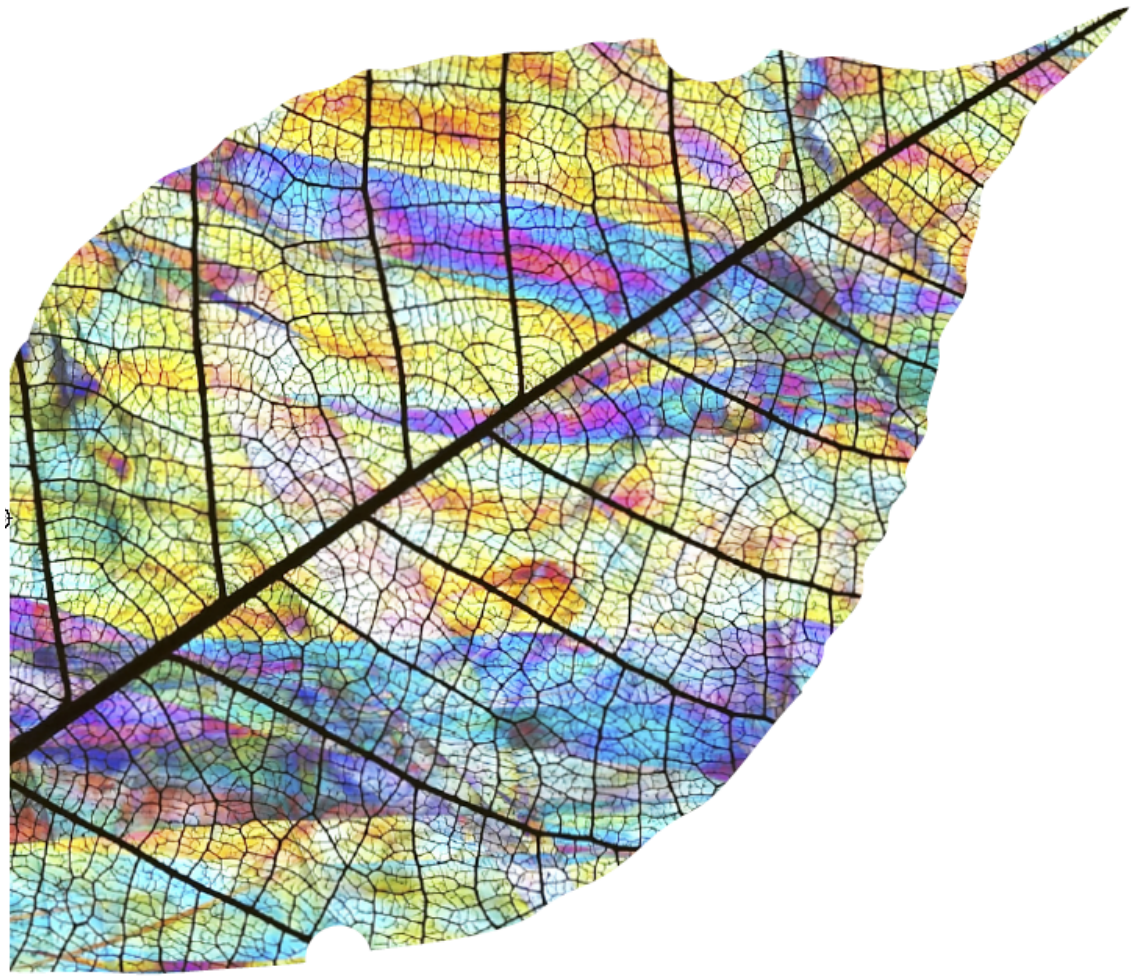
World Universities Comparative Law Project
Legal rating of Australia

carried out by students at the University of Sydney

A production of the Allen & Overy Global Law Intelligence Unit



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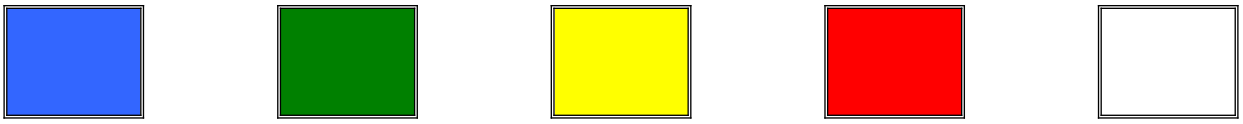


Produced by the Allen & Overy Global Law Intelligence Unit

World Universities Comparative Law Project

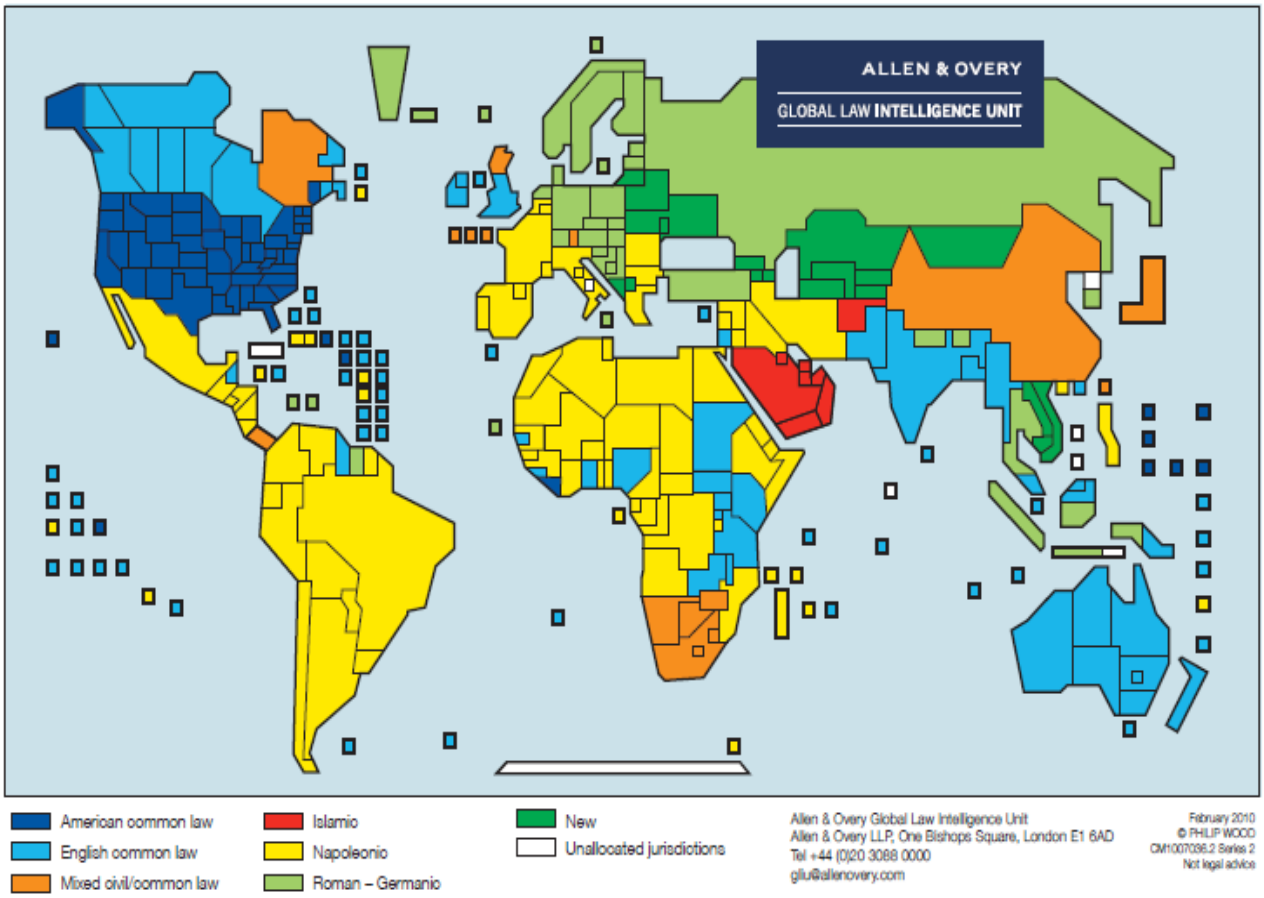
The World Universities Comparative Law Project is a set of legal ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal rating of Australia was carried out by students at the University of Sydney.

The members of the Faculty of Law at the University of Sydney who assisted the students were Professor John Stumbles and Professor Sheelagh McCracken.

The Allen & Overy Global Law Intelligence Unit produced this survey and is most grateful to the above for the work they did in bringing the survey to fruition.

All of those involved congratulate the students who carried out the work.

Families of law



Foreword

The Sydney Law School at the University of Sydney is one of Australia's leading law schools, having produced many leading jurists and contributed significantly to legal education and research in Australia since its effective establishment in 1890. Today, Sydney Law School is an international leader in legal research, led by globally recognised legal educators, world-renowned researchers and highly respected professional practitioners and adjunct faculty.

The World Universities Comparative Law Project complements Sydney Law School's special emphasis on international and comparative law and its strong focus on corporate and commercial law. In an age of globalisation, the Project provided the students involved with an unparalleled opportunity to critically reflect on Australian law and compare it with that of other countries, and to compare the common law approach to regulation with that of other systems of law. The Project also required the students in some cases to look beyond New South Wales and compare the law in New South Wales with that of the other States and Territories. I thank Philip Wood CBE QC (Hon) for establishing the Project and for inviting Sydney Law School to contribute to it.

Australia's constitutional arrangements complicate the task of summarising an area of law and assigning it a rating. The division of legislative power between the Commonwealth (national) and State legislatures means that in some areas of law, differences in the law between States make it inapt to speak of 'Australian' law in those areas, and summaries of 'Australian law' carry the risk of overlooking subtle, but important, nuances in the law across Australia. In other areas of law, uniformity of law across Australia is the result of intergovernmental agreement rather than constitutional command and therefore is (theoretically, at least) subject to being undone at any time in the future.

I congratulate the students who produced this report: Jake Connellan, Isolde Daniell, Daniel Farinha, Winnie Liu, Chris Macalpine, Maria Mellos, Luca Moretti, Gabor Papdi and Jeremy Tjeuw. I also thank my colleagues, Professors John Stumbles and Sheelagh McCracken, for guiding and assisting the students throughout the project.

Joellen Riley
Head of School and Dean
Sydney Law School, University of Sydney

April 2017

Description of the legal rating method

Introduction

This paper assesses aspects of the law in Australia with a view to rating the law in the relevant areas. The survey is concerned primarily with wholesale financial and corporate law and transactions, not with retail law.

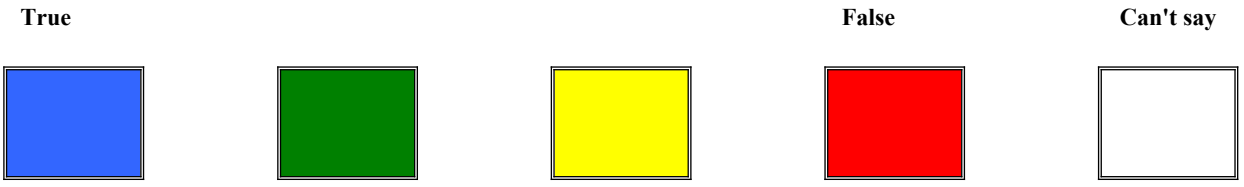
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes of our societies. Liabilities can be very large and reputational losses severe.

The survey was carried out by students at the University of Sydney. The survey was designed by the Allen & Overy Global Law Intelligence Unit.

The students were requested to express their views freely and in their own way. The views expressed are their views, not necessarily those of the University of Sydney, the members of the Practitioner Expert Panel or the Global Law Intelligence Unit, the members of Allen & Overy.

Methodology

The survey uses colour-coding as follows:



Blue generally means that the law does not intervene and the parties are free, ie the law is liberal and open.

Red generally means that there is intense legal intervention, usually in the form of a prohibition.

Green and **yellow** are in-between.

The purpose of this colour-coding is to synthesise and distil information in a dramatic way, rather than a legal treatise. The colours correspond to a rating of 1, 2, 3 or 4, or A, B, C or D.

The cross in the relevant box signifies the view of the students carrying out this assessment of the position of Australia. This is followed by a brief comment, e.g. pointing out qualifications or expanding the point. These comments were written by the students.

The colour-coding does not usually express a view about what is good or bad. Whether the law should intervene in a particular arena is a matter of opinion. The scale is from low legal intervention to intense legal intervention or control. This is not a policy or value judgment as to whether or not the law should or should not intervene. Jurisdictions often disagree on whether the law should intervene and how much. So one of the main purposes of this survey is to endeavour to identify some of the points of difference so as to promote fruitful debate.

Black letter law and how it is applied

This survey measures two aspects of law. The first is black letter law, ie what the law says or the written law or law in the books.

The second measure is how the law is applied in practice, regardless of what it says. Thus, the law of Congo Kinshasa and Belgium has similar roots but its application is different.

Although there is a continuum, these two measures have to be kept separate. Otherwise we may end up with just a blur or noise or some bland platitude, eg that the law depends upon GDP per capita.

In fact, only the last two questions deal with legal infrastructure and how the law is applied. All of the others deal with the written law, without regard to enforcement or application.

Key indicators

The survey uses key indicators to carry out the assessment. It is not feasible to measure all the laws or even a tiny fraction of them. The law of most jurisdictions is vast and fills whole libraries.

The key indicators are intended to be symptomatic or symbolic of the general approach of the jurisdiction. To qualify as useful, the indicator must usually be (1) important in economic terms, (2) representative or symbolic and (3) measurable. In addition, the indicators seek to measure topics where jurisdictions are in conflict. There is less need for measuring topics where everybody agrees.

An important question is whether this method is useful or not, and, if it is, whether the indicators are relevant.

Legal families of the world

Most of the 320 jurisdictions in the world, spread just under 200 sovereign states, can be grouped into legal families. The three most important of these are: (1) the common law group, originally championed by England; (2) the Napoleonic group, originally championed by France; and (3) the Roman-Germanic group, originally championed by Germany, with major contributions from other countries.

The balance of jurisdictions is made up of mixed, Islamic, new and unallocated jurisdictions.

Many aspects of private law are determined primarily by the family group, but this is not true of regulatory or economic law.

Excluded topics

This survey does not cover:

- transactions involving individuals
- personal law, such as family law or succession
- competition or antitrust law
- intellectual property
- auditing
- general taxation
- macroeconomic conditions, such as inflation, government debt, credit rating or savings rates
- human development, such as education, public health or life expectancy
- infrastructure, such as roads, ports, water supply, electricity supply
- personal security, such as crime rates, civil disorder or terrorism.

Banking and finance

Introduction

Banks and bondholders (typically also banks, but also insurance companies, pension funds and mutual funds) provide credit or capital. Their main risk is the insolvency of the debtor and therefore the key indicators intended to measure whether the law supports those habitual creditors or debtors, such as large corporations

as borrowers, when it matters, ie on bankruptcy. This is when commercial law is at its most ruthless in deciding who survives and who drowns.

This debtor or creditor decision is implemented mainly through the bankruptcy ladder of priorities. A feature of common law systems is the presence of super-priority creditors who are paid before anyone else - creditors with a set-off or a security interest and beneficiaries under a trust. For example, if a bank has universal security over all the assets of a company, the bank is paid before all other creditors, including employees and trade creditors. This regime therefore protects significant creditors who such as banks.

Jurisdictions based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. Their bankruptcy ladder favours greater equality of creditors. Most traditional Roman-Germanic jurisdictions are in-between. They allow insolvency set-off and have quite wide security but most do not recognise the trust. There are wide exceptions to these generalisations.

Insolvency set-off

Generally If set-off of mutual debts is allowed on insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Very large amounts are involved in markets for foreign exchange, securities, derivatives, commodities and the like, so that the question of whether exposures should be gross or net is a matter of policy as to who the law should protect.

Q1 In **Australia**, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

True			False	Can't say
X				

Comment:

Australian law affords considerable protection to certain creditors on insolvency through set-off. Section 553C *Corporations Act 2001* (Cth) applies 'where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company'.[1] The terms credit, debt and dealing have been construed widely, as has the mutuality requirement.[2] In these circumstances, 'an account is to be taken of what is due from the one party to the other in respect of those mutual dealings'[3] and only the balance of this account will be admissible to proof against/payable to the company. Section 553C(2) provides, however, that insolvency set-off does not apply where a party has notice of the company's insolvency at the time of extending or receiving credit. Knowledge of facts which would indicate insolvency to a reasonable observer will suffice.[4]

Section 86 of the *Bankruptcy Act 1966* (Cth) is the equivalent and substantially identical provision applicable to insolvent individuals. It should be noted that the courts look to both statutes when considering the meaning of the wording.

[1] *Corporations Act 2001* (Cth) s 553C.
[2] *Day & Dent Constructions Pty Ltd (In Liq) v North Australian Properties Pty Ltd* (1982) 150 CLR 85; *Gye v McIntyre* (1991) 171 CLR 609.
[3] *Corporations Act 2001* (Cth) s 553C.
[4] *Jetaway Logistics v Deputy Commissioner of Taxation* (2009) 26 VR 657.

Insolvency set-off is mandatory and self-executing, and cannot be varied or excluded by agreement as in the case of legal or equitable set-off.[5] In order for set-off to occur, credits, debts or dealings must be held at least beneficially, although it is not necessary that they be presently enforceable at the time of winding up. Mutual rights and obligations existing at the time of the commencement of the liquidation and later developing into pecuniary claims capable of set-off are captured.[6]

As such, insolvency set-off in Australia allows unsecured creditors to fully recover to the extent of their own off-setting debt to an insolvent corporation. In this way, insolvency set-off abrogates the usual pari passu principle of proportionate recovery by all unsecured creditors.[7]

In addition the *Payment Systems and Netting Act 1998* (Cth), ensures that the netting arrangements in close-out netting contracts such as derivative contracts operate in accordance with their terms on the liquidation of a counterparty. The Act also preserves on liquidation the operation of approved multilateral and market netting arrangements in accordance with their terms.[8]

Security interests

Generally Security interests give priority to the creditor with security - typically banks - who are the main providers of credit in most countries.

In traditional common law jurisdictions, a company can create universal security over all its present and future assets to secure all present and future debt owed to a bank. Once registered, the security is valid against all creditors, except that the floating collateral ranks after preferred creditors - typically wages and taxes. The security can be granted to a trustee for creditors. On a default there are no mandatory grace periods and the creditor can enforce out-of-court by appointing a receiver (a type of possessory manager) or by private sale. But in some common law jurisdictions there are freezes on enforcement in the event of a judicial rescue of the debtor. Also, in some of these jurisdictions there are stamp duties.

On the other hand, in many traditional Napoleonic jurisdictions, universal security is not possible, neither is security for all future debt. There is no trustee to hold the security. On enforcement, there are grace periods and no receiver. Sale is through the court and a public auction. Preferential creditors rank ahead. Some countries have a freeze on enforcement under a judicial rescue statute.

The main policy issue is therefore whether security should be encouraged or whether the law should intervene to impose greater equality.

The main tests are (1) scope of eligible assets, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs.

Q2 In **Australia**, the law offers a security interest which is highly protective of the secured creditor.

True			False	Can't say
X				

[5] *Gye v McIntyre* (1991) 171 CLR 609.
[6] *Hiley v Peoples Assurance Co Ltd* (1938) 60 CLR 468.
[7] *Corporations Act 2001* (Cth) s 555.
[8] *Payment Systems and Netting Act 1998* (Cth) pts 3-5.

Comment:

The law of security interests in Australia involves a combination of common law principles and statutory title obtained by registration. In particular, a mortgage in respect of Torrens land that has been entered on the Torrens register operates as a charge on the land[9] and, subject to few exceptions, enjoys indefeasibility of title (discussed in Question 15). Nevertheless, Australian law continues to recognise equitable interests in Torrens land, including trusts, equitable liens and equitable mortgages.

Likewise, the *Personal Property Securities Act 2009* (Cth) ('PPSA') primarily governs consensual interests in personal property that in substance secure payment or performance of an obligation.[10] Due to this functional definition, the regime extends beyond traditional common-law securities (charges, mortgages and pledges) to various other commercial arrangements (e.g. conditional-sale agreements, finance leases and flawed-asset arrangements).[11]

In order for a secured creditor to obtain maximum protection under the PPSA, the security interest needs to be perfected, which requires three steps to be satisfied. First, the security interest must be 'attached' to the collateral, thereby rendering the security interest enforceable against the grantor. Attachment occurs if the grantor holds or is empowered to transfer rights in the collateral and the security interest is given for value or arises by the grantor's act.[12]

Secondly, the security interest must be enforceable against third parties. This occurs if it is 'attached' and either the secured party possesses or controls the collateral or a security agreement 'covers' the collateral, i.e. sufficiently describes the collateral in writing signed or adopted by the grantor.[13]

Thirdly, an interest is 'perfected' if the previous two steps are satisfied and the secured party either registers a financing statement on the Personal Property Securities Register or (for some types of collateral) possesses or controls the collateral.[14] Perfection by registration can cover all present and after-acquired property;[15] the security interest will then attach to the future property when the grantor acquires its rights. Moreover, absent any contrary agreement or authorisation, a security interest in specific property extends to most liquid proceeds from sale.[16]

On insolvency or voluntary administration an unperfected security interest vests in the grantor with the consequence that the creditor becomes unsecured.[17] Subject to certain exceptions, a security interest given by a company and perfected only by registration must be perfected no later than 20 business days after the date the security agreement comes into force.[18]

A secured party's priority under the PPSA depends upon the fact of perfection[19]. Generally, perfected security interests take priority over unperfected interests and, where both are perfected by registration, in the order of registration. However, interests perfected by control,[20] and purchase money security interests perfected by registration,[21] may prevail over prior security interests perfected by registration. In insolvency,

[9] *Real Property Act 1900* (NSW) s 57(1).
[10] *Personal Property Securities Act 2009* (Cth) s 12.
[11] Some other arrangements generate deemed security interests, and exceptions apply: see ibid ss 8, 12.
[12] *Personal Property Securities Act 2009* (Cth) s 19.
[13] Ibid s 20.
[14] Ibid s 21.
[15] Ibid s 18(2).
[16] Ibid ss 31–3.
[17] Ibid s 267.
[18] *Corporations Act 2001* (Cth) s 588FL.
[19] *Personal Property Securities Act 2009* (Cth) s 55.
[20] Ibid s 57.
[21] Ibid s 62.

claims of various preferred creditors (e.g. employees, auditors and administrators) have priority over 'circulating security interests' (e.g. security interests over accounts or inventory where the grantor is free to deal with the collateral).[22]

Buyers and lessees of personal property generally take free of unperfected security interests.[23] The PPSA also contains other rules permitting buyers and lessees of goods or other personal property, in the ordinary course of business of selling or leasing goods and other personal property of that kind, to take free of a perfected security interest given by the seller or lessor.[24]

The PPSA simplifies the process of enforcing securities upon default. Without prejudicing other remedies under a security agreement,[25] it empowers secured parties to seize, dispose and retain collateral.[26] In most instances, only some form of notice is necessary to exercise these powers, so that court intervention is minimal, and the power to retain collateral is effectively an out-of-court foreclosure remedy.

Universal trusts

Under a trust, one person, called the trustee, holds title to the assets of another person, called the beneficiary, on terms that, if the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are immune and therefore taken away from the debtor-trustee's bankrupt estate.

The main examples of trusts are custodianship of securities, pension funds, securities settlement systems and trustees of security for bondholders and syndicate banks. The amounts involved are enormous.

All jurisdictions have an effective trust of goods (called bailment or deposit). The common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do not have a universal trust, subject to wide exceptions, especially for custodianship of securities. A few countries in this group have a universal trust by statute, e.g. France and China.

Q3 **Australia** has a universal trust for all assets.

True			False	Can't say
X				

Comment:

Australian law, being derived from English law, recognises trusts with respect to all types of property – land, chattels and choses in action. In Anglo-Australian law, a trust is a relationship between a trustee and beneficiary with respect to property, giving rise to personal rights and obligations and proprietary rights in the subject property.[27] This relationship is recognised by and enforceable in equity. The defining feature of a trust is the separation of legal and equitable ownership, with one person (the trustee) holding the legal estate in the subject property for the benefit of another (the beneficiary) or for a charitable purpose. Bailments do

[22] *Corporations Act 2001* (Cth) ss 51C, 433, 442B, 443E, 561; *Personal Property Securities Act 2009* (Cth) ss 340–1A.
[23] *Personal Property Securities Act 2009* (Cth) s 43.
[24] Ibid s 46.
[25] Ibid s 110.
[26] Ibid pt 4.3.
[27] Mark Leeming, 'What is a Trust?' (2008) 31 *Australian Bar Review* 211.

not involve a conveyance of legal title to the bailee and therefore are not trusts under Australian law. Both natural and legal persons may be trustees and/or beneficiaries of trusts.

The most basic type of trust in Australia is the express private trust, requiring the three certainties of intention, subject-matter (specific property held on trust) and object. Subject to certain exceptions, Australian law also requires writing if the trust is in relation to land as well as compliance with the rule against perpetuities relating to the duration of the trust in order to be validly constituted. Australian law recognises both fixed and discretionary express trusts.

Resulting trusts are recognised by Australian law as arising automatically in circumstances involving an incomplete or ineffective disposition of the beneficial interest in property and are presumed to arise where the purchase price of property is provided by someone other than the person who takes the legal estate.

Constructive trusts may be imposed on parties to a transaction by operation of law where one party contributes property in pursuit of a joint endeavour which fails without attributable blame and where it would be unconscientious for the other party to continue to retain the benefit of the property to the denial of the contributing party.[28] Australian law also readily recognises the constructive trust as a remedy in respect of an equitable cause of action,[29] but it is viewed as a remedy of last resort to be imposed only in cases where no less intrusive equitable remedies such as an equitable lien or charge would be adequate to do justice between the parties.[30]

The trust is a flexible instrument capable of being adapted to infinitely variable circumstances,[31] and as a result, the trust is widely used in commercial transactions in Australia. The unit trust – an express private trust in which the beneficial interest is divided into aliquot shares – is the structure of choice for managed investment products in Australia. The units in many unit trusts are either redeemable against the trust fund or freely alienable, and many managed investment products are quoted and traded on Australia's main stock market, the Australian Securities Exchange.

The trust structure may also be used in Australia to carry on an active business. In such trading trusts, the property used to carry on a business is held by a trustee (usually a company) on trust for the investors in the business. The trustee has a power under the trust deed to deal with the property in carrying on the business. This arrangement is effectively a surrogate company for carrying on a business,[32] but may provide investors with better tax outcomes and asset protection in insolvency than a plain company structure would. As against that, a third party dealing with the trustee of a trust needs to ascertain that the trustee has power as trustee to enter into a particular dealing and that such a dealing is for the benefit of the trust. In contrast a third party dealing with a company has the benefit of certain statutory presumptions that the dealing is within power and for the benefit of the company unless the third party knew or suspected that the presumption was incorrect.[33]

Australian law recognises *Barnes v Addy* liability for a third party who knowingly assists in a dishonest breach of trust or fiduciary obligation or knowingly receives property transferred in breach of trust or fiduciary obligation. In contrast to other common law jurisdictions, Australian law recognises the first limb of *Barnes v Addy* (knowing assistance) liability in its original form and has not yet accepted the 'dishonest assistance' formulation in *Royal Brunei Airlines v Tan*.[34]

[28] *Muschinksi v Dodds* (1985) 160 CLR 583, 618-20.
[29] Ibid 614-7.
[30] *Giumelli v Giumelli* (1999) 196 CLR 101, [10].
[31] *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491, 503.
[32] Nuncio D'Angelo, 'The Trust as a Surrogate Company' (2014) 8 *Journal of Equity* 299, 301-3.
[33] *Corporations Act 2001* (Cth) ss 128-29.
[34] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, [162]-[165].

Other indicators

Other bankruptcy indicators not measured here include freezes on the termination of contracts, fraudulent preferences, the priority of rescue new money, the presence and intensity of corporate rescue proceedings and recognition of foreign insolvencies. Director liability for deepening the insolvency is dealt with below.

Other financial law topics not covered in this survey include the regulatory regime, especially capital, liquidity, authorisation of financial business, conduct of business, control of prospectuses, control of market abuse and frauds, such as insider dealing, and the insolvency regime for banks. Financial regulation is a very large field.

Corporations

Introduction

Financial law involves competition between debtors and creditors so that jurisdictions can be positioned on a straight line. Corporate law however involves three main competitors: (1) shareholders, (2) creditors and (3) managers - a triangle. If the key indicators show that a jurisdiction strongly favours one or other of the parties at the points of the triangle, whether creditors, shareholders or management, then one can begin to build up a picture of the choices which the jurisdiction habitually makes in resolving the conflicting interests of the parties.

For example, a very tough prohibition on financial assistance (which is protective of creditors against shareholders) tends also to support an attitude to other principles of the maintenance of capital or to support the proposition that mergers by fusion are difficult (because they can prejudice creditors). This would be true of the English regime in 1948. Similarly, a view which easily imposes personal liability on directors for deepening an insolvency might also show a legal approach which is not supportive of the veil of incorporation in other areas, eg shareholder liability and substantive consolidation on insolvency.

The two extreme corporate law models are the Delaware model and the traditional English model, exemplified by the English Companies Act 1948 (now superseded). Napoleonic and Roman-Germanic models are in-between to varying degrees.

The Delaware regime is highly protective of management in the key areas. The traditional English regime favours creditors on most of the key contests and, where creditor interests are not involved, it tends to favour shareholders as opposed to managers.

Director liability for deepening an insolvency

Generally If the law imposes personal liability on directors for deepening an insolvency, eg carrying on business and incurring debts where there is no reasonable prospect of paying them, then the regime is hostile to the interests of management. The legal risks of management are increased.

There are basically four regimes internationally: (1) directors are hardly ever liable for deepening the insolvency, eg Delaware and most US jurisdictions, plus some traditional English jurisdictions which only punish fraudulent trading; (2) directors are liable for serious negligence (England, Singapore, Australia, Ireland); (3) directors are liable for mere business misjudgements deepening the insolvency (France); and (4) directors are liable if they fail to file for an insolvency proceeding after the company becomes insolvent (France, Germany and others).

Q4 In **Australia** the law rarely imposes personal liability on directors for deepening the insolvency and there is no rule that the directors must file for insolvency when the company is insolvent.

True		False	Can't say
		X			

Comment:

In Australia, the law does impose personal liability on directors for deepening the insolvency of their company. Section 588G of the *Corporations Act 2001* (Cth) ('Corporations Act') imposes personal liability on a director who fails to prevent their company from incurring a debt, at a time when the company was insolvent, or would become insolvent by incurring the debt, and the director suspected, or had reasonable grounds for suspecting, that the company was, or would become, insolvent. The statutory provision is engaged regardless of whether the director was negligent or breached any duty owed to the company.

Liability under s 588G may take the form of disqualification from directorship[35], compensation[36] and/or pecuniary penalties.[37] In addition, criminal sanctions may apply if at the time of incurring the debt, the director in fact suspected the company was, or would become, insolvent and they acted dishonestly.[38]

A director who is liable under s 588G may raise any of the defences found in s 588H of the Corporations Act. These are: where the director had an expectation that the company was solvent and would remain solvent after incurring the debt, and this expectation was based on reasonable grounds (including where the director relied on information provided by a competent person responsible for examining the company's solvency); where the director, due to an illness or some other good reason, did not take part in managing the company at the time the debt was incurred; and where the director took all reasonable steps to prevent the company incurring the debt.

In March 2017, the federal government proposed legislation for an insolvent trading 'safe harbour' designed to encourage companies to take reasonable risks to exit financial hardship instead of going into voluntary liquidation.[39] Under the proposal, the insolvent trading provisions would not apply to a person and a debt if the debt is incurred in connection with the person taking course of action that is reasonably likely to lead to a better outcome for the company and the company's creditors.[40]

Courts also have the discretion to excuse liability, in part or in full, if the director has acted honestly and it would be fair to grant relief.[41]

[35] *Corporations Act 2001* (Cth) s 206C.
[36] Ibid ss 558J, 588M.
[37] Ibid s 1317G.
[38] Ibid s 588G(3).
[39] Australian Government, *National Innovation and Science Agenda- Improving Corporate Insolvency Law* (28 March 2017) Australian Government Treasury < http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2017/NISA-Improving-corporate-insolvency-law>.
[40] Ibid.
[41] *Corporations Act 2001* (Cth) ss 1317S, 1318.

Although there is no rule which mandates that directors must file for insolvency when their company is insolvent, the threat of personal liability under s 588G has substantially the same effect. Prudent directors typically resolve to place the company into voluntary administration where there is a potential for insolvency and well in advance of actual insolvency.

Financial assistance to buy own shares

Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure the guarantee. The commercial effect is similar to the repayment of the share capital of the target before its creditors are paid. Shareholders should be subordinated to creditors.

The prohibition therefore favours creditors against shareholders of the target.

The Delaware regime does not prohibit financial assistance. The traditional English regime has a wide prohibition (not England any more). Most Roman-Germanic regimes are against it, with Napoleonic regimes hesitant. The EU has a prohibition against financial assistance by public companies. Some countries allow financial assistance by private companies if solvency is established.

A contravening transaction is usually a criminal offence and void.

Q5 **Australia** permits a company to grant financial assistance for the purchase of its own shares.

True			False	Can't say
		X		

Comment:

Section 260A of the *Corporations Act 2001* (Cth) ('Corporations Act') permits a company to financially assist a person to acquire shares in the company (or its holding company) in prescribed circumstances only. That is Australian law effectively has a blanket prohibition on financial assistance subject to limited exceptions.

The relevant provisions of the Corporations Act have their basis in the former United Kingdom legislation that was introduced on the recommendation of the Greene Committee in 1926.[42] The legislative intention is to ensure that those acquiring shares in a company do so using their own resources.[43] In realising that legislative intention courts interpret the legislation widely to avoid circumvention of the prohibition.[44] That approach can be seen for example in:

(a) the courts' tendency to eschew giving 'financial assistance' a technical meaning, preferring to look at all the commercial circumstances to determine if there has in substance been financial assistance;[45] and

[42] Wilfrid Greene, *Report of the Company Law Amendment Committee*, Cmd 2657 (1926).
[43] *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 15 ACLR 230, 257 (Kirby P).
[44] *Wallersteiner v Moir* [1974] 1 WLR 991, 1014 (Lord Denning MR).
[45] *Wambo Mining Corp Pty Ltd v Wall Street (Holding) Pty Ltd* (1998) 16 ACLC 1601, 1606ff.

(b) the recognition of the fact that financial assistance can occur directly or indirectly.[46]

However, the present provisions of the Corporations Act do allow for financial assistance in certain circumstances. The two key exceptions are that financial assistance is permitted where:

(a) the giving of financial assistance does not materially prejudice the interests of the company or its shareholders or the company's ability to pay its creditors; or
(b) the financial assistance is approved by shareholders by a 75% vote and advance notice is given to the corporate regulator.

The first exception is intended to allow courts to take a commercial approach to the prohibition, and in particular to ensure the provision does not have an unnecessarily restrictive impact on ordinary commercial transactions.[47] The operation of this exception requires the identification of the company's present and future creditors. The identification of future creditors requires a forward looking analysis, the duration or extent of which is dependent on the nature of the company's business. The second exception could be criticised on the basis that it significantly limits the operation of the prohibition in a way that, while acceptable to shareholders, ignores the interests of creditors (whose interests the prohibition was also intended to protect). It could be argued that such creditors may have grounds to seek protection from the corporate regulator or that the insolvent trading provisions (see question 4 above) provide some protection, but it is undoubtedly the case that the shareholder approval exception favours the rights of members at the expense of creditors' rights.

The Corporations Act also allows a company to grant financial assistance in other particular circumstances, including where the company granting financial assistance is in the business of providing finance and grants financial assistance in the ordinary course of carrying out that business, or where financial assistance is provided as part of an employee share scheme.

Section 260D of the Corporations Act expressly provides that contravention does not affect the validity of any agreement or transaction connected with the financial assistance and the company does not commit an offence. However any person involved with a contravention may be subject to a civil penalty or even found guilty of a criminal offence if the involvement was dishonest. Further the person may have breached their fiduciary duties as a director (if applicable) and be liable for insolvent trading in some circumstances, as provision of financial assistance is deemed to be the incurring of a debt.

Public takeover regime

Generally A public takeover regime which is free and open tends to favour managers who can guard against takeovers by poison pills and the like and who have relative freedom to acquire other companies. An example is the Delaware regime. A restrictive regime on the lines of the British system tends to favour shareholders.

The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4) proof of certain funds to implement the offer; (5) compulsory acquisition of dissenting minorities (squeeze-out); (6) fixed timetable; (7) no ability of the managers to frustrate a bid by poison pills without shareholder approval; and (8) control of the content of circulars, especially forecasts.

[46] See eg *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 15 ACLR 230.
[47] *Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72, 158 (Santow J); see Explanatory Memorandum, Company Law Review Bill 1998 (Cth).

Q6 Apart from exchange controls and restrictions on foreign direct investments, the public takeover regime in **Australia** is open and has few restrictions.

True			False	Can't say
			X	

Comment:

The Australian takeover regime, largely contained in Chapter 6 of the *Corporations Act 2001* (Cth) ('Corporations Act') is quite prescriptive and places a great deal of emphasis on the importance of full disclosure by market participants. The comprehensive legislative code and regulatory framework, intended to promote an informed market, has been justified by legislators and the corporate regulator (the Australian Securities and Investments Commission) by reference to Australia's unusually widespread incidence of share ownership, a result of compulsory superannuation.

The fundamental principle of the takeover rules is that all changes of control in listed or other public companies with more than fifty members should take place in an efficient, competitive and informed market.[48] The key legislative rule, in section 606 of the Corporations Act, is known as the twenty percent rule. That rule, at its simplest, is that no person can acquire a 'relevant interest' in voting shares of a relevant corporate entity, if as a result of that acquisition either that person, or another person's voting power in the corporate entity goes above 20% or increases at any point above 20% but below 90%. At or above 90% a bidder may compulsorily acquire any securities in a bid class if the bidder and their associates have relevant interests in at least 90% (by number) of the securities in the bid class and have acquired at least 75% (by number) of the securities the bidder offered to acquire under the bid.

In calculating any person's voting power the votes that are attached not only to shares in which they have a relevant interest (including through holding companies) are included but also those that are attached to shares in which the person's associates have relevant interests. The definitions of 'relevant interest', 'voting power' and 'associate' are all broad and can be ambiguous; the twenty percent rule is designed to cast a very wide net, and is therefore very restrictive.

There are limited permitted exceptions to the twenty percent rule; the most important for our purposes allow for takeover bids and schemes of arrangement. Takeover bids can be market bids, or more commonly off-market bids. In both takeover situations the procedure and timelines for the bids are quite strictly prescribed. Schemes of arrangement are regularly used to restructure companies, including allowing transfer of shares in return for consideration to a bidder, provided the requisite shareholder votes are obtained and a court sanctions the scheme. Given schemes require court supervision they represent (as do takeover bids) a quite limited exception to the restrictions of the twenty percent rule.

As the Australian regime places a great deal of emphasis on disclosure in change of control transactions, the most burdensome aspect of engaging in public mergers and acquisitions for companies is putting together the disclosure documents. Both bidders and targets have overriding obligations to provide members with all information material to the decision as to whether to accept the offer, and the legislation and regulatory guidance also specify required information such as the bidder's intentions for the target and sources of

[48] The first Eggleston Principle, which is given legislative force by section 602(a) of the Corporations Act.

funding, or the recommendations to the members of each director of the target. In a situation where the bidder is offering scrip as consideration under the bid the requirements are even more demanding and require a level of disclosure that can be equivalent to that required for an initial public offering of the bidder's securities.

An important aspect of corporation regulation in Australia is the Australian Takeovers Panel, which is similar to the Panel on Takeovers and Mergers in the United Kingdom. The Panel provides some flexibility in what would otherwise be a very restrictive takeovers regime as parties can seek efficient and reasonably commercially-minded resolution of disputes arising in a takeover context. The Panel by its reasoning provides guidance to market participants on practices such as deal protection devices, on which the Panel and Australian courts have tended to be reasonably interventionist by international standards. For example break fees that exceed one percent of the equity value of the target have generally not been permitted by courts or the Panel, for fear that they would have a coercive effect on members considering a change of control transaction.[49]

It is fair to say that the prime concern of Australian takeovers regulation is ensuring that Australia's large population of retail investors is provided with sufficient information to make informed decisions in response to takeovers. Consequently an informed market is usually prioritised above the freedom of management to engage in mergers and acquisition and as a result Australian takeover legislation generally adopts a restrictive approach.

Other indicators

Other important indicators are corporate governance (difficult to measure), free ability to merge companies by fusion, the one-share-one-vote rule, and, to a lesser extent, minority protections. Other indicators relate to quick and cheap incorporation, the *ultra vires* rule, maintenance of capital, no par value shares, shareholder liability, substantive consolidation on insolvency and disclosure. These are not measured here.

Commercial contracts

Introduction

Contract is at the heart of commercial life, and is everywhere. In fact, the main tenets of contract law across the main families of jurisdictions are consistent - it is in the fields of insolvency and property law where the main differences emerge. It is true that there are contract differences, for example, between writing requirements, open offers, the time of acceptance and specific performance, but often these differences are of lesser significance in practice in the business field.

The key indicators the survey chooses all tend to symbolise whether the approach of the jurisdiction to contract is hard or soft. If the approach is hard, then the jurisdiction tends to support predictability in business contracts so that certainty and freedom of contract are valued more than mitigating the risk of occasionally abusive behaviour and unfair results, especially for weaker parties. A soft jurisdiction tends to give greater primacy to notions of good faith and the like.

Exclusion of contract formation

Generally Commercial parties often wish to be able to negotiate heads of terms commercially without being bound by a contract. In some jurisdictions, the courts are ready to infer that the parties are bound if the terms are sufficiently clear, even if they have said expressly that they do not intend to be bound.

[49] *Re APN News & Media Limited* (2007) 62 ACSR 400 (Lindgren J); Australian Government Takeovers Panel, *Guidance Note 7: Lock-up devices* (11 February 2010) [9]; *National Can Industries 01(R)* [2003] ATP 40, [33].

Q7 In **Australia**, parties are not bound to heads of terms if they expressly state that the terms are "subject to contract" or some such clear phrase.

True		False		Can't say
X				

Comment:

An Australian court is highly likely to uphold a 'subject to contract' clause. The law generally prioritises predictability and certainty in commercial relations. This is achieved through the 'objective intention' approach to contractual interpretation.

The 'objective intention' approach is concerned with what each party's words and actions would have indicated to an ordinary person in the other party's position. In the modern case law, it is legitimate to take into account commercial realities- as they would have been understood by reasonable business people at the time of entering into the contract- in determining the parties' intention.[50]

In a commercial context, the use of the words 'subject to contract' in an 'offer' would clearly demonstrate- to a reasonable business person in the recipient's position- that the alleged offeror was not willing to be bound. Therefore, there would be no offer, with the result that the parties would not be bound by a bilateral contract (although their interaction may give rise to other legal relations, for example through a *High Trees* estoppel[51] or through statutory liability for misleading or deceptive conduct within s 18 of the Australian Consumer Law).[52]

A leading authority is *Masters v Cameron*,[53] a 1954 decision of the High Court, the highest appellate court in Australia. An agreement in writing for the sale of freehold land provided: 'This agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors'. The Court noted that, as a matter of construction, the parties could have intended to be immediately bound- whilst also expecting that their agreement would be set out more fully at a later date. However, importantly, the Court also clearly recognised a case where 'the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own'.[54]

It is clear that, in a case involving two commercial, well-informed parties, and if the clause is properly expressed, the most common outcome will be that the agreement is not binding.[55]

Termination clauses

Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these clauses and do not

[50] *Victoria v Tatts Group Limited* [2016] HCA 5 (2 March 2016), [71].
[51] *Central London Property Trust v High Trees House Ltd* [1947] KB 130; for an early Australian application, see *Je Te Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101.
[52] *Competition and Consumer Act 2010* (Cth) Schedule 2.
[53] (1954) 91 CLR 353.
[54] Ibid 361.
[55] Ibid 363.

rewrite the contract according to the court's notions of what is fair. Other jurisdictions prefer good faith. We ignore consumer contracts - where there may be consumer protections.

Q8 In **Australia**, a termination clause in a loan or sale of goods contract between sophisticated companies (not individuals) providing for the termination of the contract immediately on certain events is usually upheld, even if the event concerned is relatively trivial.

True			False	Can't say
X				

Comment:

The Australian common law, following in the English tradition, permits the parties to a contract wide freedom to agree on a right of termination, regardless of the materiality of the breach. The law takes a 'hard' approach, prioritising freedom of contract and predictability. If breach is established, and the terminating party has complied with any procedure stipulated by the clause (for example, a notice period or a provision requiring the party not in breach to give an opportunity to remedy the breach), the court will treat the parties' contractual relationship as at an end.

The federal consumer protection statute, the Australian Consumer Law ('ACL'),[56] is predominantly concerned with the supply of goods or services for personal, household or domestic use. However, some prohibitions may extend to commercial relations. For example, section 21 prohibits 'unconscionable conduct' in connection with the supply of goods or services to any person other than a publicly listed company. The federal ACL applies to the conduct of corporations[57] (except the supply of financial services: the conduct of corporations in this respect is regulated in detail by the *Australian Securities and Investments Commission Act 2001* (Cth) pt 2). State and Territory legislation extends the ACL to the conduct of individuals.

Importantly, the federal legislature has recently extended the prohibitions on 'unfair contract terms' (Part 2-3 of the ACL) to apply to 'small business contracts'. The Part now applies to a standard form contract for the supply of goods or services or the sale of an interest in land, with an upfront price which does not exceed $300,000 (or under $1,000,000 if the contract has a duration of more than twelve months) where one party is a business employing less than twenty persons.[58] A term of such a contract is void if the term is unfair. (A small business loan contract is regulated by the equivalent provision in Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001* (Cth).)

For example, the provision could apply to a termination clause in a standard form contract for the sale of goods to a small business, having regard to the seriousness or significance of the event or circumstance which triggered the termination clause. However, the test is onerous: a term is 'unfair' only if it would cause a significant imbalance in the parties' rights and obligations, is not reasonably necessary in order to protect the legitimate interests of the advantaged party, and would cause detriment to the other party if relied on. As

[56] *Competition and Consumer Act 2010* (Cth) Schedule 2.
[57] Ibid s 131.
[58] ACL s 23(4).

such, and because they only apply to standard form contracts, these provisions have not affected the rating here.

If the breach triggers a loss of property on the part of the breaching party (for example, if a fixed term contract has been pre-paid and the full payment is lost, or if a reward or benefit is forfeited on breach), the courts' equitable jurisdiction to relieve against forfeiture and penalties may be engaged. The jurisdiction of equity over 'unconscionable conduct' has enjoyed a resurgence in Australia in the last thirty years.[59] However, most commercial parties do not find it difficult to structure their agreement to avoid such results.

Exclusion clauses

Generally Contracting parties often seek to exclude their liability for defective performance of the contract. So the issue is whether these exclusion clauses are generally upheld if they are clear and whether freedom of contract is allowed in this area.

Q9 In **Australia**, exclusions of liability in most commercial contracts between sophisticated companies, such as a sale of goods contract, are generally upheld if they are clear.

True		False	Can't say
	X		

Comment:

As a general rule, freedom of contract is highly valued in Australia. Clauses excluding liability in tort or contract are generally enforceable in Australian law, subject to the following qualifications.

First, Australian courts have traditionally followed the English approach of strictly construing exclusion clauses to confine their scope. This approach includes resolving ambiguity against the drafter (*contra proferentem*); demanding clear words to exclude liability in negligence; and declining to apply exclusion clauses to 'fundamental', 'wilful' or 'total' breaches or conduct beyond the 'four corners' of the contract. However, more recent cases favour the application of ordinary principles of construction to exclusion clauses, rather than the traditional restrictive approach.[60] Furthermore, parties can manage this risk with sufficiently clear and exhaustive drafting.

Secondly, the use of exclusion clauses does not avoid liability arising from pre-contractual statements that are fraudulent or that generate an estoppel. Importantly, the Australian doctrine of equitable estoppel extends to representations of present fact or future conduct upon which the representee has relied to its detriment and which it would be unconscionable for the representor to deny.

Thirdly, various statutes impose liabilities that are not excludable by agreement, especially if the transaction or one of the parties is sufficiently small. Exclusion clauses cannot exclude liability for misleading or deceptive conduct in trade or commerce under the Australian Consumer Law, s 18 (contained in *Competition and Consumer Act 2010* (Cth), Schedule 2) ('ACL'), although they may be relevant to whether conduct was

[59] See, eg, Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 Law Quarterly Review 238, 239.
[60] See *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500, 510.

misleading or deceptive.[61] Moreover, Part 3-2 of the ACL outlines various guarantees concerning title, quality, fitness, conformity, and due care and skill. These guarantees apply to consumer transactions, including the acquisition of goods or services worth $40,000 or less except for the purpose of re-sale or commercial use.[62] Clauses purporting to exclude these guarantees are void unless they are fair and reasonable and concern the replacement or repair of goods or resupply of services.[63]

In addition, s 23 of the ACL invalidates any term in a standard-form 'small business contract' that is unfair. (The definition of 'small business contract' is set out in Question 8, above.) An exclusion clause would only be 'unfair' if it caused a significant imbalance in the parties' rights and obligations, was not reasonably necessary to protect a party's legitimate interests, and would cause detriment to the other party.[64] Other non-excludable protections apply even to commercial contracts between sophisticated companies, for example agricultural and insurance contracts.[65]

Other indicators

Other contract indicators not assessed here include writing formalities, open offers, mistake, frustration, damages, penalties, specific performance and whether notice of assignment of the contract to the debtor is mandatory if the assignment is to be valid on the insolvency of the assignor.

Litigation

Introduction

The first three key indicators of governing law, jurisdiction and arbitration tend to show whether the jurisdiction does or does not place a high value on international comity and freedom of contract as opposed to national primacy.

The indicator on class actions tends to show whether or not the jurisdiction's litigation system is orientated towards plaintiffs, especially mass plaintiffs in product liability cases. This indicator may also show the attitude of the jurisdiction to the protection of individual parties as against business parties, both in terms of the incidence of costs and enforcement.

Governing law clauses

Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that the contract obligations may be different.

[61] This provision applies equally to transactions between commercially sophisticated parties.
[62] ACL s 3.
[63] Ibid ss 64, 64A.
[64] Ibid s 24.
[65] See *Contracts Review Act 1980* (NSW) ss 6, 7; *Insurance Contracts Act 1984* (Cth).

Q10 The Australian courts will apply an express choice of a foreign law in a loan or sale of goods contract between sophisticated companies, even though the contract has no connection with the foreign jurisdiction, but subject to Australian public policy and mandatory statutes.

True			False	Can't say
X				

Comment:

Under Australian common law, courts will usually apply an express choice of a foreign law in a contract between sophisticated parties, regardless of whether the contract has a connection with the foreign jurisdiction. As such, Australia places a high value on international comity and freedom of contract as opposed to national primacy. Australian authority follows the decision of the Privy Council in *Vita Food Products Inc v. Unus Shipping Co Ltd*[66] where it was held that a choice of law clause in favour of English law should be given effect despite the fact that both the contract and the parties to it had no connection to England.

However, this general rule is subject to considerations of public policy and statute.

Public Policy

Considerations of public policy are often used restrictively by Australian courts as there is a general concern for comity. However, in circumstances where a foreign law expressed in a choice of law clause would violate fundamental principles of justice, or where the foreign law has been chosen so as to avoid the laws of a 'friendly country' (that is, a country with which Australia has relations), then Australian courts will refuse to uphold the choice of law clause as expressed by the parties to a contract.[67]

Mandatory Statute

In contracts for the sale of goods, Australian courts are bound to apply provisions of the Australian Consumer Law ('ACL'), contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). Section 67 of the ACL provides that where the proper law of a contract for the supply of goods or services would be a law of Australia but for a term of the contract providing otherwise, the express choice of foreign law clause in the contract is to have no effect. Since, absent any express provision, the proper law of a contract is the law that has the closest and most real connection to the contract,[68] consideration of a connecting factor is highly relevant in refusing an express choice of foreign law under section 67 of the ACL. Provisions that have a similar effect apply to certain insurance contracts (*Insurance Contracts Act 1984* (Cth), s 8) and to contracts regulated by *Carriage of Goods by Sea Act 1991* (Cth), s 11.

[66] [1939] AC 277.
[67] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 75 ALR 353, 459 (McHugh JA); *Fullerton Nominees Pty Ltd v Darmago* [2000] WASCA 4, [27]-[32].
[68] *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

In relation to the application of statutes more generally, the critical question that a court must determine is whether the intention of the Act is to ensure that private arrangements between contracting parties cannot defeat its provisions. This is ultimately a matter of statutory interpretation.

Foreign jurisdiction clauses

Generally Many contracts confer jurisdiction, sometimes exclusive, on the courts of a foreign jurisdiction, usually accompanied by a choice of foreign governing law.

Q11 The Australian courts will generally uphold a clear submission in a loan or sale of goods contract between sophisticated companies to the exclusive jurisdiction of the courts of a foreign country, even if there is no connection between that country and the contract.

True			False	Can't say
X				

Comment:

Australian courts will generally uphold an express choice of foreign jurisdiction clause, regardless of whether the contract has a connection with the foreign jurisdiction, in accordance with principles of international comity and freedom of contract.

Position under the United Nations Convention on Contracts for the International Sale of Goods ('Vienna Convention')

The Vienna Convention is a treaty of uniform international sales law, ratified by the majority of major trading countries and having effect in Australia from 1 April 1989. Where the Vienna Convention applies to a contract for the sale of goods, Australian courts, as courts of a contracting state to the Convention, are bound by Article 6. Article 6 requires Australian courts to decline jurisdiction and acknowledge foreign exclusive jurisdiction clauses in favour of the courts of another member state of the Vienna Convention, notwithstanding a lack of connection between that state and the contract.

Position under common law

In circumstances where Article 6 of the Vienna Convention is not applicable, the general approach of Australian courts is also to uphold foreign exclusive jurisdiction clauses. As noted by the High Court of Australia in *Oceanic Sun Line Special Shipping Co. Inc. v Fay*[69] ('*Oceanic Sun*'), 'where there is an agreement to submit to another jurisdiction… the courts will, except where the plaintiff adduces strong reasons against doing so, require the parties to abide by their agreement.' This is particularly so where a contract is between commercially sophisticated parties who are capable of effectively protecting their interests through negotiation. In such cases it is highly unlikely that a court will deny the parties' their contractual intention by refusing to uphold a foreign exclusive jurisdiction clause, absent exceptional circumstances.

[69] (1988) 165 CLR 197.

Exceptional circumstances

Although Australian courts will generally enforce a foreign exclusive jurisdiction clause agreed upon by the parties, there are several exceptional circumstances where courts may refuse to enforce such clauses.

(i) Third parties

Where a party to a contract containing a foreign jurisdiction clause is able to successfully argue that there are other parties to the proceedings who are not bound by the clause who will be prejudiced if a stay of local court proceedings is ordered, then Australian courts will exceptionally decline to uphold a foreign exclusive jurisdiction clause (as in *Incitec Ltd v Alkimos Shipping Corporation* (2004) 138 FCR 496). The concern of Australian courts in such circumstances is twofold: first, that the third party will be joined to foreign proceedings despite the fact that it did not have a role in agreeing the clause conferring exclusive jurisdiction on a foreign court; and second, that even if the third party were not joined in foreign proceedings, there is a real risk that local proceedings would be duplicated in a foreign jurisdiction, such that different outcomes may arise on the same subject matter.

(ii) Public policy

An Australian court may also decline to recognize a foreign jurisdiction clause because of public policy considerations.[70] For example, an Australian court would refuse to recognise a foreign jurisdiction clause where the foreign court lacks independence or is corrupt.[71]

Recent development

More recently, in November 2016, the Australian Government's Joint Standing Committee on Treaties recommended that Australia accede to the *Convention on Choice of Court Agreements* ('the Convention') and implement the Convention domestically through a new International Civil Law Act.[72] If implemented, Australian courts would have to decline jurisdiction when confronted by an exclusive choice of court agreement designating the courts of another Contracting State, pursuant to Article 6.

Arbitration recognition

Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often enforceable locally under the New York Arbitration Convention of 1958, to which most countries have adhered.

[70] See e.g. *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

[71] *AK Investment CJSC v Kyrgzyz Mobile Tel Ltd* [2011] 4 All ER 1027.

[72] Joint Committee on Treaties, Parliament of the Commonwealth of Australia, *Report 166: Implementation Procedures for Airworthiness-USA; Convention on Choice of Courts-accession; GATT Schedule of Concessions-amendment; Radio Regulations-partial revision* (November 2016), 21.

Q12 In **Australia**, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Australian courts.

True			False	Can't say
X				

Comment:

Australia is increasingly positioning itself as an arbitration-friendly country. As a signatory to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* ('New York Convention'), Australia recognises arbitration as a valid means of dispute resolution as well as the enforceability of foreign arbitral awards. The Convention has the force of law in Australia under the *International Arbitration Act 1974* (Cth) ('IAA').

Section 7 of the IAA gives effect to Article II of the New York Convention by requiring Australian courts to stay proceedings in which the parties have agreed for the matter to be resolved by arbitration and where the matter is capable of settlement by arbitration. Further, Parts II and III of the IAA grant the Federal Court of Australia and the Supreme Courts of all states and territories the power to enforce foreign arbitral awards, including interim and temporary measures.

However, a court cannot enforce an arbitration agreement that is 'null and void, inoperative or incapable of being performed' in accordance with s 7(5) of the IAA and Article II(3) of the New York Convention. While it is impossible to ascertain an exhaustive list of arbitration agreements that are null, void, inoperative or incapable of being performed, Australian courts have determined instances where this description is satisfied. An arbitration agreement may be null and void if it results in one party being deprived of the ability to make a claim under Australian law. This was the case in *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc*[73] where the Federal Court held that the arbitration agreement between the parties was null and void because it prevented one party from making a claim under the former *Trade Practices Act 1974* (Cth).

An arbitration agreement is considered inoperative where the party seeking a stay of proceedings in favour of an arbitration agreement has waived its right to seek such a stay. A claim may not be capable of settlement by arbitration if the claim is non-contractual, for example, if the claim is statutory, tortious, equitable or restitutionary in nature. However, Australian courts in recent times have favoured a liberal interpretation of arbitration agreements to allow non-contractual disputes arising out of the parties' agreement to be determined by the same tribunal. Since the Full Federal Court of Australia's decision in *Comandate Marine v Pan Australia Shipping*[74] many common law jurisdictions have adopted a similar approach including the UK House of Lords in *Fiona Trust & Holding Corporation v Privalov*.[75]

[73] (1996) 71 FCR 172.
[74] (2006) 156 FCR 45.
[75] [2007] UKHL 40.

Class actions

Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound.

Q13 In **Australia**, class actions where the class is bound if they do not opt out are generally not allowed.

True			False	Can't say
		X		

Comment:

In Australia, plaintiffs may commence opt out class actions that bind all persons and entities that fall within a particular group. The opt out system operates at both state and federal levels as a means of ensuring access to justice for individual plaintiffs and overall court efficiency.

Most class actions are commenced in the Federal Court of Australia under Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('Federal Court Act'). Section 33C of the Federal Court Act permits one or more persons to commence class action proceedings representing some or all persons of that group. A group member may opt out of proceedings by written notice to the Court pursuant to s 33J of the Federal Court Act.

The opt out system also operates in a number of Australian states. Victoria and New South Wales have adopted similar provisions to Part IVA of the Federal Court Act, namely Part 4A of the *Supreme Court Act 1958* (Vic) and Part 10 of the *Civil Procedure Act 2005* (NSW). In Queensland, the *Limitation of Actions and Other Legislation Amendment Bill 2016* was passed on 8 November 2016 which brought its state-based class action regime in line with the Federal Court of Australia, and the Supreme Courts of New South Wales and Victoria. In Western Australia, the Law Reform Commission has recommended similar changes to the state-based class action regime.

The opt out approach is unpopular amongst litigation funders on the basis that it allows some group members to 'freeload' on the benefits of class action without having to contribute towards costs. Consequently, litigation funders have pushed the boundaries of the opt out approach and advocated for a 'limited group' or 'closed class' approach. In *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd*[76], the Full Federal Court of Australia held that, as a matter of statutory construction, s 33C(1) of the Federal Court Act permits the representative party to commence proceedings on behalf of less than all the potential members of the group. On that basis, the Court recognised the 'closed class' method in which the group could be limited to those members that have entered into a litigation funding agreement with a particular litigation funder.

More recently, the Full Federal Court held in *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited*[77] that, subject to certain safeguards, all members of the class that stand to benefit in the class action may be required to contribute to the common fund irrespective of whether the members had executed a funding agreement with the funder.

[76] (2007) 164 FCR 275.
[77] [2016] FCAFC 148 (20 October 2016).

Other indicators

Other indicators not covered by this survey include contingent costs, loser pays the costs of the winner, prejudgment freezes or arrests, appeals, scope of disclosure (discovery of documents), efficacy of waivers of sovereign immunity and the enforceability of foreign judgments.

Real property

Ownership of land

Generally In most countries, nationals can own land absolutely and are not restricted simply to leases for a limited term or simple rights of occupancy. However, in some jurisdictions, absolute ownership of land is not available to nationals or local corporations. If this is so, then the jurisdiction would be coloured green if citizens can lease land for a very long term without material restrictions, such as 999 years, and can also mortgage or sell the land or give it away or bequeath it under their wills without official consent because the ownership is a close proximate of absolute ownership. If on the other hand citizens are entitled only to a lease of, say, 70 years or less, or to similar rights of occupancy, and if there are limitations on dealing with the land without official consent, such as mortgaging, selling or bequeathing it, then the jurisdiction would be red.

Q14 In **Australia** nationals and local corporations are entitled to own land absolutely.

True			False	Can't say
X				

Comment:

Australian nationals and local corporations are entitled, as freehold owners, to own land in perpetuity with absolute rights of alienation and are not restricted to the limited right to lease or occupy land. However, the right to own land is only quasi-absolute as it is constrained by the landholding principle of the doctrine of tenures and the ultimate sovereignty of the Australian federal and state governments.

The Underpinning Legal Theory of Landholding – The Doctrine of Tenures

Despite the absence of feudal foundation, Australian landholding law is underpinned by the doctrine of tenures. Accordingly, a person's proprietary entitlement as the freehold owner of land in fee simple is a derivative right to hold the land of the Crown in the right of the State.[78] However, in practice the doctrine retains only arcane academic significance and has been criticised as anachronistic and impractical.[79] For all practical purposes the owners of land are not regarded as hierarchically subordinate to any government interest.

The Government Retains Legislative Sovereignty

The rights afforded by the ownership of land are ultimately subject to the curtailing legislative sovereignty of the Australian federal and state governments. Accordingly, all ownership rights must be exercised in

[78] *Commonwealth v Anderson* (1960) 105 CLR 303, 325.
[79] John Devereux et al, 'Towards a Reconsideration of the Doctrine of Estates and Tenure' (1996) 4 (1) *Australian Property Law Journal* 30.

compliance with Australian law and the government may enact legislation that limits any of the extant legal rights afforded by ownership. A pertinent example is the reservation to the state government of the minerals contained within all land lots. For example, some states have enacted legislation that reserves ownership of subterranean coal seam gas deposits to the government and curbs landowner's rights to exclude mining companies from their land. Non-landowners are thereby legislatively empowered to gain access to land in preference to the landowner's right to exclude them as trespassers. Furthermore, the government retains the constitutional and legislative power to compulsorily acquire land on just terms.

Security of land title and land registers

Generally Many jurisdictions improve the security of title to land by a registration system which, although not necessarily state-guaranteed, has high reliability. An example is the Torrens system developed in Australia and used in many other countries, eg Canada and England.

Most countries in the civil code groups do not have a title register but instead require documents concerning land to be notarised and filed at the registry so that they can be searched. The United States does not generally have title registers for land although there may be mortgage registers. They rely on title registration companies which provide title insurance.

Q15 Most land in **Australia** is registered in a land register which records most major interests in land, eg ownership, mortgages and longer-term leases.

True			False	Can't say
X				

Comment:

In order to ensure security of property interests and increase commercial certainty and reliability, Australia has adopted a comprehensive system of land registration. Originating in South Australia in 1858, the Torrens system of land titles registration governs the vast majority of privately held land in Australia. The Torrens system creates a species of title by registration as distinct from a system of registration of title. Specifically, each Australian state and territory has enacted comparable, but not uniform, legislation providing for the registration of most legal interests in land.[80] Through a gradual process of voluntary conversion of individual parcels, most land alienated from the Crown has become subject to these Torrens statutes. For example, in New South Wales, over 99% of land titles are recorded in the State's Torrens register;[81] in Queensland, all identified 'old-system' parcels have been converted.[82]

Once land is converted to Torrens title, any estate or interest recognised at common law can be created by registering a dealing on the Torrens register. For example, estates in fee simple (the common-law form of land ownership), leasehold estates (of any duration) and mortgages are all registrable. Importantly,

[80] *Land Titles Act 1925* (ACT); *Real Property Act 1900* (NSW); *Land Title Act* (NT); *Land Title Act 1994* (Qld); *Real Property Act 1886* (SA); *Land Titles Act 1980* (Tas); *Transfer of Land Act 1958* (Vic); *Transfer of Land Act 1893* (WA).

[81] Land and Property Information New South Wales, *Glossary* (2016) <http://www.lpi.nsw.gov.au/publications/glossary>.

[82] Queensland Government, *Freehold land administration* (10 February 2016) Museum of Lands, Mapping and Surveying <https://www.qld.gov.au/recreation/arts/heritage/museum-of-lands/administration/freehold/>.

registration cures defects in title arising from an antecedent fraud, forgery or mistake; the system favours registered transferees over historical title-holders.[83] Nonetheless, unregistered instruments may create equitable interests in Torrens title land, notably equitable mortgages, fixed trusts and interests under specifically enforceable contracts for the sale of land. To protect such unregistered interests, parties may lodge a caveat, which prospectively bars the registration of dealings until its removal.

Upon registration, an estate or interest generally acquires immediate indefeasibility – an absolute priority over unregistered interests and immunity from adverse claims. Each Torrens statute withholds this indefeasibility in circumstances involving actual fraud, accidental misdescription or omission, or short-term unregistered leases (broadly, of less than three years).[84] Furthermore, Australian courts have determined that indefeasibility does not protect registered proprietors from '*in personam* claims'. Such claims typically arise where a registered proprietor's own conduct has generated a recognised cause of action at law or in equity. Critically, mere notice of an earlier interest – whether actual or constructive – does not deprive a party of indefeasibility.

Land development restrictions

Generally Many countries restrict development and the change of use of land and require permits to be obtained for any development or change of use.

Q16 In **Australia**, apart from environmental controls (dealt with later), the control of commercial development and the change of use of land is very light and, where required, permits are quick and cheap to obtain.

True			False	Can't say
			X	

Comment:

Each state and territory has independent, complex, and constantly changing systems for controlling commercial development and the use of land that vary greatly across jurisdictions.[85] Commercial development approvals and the administrative process of planning scheme arrangements (rezoning) are lengthy and require significant costs and disclosure of information. Overall, there is extensive governmental control of commercial development and permits are not quick or cheap to obtain.

Independent State Land Use & Planning Legislation

The principal legislative responsibility for land-use planning and the control of commercial development lies with the states and territories. In practice, administration is usually delegated to local government municipal councils or a growing number of independent assessment bodies.[86]

[83] Defrauded registered proprietors may have recourse to Torrens Assurance Funds, which are provided by the state; in practice, such claims are rare.
[84] For example, in NSW a registered proprietor will take their interest subject to a lease of less than 3 years provided they had notice of that interest (*Real Property Act 1900* (NSW) s 42(1)(d)).
[85] Commonwealth Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments,* Research Report (2011) vol 1.
[86] Unlike the States, the Northern and Australian Capital Territory governments have not delegated planning powers to local government.

Ministerial Fast-track Process

Most states and territories empower the responsible government minister to issue direct and paramount approval for larger and more significant commercial developments. For example, in the State of New South Wales's City of Sydney local council area, the NSW Government Planning Minister acts as the overriding consent authority for any development that has been declared a "state significant development".[87]

Planning Scheme Amendments (Rezoning) – Change in Land Use

Generally, local councils act as the delegated planning authority and are responsible for devising a Planning Scheme and the specific land use controls for the different areas of land under its jurisdiction. In most jurisdictions, a commercial developer cannot initiate the rezoning process of changing the use of land but instead must rely upon formal initiation by the planning authority.[88]

In a 2011 study by the federal Australian Commonwealth Productivity Commission, the rezoning process was the most commonly cited cause of delay in the development of land[89] and the average time taken for rezoning approval was 25 months.[90]

Development Approval – Control of Commercial Development

Statutory Timeframes for the Determination of Development Applications

The prescribed statutory timeframes for decision-making upon development applications varies widely across jurisdictions. As they stood in April 2011, the minimum time for the decision process to be finalised was between 14 and 84 days and the maximum was between 42 and 196 days.[91] Furthermore, the mandated timeframe may not include certain time periods such as where there is a request for further information from the applicant.

Actual Time for the Determination of Development Applications

In the City of Sydney local council area, for the financial year ending June 2015, the average net time to determine a development application was 74 days.[92] In the State of Victoria's Melbourne City Council, the average gross days to final outcome was 132 days.[93]

Other indicators

Other indicators not surveyed include transfer costs, stamp duties and lessee protections.

Employment law

Generally The indicator here is whether it is easy or hard to hire and fire employees. The measures include high minimum wages, maximum hours, minimum holidays, maternity rights, equal pay for equal work (non-discrimination) and severance costs.

[87] *Environmental Planning and Assessment Act 1979* (Cth) ss 89C-89L.
[88] Commonwealth Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments,* Research Report (2011) vol 1, 140.
[89] Ibid 147.
[90] Ibid 148.
[91] Ibid 81.
[92] City of Sydney, *Activity Reports,* City of Sydney Council <http://www.cityofsydney.nsw.gov.au/development/development-applications/how-das-are-assessed/activity-reports>.
[93] Victorian Department of Environment, Land, Water and Planning, *Planning Permit Activity in Victoria*, Victorian Department of Environment, Land, Water and Planning, <http://www.planning.vic.gov.au/publications/planning-permit-activity-in-victoria/planning-permit-activity-quarterly-report>.

Q17 In **Australia**, there are few controls on hiring and firing employees or on the terms of employment.

True			False	Can't say
			X	

Comment:

In Australia, there are few controls on hiring employees, but numerous controls on firing employees and on terms of employment.

As to hiring employees, the main control imposed is concerned with the citizenship or residency status of employees. While there is no restriction on hiring an Australian citizen, a permanent Australian resident or a New Zealand citizen, a foreign national outside this class may only be hired if their visa allows them to work; and, if so, then only within the terms of that visa.[94] Apart from this restriction, and leaving aside the inherent qualifications which are preconditions for certain roles (such as possessing a law qualification for the role of a lawyer), there are few controls on whether a person can be hired or not.

As to the firing of employees, Australian law imposes two main, broad substantive controls on employers.

First, the law prevents the 'unfair dismissal' of employees:[95] that is, the firing of an employee where the firing is 'harsh, unjust or unreasonable'.[96]

Secondly, certain grounds of termination are prescribed as unlawful under the law. These are, namely, where the employee's employment is terminated because of the employee: participating (or not participating) in a trade union; acting as a representative of employees; exercising their 'workplace rights'; or being absent due to illness or injury, parental leave or participation in voluntary emergency management activities.[97] Termination of employment for discriminatory reasons- including discrimination based on age, gender or race- is also unlawful.

In addition to the above, s 117 of the *Fair Work Act* provides an important procedural control on firing employees: written notice of termination must be given to the employee. The amount of notice that an employer must give varies according to how long an employee has worked for that employer. Employees are also entitled to the period of notice specified in their contract of employment or reasonable notice implied by law if the contract does not contain an express notice period. Alternatively, instead of giving notice, an employer may choose to pay an employee the wages which they would have received if they had worked after notice had been given.

As to the terms of employment, there are certain aspects which are controlled under Australian law.

First, there are minimum standards of employment which employers must follow, which are set out in Part 2-2 of the *Fair Work Act*. These cover areas such as maximum working hours, flexible working arrangements and paid and unpaid leave from work.

[94] *Migration Act 1958* (Cth) ss 245AB, 245AC.
[95] *Fair Work Act 2009* (Cth) s 382.
[96] Ibid s 385.
[97] Ibid s 772.

Overlaying these minimum standards are industry-specific awards, agreements and determinations.[98] Many of these exist, and they apply to many areas of employment. Typically, they prescribe details of employment such as classification of employees, hours of work, wages, leave, penalty rates and dispute resolution.

In summary, the controls that do exist on employers hiring and firing employees and on the terms of employment do not circumscribe every aspect of the employer-employee relationship. It is not their purpose to dictate how the employer-employee relationship is to function. Rather, they are designed to protect employees, who usually occupy the weaker bargaining position vis-à-vis employers.

Environmental restrictions

Q18 In **Australia** the rules governing the environment and liability for clean-up are very light and relaxed.

True			False	Can't say
			X	

Comment:

Environmental regulation in Australia is complicated by the fact that all three levels of government may legislate with respect to environment. The Commonwealth (federal) legislature lacks a direct power to legislate with respect to the environment and so must rely on other federal constitutional heads of power to regulate environmental matters.[99] State legislatures, who have plenary legislative power, have in turn delegated certain environment and planning powers to local governments and granted them considerable autonomy such that they can be treated as a third level of government for the purposes of environmental regulation. This results in substantive differences in law between different places in Australia and duplication of processes,[100] increasing compliance costs.

The main Commonwealth statute regulating environmental matters is the *Environmental Protection and Biodiversity Conservation Act 1999* ('EPBC Act'). It requires an environmental impact assessment to be carried out in relation to any proposed action which has a significant impact on a 'matter of national environmental significance'[101] or on the environment in Commonwealth land or waters.[102] The EPBC approval process is detailed and time-consuming.

Approval is at the discretion of the Minister and may be subject to any condition that the Minister considers to be necessary or convenient for protecting a matter of national environmental significance or repairing or mitigating damage to a matter of national environmental significance.[103] In deciding whether or not to approve a proposed action and what conditions to attach to the approval, the Minister must take into account a number of considerations, including the principles of ecologically sustainable development, community

[98] Ibid pts 2.3-2.5.
[99] Melissa Perry, 'The Fractured State of Environmental Regulation' (2013) 28(2) *Australian Environment Review* 438; see, e.g. *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1.
[100] Though this is ameliorated to some extent by bilateral agreements between the Commonwealth and the States.
[101] EPBC Act pt 3 div 1.
[102] Ibid pt 3 div 2.
[103] Ibid s 134.

and stakeholder comments and relevant comments from Commonwealth and State/Territory Ministers.[104] The extensive number of considerations effectively necessitates a long and onerous assessment process and the imposition of conditions to remediate the environment after the proposed action is completed. Various bodies are tasked with the monitoring and enforcement of such approvals.

Similar assessment and approval processes exist under State legislation for proposed actions that are outside the scope of the EPBC Act, which may include requirements to prepare an Environmental Impact Statement for certain categories of development. An additional complication at the State level arises from the less stringent rules of standing for judicial review proceedings in respect of environmental and planning matters.[105] The rules enable persons with no direct interest in an administrative decision made under an environment and planning statute to challenge its validity in a court. The broader right of standing is made possible by the fact that State courts are unconstrained by the federal constitutional requirement that they only determine 'matters' in which there is some immediate right, title, privilege or immunity claimed by a party. [106] This can create significant delays and uncertainty.

Openness to foreign business

Generally These indicators measure the degree to which the country is open to foreign businesses. The indicators are quite generic and therefore subjective.

Foreign direct investment

Q19 In **Australia** foreigners may freely own and control local companies outside protected industries, such as media, banks and defence.

True			False	Can't say
	X			

Comment:

Generally, a foreign person (being an individual or a corporation in which substantial interests are held by foreign parties) must obtain the Australian Treasurer's approval for significant acquisitions in land or business. Notification and approval are required where the percentage interest to be acquired in the target exceeds the relevant percentage threshold; and the total asset value of the whole target exceeds the relevant monetary threshold. For land acquisitions, the threshold applies to the total value of the interest acquired. In the case of agricultural land, the threshold applies to the total of the value of all interests in agricultural land held by the foreign person (and any associates) as well as the consideration paid in the acquisition. Investment by foreign governments must undergo review for all resulting direct interests in Australian entities or businesses, regardless of value.

[104] Ibid s 136(2).
[105] See e.g. *Environmental Planning and Assessment Act 1979* (NSW) s 123.
[106] Melissa Perry, 'The Fractured State of Environmental Regulation' (2013) 28(2) *Australian Environment Review* 438, 439.

In practice, the Australian Government applies an open and flexible foreign investment policy, though nevertheless requires the review of such investments 'against the national interest on a case-by-case basis'.[107] The national interest test applied is far-reaching and not defined in legislation, allowing consideration of a wide range of factors. These include but are not limited to national security, competition, tax revenues,[108] community impact and the character of the investor. Australia's foreign investment review framework is primarily set by the *Foreign Acquisitions and Takeovers Act 1975* (Cth), and is applied in accordance with stated Government Policy and Guidance Notes as published by the Foreign Investment Review Board (a non-statutory advisory body, tasked with advising the Treasurer on foreign investment proposals). While it is normal for the Australian Government to work with applicants to ensure investment flows can be maximised, failure to comply with the legal and regulatory framework in place may result in the imposition of penalties.[109]

Notification and approval requirements are also subject to various exceptions and caveats depending upon the identity of the prospective investor and target industry of the investment. Special arrangements under existing free trade agreements currently allow Chilean, Chinese, Japanese, New Zealand, South Korean and United States non-government investors a substantially increased review-free threshold (AUD$1,094 million). The Trans Pacific partnership, until its recent deferral, had proposed to extend this benefit to each ratifying state. Regardless, investment in sensitive businesses (including those in media, telecommunications, transport, defence, encryption and securities technologies, uranium or plutonium extraction, and the operation of nuclear facilities)[110] are reviewed according to the lower threshold. The purchase of vacant commercial land generally requires notification in all cases, whilst developed commercial land is also considered sensitive if it is leased to a Commonwealth (federal), State or Territory body, lies under prescribed airspace or is to be used for certain activities.[111] Other specific legislation also sets out restrictive rules applying to investment in certain nationally significant industries and assets, including media, agribusiness, banking, aviation, telecommunication and shipping.[112]

In its latest annual review, the Department of Foreign Affairs and Trade reported net inflows of foreign investment in Australia totalling AUD$75.6 billion,[113] taking aggregate foreign investment stock in Australia to AUD$3.0 trillion in 2015 (an increase of 7.9% from 2014).[114] The largest contributor to this is the United States, followed by the United Kingdom and Belgium, with China ranking 7th with AUD$74.9 billion of capital deployed in Australia in 2015.[115] The three largest recipients of foreign investment stock were mining (40.1%), Manufacturing (11.7%) and Real Estate (8.7%) respectively.[116]

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[107] Foreign Investment Review Board, *Australia's Foreign Investment Policy* (1 July 2016) Foreign Investment Review Board <firb.gov.au>.
[108] Foreign Investment Review Board, *Guidance Note 47* (24 November 2016) Foreign Investment Review Board <https://firb.gov.au/resources/guidance/tax-conditions-gn47/>.
[109] Foreign Investment Review Board, *Australia's Foreign Investment Policy* (1 July 2016) Foreign Investment Review Board <firb.gov.au>.
[110] Ibid.
[111] Foreign Investment Review Board, *Guidance Note 14* (1 July 2016) Foreign Investment Review Board < https://firb.gov.au/resources/guidance/gn14/>.
[112] E.g. the *Financial Sector (Shareholdings) Act 1998* (Cth); *Airports Act 1996* (Cth); *Shipping Registration Act 1981* (Cth).
[113] Department of Foreign Affairs and Trade, *International Investment Australia 2015* (23 November 2016) Department of Foreign Affairs and Trade <http://dfat.gov.au/about-us/publications/Pages/international-investment-australia.aspx>.
[114] Ibid.
[115] Ibid.
[116] Ibid.

In order to carry on business in Australia, foreign corporations are required under the *Corporations Act 2001* (Cth)[117] to register and establish an office within jurisdiction. As for the establishment of Australian corporations, Part 2D.3 of that Act requires at least one or at least two directors of proprietary and public companies to ordinarily reside in Australia, respectively.[118]

Exchange controls

Q20 In **Australia**, there are no exchange controls. Businesses may therefore have foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency.

True			False	Can't say
X				

Comment:

A floating exchange rate prevails in Australia, and there are no general restrictions on the transfer of funds inward or outward. This freedom is subject to a number of exemptions, authorities and approvals, for instance under the *Autonomous Sanctions Act 2011* (Cth) and its associated Regulations.[119] Restrictions on the transfer of funds currently in place encompass, inter alia, those relating to persons/entities associated with nuclear or missile programs in Iran and the Democratic People's Republic of Korea, supporters of the Syrian regime and persons who have been instrumental or complicit in the threat to the sovereignty and territorial integrity of Ukraine.

The Department of Foreign Affairs and Trade also administers certain financial sanctions of the United Nations Security Council, per Regulations under the *Charter of the United Nations Act 1945* (Cth) – these prohibit the use or dealing with of funds, financial assets or economic resources of prescribed terrorist persons/organisation and designated countries. It is a criminal offence to make assets available to such persons or entities.

Australia implements a dividend imputation system, under which less than fully-franked dividends paid to non-resident shareholders are subject to dividend withholding tax at a rate of 30% (unless reduced under a tax treaty) to the extent they are not franked.[120] Similar withholding taxes may apply to interest and royalty payments.

Finally, where a reporting entity (for example a bank) under Australian anti-money laundering laws sends or receives an instruction to or from a foreign country for a transfer of funds, the Australian Transaction Reports and Analysis Centre (AUSTRAC) must be notified.[121] Reporting entities must also report suspicious matters connected to the actual or potential provision of designated services to AUSTRAC if there is reasonable suspicion a client is not who they claim to be or the reporting entity has information that may be

[117] *Corporations Act 2001* (Cth) ss 601CD, 601CT.
[118] Ibid pt 2D.3.
[119] *Autonomous Sanctions Regulations 2011* (Cth).
[120] Price Waterhouse Coopers, *Australia: Corporate Withholding Taxes* (22 November 2016) <http://taxsummaries.pwc.com/uk/taxsummaries/wwts.nsf/ID/Australia-Corporate-Withholding-taxes>.
[121] *Financial Transaction Reports Act 1988* (Cth); *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

relevant to the commission of an offence under Australia laws or tax evasion. The *Proceeds of Crime Act 2002* (Cth) also provides Australia law enforcement agencies with significant powers to deprive persons (whether or not convicted) or the proceeds of crime.[122]

Alien ownership of land

Q21 In **Australia**, foreign-controlled companies have the same rights as nationals or residents to own or lease land without a permit.

True			False	Can't say
			X	

Comment:

The rights of foreign-controlled companies to own or lease land are restricted under Australia's foreign investment framework. The federal *Foreign Acquisitions and Takeovers Act 1975* (Cth) ('FATA') legislation empowers the federal government Treasurer under advice from the non-statutory Foreign Investment Review Board ('FIRB') to regulate and invalidate proprietary actions which are "contrary to the national interest." The Treasurer's power is subjective and exercised upon a discretionary cases-by-case basis. Accordingly, foreign-controlled companies do not have the same rights as Australian nationals to own or lease land and are subject to substantial and often politicised restrictions upon their control of land.

A) Treasurer's Power – "Significant Actions"

With respect to Australian land, an action by a foreign-controlled company to take ownership or leasehold over land would be deemed reviewable as a "significant action" under FATA if it met the statutory criteria of being the act of: a "foreign person" acquiring an "interest in Australian land" at a value in excess of a prescribed "monetary threshold".

If these conditions are met the Treasurer may, with regard to the sole criterion of whether the action is "contrary to the national interest," choose to impose condition-precedents to validity, prohibit the proposed action, or make a "disposal order" to unwind a completed action.

i) "Foreign Persons"

A company is subject to the FATA legislation as a "foreign person" if: a single person that is not ordinarily a resident in Australia, a foreign corporation, or a foreign government holds an interest of 20% or more, or foreign parties hold an aggregate interest of 40% or more, in that company.

ii) "Interest in Australian Land"

Generally, the definition of an "interest in Australian land" is wide and inclusive of any legal and equitable interests that would entitle the holder to exclusive possession. However, only leasing or licencing agreements that are reasonably likely to exceed 5 years at the time the interest is acquired are included.

iii) "Monetary Threshold"

[122] Sheelagh McCracken et al, *Everett and McCracken's Banking and Financial Institutions Law* (Thomson Reuters, 8th ed, 2013) 107-118.

The monetary threshold depends on the zoning, vacancy, potential use of the land and whether the acquiring company is from a country with whom Australia has an applicable Free Trade Agreement. Critically, the threshold value is $0 and approval is always required for residential, vacant commercial, and mining or production tenement land. The threshold is $15 million for agricultural land, and $55 million and $252 million for sensitive and non-sensitive developed commercial property respectively.

The Treasurer's Statutory Criteria of Assessment - "National Interest"

Although there is no statutory definition of "national interest", by reference to the Australian Foreign Investment Policy, FIRB non-exclusively lists the following potential national interest considerations: "national security, competition, Australian Government policies including any potential tax risk, impact on the economy and the community, and the investor's character".[123]

B) Requirement to Give Notice – "Notifiable Action"

All transactions with respect to Australian land are "notifiable actions" and thus the Treasurer must be notified prior to any action being taken, irrespective of whether the Treasurer has "significant action" powers. Upon notification, a standard waiting period of 30 days applies before any action can be taken by with respect to that land.

C) Additional Requirement of Registration for Agricultural Holdings

ATO Agricultural Land Register

Irrespective of their value, all agricultural landholdings acquisitions or disposals by foreign controlled-companies must be registered with the Australian Taxation Office under the federal *Register of Foreign Ownership of Agricultural Land* Act 2015.

Application of the law

Generally These indicators deal with the application of the law, as opposed to what the law actually says. They are bound to be generic and subjective, a matter of impression.

Q22 In **Australia**, the higher courts usually treat big businesses as fairly as they treat individuals and do not favour local interests over foreigners.

True			False	Can't say
X				

Comment:

In Australia, all courts treat those before them equally, regardless of whether they are big businesses or individuals, or whether they represent local interests or foreign interests.

Most importantly, this principle is enshrined by the doctrine of *stare decisis*, or the legal principle that 'care should be taken to avoid […] the re-opening and re-examination of issues that have substantially been

[123] Australian Government Foreign Investment Review Board, *Foreign Investment Reforms Factsheet: Foreign Investment in Australia*. (January 2017) <http://firb.gov.au/files/2015/09/FIRB_fact_sheet_Foreign_investment_overview.pdf>.

decided by earlier decisions in closely analogous circumstances'.[124] That is to say, legal principles are equally applied to everyone, regardless of their legal status as individuals, corporations or otherwise, and their nationality or residence. The integrity of this principle is also ensured by the transparency and accountability of the Australian court system, most notably, the handing down of written judgments, open court and rules against bias, even where it is merely apprehended.[125]

Very often, the substantive law applicable in Australia varies, with different rules applying to individuals and companies, and foreigners and locals. However, that is a different issue from equal treatment by the Court: that is a matter concerned with the laws set by the Parliament, not their application by the Judiciary.

The courts' treatment of those before them is regular and consistent. 'Regularity and consistency are important attributes of the rule of law.'[126] In this way, it is evident that the Australian Courts' respect for the rule of law is of the utmost importance.

Costs and delays of commercial litigation

Q23 The costs and delays of commercial litigation in the higher courts in **Australia** are not considered materially greater than in other comparable countries.

True			False	Can't say
	X			

Comment:

The cost of commercial litigation in Australia is often considered disproportionately high, primarily due to the costs associated with discovery. Discovery refers to the process undertaken by parties to a legal proceeding to identify and disclose documents to each other that are relevant to the issues in the proceeding. While discovery is a critical element of fact-finding in any proceeding, the utility of discovered documents in the context of litigation is often incongruous with the costs associated with the process.

The Australia Law Reform Commission ('ALRC') reports the growing concern amongst judges and legal professionals that litigants are being 'priced out' of the court system. The general perception is that the majority of discovered documents are often irrelevant to the proceeding at hand. However, there is currently a lack of data to verify or refute this claim. By comparison, the ALRC reports that 69 per cent of US legal practitioners surveyed thought that the discovery generated by the parties was the right amount needed for the fair resolution of the case.

Delay

Delays of commercial litigation in the higher courts of Australia do not appear to be materially greater than that experienced in other comparable countries. The Australian Government Productivity Commission's *Report on Government Services 2015* indicates that approximately 32 per cent of cases lodged before a state or territory Supreme Court took over 12 months to reach completion. The Commission points out that the

[124] *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 569 (Kirby J).
[125] *Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[126] *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 383.

backlog of cases is not necessarily an indicator of delay. The time it takes to process a case can be affected by factors outside the direct control of court administration.

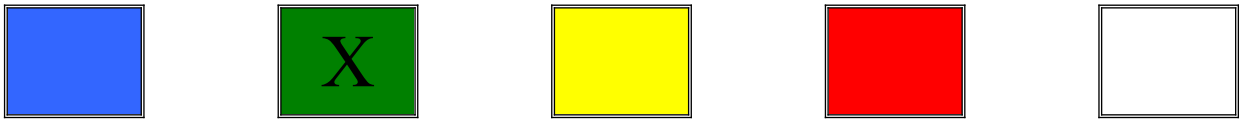
Cases on appeal to state and territory Courts of Appeal are typically resolved more quickly with just 15 per cent taking more than 12 months to reach completion. The speed with which cases are resolved also appears to differ between state and federal courts. For example, the Federal Court of Australia reports that the average time between initial application and disposition of a matter before the Court is 115 days. The timeframe for the resolution of a proceeding before the Federal Court is not materially greater than that experienced in other comparable countries.

Overall ranking

This overall ranking is achieved by a survey of all the rankings as shown in this table:

	Question	Rating
1.	Insolvency set-off	
2.	Security interest	
3.	Universal trusts	
4.	Director liability for deepening insolvency	
5.	Financial assistance to buy own shares	
6.	Public takeover regime	
7.	Exclusion of contract formation	
8.	Termination clauses	
9.	Exclusion clauses	
10.	Governing law clauses	
11.	Foreign jurisdiction clauses	
12.	Arbitration recognition	
13.	Class action	
14.	Ownership of land	
15.	Security of land title and land registers	
16.	Land development restrictions	
17.	Employment law	
18.	Environmental restrictions	
19.	Foreign direct investment	
20.	Exchange controls	
21.	Alien ownership of land	
22.	Court treatment of foreign big business	
23.	Costs and delays of commercial litigation	

True **False** **Can't say**



Commentary and suggestions for change

Our result is an overall ranking of 'Green'. We think this is appropriate. This is because, although Australian law affords quite generous freedom to parties in the areas of contract law and insolvency (subject to an overlay of legislation, which in some cases is quite prescriptive), there is significant regulation in the areas of corporate fundraising, planning and development, and foreign investment. As a result, most commercial activities will be substantially affected by regulation. We consider some examples of restrictiveness, and some reasons for complexity, below.

Australian federal constitutional structure
Given Australia's small population, there is a view that its federal constitutional structure contributes disproportionately to the complexity of regulation. The Australian Constitution provides for two tiers of government – the Commonwealth (federal) government and State governments. Territory legislatures and governments are created and given power by Commonwealth legislation, in a manner similar to the devolved legislatures in the United Kingdom. The Constitution confers on the Commonwealth legislature specific and enumerated powers (defined by subject-matter or purpose), whereas State legislatures' powers are unrestricted except by inconsistency with valid Commonwealth laws and express and implied prohibitions contained in the Constitution.

The powers conferred on the Commonwealth do not cover the entire field of corporate and commercial law. As such, the majority of litigation in trusts, contract law and real property is conducted in the Supreme Courts of the States and Territories. However, in recent times, the trend has been towards increasing Commonwealth regulation of commercial activity. The Commonwealth legislature regularly relies on the 'corporations power' of the federal Constitution to regulate areas such as employment and consumer law, and it also receives referrals of power from the States to extend regulation to the activities of individuals. This has added to the complexity of regulation.

Restrictions on foreign investment
The present federal government considers it important to scrutinise foreign investment. As described in questions 19 and 21, the federal Treasurer has a broad discretion to block investment which he or she does not consider to be in the national interest. Notably, the regime applies to all residential land, regardless of its value. Representatives of investors have criticised the regime because of reported long delays for approval (up to three to four months); the obscurity of the 'national interest' criterion; and its unexpected consequences for business (for example, private equity firms which raise funds from foreign investors are finding themselves caught by the regime).

In August 2016, the federal Treasurer blocked two bids, one from a Hong Kong company and one from a Chinese company, to acquire a major part of the NSW State Government's electricity poles and wires business. Elsewhere, the Treasurer has used his wide powers in relation to the acquisition of large swathes of agricultural land. These decisions, unsupported by clear reasons, drew criticism from bidders and foreign governments. Recently, the federal government has formed the Critical Infrastructure Centre to better coordinate state and federal government decision-making on key transactions. It is important that foreign investment review procedures are well-resourced, timely and transparent, given their significant impact on transactions.

Corporate fundraising
Although the regulation of corporate fundraising and takeovers generally achieves its purpose of protecting retail investors, we make the following suggestions for improvement which may be of interest for comparative purposes.

First, proving 'association' for the purposes of the takeover restrictions is notoriously difficult. More aggressive evidentiary rules such as a rebuttable presumption or some other reversal of the onus of proof would ensure that investors who hold less than 20% of a company individually are not able to improperly

exert control in concert, without breaching the 20% takeover rule. In this respect a more restrictive approach might ensure a more successful regime.

Secondly, section 411(17) of the *Corporations Act 2001* (Cth) states that in some situations a court must not approve a scheme of arrangement where it has been proposed for the purpose of avoiding the provisions of the takeover regime. Generally, judges take the view that where there is a legitimate commercial purpose for seeking a scheme rather than a takeover then there is no avoidance purpose. This is a sensible outcome given that the scheme of arrangement is now the predominant mechanism for takeovers of public companies, and each scheme is subject to the scrutiny of the court. However in some circumstances, notwithstanding that there may be a legitimate commercial purpose for a scheme, courts have held it to be an avoidance of the takeovers regime (see eg *Mincom Ltd v EAM Software Finance Pty Ltd (No 3)* (2007) 213 FLR 364 per Fryberg J). This is an example of an unnecessary restriction, as shareholders and creditors would be adequately protected by the discretion of the court to approve the scheme if s 411(17) were repealed.

Standard form contracts
Although this survey is not concerned with consumer law, any commercial actor in Australia should be aware of the extensive regulation of standard-form contracts. As outlined in question 8, the Australian Consumer Law and the *Australian Securities and Investments Commission Act 2001* (Cth) provide that 'unfair' terms in 'small business contracts' are void. These provisions significantly detract from the principle of freedom of contract and may prevent a party to a purely commercial agreement from fully exploiting its superior bargaining position.

Litigation funding
Australia's opt out class action regime is one of the most liberal in the world. The 'opt out' approach favours plaintiffs, and is designed to promote access to justice and the efficient resolution of disputes. Increasingly, however, litigation funders are looking to Australia as a popular jurisdiction for commencing class actions. The growth of litigation funding for class actions has resulted in increasing pressure on regulators to adopt a closed-group approach to class actions, as well as on courts to issue 'common fund' orders.

A common fund order requires plaintiffs to pay a portion of their distribution to the fund. This development has been criticised for its potential to deny the members of a class access to justice, particularly when the plaintiffs have not solicited the litigation funder's services. Stronger regulatory control is needed both to curb unmeritorious claims from being brought as a business incentive and to ensure proper access to justice for plaintiffs.

Employment law
Australian employment law is strongly weighted in favour of employees. This is evident from the broad safeguards and restrictions imposed on firing employees. This is also evident in the pay of Australian employees, which is among the highest in the world. Without a doubt, the current state of employment law reflects the strong presence and influence of Australian trade unions.

Insolvent trading
The predecessor to s 588G of the *Corporations Act 2001* (Cth) allowed directors to rely on passivity as a defence to a charge of insolvent trading: there was no liability for a director if a debt was incurred while the company was insolvent, if the director did not authorise it or did not know the company was insolvent. This is no longer the case: s 588G places a proactive duty on directors to prevent insolvent trading. The standard of conduct now expected of directors is therefore stricter. An interesting change may occur in 2017 if the federal Parliament passes legislation to provide a 'safe harbour' for a director who 'starts taking a course of action that is reasonably likely to lead to a better outcome for the company'.

In practice, there have been very few cases on s 588G. Furthermore, most of the proceedings which are brought have been civil actions: criminal prosecutions for breaching s 588G(3) are extremely rare.

Profiles

The survey was carried out by the following students:

Winnie Liu

Winnie recently completed a Juris Doctor degree at Sydney Law School, the University of Sydney. Her areas of interest include contract law, equity, private international law, public international law and criminal law. She is currently working at Herbert Smith Freehills. Winnie can be contacted at winnieliu22@gmail.com.

Jake Connellan

Jake is a final year student in the Juris Doctor program at Sydney Law School, the University of Sydney, having previously completed a Bachelor of Commerce at the University of Sydney. During his degree he has undertaken study at the East China University of Political Science and Law in Shanghai and maintained a keen interest in development economics and globalisation. He will continue his legal career at HWL Ebsworth in 2017. Jake can be contacted at jcon2640@uni.sydney.edu.au.

Gabor Papdi

Gabor completed a Bachelor of Laws at the University of Sydney in 2016. His areas of interest are corporations law, property law and equity. He currently works as a graduate at a Sydney-based law firm, focusing primarily on financial services regulation, consumer credit regulation and privacy.

Luca Moretti

Luca is a final year law student at the University of Sydney. He is writing his Honours thesis on contract law and equity and works in the corporate group at Herbert Smith Freehills. Luca can be reached at lmor6317@uni.sydney.edu.au.

Maria Mellos

Maria is a final year law student completing a Bachelor of Laws at the University of Sydney. She is currently writing her Honours thesis on the topic of equitable relief and her areas of interest are equity and insolvency. Maria can be reached at mariamellos1@gmail.com.

Daniel Farinha

Daniel is the researcher for the Equity Division of the Supreme Court of New South Wales. He graduated from the University of Sydney with First Class Honours and the University Medal in both Economics and Law. His interests include real property and commercial law.

Isolde Daniell

Isolde is in her final semester of a Bachelor of Laws at the University of Sydney. She completed a Bachelor of Arts majoring in French at the University of Sydney in 2013. Her areas of interest include contract law and planning and development and she is writing her Honours thesis on the subject of judicial review.

Chris Macalpine

Chris is a 5th year student at University of Sydney Law School. His areas of interest are Corporate and Commercial Law, particularly relating to Banking, Finance, and the influence of equitable doctrines thereon. He previously graduated with a Bachelor of Commerce majoring in Finance (University of Sydney) and intends to pursue a career at the confluence of his two degrees.

Jeremy Tjeuw

Jeremy is an undergraduate student at the University of Sydney. He takes a keen interest in property law and taxation law. Currently, he works at a Sydney-based law firm. Jeremy can be reached at tjeuwjh@gmail.com.

Academic Assistance

John Stumbles and **Sheelagh McCracken** are both Professors of Finance Law at the University of Sydney Law School and Fellows of the Australian Academy of Law.

Prior to commencing his academic career, Professor Stumbles was a banking and finance partner at Mallesons Stephen Jaques (now King & Wood Mallesons) where he remains a consultant. He has taught undergraduate and post-graduate courses in equity, insolvency and personal property securities. His current research interests, and the subject of his written work, include personal property securities and the interrelationship between the general law and statute law.

Professor McCracken has taught finance law at various centres in Australia and around the Asia-Pacific region. She writes and speaks regularly on finance law, recently focusing in particular on secured transactions law. Amongst the range of books she has published is a standard Australian text, Everett & McCracken's Banking and Financial Institutions Law, which she has co-authored for over 25 years.

Allen & Overy Global Law Intelligence Unit

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Philip Wood is one of the world's leading comparative lawyers and practitioners. He has written about 18 books on financial law. He was formerly a partner and head of the banking department of Allen & Overy. For many years he has been developing innovative and pioneering methodologies for assessing legal jurisdictions and has produced a book of maps of world financial law. His university textbook on the Law and Practice of International Finance has been translated into Chinese and a Japanese version is forthcoming.

Melissa Hunt is project director of the Intelligence Unit and is responsible for the management of the project. She carries out other work for the Intelligence Unit, including the preparation of tables covering rule of law and legal infrastructure risks in the jurisdictions of the world.

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