Legal 500
Country Comparative Guides 2024

Australia

Lending & Secured Finance

Contributor

Mills Oakley

Graeme Gurney

Partner | ggurney@millsoakley.com.au

Monique Stella

Partner | mstella@millsoakley.com.au

Peter Kennedy

Partner | pkennedy@millsoakley.com.au

Kirsten Farmer

Partner | kfarmer@millsoakley.com.au

Norman Donato

Partner | ndonato@millsoakley.com.au

Damian Walsh

Special Counsel |

This country-specific Q&A provides an overview of lending & secured finance laws and regulations applicable in Australia.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

Australia: Lending & Secured Finance

1. Do foreign lenders or non-bank lenders require a licence/regulatory approval to lend into your jurisdiction or take the benefit of security over assets located in your jurisdiction?

A corporation may only carry on banking business (meaning a business both of taking deposits and making advances of money) in Australia if it holds an authorised deposit-taking institution (***ADI***) licence from the regulator, the *Australian Prudential Regulation Authority* (***APRA***).

If a foreign bank intends to provide finance but not to take deposits, it does not require an ADI licence. However, it is still likely be required to be registered by APRA under the *Financial Sector (Collection of Data) Act 2001 (Cth)*.

If, however, it intends to both lend and take deposits it must apply for an ADI licence and:

a. It must satisfy APRA that it is subject to adequate supervision in its home country and has received consent from its home supervisor to establish in Australia.
b. If it will only have *wholesale* clients, it may do so as a foreign ADI by establishing an Australian branch, in which case, although it will still be oversighted by APRA, it is not subject to its capital requirements.
c. If it will provide services to *retail* clients, it must establish an Australian subsidiary, which will need to meet local capital requirements and local regulatory requirements, including having a local board.

If a foreign bank does not hold an ADI licence and intends to run a financial services business, it must have an Australian financial services licence (***AFSL***) issued by the *Australian Securities and Investment Commission* (***ASIC***).

Foreign banks, particularly those owned or controlled by a foreign government, may require approval from the *Foreign Investment Review Board* (***FIRB***) to take and enforce security over certain classes of Australian assets, including residential land.

2. Are there any laws or regulations limiting the amount of interest that can be charged by lenders?

The *National Consumer Credit Protection Act 2009 (Cth)* caps the fees and charges that can be imposed on certain types of loans to individuals.

Whilst there are no statutes that limit the amount of interest that can be charged and courts are reluctant to interfere with the commercial terms that the parties have agreed on commercial loans, an amount of interest may be set aside where the amount charged is considered a penalty.

3. Are there any laws or regulations relating to the disbursement of foreign currency loan proceeds into, or the repayment of principal, interest or fees in foreign currency from, your jurisdiction?

Unless an exemption applies, interest withholding tax of 10% is payable on interest paid by Australian resident borrowers to offshore lenders.

Interest is defined broadly and includes amounts in the nature of interest.

Two common exemptions are:

a. lenders is in a jurisdiction which has a double tax treaty with Australia; and
b. financings that satisfy the ***public offer*** exemption set out in section 128F of the *Income Tax Assessment Act 1936 (Cth)*.

The Commonwealth Government also prohibits transactions with certain parties under its sanction laws.

4. Can security be taken over the following types of asset: i. real property (land), plant and machinery; ii. equipment; iii. inventory; iv. receivables; and v. shares in companies incorporated in your jurisdiction. If so, what is the procedure – and can such security be created under a foreign law governed document?

Yes.

Creation and priority between:

- ***Securities over* land:** regulated by State based law, based on where the land is located, summarised in 1; and
- ***Securities over personal* property:** are regulated by the PPSA, summarised in 4.2 – 4.6.

Some comments on foreign law governed securities are in 4.7.

4.1 Real property (land) and plant and machinery affixed to land

The main form of security over land in Australia is a mortgage.

States prescribe the form of mortgages and steps required to verify identity (***VOI***).

Plant/machinery affixed to land is covered by a mortgage of the land. Plant/machinery not affixed is personal property must be secured as described in 4.2 and 4.3.

In New South Wales, Queensland, Victoria, South Australia and Western Australia, most mortgage registrations are completed electronically through the online ***PEXA*** platform. More complicated transactions and all transactions in the remaining jurisdictions still require a paper lodgement.

4.2 Personal property (including equipment not affixed to land, inventory, receivables and shares)

Securities (***security interests***) over personal property (***collateral***) of Australian corporations (and individuals) are governed by the PPSA.

a. The procedure for taking security over all collateral classes is broadly the same:
    i. a security agreement, either a general security agreement (***GSA***) over all assets or a specific security agreement (***SSA***) over specific assets;
    ii. registration on the register (***PPSR***); and
    iii. for particular collateral classes, at the option of the parties, taking additional steps to confer a higher priority against third parties – summarised in 4.3 – 4.6.
b. PPSA distinguishes between securities over circulating assets and non-circulating assets, which is relevant to:
    i. ***Dealings*:** grantors may generally deal with circulating assets without permission from the security holder until the security ***attaches***; and
    ii. ***Insolvency*:** securities over circulating assets will generally rank behind statutorily preferred creditors.
c. Priority rules between competing securities:
    i. perfected securities have priority over unperfected security;
    ii. perfection is achieved by registration, and for some collateral classes, by control as well;
    iii. perfection by control gives a better priority than perfection by registration alone;
    iv. more than one registration is possible for some collateral classes and one of those registrations may confer a better priority; and
    v. in the absence of (iii) or (iv), for securities perfected only by registration, priority is generally determined by the order of registration.
d. An example of (c)(iv) is where the secured party has funded the acquisition of the collateral. In that case, the security may be registered as a *Purchase Money Security Interest* (***PMSI***), which confers a super-priority over all other securities affecting the collateral, other than those perfected by control.
e. PPSA imposes a strict time period of 20 Business Days for registration of most securities. PMSI's have different (and shorter) time periods depending on the nature of the collateral.
f. An unregistered security or one registered outside the relevant period is likely to be unenforceable if the grantor becomes insolvent within 6 months.

In September 2023 the federal government released an exposure draft bill to amend the PPSA which is designed to simplify its operation. If implemented in its current form, among other things, the requirements around registering PMSI interests will change. The government has not yet confirmed the final form of the changes to the PPSA.

4.3 Equipment

Notwithstanding that the lessor under a finance lease is the legal owner of the leased equipment, finance leases

are deemed by the PPSA to be securities and must be registered (usually as a PMSI) to give the lessor a statutory priority over conventional securities granted by the lessee.

If the equipment is an aircraft, watercraft or motor vehicle, then a special registration should be made on the PPSR against the serial number of the equipment.

Cape Town Convention registrations should also be made for aircraft.

4.4 Inventory

Inventory is generally a circulating asset. The permission to deal is revoked when the security attaches , usually by notice or enforcement. Security over inventory will generally rank behind statutory creditors.

4.5 Receivables

a. A secured party can take security over receivables under a GSA, a SSA or by an assignment (where the debtor may or may not be notified). The PPSA will apply in all cases.
b. Generally, receivables will be circulating assets and security will rank behind statutory creditors.
c. If, however, the secured party:
    i. has given notice to the debtor;
    ii. has control over the account into which proceeds of the receivables are paid, because it is the account bank or by agreement with the account bank; and
    iii. makes a registration on the PPSR which notes the existence of that control, the security will be a non-circulating asset and will rank ahead of statutory creditors.

5.6 Shares in companies incorporated in your jurisdiction

To achieve the highest priority over shares, a secured party should establish control over the shares by:

a. in the case of certificated shares, holding the original share certificates and a signed blank share transfer form; and
b. in the case of uncertificated (for example listed) shares, entering into a tripartite agreement with the nominee-holder that restricts dealings other than by or at the direction of the secured party.

If control is not established, another person who perfects security by control in this way will rank ahead even if that security was later.

4.7 Foreign law governed security

A registrable security over land in Australia requires an Australian law security.

A foreign law security may create effective security over Australian personal property, but to gain priority and be effective in insolvency, it should be perfected as described above.

Secured parties relying on foreign documents should note that Australian documents contain various market standard provisions which disapply certain PPSA provisions which are onerous to security holders and can interfere with enforcement.

5. Can a company that is incorporated in your jurisdiction grant security over its future assets or for future obligations?

Yes.

6. Can a single security agreement be used to take security over all of a company's assets or are separate agreements required in relation to each type of asset?

Yes.

A GSA, but note that although it is market practice in Australia for GSA's to be expressed as attaching to land, a PPSA registration does not validate securities over land, so secured parties should take registered mortgages over any valuable land.

As well as any main security (for example, a mortgage of land), Banks will generally take a GSA as it confers various protections in insolvency.

7. Are there any notarisation or legalisation requirements in your jurisdiction? If so, what is the process for execution?

Notarisation or other legalisation is generally not required.

The land statutes in each State has particular requirements for execution of mortgages and different rules for mortgages executed outside Australia. Some States (and some financiers) require VOI.

8. Are there any security registration requirements in your jurisdiction?

Yes. See 4 above.

9. Are there any material costs that lenders should be aware of when structuring deals (for example, stamp duty on security, notarial fees, registration costs or any other charges or duties), either at the outset or upon enforcement? If so, what are the costs and what are the approaches lenders typically take in respect of such costs (e.g. upstamping)?

Stamp duty has been abolished on loan/mortgage transactions.

GST (a value added tax) does not currently apply to financial transactions.

Enforcement costs are paid by grantors.

10. Can a company guarantee or secure the obligations of another group company; are there limitations in this regard, including for example corporate benefit concerns?

A guarantee or security (***support***) for the obligations of a related company, must be for the direct or indirect commercial benefit and in the best interests of the company giving it. Support will not generally be for the benefit of the company if it directly benefits a wider corporate group or members.

Support that does not provide a corporate benefit to the company may be set aside as a preference or may be voidable in the insolvency of the company.

However, where the constitution of a subsidiary expressly permits and the subsidiary is not insolvent at the time or as a result, support may be given for the benefit of the holding company.

It should also be noted that if the company is a public company, there are further restrictions on providing a financial benefit (which would include support) for the benefit of a related company. Shareholder approval will be required unless an exemption applies, the most common being a transaction for the benefit of a wholly owned subsidiary or a transaction on arm's length terms.

11. Are there any restrictions against providing guarantees and/or security to support borrowings incurred for the purposes of acquiring directly or indirectly: (i) shares of the company; (ii) shares of any company which directly or indirectly owns shares in the company; or (iii) shares in a related company?

Yes.

A company may only ***financially assist*** a person to acquire shares in the company or a holding company of the company if:

a. the financial assistance does not ***materially prejudice*** the interest of the company or its shareholders, or the company's ability to pay its creditors (in most cases, it will be very difficult to have the required level of certainty to rely on this permission); or
b. the company's shareholders (and generally those of its parent) approve the financial assistance by special resolution under a ***whitewash process***.

The restriction includes giving securities and guarantees and applies whether the assistance is given before, at the same time as, or after the acquisition.

Breach does not invalidate the transaction, but officers of the company commit criminal offences and persons assisting in the commission, including lenders and advisers, may be guilty of aiding and abetting.

The usual approach is to require the whitewash process to be followed before the financial assistance is provided.

12. Can lenders in a syndicate appoint a trustee or agent to (i) hold security on the syndicate's behalf, (ii) enforce the syndicate's rights under the loan documentation and (iii) apply any enforcement proceeds to the claims of all lenders in the syndicate?

Yes.

The most common structure involves a security trustee (which may be an affiliate of the syndicate agent or an independent trustee) who holds the security on trust and enforces it for the benefit of all the lenders.

13. If your jurisdiction does not recognise the role of an agent or trustee, are there any other ways to achieve the same effect and avoid individual lenders having to enforce their security separately?

N/A.

14. Do the courts in your jurisdiction generally give effect to the choice of other laws (in particular, English law) to govern the terms of any agreement entered into by a company incorporated in your jurisdiction?

Yes.

Subject to certain policy qualifications, Australian courts will generally give effect to a choice of law of submission to another jurisdiction.

Australia's has adopted the *UNCITRAL Model Law on Cross-border Insolvency*, but in insolvency matters relating to Australian companies, notwithstanding a foreign choice of law or submission, Australian courts will generally have jurisdiction.

15. Do the courts in your jurisdiction generally enforce the judgments of courts in other jurisdictions (in particular, English and US courts) and is your country a member of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (i.e. the New York Arbitration Convention)?

Yes.

The *Foreign Judgments Act 1991 (Cth)* sets out a regime for the recognition and enforcement of judgments of the superior courts (and specified inferior courts) of specified foreign jurisdictions.

A judgment must be final and conclusive and for payment of a sum of money.

The regime currently applies to: Alberta, Bahamas, British Columbia, British Virgin Islands, Cayman Islands, Dominica, Falkland Islands, Fiji, France, Germany, Gibraltar, Grenada, Hong Kong, Israel, Italy, Japan, Korea, Malawi, Manitoba, Montserrat, Papua New Guinea, Poland, St. Helena, St. Kitts and Nevis, St. Vincent and the Grenadines, Seychelles, Singapore, Solomon Islands, Sri Lanka, Switzerland, Taiwan, Tonga, Tuvalu, United Kingdom and Western Samoa.

Notably, it does not apply to USA, China and India.

In other instances, foreign judgments may be enforced under common law principles. Similar conditions must be satisfied but, in addition, certain public policy concerns apply.

The *International Arbitration Act 1974 (Cth)* gives force of law in Australia to the New York Convention and the *UNCITRAL Model Law on International Commercial Arbitration*.

16. What (briefly) is the insolvency process in your jurisdiction?

At its core, Australia's insolvency regime remains broadly similar to the insolvency regime of the United Kingdom.

16.1 Schemes of arrangement

Schemes of arrangement are suitable for larger and more complex restructurings. Schemes are overseen by the Courts and require agreement of a majority in each class of creditors affected.

It is common practice for the company's directors and officers to remain in control while the scheme is being formulated. If the company's directors remain in control of its affairs, they should secure the benefit of the ***safe harbour provisions*** referred to below.

16.2 Receivership and liquidation/winding up

Typically, after an event of default under a GSA or other security, a secured creditor may appoint a registered liquidator as receiver and manager of the grantor. The Receiver's role is to take control of and sell the secured assets in order to repay the secured debt.

There is also power for a Court to appoint a Receiver on the application of an unsecured creditor, but it is very rarely used.

Where a company is insolvent or deemed to be so for failure to meet a statutory demand, a liquidation can be begun by creditors. Liquidation results in a company's business being shut down, its assets sold and the proceeds distributed to creditors pro rata to their proven debts.

There is a ***simplified liquidation process*** for companies that have liabilities less than $1million and not more than 25% of creditors object.

16.3 Restructuring

Although Australia does not have a debtor in possession insolvency regime like Chapter 11, four regimes have been introduced over the last 30 years that have elements of that regime:

a. (1993) ***Voluntary Administration***, under which a registered liquidator is appointed by the directors(or, rarely, by a secured creditor holding a GSA or, very rarely, by a liquidator or provisional liquidator) as the voluntary administrator (**VA**) of a company which is insolvent or likely to become insolvent.

The appointment results in a statutory moratorium on creditors taking action, unless they are a secured creditor holding a GSA, who has a limited period of 13 business days to enforce.

The directors cede control and the VA manages its affairs until the creditors decide the company's fate. The VA and creditors may apply to the Court for relief in certain circumstances but, unlike Chapter 11, the process is not subject to Court oversight.

There is a strict timeframe for the calling of creditors' meetings. At the second creditors' meeting, a majority of the creditors by number and dollar value must choose one of only three possible outcomes:

i. the company is wound up and the administrator becomes the liquidator;
ii. the company enters into a deed of company arrangement (a binding agreement between the deed administrator and the creditors that is intended to provide creditors with a return that would be better than a liquidation) and the voluntary administrator becomes the deed administrator; or
iii. rarely, because it requires the company to be solvent, the company is returned to its directors.

A deed of company arrangement provides the opportunity for the company to continue to trade with control going back to the directors and employees retaining their jobs. There is no standard or cookie cutter approach when formulating a proposal for a deed of company arrangement. It is intended to be flexible.

b. (2018) The ***ipso facto*** regime: see 17.
c. (2018) The ***safe harbour provisions***, a process that provides a defence for directors to the offence of insolvent trading while a company is seeking to restructure.
d. (2021) A small business restructure process (***SB Restructure***), which allows eligible businesses to compromise their debts with creditors under a restructuring plan. Directors remain in control, but are assisted through the restructuring process by a restructuring practitioner (***RP***), who must be a registered liquidator. The RP oversees the payments of dividends to creditors while directors and business owners continue to manage their day-to-day business.

Sitting outside the insolvency framework are informal workouts. These involve one or more creditors, typically financial institutions, working with a business to restructure part or all of the business to allow it to continue trading.

17. What impact does the insolvency process have on the ability of a lender to enforce its rights as a secured party over the security?

Schemes, receiverships over the whole or substantially the whole of the company's property, VA's and SB Restructures are supported by the ipso facto stay. Subject to exceptions, the regime imposes a statutory stay on exercise by counterparties of contractual rights (including security powers) during these processes.

Enforcement by a secured creditor is not stayed if:

a. it enforced security before the process began;
b. it holds a GSA and enforces during a short period;
c. it enforces against perishable property;
d. the relevant insolvency practitioner consents; or
e. the Court makes an order lifting the stay ***in the interests of justice***.

18. Please comment on transactions voidable upon insolvency.

A payment of money, transfer of property or other transaction from the company's assets to a third party that either:

a. occurs at a time when the company was insolvent or became insolvent as a result; or
b. causes a detriment to the company,

may be a ***voidable transaction*** and potentially ***clawed back*** by a liquidator after their appointment.

There are a number of categories:

***18.1 Unfair preference*:** typically occur when an unsecured creditor receives an advantage over other unsecured creditors by receiving payment for outstanding liabilities and does so in circumstances where they knew, or ought to have known, the company was insolvent.

***18.2 Uncommercial transactions*:** transactions entered into by a company where, having regard to the respective benefits and detriments to the company, a reasonable person in the directors' circumstances would not have entered into the transaction.

***18.3 Unreasonable director related transactions*:** a similar test is applied to transactions entered into with a director or close associate of the company.

***18.4 Unfair loans*:** may arise in circumstances where a loan to a company is unfair because, for example, the interest is or becomes extortionate.

***18.5 A creditor-defeating disposition*:** a company transfers property to another entity for less than its reasonable market value with the intention of hindering the company's ability to meet the claims of its creditors.

Different time frames before the winding up and somewhat different tests are applicable to different types of transaction.

19. Is set off recognised on insolvency?

Contractual set-off ceases to be enforceable in the liquidation of a company, but may be replaced by statutory set-off of ***mutual*** debts. Whether debts and credits are mutual and can be set-off is to be determined at the date of liquidation.

20. Are there any statutory or third party interests (such as retention of title) that may take priority over a secured lender's security in the event of an insolvency?

Yes.

In the case of circulating assets, the secured party's security will rank behind certain statutorily preferred debts (such as employee entitlements).

A retention of title clause falls within the definition of ***security interest*** in the goods under the PPSA, and if effectively registered, will be a PMSI that takes priority over all other securities, including earlier registered GSA's.

21. Are there any impending reforms in your jurisdiction which will make lending into your jurisdiction easier or harder for foreign lenders?

***Banking regulation*:** As a reaction to perceived excesses and poor behaviour by banks and financial services companies in the Australian market, the Commonwealth Government established the Banking Royal Commission in 2019. The findings of the Royal Commission were very critical of some practices of Banks. As a consequence further regulation and oversight has been introduced. This is likely to be a continuing trend.

Oddly, however, the non-bank lending market is largely unregulated.

***Insolvency reform*:** On 28 September 2022, a Commonwealth Parliamentary Committee began an enquiry into corporate insolvency in Australia. The Committee currently intends to table a report in both Houses of the Parliament by 30 May 2023.

22. What proportion of the lending provided to companies consists of traditional bank debt versus alternative credit providers (including credit funds) and/or capital markets, and do you see any trends emerging in your jurisdiction?

The Australian corporate and business lending market is largely dominated by ADI's. Alternative credit providers maintain a smaller hold on the market, with the private debt market reaching a market size of AUD133 billion at the end of 2021, or approximately 11% of the total corporate and business lending market. This share is expected to grow quickly as banks tighten their lending practices in response to more stringent oversight and regulation, and the increased flexibility offered to borrowers through alternative credit providers.

Alternative credit providers are rare participants in the debt capital markets, which are dominated by banks and investment banks.

23. Please comment on external factors causing changes to the drafting of secured lending documentation and the structuring of such deals such as new law, regulation or other political factors

The Asia-Pacific Loan Markets Association (***APLMA***) has been active in promoting standardised documentation for syndicated and bilateral loans along the lines of ***LMA*** documents, with a view to creating a market standard and reducing negotiation time and cost.

Contributors

Graeme Gurney
Partner
ggurney@millsoakley.com.au

Monique Stella
Partner
mstella@millsoakley.com.au

Peter Kennedy
Partner
pkennedy@millsoakley.com.au

Kirsten Farmer
Partner
kfarmer@millsoakley.com.au

Norman Donato
Partner
ndonato@millsoakley.com.au

Damian Walsh
Special Counsel

