Australia

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1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

2017 was a good year for borrowers – with bank funding costs down and a scarcity of assets/names driving better pricing and terms for the borrowers who came to market, together with the emergence of many alternative sources of funding on competitive terms. These include a strong demand from the Australian debt capital markets (medium term notes) and US private placement markets for infrastructure borrowers. Strong corporates such as Sydney Airport, AMP Group and Ramsay continued to tap the syndicated loan markets.

On the more highly leveraged transactions, 2017 will be remembered as the year in which unitranche financings (such as iNova, Laser Clinics and Novotech) and Australian law-governed AUD-only Term Loan Bs (Camp Australia, Leap Legal/Infotrack and Craveable Brands) really made a big impact. While traditional senior/senior + holdco mezzanine leveraged loans continue to be used (e.g. Icon Cancer Care), some of the larger sponsors are now running dual-track financing strategies, forcing banks providing traditional syndicated loans to compete with unitranche financings provided by institutional lenders/debt funds.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

- Large corporate loans syndicated in the Asia-Pacific loan markets included Sydney Airport on its A$1.4 billion refinancing – voted KangaNews' syndicated loan deal of the year 2017, Transurban Group's A$1bn+ refinancing and the Port of Brisbane refinancing.
- The first Australian law standalone covenant-lite AUD Term Loan B facility for an Australian corporate, arranged by Goldman Sachs and JPMorgan for leading tech companies LEAP Legal Software and Infotrack and the senior and mezzanine AUD Term Loan B facilities for the debt recapitalisation of Craveable Brands.
- Significant acquisition financings including Carlyle/PEP's iNova acquisition, QIC/Goldman Sachs PIA/Pagoda Investment consortium's acquisition of Icon Cancer Care and KKR's acquisition of Laser Clinics Australia.

KWM was involved on all the above transactions (including on the vendor/bidder side).

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

Yes. However, corporate benefit and other requirements need to be considered. These issues are outlined below.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

The directors of a company owe a duty to the company to act for the benefit of the company in its best interests, with due care and diligence, in good faith and for a proper purpose. Directors must also avoid any conflict between a director's duty to the company and that director's personal interest. Directors must comply with these duties when resolving to give a guarantee.

In determining whether to grant a guarantee or provide security, directors may consider both direct benefits and indirect benefits of doing so. Indirect benefits may include that the provision of the guarantee is a requirement for the ongoing support of other members of the corporate group where the support also indirectly benefits the company. While it is not sufficient that the guarantee benefits the corporate group as a whole, a director of a wholly owned subsidiary may take into account the best interests of its holding company as long as the constitution of the company permits it to do so and the company is solvent at all relevant times.

A guarantee that does not commercially benefit a company may be voidable or, in a liquidation, the guarantee could be deemed an uncommercial transaction or unfair preference. A breach of duties by directors can result in civil and criminal penalties and personal liability for directors.

2.3 Is lack of corporate power an issue?

An Australian company has all the powers of an individual. This includes the power to give a guarantee. However those powers may be limited by the company's constitution.

Third parties dealing with a company are entitled to make certain statutory assumptions, including that the company's constitution has been complied with unless they know or suspect the assumption to be incorrect.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

Shareholder approval is not strictly required except for public companies in connection with related party transactions, subject to certain exemptions, the most relevant being where the transaction is on arm's-length terms or is for the benefit of 100%-owned subsidiaries. For private companies, it remains good practice to get shareholders' approval.

If the provision of a guarantee constitutes financial assistance, such as a guarantee of a loan used to assist the acquisition of shares in the company, the financial assistance must either (a) not materially prejudice the interests of the company or its shareholders or the company's ability to pay its creditors, (b) be approved by shareholders and the shareholders of relevant holding companies, or (c) fit within another exception.

Transactions which involve consumers and small business are subject to additional requirements under national consumer protection legislation.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

There are no specific requirements of this nature that apply in addition to the corporate benefit requirements outlined above. However, guarantees given while a company is insolvent/nearly insolvent or which render a company insolvent can be set aside by a liquidator. Directors may also be subject to personal and criminal liability for entering into such guarantees.

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

There are no exchange controls that would prevent payment under a guarantee or restrict enforcement of a guarantee. However, Australian sanctions laws prohibit dealings with designated persons and entities in various countries.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

Most assets are available to secure lending obligations, subject to applicable contractual restrictions and, in limited cases, statutory restrictions. The regimes which apply to taking security differ according to whether the collateral is "personal property", in which case the *Personal Property Securities Act 2009* (Cth) ("**PPSA**") applies, or whether the collateral is real property, in which case State and Territory-based real property legislation applies.

The PPSA is modelled on the Canadian and New Zealand Acts and shares similarities with Art. 9 of the Uniform Commercial Code. Generally speaking, security interests are interests in personal property that secure payment or performance and include some "deemed security interests" (such as certain leases of personal property and assignments of certain receivables) which may not secure payment or performance.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Yes. A general security agreement ("**GSA**") granting general security over all or substantially all of the present and future assets of the grantor is routinely entered into. It is also possible to take security over one or more types of specific assets under a specific security agreement ("**SSA**") (e.g. shares in a company, book debts, deposit accounts, goods). Otherwise, it is not usual to provide for security over different collateral classes in separate documents.

A GSA will typically cover all real and personal property. However, if the collateral is land and the land is material to the security package, separate real property mortgages are also usually entered into and registered on the appropriate real property register for priority perfection purposes.

The PPSA provides for perfection of a security interest in personal property by one of three means:

- registration on the Personal Property Securities Register ("**PPSR**") – this is the most common method of perfection;
- in the case of goods and certain intangible rights, possession by the secured party; or
- in the case of certain financial assets (including shares and bonds), control by the secured party.

It is not mandatory to perfect security interests governed by the PPSA, but if they are not perfected, then:

- they vest in the grantor immediately upon the grantor entering voluntary administration, bankruptcy or liquidation;
- a competing secured party may have a higher priority interest; and/or
- third parties may acquire an interest in the collateral free of the secured party's interest.

Australian law recognises fixed charges (or, using PPSA terminology, security interests over "non-circulating assets") and floating charges (security interests over "circulating assets").

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes.

Security over interests in land typically takes the form of a registered mortgage. Separate State and Territory laws regulate interests in land including real property mortgages and set out the applicable registration procedure.

Security over plant, machinery and equipment is usually taken under a GSA or SSA. Since plant, machinery and equipment (as long as they are not fixtures attached to land) are personal property, security over them is registrable on the PPSR.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Yes.

Security over receivables can be taken under a GSA or an SSA.

If a "fixed charge" over receivables is required, the secured party must control dealings by the grantor with the receivables and register that it has control.

There is no requirement to notify the debtor in order to perfect the security interest or to obtain priority over other security interests. However, the secured party may wish to do so to obtain legal title to the receivables and the legal right to enforce in its name and power to give a good discharge.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Yes.

Security over accounts with a bank or an approved deposit-taking institution (an "**ADI**") can be taken under a GSA or an SSA.

An ADI with a security interest in an ADI account held with it is taken to have perfected its security interest by control and need not take any steps to perfect its security interest in that account. However, any other person who takes a security interest in an ADI account can only perfect their security interest by registration on the PPSR.

If a "fixed charge" is required over a bank account or ADI account, the secured party must control dealings by the grantor with the account and register that it has control.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Yes.

Security over shares in a company can be taken under a GSA or an SSA.

Shares in unlisted Australian companies are generally certificated. It is market practice in Australia that security over certificated shares is perfected by control (i.e. secured party holding share certificates and blank share transfer forms) as well as by registration on the PPSR.

Shares in listed Australian companies are uncertificated and are recorded on an electronic register. They are transferred in accordance with Australian Securities Exchange rules. In addition to registration on the PPSR, control is obtained by the secured party entering into an agreement with a "controlling participant" to regulate dealings with the shares in the clearing system.

Even though an English or New York law-governed document can create valid security over shares in an Australian company, an Australian law-governed GSA or SSA is the preferred technique used in practice, given Australian law is likely to govern the validity and perfection of the security under conflicts of law rules in the PPSA and at general law.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Yes.

Security over inventory can be taken under a GSA or an SSA.

If a "fixed charge" over inventory is required, the secured party must control dealings by the grantor with the inventory and register that it has control.

It is not usual for a secured party to take control over inventory as the grantor will need the freedom to deal with it in the ordinary course of business.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

Yes. This is subject to corporate benefit, financial assistance requirements and other issues mentioned in this paper.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

Notarisation is not required under Australian law. The duty and fees associated with taking security in Australia are registration fees.

The fees for registering a security interest on the PPSR are nominal. Such registration can be made for seven years, 25 years or no stated end time.

The fees for registering a real property mortgage vary between States and Territories, but are similarly nominal, other than in South Australia and Queensland.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

No. There is no significant time or expense, and registrations on the PPSR are instantaneous. However, the PPSR registration system is highly prescriptive and invalidating errors are easy to make, so care needs to be taken to ensure that registrations are correctly made.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

Foreign lenders and foreign beneficiaries of security over Australian assets may need to consider the application of the Australian Government's Foreign Investment legislation, which is administered by the Foreign Investment Review Board ("**FIRB**"). Under some circumstances, notification and FIRB approval is required before taking or enforcing security.

In general terms, if security over Australian assets is held in the ordinary course of carrying on a business of lending money and solely as security for the purposes of a moneylending agreement, then a moneylender exemption will usually apply. The moneylender exemption also covers the acquisition of an interest by way of enforcement of a security held solely for the purposes of a moneylending agreement. Where the exemption applies, notification and FIRB approval is not required when taking or enforcing the security.

A "moneylending agreement" is defined to mean:

(a) an agreement entered into in good faith, on ordinary commercial terms and in the ordinary course of carrying on a business (a moneylending business) of lending money or otherwise providing financial accommodation, except an agreement dealing with any matter unrelated to the carrying on of that business; and

(b) for a person carrying on a moneylending business, or a subsidiary or holding entity thereof, an agreement to acquire an interest arising from a moneylending agreement (within the meaning of paragraph (a)).

For foreign government investors, the moneylender exemption requires that if an interest is acquired by way of enforcement of a security, that interest is disposed of (or a genuine sale process is commenced) within six months of the acquisition (or 12 months for an ADI), otherwise separate FIRB approval is required.

A foreign government investor includes a body politic of a foreign country, foreign governments, their agencies or related entities from a single foreign country that have an aggregate interest (direct or indirect) of 20% or more in the entity (or 40% or more if from multiple foreign countries), or if the entity is otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling group.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

No. If the security taken is perfected (whether by registration, control or possession), there are no specific priority concerns just because the security secures a revolving credit facility.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

Australian documentary and execution requirements are not particularly onerous. Notarisation is not required.

An Australian company will generally sign in accordance with s. 127 of the *Corporations Act 2001* (Cth) ("**Corporations Act**") (by two directors, a director and secretary, or the sole director and secretary) because certain assumptions as to corporate authority can be relied upon by the counterparty. However, it is also common for Australian companies to sign under a power of attorney.

The execution of deeds by some foreign companies can present some minor logistical issues to ensure that the execution is valid; however, these issues are generally broadly understood in the market.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

A company is prohibited from financially assisting the acquisition of its shares or shares in its holding company, other than as set out below. A breach of the financial assistance provisions will not affect the validity of the transaction but can lead to civil offences for persons involved in the contravention and may lead to criminal offences where the breach was dishonest.

(a) Shares of the company

A company can give financial assistance if it either: (a) does not materially prejudice the interests of the company or its shareholders or the company's ability to pay its creditors; or (b) the financial assistance is approved by shareholders and the shareholders of relevant holding companies. There are some other fact-specific exemptions. Approval by shareholders of a company (first company) and the shareholders of the ultimate Australian holding company of the first company is referred to as a "whitewash" procedure and is routinely sought unless it is clear that there is no material prejudice to the interests of the company, its shareholders or its ability to pay creditors. The procedure involves lodging the shareholder approval documents with the Australian Securities and Investment Commission ("**ASIC**"). A 14-day waiting period applies before the financial assistance can be given.

(b) Shares of any company which directly or indirectly owns shares in the company

The financial assistance provisions also apply in situations where the financial assistance relates to shares being acquired in a holding company of the company giving the financial assistance. A holding company is any company that holds more than 50% of the shares, possesses more than 50% of the voting rights or otherwise controls the company board.

(c) Shares in a sister subsidiary

The financial assistance prohibition does not apply to the acquisition of shares in sister subsidiaries.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

The use of agents for lenders and security trustees in syndicated lending agreements is common market practice in Australia.

Lenders will typically appoint an agent to represent them (in a non-fiduciary capacity), to perform defined administrative duties, to liaise with the borrower and security providers and to coordinate the lender group.

In most cases, security for a syndicated loan is granted to a security trustee who is able to enforce the security at the direction of the lenders (or the agent for the lenders) and is required to distribute the proceeds of enforcement in accordance with the security trust deed.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable in Australia.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

Transfer and substitution mechanics are typically documented in the facility agreement and security trust arrangements. They set out the agreed manner in which rights and obligations of an outgoing lender are assigned or novated to an incoming lender with the consent of all parties where required. Other than the specified documentary requirements (including obtaining necessary consents), nothing additional is required.

In some circumstances, depending on the location of the loan and security, stamp duty may be chargeable in connection with an assignment of a loan.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Australia levies interest withholding tax ("**IWT**") on interest payments (which is broadly defined for these purposes and includes amounts in the nature of, or in substitution for, interest and certain other amounts) under debt interests made by an Australian borrower in Australia to an offshore lender, unless an exemption applies. The rate of IWT is 10% of the gross amount of interest paid.

Some common exemptions to this are:

- a lending that is an issuing of "debentures" (such as bonds and notes) or a "syndicated loan" which results from a public offer made in a particular manner; and
- the "financial institution" exemption which is contained in certain double tax treaties which the Australian government has with a number of countries.

Interest that is effectively connected with an Australian branch of a non-resident lender would be taxed in Australia on an assessment basis rather than a withholding tax basis.

It is currently unclear whether or not any payment by a guarantor under a guarantee on account of interest owing by the borrower would be subject to IWT. The better view is that such payments (other than interest paid on an overdue amount) do not constitute "interest" for IWT purposes, and, if so, would not be subject to IWT.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are none in Australia.

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to or guarantee and/or grant of security from a company in your jurisdiction?

In most cases, the entry by a foreign lender into a loan agreement with an Australian borrower or taking security over assets in Australia will not of itself subject the lender to income taxation in Australia. However, this will depend on the circumstances, including whether or not the lender conducts any other business or has any relevant presence in Australia.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

None other than those discussed above.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

Australia has thin capitalisation rules which restrict interest deductions if the amount of debt used to finance Australian operations exceeds specified limits subject to safe harbours including *de minimis* exemptions.

The thin capitalisation rules apply to all debt interests, including debt advanced by related and unrelated lenders, whether Australian or foreign, and therefore are not restricted to debt advanced by a foreign lender.

Any cross-border debt financing into Australia must also comply with Australia's transfer pricing rules. The parties should be dealing on an arm's-length basis and the debt should be priced having regard to arm's-length conditions.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

In Australia, parties to a contract are free to select the governing law of the contract. However, to be enforceable, the choice of law must be made in good faith and must not contravene public policy.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

England

Generally yes, subject to fulfilment of registration requirements.

Under the *Foreign Judgments Act 1992* (Cth) and related regulations, English judgments can be registered and take on the status of an Australian judgment, subject to satisfying the following requirements:

- the judgment needs to be a "money judgment". That is, it must be a judgment under which money is payable;
- the judgment must not be under appeal;
- the judgment must not be wholly satisfied;
- the judgment must be enforceable in England; and
- the application for registration must be within six years of the date of the English judgment.

New York

There is no reciprocal bilateral arrangement for recognition of judgments between Australia and the United States. Instead, common law principles for recognition and enforcement of foreign judgments apply. To be enforceable at common law:

- the judgment must be final and conclusive;
- the New York court must have exercised its jurisdiction over the defendant;
- the defendant must have submitted (or be deemed to have submitted) to the jurisdiction of the New York court; and
- the judgment must be for a monetary sum.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

It is not possible to specify a typical timeframe to finalise enforcement against assets. The timetable will be subject to variables including the type and complexity of the claim, the exact nature of the enforcement process, whether a formal insolvency process or liquidation is involved and whether the borrower or guarantor is cooperative.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

The process of enforcement will be governed by the terms of the security documents and loan agreements, the PPSA and the Corporations Act.

In most circumstances, no regulatory consents are required in order to enforce. However, as set out in question 3.11, FIRB approval may be an issue in limited circumstances.

Restrictions also apply to enforcing collateral security in the event of insolvency, dependent upon the type of insolvency proceedings undertaken. We discuss this in section 8 below.

A receiver appointed by creditors under a security document is subject to statutory duties. This includes an obligation to sell collateral at market value or, if market value is not known, at the best price reasonably obtainable. While this does not in itself require a public auction, in many circumstances, a public auction or other transparent sale process will be required in order to demonstrate that the receiver has complied with its duties. This may have timing implications for recovery depending on the nature of the assets involved.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

Subject to our comments about FIRB in question 3.11, there are no restrictions which apply specifically to foreign lenders.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

In administration, there is a moratorium which runs from the date an administrator is appointed. Administration can be commenced in a number of ways, including by the directors of the company or a person with a perfected security interest over the whole or substantially the whole of the property of the company (the latter being a "**Substantial Chargee**").

The length of this moratorium period varies and the moratorium prohibits any enforcement proceedings being commenced against the company or in relation to its property. However, a Substantial Chargee can enforce its security interest during a decision period of 13 business days from notice of commencement of the administration. Other exceptions include enforcement with the administrators' consent or leave of the court.

While an Australian company is in liquidation, a person is prohibited from commencing or proceeding with civil proceedings except by leave of the court. This prohibition does not apply to a secured party's right to realise or otherwise deal with its perfected security interest.

See also question 8.1 below.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

Yes, an award made in an international arbitration with a seat in one of the Contracting States to the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958*) (the "**New York Convention**") will generally be recognised and enforced by Australian courts, as if the award were a judgment or order of that court. Australian courts will not re-examine the merits of the arbitral award.

There are limited grounds upon which the court may refuse to enforce the foreign award under Article V of the New York Convention.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

This depends on the type of bankruptcy proceedings undertaken.

See also question 7.6 above.

The Australian Government has recently introduced new "safe harbour" and "*ipso facto*" laws.

The "*ipso facto*" laws will apply to contracts, agreements and arrangements entered into on or after 1 July 2018, to impose a stay on contractual counterparties of companies who become subject to any of the following procedures: administration; implementing a scheme of arrangement to avoid being wound up in insolvency; or receivership. The stay will apply to express rights arising for the following reasons: (1) the company being subject to the procedure; (2) the company's financial position during the procedure; (3) a reason prescribed in the regulations relating to the company possibly being subject to the procedure or the company's financial position; or (4) a reason in substance contrary to the stay. The stay also applies to self-executing rights; i.e. rights that apply automatically without a party taking action.

Importantly, the stay will not apply to, *inter alia*: (1) if a company is in administration, a Substantial Chargee's rights to take enforcement action during the 13-business day "decision period" commencing from the company entering into administration; (2) drawstops, i.e. a creditor is not forced to advance new money; (3) contracts or arrangements entered during the procedure; (4) a right prescribed in the regulations (yet to be published as at the date of this chapter); or (5) consent of the administrator, scheme administrator receiver or liquidator, as applicable officer or a right if a court so orders.

The impact of these "*ipso facto*" reforms on lending practices is wide-ranging. With the regulations still to be published, market participants will need to seek detailed advice before undertaking their next transaction.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

A liquidator can seek court orders to set aside certain transactions entered into or where steps were taken to give effect to the transaction in a period before the external administration (i.e. the "**hardening period**"). This may include making payments or granting security. In relation to security, the key "voidable transactions" are:

- uncommercial transactions – a transaction which was entered into by a company when it was insolvent or as a result of which the company becomes insolvent and which a reasonable person would not have entered into; and
- unfair preferences – where there is a shortfall in security, a transaction between an insolvent company and a creditor under which that creditor receives more for its unsecured debt than it would have in a winding up.

Below is a summary of the hardening periods:

Transaction	Not related party	Related parties
Unfair preference	6 months	4 years
Uncommercial transactions	2 years	4 years
Unreasonable director-related transactions	N/A	4 years
Obstruction of creditors' rights	10 years	
Unfair loan	Indefinite	

Security interests over circulating assets (including receivables, inventory and cash in bank accounts) which are not subject to control:

(a) may be void as against a liquidator if it was created within six months of the external administration and the company was insolvent, except insofar as it secures a new advance; and

(b) will rank in a winding up behind certain statutorily preferred creditors such as employee entitlements and administrator's indemnity for debts and remuneration.

Normal directors' duties also apply to a director's decision to grant security (see question 2.2 above), and if security has been granted in breach, secured lenders may be subject to clawback risk under concepts of knowing receipt/knowing assistance. The "hardening period" is six years.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

No. However, banks, other ADIs and insurers are subject to different and specific insolvency regimes under legislation including the *Banking Act 1959* (Cth) and the *Insurance Act 1973* (Cth).

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

Yes. A secured party may enforce its security by appointing a receiver (or receiver and manager) or entering into possession as mortgagee in possession.

Appointment and powers of a receiver or mortgagee in possession is governed by the terms of the security document. The PPSA also provides certain notice requirements which may apply to enforcement against personal property. In addition, the PPSA provides a range of statutory enforcement options – these do not apply where a privately appointed receiver or other controller is realising assets of a corporate borrower or guarantor, but do apply to other controllers. The PPSA provisions are, in many instances, contracted out of.

Where the relevant security is a real property mortgage, a secured party can also either appoint a receiver or enter into possession as mortgagee under the relevant State or Territory laws. A mortgagor can restrain the sale where it can be shown that the power of sale has not become exercisable or the mortgagee is in breach of the duty to sell.

Some statutes may provide other remedies as well.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

Yes. Under the *Foreign Judgments Act 1991* (Cth), a party's submission to a foreign jurisdiction is legally binding and enforceable in Australia provided that the subject matter is not illegal and not contrary to public policy.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

As a general rule, a party's waiver of sovereign immunity will be legally binding and enforceable under the *Foreign States Immunities Act 1985* (Cth).

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank *versus* a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

If a person provides a "financial service", it must obtain an Australian Financial Services Licence from ASIC under the Corporations Act and comply with a range of conduct obligations. Although loan facilities are excluded from the Corporations Act, issuing, acquiring or arranging a derivative, swap or deposit product will constitute a financial service, as will providing advice in connection with those products.

There are no licensing or registration requirements in Australia that apply specifically to entities that act as an agent or security trustee.

Approval is required from the Australian Prudential Regulation Authority ("**APRA**") before an entity (including a bank) carries on banking business in Australia. The use of the word "bank", "banking", "credit union" and related words when a company or bank carries on business in Australia is also restricted unless the company is registered as a bank or has approval from APRA.

In most cases, the making of a single loan in Australia or taking of security in Australia by any entity does not require the lender or secured party to be registered with ASIC as a foreign company. However, this is a complex issue that depends on the circumstances including the amount of business that the entity carries on in Australia and the presence that the entity has in Australia.

Registration and reporting requirements apply under the *Financial Sector (Collection of Data) Act 2001* (Cth) ("**FSCODA**") to lenders, depending on the nature and scale of their lending activities in Australia. Generally, if 50% of a lender's assets in Australia consist of debts due to them from the provision of finance, then they will be registrable with APRA under the FSCODA.

Registration with the Australian Transaction Reports and Analysis Centre and compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) will be required for loans made at or through the lender's (or its agent's) permanent establishment in Australia.

Breaches of applicable legislation may results in fines or penalties being imposed.

11 Other Matters

11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

The issues outlined above provide a general overview of the main legal considerations which are most likely to be relevant to secured lenders in Australia.

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