Fact sheet – First Nations startups

#9 Debt financing & security

First Nations startups may need to secure an external source of funding to establish business operations and subsequently grow. This fact sheet considers debt financing and security. For equity capital raising see **fact sheet #8** and for grant funding see **fact sheet #10**.

Debt financing

Debt Financing is a form of financing where the borrower receives a loan from the lender. The lender will charge interest on the amount of the loan outstanding until the loan is fully repaid. The key benefit of debt financing is that the borrower retains all ownership control in their business. However, borrowers must have sufficient cash flow to make repayments.

Security over land

The most common form of security granted over land is a registered real property mortgage governed by the *Land Title Act 1994* (Qld). Once a lender registers a mortgage over the land, you will still own the land but certain restrictions may apply to the way in which you deal with the land as will be set out in the mortgage. For example, you will not be able to sell the land without first obtaining consent from the lender. You may also be restricted from providing any other security over the land to other lenders and obliged to maintain the land to ensure that it does not lose its value.

An "equitable mortgage" can also be created over land. These can arise when a legal mortgage is executed but not registered. Equitable mortgages do not offer the same level of protection to lenders as legal mortgages.

Security over personal property

The *Personal Property Securities Act 2009* (Cth) **(PPSA)** regulates security interests in personal property. The PPSA created the Personal Property Securities Register **(PPSR)** which is an official government register that shows security interests in personal property. The PPSR can be used to conduct searches to find out if personal property has a security interest against it. If a First Nations startup enters a general security deed with a lender, the lender may request a security interest over All Present and After-Acquired Property **(ALLPAAP)** of the startup. The property referred to in this instance is any property owned by the startup which may include motor vehicles, office furniture, equipment and/or inventory.

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An ALLPAAP grants the lender an interest in both the personal property of the startup at the time the registration is made on the PPSR and the personal property acquired after the registration is made. Alternatively, or sometimes in addition, a First Nations startup may be requested to grant a security interest over specific personal property under a specific security deed. The lender would then identify specific property that can be specifically identified and provided as security. This kind of security is mainly used to secure property that can be specifically identified by a serial number (for example, a car or boat), shares in the startup or that the startup owns, or other financial instruments.

Guarantees and indemnity

The guarantee is effectively a contractual promise by a party (the guarantor) to the other contracting party (the beneficiary – usually the lender) to discharge the obligations of the original contracting party (the primary party – likely the startup) to the other party in case the primary party fails to fulfil those obligations. See **fact sheet #5 Contracts – external goods & services** for more information on guarantees, including warnings regarding directors' guarantees.

A lender may also insist the borrower provide an indemnity. This is a primary liability that the borrower bears and is a separate obligation to rectify any “loss” suffered by the lender via the payment of money. First Nations startups should be cautious to provide indemnities as they may extend to loss or damage that would not ordinarily be recoverable.

Raisings under the *Corporations Act 2001 (Cth)*

The *Corporations Act 2001* (Cth) sets out the laws and regulations dealing with business entities in Australia, including how businesses may raise funds from the public. If a company is seeking to raise significant funds from the public, they should seek legal advice to ensure they are complying with their legal obligations.

Please see our other Fact Sheets for First Nations startups here.

For more information, please contact: **probonoteam@hopgoodganim.com.au**

Disclaimer

The content of this fact sheet is current at October 2024 and is intended to provide a general guide to the subject matter only. The fact sheet does not constitute legal advice. Obtaining specialist advice about your specific circumstances is recommended.