

scoop

entertaining the law



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Personal Properties Security Act: Watch Out!

In an earlier Scoop, we provided an alert regarding the then-new *Personal Property Securities Act 2009* (Cth). That Act was, at the time, new and unprecedented legislation in Australia. Accordingly, there was significant uncertainty regarding how that Act and the Personal Properties Securities Register (**PPSR**) operated. In our experience, many clients simply chose to adopt a *wait and see* approach rather than taking proactive steps – and possibly even considering that, in the event of a default, they would simply retake possession of the asset on a “no one will ever know” basis.

A little over 2 years has passed since then and now a number of landmark and very important decisions have been handed down regarding the effect of the PPSR.

The cases highlight a critical point - a retention of title arrangement, even if properly documented, will not withstand a receiver unless the arrangement is registered effectively under the Act.

In short, **the takeaways** from the cases are:

1. Where there is a separation between the owner of an asset and who has effective control or possession of it, a security interest may need to be registered on the PPSR. This has broad implications well and truly beyond the traditional definition of a “security interest”.
2. Clients who have adopted that *wait and see* approach are now paying the price. The cases have shown that the Court is willing to enforce the Act strictly – even requiring the delivery up of property which has been removed due to a default.
3. Clients who made registrations on old State-based registers should review all of their migrated registrations in the PPSR by 31 January 2017; from then, any defects in that migrated registration may cause invalidity. In particular, registrations in respect of trusts (which were previously not available) now are – clients should consider making new registrations in respect of the trusts as well.

If you have clients in these positions, **we are happy to assist to preserve ownership of their assets**. For those of you that are interested, a summary of the recent cases and hyperlinks to the judgments is set out over the page.



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[Maiden Civil](#)

Queensland Excavation Services (**QES**) hired 3 Caterpillar excavation vehicles to Maiden Civil in around August 2010. That hire arrangement was under verbal and was not registered on the PPSR.

A receiver was appointed to Maiden Civil on 27 July 2012. QES terminated the hire arrangement and repossessed the Caterpillars.

Because the hire agreement was in place before 1 February 2012, that hire arrangement was a transitional security interest. However, that security interest should have been registered on the NT register that was in place before the PPSR. Even so, QES could have registered under the PPSR but it failed to do so.

Accordingly, despite QES' "ownership" of the Caterpillars, the Court ordered that the **receivers were entitled to possess and sell** them free of QES' interest.

[Arcabi](#)

Arcabi operated a market for the purchase and sale of rare coins and notes (called numismatics). There were a small proportion of commercial sellers of rare coins and notes who would store them with Arcabi or place them on consignment sale with Arcabi.

The case concerned retail investors who have largely recovered their property. However, the position for the commercial sellers is not as clear (and is yet undecided); whichever the result, this **uncertainty** and the **cost of litigation** could have been avoided for a registration fee as low as \$8.00.

[White v Spiers Earthworks](#)

Spiers operated an earthmoving business. In 2010, it sold that business to BEM but retained the earthmoving equipment and hired that equipment to BEM for a fee. That hire arrangement was documented in a legally binding agreement.

Spiers did not register its interest in the earthmoving equipment on the PPSR. Receivers were appointed to BEM on 31 July 2013. The receivers succeeded in obtaining an order for possession of the earthmoving equipment (valued at around \$1.4 million). The **receivers were entitled to sell that equipment and keep the proceeds** for the benefit of NAB.