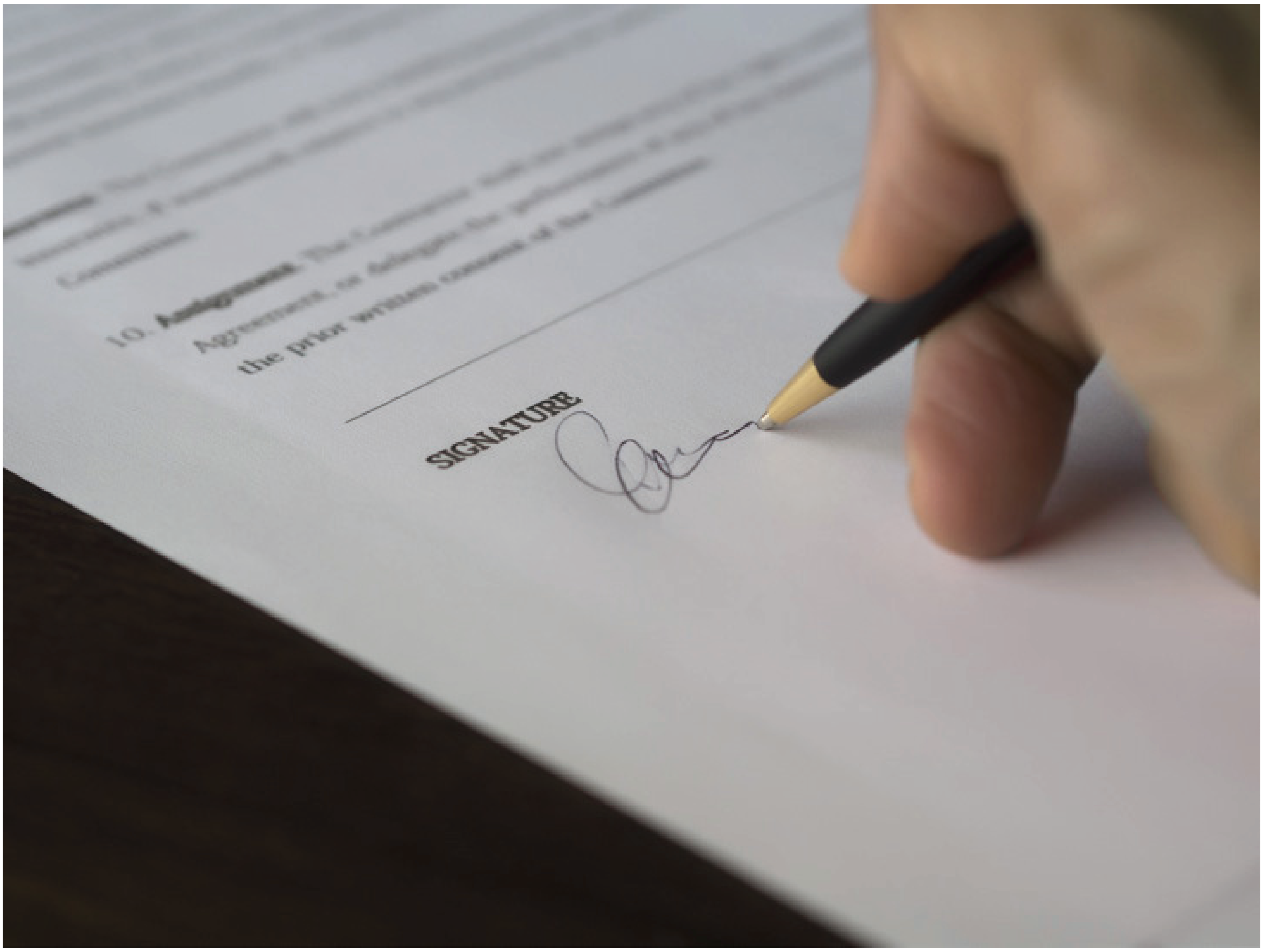

Personal Property Securities Act changed retention of title rules

The Personal Property Securities Act 2009 (Commonwealth) ('PPS Act') came into full effect in May 2011. This Act introduced what are described as 'personal property securities' and replaced some 70 existing acts and 40 registers for various kinds of securities with one act and register.

Mark Hamilton of Grope Hamilton Lawyers reports.

PREVIOUS RETENTION OF TITLE REQUIREMENTS

This had a significant effect on retention of title clauses in the wine sector in relation to such things as the sale of finished product under simple invoices or distribution agreements and the sale of bulk wine or grapes.

Not all wine producers and vineyard owners have caught up yet.

For many years in Australia and other common law countries, a very common method of securing protection for payment for goods has been a device known as a 'retention of title' or a 'Romalpa' clause ('ROT').

Wine Lawyer

Mark Hamilton
Grope Hamilton Lawyers

This has appeared in many wine industry distribution agreements and in the terms and conditions on many invoices.

An ROT clause was designed to protect the unpaid seller from the insolvency or default of the buyer by stipulating that the ownership of, or title to, goods sold does not pass to the buyer until payment is received by the seller.

In the event of default by the buyer, a seller, under an ROT clause, retained ownership of the goods and was therefore entitled to repossess the goods.

Previously, ROT clauses were not considered to create a charge or 'security interest', and did not have to be registered.

Given that the concept of a ROT clause was that property or title in, or ownership of, goods did not pass to a purchaser until the price for the goods is paid, this meant that the purchaser was not able to give a security over the title to goods.

This simple concept, and the fact

that registration as a security was not required in Australia and other countries meant that ROT clauses were a very effective protection for sellers against insolvent or defaulting purchasers.

APPLICATION OF PPS ACT

'Personal property' is defined very broadly in the PPS Act as all forms of property – including a licence – other than land, or a right, entitlement or authority that is granted by or under a law of the Commonwealth, a State or a Territory, and declared by that law not to be personal property for the purposes of the PPS Act.

This Act is unfortunately quite convoluted.

The PPS Act has impacted dramatically upon all forms of security over personal property, including ROT clauses. ROT clauses are specifically treated as security interests – in a similar manner to other countries, such as the United States.

This changed the way sellers deal with purchasers, and the ability of sellers to rely on the security created by ROT clauses.

It also created issues for purchasers in dealing with their financiers in terms of security arrangements.

The PPS Act displaced the concept of legal title – fundamental to previous ROT clauses – in favour of specialised concepts of possession and control.

PMSI'S AND RETENTION OF TITLE

Under the PPS Act there was a shift away from the concept of title to possession and control being paramount.

The PPS Act has provided some means for a seller of goods to obtain a priority form of security interest.

The PPS Act introduced the new concept of a Purchase Money Security Interest (PMSI), which includes the interest created under the previous ROT clause, securing payments for goods.

Under the PPS Act, a PMSI has 'super priority' over most other interests, provided always that a PMSI is 'perfected' by registration on the Register.

PERFECTION

Under the PPS Act, the security interest created by a ROT clause or PMSI is perfected if:

- The goods are still in the possession of the seller, or
- The PMSI is registered under the Act.

In the PPS Act, 'collateral' means personal property to which a security interest is attached.

The collateral for a PMSI under a sale contract will be the goods that are sold.

Therefore, in order to rely on and enforce ROT clauses, sellers need to register each such interest as a PMSI on the PPS register to 'perfect' the security interest.

If not, the seller risks being defeated by competing security interests and other third party claims over the goods which the seller has parted with.

> 'Personal property' is defined very broadly in the PPS Act as all forms of property – including a licence – other than land, or a right, entitlement or authority that is granted by or under a law of the Commonwealth, a State or a Territory, and declared by that law not to be personal property for the purposes of the PPS Act. This Act is unfortunately quite convoluted.

REGISTRATION

The process for registration on the PPS Register is:

- The filing of a Financing Statement with details of the security interest, including a PMSI;
- A PMSI does not have to be over every item or good supplied, but one registration may be made for all future ROT transactions with that particular buyer for the same class of goods; and
- Payment of the Application Fee.

At the time of registration of a security interest on the PPS Register, the Applicant must believe on reasonable grounds that an interest capable of registration exists to avoid committing an offence under the PPS Act.

The civil penalty for committing this offence is, for an individual, $5500 and $27,500 for a body corporate.

Therefore, in order to register a PMSI, there should be an effective ROT clause or other security in existence to justify or to at least evidence the belief.

Once registered as a PMSI, the seller has a super interest in or right to the goods, subject to the priority of previously registered PMSIs.

The priority of PMSI registrations is determined on a first in time basis and therefore a seller should lodge a financing statement for a ROT clause as soon as possible – within 10 business days, unless the goods which are collateral are part of inventory.

PROCEEDS

A registered and perfected PMSI can give security over goods which are sold, and also proceeds arising from dealings with the goods.

However, the ROT clause creating the PMSI must specifically cover proceeds, and the amount of proceeds secured by the PMSI must be disclosed in the financing statement registering the PMSI.

This can represent an improvement over the protection which existed previously.

TRANSITIONAL PROVISIONS

The PPS Act provided for a two-year transitional period from May 2011.

All existing or new security interests needed to be transferred into the national database during that time.

About the author:

Mark Hamilton of Grope Hamilton Lawyers provides specialist national legal services to the Australian wine industry.

He has a lifetime of wine sector experience through his involvement with Hamilton's Ewell Vineyards.

He can be contacted on (08) 8231 00898 or 0412 842 359 or mhamilton@gropehamiltonlawyers.com.au. See www.gropehamiltonlawyers.com.au.

For more information about the PPSR and the impacts on your business, visit www.ppsr.gov.au.

There is also a guide intended to help Australian businesses not familiar with the practical implications of this law. Here you can find out about the business benefits, how to use the register and see case studies with practical examples of businesses using the register.

GW