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## The New Personal Property Securities Register and Retention of Title

A lot has been written lately about the new Personal Property Securities Act 2009 (the “Act”) and the Personal Property Securities Register (the “Register”). We are told that it will completely change the way that ‘security interests’ (such as the interests of suppliers who sell products under a retention of title arrangement or supply goods under a bailment or lease agreement) are protected. The new regime will also introduce a raft of new concepts and phrases, as well as do away with many of the traditional methods of protecting security interests (such as company charges and the registration of interests over motor vehicles on the Register of Encumbered Vehicles).

### Does the new regime affect you, and, if so, what do you need to do?

Many businesses buy and sell goods on the basis that the seller will retain title to the goods until payment has been received. This is usually achieved by incorporating a retention of title (“ROT”) or Romalpa clause in the seller’s terms of sale. If your business buys or sells goods on this basis then the new regime will squarely affect you.

### What is the regime all about?

The main purpose of the regime is to establish a single national system to register property security interests throughout Australia. The regime will, hopefully, make searching for security interests over property easier. The regime is also intended to regulate competing claims for priority if two or more parties claim an interest in goods or property. The Register has been designed to allow purchasers to make one search for the secured interests, if any, of other parties over goods before purchasing them. The Register will also allow lenders and other interested parties to search whether another party has an interest in the goods or property (excluding land) before taking an interest in the property.

For example, if you supply goods on a ROT basis and you wish to protect your interest in the goods against competing claims until payment then, under the new regime, it will be necessary to register that interest (called a Purchase Money Security Interest - PMSI) on the Register. If there are competing claims over the same goods (for example by a customer’s insolvency administrator such as a liquidator) then it will no longer be sufficient to merely establish that the goods were supplied under a ROT arrangement. Rather, it will be necessary to have registered your ‘property interest’ in the goods before or when the goods are sold because, otherwise, another registered interest (for example by a liquidator) will defeat your claim.

### What are security interests?

A security interest is an interest in personal property which ‘secures payment or performance of an obligation’ (see section 12(1) of the Act). Accordingly, where goods are supplied in exchange for future payment and ownership of the goods remains with the seller until payment has been made then the seller has a security interest in the goods. Examples of security interests covered by the Act include ROT clauses, equipment hire, charges and trust receipts. There are also a number of ‘deemed’ security interests under the Act such as in the case of consignments, bailments for value and some leases of goods.

### **When will the register commence?**

The commencement date for the Register was originally to be May 2011 and was then deferred until October 2011. The commencement date has again been deferred and it is now expected to commence in early 2012. The exact date for commencement has still not been determined. The Commonwealth Attorney-General is expected to make an announcement about the commencement date later in the year. Under the Act, the deadline for introduction of the Register is 1 February 2012.

### **How do you protect your retention of title or other security interests?**

Under the new regime, a secured interest will only be protected against competing claims through registration. All security interests which are covered by the Act should be registered to maintain priority. This includes company charges such as those presently registered with the Australian Securities and Investments Commission (ASIC) and motor vehicles presently registered with REVS. The government has indicated that certain existing registers (such as ASIC charges) will generally be automatically migrated to the Register.

### **How do you register security interests?**

You will need to create an account on the website for the Register as and when it becomes available. The Register will be online, updated in real-time and publically accessible so that you should be able to manage and view your security interests. As yet, the website for the Register is only in trial mode and not publicly accessible.

### **What information will you need to register your security interest?**

As the Register has not yet been finalised, our comments are based on a trial version of the Register. In order to register a security interest, you will need details about the nature of the security itself, the person or company who grants the security interest and the person or company who holds the security interest. Payment for on-line registration can only be made by credit card at this stage. The charges for registering a security interest will depend on the length of time the registration should remain effective. The announced fees for on-line registration are:

1. registration where duration is 7 years or less - \$7.40
2. registration where duration is more than 7 years but less than 25 years - \$37.00
3. registration for an undefined duration - \$130.00

### **What steps can you take to ensure that your security interest prevails?**

To ensure that any security interest that you or your company has, such as under a ROT clause, will be registrable, you should:

1. review your trade documents such as terms and conditions of sale, supply agreements, leasing agreements etc. to ensure that they contain an acknowledgement by customers that you will register your security interest and that they will supply any relevant information or assistance to you;
2. decide which transactions you wish to cover by registration. Do you, for example, want to register your security interests arising out of:
  - 2.1 every sale;
  - 2.2 sales above a certain value;
  - 2.3 all sales to a particular customer or customers or class of customers;
  - 2.4 all sales of particular goods or class of goods; or
  - 2.5 any combination of these; and
3. review your trade procedures to put your registration policy into effect. For this purpose, you may also have to decide whether additional personnel will be required and how your sales department or dispatch section will co-ordinate with the people responsible for security interest registration.

## Can you wait until commencement of the register?

We recommend that you have your relevant documents (e.g. terms of sale and credit applications) reviewed in advance of commencement of the new regime. You should also decide in advance when to register your security interest and what internal procedure to adopt in order to do so. Ideally, you should be prepared to register your company's security interests as soon as the PPS regime has commenced.

## Two year transition period

Once the new scheme commences, there will be a two year period in which to register an unregistered security interest. After that time, unregistered security interests will no longer be effective if the company holding the assets becomes insolvent. Please note, however, that this two year transition period does not apply to new sales or transactions made after the scheme begins. Once the regime commences, all new sales and relevant leases, consignments and new business contracts will have to comply with the new regime to be protected.

For further information in relation to the new Personal Property Securities Register, please contact Norbert Schweizer at [nschweizer@schweizer.com.au](mailto:nschweizer@schweizer.com.au).



**Norbert Schweizer**, Partner  
+61 (2) 9223 9399  
[nschweizer@schweizer.com.au](mailto:nschweizer@schweizer.com.au)

## Contact and Imprint



Schweizer Kobras Pty Ltd • An Incorporated Legal Practice • ACN 082 983 300 • ABN 80 323 580 453  
Level 5 • 23-25 O'Connell Street • Sydney NSW 2000 | PO Box H283 • Australia Square NSW 1215  
DX: 10161 Sydney Stock Exchange

Telephone: +61 (0)2 9223 9399

Facsimile: +61 (0)2 9223 4729

Web site: <http://www.schweizer.com.au>

E-Mail: [mail@schweizer.com.au](mailto:mail@schweizer.com.au)

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