



ELEVATING WORK PLATFORM ASSOCIATION OF AUST. INC

ACN: 545 830 419 ABN 32 545 830 419

E-mail: info@ewpa.com.au Website: www.ewpa.com.au



HIRE & RENTAL INDUSTRY ASSOCIATION LTD

ACN: 093 630 847 ABN: 70 093 630 847

P O Box 1304 Mona Vale NSW 1660 Tel: 02 9998 2255 Fax: 02 9998 2299

Free-call 1800 01 5166 E-mail info@hireandrental.com.au Website www.hireandrental.com.au

Personal Property Securities Act 2009 (PPSA)

This document is written on behalf of the Hire and Rental Industry Association (HRIA) and the Elevating Work Platform Association (EWPA), the Crane Industry Council of Australia (CICA) and the Australian Industrial Truck Association (AITA) representing the Rental Industry.

There are three major concerns with the PPSA for the rental industry:

1. The extinguishment of title (loss of ownership by rental companies of their assets)
2. The complexity of the PPSA for the ordinary person running a business. Their ability to understand and comply with the PPSA law and the PPSR register.
3. The myth of the evil of apparent wealth (rental assets are clearly identifiable as assets of the rental company).

There are many positives the PPSA has brought about by the joining of all the previous acts around the country. One unified piece of legislation has meant organisations like car dealers are able to verify ownership and finance commitments on vehicles across Australia. In the new age of the internet dealers are able to check ownership or joint ownership through financial commitments meaning a much lower risk of fraud or default. It helps clarify where there is a financial obligation on an asset.

Rental was previously not included in any of the legislation. There is never a joint liability or obligation with rental. Ownership is never shared or transfers under a rental agreement and there is no in substance security created by an ordinary casual (indefinite hire) transaction, yet it is currently captured under the PPSA and treated as if there is a right transferred to the hirer that others should be aware of.

Due to the complexity of the PPSA and the link to the Corporations Act, it is difficult to see how title will be restored to the rental company. The PPSA is too complex and there are too many twists and turns (traps) for rental companies to understand.

The finance industry deals in longer term transaction. Finance Agreements are written specifically identifying the asset and the transaction. Finance companies have the resources to manage the systems and structures for these transactions. They are generally slow moving transactions that occur over several days or weeks. Rental companies deal in a multitude of varied transactions on an hourly, often 24/7 basis. It is a fast moving industry with varied asset classes and varied customer types. Rental companies do not have the resources to manage the day to day registration of the multiple transactions that occur or the knowledge to understand and register effectively to protect their assets.

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The notion of evil of apparent wealth is stated as one the key philosophises underpinning the inclusion of rental in the PPSA. This is basically trying to protect the finance industry from a fraud where a potential borrower holds out rental assets as being their own. The outcome of this attempt to prevent a fraud is in the words of Judge Sifris J Supreme Court of Victoria - Relux Commercial Pty Ltd (in Liquidation) V Doka Formwork Pty Ltd the creation of a draconian piece of legislation, that has a catastrophic outcome for the rental company.

The only effective way of restoring title to the rental industry is to remove "ordinary short term rental" from the PPSA. If this is not palatable or achievable (which it should be) then a least remove it for a period of time that allows the commercial activities of the rental industry to proceed unencumbered so the assets are not at risk of being seized by liquidators. This is a minimum of 2 years but preferably 3 years. The 3 year time frame is consistent with the Act in determining when a lease is just a normal everyday hire or if it is an in substance security. 3 years represents about 30% of the useful life of any significant assets, so anything shorter than 3 years could not be considered a substitute for purchase (in substance).

Rental is a very important part of the fabric of our economy. It allows the most efficient use of assets by moving the assets to the point of greatest utilisation. This occurs between the rental company and the end user (construction/manufacturing company etc.), but also between rental companies. Up to 20% of rental assets are moved between rental businesses to meet the others rental companies' shortages. The PPSA is looming as a significant deterrent to the sustainability and development of rental. The Forge case in WA is an example where assets were brought in from the US to support the mining industry and the ownership of these assets is now being challenged.

The rental industry has been dragged into an area of the law where it was not previously bound and is now extremely adversely impacted by the complexities and penalties the PPSA holds. Tinkering at the edges will simply move the goal posts but still carry risks and liabilities that are commercially untenable. Ordinary Casual Rental should be removed from the PPSA and we seek the Governments support in making this change.

Tim Nuttall - Immediate Past President EWPA (PPSA Working Group)

These key points are an overview of our official responses to the PPSA Review currently underway by the Government under the Chairmanship of Bruce Whittaker