Project Finance

Contributing editors
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2018

GETTING THE DEAL THROUGH

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 2007
Eleventh edition
ISSN 1755-974X

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Australia

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Creating collateral security packages

1 What types of collateral and security interests are available?

It is generally possible to take all assets security in Australia, subject to contractual restrictions and, if applicable, restrictions under certain statutory licences.

Any security interest in 'personal property' is governed by the Personal Property Securities Act 2009 (Cth) (PPSA), which expressly allows for security interests over all present and future (ie, after-acquired) property including proceeds from investments and sale of collateral. The PPSA will apply if secured property is located in Australia or if the grantor of the security interest is an Australian entity.

However, 'personal property' under the PPSA does not include land and fixtures and certain statutory rights (including mining and petroleum titles, water rights, gaming licences, liquor licences – although these exclusions are on a state-by-state basis, pursuant to state legislation). Security interests over these assets are generally subject to applicable state (or federal) legislation.

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party? Is it necessary for the security agent and trustee to hold any licences to hold or enforce such security?

Perfection of a security interest under Australian law is usually relatively simple. For most personal property, perfection will usually be by way of registration on the Personal Property Security Register (PPSR) which involves an online registration by the secured party. Security over personal property can be also be perfected by the secured party having possession of the secured property (for example, share certificates and blank transfer forms or other certificates of title) or the secured party having control of the property over which the security interest was granted (for example, the secured bank account is held with the secured party). It is common for a PPSR registration to be made even if the secured party has possession or control over the secured property.

However the following types of collateral may require separate perfection steps:

- Certain assets that the personal properties legislation stipulates can be registered by serial number (eg, motor vehicles and certain intellectual property).
- Real property requires registration on the relevant state land titles office and may require the grantor providing the certificate of title to the property.
- Some asset classes require separate registration on the relevant federal or state register (eg, statutory licences such as mining tenements and petroleum licences).

Establishing priority in Australia is more complex. Broadly, in relation to personal property:

- A perfected interest will take priority over an unperfected security interest.
- Where both interests are perfected, the security interest that was perfected earlier will have priority.
- Where both interests are unperfected, the earlier attached security interest will have priority.
- Where a financier provides funds to a borrower for the purchase of particular collateral, some amount of the purchase price remains outstanding, or the collateral is provided under a lease of more than two years, the financier will have a 'purchase money security interest' over the collateral. This security interest has 'super-priority' over all other security interests.
- For real property and most statutory licences, priority is established through registration on the relevant register, with first-in-time registrations having priority, and registered interests having priority over unregistered interests.

No stamp duty is payable to perfect any security interest in Australia. However, registration fees are usually payable in order to perfect a security interest by registration, whether on the PPSR, a relevant state land authority or other government agency. Such fees are generally not financially significant.

Usually in Australia if security is being granted for the benefit of more than one party, security will be granted to a security trustee. The security trustee holds the benefit of the security on trust for all beneficiaries of the security, including assignees. However, it is possible instead for security to be granted to a security agent, who holds the benefit of the security as an agent for all relevant finance parties. The latter method is sometimes used for cross-border financings where an Australian guarantor guarantees the obligations of a borrower incorporated in a jurisdiction that does not recognise trustee relationships.

There are no licences required specifically for an entity to act as security trustee or security agent and hold or enforce security over Australian assets. However, holding or enforcing security over Australian assets may require foreign investment approvals.

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

Usually, a creditor would check the PPSR and other relevant registries in respect of particular material assets (for example, land titles or mining tenement registries) as well as seeking warranties from relevant security providers. While this provides a reasonable degree of protection, a creditor cannot comprehensively assure itself that there are no liens over an asset through searches as these will not reveal the presence of unperfected or equitable liens, nor will the registry record security interests perfected by possession or control (although these should be evident through due diligence). Generally, unperfected liens will rank behind a creditor's perfected lien; however, common law liens (such as workman's liens), while unusual, are not subject to the PPSA so may have priority.

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

A project lender's ability to enforce the security will be governed by the terms of the relevant security agreement and relevant legislation including the PPSA and the Corporations Act.

Under the PPSA, there are rules governing enforcement of security interests, including that notices must be given to a debtor or a higher ranking security holder. Most rules can be contractually dis-applied

and it is normal to do so under project financing security agreements. Also, the project lender may elect to enforce the security under the common law framework rather than under the PPSA regime. Under common law, the length of notice before enforcement must be reasonable (ie long enough in the particular circumstances of the case to allow the recipient to make the requisite payment). Notices under mortgages in certain states have statutory time limits as well as other statutory requirements. These time limits (but not the other requirements) can be, and generally are, contracted out of.

The project lender will generally have the right to enforce its security by appointing a receiver or take possession as mortgagee, although this right is less commonly exercised other than in respect of real property security. Further should the project lender hold registered security over all, or substantially all, of a company's assets, it may appoint an administrator. There is no requirement for the project lender to obtain a judgment before exercising enforcement rights and the project lender may enforce the security should the security documents permit it to do so.

The Corporations Act imposes a duty on receivers and other controllers of the property of a corporation to take all reasonable care to sell the property for not less than its market value, or if it does not have a market value when it is sold, at the best price that is reasonably obtainable. The common law imposes a similar duty on receivers. Provided a receiver exercises such care, it is not required to delay the sale of the secured property on enforcement. The sale may be public or private. The project lender may participate as a buyer in a sale (although in such circumstances should take care to maintain the integrity of the marketing process), and sales may be in foreign currency.

5 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

In Australia, a company which is insolvent, or is likely to become insolvent at some future time, is likely to have an administrator appointed to it. Administration is a statutory process and while an administrator can be appointed by a liquidator, or a secured party with security over the whole, or substantially the whole of a the company's property, most commonly, it is the board of the relevant company who resolve to appoint an administrator. An incentive for directors to appoint an administrator is that the appointment can operate as a defence to a claim against the director personally, by creditors, a liquidator or the regulator, of permitting the company to trade while insolvent.

The appointment of an administrator to an Australian company creates a statutory moratorium on creditors' rights for the duration of the administration. There is a stay on proceedings, winding up applications, the exercise of third party rights as well as enforcement against property, including by a secured project lender. However, if the project lender holds security over all or substantially all of the company's assets, it has a 13 business day 'decision period' after the administration begins in which it can enforce its rights. It is common practice for a project lender to seek security over all or substantially all of a project company's assets so it avoids the risk of moratorium on security enforcement during administration.

If a company is wound up and its assets liquidated, unfair preferences and uncommercial transactions can be voided. These provisions may extend to secured creditors. If a project lender enters into a secured transaction shortly before the project company becomes insolvent, unsecured creditors may be able to challenge the security on the basis that the grant of security constituted an unfair preference or uncommercial transaction. If successful, the project lender will not be able to access the assets the subject of the transaction, and the assets will be distributed among all creditors including unsecured creditors.

Unfair preferences are where one creditor is unfairly preferred over others. Uncommercial transactions are those that do not involve creditors, and aim to capture disposals of property at an undervalue and other matters. The transactions must have been made while the company is insolvent, or the company must have become insolvent as a result of the transaction. The transaction must also have been entered into during the period ending on the 'relation-back' day, but on or before the winding up process began. For unfair preferences, the period is six months; for uncommercial transactions, two years; for transactions involving related parties, four years; and for transactions entered into to avoid the rights of creditors, 10 years. This is known as the 'hardening period' as after this date the transaction cannot be voided.

Secured creditors are paid in preference to all unsecured debts and claims. Other distributions that take priority over unsecured creditors (but behind secured creditors) are costs of winding up, employee entitlements, tax liabilities and floating charges. There are no relevant entities excluded from bankruptcy proceedings.

A creditor can usually appoint a receiver to take control of the secured property. Generally, a receiver is entitled to sell the property to realise the debt. Claims of foreign creditors are treated the same as Australian creditors.

Foreign exchange and withholding tax issues

6 What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

There are generally no exchange controls that can prevent repatriation or realisation of proceeds. Laws in connection with sanctions, terrorism or money laundering may restrict or prohibit payments, transactions and dealings in certain cases.

7 What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

There are generally no restrictions on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions. Non-resident withholding taxes apply to payments of interest, royalties and dividends by residents of Australia to non-residents, although parties may commercially agree that the payer will 'gross up' the payment.

Interest withholding tax applies at the rate of 10 per cent to the gross amount of interest paid. An exemption from interest withholding tax may be available under Australia's domestic tax laws or under the terms of a tax treaty. For example, there is a commonly used exemption in respect of interest paid on a syndicated loan where the invitation to participate in the syndicated loan facility satisfied the 'public offer test'. There are also double tax agreements with many other countries which exempt payments of interest from to resident financial institutions.

As for most jurisdictions, there are anti-money laundering and counter-terrorism financing standards imposed on the financial sector and related industries in Australia.

8 Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

There is no requirement for Australian project companies to repatriate foreign earnings.

9 May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Yes, though these accounts must be declared with the Australian Tax Office.

Foreign investment issues

10 What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

There are significant and complex restrictions on foreign ownership of Australian companies or assets, including mining and petroleum tenements and land. Approval from the Foreign Investment Review

Board (FIRB) is required for a wide range of transactions. If approval is not granted and the transaction proceeds, the Treasurer has powers to impose penalties or to make an order that the transaction be unwound or that the asset be disposed of. Whether FIRB approval is required for a transaction can be a technical question, and applying for an approval will often incur significant fees.

There is a broad exemption for financiers. The restrictions do not apply to acquisitions of entities and land for the purposes of securing payment obligations under a moneylending agreement, or on enforcement of that security. This exemption applies for moneylending agreements that are in good faith, on ordinary commercial terms, and in the course of carrying on a business of lending or providing financial accommodation. It also covers parties connected with the funding but are not themselves lenders such as a security trustee, receiver and holders of secondary debt. Additional rules apply in respect of security over residential land: the financier must be a registered as an authorised deposit-taking institution (ie, a bank) in Australia or licensed outside Australia as a financial institution and be listed on a stock exchange or have at least 100 holders of its securities. There are also limits on how long a security holder who is a foreign government investor can hold an interest post-enforcement of security.

The FIRB regime has different thresholds for classes of transaction. Acquisitions under these thresholds may not require FIRB approval. For 'agreement countries', these thresholds are higher and so capture a wider spread of transactions. Current agreement countries are United States of America, New Zealand, Chile, China, Japan and Korea. There is no need for any particular registration required for investors from these countries to take advantage of the higher thresholds.

However, the increased thresholds do not apply where the acquisition is made by a subsidiary incorporated elsewhere, the acquirer is a foreign government investor, or the target of the acquisition is in a sensitive sector. These assessments are complex and should be made on a case-by-case basis.

11 What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

Any person wishing to carry on an insurance business in Australia must be authorised by the Australian Prudential Regulation Authority (APRA) whether conducting business directly or through an insurance agent or broker and regardless of whether or not the person or company holds an authorisation in an overseas jurisdiction. There is a limited exemption to enable insurance business that cannot be appropriately placed in Australia to be provided by an unauthorised foreign insurer. Products for managing financial risk may be subject to financial services regulation and licensing requirements.

Non-resident insurers with no principal office or branch in Australia may be taxed on a deemed table income based on gross premium derived under an insurance contract from the insurance of property situated in Australia or the insurance of an event that can only happen in Australia. In certain circumstances, the insured person and any person in Australia acting on behalf of the insurer can become personally liable to pay this tax.

12 What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

There are a number of restrictions on bringing in foreign workers to work on Australian projects. Foreign workers must hold a valid and appropriate visa to work in Australia (including on offshore resources projects), and are subject to Australian employment laws. Employers can sponsor foreign workers for either temporary or permanent visas. The most common temporary visas used for workers on resources projects are 457 visas, but these will be replaced in March 2018 by temporary skill shortage (TSS) programme. The TSS programme will comprise two visa streams – a short term two-year visa and a medium term four-year visa.

Temporary visas are available only to workers in a specified list of occupations. In addition, employers may first be required to demonstrate they have sought to employ an Australian citizen in the role (for example, by advertising for the position locally or engaging a recruitment agency to test the local market). While labour market testing is currently mandatory only for certain occupations and may be exempted for positions that require higher skill levels, under the TSS regime labour market testing will be mandatory for all occupations unless an exemption applies under Australia's international obligations.

Visa applicants must clear a criminal records check and demonstrate English language proficiency. Under the proposed TSS programme, employers will be subject to further required to undertake a 'non-discriminatory workforce test' to ensure that Australian workers are not being actively discriminated against, pay minimum Australian market salary rate and contribute more towards training Australian workers.

13 What restrictions exist on the importation of project equipment?

Australia offers a straightforward and undemanding platform for importation to the country. There is no general requirement for an importing entity to hold a licence for importation. The import of certain goods may be prohibited or restricted, but this is unlikely to be relevant to project equipment.

The Australian Border Force must clear all goods imported into Australia whether they are imported by air, sea or post. All goods imported with a value of more than A$1,000 must be cleared by submitting a completed import declaration form and paying any duty, goods and services tax and other taxes and charges that may apply. Goods with a value equal to or less than A$1,000 generally do not attract duty or tax.

Any equipment to be used in Australia must also comply with Australian standards and relevant codes of practice.

14 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

Australia is a low-risk jurisdiction for nationalisation or expropriation of project companies and assets. All levels of government in Australia may compulsorily acquire land where necessary for certain public purposes. They are obliged to pay compensation for the land, generally based on the value of the land acquired. There has been no nationalisation of project companies in Australia in recent history.

Fiscal treatment of foreign investment

15 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no incentives offered preferentially to foreign investors or creditors in Australia.

Generally, no stamp duty or other taxes are payable to ensure that a foreign investment, loan, mortgage or other security interest is effective or registered (though registration fees may be payable). In some situations, stamp duty may be payable if equity is being taken in a company which holds land assets. Tax may be payable on income, and interest, dividend and royalty payments made by an Australian resident company to a non-resident may be subject to withholding tax unless an exemption applies.

Government authorities

16 What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

Federal and state government agencies will often have shared responsibility for typical project sectors. The relationship between federal and state authorities can be complex and will depend upon the jurisdiction, sector and sometimes the nature of the particular project. Usually, the relevant state agency will be responsible for infrastructure procurement and minerals extraction although the federal agency will have responsibility for offshore oil and gas projects in Commonwealth waters.

Regulation of natural resources

17 Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

Regulation of rights to natural resources varies for each resource class but generally title to natural resources can be acquired by foreign parties subject to foreign investment regulation.

Mining

Australia's mining industry is largely regulated at a state and territory level, with limited overlapping Commonwealth regulation. At law, minerals are, with few exceptions, owned by the state, and state and territory governments authorise companies and individuals to undertake specific mining activities in respect of designated areas.

Exploration tenements authorise exploration activities and typically give a preferential right to apply for a mining tenement, which covers extraction and production. Some jurisdictions also grant retention tenements where a significant resource has been identified but is currently uneconomic to develop. Retention tenements protect investors in these circumstances from the 'use it or lose it' policy that underpins Australia's resources regulation regime.

Mining tenements may be granted for specific minerals or minerals generally. They may be granted over public and private land, and each jurisdiction specifies a procedure for negotiating access and landowner compensation. Ministerial consent is required to transfer most types of tenements.

In Western Australia, state agreements can be an exception to the above regime. These are agreements between a developer and a state government for the development of a particular significant resource. This agreement sets out the rights and obligations of both parties throughout the project, overrides any other resource legislation and are negotiated on a case-by-case basis. A state agreement provides significant certainty to a developer, as it can only be amended by mutual agreement between the state and the developer. An agreed state agreement demonstrates clear government support for a project.

Oil and gas

Ownership of hydrocarbons is vested in the Commonwealth, state or territory governments. The right to conduct petroleum activities, including exploration and production, is acquired through the grant of various licences and approvals from the government authority responsible for administering the applicable legislative regimes. Once it has been recovered, the titleholders own the petroleum and the government's interest in such petroleum is limited to an economic interest in the form of a tax or royalty.

The Commonwealth and each Australian state and territory has its own legislative regime for the regulation of upstream petroleum activities. The statutory regimes are effectively separated into three distinct geographical areas:

- Commonwealth offshore (waters beyond the three nautical mile mark to the edge of Australia's continental shelf);
- state or territory offshore (waters up to the three nautical mile mark); and
- Onshore (which is governed by the particular state or territory).

In Australia, it is not uncommon for offshore petroleum projects to be regulated by petroleum legislation from all three regimes; for example, where a project involves exploration in the Commonwealth offshore area, a pipeline that passes through the state offshore area and an onshore processing facility.

Commonwealth

Upstream petroleum activities in the Commonwealth offshore area are principally governed by the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth) (the OPGGSA). Project proponents are granted rights to conduct petroleum exploration, appraisal, development and production activities in the Commonwealth offshore area under a statutory licensing regime. The Joint Authority and the National Offshore Petroleum Titles Administrator have responsibility for the administration of petroleum tenure under such a licensing regime.

State

Each state and territory has its own legislative regime regulating petroleum activities in each of their offshore and onshore areas. The types of petroleum tenure established by each of these regimes broadly mirror those contained in the OPGGSA. The relevant state or territory Minister is responsible for the grant and administration of this tenure.

Water, land, grown resources

Title to water is held by the states and territories. State legislation generally provides for the state to grant rights to use water in its jurisdiction. These rights may be subject to conditions, such as the holder complying with a water management plan. The Murray-Darling river system is the most economically important river system in Australia, and affects New South Wales, Victoria and South Australia. Rights to water from this system are governed by the Murray-Darling Basin Agreement, a complex set of agreements between the states.

Generally rock, gravel, shale (other than oil shale), some sands and some clays are not governed by the mining legislation, but are administered by local government and can be privately owned.

Land ownership in each state and territory is based on the Torrens system of title. Land is either freehold land or Crown land, which may be leased or licenced for particular purposes.

Natural products grown on the land are the generally property of the owner of the land.

Native title

Native title describes the land rights of Aboriginal and Torres Strait Islander peoples under traditional laws and customs. Where a project takes place on land affected by native title, project participants must follow the procedures of the Native Title Act 1993 (Cth). This may involve compliance with the 'future acts' regime, negotiations with native title holders or claimants and, in some cases, a project may require a more broad ranging Indigenous Land Use Agreement before it can proceed. Projects affecting sites of cultural heritage must follow certain requirements. There is the risk of delays if significant areas of cultural heritage are identified.

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

Royalties are generally payable to the relevant state or territory government on the extraction of minerals or the production of petroleum. While normally calculated on a gross revenue basis, the rates differ between jurisdictions and commodities.

For example, in Western Australia, there are two systems used to collect mineral royalties. Royalties for low value construction and industrial minerals are generally collected under a specific rate, or quality-based rate. Under this rate royalties are calculated on the number of tonnes produced. A value-based rate of royalty is generally used for other minerals. This royalty rate is calculated as a proportion of the 'royalty value' of the mineral. The royalty value is broadly calculated as the quality of the mineral in the form in which it is first sold, multiplied by the price in that form, minus allowable deductions. Different royalty rates apply for bulk material which has been subject to limited treatment, concentrate material which has been subject to substantial enrichment through a concentration plant and metal. Further, alternative royalty values sometimes apply (eg, nickel has an alternative value).

State agreements can specify different royalty rates: changing the royalty system for the particular company who has the agreement with the state. Alternatively, state agreements may simply refer to the royalty provisions in the relevant legislation.

Mining and petroleum projects are also subject to industry specific taxes. These taxes and royalties operate alongside the general companies taxation regime and liability for one tax may sometimes be offset or deductible against another. The petroleum resource rent tax covers offshore and onshore oil and gas projects. There is no distinction between royalties and taxes on extraction payable by Australian and foreign parties.

19 What restrictions, fees or taxes exist on the export of natural resources?

There are few limitations on the export of natural resources from Australia, and no specific export taxes or fees on commodities.

Update and trends

Domestic pension funds, institutional investors and offshore funds continue to circle the Australian market for debt funding opportunities in operating projects but remain selective. Transurban was able to refinance its Lane Cove Tunnel project with a combination of bank funding and long-term debt placements from IFM managed funds, REST Super and Prudential. We expect to see such funds play a greater role in debt funding operating projects into the future.

The Western Australian government has a domestic gas reservation policy with a target of 15 per cent of production from each export LNG project. The policy has been applied through conditions on land or petroleum tenure in a state agreement, rather than under specific legislation.

Legal issues of general application

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

No specific government approval is required for typical project financing arrangements, including loans and remittances. Approval may be required to take certain types of security, for example security over mining tenements.

However, there is government regulation of common project finance areas such as infrastructure, transport, aviation, water, and electricity. Both federal and state and territory governments may be involved, and the requirements can be complex. Planning, environmental, health and safety, and native title laws will all apply. Further, approval is required to take an interest in some assets. Government approval is required for private acquisitions of critical infrastructure.

21 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

There is no need for registration of project documents other than the registration of security interests as described above. Government authorities will need to approve any contract where the government is a counterparty, or any licence granted by the government where taking security requires consent. There is no need for documents to be notarised or apostilled.

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

Arbitral awards are, subject to the usual grounds for challenge, generally enforceable in Australia, regardless of the country in which they are made. Australia is a member of the ICSID Convention and the New York Convention, and the UNCITRAL Model Law has effect in Australia. If a foreign award meets the conditions of the New York Convention and the Model Law, Australian courts will generally enforce it. However, some matters are non-arbitrable as a matter of public policy. Bankruptcy and insolvency matters, some intellectual property, insurance contracts, and competition law are generally non-arbitrable. All Australian states have a version of the Model Law, creating a uniform framework for domestic arbitration. No statutory provisions require automatic domestic arbitration.

Australia has a well-developed and tried and tested legislative framework that supports the enforceability of arbitral awards produced through arbitration. The Australian Centre for Commercial Arbitration rules are in line with international best practice.

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

Project agreements and financing agreements are typically governed by Australian law. Occasionally financing agreements for projects are governed by foreign law, usually English or New York law. Security agreements generally are governed by domestic law regardless of the choice of law for the financing facility.

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

Australian courts generally will give effect to the submission by parties to a foreign law contract to the jurisdiction of the courts of that governing jurisdiction unless there are public policy reasons not to do so. The Australian courts will draw a distinction between exclusive and non-exclusive jurisdiction so it is prudent to draft any jurisdiction clause clearly. Also, certain Australian statutes may allow actions in respect of contractual arrangements where the jurisdiction of Australian courts is prescribed.

Foreign state immunity is codified in Australia in the Foreign States Immunities Act 1985 (Cth). Such immunity may be waived by agreement and any such agreement will be generally effective and enforceable.

Environmental, health and safety laws

25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

Most major projects require state as well as federal approvals. Environmental approvals for resources projects are primarily regulated at state level, however federal legislation applies where a project is likely to have a significant impact on a matter of national environmental significance. There are opportunities to streamline these environmental assessment processes to minimise procedural duplication, owing to bilateral agreements in place between state and Commonwealth governments, depending on the nature of the impacts and location of the project.

Work Health and Safety legislation applies to all project sectors. The legislation is state-based, but with the exception of Victoria and Western Australia, the state legislation was modelled on the national Work Health and Safety legislation. WHS law requires employers, or persons conducting a business undertaking, to do everything reasonably practicable to ensure the health and safety of workers and other persons at their workplace and any other place that is connected with their business undertaking.

Directors, officers and managers also have an ongoing due diligence duty under WHS law, which requires them to take all reasonably practicable steps to eliminate or minimise health and safety risks in their workplace. Part of this duty requires them to monitor and assess, on an ongoing and continuous basis, all risks to health and safety that exist in their particular workplace.

Project companies

26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

A company is an attractive business structure because it provides limited liability for its shareholders. The most common Australian company is a company limited by shares, which can be either a proprietary company or a public company. Trust and partnership structures may be used but are less common project vehicles.

Joint ventures in Australia can be either incorporated (where the joint venturers come together to form a company) or unincorporated (which is an often used structure for resources projects). Under an unincorporated joint venture participants hold their interest and entitlements in the project assets separately as tenants in common and a joint venture agreement between the participants governs the project and the participants' obligations to each other.

Projects in Australia are typically funded by equity and debt. Many Australian project companies are publicly listed on the Australian Stock Exchange which operates the primary securities exchange for Australia's strong equity market, although others are privately held. Common sources of debt finance include Australian and international banks and private equity firms as well as superannuation and other funds who are increasingly active investors in debt as well as equity in the infrastructure sector. Australian project companies have also increasingly turned to the international and, to a lesser extent, domestic debt capital markets for financing.

Public-private partnership legislation

27 Has PPP-enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

Australia does not have a specific legislative framework for PPPs, although PPPs are regularly used for public infrastructure investment. The National PPP Policy and Guidelines set out the processes that authorities should follow in the investment, procurement, development and operations stages of PPPs, along with standard risk allocations and commercial principles to be adopted. State governments have their own jurisdictional requirements and departures that are read in conjunction with the National Guidelines. Virtually all categories of public infrastructure either have been, or are proposed to be subject to PPP transactions. These include transport, social infrastructure, energy, water and telecommunications projects.

PPP – limitations

28 What, if any, are the practical and legal limitations on PPP transactions?

A PPP model can be and has been used for a wide range of projects and services. However, the relevant level of government will review a PPP business case to ensure that it will deliver the best value for money to the government.

Government policy dictates that generally, only transactions above A$50-100 million will be considered for a PPP. Projects under this value threshold can also be considered for if they represent significant value for money. Some jurisdictions allow projects to be bundled together to meet this value threshold.

Most Australian governments also require a public interest, public benefit or public policy test when considering a PPP delivery method. This usually involves conducting a business-case assessment, which includes considering the impact of the project on the public, especially on those stakeholders identified as being directly affected by the project. The National Guidelines recommend that project developers liaise with public interest groups and other relevant bodies, and consider possible outcomes of a qualitative or quantitative nature that may impact upon the value-for-money analysis.

There are no legal restrictions on foreign entities engaging in the PPP process with Australian governments, apart from building licensing obligations in some jurisdictions. Many foreign entities have been involved in consortia that have bid for and won Australian PPP projects.

PPP – transactions

29 What have been the most significant PPP transactions completed to date in your jurisdiction?

Large economic infrastructure projects continue to be a focus in Australia with the sale of public assets by state governments, including the Victorian government's long-term lease of Port of Melbourne and the continuing privatisation of the New South Wales energy transmission and distribution businesses. Proceeds, along with the Commonwealth asset recycling payments, have been directed towards new infrastructure projects, including the A$11 billion Melbourne Metro rail project in Victoria and the Sydney Metro rail project in New South Wales.

In April 2017, the NSW government announced it will lease the state's Land and Property Information titling and registry services to a consortium of infrastructure investors who accessed considerable project financing.

Another notable PPP transaction is the A$16.8 billion WestConnex Motorway Project where our firm advised the Commonwealth government in relation to its A$2 billion concessional loan for the project's second stage – being the first major road project to receive concessional loan funding from the federal government. The New South Wales government has now indicated it intends to sell at least a 51 per cent stake in the project to help fund the third and final stage of the roads project.

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