Risk management and the PPS Register

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The Personal Property Securities Register presents lawyers with significant risks, even as it provides better protection for clients whose interests are registered.

The Personal Property Securities Register (PPSR) is a revolutionary change in the way property interests other than land are dealt with in Australia. Solicitors need to be aware of it in all areas of practice, as its scope is wide and failure to take it into account can lead to expensive mistakes. There have been multiple technical articles and seminars on the scheme; this note is a general reminder to practitioners of its operation in the context of risk management.

The Act

In brief, the *Personal Property Securities Act* (the Act), which commenced on 30 January 2012, introduced a single national online register of security interests in personal property within Australia, excluding land (the PPSR).

A security interest over personal property is broadly defined as:

- any interest in personal property in a transaction that secures payment or performance of an obligation (such as a mortgage, charge, lease or retention of title clause); or
- a consignment sale (a particular type of lease under the Act) or certain other matters.

Further, less obvious, security interests can also be registered.

The Act works on a substantive basis – anything that in substance secures payment or performance of an obligation will be a security interest and require registration (if it cannot be otherwise perfected by control or possession). Practitioners should note this is a fundamental change in respect of things that were previously not understood to be security interests, including:

- scheme leases (finance, operating leases and hire-purchase agreements with a duration of over 12 months, or over three months if property with a scheme serial number);
- retention of title rights;
- goods on consignment; and
- bailments.

The interests covered by the regime are broad and include intangible property, such as more exotic matters like intellectual property, in addition to the more run-of-the-mill matters such as retention of title clauses, and share sale and option agreements that solicitors in general practice often encounter.

Priority and perfection

The Act sets out rules that determine priorities between competing security interests. The regime mimics, conceptually, the Torrens system of registration of security over property. This means that all the risks that can happen when dealing with land, especially with unregistered security, may now occur with personal property.

The Act provides that a subsequent buyer or lessee can acquire personal property free of a security interest when:

- the security interest is "unperfected", in other words not registered or perfected in some other way; or
- if the purchaser or lessee acquires the personal property in the ordinary course of business or acquires a property with a regime serial number after a search shows that serial number has no registered interest.

The NSW Supreme Court recently confirmed that a registered security interest will defeat an unregistered security interest, even if the holder of the unregistered interest is the actual owner of the goods (in *In the matter of Maiden Civil (P&E) Pty Limited et al* [2013] NSWSC 852) ("Getting your priorities right", *LSJ*, August 2013).

Risks to practitioners

This revolutionary regime presents lawyers with significant risks. Just as mortgagees over land in Australia will, on settlement, require their security interest be registered on title in the public register for all the world to see, solicitors have to be aware of the need to advise clients of the desirability of personal property security registration, and of the risks of failure to do so.

Any subsequent registered security will take priority over the unregistered security. In circumstances where the security may be called upon, the client's security may be defeated for practical purposes as the registered security holder takes priority over the security property, and the unregistered security holder is left to attempt to recover security from insufficient assets.

A failure to address the regime by a solicitor who acts for the acquirer of a security interest in personal property in Australia could lead to a similar situation as would apply were they to fail to arrange for registration of a mortgage over land.

It goes without saying that a client in such a situation will likely blame the solicitor for this and sue the solicitor for what could be substantial amounts of money.

Risk management

A significant component of risk management is putting in place simple, cost-efficient procedures that will minimise the risk of an adverse event occurring along the way.

It follows that legal practitioners will need to consider the regime in any commercial transaction that does not relate to land. Remember that the scheme is exceptionally broad and anything that in substance secures payment or performance of an obligation will be a security interest and require registration.

Practitioners should consider:

- preparing a checklist to accompany each matter opening form;
- the need to advise each client on the effect of the regime, and the consequences of failure to register; and
- creating an internal register of security interests.

Now would also be a good opportunity to review current or recently closed files to determine whether the regime is implicated and to advise clients of what may need to be done (under the transitional security interest regime in the Act).

The transitional security period ends on 30 January 2014. Certain interests that are now security but were not prior to 30 January 2012 will be protected so long as registration is effected prior to the end of the transitional period.

This is a potentially 'long tail' area, where security interests may survive for a significant period after the closure of the practitioner's file. Filenotes of advice are, as always, critical and should be kept.

Practitioners should treat any security documents that are left with them for safekeeping like a deed or a will, and exempt the relevant documents from any document destruction policy.

The Law Society has a dedicated page with information, fact sheets and precedents at *tinyurl.com*/ksrwchg. □