Australia

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1 Receivables Contracts

1.1 Formalities. In order to create an enforceable debt obligation of the obligor to the seller: (a) is it necessary that the sales of goods or services are evidenced by a formal receivables contract; (b) are invoices alone sufficient; and (c) can a binding contract arise as a result of the behaviour of the parties?

(a) There is no general requirement that an agreement for a sale of goods or a provision of services be evidenced by a formal written contract between the parties. However, certain contracts do require the formality of writing, such as contracts for the sale of land (or interests in land) and credit contracts regulated under the *National Consumer Credit Protection Act 2009* (Cth) ("**NCCPA**") (which also mandates detailed form and content requirements). In some cases, electronic transactions legislation may allow a contract that is required to be "in writing" to be entered into other than using a physical paper agreement. The *Personal Property Securities Act 2009* (Cth) ("**PPSA**") requires a security agreement to be evidenced in writing and either signed by the seller or adopted by the seller by conduct.

(b) Where no special rules such as those noted in (a) apply, an invoice may be sufficient evidence of contractual relations provided that the basic requirements of contract formation are met (namely offer, acceptance, consideration, certainty, completeness, capacity and intention to create legal relations).

(c) Where no special rules such as those noted in (a) apply and the basic requirements of contract formation highlighted in (b) are met (including an intention to create legal relations), the conduct of the parties may be sufficient for a contract to be deemed to exist.

1.2 Consumer Protections. Do your jurisdiction's laws: (a) limit rates of interest on consumer credit, loans or other kinds of receivables; (b) provide a statutory right to interest on late payments; (c) permit consumers to cancel receivables for a specified period of time; or (d) provide other noteworthy rights to consumers with respect to receivables owing by them?

The NCCPA regulates loans and leases (and, e.g., associated guarantees and mortgages) entered into with consumers, and regulates matters such as the contract form, disclosures and conduct. Where the receivables are margin loans, these will be regulated by relevant provisions of the *Corporations Act 2001* (Cth) ("**CA**") rather than the NCCPA and will be subject to their own disclosure, licensing and responsible lending regime.

(a) Under the NCCPA:

- restrictive charging provisions apply to small amount credit contracts; and
- a general cap of 48% applies to credit contracts, calculated as provided in the NCCPA.

(b) There is no express statutory right to demand payment of default interest under statute in Australia. However, this is a commonly accepted contractual term and, subject to meeting certain requirements, is not prohibited.

Default interest is permitted under the NCCPA if it is only imposed on an event of default, only in respect of the amount in default and only while that default continues.

The right to default interest should also be clearly set out in the contract and the amount should not be so high as to constitute a penalty or be considered unconscionable or unfair.

(c) Unless the contract prohibits its early repayment, a credit provider must accept early payments under NCCPA regulated contracts. The NCCPA also restricts early termination charges and obliges credit providers and lessors to consider applications for contract variation due to hardship (e.g., illness or unemployment).

(d) Consumer protection legislation (including the NCCPA) provides consumers with extensive rights and protections. Other key protections include:

- obligations relating to responsible lending, disclosure and contractual form; and
- consumer rights of contractual review, to have unfair terms declared void, to access external dispute resolution schemes (which may have regard to "fairness" generally rather than strict legal obligations, and cannot be appealed) or to have a court reopen an unjust transaction.

1.3 Government Receivables. Where the receivables contract has been entered into with the government or a government agency, are there different requirements and laws that apply to the sale or collection of those receivables?

The application of relevant rules to contracting with government will depend on which "arm" of the "government" a party is contracting with (e.g., whether it is the Commonwealth or a state, and whether it is the Crown in the right of the Commonwealth or a state, or a separate statutory corporation formed under federal or state law). Government contracts for receivables are generally subject to the

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same requirements and laws as contracts between other persons, but there can be some modifications in their application (for example, the powers of the Commonwealth are limited by the Constitution of Australia and a statutory corporation will only have the powers enumerated in its constituting statute). Other important points to note include:

- the parliament of the Commonwealth or a state or territory can pass laws that affect a contract it has previously entered into;
- enforcement against the Crown is subject to special procedures under Crown proceedings legislation;
- the payment of a debt owed by the Crown from government revenue must be authorised by legislation; and
- in very limited cases, executive necessity may allow the Crown to breach a contract without penalty on the basis of its public responsibility.

2 Choice of Law – Receivables Contracts

2.1 No Law Specified. If the seller and the obligor do not specify a choice of law in their receivables contract, what are the main principles in your jurisdiction that will determine the governing law of the contract?

In these circumstances, an Australian court will generally determine the governing law by:

- firstly, assessing whether an implied choice of law can be inferred as a matter of contractual construction; and
- secondly, if no such implied choice of law can be inferred, by identifying the law with the closest and most real connection to the contract (having regard to factors such as the place of residence and business of the parties).

2.2 Base Case. If the seller and the obligor are both resident in your jurisdiction, and the transactions giving rise to the receivables and the payment of the receivables take place in your jurisdiction, and the seller and the obligor choose the law of your jurisdiction to govern the receivables contract, is there any reason why a court in your jurisdiction would not give effect to their choice of law?

Australian courts will generally give effect to an express choice of law, subject to that choice being *bona fide*, there not being any public policy reason for not giving effect to the choice of law, and the choice of law not infringing any statute of the forum. On the facts of the base case, it is unlikely that any of those vitiating factors would apply.

2.3 Freedom to Choose Foreign Law of Non-Resident Seller or Obligor. If the seller is resident in your jurisdiction but the obligor is not, or if the obligor is resident in your jurisdiction but the seller is not, and the seller and the obligor choose the foreign law of the obligor/seller to govern their receivables contract, will a court in your jurisdiction give effect to the choice of foreign law? Are there any limitations to the recognition of foreign law (such as public policy or mandatory principles of law) that would typically apply in commercial relationships such as that between the seller and the obligor under the receivables contract?

Please see question 2.2. Australian courts will generally give effect to an express choice of foreign law, subject to the exceptions noted.

If questions of foreign law arise in Australian courts, the party asserting a particular effect of foreign law must prove that effect by providing expert evidence, and the Australian courts treat the effect as a question of fact to be established by evidence.

3 Choice of Law – Receivables Purchase Agreement

3.1 Base Case. Does your jurisdiction's law generally require the sale of receivables to be governed by the same law as the law governing the receivables themselves? If so, does that general rule apply irrespective of which law governs the receivables (i.e., your jurisdiction's laws or foreign laws)?

There is no general rule in Australia that the sale of receivables needs to be governed by the same law as the receivables themselves and, as noted in question 2.2, Australian courts will generally respect a choice of law (subject to certain exceptions). However, the law of the receivable is still relevant (for example, in construing the rights and obligations of the parties to the receivable contract).

The PPSA has separate conflict of law rules which are complex. They do not affect the choice of law of the sale of receivables, but are raised here for completeness. Generally speaking, the PPSA applies to a transfer of receivables if the seller is located in Australia or if the receivable is an Account or Chattel Paper payable in Australia. One or both of these are satisfied in most Australian securitisations. If the PPSA applies:

- perfection as against the debtor is governed by the PPSA rules (see question 4.2); and
- perfection as against third parties asserting a competing interest in the receivable is generally determined by the laws of the jurisdiction in which the seller is located. However, because of the complexity in this area, we expect that in practice purchasers will often register even if the seller is located outside Australia.

3.2 Example 1: If (a) the seller and the obligor are located in your jurisdiction, (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of your jurisdiction to govern the receivables purchase agreement, and (e) the sale complies with the requirements of your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller, the obligor and other third parties (such as creditors or insolvency administrators of the seller and the obligor)?

If the seller is located in Australia, Australian requirements would apply as discussed in question 3.1.

3.3 Example 2: Assuming that the facts are the same as Example 1, but either the obligor or the purchaser or both are located outside your jurisdiction, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller), or must the foreign law requirements of the obligor's country or the purchaser's country (or both) be taken into account?

If the seller is located in Australia, Australian requirements would

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apply as discussed in question 3.1. However, the law of the obligor's country may also be relevant, particularly if it has rules on how the obligation can be transferred.

3.4 Example 3: If (a) the seller is located in your jurisdiction but the obligor is located in another country, (b) the receivable is governed by the law of the obligor's country, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the obligor's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the obligor's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller) without the need to comply with your jurisdiction's own sale requirements?

The same answer applies as for question 3.3.

3.5 Example 4: If (a) the obligor is located in your jurisdiction but the seller is located in another country, (b) the receivable is governed by the law of the seller's country, (c) the seller and the purchaser choose the law of the seller's country to govern the receivables purchase agreement, and (d) the sale complies with the requirements of the seller's country, will a court in your jurisdiction recognise that sale as being effective against the obligor and other third parties (such as creditors or insolvency administrators of the obligor) without the need to comply with your jurisdiction's own sale requirements?

If the obligor's debt is payable in Australia, Australian requirements will apply as discussed in question 3.1 in addition to the requirements of the seller's country.

3.6 Example 5: If (a) the seller is located in your jurisdiction (irrespective of the obligor's location), (b) the receivable is governed by the law of your jurisdiction, (c) the seller sells the receivable to a purchaser located in a third country, (d) the seller and the purchaser choose the law of the purchaser's country to govern the receivables purchase agreement, and (e) the sale complies with the requirements of the purchaser's country, will a court in your jurisdiction recognise that sale as being effective against the seller and other third parties (such as creditors or insolvency administrators of the seller, any obligor located in your jurisdiction and any third party creditor or insolvency administrator of any such obligor)?

If the seller is located in Australia, Australian requirements would apply as discussed in question 3.1 in addition to the other applicable requirements.

4 Asset Sales

4.1 Sale Methods Generally. In your jurisdiction what are the customary methods for a seller to sell receivables to a purchaser? What is the customary terminology – is it called a sale, transfer, assignment or something else?

In Australia, a sale of receivables is generally by way of legal or equitable assignment.

Under a legal assignment, legal and equitable title is passed to the purchaser, who becomes sole owner of the receivable. A legal assignment must be an absolute assignment in writing of the whole of a present debt, with written notice to the debtor.

Equitable assignments are more common in securitisation transactions, under which the purchaser obtains beneficial ownership of the receivable, but legal title remains with the seller. An equitable assignment requires valuable consideration and a clear intention to assign identifiable receivables and may have additional risks including that:

- the debtor may be fully discharged by paying the seller, and may exercise set-offs against the seller (see question 4.13);
- the seller may sell the same receivable to another purchaser (PPSA registration (see question 4.2) and otherwise notice to the debtor can overcome this); and
- the purchaser may need to join the seller in actions against the debtor.

4.2 Perfection Generally. What formalities are required generally for perfecting a sale of receivables? Are there any additional or other formalities required for the sale of receivables to be perfected against any subsequent good faith purchasers for value of the same receivables from the seller?

Perfection is governed by property law statutes in the various Australian states and territories and by the rules of equity. The PPSA also imposes separate but overlapping perfection rules where the receivables are "Accounts" or "Chattel Paper" under the PPSA, which will be the case in most Australian securitisations.

"Perfection" in this context has two elements:

(a) obtaining the best interest against the debtor:
  - a legal assignment is fully perfected against the debtor and an equitable assignment can be perfected by notice to the debtor; and
  - under the PPSA, despite notice to the debtor, the debtor and the seller may modify the contract as it relates to payments that have not been fully earned by performance, but only if, amongst other things, this does not materially adversely affect a purchaser's rights; and

(b) obtaining best interest against third parties:
  - the interest of an assignee of Accounts or Chattel Paper is a deemed security interest under the PPSA, which can be registered under the PPSA giving a priority based on registration time against other interest holders (including other purchasers);
  - failure to register under the PPSA does not invalidate the assignment as against the debtor or any insolvency official appointed to the debtor;
  - where the receivable is Chattel Paper, a promissory note or certain other negotiable instruments, a holder of the original instrument may have PPSA priority over other registered assignees; and

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■ where the PPSA does not apply, notice of assignment to the debtor will generally give priority over other interested parties who have not yet given notice.

4.3 Perfection for Promissory Notes, etc. What additional or different requirements for sale and perfection apply to sales of promissory notes, mortgage loans, consumer loans or marketable debt securities?

The general rules are set out in questions 4.1 and 4.2. However, each of these debt classes raises specific issues. For example:

- an assignment of promissory notes does not require PPSA perfection;
- an assignment of mortgage loans may require registration of land mortgage transfers on land titles registers;
- assignment clauses in consumer and small business loans can, in some cases, give rise to unfair contract terms issues; and
- marketable debt securities sold through clearing systems are subject to the rules of the clearing system.

4.4 Obligor Notification or Consent. Must the seller or the purchaser notify obligors of the sale of receivables in order for the sale to be effective against the obligors and/or creditors of the seller? Must the seller or the purchaser obtain the obligors' consent to the sale of receivables in order for the sale to be an effective sale against the obligors? Whether or not notice is required to perfect a sale, are there any benefits to giving notice – such as cutting off obligor set-off rights and other obligor defences?

Notice of the assignment will allow the purchaser to enjoy the benefits described in questions 4.1 and 4.2. Notice is not always given at the time of assignment, however, and many market participants rely on an ability to perfect assignment at a later date if required.

If the receivables contract permits, or does not prohibit, an assignment, then obligor consent is not required.

If the contract prohibits assignment, but the receivable is an Account or Chattel Paper under the PPSA, then an assignment is valid regardless of lack of consent. However, the debtor may have contractual and tortious remedies arising out of contract breach.

4.5 Notice Mechanics. If notice is to be delivered to obligors, whether at the time of sale or later, are there any requirements regarding the form the notice must take or how it must be delivered? Is there any time limit beyond which notice is ineffective – for example, can a notice of sale be delivered after the sale, and can notice be delivered after insolvency proceedings have commenced against the obligor or the seller? Does the notice apply only to specific receivables or can it apply to any and all (including future) receivables? Are there any other limitations or considerations?

The notice can be delivered at any time. However, payments occurring and competing interests arising before the notice is given are not affected by such notice.

For a legal assignment, the notice must be in writing and comply with certain state-based requirements under applicable legislation.

If the PPSA applies, the notice must comply with the content requirements set out in the PPSA.

4.6 Restrictions on Assignment – General Interpretation. Will a restriction in a receivables contract to the effect that "None of the [seller's] rights or obligations under this Agreement may be transferred or assigned without the consent of the [obligor]" be interpreted as prohibiting a transfer of receivables by the seller to the purchaser? Is the result the same if the restriction says "This Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights or obligations)? Is the result the same if the restriction says "The obligations of the [seller] under this Agreement may not be transferred or assigned by the [seller] without the consent of the [obligor]" (i.e., the restriction does not refer to rights)?

Australian courts would generally interpret each of these contractual restrictions as prohibiting a transfer or assignment of receivables by the seller to the purchaser without consent. However, where a contract requires consent and such consent is forthcoming, the assignment of contractual rights would be permissible.

It is likely that Australian courts would find no difference between the first two formulations above. The third formulation does not specifically prohibit the transfer of rights (with or without consent). Therefore, under the third formulation, it may be possible to assign certain rights without consent.

4.7 Restrictions on Assignment; Liability to Obligor. If any of the restrictions in question 4.6 are binding, or if the receivables contract explicitly prohibits an assignment of receivables or "seller's rights" under the receivables contract, are such restrictions generally enforceable in your jurisdiction? Are there exceptions to this rule (e.g., for contracts between commercial entities)? If your jurisdiction recognises restrictions on sale or assignment of receivables and the seller nevertheless sells receivables to the purchaser, will either the seller or the purchaser be liable to the obligor for breach of contract or tort, or on any other basis?

If the contract prohibits assignment but the receivable is an Account or Chattel Paper under the PPSA, an assignment is generally valid regardless of lack of consent. However, the debtor may have contractual and tortious remedies arising out of contract breach.

If the PPSA does not apply, a contractual restriction prohibiting assignment may mean that any assignment without consent is invalid between the obligor and the purchaser.

4.8 Identification. Must the sale document specifically identify each of the receivables to be sold? If so, what specific information is required (e.g., obligor name, invoice number, invoice date, payment date, etc.)? Do the receivables being sold have to share objective characteristics? Alternatively, if the seller sells *all* of its receivables to the purchaser, is this sufficient identification of receivables? Finally, if the seller sells *all* of its receivables *other than* receivables owing by one or more specifically identified obligors, is this sufficient identification of receivables?

The sale document must adequately identify the receivables to be sold such that at any point in time those receivables that are subject to the assignment can be distinguished from those that are not by reference to the wording of the sale document. However, provided that the class of receivables being transferred can be, and

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is, identified with adequate certainty to distinguish it from other receivables, this need not be achieved through listing each specific receivable.

The receivables being sold do not need to share the same objective characteristics but it is quite common for receivables being sold to share specified "eligibility criteria".

A sale can generally be drafted to attach to all of the receivables of the seller, provided that "receivables" are sufficiently defined for these purposes, and a sale of all receivables other than specifically identified receivables (or adequately identified classes of receivables) can also generally be structured.

If receivables are secured by security over cars, ships, aircraft or certain intellectual property rights, then there may be benefits in registering that underlying security with respect to the serial number for those items.

4.9 Recharacterisation Risk. If the parties describe their transaction in the relevant documents as an outright sale and explicitly state their intention that it be treated as an outright sale, will this description and statement of intent automatically be respected or is there a risk that the transaction could be characterised by a court as a loan with (or without) security? If recharacterisation risk exists, what characteristics of the transaction might prevent the transfer from being treated as an outright sale? Among other things, to what extent may the seller retain any of the following without jeopardising treatment as an outright sale: (a) credit risk; (b) interest rate risk; (c) control of collections of receivables; (d) a right of repurchase/redemption; (e) a right to the residual profits within the purchaser; or (f) any other term?

The language of the contract should clearly and expressly be that of a sale and the legal character of the rights and obligations created by the terms of the contract should be consistent with that language. Australian courts are likely to look to the legal substance of the transaction rather than its economic substance. In particular, a court is likely to adopt a two-step analytical process:

- firstly, a determination of the rights and obligations the parties gave each other under the terms of the sale contract; and
- secondly, the characterisation of such rights and obligations as a matter of law (without regard to the intention of the parties).

The transaction must not be a "sham". The parties must not disguise the transaction as a sale, if the true nature of the rights and obligations intended by the parties are not those of a sale.

Not all "retention" factors will undermine the characterisation as a sale. For example:

- it is common for the seller to act as servicer of the receivables;
- there are accepted ways to structure purchase price mechanics to provide for variable or deferred elements; and
- the seller may provide indemnity protection for representations and warranties relating to the receivables.

In addition, a sale should not be recharacterised simply because the seller has a right to repurchase the transferred receivables. However, a right of repurchase may increase the risk of recharacterisation if it exists in conjunction with other features which, taken together, suggest the creation of legal rights and obligations inconsistent with those of a sale.

Under the PPSA, a transfer of Accounts or Chattel Paper is generally treated as a security interest regardless of economic effect. However, if a transfer of Accounts or Chattel Paper does "secure payment or performance of an obligation", then the proceeds are subject to a mandatory waterfall which requires residual proceeds to be returned to the seller after the secured obligation has been satisfied. It seems unlikely that this will apply unless the whole transaction is recharacterised as a secured loan.

4.10 Continuous Sales of Receivables. Can the seller agree in an enforceable manner to continuous sales of receivables (i.e., sales of receivables as and when they arise)? Would such an agreement survive and continue to transfer receivables to the purchaser following the seller's insolvency?

Yes, a present assignment of adequately identified future property for valuable consideration can be recognised in equity (but not at common law).

Please see question 4.11 further in relation to a subsequent insolvency.

4.11 Future Receivables. Can the seller commit in an enforceable manner to sell receivables to the purchaser that come into existence after the date of the receivables purchase agreement (e.g., "future flow" securitisation)? If so, how must the sale of future receivables be structured to be valid and enforceable? Is there a distinction between future receivables that arise prior to versus after the seller's insolvency?

Yes, as per question 4.10. The sale should be for valuable consideration with the sale documentation including clear and unambiguous identification of the receivables to be assigned. The assignment of the future receivables should occur automatically by the terms of the sale contract without any further act being required. If properly drafted, the receivable should vest in the purchaser immediately upon coming into existence and there is some legal authority to support the validity of the assignment after the commencement of a winding up of the seller. However, arrangements under which payments continue – at least for some period – to be made to the seller, can potentially have an impact on the purchaser. Although the purchaser may be able to trace receipts into the assets of the seller, the purchaser will not be in an effective position to control receipts. Please also see question 6.5 and, in relation to the PPSA, above.

4.12 Related Security. Must any additional formalities be fulfilled in order for the related security to be transferred concurrently with the sale of receivables? If not all related security can be enforceably transferred, what methods are customarily adopted to provide the purchaser the benefits of such related security?

The formalities required for a legal assignment of related securities will depend on the type of related security involved. For example, a legal assignment of a real property mortgage will require the registration of a transfer of the mortgage on the relevant land titles register. Transfers of related securities regulated by the PPSA will need to be perfected by PPSA registration.

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4.13 Set-Off; Liability to Obligor. Assuming that a receivables contract does not contain a provision whereby the obligor waives its right to set-off against amounts it owes to the seller, do the obligor's set-off rights terminate upon its receipt of notice of a sale? At any other time? If a receivables contract does not waive set-off but the obligor's set-off rights are terminated due to notice or some other action, will either the seller or the purchaser be liable to the obligor for damages caused by such termination?

Australia recognises a number of different types of set-off. The effect of notice on these rights will depend on the type of set-off in question. Generally, notice will terminate the accrual of rights of contractual or statutory set-off, but will not terminate any accrued rights in respect of pre-notice cross-debts. An assignee will generally take subject to any such accrued rights of set-off and any other equities. In the case of equitable set-off, the assignee may in some circumstances take subject to equitable set-off in respect of both pre- and post-notice cross-claims. Insolvency set-off is mandatory and self-executing, but the mutuality requirement for insolvency set-off will generally be destroyed by the assignment.

The mere operation of these principles to fix the rights of the parties is unlikely to give rise to liability for damages. However, if, for example, the termination of set-off rights arose from an assignment in breach of the underlying agreement, the obligor may in some circumstances have a claim for contractual or tortious remedies such as damages in respect of the relevant breach.

4.14 Profit Extraction. What methods are typically used in your jurisdiction to extract residual profits from the purchaser?

In Australia, the securitisation vehicle is most commonly a trust, from which residual profit can be extracted by distributions to the beneficiaries of that trust. The originator may also act as subscriber for one or more classes of notes issued by the trust and returns can be extracted on these notes. Fees can also be extracted by the originator acting as, for example, servicer or manager of the trust.

5 Security Issues

5.1 Back-up Security. Is it customary in your jurisdiction to take a "back-up" security interest over the seller's ownership interest in the receivables and the related security, in the event that an outright sale is deemed by a court (for whatever reason) not to have occurred and have been perfected (see question 4.9 above)?

It is not customary to take "back-up" security to address the risk that the sale is deemed by a court not to have been perfected.

5.2 Seller Security. If it is customary to take back-up security, what are the formalities for the seller granting a security interest in receivables and related security under the laws of your jurisdiction, and for such security interest to be perfected?

The security interest will need to be perfected by PPSA registration. Please see question 5.3.

5.3 Purchaser Security. If the purchaser grants security over all of its assets (including purchased receivables) in favour of the providers of its funding, what formalities must the purchaser comply with in your jurisdiction to grant and perfect a security interest in purchased receivables governed by the laws of your jurisdiction and the related security?

The most common form of security is a general security interest over all assets of the purchaser.

The security interest must be perfected by PPSA registration within prescribed time limits. It is possible to perfect security interests in some assets by possession or control only, with no registration, but this is unusual in the securitisation context.

5.4 Recognition. If the purchaser grants a security interest in receivables governed by the laws of your jurisdiction, and that security interest is valid and perfected under the laws of the purchaser's jurisdiction, will the security be treated as valid and perfected in your jurisdiction or must additional steps be taken in your jurisdiction?

If the purchaser is an Australian company or an Australian registered foreign company, then the security interest must comply with Australian validity and perfection rules.

Where the purchaser is not Australian or Australian registered, the Australian conflict of laws rules for intangible property are complex. In practice, most security interests over receivables governed by Australian law are taken so as to comply with validity and perfection requirements in Australia. Please see section 3 for further details.

5.5 Additional Formalities. What additional or different requirements apply to security interests in or connected to insurance policies, promissory notes, mortgage loans, consumer loans or marketable debt securities?

As a general matter, there are no additional or different requirements except as noted in section 4.

5.6 Trusts. Does your jurisdiction recognise trusts? If not, is there a mechanism whereby collections received by the seller in respect of sold receivables can be held or be deemed to be held separate and apart from the seller's own assets (so that they are not part of the seller's insolvency estate) until turned over to the purchaser?

Yes, Australia recognises trusts.

Collection trusts are commonly used in Australian securitisation transactions. Collection trusts and turnover trusts may be security interests under the PPSA, and it is common to register them.

5.7 Bank Accounts. Does your jurisdiction recognise escrow accounts? Can security be taken over a bank account located in your jurisdiction? If so, what is the typical method? Would courts in your jurisdiction recognise a foreign law grant of security (for example, an English law debenture) taken over a bank account located in your jurisdiction?

Escrow accounts are recognised in Australia, but are uncommon.

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It is more common for the purchaser to take security over the payment bank account.

Security is commonly taken over bank accounts under a security agreement by way of charge or mortgage and perfected by PPSA registration. Tripartite arrangements with the account bank are recommended.

Where the security holder is an Australian authorised deposit-taking institution ("**ADI**") and it is taking security over an account for which it is the account bank, it has absolute priority and registration is not required.

As a general rule, Australian courts will recognise and enforce foreign-law security over bank accounts in Australia. However, Australian rules for validity and perfection apply in most cases.

5.8 Enforcement over Bank Accounts. If security over a bank account is possible and the secured party enforces that security, does the secured party control all cash flowing into the bank account from enforcement forward until the secured party is repaid in full, or are there limitations? If there are limitations, what are they?

The secured party, or any receiver appointed by it, controls all cash from enforcement forward. However, if the secured party does not control the bank account for the purposes of the PPSA, then certain statutory preferred creditors may have priority rights to the bank account, which can disrupt the secured party's control of the cash.

5.9 Use of Cash Bank Accounts. If security over a bank account is possible, can the owner of the account have access to the funds in the account prior to enforcement without affecting the security?

Yes, generally, as long as that is provided for in the terms of the security document.

6 Insolvency Laws

6.1 Stay of Action. If, after a sale of receivables that is otherwise perfected, the seller becomes subject to an insolvency proceeding, will your jurisdiction's insolvency laws automatically prohibit the purchaser from collecting, transferring or otherwise exercising ownership rights over the purchased receivables (a "stay of action")? If so, what generally is the length of that stay of action? Does the insolvency official have the ability to stay collection and enforcement actions until he determines that the sale is perfected? Would the answer be different if the purchaser is deemed to only be a secured party rather than the owner of the receivables?

If the sale of receivables is a true sale by way of legal assignment and has been perfected, a seller's insolvency should not interfere with a purchaser's rights in respect of the purchased receivables (subject to those matters discussed at question 6.3). If there has been a true sale, but it is only by way of equitable assignment, the position may be more complex and practical issues may arise. If there is any doubt as to whether the assignment has been perfected, an administrator or liquidator of the seller may obtain an interim injunction from a court staying the enforcement by the purchaser of its rights, pending judgment from the court as to whether the assignment has been perfected.

If the purchaser is deemed to be only a secured party (in the sense of holding a security interest such as a charge over the receivables) rather than the owner of the receivables, then, broadly, if the security interest:

- is a "circulating security interest", it may in certain circumstances be void against the company's liquidator;
- is not perfected, it will vest in the seller upon its going into administration or liquidation;
- is perfected by registration and by no other means and registration occurred within certain prescribed time periods, the interest will vest in the seller upon its going into administration or liquidation; and
- is perfected:
  - the purchaser will be bound by the statutory stay on enforcement during the administration of the seller; and
  - an administrator of the seller may be able to dispose of the receivables which are the subject of the security interest in the ordinary course of the seller's business in certain circumstances.

The period of the stay on enforcement of security interests during administration referred to above is typically between 15 and 30 business days, but this period may be extended as a result of a resolution of creditors or orders of the court (and can be extended by up to a year or possibly longer).

To the extent that the purchaser is exercising a contractual right against the seller in collecting, transferring or otherwise exercising ownership rights over the purchased receivables, it may also be subject to a stay during the administration period (refer to the first bullet point in the answer to question 8.7 below).

6.2 Insolvency Official's Powers. If there is no stay of action, under what circumstances, if any, does the insolvency official have the power to prohibit the purchaser's exercise of its ownership rights over the receivables (by means of injunction, stay order or other action)?

An insolvency official does not generally have the power to prohibit the purchaser's exercise of rights in connection with an effective sale of receivables, other than in the circumstances discussed in questions 6.1 and 6.3. However, the insolvency official is not required to assist the purchaser where such assistance is necessary for the purchaser to exercise their rights.

6.3 Suspect Period (Clawback). Under what facts or circumstances could the insolvency official rescind or reverse transactions that took place during a "suspect" or "preference" period before the commencement of the seller's insolvency proceedings? What are the lengths of the "suspect" or "preference" periods in your jurisdiction for (a) transactions between unrelated parties, and (b) transactions between related parties? If the purchaser is majority-owned or controlled by the seller or an affiliate of the seller, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period? If a parent company of the seller guarantee's the performance by the seller of its obligations under contracts with the purchaser, does that render sales by the seller to the purchaser "related party transactions" for purposes of determining the length of the suspect period?

If a transaction takes place within a specified "suspect" or "preference" period, a liquidator may be able to have the transaction set aside if it is a "voidable transaction". In general terms,

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voidable transactions include unfair preferences and uncommercial transactions while the company was insolvent, unfair loans and unreasonable director-related transactions. The suspect period depends on the type of voidable transaction (for example, it is generally six months from the commencement of administration or liquidation for unfair preferences and two years for uncommercial transactions, but this may be extended to either four or 10 years in certain circumstances).

The suspect period for insolvent transactions involving related entities is four years, which may apply where the purchaser is majority owned or controlled by the seller or the purchaser and the seller are otherwise part of the same corporate group. The existence of a guarantee by a parent company of the seller does not on its own render sales "related party transactions".

6.4 Substantive Consolidation. Under what facts or circumstances, if any, could the insolvency official consolidate the assets and liabilities of the purchaser with those of the seller or its affiliates in the insolvency proceeding? If the purchaser is owned by the seller or by an affiliate of the seller, does that affect the consolidation analysis?

Assuming that the purchaser and the seller are separate and independent bodies, there is no statutory right or established Australian line of authority that would allow an insolvency official to consolidate their assets in insolvency proceedings. However, if the purchaser and the seller are related entities and/or their affairs are intermingled in a prescribed manner, it may be possible for a liquidator to obtain a pooling order or to make a pooling determination to permit the purchaser and the seller to be wound up on a pooled basis. Further, the assets and liabilities of corporate groups with complex cross-guarantees may be aggregated in certain circumstances.

6.5 Effect of Insolvency on Receivables Sales. If insolvency proceedings are commenced against the seller in your jurisdiction, what effect do those proceedings have on (a) sales of receivables that would otherwise occur after the commencement of such proceedings, or (b) on sales of receivables that only come into existence after the commencement of such proceedings?

Once certain insolvency proceedings have been commenced:

- no sale of receivables can occur unless the relevant insolvency official or the relevant Australian court consents;
- if the contract has been entered into but the purchase price has not been paid (or the purchaser has not otherwise acquired a proprietary interest in the receivables), the purchaser will have an unsecured claim against the seller with regards to any loss the purchaser suffers; and
- if there has been a true sale of future receivables, and the purchaser has paid the purchase price in full prior to the initiation of administration or liquidation, then (subject to the discussion in questions 6.1 and 6.3) the seller's insolvency alone will not affect the purchaser's rights in relation to the receivables.

6.6 Effect of Limited Recourse Provisions. If a debtor's contract contains a limited recourse provision (see question 7.3 below), can the debtor nevertheless be declared insolvent on the grounds that it cannot pay its debts as they become due?

In Australia, a company is insolvent if it cannot pay its debts as and when they fall due and payable. The equivalent position for vehicles established as trusts is more complicated, as a trust is not a separate legal entity from its trustee.

To our knowledge, Australian courts have not specifically looked at the effect of limited recourse clauses on a company's solvency. It is unlikely that Australian courts would consider that a limited recourse debt is "payable" to the extent that it exceeds the value of the assets to which a properly drafted limited recourse clause is directed, such that the failure by a debtor to pay that portion of the debt which exceeded the value of the assets could render the debtor insolvent. However, we are aware of an English judgment to the contrary which, whilst not binding on Australian courts and made in unusual circumstances, may still be persuasive in some circumstances.

7 Special Rules

7.1 Securitisation Law. Is there a special securitisation law (and/or special provisions in other laws) in your jurisdiction establishing a legal framework for securitisation transactions? If so, what are the basics? Is there a regulatory authority responsible for regulating securitisation transactions in your jurisdiction?

Although Australia does have a legislative framework for covered bonds, it does not have a specific legislative framework for securitisation. However, in the case of securitisations involving ADIs, APS 120 (a prudential standard specific to securitisation established by the Australian Prudential Regulation Authority ("**APRA**")) applies, and APRA has primary responsibility for regulating the prudential aspects of securitisation. In addition, some Australian laws (such as stamp duty laws) make specific provision for securitisation in certain circumstances (for example, in the form of exemptions), and many laws of general application will impact a securitisation transaction.

7.2 Securitisation Entities. Does your jurisdiction have laws specifically providing for establishment of special purpose entities for securitisation? If so, what does the law provide as to: (a) requirements for establishment and management of such an entity; (b) legal attributes and benefits of the entity; and (c) any specific requirements as to the status of directors or shareholders?

Australia does not have a specific legislative framework for the establishment of special purpose entities for securitisation.

7.3 Location and form of Securitisation Entities. Is it typical to establish the special purpose entity in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the special purpose entity in your jurisdiction? If offshore, where are special purpose entities typically located for securitisations in your jurisdiction? What are the forms that the special purpose entity would normally take in your jurisdiction and how would such entity usually be owned?

Securitisation vehicles are most commonly established in Australia as special purpose trusts, but can also be established as special purpose companies.

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Advantages to using an Australian trust include that (a) the Australian market is familiar with trust structures, and (b) governance of the trust is relatively easy to implement (for example, a manager can be appointed and allocated special duties and control rights).

Where structured as a special purpose trust, it is common for all or a majority of the trust units to be owned by the seller or a related entity of the seller.

The securitisation vehicle may be established offshore where, for example, debtors or receivables are located offshore.

7.4 Limited-Recourse Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) limiting the recourse of parties to that agreement to the available assets of the relevant debtor, and providing that to the extent of any shortfall the debt of the relevant debtor is extinguished?

Australian courts should generally give effect to a clause limiting the recourse of parties to specified assets provided that the contract itself is enforceable (and, in the case of a contract governed by the foreign law, that contract and the limited recourse clause are enforceable as a matter of the foreign law). However, please see question 1.2 and section 8 in relation to consumer contracts.

7.5 Non-Petition Clause. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) prohibiting the parties from: (a) taking legal action against the purchaser or another person; or (b) commencing an insolvency proceeding against the purchaser or another person?

Australian courts should generally give effect to a clause prohibiting a creditor from taking legal action or commencing an insolvency proceeding (subject to the corresponding provisos in question 7.4). However, please see question 1.2 and section 8 in relation to consumer contracts.

7.6 Priority of Payments "Waterfall". Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) distributing payments to parties in a certain order specified in the contract?

Yes, an Australian court should generally give effect to properly drafted contractual provisions which provide for the application of proceeds from the enforcement of security over the securitisation vehicle's assets, to the creditors bound by such provisions and entitled to such proceeds in a prescribed order (and, in the case of a foreign law-governed waterfall, on the assumption that the waterfall is enforceable under the relevant foreign laws). However, certain creditors have priority entitlements under Australian law which cannot be contracted out of in a priority waterfall. For example, liquidators are entitled to be paid their remuneration and expenses in realising assets in priority to secured creditors. Employees also have certain priority entitlements.

7.7 Independent Director. Will a court in your jurisdiction give effect to a contractual provision in an agreement (even if that agreement's governing law is the law of another country) or a provision in a party's organisational documents prohibiting the directors from taking specified actions (including commencing an insolvency proceeding) without the affirmative vote of an independent director?

As directors are under a duty to act in the best interests of a company and to prevent a company from insolvent trading, any contractual provision or provision in a company's organisational documents prohibiting a director from taking specified actions could be contrary to those duties. As a general principle, Australian courts will not allow directors to act in accordance with such a provision where those actions would otherwise be inconsistent with their duties as directors. In exceptional circumstances, Australian courts have given effect to such provisions where they are subject to a "fiduciary out", allowing a director to act contrary to the contractual provision if the actions of the director would be in breach of any duty owed to the company or unlawful.

7.8 Location of Purchaser. Is it typical to establish the purchaser in your jurisdiction or offshore? If in your jurisdiction, what are the advantages to locating the purchaser in your jurisdiction? If offshore, where are purchasers typically located for securitisations in your jurisdiction?

The same answer applies as for question 7.3.

8 Regulatory Issues

8.1 Required Authorisations, etc. Assuming that the purchaser does no other business in your jurisdiction, will its purchase and ownership or its collection and enforcement of receivables result in its being required to qualify to do business or to obtain any licence or its being subject to regulation as a financial institution in your jurisdiction? Does the answer to the preceding question change if the purchaser does business with more than one seller in your jurisdiction?

The NCCPA (see question 1.2) applies if credit is provided to consumers in the course of a business of providing credit carried on in Australia or as part of, or incidentally to, any other business of the credit provider carried on in Australia (including where a person engages in conduct that is intended to induce people in Australia to use the goods or services of the person or is likely to have that effect, whether or not the conduct would have that effect in other places as well).

Where credit is provided to consumers, certain persons (e.g., credit providers and lessors and persons exercising their rights or obligations), will require an Australian Credit Licence ("**ACL**") unless an exemption applies. In the first instance this includes the purchaser where the legal title is perfected, as the collection and enforcement of the receivables will be carrying on a business of being credit provider in Australia. An exemption is available to securitisation entities in certain circumstances if specified requirements are met, and other exemptions may be available in particular circumstances.

As noted above, different requirements under the CA will apply if the receivables are margin loans.

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In addition to the ACL requirements, an Australian financial services licence ("**AFSL**") may be required by certain securitisation participants (e.g., trustees and trust managers) under the CA unless an exemption applies. The jurisdictional test in relation to AFSLs is similar to the NCCPA requirements and would unlikely be avoided on the basis that the only business carried on in Australia was in relation to receivables.

Further, the CA also requires a foreign company to be registered with the Australian Securities and Investments Commission if it will "carry on business in Australia", which will depend on a number of factors including whether there is some repetition of commercial activities in Australia.

Where a foreign company has as its sole or principal business in Australia the borrowing or lending of money, or has certain assets in Australia, it may also have to register under data collection and reporting legislation.

8.2 Servicing. Does the seller require any licences, etc., in order to continue to enforce and collect receivables following their sale to the purchaser, including to appear before a court? Does a third-party replacement servicer require any licences, etc., in order to enforce and collect sold receivables?

A servicer will be exercising the rights and obligations of a credit provider and will therefore require an ACL. This applies whether the servicer is an original or replacement servicer.

Certain Australian states and territories also have separate debt collection legislation which requires debt collectors to be registered or licensed in those jurisdictions.

The servicer may also require an AFSL if the receivables involve financial services regulated under the CA, including insurance or margin loans.

8.3 Data Protection. Does your jurisdiction have laws restricting the use or dissemination of data about or provided by obligors? If so, do these laws apply only to consumer obligors or also to enterprises?

The *Privacy Act 1988* (Cth) ("**PA**") regulates how personal information can be collected, used and disclosed. It imposes ongoing standards in relation to personal information, including security and access obligations.

The PA only applies to information about individuals, but applies regardless of the consumer's purpose in entering into the receivable. It extends to personal information about individuals collected in relation to a corporate customer (e.g., directors or employees).

The PA also contains specific requirements that apply to credit information. This information is subject to tighter restrictions on how the information can be collected, used and disclosed.

Bankers also have a duty of secrecy to their customers which arises out of the relationship between banker and customer. This duty applies to both individuals and corporates.

In addition, an equitable duty of confidentiality applies to information of a confidential nature, and unauthorised use or disclosure may constitute a breach of this duty. Contracts may also impose confidentiality obligations and a breach may result in a breach of contract.

8.4 Consumer Protection. If the obligors are consumers, will the purchaser (including a bank acting as purchaser) be required to comply with any consumer protection law of your jurisdiction? Briefly, what is required?

The NCCPA will apply where a debtor or lessee is a relevant consumer. See further questions 1.2 and 8.1.

If the receivables are sold, the debtor will generally have the same rights against the purchaser as against the original credit provider for failures to comply with the contract disclosure, and certain conduct and fee restrictions under the NCCPA.

Other relevant legislation includes various consumer protections such as:

- provisions making certain unfair contract terms void; and
- prohibitions against unconscionable conduct and misleading and deceptive conduct.

Relevant legislation also contains "linked credit provider" provisions, under which credit providers and lessors can be responsible for the conduct of third parties (e.g., retailers) where the contract or lease has been entered into to finance goods or services offered by those third parties.

8.5 Currency Restrictions. Does your jurisdiction have laws restricting the exchange of your jurisdiction's currency for other currencies or the making of payments in your jurisdiction's currency to persons outside the country?

Regulations can be made to control the buying, borrowing, selling, lending or exchanging of foreign currency in Australia, but there are no such regulations currently in place.

The approval or authorisation of the Minister for Foreign Affairs is required for certain transactions involving dealings with assets in connection with persons or entities linked to terrorist activities or certain proscribed countries.

Other regulations generally prohibit dealing with certain "designated persons or entities" by directly or indirectly making assets (including shares and securities) available to or for their benefit without a permit, and our anti-money laundering legislation may prohibit the entering into of transactions with residents of prescribed foreign countries (although no countries are currently prescribed).

There are no operative exchange controls on the transfer of money out of Australia but reporting obligations may apply to certain transfers.

8.6 Risk Retention. Does your jurisdiction have laws or regulations relating to "risk retention"? How are securitisation transactions in your jurisdiction usually structured to satisfy those risk retention requirements?

There is currently no separate explicit risk retention requirement in Australia for securitisation transactions.

8.7 Regulatory Developments. Have there been any regulatory developments in your jurisdiction which are likely to have a material impact on securitisation transactions in your jurisdiction?

The Australian financial sector has been subject to significant regulatory reform over recent years. Some of the key recent changes are described below:

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- The insolvency laws in Australia have recently been amended to introduce a stay on the enforcement of certain rights during an administration, receivership or a creditors' scheme of arrangement to avoid an insolvent liquidation. Broad anti-avoidance provisions will apply. It has not yet been confirmed what exclusions will apply; however, it is currently anticipated that exclusions will be made for certain financial contracts.
- In February 2018, all organisations who have personal information security obligations under the PA will be required to notify individuals if their personal information has been subject to a data breach. Data breaches will only have reported to individuals if the breach is "notifiable" (i.e., is likely to result in "serious harm" to the individual).
- Small amount credit contracts and consumer leases may also be subject to stricter regulatory requirements. There is currently legislation before parliament which will require all small amount credit contract providers to document in writing that the contract is not unsuitable and ensure the contracts have equal repayment instalments. All small amount credit contracts will also be subject to statutory earnings protections such that repayments cannot exceed 10% of the consumer's net income. Consumer leases will be subject to increased responsible lending obligations, protected earnings requirements, new disclosure requirements, caps on fees and charges, and other requirements. Anti-avoidance rules will apply to both small amount credit contracts and consumer leases.
- Credit card providers may also have increased responsible lending obligations under the NCCPA. Under proposed new legislation, providers must conduct an enhanced unsuitability assessment before a credit card contract is entered into or any increase in credit limit is approved. Retrospective interest rate charges on interest free periods will be prohibited. The current draft of the legislation also increases regulation around credit limits. Providers will be unable to offer unsolicited credit limit increases and must make it easier for consumers to reduce their credit limit or terminate their credit card contract.
- APRA's powers have been broadened to allow it to make rules and issue directions relating to the lending activities of non-ADI lenders where it has identified material risks of instability in the Australian financial system. Directions powers and penalties will also be introduced for non-ADI lenders who contravene a direction from APRA. This will give APRA further control over entities who provide finance in Australia but are not considered to be conducting "banking business" under the Banking Act 1959 as they do not take deposits, and have therefore not previously been subject to direct regulation by APRA.

9 Taxation

9.1 Withholding Taxes. Will any part of payments on receivables by the obligors to the seller or the purchaser be subject to withholding taxes in your jurisdiction? Does the answer depend on the nature of the receivables, whether they bear interest, their term to maturity, or where the seller or the purchaser is located? In the case of a sale of trade receivables at a discount, is there a risk that the discount will be recharacterised in whole or in part as interest? In the case of a sale of trade receivables where a portion of the purchase price is payable upon collection of the receivable, is there a risk that the deferred purchase price will be recharacterised in whole or in part as interest? If withholding taxes might apply, what are the typical methods for eliminating or reducing withholding taxes?

Australia imposes withholding tax on, among other things, payments of interest or royalties from Australian residents to foreign resident recipients.

Whether Australian withholding tax will apply to payments, and the rate of withholding, will depend on:

- in the case of interest, whether the payments are interest, or in the nature of or in substitution for interest;
- in the case of royalties, whether the payment is regarded as a royalty for Australian tax purposes (which may include payments for the use of intellectual property and commercial or scientific equipment or information); and
- the country where the recipient is located.

The default rate of interest withholding tax in Australia is 10% and the default rate of royalty withholding tax in Australia is 30%. The rate may be reduced if the recipient is resident in a country with which Australia has a double tax treaty and the treaty limits the rate of withholding tax. Some treaties reduce the rate to nil in the case of interest withholding tax, and 5% in the case of royalty withholding tax.

For certain underlying receivables (e.g., certain notes), an exemption from interest withholding tax may be available if the underlying issue satisfies the public offer test. A company may satisfy the public offer test in a variety of ways, including offering the notes to 10 or more unrelated financiers or entities that carry on the business of investing in securities, or listing the notes on a stock exchange. There is no equivalent exemption for royalty withholding tax.

For the purposes of Australian interest withholding tax, there is a risk that any discount on a sale of trade receivables may be recharacterised as interest. The tax consequences of deferred payments will depend on the terms of the deferral (e.g., whether any contingencies are involved) and whether any part of the deferred payment is referable to or in substitution for interest.

After 31 December 2018, the U.S. Foreign Account Tax Compliance Act may require certain Australian obligors to withhold 30% tax from payments to certain non-compliant sellers or purchasers. Whether such withholding will apply will depend in part on the approach to "foreign passthru payments" to be developed by the U.S. Government, and any relevant treaties entered into or legislation implemented in other jurisdictions.

9.2 Seller Tax Accounting. Does your jurisdiction require that a specific accounting policy is adopted for tax purposes by the seller or purchaser in the context of a securitisation?

Australian taxation laws do not require a specific accounting standard to be adopted for securitisation. However, Australian accounting policies adopted by an entity can impact on the Australian tax treatment of the entity's income and outgoings in some situations. Specific provisions may apply to securitisation vehicles and in respect of financial transactions.

9.3 Stamp Duty, etc. Does your jurisdiction impose stamp duty or other transfer or documentary taxes on sales of receivables?

In Australia, stamp duty is imposed at the state and territory level on certain kinds of transactions or instruments. These stamp duty laws are not uniform in terms of which transactions or instruments are subject to duty, the rates of duty or the available exemptions. Up to eight separate sets of stamp duty laws can apply to a transaction. Generally, the location of the receivables and, in some cases, the related securities will determine which stamp duty laws need to be considered.

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Stamp duty issues that can arise in relation to a securitisation include on the transfer of receivables and on the granting of security, although exemptions can apply (for which the exact structure and drafting can be important).

9.4 Value Added Taxes. Does your jurisdiction impose value added tax, sales tax or other similar taxes on sales of goods or services, on sales of receivables or on fees for collection agent services?

Goods and services tax ("**GST**") in Australia is imposed at the rate of 10% of the GST-exclusive consideration for a taxable supply. The sale of receivables and related securities is not generally a taxable supply. However, the supply of collection agent services will generally be a taxable supply on which GST is payable by the supplier. In some circumstances, a securitisation vehicle may be entitled to claim back 75% of the GST payable by the service provider if the securitisation vehicle is registered for GST.

9.5 Purchaser Liability. If the seller is required to pay value-added tax, stamp duty or other taxes upon the sale of receivables (or on the sale of goods or services that give rise to the receivables) and the seller does not pay, then will the taxing authority be able to make claims for the unpaid tax against the purchaser or against the sold receivables or collections?

Australian tax law empowers relevant taxing authorities to collect tax debts (whether or not related to the relevant transaction) and other amounts owing to a recalcitrant taxpayer from third parties. This power generally applies where the third party owes or may later owe money to the taxpayer. In these circumstances, the relevant taxing authority is generally empowered to require the third party to pay the money directly to the taxing authority instead of to the taxpayer.

9.6 Doing Business. Assuming that the purchaser conducts no other business in your jurisdiction, would the purchaser's purchase of the receivables, its appointment of the seller as its servicer and collection agent, or its enforcement of the receivables against the obligors, make it liable to tax in your jurisdiction?

The purchaser's potential liability for Australian tax depends on its country of residence for tax purposes.

If the purchaser is resident in a country with which Australia has a double tax treaty, the purchaser should not be liable to Australian tax provided the purchaser does not have a permanent establishment in Australia. This may depend, amongst other things, on the terms of appointment of the seller as its agent in Australia. The terms of the treaty may also provide that particular income is taxable in Australia to a certain extent (e.g., withholding tax on interest).

If the purchaser is resident in a country with which Australia does not have a double tax treaty, the purchaser should only be liable for Australian tax on Australian sourced income. This is determined by reference to the nature of the income and relevant circumstances. In this respect, income that is subject to Australian withholding tax (e.g., interest) is not otherwise assessable in Australia.

9.7 Taxable Income. If a purchaser located in your jurisdiction receives debt relief as the result of a limited recourse clause (see question 7.3 above), is that debt relief liable to tax in your jurisdiction?

Australian commercial debt forgiveness ("**CDF**") provisions operate to claw back the tax benefit a debtor receives when a commercial debt owed by the debtor is forgiven.

In broad terms, a debt is a "commercial debt" if interest paid on the debt is *prima facie* allowable as a deduction to the debtor. A debt is "forgiven" where the obligation to pay is extinguished.

The debtor's deductible revenue losses, or other tax benefits and attributes, are reduced by the forgiven amount (taking into account certain adjustments). However, the provisions do not result in tax necessarily being payable by the debtor.

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- Law Firm of the Year – Banking & Finance, *Best Lawyers* 2018.
- Banking Law Firm of the Year, *ALB China* Law Awards 2016 and 2017.
- Law Firm of the Year – *KangaNews* Awards 2017 (11 consecutive years).
- Banking and Finance Firm of the Year, *China Law and Practice* Awards 2017.
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