when it is agreed that it will run for more than two years in total. The better view is that HireCo should register before it agrees to the lease going for more than two years. Up to that point the whole arrangement has been outside PPSA and Grant

has not been a 'grantor'. For technical reasons it will also be best if the registration is in any event made before the hire has lasted 18 months.

Master agreements - the best way of documenting hires for PPSA purposes where the hirer is a repeat customer.

37. The operation of master agreements raises a number of issues but these can be boiled down to the following:
- PPSA refers to 'security agreements' which are agreements that create or provide for security interests or under which security interests arise. A hire agreement can be a security agreement if the hire is a PPS lease or otherwise falls into PPSA.
 - It is clear that one security agreement can create or provide for many security interests.
 - Many hire companies have operated on an 'agreement by agreement' basis before PPSA. In other words each hire was a separate and self-contained contract. A repeat customer would sign a new contract each time it needed equipment. It is likely that this practice creates many separate 'security agreements'.
38. The Association believes that the safest approach to hire contracts is to conclude a single 'over-arching' master agreement with each repeat customer. The important thing about a master agreement is that it provides for all future hires that the customer requests. But it can equally operate even if there is only ever one hire to a customer.
39. The master agreement has advantages outside PPSA too – it means that full hire business standard terms only have to be agreed once with the customer and not every time that there is a hire. Only the particular details of the hire need to be documented. So it cuts down paperwork. And because the contract is done at head office level it will reduce the possibility that a customer turns around and argues that its employee on site didn't have authority to agree the terms.

In what timeframe should a hire business register?

40. It is critical that a PMSI registration is made promptly and in any event before the goods are delivered – to be safe and for the reasons above. Otherwise PMSI priority may not be obtained. Note that for technical reasons under the Corporations Act, to protect its interest a hire business must register any non-transitional security interest no later than 20 business days after the hire agreement is signed. This is because the Corporations Act now contains a vesting in the grantor rule that operates if the grantor is a company. This rule is in addition to the PPSA 'vesting in grantor' rule!
41. We always recommend registering:
- **immediately** as soon as the hire agreement is signed for the Corporations Act reason mentioned above; and
 - **before delivery**. This is because if the customer goes into insolvency at any time before registration the equipment can be lost under the vesting rules, even if it would be safe under the priority rules.
42. Where the hire was never seen as likely to go for more than two years, but that becomes a possibility due to extensions by the customer or just the passage of time in an indefinite hire, the Association recommends registering as soon as that possibility emerges. Normally it will be safest

to make that registration before 18 months into the hire or any earlier time at which there is agreement with the customer that the hire will last more than two years.

How often should a hire business register?

43. Once a master agreement is signed, a 'general' registration can be made on the PPSR against the customer. The general registration will perfect any number of security interests under it. For hire businesses that do not hire serial number registrable equipment, the single general registration should be all that is needed for each customer:

Example – HireCo hires out portable toilets. (Portable toilets are not serial number registrable property.) HireCo enters into a master hire agreement with GrantCo. The agreement is documented by being attached to the credit application that GrantCo signs. The credit application states that by signing, GrantCo agrees that all hires will be governed by the master hire agreement.

As soon as the agreement is in force HireCo registers against GrantCo on the PPSR. The registration states that the collateral is in the class 'Other Goods' and that HireCo's interest is a PMSI.

This single registration will perfect any security interest that may arise because of any number of hires by HireCo to GrantCo.

44. Even if they have a master agreement in place, hire businesses that hire out serial number registrable equipment will need to decide whether they also wish to register each hire specifically by serial number. If they decide not to, then they will be protected from the PPSA vesting and priority rules but they will not be able to claim their goods from a buyer or lessee if there is a wrongful sale or lease by their customer.

Example – General HireCo has a master hire agreement with GrantCo and a general registration perfects any security interest that may arise in respect of hires. The general registration covers collateral in the classes 'Other Goods' and 'Motor Vehicle'. GrantCo hires a \$25,000 forklift from General HireCo. General HireCo decides to rely on its general registration. Three days later, GrantCo requests a hire of a \$500,000 excavator under the hire agreement. General HireCo decides that it should make a specific registration by serial number of the excavator. This will give protection in a wrongful sale and allow General HireCo to recover the excavator from a purchaser.

45. Another reason why more than one registration may be needed is that separate registrations are needed if the hire business has security interests that are both transitional and non-transitional. A registration showing the security interest as transitional will not protect a non-transitional security interest. For more information about the distinction between transitional and non-transitional security interests, see the discussion below. In case of uncertainty about the status of security interests, it may be prudent to ensure there are registrations in both the transitional and non-transitional categories.

Distinction between transitional and non-transitional security interests

46. The distinction between a transitional security interest and a non-transitional security interest is still important in terms of ensuring the security interest is correctly classified when registering it on the PPSR. Generally speaking:

- for hires that were in place when the PPSA started to operate on 30 January 2012, the hire should be registered as a 'transitional security interest'; and

- for new hires entered into after the PPSA started to operate, the hire should in most cases, not be registered as a transitional security interest, but rather, as a non-transitional security interest.
47. However, there can be cases where a hire arose *after* the PPSA started to operate, but which is under an agreement in place *before* the PPSA started to operate. In those cases, if the pre-PPSA agreement clearly provides for the hire, the hire should be still be registered as a transitional security interest.

Example – HireCo has a 2011 signed master hire agreement with Grant. The agreement provides that Grant may hire equipment from time to time under the agreement and that any hire will be governed by the terms of the agreement. Grant takes a forklift on hire for 4 years commencing after the PPSA started to operate. The terms of the hire are governed by the 2011 agreement. HireCo’s security interest in the forklift is a ‘transitional security interest’ because it is provided for by the pre-PPSA security agreement. This is because the agreement was in force before the PPSA started to operate but provides for the hire.

48. Transitional provisions in new law can cause uncertainties and PPSA is no exception. The grey area is hires that start on or after the RCT but have only a connection with some agreement or relationship before the RCT. It is not clear from the legislation in all cases when a pre-RCT agreement ‘provides for’ the later post-RCT hire.
49. If the hire is put in place on or after the RCT, it may be prudent to register on the PPS Register any hires commencing on or after the RCT as *both* transitional and non-transitional. A conservative approach makes sense especially because registration in the transitional category will not protect an interest if it turns out to be non-transitional. There have been cases where hire businesses have been relying on transitional registrations because they have a pre-PPSA master agreement, but it has turned out that the agreement has been replaced by a whole new post-PPSA contract and they have not realised that this means that they cannot rely on the transitional registration.

Serial numbers and PPSA registration

50. For hires of some kinds of goods the registration can be very specific and can describe the goods by serial numbers. These ‘serial number registrable’ kinds of goods are:
- ‘motor vehicles’ (as defined) - the definition has two parts. If either part applies the personal property will be a ‘motor vehicle’ for PPSA purposes. It is important to appreciate that in order to be caught under the first part of the definition, the personal property must, among the other requirements set out in the full definition, be capable of travelling over 10 km/hour AND have total motor power of more than 200W. Under the second part of the definition, trailers and attachments can also be caught. The full definition is in Attachment 2;
 - ‘watercraft’ (as defined); and
 - ‘aircraft’ (as defined) and aircraft engines.
51. **NB** Just because goods have a serial number does not mean they are serial number registrable. They must fall into one of the above categories.

When must the serial number be registered?

52. If the hired equipment is serial number registrable *consumer property* a security interest can only be registered by serial number. Equipment will be consumer property if it is:

- held by an individual; and
- not held to any degree in the course of carrying on an enterprise to which an ABN has been allocated

Example – HireCo hires a Toyota Landcruiser to Mr and Mrs Grey for their three year retirement trip around Australia. The Landcruiser is serial number registrable consumer property. When HireCo registers its PPS lease security interest on the PPS Register it will only be able to do so by using the VIN (serial number) of the Landcruiser. The names of Mr and Mrs Grey will not appear in the PPS registration.

When is registration by serial number only optional?

53. A security interest over serial number registrable *commercial property* need not be registered by serial number. Commercial property is anything that is not consumer property.

Example – HireCo hires a road trailer to Joe for three years. A trailer is a 'motor vehicle' under the definition of 'motor vehicle'. Joe uses the trailer in the course of his lawn mowing business for which an ABN has been allocated. He also uses it take his family camping on weekends. The trailer is commercial property. It does not matter that Joe might sometimes use the trailer for personal purposes. HireCo may choose whether to register by serial number or only to register generally against grantor, Joe.

54. However choosing not to register by serial number carries the risk of loss of rights to the equipment if there is a wrongful sale or lease. This arises under the 'extinguishment rules' that are discussed below. Many hire businesses are taking a risk management approach in deciding whether to register by serial number or rely only on a more general registration. See the discussion below about serial numbers in relation to the extinguishment rules.

What serial number must be used?

55. For more important information about serial number registration see Attachment 3.

Extinguishment rules

56. The most powerful extinguishment rule has already been mentioned above – a buyer or lessee takes free of an unperfected security interest so that the security interest is 'extinguished' in favour of the buyer or lessee. This is also called 'taking free' of a security interest. PPSA has other rules whereby even a perfected security interest will be extinguished. Many of these rules replace the current law but are to similar effect.
57. One key rule is that a buyer or lessee takes free of a security interest (whether or not perfected) over serial number registrable goods if a search of the PPSR by serial number only would not show the security interest. Serial number registration is discussed elsewhere in this Guidance Note and applies only to goods which are motor vehicles (as defined), watercraft and aircraft and their engines.

Example - HireCo registered its PPS lease security interest against GrantCo. The collateral is a petrol-engined forklift truck. A petrol-engined forklift meets the definition of a 'motor vehicle' and the security interest is therefore serial number registrable. HireCo does not opt to register the security interest by reference to the truck's serial number and only registers it against GrantCo without specifying a serial number. Bert buys the truck from GrantCo. Bert 'takes free' of HireCo's security interest. Even though there was a perfected security interest, the collateral was serial number registrable and no serial number was shown in the PPS Register.

58. This rule illustrates that for serial number registrable goods, failure to register by serial number runs the risk of losing title in a wrongful dealing by a customer. Note however that this outcome would not apply if the buyer or lessee (Bert) bought the truck to hold as inventory, or was a party to the transaction creating the security interest.
59. There are other special rules, for example dealing with motor vehicles and low value household and domestic property. A full treatment of the extinguishment rules is beyond the scope of this Guidance Note.
60. The best protection against extinguishment is perfection by a general registration and also by serial number in the case of serial number registrable goods.

How to complete a PPSR registration

61. Registration is completed by lodging a financing statement which is an online form. The online register appears simple, but in reality there are a number of critical legal facets to the registration process. Also, the consequences of error (eg incorrect grantor description or incorrect serial number) can be severe.
62. There are commercial registration providers who will offer to attend to the actual registration and who will agree to carry out the bulk of the work to ensure that details of hirers comply with the PPSA identification requirements. This is cost-effective option for hire businesses that don't want to attend to their own registrations. However, those providers are not lawyers and hire businesses should also take legal advice about the exact way to register their security interests.
63. The following explains the elements of a typical registration for equipment hire. Also attached are some screen shots of a typical hire registration. **These are for general guidance only.**
64. In registering a security interest you will need to negotiate the following choices or issues:

Collateral is commercial property or consumer property

65. The collateral will be 'commercial property' unless the customer is an individual and is not using the property to any extent in the conduct of an ABN enterprise.
66. If the collateral is consumer property and it is also serial number registrable property, the grantor's details will not be included in the registration.

Transitional or non-transitional

67. A user of the PPS register must decide whether to register the security interest as transitional or not. If a non-transitional security is registered as transitional, the registration is ineffective. Accordingly, it is critical to know in which category the security interest falls. This is discussed above. It may be prudent to register in both categories in some cases.

Collateral class

68. For equipment hire there are only four collateral classes that will normally be relevant:
 - Motor vehicle;
 - Aircraft;
 - Watercraft; and
 - Other goods.

69. If the collateral is a motor vehicle, aircraft or watercraft then the relevant one of those collateral classes will be appropriate. Remember that these terms have a wide definition and in particular the definition of 'motor vehicle' picks up the many kinds of equipment that would not normally be regarded as motor vehicles because they are not road vehicles.
70. Otherwise the collateral class will be 'Other Goods'.
71. It may be necessary to register in two separate collateral classes as part of one registration. For example, a hire business may hire out utes as well as road plates. The utes are in the collateral class 'motor vehicles' and the road plates are in the collateral class 'other goods'.
72. For collateral in the first three classes, serial number specific registration will also be desirable for the reasons relating to sale and extinguishment discussed above. Where the collateral class chosen is one of those three classes, the PPSR will ask whether the registration is to be of a specific vehicle or craft.

Collateral description

73. The register allows the secured party to insert a description of the collateral in addition to just specifying the class of collateral. Hire businesses can use their own wording for this description.
74. The purpose of the description is to narrow down the registration so that the hire business is not disturbed by those who deal with its customer and would be obliged to ask whether the hire business has security over any other kinds of goods before acquiring interests from the customer.
75. The description needs to cover anything the business might hire but otherwise be as narrow as practicable.

Example – Scaffohire hires out some scaffolding to a customer GrantCo. Scaffohire only ever hires out scaffolding. In the PPS registration Scaffohire correctly chooses the collateral class 'Other Goods' and inserts the collateral description 'Scaffolding'.

GrantCo needs to raise money and borrows from bank giving a security interest over one of its forklifts. Bank does a PPSR search of GrantCo and sees Scaffohire's registration..

However because the registration indicates that Scaffohire only has an interest in 'scaffolding', Bank decides it can ignore the registration as its credit assessment does not involve taking security over scaffolding that GrantCo has in its possession. It doesn't need to trouble Scaffohire.

Inventory

76. The online financing statement asks whether the collateral is 'inventory'. Unfortunately, the question is incorrectly framed on the PPS Register and needs to be amended. The problem is that when the PPS Register asks whether the collateral is inventory it is not using the word 'inventory' in the same sense as applies for other purposes under this legislation. However, the current design of the register does not correctly reflect this and there are conflicting views about whether hired goods can be 'inventory'. Our view is that collateral under a hire agreement is not 'inventory' in the sense that the term is used (or should be used) in the PPS register financing statement.
77. Because hired goods are not 'inventory', the question the register asks about 'control' is therefore irrelevant.
78. That is not to say that hired goods can't be 'inventory' for other purposes under PPSA. Unfortunately the term 'inventory' has two different definitions and the right one to use depends on

the context. For the purposes of PMSI priority and the critical timeframe for registration, inventory has the definition discussed in this Guidance Note in that context.

Purchase money security interest

79. For the reasons described above, PMSI super priority is an important protection offered to hire businesses. The super priority is only available if there is registration as a PMSI and if that registration is effected within the timeframes discussed above.
80. PPSA is very unforgiving in relation to PMSI registration. Not only does PMSI super priority depend on it, but if a registration describes a security interest as a PMSI and it is not a PMSI to any extent, then the registration is ineffective.
81. So getting the answer to the PMSI question right is **critical**. Most hires will be registered as PMSIs. The exceptions will be for hires that are:
 - part of a sale and lease-back; or
 - of collateral (not serial number registrable) intended to be used predominantly for personal, household or domestic purposes.

Proceeds

82. Hire businesses will normally wish to claim proceeds. Under PPSA, where there is a sale of the collateral, the security interest automatically attaches to the 'proceeds'.

Example – HireCo hires a forklift to Mr Skint. Mr Skint wrongfully sells the forklift to Bert in exchange for \$500 and a cricket bat signed by Shane Warne. HireCo will have rights to the forklift if it can be recovered, subject to the perfection and extinguishment rules. HireCo automatically also has rights to the \$500 and the bat as these represent proceeds of the sale.

83. On the PPSR, HireCo should indicate that proceeds are claimed. The description of proceeds is 'All present and after-acquired property'. This is not to be confused with the collateral class 'All present and after-acquired property', which does not normally apply to registering hires as security interests.
84. The claiming of proceeds and the description of proceeds as 'all present and after-acquired property' are completed as a default setting in the PPSR financing statement and normally should not be changed.

Identifying the hire business and the grantor

85. PPSA demands correct identification of the hire business as secured party and the customer as grantor. Getting the identifier or name of a grantor wrong will normally make a registration ineffective, as an incorrect description does not allow users of the PPSR to detect security interests by a search against the grantor.
86. For many businesses the process of identification may need them to focus on the legal characteristic of their customer in a way that has not previously been necessary.
87. The following rules are particularly important under PPSA:
 - Companies may be identified by ACN, but an ACN registration only is not going to be good enough if they are acting as trustees of trusts with ABNs.

Example – HireCo Pty Limited ACN 125 451 145 registers as a secured party on the PPSR. HireCo is not trustee of any trust. HireCo's ACN is the correct identifier and is good enough.

- If a company is acting as trustee then the registration must actually identify the ABN of the trust. This will be different to the ABN of the company in its own right.

Example – GrantCo Pty Limited ACN 121 121 121 is trustee of the Grant Family Trust ABN 15 888 123 123. The correct identifier for use on the PPSR is the ABN of the trust.

Some hire businesses take the added precaution of making the registration against the ACN and also the trust ABN. This is because it can sometimes be unclear whether the dealings are with the company as trustee or not.

- Partnerships are normally correctly identified by their ABN i.e. the ABN of the partnership.
 - For individuals, the PPSA has a hierarchy of identifiers. Normally the grantor's name as appearing on his or her driver licence will be the appropriate identifier, together with the grantor's date of birth as appearing on the licence. However, in some cases the grantor's name taken from another document will be the correct identifier. An edited extract of the regulation dealing with identifying individuals is at Attachment 5.
88. The above covers the most commonly encountered legal forms of entity but it is not exhaustive. Seek legal advice to be sure that both the secured party and the grantor are correctly identified in the financing statement.

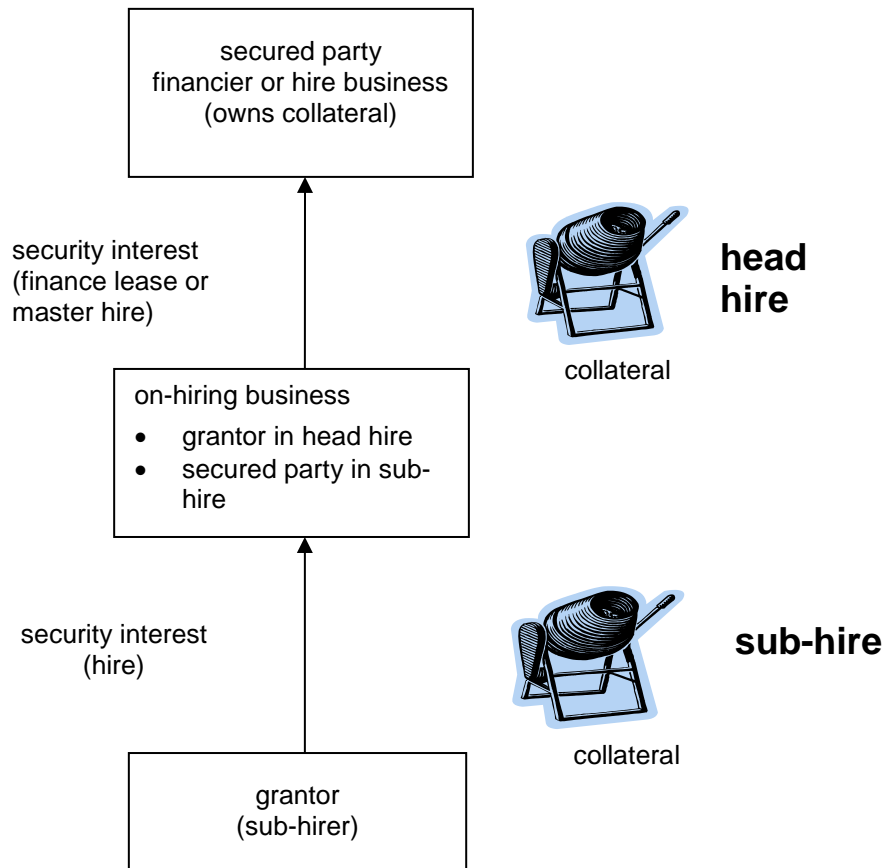
Verification statements and giving notice

89. When a hire business makes a registration against a customer, the PPS Register will issue a 'verification statement' to the customer. This allows the hire business to check and keep a record of the registration. PPSA provides that the hire business must, as soon as reasonably practicable, send a notice of the verification statement to the customer. A customer can agree to waive its right to receive the notice. Most hire businesses have provisions in their agreements under which customers waive this right.

PPSA and sub-hires/cross-hires

90. PPSA presents problems for sub-hire (or cross-hire). In simple terms, when there is a sub-hire and PPSA applies, the rights of the head hire business are only as good as the steps that the on-hiring business takes.

91. A typical sub-hire is illustrated below:



92. The effect of PPSA appears to be that, in a chain of a head hire and one or more sub-hires, a failure to register can threaten the rights of other secured parties in the chain. The rights of the owner are 'derivative' and depend on the equipment being returned to the on-hiring business.

Example – HireCo hires a cement mixer to Grant and perfects the security interest by registration against Grant. Grant sub-hires to SubCo. HireCo has a security interest from Grant. Grant also has a security interest from SubCo. If Grant does not perfect the security interest by registering against SubCo on the PPS Register, HireCo's rights to the mixer may be threatened if SubCo wrongfully sells it or if SubCo becomes insolvent.

93. Where sub-hire occurs, the owner should not only register its interest under the head hire but should also ensure that its customer registers its interest under any sub-hire to a third party. Some legal advisors recommend that the owner should consider taking a security interest over the sub-hire agreements to obtain additional protection.
94. There is considerable uncertainty about sub-hire and the Government is reviewing the whole issue of how the PPSA operates in the sub-hire context. Some people have suggested that only the first hire or head hire needs to be registered and that this can protect all sub-hires down the line. However that cannot be regarded as settled and hire businesses should treat advice to that effect with caution until the position is clarified by further legislation.

A 'risk management' approach to PPSA?

95. It is not illegal for a hire business to choose not to perfect. Some hire businesses may take the view that the risks of not perfecting are acceptable. These businesses may be willing to accept some risk.

Example – accepting risk of insolvency

Joe's Hire hires formwork sometimes for more than two years. Joe's has mostly small clients and no single client ever takes more than \$2,000 worth of formwork on hire. The only exception is a State-owned utility which is Joe's largest customer by far. Joe's Hire decides that

- the risks of insolvency of the utility are negligible;*
- that there is a commercially acceptable risk of loss for the small customers – even if one of those becomes insolvent or wrongfully sells some formwork, the loss of the formwork would not be too damaging to Joe's Hire.*

Joe's Hire accepts the risk that it could lose ownership of formwork on customer insolvency. Joe's Hire takes a calculated risk and decides it will not perfect any PPS leases that arise under the hires to the customers.

96. As explained above, it is also (in the case of equipment that is not consumer property) optional whether to register by serial number. Some hire businesses may decide only to register against the grantor and not to register by serial number.

Example – accepting risk of wrongful sale or lease

HireCo and GrantCo have a master hire agreement to cover all hires. In February 2013, HireCo registers all security interests that may arise under the master hire agreement. In July 2013 GrantCo hires a petrol-engined forklift truck under the master hire agreement for 27 months. HireCo therefore has a PPS lease security interest in the form of a hire to GrantCo. A petrol-engined forklift meets the definition of a 'motor vehicle' and the security interest is therefore serial number registrable. Because it is not consumer property, HireCo has a choice whether to rely on the existing general registration against GrantCo or also to register using the truck's specific serial number.

HireCo decides not to register the security interest by reference to the truck's serial number. Therefore, the collateral is serial number registrable but no serial number is shown in the PPS Register.

If GrantCo goes into liquidation or administration, HireCo would not automatically lose its interest but by choosing not to register by serial number, HireCo does take the risk that someone could buy or lease the truck from GrantCo and get ownership or a lease interest free of HireCo's interest. Of course, HireCo can take legal action against GrantCo for wrongfully selling the equipment but if GrantCo is insolvent the ability to retrieve and claim the equipment from a buyer could be the most valuable right.

Pooling arrangements

97. There are specific exemptions from some PPSA rules for 'pooling arrangements' such as those that are found in the pallet business where an owner of pallets hires them to a customer and permits its customer to allow others to use them. These exemptions will only apply where, by nature or usage of trade, equivalent goods can be returned in place of the goods originally hired.

Financier expectations

98. Hire businesses that have equipment under finance may expect to find that their financiers demand that they demonstrate that steps are being taken to protect rights under PPSA. General bankers to hire businesses are also likely to express similar concerns due to the possible threat to hire businesses who are not 'PPSA-aware'.

Implications of PPSA for hire businesses selling equipment

99. When selling equipment, hire businesses should bear in mind that the PPSA security interest concept also covers a number of sale arrangements which can give rise to security interests, including the following:

- The interest of a consignor who delivers goods to a consignee under a 'commercial consignment' – i.e. a consignment for the purposes of sale, lease or other disposal where both consignee and consignor deal in goods of that kind.

Example - HireCo puts 5 ex-hire diggers on Grant's lot so that Grant can sell or lease them. Grant is HireCo's agent in the sale. Grant is the 'grantor' of a security interest to HireCo.

Consignments to auctioneers for sale purposes are excluded.

- Rent to buy.
- Retention of title sales.

Example - HireCo agrees to supply an ex-hire projection screen to Grant. The sale contract says that HireCo keeps ownership until Grant has paid in full. This is a security interest granted by Grant to HireCo.

100. The PPSA considerations that apply to the above kinds of arrangements are beyond the scope of this Guidance Note. However the basic risks and the importance of perfection by registration are the same. Seek legal advice.

Implications for hire businesses buying equipment

101. Under PPSA it will be possible and prudent to search the PPS Register to discover adverse interests such, as ownership by a financier or hire company. Hire businesses will need to revisit their procedures for checking ownership of equipment they intend to purchase. They will need to bear in mind when searching that the definition of motor vehicle changed in 2014. Seek legal advice.

PPSA and enforcement

102. Chapter 4 of PPSA contains rules about enforcing security interests. Hire businesses have to readjust their thinking in that under PPSA there are distinct rules about seizing, selling or retaining equipment, even if it is owned by the hire business. These new rules will only apply to PPS leases if they are also 'in substance' security interests.

103. Some leases are both PPS leases and 'in substance' security interests.

Example – Secured Party is a finance company and enters into a 5 year finance lease of a forklift truck with Grantor. The truck has a useful economic life of 5 years. Secured Party has a guaranteed residual entitlement at the end of the lease. The lease rental is

based on a specified interest rate return to Secured Party over 5 years. The risks and benefits of ownership are with Grantor who must insure and look after the truck. Under accounting standards, the truck is treated as an asset of Grantor with a commensurate finance liability.

The finance lease is likely to be an 'in substance' security for PPSA purposes. Secured Party is really in the position of a lender and in commercial terms the truck is security for default. If Secured Party wants to enforce and take possession of the truck and sell or retain it, Secured Party will need to comply with Chapter 4 of PPSA.

104. Because of uncertainty as to when a hire may be an 'in substance' security interest as well as being a PPS lease, hire businesses should consider including the kind of provisions mentioned below in their documents, so as to minimise the impediments in Chapter 4 by 'contracting out' to the extent allowed.

PPSA CAN WRECK YOUR BUSINESS

DON'T BE CAUGHT!

Equipment has been lost to PPSA!

PPSA is substantially modelled on the New Zealand Act of the same name. In the decade since PPSA was introduced there, many cases have shown the serious implications of the new law for the hire and rental industry with equipment being lost. In all these cases the owners would have kept their property had they been 'PPS-aware'.

The same outcome has now occurred in Australia in a number of cases. In the *Maiden Civil* case a financier took ownership of two excavators because the owner hire business did not register under PPSA.

And in the *Forge* liquidation a bank used the PPSA to take ownership of leased turbines for a power plant that were worth \$60million! In another case, Alleasing lost a crushing plant worth \$25 million in the Onesteel administration.

Losses have been caused by simple mistakes in registration like not ticking the PMSI box or making a registration against ABN and not ACN or vice versa.

In each of these cases a simple correct PPSR registration would have saved the asset for the lessor/hire business.

PPSA can wreck a hire business.

Developing a PPSA action plan

105. Most hire businesses have never had to register their hires anywhere and before PPSA could rely on ownership to protect themselves. That all changed under PPSA. It is likely that they will require specific advice about the impact of PPSA.
106. From 20 May, 2017 most hire businesses can stay out of PPSA. For those that can't, getting 'PPSA ready' will typically involve a number of steps. These steps will normally include:

- (a) appoint a PPSA project officer – someone responsible for gaining a more detailed understanding of the legislation. Have a fall-back in case that person leaves or is sick;
- (b) analyse which hire or other arrangements give rise to PPSA security interests. Some hire businesses may be able to remain outside PPSA by only entering into short fixed term hires, for example. Other businesses may accept that PPSA applies but decide to accept the risk that flows from not perfecting their security interests;
- (c) review documents and systems. Most businesses will be advised to amend their hiring agreements and documentation processes. Typical changes will include:
 - developing a process to ensure a written agreement that covers (and adequately describes) the collateral;
 - contracting out of the requirement that otherwise applies to the hire business to provide the statement of PPS registration to the customer;
 - wording that maximises enforcement rights. Some agreements may amount to ‘in substance’ security interests which brings them into Chapter 4 of PPSA. Appropriate wording in these agreements can minimise obligations to give notice to the customer of various steps in relation to enforcement and repossession, retention or sale of the hired equipment;
 - clauses that preserve confidentiality. PPSA gives certain third parties including competing security interest holders rights to obtain a copy of the security agreement and amounts owing. These rights can be minimised by appropriate wording in the agreement;
 - providing the ability to recover registration costs from the customer; and
 - obliging a customer to perfect any sub-hire to a third party,
- (d) develop a system for registration.

More information and advice

107. Questions on this Guidance Note may be addressed to James Oxenham at the Association. The Association has developed a list of answers to frequently asked questions, a copy of which can be obtained from the Association. The Government has published a business guide to PPSR which can be found at <https://www.ppsr.gov.au/pps-r-business-guide-0>.
108. Hire businesses seeking legal advice on PPSA may wish to contact Bartier Perry, a commercial law firm in Sydney, which has specialist expertise in PPSA and the hire industry and can provide advice in all States and Territories. The contact at Bartier Perry is Oliver Shtein Tel 02 8281 7868 or oshtein@bartier.com.au.

Version prepared in May, 2017

Attachment 1

The definition of 'PPS lease'

WARNING – THIS DEFINITION ONLY APPLIES FROM 20 MAY 2017. BEFORE THAT SHORTER TIME THRESHOLDS APPLIED AND THE DEFINITION CAUGHT INDEFINITE TERM HIRES

Meaning of *PPS lease*

- (1) A **PPS lease** means a lease or bailment of goods:
 - (a) for a term of more than 2 years; or
 - (c) for a term of up to 2 years that is automatically renewable, or that is renewable at the option of one of the parties, for one or more terms if the total of all the terms might exceed 2 years; or
 - (d) for a term of up to 2 years, or a lease for an indefinite term, in a case in which the lessee or bailee, with the consent of the lessor or bailor, retains uninterrupted (or substantially uninterrupted) possession of the leased or bailed property for a period of more than 2 years after the day the lessee or bailee first acquired possession of the property (but not until the lessee's or bailee's possession extends for more than 2 years).
- (2) However, a **PPS lease** does not include:
 - (a) a lease by a lessor who is not regularly engaged in the business of leasing goods; or
 - (b) a bailment by a bailor who is not regularly engaged in the business of bailing goods; or
 - (c) a lease of consumer property as part of a lease of land where the use of the property is incidental to the use and enjoyment of the land; or
 - (d) a lease or bailment of personal property prescribed by the regulations for the purposes of this definition, regardless of the length of the term of the lease or bailment.

Bailments for value only

- (3) This section only applies to a bailment for which the bailee provides value.

Attachment 2

Definition of 'motor vehicle'

The definition in the PPS Regulations has two parts. If either part applies the personal property will be a 'motor vehicle' for PPSA purposes.

The first part covers personal property that:

- (a) is built to be propelled, wholly on land, by a motor that forms part of the property; and
- (b) is capable of a speed of at least 10 km/h; and
- (ba) has one or more motors that have a total power greater than 200 W; and
- (c) has any of the following:
 - (i) a vehicle identification number;
 - (ii) a chassis number;
 - (iii) the manufacturer's number; and
- (d) does not run on rails, tram lines or other fixed path.

The second part covers personal property that:

- (a) is capable, when being towed by, or attached to, a motor vehicle, of travelling at a speed greater than 10 km/h; and
- (b) is a piece of machinery or equipment that is equipped with wheels and designed to be attached to, or towed by, a motor vehicle; and
- (c) has any of the following:
 - (i) a vehicle identification number;
 - (ii) a chassis number;
 - (iii) the manufacturer's number.

Attachment 3

How does serial number registration work?

Just because goods have a serial number does not mean they are serial number registrable. They must fall into one of the categories explained in this Guidance Note – e.g. motor vehicles, watercraft, aircraft or aircraft engines.

The PPSA sets out a hierarchy of serial numbers for property that may or must be described by serial number in a PPS registration.

For goods that meet the definition of 'motor vehicle' the hierarchy is as follows:

- (a) the vehicle identification number (VIN). The VIN is a unique number allocated under motor vehicle standards legislation;
- (b) if it does not have a VIN but has a chassis number, the chassis number. A chassis number is numbers or letters or both that are attached or stamped on the chassis and appear to uniquely identify the vehicle.
- (c) if it does not have a VIN or a chassis number, the manufacturer's number. A manufacturer's number is numbers or letters or both permanently attached or stamped on a permanent part of the vehicle by the manufacturer and that appear to uniquely identify the vehicle.

Some examples illustrate:

Example - HireCo has a security interest in a Holden Commodore it leases to Grantor Pty Limited for business purposes. HireCo may register the security interest by reference to the VIN of the Commodore.

Example - HireCo hires a motorized golf cart to Grant for his personal use on his own private course at his house for six months. The cart does not have a VIN. HireCo may register only by serial number as this cart is consumer property. Grant's name would not appear in the PPS Register. Because there is no VIN the registration must specify the cart's chassis number.

Example - HireCo hires a forklift reach truck to Grantor Pty Limited for six months for use at its distribution centre. The truck does not have a VIN. Nor, because of the way it is constructed, does it have a chassis. HireCo may register by serial number. Because there is no VIN or chassis number the registration must specify the manufacturer's number.

For watercraft, aircraft and aircraft engines other rules apply.

WARNING – serial number registration uses special functionality in the PPSR. If you make a general type of registration just putting a serial number in the 'collateral description' area of the form is not the same as making a serial number registration.

WARNING – serial number registration is fraught with risk (wrong numbers or type of numbers). Always consider making a general registration as well as specific registrations by serial number. A general registration provides substantial protection and can cover any number of hires.

Attachment 4**The PPSA definition of 'inventory' for PMSI purposes**

inventory means personal property (whether goods or intangible property) that, in the course or furtherance, to any degree, of an enterprise to which an ABN has been allocated:

- (a) *is held by the person for sale or lease, or has been leased by the person as lessor; or*
- (b) *is held by the person to be provided under a contract for services, or has been so provided; or*
- (c) *is held by the person as raw materials or as work in progress; or*
- (d) *is held, used or consumed by the person, as materials*

Note – this definition applies in deciding whether the hire business has the 15 day 'grace period' to register and obtain PMSI priority.

For the purposes of the online financing statement the word 'inventory' has a different meaning.

Note that for PMSI registration timeframe purposes 'inventory' can include equipment that is leased as well as sold by the grantor and also can include equipment the grantor 'provides' to its customers under a contract of service.

Remember however that it is always safest to register immediately the hire agreement is entered into and before delivery.

Attachment 5 - Adapted from the Personal Property Security Regulations

Individual grantor or secured party

Choose the first one that applies going down the table.

For the date of birth of the individual choose the first one that has the date of birth on it.

Individual	Details	Source
Individual who holds a current driver's licence	Individual's surname and given names, as recorded on the individual's driver's licence	Current driver's licence issued by a State or Territory licensing authority to the individual
Individual who holds a current proof of identity or current proof of age card	Individual's surname and given names, as recorded on a proof of identity or proof of age card issued by a State or Territory body	Current proof of identity or current proof of age card issued by a State or Territory body to the individual
Individual who holds a current Australian passport	Individual's surname and given names, as recorded on the individual's current Australian passport	Current Australian passport issued to the individual
Individual who holds a current visa, issued by the Australian Government	Individual's surname and given names, as recorded on the individual's current Australian visa	Current Australian visa issued for the individual
Individual who holds a current passport other than an Australian passport	Individual's surname and given names, as recorded on the individual's current passport issued by the jurisdiction in which the individual ordinarily resides	Current passport issued by the jurisdiction in which the individual ordinarily resides
Any other individual	Individual's surname and given names, as recorded on the individual's birth certificate	Birth certificate issued for the individual