# KEY AUSTRALIAN ISSUES FOR FOREIGN LENDERS

An overview of key issues for foreign lenders to consider when lending into Australia

## INTEREST WITHHOLDING TAX

Interest withholding tax (**IWT**) of 10% is typically payable on interest payments from an Australian borrower to a foreign lender unless:

- the lender is in a jurisdiction where double tax treaties have been entered into with Australia; or
- the public offer exemption as set out in section 128F of the Income Tax Assessment Act 1936 has been complied with.

The public offer exemption applies in relation to two principal categories of loans, being debentures (which will be the preferred route if the facility is under A$100 million at first drawdown and there may only be one lender) and syndicated loan facilities (which will be the preferred route if the facility is at least A$100 million at first drawdown and there will be at least two lenders). For the exemption to apply to the debenture or syndicated loan facility, the parties must satisfy one of five public offer tests, which is a relatively straightforward procedure with the most common being offers made:

- to at least 10 unrelated lenders; or
- publicly in an electronic form (such as a listing on a Bloomberg or Reuters screen).

While it is not necessary that all lenders accept the public offer, the offer must be genuine in order to meet the public offer exemption. It is essential that tax advice is sought when seeking to rely on the public offer exemption.

## LICENSING AND REGULATORY APPROVALS

Most loans made by foreign lenders into Australia do not require any licensing or other regulatory approvals. Foreign lenders should note the following licensing and regulatory approvals which may be applicable:

***Australian Financial Services Licence (AFSL)*** - Australia has a licensing system for financial service providers who carry on a financial services business in Australia. A person who is "carrying on a business of providing financial services" in Australia is required to hold an AFSL, unless an exemption applies. Generally, the making of loans does not require an AFSL licence, but if the loans are more structured or if the foreign lender is also dealing in derivatives or preferred equity or convertible instruments then an AFSL may be required.

***Foreign Investment Review Board (FIRB)*** - Notification of certain foreign investment proposals need to be lodged with FIRB. The Australian Treasurer

**KEY ISSUES**


- Interest Withholding Tax
- Licensing and Regulatory Approvals
  - Australian Financial Services License (AFSL)
  - Foreign Investment Review Board (FIRB)
  - Banking Licence
  - Australian Credit Licence (ACL)
  - APRA Register of Entities
  - Registration as a Foreign Company
  - Other Licences
- Financial Assistance
- Security
  - Taking Security
  - Enforcing Security
- Ipso Facto Reform

then has the power to approve, impose conditions or prohibit that foreign investment. While the taking of security interests over Australian assets, land and securities by a foreign lender comes within the ambit of the foreign investment rules, the vast majority of financing transactions involving foreign lenders can take advantage of the "moneylending exception", which exempts foreign lenders who are in the ordinary business of lending money from the need to notify FIRB when taking or enforcing security in Australia. While the "moneylending exception" can also apply to foreign government lenders when they enter into or to take security, there are particular FIRB rules which require such lenders with significant foreign government holdings to dispose of the interest acquired on enforcement of security within specific time periods. Additional rules also apply in connection with taking security over residential land.

***Banking Licence*** – A foreign lender would need to be licensed as an authorised deposit taking institutions (**ADI**) if it carries on a banking business in Australia. Direct lending on its own does not constitute a banking business. The business of a bank includes both taking money on deposit and making advances of money. Accordingly, a foreign lender will not need to be licensed as an ADI if they only lend into Australia and do not take deposits.

***Australian Credit Licence (ACL)*** - A foreign lender would need to obtain an ACL if it is providing credit to a natural person and the credit is provided wholly or predominantly for personal, household or domestic purposes or residential property investments.

***APRA Register of Entities*** – Under the Financial Sector (Collection of Data) Act 2001, a foreign lender would need to register as a 'registrable corporation' with the Australian Prudential Regulation Authority (**APRA**) if it "engages in the provision of finance in the course of carrying on business in Australia". While infrequent loans are unlikely to be considered evidence of "carrying on business in Australia", a foreign lender engaging in a high volume of business activities in Australia may fall into this category, be required to register with APRA and be required to provide APRA with ongoing information on their lending activities in Australia.

***Registration as a Foreign Company*** – A foreign company must not " carry on business in Australia" without registering as a foreign company with the Australian Securities and Investment Commission (**ASIC**). As with the AFSL and APRA registrations noted above, whether a foreign lender is "carrying on business in Australia" is a question of fact and degree depending on, amongst other things, volume of activity and whether the foreign lender is undertaking activities on the ground in Australia.

***Other Licences*** – This briefing note is general in nature and does not consider specific laws that may apply to regulated industries such as superannuation or insurance. If the foreign lender or the proposed obligor operates in a regulated industry then specific legislation may also need to be considered.

## FINANCIAL ASSISTANCE

The Corporations Act 2001 generally restricts a company's ability to give financial assistance to another person to assist that person to acquire shares in the company or its holding company. There are exemptions if certain procedures are followed, the most common being the "whitewash" procedure. The "whitewash" procedure is set out in section 260B of the Corporations Act

2001 and requires board and shareholder meetings to be held and the lodgement of statutory notices with the Australian Securities and Investment Commission (**ASIC**). Importantly, there needs to be a two week period from the date of the last filing with ASIC before the financial assistance can be given. On an acquisition financing, lenders will typically give a minimum of 20 business days post acquisition for completion of the whitewash procedure. Contravention of the financial assistance restriction does not invalidate the underlying transaction, but any person involved in the giving of the financial assistance (including non-Australian parties) may be the subject of civil penalties and, in the case of dishonest involvement, criminal action.

## SECURITY

***Taking Security*** - The Personal Property Securities Act 2009 (**PPSA**) is the relatively new personal property security regime of Australia. It is modelled on the regimes in New Zealand, Canada and the US. Security interests in the PPSA include traditional securities such as charges and mortgages but also include deemed security interests like hire purchase arrangements, finance leases, capital leases, retention of title arrangements, flawed asset arrangements and turnover trusts. The general rule is that the PPSA applies if the personal property is located in Australia or the grantor is an Australian entity. Security interests are perfected by registration on the Personal Property Securities Register (**PPSR**) and/or taking possession or control of the personal property. Real estate mortgages are perfected by being registered at the land registry in the Australian State where the real estate is located.

***Enforcing Security*** - Australia is a creditor-friendly jurisdiction where it is relatively straightforward to enforce security. A particularly creditor friendly aspect worth noting is that if a secured creditor holds a charge over the whole, or substantially the whole, of a grantor's property and a company goes into administration, section 441A of the Corporations Act 2001 allows such secured creditor to appoint its own receiver in the first 13 business days of administration. Without this, a secured creditor would need to wait to the end of the administration process (typically several months and even years) before it can enforce its security interest. Other specific perfection requirements are necessary for certain asset classes such as mining, oil and gas tenements.

## IPSO FACTO REFORM

Australia introduced an 'ipso facto' stay regime on 1 July 2018. Ipso facto clauses allow termination by a party if an insolvency event occurs in relation to the other party. There is a long list of exceptions to the stay on ipso facto clauses, including for syndicated loans, bonds and certain other financial markets products, including derivatives, settlements systems, and set-off and netting rights. The stay will not apply to contracts entered into before 1 July 2018. The regime is new and there is very limited guidance on the interpretation of these provisions to date.

# CONTACTS

**Richard Gordon**
Partner, Sydney
**T** +61 2 8922 8077
**E** richard.gordon@cliffordchance.com

**Philip Sealey**
Director, Perth
**T** +61 8 9262 5542
**E** philip.sealey@cliffordchance.com

**Alastair Gourlay**
Counsel, Sydney
**T** +61 2 8922 8043
**E** alastair.gourlay@cliffordchance.com

**Chad Bochan**
Counsel, Sydney
**T** +61 2 8922 8501
**E** chad.bochan@cliffordchance.com

**Mark Gillgren**
Counsel, Perth
**T** +61 8 9262 5543
**E** mark.gillgren@cliffordchance.com

**Kane Barnett**
Counsel, Sydney
**T** +61 2 8922 8090
**E** kane.barnett@cliffordchance.com