ICLG

The International Comparative Legal Guide to:

Project Finance 2014

3rd Edition

A practical cross-border insight into project finance

Published by Global Legal Group, with contributions from:

Abuda Asis & Associates
Advokatfirmaet Thommessen AS
Ali Budiarjo, Nugroho, Reksodiputro Counsellors at Law
BMT LAW
Boga & Associates
Bonelli Erede Pappalardo
Brigard & Urrutia Abogados S.A.S.
Cabinet d'Avocats Charles Badou
Clayton Utz
Cuatrecasas, Gonçalves Pereira
Debarliev, Dameski & Kelesoska Attorneys at Law
DFDL
El-Borai & Partners
Etude Kabinda/Avocats DRC
Galicia Abogados, S.C.
Gorrissen Federspiel
Hajji & Associés
Heuking Kühn Lüer Wojtek
Ikeyi & Arifayan
Iwata Godo
Khan Corporate Law
Koep & Partners
Kyriakides Georgopoulos Law Firm
Loyens & Loeff
Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados
Milbank, Tweed, Hadley & McCloy LLP
Odvetniki Šelih & partnerji, o.p., d.o.o.
Philippi, Yrarrazaval, Pulido & Brunner
Project Lawyers
Sysouev, Bondar, Khrapoutski
Torres Plaz & Araujo
Vieira de Almeida & Associados
Walder Wyss Ltd.

GLG
Global Legal Group

The International Comparative Legal Guide to: Project Finance 2014

GLG
Global Legal Group

Contributing Editor
John Dewar, Milbank, Tweed, Hadley & McCloy LLP

Account Managers
Edmond Atta, Beth Bassett, Antony Dine, Dror Levy, Maria Lopez, Florjan Osmani, Paul Regan, Gordon Sambrooks, Oliver Smith, Rory Smith

Sales Support Manager
Toni Wyatt

Sub Editors
Nicholas Catlin
Amy Hirst

Editors
Beatriz Arroyo
Gemma Bridge

Senior Editor
Suzie Kidd

Group Consulting Editor
Alan Falach

Global Head of Sales
Simon Lemos

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
April 2014

ISBN 978-1-908070-94-4
ISSN 2048-688X

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Australia

Clayton Utz

Bruce Cooper

1 Overview

1.1 What are the main trends/significant developments in the project finance market in Australia?

While the ground-breaking Roy Hill iron ore project will close in early 2014, the year ahead is likely to bring a shift in focus away from the mining/resources mega-deals of recent years, as the market takes a breather after the past four years in which significant transactions have closed. The large Queensland greenfield coal project developments in planning might struggle in 2014 to achieve progress towards completion: coal will continue to be a difficult sector in the current climate, as that market continues to be shaped by the long-term outlook for China growth, the continued (high) cost of doing Australian deals and the relative strength of the Australian dollar.

Outside the resources sector, it should still be a busy year for the Australian infrastructure market, with a number of large brownfield disposals and privatisations expected as well as a healthy pipeline of greenfield projects, particularly in the transportation sector. Below are some of the highlights we can expect from the year ahead:

- As mentioned above, the A$10bn Roy Hill iron ore project is expected to reach financial close in the first half of the year. Roy Hill is likely to represent the high water mark of large scale project financing in Australia: one of the few significant resource projects to close with a full EPC package and without a traditional parent completion guarantee. We do not, however, expect that structure to be the new paradigm of resource project financing in Australia – a number of bespoke factors led to the deal being funded on the current structure.
- While the majority of Australian LNG projects are now in the construction phase, and little greenfield activity is expected in the year ahead, we could see substantial restructuring in the sector as ownership stakes in existing projects change hands. In particular, Shell has announced a A$17bn programme of divestments targeted for 2014-15 which are expected to come in large part from its Australian LNG portfolio.
- The relative slowdown in greenfield activity in the resources sector is likely to be accompanied by a continued programme of disposals by established projects of their product delivery infrastructure to investors.
- The incumbent Commonwealth Government was elected in September 2013 on a platform of increased investment in national infrastructure, with a particular emphasis on transport. The Commonwealth Government has committed to delivering a string of large infrastructure projects and has made infrastructure investment the central piece of both its policy at home and its G20 presidency. By way of example, it has pledged A$6.7bn towards the Bruce Highway expansion, A$5.6bn towards the duplication of the Pacific Highway from Newcastle to Queensland, A$1.5bn towards the East West Link road project in Melbourne, A$1.5bn towards the WestConnex motorway in Sydney, A$1bn towards the Gateway Motorway upgrade in Brisbane and A$405m to the F3-M2 motorway link project in Sydney and while some of those may be funded by government alone, others are slated for private sector funding involvement. In addition to these projects 2014 should also see the development of a number of state-led rail projects, including the A$5bn Brisbane Underground Bus and Train tunnel project, the final phase of the A$8.3bn North West Rail Link and a number of urban light rail projects.
- To raise the necessary funds for projects, Commonwealth and State Governments are pushing ahead with a programme of privatisations with a potential value in excess of A$100bn. The state of New South Wales is currently in the process of privatising the Port of Newcastle and will continue its privatisation programme of state-owned electricity generation assets in 2014 with the likely completion of the sale of Macquarie Generation to AGL Energy and the launch of the sale process for both Delta Electricity and the state's renewable energy asset portfolio. The eventual privatisation of the state's transmission assets is also expected, however this is likely to be delayed until the upcoming state election in 2015. Victoria, Queensland and Western Australia are also tipped to be considering the sale of ports in Melbourne, Fremantle, Port Headland, Gladstone and Townsville, following the success of the sale of the Port of Botany and Port of Kembla in New South Wales last year which raised a total of A$5.1bn. Queensland in particular is in the process of conducting scoping studies on a number of its power generation, transmission and port assets, however no definitive steps are expected to be taken until after the next state election to be held in 2015.
- The Commonwealth Government's announcement that it will repeal the controversial carbon tax and its decision to conduct a performance review of existing renewable energy incentives have created a climate of regulatory uncertainty which, together with soft demand, will mean that there is likely to be little activity in the greenfield energy sector in 2014.
- Reliance on both equity and debt finance from non-bank sources is likely to continue as both domestic and offshore pension funds look for investment opportunities in the Australian market, with particular emphasis on the acquisition of brownfield assets.

- As with previous years the dominance of Australian banks in domestic projects is expected to continue, but we can also expect increased participation by offshore financial institutions. The attractiveness of Australian infrastructure assets to offshore investment – non-pension – funds will continue to be an issue: the balance between the stability of Australia as an investment destination versus the need to overcome the investment return hurdles of such funds will continue to test those funds' appetite for Australian infrastructure investment. In contrast with earlier years, the expectation of continued weakening in the Australian dollar is likely to make Australian deals more attractive.

1.2 What are the most significant project financings that have taken place in Australia in recent years?

2013 was a strong year for Australian project finance, with landmark financings in the oil and gas sector helping to place Australia amongst the largest geographic markets for infrastructure investment. A selection of the major transactions to achieve financial close in the 2013 calendar year are listed below:

- The largest transaction in both the Australian and global market was the US$34bn Ichthys LNG project financing. The project, which involves the construction of both offshore facilities producing hydrocarbons from the Ichthys Field off the coast of Western Australia and onshore facilities 885 km away at Blaydin Point in Northern Australia, relied on a debt package totalling US$20bn from 20 banks, with the support of 8 export credit agencies.
- The A$5.1bn privatisation of Port Botany and Port Kembla, two ports in the Sydney area of New South Wales, also reached financial close in 2013. Proceeds from the sale will be invested in a fund established by the New South Wales Government to deliver infrastructure projects.
- The A$1.4bn Queensland New Generation Rolling Stock PPP project reached financial close. The project involves the provision and maintenance of 75 new six-car trains for a duration of 30 years for the South East Queensland suburban passenger rail network.

2 Security

2.1 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?

It is possible to give asset security by means of a general security agreement. For personal property, this is governed by the Personal *Property Securities Act* 2009 (Cth) (the ***PPS Act***) that commenced operation on 30 January 2012.

The PPS Act constituted a comprehensive reform of national and state systems and law relating to security over "personal property": essentially any property, asset or right other than land, structures on and fixtures to land and statutory rights which the relevant statute declares not to be personal property.

The key change introduced by the PPS Act was its treatment of an interest in personal property as a security interest if the interest effectively secures an obligation, either to pay money or otherwise. This broad definition extended the ambit of what constitutes a security interest to cover transactions that previously may not have been so regarded: finance leases and retention of title arrangements are examples. The PPS Act further deems certain arrangements as security interests, even if the arrangements secure no obligation. An example of an arrangement that may be deemed to be a security interest is a lease or bailment of goods for greater than a year (or greater than 90 days in the case of goods which bear a serial number), so introducing an arrangement called a PPS Lease.

Project agreements need scrutiny to determine if unintended PPS Act security interests have been created, which then require registration. An example of this is the relatively common contractual provision that requires a party to hold monies or goods on trust to secure an obligation it owes to the counterparty.

The PPS Act established a national register (the ***PPS Register***), which replaces the previous existing Commonwealth and State-based security interest registers. Depending on the assets that are secured, various PPS Register entries may be made, reflective of the different secured collateral under the agreement.

Under the PPS Act, a security interest is enforceable against a third party if it attaches to the relevant collateral and is perfected. Attachment arises if the grantor has rights in the secured collateral and receives value for granting the security interest or performs an act that gives rise to the security interest. Although the PPS Act provides that perfection of some security interests is achieved by taking possession or control (a security interest in a bank account, for example, can be perfected by enjoying control over the account), perfection of a security interest is generally achieved by registering a financing statement in respect of the security interest on the PPS Register. This statement describes the nature of the security interest and the secured party.

Any party with a relevant security interest is permitted to effect registration. No underlying finance or security document (or any extract from them) is required to be recorded on the PPS Register. Upon registration, the registering party is issued a token and registration number (peculiar to the relevant security interest). No changes to, or discharge of, a registered security interest can be effected without the relevant token and registration number.

The PPS Act includes rules to determine the priority of security interests over collateral. The old common law, equity and *Corporations Law* priority rules have been replaced by the PPS Act priority rules. Apart from perfection by control, which generally confers the best priority, priority is established by reference to registration in the PPS Register or by retaining/taking possession of the relevant property.

Under the PPS Act a person may register a security interest in advance of the security actually being granted, so long as the person believes on reasonable grounds that it will become a secured party in relation to the relevant collateral.

Under the conflict of laws rules in the PPS Act, registration of a security interest may still be required (and PPS Act priority rules may still apply) even if the property owned by the Australian person is located offshore.

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Security can be taken over virtually all assets of a project company: land; plant machinery; equipment; rights, etc.

The PPS Act applies to "personal property" but that term does not include any interest in land, buildings or fixtures to land/buildings, nor does it apply to rights arising under or conferred by statute if the relevant statute provides that such rights are not to be covered by the PPS Act. An example of this is *Offshore Resources Legislation Amendment (Personal Property Securities) Act* 2011, which

declares, among other things, petroleum exploration permits, leases, licences and gas pipeline licences not to be "personal property".

Real property security takes the form of a mortgage, which follows a statutory form particular to each State/Territory and which must be registered at the relevant State or Territory land titles office to perfect the security interest. Priority in respect of legal mortgages is regulated by the order in which registration is made.

2.3 Can security be taken over receivables where the chargor is free to collect in the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Yes. Under the PPS Act, a security interest may be granted over "circulating assets", being generally assets which the secured party has given the grantor express or implied authority to deal with in its ordinary course of business. Such property would generally include: accounts arising from the ordinary course of business of providing goods or services; accounts representing the proceeds of inventory; bank accounts; currency; inventory; and negotiable instruments. Notice to the debtor is not required, though the PPS Act contains rules governing the effect of a notice to the debtor in these circumstances.

See question 2.1 for a description of the procedures.

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

Yes. Security can be taken over cash deposited in bank accounts. See question 2.1 for relevant procedures. The PPS Act gives priority to a security interest over a bank account held by an ADI if that ADI is the account bank and controls the account. Accounts of Australian borrowers held offshore, therefore, would best be held by an ADI operating in that offshore market.

2.5 Can security be taken over shares in companies incorporated in Australia? Are the shares in certificated form? Briefly, what is the procedure?

Yes. The PPS Act applies to security taken over "intermediated securities" where the intermediary or grantor is located in Australia. The definition of "intermediated securities" includes shares held on the Clearing House Electronic Sub-register System (CHESS). A security interest in intermediated securities may be perfected through registration of a financing statement or through taking control of the intermediated securities using the specific rules in the PPS Act. Security may also be taken over "investment instruments" which includes non-CHESS shares. Control is the favoured method to perfect security interests in investment instruments, but registration is also possible.

See question 2.1 for a description of the procedures.

2.6 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 (in particular, shares, real estate, receivables and chattels)?

Mortgage duty is a State tax that has been progressively abolished in Australia. No State, other than NSW, currently levies mortgage duty (New South Wales mortgage duty is charged at an *ad valorem* rate of 0.4% of the secured amount).

Previously, the New South Wales Government had planned to abolish mortgage duty on business transactions, unquoted marketable securities duty, and duty on transfers of non-land business assets such as goodwill, patents, trademarks and other intellectual property by 1 July 2012. The commitment to abolish mortgage duty is stated in the *Duties Act* 1997 (NSW) under section 203A, however the enactment of this measure was initially deferred by the 2012/2013 budget until 1 July 2013 and has now been deferred indefinitely by the 2013/2014 budget.

Notarisation is not required to perfect security in Australia.

Nominal fees are payable to register security over personal property in the PPS Register. Fees are payable to register interests in real estate at the relevant State/Territory land titles office. In some States/Territories, these fees are nominal but in others they are set according to value.

2.7 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. However, care must be exercised in lodging a correct financing statement at the PPS Register, at the risk of the registration being ineffective and priority lost.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

In general, there are no government regulatory consents required to create security over project assets. However, depending on the sector of the relevant project, there may be a considerable variety of Commonwealth, State, Territory or local licences and permits required generally for the project. While there may be none specifically required to create security, this may not be the case for projects which are situated on land owned by any governmental authorities or for projects which are underpinned by a grant to the project company of a licence or tenement by a governmental authority.

3 Security Trustee

3.1 Regardless of whether Australia recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Australia recognises the concept of a trust. It is customary in Australia for a security trustee to be appointed by a syndicate of lenders to hold security, to undertake enforcement action and to apply proceeds of enforcement to lenders (and other parties to a project financing, including hedge instrument counterparties), pursuant to the terms of instrument appointing it.

3.2 If a security trust is not recognised in Australia, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

See question 3.1.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

Generally Australian law allows secured parties to action flexible self-help enforcement processes through the appointment of a receiver that acts on their instructions and has powers (generally broadly formulated and which would include taking possession, collecting income, managing and selling the asset) set out in the relevant security agreement, as augmented by the Corporations Law. The PPS Act contains enforcement provisions, the majority of which project finance lenders would insist must be waived by the security grantor (which the PPS Act permits).

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

Foreign creditors are not treated differently to domestic creditors.

5 Bankruptcy and Restructuring Proceedings

5.1 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 security?

Liquidation proceedings do not generally impact or restrict a secured creditor from realising or enforcing its security, though any receiver appointed by the secured creditor will lose the ability to carry on business on behalf of the company. Unlike bankruptcy, liquidation does not vest assets in the liquidator.

The commencement of a voluntary administration imposes a moratorium on acts of all creditors (including secured creditors), allowing the voluntary administrator to control the company's assets during the administration, though it may not deal with secured assets except those subject to a floating charge (under the PPS Act, security over circulating assets). A secured creditor, provided it holds a security interest over the whole or substantially the whole of the assets of the company (and enforces its security), may avoid the moratorium provided it takes enforcement action within 13 business days of the voluntary administrator's notification of appointment to it.

Project lenders need to be mindful that security taken in a project financing must satisfy the all/substantially all rule at the risk of being subject to this moratorium. In Australia, the featherweight floating security interest is a customary mechanism to ensure a qualifying security interest is held, in circumstances where substantive security may not be over the required assets (for example, when a charge over sponsor shares in the project company is granted).

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

The *Corporations Act* 2001 (Cth) contains presumptions of insolvency, which are rebuttable by the debtor, enabling liquidators to challenge certain transactions. Transactions which may be challenged include: unfair preferences; invalid floating charges; uncommercial transactions; insolvent transactions; unfair loans; and voidable transactions. Secured creditors holding a floating charge (under the PPS Act, a security over circulating assets) may be subject to a limited category of priority payments, relating to some employee payments. Taxes are not afforded a priority position.

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

Special insolvency regimes apply to ADIs (authorised deposit-taking institutions, which are essentially domestic and foreign financial institutions, a list of which is periodically published under the *Banking Act* 1959 (Cth) regulations) and insurance companies.

The Australian Prudential Regulation Authority (***APRA***) oversees banks, credit unions, general insurance, life insurance and other companies. APRA has powers to control the operations of an insolvent institution with the aim of restoring it to financial health.

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

See question 4.1. The PPS Act has a limited appropriation-type remedy.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

As discussed above at question 5.1, a project company may initiate a process of voluntary administration which may have the effect of imposing a moratorium on all creditors, including secured creditors. Provided however that a secured creditor holds a security interest over the whole or substantially the whole of the assets of the company, it may avoid the moratorium by taking enforcement action within 13 business days of notice of the appointment of the voluntary administrator.

Either in conjunction with the above, or separately, a project company may also propose to its creditors that a composition be accepted or a scheme of arrangement be entered into in satisfaction of the creditors' claims against the project company. Any such composition or scheme will need to be approved by a special resolution passed by a majority in number and three quarters in value of creditors present, at which point it will be binding on all creditors.

Consensual contractual methods of restructuring its debts are of course also available to a project company, but these would require the agreement of all creditors.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in Australia.

The *Corporations Act* 2001 (Cth) imposes on all directors, including those holding an honorary appointment, an objective duty of care to actively prevent a company from incurring a debt at a time when it is insolvent, or if incurring such debt would result in the company becoming insolvent. For these purposes a person may also be a director if they are not formally appointed but act in that role, or if the directors of the company act in accordance with their instructions or wishes.

Contravening the insolvent trading provisions of the *Corporations Act* 2001 (Cth) can result in civil penalties against directors, including pecuniary penalties of up to A$200,000. In addition, compensation proceedings for amounts lost by creditors can be initiated by the Australian Securities & Investments Commission, a liquidator or a creditor against a director personally. Compensation payments are potentially unlimited and could lead to the personal bankruptcy of directors. Finally, if dishonesty is found to be a factor in insolvent trading, a director may also be subject to criminal charges (which can lead to a fine of up to A$220,000 or imprisonment for up to five years, or both).

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

The *Foreign Acquisitions and Takeovers Act* 1975 (***FATA***) provides the framework for Australia's screening of foreign investments. The Treasurer determines whether investment proposals are contrary to Australia's national interest and relies on advice from the Foreign Investment Review Board (***FIRB***).

Acquisitions that must be notified to the FIRB, regardless of their value or the nationality of the investor, are: vacant non-residential land; residential real estate; shares or units in Australian urban land corporations or trust estates (essentially an entity where more than 50% of its assets is urban land); and, regardless of the investment value, direct investments by foreign governments and their related entities, and proposals by them to establish new businesses in Australia or acquire interests in Australian urban land.

The FIRB must be notified of all other acquisitions if the value exceeds the applicable monetary threshold. Please see:

- http://www.firb.gov.au/content/monetary_thresholds/monetary_thresholds.asp

Foreign persons should be aware that separate regulation also imposes limits on foreign investment. Please see Australia's "Foreign Investment Policy":

- http://www.firb.gov.au/content/_downloads/AFIP_Aug2012.pdf

The FATA provides (subject to the Foreign Investment Policy) an exemption for lenders taking security over Australian property/assets for amounts owing under a loan agreement and which will, in most cases, not prevent enforcement.

Separate legislation imposes notification, consent or other requirements in respect of certain industries, including media, banking, airlines and airports, among others.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

Under the Australia/United States Free Trade Agreement, a monetary threshold (above which investments must be notified to FIRB) has been set for US investors (in 2014 it is A$1.078bn for non-sensitive sectors and A$248m for sensitive sectors. This figure is indexed annually on 1 January) but generally no bilateral investment treaties currently shield qualifying investors/investments from FIRB issues.

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

The Commonwealth, State and Territory Governments may make compulsory acquisitions, though the Australian Constitution, subject to certain exceptions, obliges the Commonwealth to pay just compensation. State and Territory Governments are not bound by the Australian constitution on expropriation/nationalisation matters. However, New South Wales statutory provisions do require just compensation to be paid for land acquisitions by that State.

Most investment treaties entered into by Australia only permit expropriation when it is: non-discriminatory; carried out for a public purpose under due process of law; and accompanied by prompt and adequate payment of compensation. Some free trade agreements prohibit direct expropriation (for example those with the US, Singapore and Thailand).

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

The Commonwealth Department of Infrastructure and Transport regulates the areas of infrastructure planning, land transport, civil aviation, maritime transport and major projects facilitation. Various State and Territory departments are also involved, depending on the type and location of a project. Regulations and the approval/consent process can be complex depending on the nature of the project. Environmental, health/safety, planning laws typical in most developed countries will apply, in addition to native title laws which are peculiar to Australia.

7.2 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?

All documents creating a security interest in personal property should be registered in the PPS Register. Dealings with real property must be registered with the relevant State land titles office. All project documents must be in writing insofar as they relate to the creation or transfer of a legal interest in real property. Industry-specific state registrations and filings may be required: for example, in mining and petroleum projects. Stamp duty, if applicable, and filing/registration fees must be paid as a precursor to registration/lodgement.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Applications to licence Crown land are uncommon. Some major projects may require a lease of Crown land. See question 6.1 for FIRB restrictions.

Most natural resources management and environmental protection legislation enables a statutory authority to issue licences to project sponsors to undertake otherwise illegal activities. Licences are required to develop land, emit pollution, take native wildlife, harvest fish, operate ports and pipelines, etc.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

While the extraction of natural resources is highly regulated, few export restrictions apply.

Extraction of natural resources

Royalties are payable to State and Territory Governments on the extraction of minerals and petroleum products extracted under licences granted by such governments. The methods of calculating royalties vary between States and include flat-rate (on a cost per tonne basis), *ad valorem* (based on total percentage of product recovered) and profit-based royalties.

The Petroleum Resource Rent Tax (***PRRT***) is a Commonwealth tax levied on the taxable profits of a petroleum project at a rate of 40%, subject to certain expenditure allowances. It applies to onshore and offshore Australian petroleum projects. The Minerals Resource Rent Tax (***MRRT***) applies to new and existing coal and iron ore projects in Australia. The MRRT is a Commonwealth tax that relates solely to coal and iron ore and is a profit-based tax (applying to business with profits exceeding A$75m), applied at the rate of 30%. However, because it is subject to expenditure allowances, is levied at an effective rate of 22.5%. Credited against any MRRT liability are royalties paid to the State and Territory Governments. The Commonwealth Government has introduced proposed legislation into parliament repealing the MRRT from 1 July 2014. The proposed legislation was passed by the lower house, but is yet to be passed by the Senate. The bill is expected to be reintroduced to the Senate after 1 July 2014, when the senators elected in the 2013 elections take their seats.

Export of natural resources

Restrictions do not generally exist for natural resources exports, but for specific restrictions for export of radioactive material, diamonds and certain hazardous materials.

GST

The export of goods from Australia is generally exempt from GST.

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Foreign exchange controls have generally been removed by the Commonwealth Government. Restrictions have been placed on payments and transactions generally involving countries, individuals and entities in or connected with a number of countries, including: individuals associated with the Milosevic regime in the former Federal Republic of Yugoslavia; the Democratic Republic of the Congo; Guinea-Bissau; the Central African Republic; Côte d'Ivoire; North Korea; Eritrea; Fiji; Iran; Iraq; Lebanon; Liberia; Libya; Somalia; Sudan; Al-Qaida and the Taliban; Syria; and Zimbabwe. The removal of financial restrictions against Myanmar took effect on 3 July 2012 although limited restrictions remain in connection with the supply of arms and other military related matters. The Commonwealth Department of Foreign Affairs and Trade, the Commonwealth Attorney-General and the Reserve Bank of Australia publish prohibited persons lists which will provide up-to-date information.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

The repatriation and remittance of investment returns to overseas jurisdictions is generally unrestricted, but see question 7.5.

Companies that pay interest, unfranked dividends and royalty payments to non-residents are generally required to pay withholding tax on such payments. Withholding rates are 10% for interest (though see section 17 for comments on possible interest withholding tax exemptions), 30% for unfranked dividends and 30% for royalties. Australia is a party to double tax treaties with over 40 countries, pursuant to which the payer may be entitled to withhold less tax or none at all.

A foreign corporation operating in Australia must pay income tax on its Australian source income. For a foreign corporation that is a resident of a country with which Australia has concluded a double tax treaty, that corporation must pay income tax on any income that is attributable to any permanent establishment of that corporation in Australia. Having done so, its repatriation of profit from that income should not attract withholding tax.

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes. Project companies may maintain onshore foreign currency accounts and offshore accounts. With the exceptions of anti-money laundering and counter-terrorism legislation, there are no restrictions on operating foreign currency accounts in Australia (see question 7.5).

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in Australia or abroad?

There are no restrictions on the payment of dividends from a project company to a non-resident company, but see question 7.6.

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Australian projects can require an extensive range of approvals under environment, planning, and health and safety laws. Relevant stakeholders in the planning/approval process can include the Commonwealth, State, Territory and municipal governments, local landholders, resident and environmental groups. The approval process can be long, involved and expensive.

The *Environment Protection and Biodiversity Conservation Act* 1999 requires an Environmental Impact Assessment (***EIA***) to be

undertaken for projects potentially impacting "matters of national significance". Each State and Territory also has legislation requiring environmental impact assessments to be performed in particular circumstances. Onshore and offshore exploration and mining for minerals, oil and gas are regulated by specific legislation, and each State has legislation requiring notification of contaminated land in defined circumstances and imposing clean-up obligations. Common law may impose additional liability for negligence, trespass or nuisance. Lender liability may arise, depending on the level of involvement/control a lender has.

A complex web of occupational health and safety (***OHS***) laws is contained in State and Territory statutes. These statutes are being harmonised to mirror the Commonwealth's *Model Work Health and Safety Act*. The OHS regulatory authority for the Commonwealth is Comcare, and each State has a different statutory authority regulating OHS laws. Other health legislation governs the handling of dangerous goods, and radioactive substances, as well as other activities.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

There are no statutory procurement controls for private projects. Commonwealth and State/Territory regulations exist when dealing with State parties.

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

All foreign insurance companies require permission from APRA to operate within Australia, except where the insurance is provided to a "high value insured" (applying an operating revenue/gross assets/number of employees test), is for an "atypical risk" or is for risks that cannot reasonably be placed in Australia (essentially the coverage is unavailable or available on substantially less favourable terms (including price) than that offered in the domestic market).

The imposition of stamp duty, withholding tax, fire services levy, terrorism reinsurance levy and goods and services tax on insurance policies over project assets will vary depending upon the type of insurance and the insurer.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes, though subject to the restrictions referred to in question 7.5.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

Foreign nationals require a visa authorising them to work in Australia. Skilled workers who require sponsorship by Australian employers in "area of need" occupations must hold a Permanent Visa. Foreign skilled workers who do not have an employer sponsoring them may obtain Temporary Visas, under the General Skilled Migration programme.

It is a criminal offence under the *Migration Act* 1958 (Cth) for an Australian employer knowingly or recklessly to provide work to an illegal worker or to refer an illegal worker for employment. It is also an offence under the *Commonwealth Criminal Code* 1995 (Cth) for an employer or labour supplier to aid or abet illegal foreign workers.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

Importation of project equipment is treated no differently to the importation of goods generally into Australia.

10.2 If so, what import duties are payable and are exceptions available?

Goods and Services Tax (***GST***) applies to most imported goods at a rate of 10% of the value of the imported product. Importers must have an Australian Business Number (***ABN***) in order to claim input tax credits or access the GST deferral scheme.

The *Customs Tariff Act* 1995 (Cth) provides information on: tariff classifications, duty rates, preference schemes and exemptions. Section XVI is relevant to the importation of project or construction equipment as it concerns: nuclear reactors; boilers; machinery and mechanical appliances and parts thereof (chapter 84); and electrical machinery and equipment and parts thereof (chapter 85).

Subject to a qualification/application process, the Australian Government's Enhanced Project By-law Scheme (***EPBS***) may allow a project to access tariff duty concessions on qualifying eligible goods not made in Australia or that are technologically more advanced, more efficient or more productive than Australian-made goods for significant projects in certain industries, under specific conditions. Quarantine laws will apply to second-hand project or construction equipment.

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

Generally yes, subject to appropriate drafting.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

Rules prohibiting domestic and foreign bribery, deception, fraudulent conduct, forgery and falsification are contained in the *Criminal Code Act* 1995 (Cth). Potential penalties include: fines of up to A$1,100,000 for an individual and A$11,000,000 for a body corporate, imprisonment between one and 10 years, or both. For certain offences, corporations may face penalties of three times the amount of the monetary benefit gained from the wrongdoing, or 10% of the annual turnover of the body corporate during the 12-month period before the month in which the offence occurred.

Other Australian statutes prohibiting corrupt business practices and bribery include the: *Corporations Act* 2001 (Cth), *Income Tax Assessment Act* 1997 (Cth), *Taxation Administration Act* 1953 (Cth) and *Competition and Consumer Act* 2010 (Cth).

13 Applicable Law

13.1 What law typically governs project agreements?

The governing law of project agreements generally depends on the location of the project. For a project undertaken in Australia, project agreements will typically be governed by the laws of the relevant Australian State or Territory, especially where any government authority is involved. Compelling reasons can result in an agreement, governed by another law: for example, export offtake contracts with a foreign buyer may be governed by foreign laws, as might significant supply contracts with offshore suppliers.

13.2 What law typically governs financing agreements?

The law governing loan agreements is usually the law of the Australian State where the borrower is located. Transactions involving ECA or bilateral/multilateral lenders may be governed by English or New York law. However, security documents evidencing security over Australian-located assets would typically be governed by the laws of the relevant Australian State or Territory.

13.3 What matters are typically governed by domestic law?

See questions 13.1 and 13.2.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

The *Foreign Judgements Act* 1991 (Cth) allows a party to make a submission to a foreign jurisdiction, so long as the submission does not relate to an activity that is illegal under Australian law or contrary to public policy. Generally, a waiver of immunity would be enforceable, subject to consideration of the relevant entity (i.e., its governmental status) and the relevant transaction.

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, the enforcement of international arbitration agreements is governed by section 7 of the *International Arbitration Act* 1974 (Cth), which implements Australia's obligations under the New York Convention, and Article 8 of the UNCITRAL Model Law on International Commercial Arbitration (Model Law).

Section 7(2) of the *International Arbitration Act* 1974 (Cth) requires court proceedings to be stayed if there is a valid arbitration agreement. Australian courts will enforce contracts requiring submission of disputes to international arbitration if the arbitration agreement is broad enough to cover the matter in dispute, and the subject matter of the dispute is arbitrable.

15.2 Is Australia a contracting State to the New York Convention or other prominent dispute resolution conventions?

Australia ratified the New York Convention in 1975. Australia is also a contracting state to the Model Law and the Washington Convention on the Settlement of Investment Disputes between States and National of Other States (ICSID Convention), which are also incorporated into domestic law by the *International Arbitration Act 1974* (Cth).

Australia is a party to free trade agreements with the United States, Thailand, Singapore, Chile, ASEAN, Malaysia and New Zealand, which (apart from the US-Australia agreement) facilitate the arbitration of disputes between investors and States. Nine further free trade agreements are currently under negotiation. Australia is also a party to a number of bilateral investment treaties.

15.3 Are any types of disputes not arbitrable under local law?

Few statutory provisions render certain disputes not arbitrable. Section 11 of the *Carriage of Goods by Sea Act* 1991 (Cth) declares void an arbitration agreement in a bill of lading (or similar document) concerning the carriage of goods to or from Australia, unless the agreement specifically provides that arbitration is to occur in Australia. Section 43 of the *Insurance Contracts Act* 1984 (Cth) and section 19 of the *Insurance Act* 1902 (NSW) provide that an arbitration clause is not binding unless parties agreed to arbitration after the dispute arose. Case law has extended this to reinsurance contracts.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

Whether a dispute is subject to mandatory domestic arbitration will depend on the construction of the arbitration clause. No statutory provisions require domestic arbitration.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

It is possible to sign direct agreements with a government entity (and these would be usual in the context of a project agreement to which a government entity/authority is a party). Some major projects in Australia have proceeded with broader government-support arrangements.

Political risk insurance for Australian projects is rarely, if ever, a deal feature.

17 Tax

17.1 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?

Interest payable on loans

As a general rule, withholding tax is deductible from the payment of interest to foreign lenders at the rate of 10%. However, an

exemption is available in respect of bonds and other debentures (which includes syndicated loans) issued under section 128F of the *Income Tax Assessment Act* 1936 (Cth) (the ***Tax Act***) if prescribed public offer tests are met.

Australia's double taxation conventions with countries such as the US and the UK prevent interest withholding tax applying to interest derived by:

- the Government and certain government authorities and agencies in the specified country; and
- a "financial institution" which is resident of a specified country and is unrelated to and dealing wholly independently with the relevant issuer.

Proceeds of a claim under a guarantee

Payments by a guarantor in respect of loans are entitled to any withholding tax exemption the relevant loans had under section 128F of the Tax Act.

If the guarantor is a non-resident of Australia and its payment is not attributable to a permanent establishment in Australia, such payment would not be subject to interest withholding tax.

17.2 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?

Outside certain venture capital or research and development incentives which are generally not relevant to projects, no tax or other incentives are provided to foreign investors.

For other taxes, refer to other relevant answers in this chapter.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in Australia?

Tax structuring remains key to sponsor considerations of project structuring. Australia's tax laws are complex and evolving and no specific model can be described.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

- The previous Commonwealth Government introduced a Bill (Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2013) (***the Bill***) for the purposes of establishing a new disclosure regime applying to the issue of simple corporate bonds (being instruments that would have to satisfy certain legislative criteria including that they are 'debentures' pursuant to section 9 of the Corporations Act) to retail investors. The reforms contained in the Bill proposed that simple corporate bonds (as defined by a new section 713A) would not require a 'full' or IPO style prospectus to be issued as required by Chapter 6D of the Corporations Act but that there would be a two-part disclosure regime consisting of a base prospectus and an offer-specific prospectus.

  The Bill also contained provisions to facilitate parallel trading of simple corporate bonds in the wholesale and retail markets, enabling simple corporate bonds in the wholesale market to be offered to retail investors using depositary interests (being a beneficial interest in the simple corporate bond). The depository interests would not be a security to which Chapter 6D would apply. The Bill also contemplated the introduction of a regulation in Chapter 2L of the Corporations Act such that the offer of debentures, or a specified class of offers of debentures, would not require a trust deed nor the appointment of a trustee. However, the Bill has not been passed into legislation and offers of these instruments must still comply with Chapter 6D of the Corporations Act, unless there is an available exemption under section 708, as well as the additional requirements pursuant to Chapter 2L of the Corporations Act.
- The ASX Listing Rules will govern quotation of any listed securities and reporting requirements in addition to the requirements of the Corporations Act.

19 Islamic Finance

19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* might be used in the structuring of an Islamic project financing in Australia.

Australia is well positioned both geographically and in terms of its strong real economy, to capitalise on the benefits of Islamic-compliant investment/funding structures. In recent years there has been significant interest, both from the private sector and government, in developing this potential. While there are no legal impediments to setting up *Istina'a* type commodity financings, *Ijarah* lease arrangements or *Murabaha* cost plus structures, the existing regulatory and taxation regimes remain unfavourable to these structures. In particular, stamp duty, mortgage duty (especially in New South Wales) and Capital Gains Tax all currently hinder the development of structures which are reliant on multiple asset transfers.

Work is under way to reform the regulatory and taxation framework so as to create a level playing field for Islamic-compliant financing structures. In Victoria, double stamp duty on *Murabaha* arrangements was abolished as early as 2004, but until further measures are enacted, activity in this field is likely to be restricted to the retail sector.

To date there has been no significant take-up of Islamic-compliant structures as part of a project financing funding solution for major Australian projects.

19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

An Australian court will recognise an express choice of law in a contract if it is the legal system of another nation state and provided generally that the choice was a *bona fide* one and not for the purpose of avoiding the impact of any Australian law. While there have been no cases in Australia specifically regarding the choice of *Shari'ah* law, it is likely that an Australian court would follow the approach that has been taken in the English courts and consider that a non-national system of law (such as *Shari'ah*) is incapable of forming the governing law of an agreement. Of course, that does not prevent, as in other jurisdictions, the crafting of contractual terms that are governed by Australian laws but which on their terms are consistent with *Shari'ah* principles and receive the blessing of an appropriate *Shari'ah* committee.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in Australia? If so, what steps could be taken to mitigate this risk?

Interest payment obligations are generally valid and enforceable under Australian law, although clauses which provide for a rate of interest payable on the occurrence of a contractual default may be unenforceable if they are found by a court to constitute a penalty for breach as opposed to a genuine pre-estimate of loss.

Acknowledgment

The author acknowledges the contribution of colleagues at Clayton Utz in the preparation of the foregoing, including: Angus Foley; Philip Bisset; Rory Moriarty; Natasha Davidson; Paul Richter; and Richard Mills.

Bruce Cooper

Clayton Utz
1 Bligh Street
Sydney NSW 2000
Australia

Tel: +61 2 9353 4000
Fax: +61 2 8220 6700
Email: bcooper@claytonutz.com
URL: www.claytonutz.com

Bruce Cooper is a partner in the Sydney office of Clayton Utz. Prior to his return to Australia, he practised in Asia, a considerable period of which was as a partner in a Magic Circle firm. He has acted for developers and lenders on a range of infrastructure and project finance transactions, across a number of sectors including water, electricity, mining, oil and gas, petrochemicals and materials processing. He has considerable experience in Australia and throughout Asia and has been regularly nominated as a leading practitioner in industry directories. He was educated at Sydney University with degrees in Arts and Laws and is admitted to practice in Australia, England and Wales and Hong Kong.

CLAYTON UTZ

Clayton Utz is a top-tier independent Australian law firm that focuses on achieving commercial outcomes for our blue-chip client base. We deliver a full-service projects capability: from tax structuring at the initial stages, to guidance through often complex planning, environmental and native title issues, to procurement and construction strategies and execution, to project and finance documentation and to dispute resolution. Our ability to bring together teams of lawyers with unique and diverse skills has seen us advise on some of the country's largest and most complex deals. Our strong relationships at all levels of Government mean we are at the forefront of critical policy development and regulation.

Clayton Utz is at the forefront of project finance in Australia and receives tier-one rankings for its project work in legal directories. We have been key legal advisers on many of Australia's most significant projects in the last decade and we continue to be involved either as project lead counsel or for a participant in the most high-profile projects to close in Australia.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Environment & Climate Change Law
- Franchise
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk