

## **PPSA - Whittaker Review Final Report Implications for the Hire Industry**

1. The final Report of the Whittaker Review into the *Personal Property Securities Act 2009* (Cth) (**PPSA**) was tabled in Federal Parliament on 18 March, 2015. Our focus here is on key issues in the Report for the hire industry. There are many, many other recommendations in the 542 page Report which we do not discuss here. They are likely to be beneficial – for example in simplifying the register.

### **PPS lease to be retained<sup>1</sup>**

2. The Report recommends that a concept of a 'PPS lease' should remain in the legislation. So a 'lease' (relevantly that word is interchangeable with 'hire') would still fall within PPSA even if there is no in substance security or finance transaction. This is not what the hire industry wanted to see, as it means that ordinary hire transactions will still be subject to the PPSA if they cross a time threshold. The Report notes that this will catch hires even though they are not equivalent to finance leases or hire purchase in terms of time or effect.
3. This recommendation is really based on the idea that hires of 'longer term' (see below) should be regulated by PPSA to address the 'ostensible ownership concern'. In the context of the hire industry this is the perceived risk that persons dealing with the customer of a hire business will be misled into thinking that the customer owns the hired equipment. This is the policy setting that is at the heart of the hire industry's concerns. The hire industry submitted to the Review that there has never been compelling evidence in the Australian context that there was such a problem with ostensible ownership and hire that the 'PPS lease' concept had to be imported here in the first place.

### **PPS lease threshold of one year<sup>2</sup>**

4. The Report recommends that the threshold for a PPS lease ought to stay at one year. This conclusion seems to be based to a degree on harmonisation with NZ and Canada each of which also has a PPSA-style system. The submission that a longer period ought to apply (including by some of Australia's largest law firms) was not accepted. The Report says that its recommendation satisfies the bulk of the hire industry's concerns - because most hires are less than a year.

### **Indefinite hire should not be a PPS lease until a time threshold is crossed<sup>3</sup>**

5. The Report accepts that there has never been a cogent argument for the current rule in the PPSA that an indefinite hire is a PPS lease from inception. The Report recommends that a PPS lease should only arise once the threshold of one year is actually crossed. It seems implicit in this that the need to register won't arise until that time. For example, it seems to be assumed that a hire business would be able to hire equipment indefinitely and then make a first priority PMSI registration only when the expiry of the PPS lease time threshold is imminent.
6. A hire for an agreed contractual term of, say, 18 months (not indefinite) would, it seems, remain a PPS lease from inception.

### **PPS lease interests shouldn't vest in the grantor on insolvency<sup>4</sup>**

7. The consultation papers developed prior to the Report flagged that PPS leases could be taken out of the 'vesting in the grantor' rules. These rules transfer ownership of a hired asset into the liquidation or administration of the customer if the hire is within PPSA but not correctly registered. The hire industry pointed out that by itself it was of little use to hire businesses to save them from the vesting rules, only for them to find that a bank takes the equipment under its general 'all assets' security because of the application of the priority rules.

<sup>1</sup> See Report para 4.3 and in particular 4.3.1 and 4.3.5

<sup>2</sup> Report 4.3.5.5

<sup>3</sup> Report 4.3.5.4

<sup>4</sup> Report 8.7.4

8. In a disappointing outcome, the Report has recommended that unperfected PPS leases should not vest in the grantor on its insolvency but has declined to also recommend that the interest of the lessor hire business should not suffer loss of priority to other interests. The logic of this approach is hard to discern in our view and it does little to help the hire industry. It is clear that lenders such as banks will in most cases be the main benefactor when a PPS lease of hired equipment is unperfected and a perfected general security holder (usually a bank) gets priority over the hired equipment.

#### **Sub-hire issue<sup>5</sup>**

9. The Report contains a detailed discussion of the arguments about whether a secured party (such as a hire business holding a PPS lease) can lose its equipment if its customer (sub-lessor) on-hires the equipment and omits to register and the sub-lessee then becomes insolvent. In an indication of how intractable this issue is, the Report fails to make any definitive recommendation and refers the issue for further consideration.

#### **Section 588FL of the Corporations Act should be repealed<sup>6</sup>**

10. The Review made the welcome recommendation that this section should be repealed. Accordingly where a hire business has a customer that is a company there would be no separately applicable Corporations Act deadline for making the registration within 20 business days of the date of the security agreement (usually hire contract). The repeal of section 588FL will not however affect the deadlines in the PPSA itself which necessitate prompt registration, sometimes before delivery of goods.

#### **Registration against ABN of trusts**

11. The Review has accepted submissions that the current requirement to register against the ABN of a trust where the trustee is a company is confusing for business people and has been a potent source of incorrect registrations. The Review has recommended that registration against a trustee need only be against the trustee entity.

#### **Narrowing of the definition of 'motor vehicle' – clarify July 2004 changes<sup>7</sup>**

12. When the government changed the definition of 'motor vehicle' in the PPS regulations from 1 July 2014, it failed to include any meaningful transitional provisions and doubt arose about the validity of prior registrations. We dealt with this omission in our 2014 bulletin on the topic. The Report recommends that the legislation clarify that the change will not affect the validity of prior registrations.

#### **Further narrowing of the definition of 'motor vehicle'<sup>8</sup>**

13. The Report recommends that the Government explore further narrowing the definition of 'motor vehicle' so that it only covers vehicles with a VIN. There is currently a Bill before Federal Parliament which will remove the 90 day PPS lease threshold for serial number registrable assets including motor vehicles. If those amendments become law then the remaining relevance of the definition of motor vehicle will be for the issue of serial number registration. The main import of this change would then be to further narrow the category of goods that may need the additional protection of serial number specific registration.

#### **Timing**

14. The Report must be considered by the Government. Some difficult transitional questions will arise. Some important aspects (eg sub-hire) have been left as matters for more detailed consideration. Whether the recommendations of the Review are adopted in full or not, we do not expect any of them to be in force very quickly. We note that the amendments to the PPSA to remove the 90 day PPS lease threshold for a PPS lease were introduced to the Parliament almost a year ago and still have not passed into law. Adoption of the recommendations must be seen as likely to only occur in a matter of months or years. Perhaps the more simple ones can be put into effect more quickly.

**With Thanks to Oliver Shtein of Bartier Perry.**

The full report can be viewed via the HRIA Website:

<http://www.hireandrental.com.au/resources/information-sheets>

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<sup>5</sup> Report 7.3

<sup>6</sup> Report 9.2.2

<sup>7</sup> Report 6.6.4

<sup>8</sup> Report 6.6.3