

PERSONAL PROPERTY SECURITIES LAW



MERITAS[®]
LAW FIRMS WORLDWIDE

GUIDE TO DOING BUSINESS IN AUSTRALIA





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GUIDE TO DOING BUSINESS IN AUSTRALIA AND NEW ZEALAND

PREPARED BY MERITAS LAWYERS
IN AUSTRALIA AND NEW ZEALAND



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Guide to Doing Business in Australia and New Zealand

This publication has been prepared to provide an overview to foreign investors and business people who have an interest in doing business in Australia and New Zealand. The material in this publication is intended to provide general information only and not legal advice. This information should not be acted upon without prior consultation with legal advisors.

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Meritas firms:

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There are over 170 lawyers in six firms across Australia and New Zealand providing clients a local legal partner with deep international resources. Our lawyers are supported by knowledgeable and conscientious patent agents, trade mark agents, notaries, administrative legal assistants, real estate law clerks, corporate clerks and litigation support specialists. We are closely integrated and strategically placed to deliver coordinated, efficient legal services.

The following currency notations are used in this book:

AUD Australian Dollar

NZD New Zealand Dollar

Please be aware that the information on legal, tax and other matters contained in this booklet is merely descriptive and therefore not exhaustive. As a result of changes in legislation and regulations as well as new interpretations of those currently existing, the situations as described in this publication are subject to change. Meritas cannot, and does not, guarantee the accuracy or the completeness of information given, nor the application and execution of laws as stated.

This book is intended to provide practical and useful insights into the 10 most common questions facing foreign investors and businesses:

1. What role does the government play in approving and regulating foreign direct investment?
2. Can foreign investors conduct business without a local partner? If so, what corporate structure is most commonly used?
3. How does the government regulate commercial joint ventures between foreign investors and local firms?
4. What laws influence the relationship between local agents or distributors and foreign companies?
5. What steps does the government take to control mergers and acquisitions with foreign investors of its national companies or over its natural resources and key sectors (e.g., energy and telecommunications)?
6. How do labor statutes regulate the treatment of local employees and expatriate workers?
7. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?
8. What types of taxes, duties and levies should a foreign investor expect to encounter?
9. How comprehensive are the intellectual property laws? Do local courts and tribunals enforce them objectively, regardless of the nationality of the parties?
10. If a commercial dispute arises, will local courts or arbitration offer a more beneficial forum for dispute resolution to foreign investors?

Contributing to this book are the law firm members of the Meritas alliance in Australia and New Zealand. Each firm is comprised of local lawyers who possess extensive experience in advising international clients on conducting business in their respective countries. The firms were presented with these 10 questions and asked to provide specifics about their jurisdiction along with timely insights and advice. In a very concise manner, the book should provide readers with a solid overview of the similarities and differences, strengths and weaknesses of the states and territories of Australia and New Zealand.

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With over 55 years' experience Snedden Hall & Gallop is Canberra's most established independent law firm, with the skills and experience necessary to provide a full range of legal services to corporate, government, associated bodies and individuals. Our lawyers are among the most experienced practitioners in the territory, with many having been in practice for several decades. For over 55 years, the firm has utilised its skills and knowledge to provide a full range of legal services to companies, small to medium businesses and individuals across the ACT and surrounding region.

Snedden Hall & Gallop is dedicated to achieving the best results for our clients. Many of Canberra's most prominent businesses choose us as their legal counsel and have done so for several years and often several decades. Our lawyers are there for our clients in the best of times and the worst of times.

Snedden Hall & Gallop offers a range of legal services to both private and corporate clients, and specialises in the areas of:

- Business Law
- Dispute Resolution
- Employment Law
- Superannuation Litigation
- Migration Services
- Wills and Estate Planning
- Property Law
- Compensation Law

Snedden Hall & Gallop is committed to providing an unparalleled quality of service. We pride ourselves on the personal attention we give to every client, including a high level of client-to-lawyer contact. Our lawyers are always available for face-to-face conferences, and we have a policy of promptly responding to phone calls and emails. Additionally, our team is in constant consultation with each other, resulting in the efficient delivery of advice that draws on the vast expertise within our firm.

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Swaab Attorneys is a multi-award winning, mid-sized commercial law firm offering legal services across a number of core practice areas and industry groups. We are based in Sydney; Australia's largest city, with a population in excess of 4.3 million people.

Our firm is shaped by our Swaab Brand of Service: a set of service standards we aspire to meet in all of our dealings, both with colleagues within our business and with our clients. In August 2014, Swaab Attorneys was named a finalist in the ALPMA Thought Leadership Awards for the development of the "USB separation survival kit." Swaab has also been a finalist in the BRW Client Choice Awards for seven consecutive years and have won three times, the most recent win being Best Law Firm (rev under AUD50m) and Best NSW Firm at the 2012 BRW Client Choice Awards. But it's not just our client service that has been awarded, we have also appeared for four consecutive years on the BRW Great Place to Work list.

We have strong capabilities in most areas of commercial and corporate law. We practice in corporate structuring and commercial transactions, intellectual property, franchise law and employment, property, planning and projects, real estate transactions and all areas of commercial litigation. We also have a large private client practice servicing family law, estate planning and other "high net worth" personal services.

We have a number of international clients for whom we act as attorneys and agents to assist them with their introduction to Australia's business landscape and the development of their business in Australia.

Our clients are medium sized, fast growing businesses and publicly listed companies in various retail, property, health, and insurance and not-for-profit industries as well as property trusts, state government departments and local government agencies. By way of example our client base includes; a major commercial property trust (Investa Funds Management), a Canadian mining



group (Red Lion Management), a Chinese commercial glass manufacturer (Austech Group), a subsidiary of a US owned rail freight and logistics company (Freightliner Australia), a global online marketing and research provider (Pureprofile Inc), Australia's largest online auction house (GraysOnline), one of Australia's largest supermarket retailers and one of the world's largest private hospital providers.



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MacDonnells Law is one of Queensland's largest and longest established independent law firms with 100 personnel, including 10 partners and 40 legal staff.

MacDonnells Law is unique in that it is the only independent law firm in Queensland to have full service offices in three of Queensland's major geographical, demographic and commercial centres, namely Cairns, Townsville and Brisbane.

For more than 130 years, the firm has offered state-wide legal services to commercial, insurance, government and individual clients throughout Queensland. Our connected, state-wide network gives us the unique ability to provide personal, local support from our regional offices, respond to client needs no matter where they are in Queensland, and ability to respond promptly regardless of the nature, size, complexity or duration of a matter.

Our firm is structured into five state-wide practice groups, comprised of highly experienced legal practitioners from all areas of law, including:

- **Commercial and Corporate:** contracts, commercial advisory, corporate law, property, intellectual property and conveyancing;
- **Dispute Resolution and Litigation:** insurance, industrial relations and employment, workplace safety, commercial disputes, trade practices law, debt recovery and insolvency;
- **Government:** government advisory, planning and environmental law, development advisory, building and construction, native title and cultural heritage.
- **Personal Law:** family law, collaborative law, asset protection and wills and estates.

At state-level, the firm plays an integral part in both the legal profession and business communities with the firm's senior personnel holding influential positions in key industry advocacy groups including the Australian Institute of



Company Directors, Tax Institute of Australia, Urban Development Institute and Property Council.

The MacDonnells Law team also has a strong understanding of government processes and policy that impact commercial organisations, as we are a platinum partner to the Local Government Managers Association (LGMA), a strong supporter of the Local Government Association of Queensland (LGAQ) and provide legal services to several state government entities.



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MADGWICKS

Lawyers

Madgwicks is a progressive Australian business law firm servicing local, national and international clients. Our staff pride themselves on responsive

legal services driven by a passion for client success.

The firm develops close working relationships with clients, providing practical commercial advice, focusing on legal solutions to achieve our clients' goals. Our clients view us as a crucial business partner as we have an intimate knowledge of their business, industry and the specific project. We position ourselves as a key element to the success of a project, and our clients view us as such.

The relationship between client and law firm is of extreme importance. Madgwicks places great emphasis on establishing an open, trusting and strong relationship with our clients. The value the firm places on relationships is reflected in the internal culture of the firm which has many long term professional and support staff employees.

The firm's clients include private and listed corporations, financial institutions, professional firms, business and private individuals. Madgwicks has clients in a diverse range of industries, including manufacturing, retailing, business services, energy, information technology, financial services, superannuation, building and construction, property development, transport, agribusiness, marketing, tourism and hospitality.

Our lawyers are skilled in handling the needs of overseas companies wishing to invest in Australia and are familiar with the rules and procedures relating to foreign investment in Australia.

Establishing operations in Australia

Australia is a great place to do business and a safe place to operate a business. With a strong economy, Australia represents an attractive proposition for offshore companies looking to grow their global operations.

While Australia's stable Government and well established legal system make it a low risk place to invest, companies looking to start operations face a myriad of registration and compliance issues. It is essential to get the right professional advice prior to commencing operations to give your business the best chance to flourish.

Madgwicks expertise for inbound clients

The core advisor for businesses planning to start up operations in Australia is a legal firm. Madgwicks has a team of highly experienced lawyers who:

- Are experienced in establishing businesses from offshore
- Have specific industry experience and knowledge
- Are accessible and eager to establish a long term relationship with an in-bound company looking to start up operations in Australia
- Provide a comprehensive range of services covering every aspect of business start up
- Are well connected in business circles with the ability to source other specialist advisors as well as facilitate alliances, suppliers and relationships with potential clients

Our legal services for business start-ups include:

- Structuring of business
- Employment contracts and workplace relations compliance
- Tax structuring compliance
- Intellectual property
- Commercial advice

We can also assist clients in respect to migration law matters as well as finding and leasing property and identifying other key service providers such as accountants and business advisors.

Services offered to Meritas members and their clients

- Free 30 minute consultation
- Introduction to key contacts
- Use of meeting rooms
- Advice on accommodation
- Immigration and relocation assistance
- Assistance with tickets to Melbourne events

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Williams + Hughes is a Western Australian law firm specializing in commercial law and commercial litigation and dispute resolution. We have offices in Perth, the State capital city, and Geraldton, Western Australia's largest regional city.

The firm was established in 1986 as one of Perth's first boutique commercial law firms. The firm grew quickly and attracted a wide range of quality work. We now act for a wide range of clients, including small to large businesses, private companies, public listed companies, multi-national groups and high net worth individuals.

Our primary focus is on commercial work, providing services in the business and corporate law, resources, commercial litigation and dispute resolution fields. We regularly act on complex, large matters against national and international global legal firms, and these firms regularly refer work to us where they are conflicted from acting. We operate in all civil and commercial jurisdictions and are particularly active in the Federal and Supreme Courts

Apart from English, we have staff members that speak Cantonese, Mandarin, German, French, Italian and Indonesian (various levels of competency).

What makes our practice unique is the way we work to deliver a positive outcome for our clients. We are creative and precise in our thinking, pragmatic in our approach, responsive to our client's changing needs and understand the importance of achieving practical commercial solutions.

A key differentiator is that we work hard to understand our client's industries. Often we become trusted business advisers, and are involved in the early stages of developing transactions rather than being brought in later to document agreed deals.

Our philosophy, **working in your favour**, has helped our practice grow over the last 29 years into one of Western Australia's most respected commercial law firms.

TOP 10 QUESTIONS

1. WHAT ROLE DOES THE GOVERNMENT PLAY IN APPROVING AND REGULATING FOREIGN DIRECT INVESTMENT?

The government regulates foreign investment through the Foreign Investment Review Board (FIRB), which is a Board within the Commonwealth Department of Treasury. One of its roles is to examine proposals by foreign interests to undertake direct investment in Australia and to make recommendations to the government whether the proposals are suitable for approval under the Australian government's policy. The ultimate decision whether a proposal is approved lies with the Treasurer.

FIRB is also responsible for monitoring and ensuring compliance with foreign investment policy.

Different rules apply depending on the nature of the proposed foreign investment, for example, an investment in residential real estate or commercial real estate versus in an Australian business. Whether FIRB approval is required for a proposed foreign investment may also depend on whether the proposed investment exceeds certain set monetary thresholds.

The application process for obtaining FIRB approval is fairly rigorous but is generally determined within 30 days of lodgement of the application, although this period may be extended.

2. CAN FOREIGN INVESTORS CONDUCT BUSINESS WITHOUT A LOCAL PARTNER? IF SO, WHAT CORPORATE STRUCTURE IS MOST COMMONLY USED?

Yes, there is no general legal requirement for a foreign investor to conduct a business with a local partner.

The most common corporate structure used in conducting business in Australia is a company, although other structures such as joint ventures, partnerships and trusts may also be used.

Even with a local partner, FIRB approval may be required.

3. HOW DOES THE GOVERNMENT REGULATE COMMERCIAL JOINT VENTURES BETWEEN FOREIGN INVESTORS AND LOCAL FIRMS?

Generally, the government does not regulate commercial joint ventures between foreign investors and local firms; however, the government may regulate the foreign investor through FIRB and other laws such as the *Corporations Act* (which regulates companies generally) and taxation laws.

4. WHAT LAWS INFLUENCE THE RELATIONSHIP BETWEEN LOCAL AGENTS OR DISTRIBUTORS AND FOREIGN COMPANIES?

Broadly speaking the relationship between an Australian agent or distributor and an overseas supplier would be a contractual one governed by the same principles of contract law as the UK and other English speaking jurisdictions.

Under Australian tax law, the pricing of goods and services supplied under contract between an Australian agent or distributor and an overseas supplier is expected to be set on an “arms-length” basis. There are comprehensive and complex tax laws dealing with transfer pricing of goods and services imported to or exported from Australia for the purposes of protecting the revenue.

Where the Commissioner of Taxation forms the opinion that cross-border transactions have not been priced on an arms-length basis, the Commissioner has power to make compensating adjustments and impose penalties.

5. WHAT STEPS DOES THE GOVERNMENT TAKE TO CONTROL MERGERS AND ACQUISITIONS WITH FOREIGN INVESTORS OF ITS NATIONAL COMPANIES OR OVER ITS NATURAL RESOURCES AND KEY SECTORS (E.G., ENERGY AND TELECOMMUNICATIONS)?

FIRB controls whether a foreign investor may invest in certain sectors. There are certain sectors where foreign investment will be prohibited or restricted or otherwise restricted as being against the national interest or as being against Australia’s national security. These include residential real estate, media, telecommunications and military (albeit FIRB approval may be granted in these areas in certain circumstances).

Even if a proposed foreign investment does not fall within a sensitive sector, FIRB has an overriding policy where approval may be declined where the proposed investment is against the national interest or is against Australia's national security.

6. HOW DO LABOR STATUTES REGULATE THE TREATMENT OF LOCAL EMPLOYEES AND EXPATRIATE WORKERS?

LOCAL EMPLOYEES

Australia's system is strongly regulated by state and federal legislation. Companies that are trading corporations fall within the federal system of industrial relations presently administered pursuant to the *Fair Work Act 2009*.

Most blue-collar and clerical workers have their employment terms and conditions determined by reference to the National Employment Standards, and various awards and collective agreements approved by Fair Work Australia, a third party tribunal.

Senior executives and management more commonly have their terms and conditions of employment determined by reference to common law agreements negotiated directly between the employer and the employee. The terms of such agreements must still exceed the statutory minimum standards.

Workplace health and safety, discrimination, and workers' compensation for workplace injury are regulated by state or territory legislation.

EXPATRIATE WORKERS

The terms and conditions for expatriate workers will greatly depend upon the type of visa arrangements approved by the Australian immigration authorities. Business people visiting from overseas can continue to enjoy the benefits of their home-based employment arrangements while undertaking short-term business activities in Australia. However, where visas are required, the employees will most commonly be required to be engaged as if they were employees fully covered by the Australian industrial relations regime and legislation referred to above. In any event, key legislation covering such issues as workplace health and safety and worker's compensation will apply to any person working in Australia.

7. HOW DO LOCAL BANKS AND GOVERNMENT REGULATORS DEAL WITH THE TREATMENT AND CONVERSION OF LOCAL CURRENCY, REPATRIATION OF FUNDS OVERSEAS, LETTERS OF CREDIT AND OTHER BASIC FINANCIAL TRANSACTIONS?

Generally, Australia does not have any exchange controls. The Australian dollar (AUD) is a floating currency widely and transparently traded, although the Reserve Bank may, from time to time, buy or sell AUD to smooth out unusual market events.

There are no restrictions on repatriation of profits back to overseas parents by way of dividends or loan repayments other than:

- The usual requirement that the Australian entity meet the solvency test of being able to meet its debts as and when they fall due, or
- In some cases, making sure the company does not fail the thin capitalisation test to ensure that its interest expense is fully deductible for tax purposes.

Local banks are generally well capitalised and sophisticated financial institutions. As such, they are accustomed to trading in foreign exchange and dealing with letters of credit and other trade-based securities.

There are, however, some reporting requirements in relation to the movement of large sums of money and there may also be financial sanctions imposed in relation to transactions involving certain countries, entities or individuals.

8. WHAT TYPES OF TAXES, DUTIES AND LEVIES SHOULD A FOREIGN INVESTOR EXPECT TO ENCOUNTER?

For most operating companies the following taxes would be encountered by an Australian operation:

- Company tax at 30% on taxable income
- Withholding tax on any dividends to the extent that these are unfranked (i.e., franked dividends to overseas shareholders are free of withholding tax)
- Withholding tax at 10% on interest payable to an overseas party
- Withholding tax on royalties payable to an overseas party
- State duties on the acquisition of land and other assets including shares in a company

- In some cases, payroll tax on wages and salaries (a state-based impost)
- Resource Rent Tax (oil and gas only)
- Pay-as-you-Go withholding tax (on the salaries and wages of employees which is remitted directly to the Commissioner of Taxation and a credit allowed to respective employees on filing their income tax return)
- In some cases, Fringe Benefits Tax on non-cash compensation paid to employees

9. HOW COMPREHENSIVE ARE THE INTELLECTUAL PROPERTY LAWS? DO LOCAL COURTS AND TRIBUNALS ENFORCE THEM OBJECTIVELY, REGARDLESS OF THE NATIONALITY OF THE PARTIES?

Australia is a member of World Trade Organisation and TRIPS, as well as the Berne, Paris and Rome Conventions, the Patent Co-Operation Treaty, the Madrid Protocol (for trade marks) and a member of other international IP treaties administered by the World Intellectual Property Organisation. As a result, Australia has a comprehensive intellectual property regime. It includes legislative regimes (e.g., *Copyright Act*, *Trade Marks Act*, *Patents Act*, *Designs Act*, *Plant Breeders Rights Act* and *Circuit Layouts Act*) and common law regimes (e.g., the protection of confidential information and common law trade marks). Australia's intellectual property statutes create both civil and criminal liability for infringements, but criminal prosecutions are rare. Where applicable, Australian intellectual property laws are enforced objectively (principally in the federal jurisdiction) and are enforced regardless of the nationality of the parties, subject to a principle of reciprocity in respect of copyright infringement such that Australia courts will only recognise copyrights of foreign nationals to the extent that courts of that national's country recognise an Australian copyright.

10. IF A COMMERCIAL DISPUTE ARISES, WILL LOCAL COURTS OR ARBITRATION OFFER A MORE BENEFICIAL FORUM FOR DISPUTE RESOLUTION TO FOREIGN INVESTORS?

All Australian courts including federal, state and territory courts offer well-regulated dispute resolution processes. The *Civil Dispute Resolution Act 2011* requires parties to litigation to certify that they have taken genuine steps to resolve a dispute prior to commencing proceedings in the Federal Court. Increasingly these courts, generally with the support of litigants and their lawyers, are requiring that pro-active case management, mediation and other alternate dispute resolution processes be implemented as early as possible to resolve disputes without the costs and delays involved in full-blown trials.

Further, in September 2010, the Federal Attorney General's Department established a Mediation Standards Board for the accreditation and regulation of Australian mediators. Accredited commercial mediators may be sourced through accrediting organisations such as LEADR and Institute of Arbitrators and Mediators Australia.

Mediation is cross-jurisdictional and therefore increasingly attractive for the resolution of international disputes.

While arbitration is also available, with well-regulated commercial arbitration procedures in most jurisdictions, the growth in alternative dispute resolution processes has meant that in general terms litigants are less attracted to arbitration than they may have been in the past. The fact that arbitration is no longer seen as a significantly less expensive alternative than traditional court-based litigation is a likely contributing factor to this.

PERSONAL PROPERTY SECURITIES LAW

Personal property securities law in Australia was recently overhauled with the introduction of the *Personal Property Securities Act 2009 (Cth)* (PPSA). The PPSA applies across all Australian jurisdictions and replaces a number of state laws to govern most, but not all, security interests in personal property.

Overseas companies doing business in Australia must ensure they understand the PPSA. If a company or person holds the benefit of a security interest (for example, a mortgage, a charge, a lien, a retention of title arrangement, etc.) over personal property in Australia (for example, motor vehicles, plant and equipment, goods and property other than land), then they must register their security interest on a government register, the Personal Property Securities Register (PPSR). If the security interest is not registered, the holder is exposed to being unable to enforce their rights as a security holder.

In some cases, failure to register can lead to very harsh outcomes (for example, a supplier of plant who has parted with possession of the plant before being paid can lose ownership of the plant if their debtor becomes insolvent). The supplier may not be able to take back their plant and a liquidator may be able to seize and sell the plant. The supplier faces joining the queue as an unsecured creditor. This is just one example of why taking advice in relation to registration of security interests over Australian property is very important.

The PPSA is a complex piece of legislation with many technical terms and concepts. It covers a range of matters in relation to personal property, including the creation and registration of security interests in personal property, priority between competing security interests and enforcement. This chapter is meant to give only a basic overview of the key issues.

KEY TERMS

To understand the PPSA regime it is important to get to grips with some of the key terms used in the PPSA.

Personal Property

Under the PPSA, personal property includes most property, tangible and intangible, other than land and some statutory rights and licences. Common examples of personal property to which the PPSA applies include:

- Plant and machinery
- Goods and chattels, including perishables
- Boats
- Motor vehicles
- Crops
- Inventory
- Shares

- Accounts
- Intellectual property
- Investment instruments, including shares and financial products

Personal property that is the subject of a security interest is referred to as collateral.

Some statutory permits and licenses are specifically excluded from personal property. Examples include mining tenements and oil and gas permits.

Security Interest

Security interests can arise in a wide range of commercial transactions, beyond “security” in the traditional sense.

A security interest is an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation.

This includes:

- Fixed and floating charges
- Chattel mortgages
- Pledges
- Hire purchase agreements
- Conditional sale agreements
- Leases of goods

Some security interests, including common law and statutory liens in personal property, are specifically excluded from the operation of the PPSA.

Certain security interests, known as “deemed security interests,” are security interests for the purposes of the PPSA whether or not they secure payment or performance of an obligation. Deemed security interests include retention of title arrangements, commercial consignment arrangements and leases, hires and bailments of personal property for specified time periods. These security interests are known as purchase money security interests (PMSIs). PMSIs attract super priority under the provisions of the PPSA.

Secured Party

The party who has the benefit of the security interest is the secured party. This includes the following:

- * A lender who has lent money and has taken a fixed floating charge
- A supplier of goods who has supplied the goods on credit terms (retention of title)
- A lessor of equipment who has hired out plant and machinery to a customer
- A consignor of goods who has left their property in an auctioneer showroom for sale

Grantor

The party who grants the security interest is the grantor, for example the debtor, borrower, supply customer or lessee. This can be a company, a trust, a person, etc.

Perfection

In order to obtain the protection of the PPSA, a secured party must ensure that its security interest is “perfected.” A security interest may be perfected by possession, by control and by registration.

In many situations, in particular leasing or supply arrangements, maintaining possession of the collateral is not possible for commercial reasons. Manufacturers routinely supply their customers on credit terms, with the goods leaving the possession of the manufacturer many weeks or months before the manufacturer is paid. This is why registration on the PPSR is so important, as a security interest can be perfected by registration.

Only certain personal property can be perfected by control. This includes Australian Deposit-taking Institution (ADI) accounts in relation to which the ADI is the secured party, shares and financial products, satellites and space objects. A large number of secured parties will be unable to rely on perfection by control.

Given the difficulty in maintaining possession and the limited availability of control, registration is usually the simplest way to perfect a security interest. It also has the distinct advantage is that it is relatively easy to do with the right advice.

PERSONAL PROPERTY SECURITIES REGISTER

The Personal Property Securities Register (PPSR) is an electronic noticeboard that provides basic information about actual or prospective security interests in personal property. It is available online and is administered by the Australian federal government. Conducting searches, completing registrations and removing or amending registrations can be done online and at relatively low cost (registration fees are usually less than AUD10).

The PPSR enables the secured party to register a security interest against the grantor. Registrations can be made for a single transaction or a series of transactions. So, for example, one registration can be made against all goods supplied under a multi-year supply contract. It is not necessary to make a separate registration each time goods are dispatched.

Strict time limits apply to registration depending on the nature of the security interest registered. These time limits must be followed to gain the full

protection of the PPSA. If a time limit is missed there is usually very little that can be done, short of applying to the Court for an extension – which can be a costly exercise.

Registration on the PPSR is important for a number of reasons.

KEY PRINCIPLES CONCERNING THE PPSA

Enforceability Against Third Parties

Third parties may search the PPSR by reference to the grantor, or in some cases, to a specific item of personal property. For example, motor vehicles can be searched by the license/registration, VIN number or other serial numbers. The same applies for aircraft and water craft.

Registration allows third parties searching the register to determine the nature and extent of security interests in personal property. If no registrations are found against an item of property or a particular grantor, the third party can assume that the grantor is free to deal with that personal property. If the third party buys that property from the grantor they will take that property free of any unregistered interests. They get clear title.

Conversely, if a search of the register shows a pre-existing registration, the third party takes that property subject to the registered interests. They get encumbered title, not clear title. This is why it is so important for anyone considering buying personal property, lending money to a company, or supplying goods on credit, to do a PPSR search of the other party.

If a secured party does not register its security interest on the PPSR and the collateral the subject of the security interest is sold, the secured party will generally have no right to pursue the purchaser. The secured party cannot seize back the property. The purchaser gets good title to the property. The secured party will retain its contractual rights against the grantor (i.e. they can still sue the grantor), however it will be unable to enforce its rights in the collateral.

The PPSA contains a number of exceptions, and exceptions to those exceptions. Specialist advice is needed. One example is where goods subject to a registered security interest are sold or leased by the grantor in the ordinary course of their business. Although the purchaser will acquire full title to the goods free from any security interest, the secured party will have a security interest in the proceeds of sale that come from the sale of those goods.

Protection in Bankruptcy and Insolvency Situations

If a secured party does not register its security interest in collateral and the grantor goes into bankruptcy or is placed into liquidation, the collateral the subject of the security interest will vest in the trustee in bankruptcy or

liquidator. The trustee in bankruptcy or liquidator may sell the collateral and apply the proceeds towards payment of the grantor's debts.

This is the case even though title to the personal property may have remained with the secured party at all times, for example by virtue of a retention of title clause. If the secured party has registered its security interest in the collateral correctly, the secured party will be entitled to take back possession of that collateral. Again, registration is critical, and failure to register can be fatal.

Priority

The PPSA contains rules for determining priority between security interests in the same personal property. Generally, the first secured party to register its security interest in personal property will have the highest priority in the distribution of that property. Some exceptions apply. For example, the holder of a PMSI will have super priority in the collateral the subject of that PMSI as against most other secured parties.

A secured party who has not registered its security interest may find itself demoted to the position of unsecured creditor on distribution of the grantor's assets (for example, in an insolvency situation). This is the case even if the unregistered interest arose months or years before the registered security interest. Time of registration of a security interest is critical under the PPSA, not time of creation.

TIMING

Generally a security interest must be registered within 20 business days of the date of the agreement giving rise to that security interest. As is the case with most things in the PPSA, exceptions apply. For example, a PMSI must be registered within 14 days of possession of the collateral passing to the grantor, or if the collateral is inventory, prior to possession passing. So, in plant hire situations or for suppliers of inventory, much tighter time frames apply. In particular, sometimes registration must be made before goods leave the secured party's premises. This can mean that a supplier needs to change its business processes to ensure registrations are made before goods are dispatched.

CAUTIONARY TALES FOR OVERSEAS COMPANIES: THE PPSA IN PRACTICE

The recent decision in *Maiden Civil (P&E) Pty Ltd; Richard Albarran and Blair Alexander Pleash as receivers and managers of Maiden Civil (P&E) Pty Ltd & Ors v Queensland Excavation Services Pty Ltd & Ors* [2013] NSWSC 852 demonstrates the consequences of failing to register a security interest on the PPSR. Queensland Excavation Services Pty Ltd (QES) purchased items of machinery which were subsequently leased to Maiden Civil (P&E) Pty Ltd (Maiden). QES

failed to register its interest in the machinery on the PPSR. At a later date Maiden entered into a finance agreement with Fast Financial Solutions Pty Ltd (FFS) by which Maiden granted FFS a security interest over all of Maiden's assets, including the machinery. FFS perfected its interest over Maiden's assets by registration on the PPSR. QES had not perfected its security interest. Maiden later went into liquidation. The New South Wales Supreme Court found that although QES was the "true owner" of the vehicles, FFS's interest took priority over that of QES as QES had failed to register its interest. QES lost its vehicles and could not take them back. Their only remedy was to sue a company in liquidation – a very harsh outcome.

In *Carrafa, Goutzos and Lofthouse (as liquidators of Relux Commercial Pty Ltd) v Doka Formwork Pty Ltd* [2014] VSC 570, Relux Commercial Pty Ltd (Relux) leased equipment from Doka Formwork Pty Ltd (Doka). Doka registered its security interest in the equipment leased to Relux, but did not comply with the timing requirements in the PPSA. Relux later went into liquidation. The Victorian Supreme Court found that Doka had registered its security interest in some of the equipment out of time. As a result, that equipment vested in Relux by operation of the PPSA. This highlights the need to register security interests within the relevant time frame.

A case currently before the Courts (as of early 2015) may prove a very costly lesson for USA-based energy giant APR Energy PLC, a company listed on the London Stock Exchange. APR leased electricity generating turbines worth \$50 million to Australian engineering services group Forge. APR failed to register its security interest on the PPSR. Forge collapsed owing hundreds of millions of dollars to creditors. The liquidators of Forge are attempting to seize and sell the turbines. APR is resisting this, but the likely outcome seems clear (unless the PPSA itself is changed). APR will lose their turbines and join a queue of unsecured creditors. Press reports suggest that the unsecured creditors may not recover anything at all from the liquidation proceeds. A simple oversight in the sales process at APR will result in massive losses for APR and a windfall for the secured creditors of Forge who properly registered their security interests.

IN PRACTICE

If a transaction is likely to give rise to the creation of a security interest, the secured party should register that security interest on the PPSR as soon as possible. It is not necessary to wait for the transaction to be completed before making a registration. However, care must be taken in determining whether a transaction will give rise to a security interest as civil penalties can apply if a person makes a registration on the PPSR without a reasonable belief that the security interest exists.

Seeking advice in relation to PPSR registrations is vital.

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