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1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your jurisdiction ratified?

Currently, Australia has 15 bilateral investment treaties (**BITs**) in force with the following countries: Argentina; China; the Czech Republic; Egypt; Hungary; Laos; Lithuania; Pakistan; Papua New Guinea; the Philippines; Poland; Romania; Sri Lanka; Turkey; and Uruguay.

Australia has entered into bilateral free trade agreements (**FTAs**) with the following countries: Chile; China; Hong Kong; India; Indonesia; Japan; the Republic of Korea; Malaysia; New Zealand; Peru; Singapore; Thailand; the United Kingdom; and the United States of America.

Australia also is a party to the ASEAN–Australia–New Zealand Free Trade Agreement (**AANZFTA**) (with: Brunei Darussalam; Cambodia; Indonesia; Laos; Malaysia; Mayanmar; New Zealand; the Philippines; Singapore; Thailand; and Vietnam), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) (with: Brunei Darussalam; Canada; Chile; Japan; Malaysia; Mexico; Peru; New Zealand; Singapore; and Vietnam), and the Pacific Agreement on Closer Economic Relations Plus (**PACER Plus**) (with: Cook Islands; Kiribati; New Zealand; Niue; Samoa; Solomon Islands; Tonga; noting that Nauru and Vanuatu have signed the agreement, but have not yet ratified it).

On 4 February 2016, Australia signed the Trans-Pacific Partnership Agreement (**TPP**), alongside Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam. After the United States of America indicated its intention to withdraw from the TPP in January 2017, Australia participated in renegotiating the agreement and the CPTPP entered into force on 30 December 2018.

In January 2022, Australia also became party to the Regional Comprehensive Economic Partnership Agreement (**RCEP**) (with: Brunei Darussalam; Cambodia; China; Indonesia; Japan; Laos; Malaysia; New Zealand; the Republic of Korea; the Philippines; Singapore; Thailand; and Vietnam).

1.2 What bilateral and multilateral treaties and trade agreements has your jurisdiction signed and not yet ratified? Why have they not yet been ratified?

Currently, the only multilateral trade agreement signed but not in force is the TPP, which has been replaced by the CPTPP (as discussed in question 1.1).

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Australia has a model Investment Promotion and Protection Agreement (**IPPA**) text. The IPPA provides a clear set of obligations relating to the promotion and protection of investments and takes full account of each party's laws and investment policies. The model IPPA text was adopted, for example, in the Australia–Egypt IPPA, the Australia–Uruguay IPPA and the Australia–Lithuania IPPA.

The Australian Government is conducting a review of its older BITs to align them with its modern treaties. The review commenced in July 2020 and is set to unfold over a four-year period. The Australian Government has received several submissions and continues to welcome submissions for the purposes of its review. The Government is considering a range of options in respect of each of its existing treaties including a full renegotiation, an amendment, the issue of unilateral or joint interpretative notes, and the replacement of the BIT with an FTA chapter. A new model BIT may also be considered.

1.4 Does your jurisdiction publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Presently, Australia does not appear to publish diplomatic notes with other States. It is noted, however, that as part of its review of Australia's BITs, the Australian Government is considering issuing unilateral or joint interpretative notes.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Australian Government has published high-level commentaries concerning the intended meaning of a small number of FTAs. For example, the Australian Government has published Australian Guides to the AANZFTA, Australia–United States Free Trade Agreement (**AUSFTA**) and Thailand–Australia Free Trade Agreement, which outline the obligations contained in the FTAs and provide a general commentary on their contents. The Australian Government has also published resources such as chapter summaries and fact sheets to aid a practical understanding of specific FTAs from a business perspective.

2 Legal Frameworks

2.1 Is your jurisdiction a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Australia is a party to the New York Convention, the Washington Convention and the Mauritius Convention.

Australia ratified the New York Convention on 26 March 1975, and it came into force on 24 June 1975. The *International Arbitration Act 1974* (Cth) (**IAA**) gives effect to Australia's obligations under the New York Convention (section 2D(d), Schedule 1).

Australia ratified the Washington Convention on 2 May 1991, and it came into force on 1 June 1991. The IAA gives effect to Australia's obligations under the Washington Convention (section 2D(f), Schedule 3).

Australia ratified the Mauritius Convention on 17 September 2020, and it came into force on 17 March 2021.

In October 2018, the IAA was amended by the *Civil Law and Justice Legislation Amendment Act 2018* (Cth) to implement aspects of the Mauritius Convention. Specifically, section 22(3) of the Act carves out prohibitions on the disclosure of confidential information where the *United Nations Commission on International Trade Law* (**UNCITRAL**) *Rules on Transparency in Treaty-based Investor-State Arbitration* (**Transparency Rules**) apply to an arbitration. The parties to arbitral proceedings and the arbitral tribunal itself are no longer precluded from disclosing confidential information in relation to an arbitration subject to the Transparency Rules.

2.2 Does your jurisdiction also have an investment law? If so, what are its key substantive and dispute resolution provisions?

The foreign investment legislative framework in Australia comprises the *Foreign Acquisitions and Takeovers Act 1975* (**FATA**), the *Foreign Acquisitions Takeovers Fees Impositions Act 2015* and their regulations. This legislative framework is supplemented by Australia's Foreign Investment Policy (**Policy**) and guidance notes. The substantive provisions of the FATA and the Policy address the formal admission of foreign investment (discussed in question 2.3 below).

The FATA continues to be refined through amendments. Effective on 1 January 2021, Australia's foreign investment regime was amended by the *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth) and *Foreign Acquisitions and Takeovers Fees Imposition Amendment Act 2020* (Cth). The changes affect companies seeking foreign investment approval, including for investments in a "national security business" (such as a business involved in or connected with a "critical infrastructure asset").

Consistent with the balance of the investment market in Australia, foreign investors are regulated by the Australian Securities and Investments Commission (**ASIC**). ASIC is an independent Commonwealth Government body responsible for (among other things) registering and ensuring companies, schemes and various individuals and entities meet their obligations under the *Corporations Act 2001* (Cth). Additionally, all dealings must be conducted in accordance with the *Corporations Act 2001* (Cth) with regard to: insider trading; market manipulation; disclosure of shareholdings; takeovers; acquisitions; and capital raisings.

The FATA (and its associated regulations) does not contain dispute resolution provisions.

2.3 Does your jurisdiction require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Under the FATA, foreign investment must receive approval from the Commonwealth Government's Treasurer in certain circumstances that involve a "foreign person" as defined by section 4 of the FATA.

A foreign person includes:

- a natural person who is not ordinarily a resident in Australia;
- a corporation in which one foreign person (or two or more foreign persons together) or a foreign Government holds a substantial interest; or
- the trustee of a trust estate in which one foreign person or corporation (or two or more foreign persons or corporations together) holds a substantial interest.

Whether a proposed foreign investment requires approval will depend upon the type of investor, the type of investment, the industry sector and also the value of the proposed investment. For example, there is greater scrutiny on investments by "foreign government investors" (as compared to foreign individuals or entities). Typical types of transactions requiring approval include real estate, agricultural, banking or business investments, and investments impacting upon Australia's national security.

In deciding whether to approve a proposed foreign investment, the Treasurer is advised by the Foreign Investment Review Board (**FIRB**).

The FATA itself does not prescribe criteria for approving foreign investment proposals. Rather, the FATA empowers the Treasurer to veto foreign investment proposals that are contrary to the national interest (FATA, section 67). The Policy is instructive as regards what is relevant to the national interest. The Treasurer and FIRB start from the general presumption that foreign investment is beneficial (Policy, page 7). Matters that are relevant to the national interest include, for example, competition, impact on the economy, the investor's character and national security.

The FATA also requires compulsory notification of certain business activities that are considered to be significant (or notifiable) actions, including regarding certain investments that may concern national security. One of the tests used is a monetary screening threshold test (indexed annually). The threshold is met when either the amount paid for an interest, or the value of the entity or the asset, exceeds the threshold amount (depending on the type of transaction).

Other business activities are considered voluntary notice activities (i.e., the foreign person can choose to notify but does not have to). The benefit of giving voluntary notice is that if the Treasurer issues a notice of "no objection", the Treasurer can no longer make orders in relation to the proposal.

Certain persons and proposals are exempt from the notification requirements; however, as strict penalties apply for breaches of the FATA, foreign investors in doubt should seek legal advice.

On 1 July 2023, a new Register of Foreign Ownership of Australian Assets (**Register**) came into effect under the FATA, with corresponding obligations on foreign persons to report ownership of Australian assets. The Australian Taxation Office (**ATO**) administers the Register, and all required reporting must occur via the ATO's online notification system.

On 1 May 2024, the Australian Treasurer announced changes to the implementation of the FIRB regime (but not the law itself), including the streamlining of applications from repeat

investors and increasing scrutiny on applications for transactions in sensitive sectors or with "high risk" characteristics.

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

The approach of Australia's courts to treaty interpretation is, subject to contrary legislation, generally consistent with the approach in international law reflected by articles 31, 32 and 33 of the *Vienna Convention on the Law of Treaties* (**VCLT**).

In *CCDM Holdings, LLC v. Republic of India (No 3)* [2023] FCA 1266, the Federal Court of Australia (**Federal Court**) was asked to consider whether India's ratification of the New York Convention constituted a waiver of foreign State immunity in the context of enforcement of an award issued in an arbitration under a BIT between India and Mauritius ([27]). In considering that question, the court referred to articles 31 and 32 of the VCLT as "the applicable principles of interpreting an international convention or treaty". In that case, India submitted that the New York Convention only applied to arbitral awards to which a State is a party where such awards involve a commercial or private law dispute. The Court rejected this submission by reference to the VCLT requirement to give primacy to the written text of the Convention, noting that there was no support for this interpretation in the context, objects and purpose of the New York Convention ([61]). The Court also considered preparatory material of the New York Convention, as permitted under article 32 of the VCLT, and held that those materials supported the conclusion that the State parties expressly agreed *not* to limit the enforceability of arbitral awards against States to only "commercial disputes" ([83]). The Court also noted that, as the language of the New York Convention was clear, it would be incorrect to use the preparatory material to interpret the treaty in a way that "create[s] ambiguity where none appears" from the text itself ([85]).

The Federal Court also noted that, although the VCLT post-dates the New York Convention, it is still applicable to the interpretation of the New York Convention on the basis that the VCLT is declaratory of customary international law, as determined by the High Court of Australia in *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11. The customary nature of the VCLT was also recognised in *Carmichael Rail Network Pty Ltd v. BBC Chartering Carriers GMBH & Co KG & Anor* [2024] HCA 4, which required the interpretation of the Australian Hague Rules to determine the validity of an arbitration agreement. The Australian Hague Rules are an amended version of the Hague-Visby Rules, which predate the VCLT. Despite this, relying on *Infrastructure Services*, the Court held that the Australian Hague Rules must be interpreted in accordance with the VCLT ([30]).

Further recent and notable cases include:

- *Tickle v. Giggle for Girls Pty Ltd (No 2)* [2024] FCA 960: The Federal Court considered whether "Giggle for Girls" had discriminated against a transgender woman under the *Sex Discrimination Act 1984* (Cth) (**SDA**) by excluding her from an app which was described as a "women-only safe space". As part of its defence, Giggle for Girls argued that the SDA provisions relied upon by Tickle were invalid because Parliament did not have the power to enact the law. The Court ultimately held that the SDA provisions fell under the Commonwealth's "external affairs power" because they were based on Australia's treaty obligations under article 26 of the International Covenant on Civil and Political Rights (**ICCPR**), which provides that "law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, […] birth or other status". The Court held that the applicable principles to interpreting treaties include articles 31 and 32 of the VCLT ([158]) and referred to the fact that recourse can be made to supplementary means of interpretation to confirm the meaning or determine the meaning that is otherwise ambiguous ([159]). It was accepted that convention committees' interpretive statements must be given "[c]onsiderable weight" (at [159]). While the Court noted that it is unclear how this approach fits with the VCLT, the Court ultimately relied on communications from the Human Rights Committee to support its conclusion that the words "other status" under article 26 of the ICCPR include gender identity ([187]).
- *Barngarla Determination Aboriginal Corp RNTBC v. Minister for Resources* [2023] FCA 809: The Federal Court considered a challenge to a ministerial declaration of an Aboriginal site as the site for a national radioactive waste facility. One of the bases for challenge was that a provision in the *National Radioactive Waste Management Act 2012* (Cth), giving the Minister power to make the declaration, was inconsistent with provisions of the 1997 *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*, when interpreted pursuant to article 31.3(c) of the VCLT and with regard to rules of customary international law pertaining to indigenous rights. Applying article 31.3(c) of the VCLT, the Federal Court underscored that its provisions were "not intended to operate in a way that alters the meaning of a [*sic*] contracting parties' legally binding obligations by reference to non-binding norms or aspirations" ([369]). The Court also agreed with the respondents' submission that article 31.3(c) of the VCLT "does not allow a rule of customary international law to be applied in substitution of a treaty provision" ([370]) – although, this was said to be distinct from article 31.3(c) of the VCLT permitting customary international law to be deployed when construing the meaning of an expression or phrase in a treaty. In this regard, the Court observed that article 31.3(c) of the VCLT "is but one interpretative rule among several, all directed to the proper interpretation of the chosen text" ([345]). The Federal Court also considered the requirements to establish the existence of customary international law that may aid in the interpretation of treaties, and accepted that "practice relating to treaties (including their interpretation) will not be relevant unless that practice specifically indicates that the treaty rules are also accepted as rules of customary international law" ([408]).

3.2 Has your jurisdiction indicated its policy with regard to investor-state arbitration?

The current Australian Government's policy is to consider ISDS provisions on a case-by-case basis.

On 14 November 2022, the Minister for Trade and Tourism stated that the Australian Government "will not include investor-State dispute settlement in any new trade agreements", to preserve the Government's ability to govern in the national interest.

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc., addressed or intended to be addressed in your jurisdiction's treaties?

None of Australia's current treaties contain anti-corruption provisions save for the CPTPP, which contains provisions that permit a State from taking measures necessary to eliminate bribery and corruption in international trade, and the Australia–UK FTA, which contains a chapter on transparency and anti-corruption.

Australia's more recent FTAs:

- recognise a State's right to adopt measures necessary to protect the environment or conserve natural resources;
- contain obligations that reflect each State's commitment to addressing climate change (Australia–UK FTA);
- expressly exclude procedures for the resolution of disputes provided for in other investment agreements from the ambit of the most favoured nation (**MFN**) clause;
- protect assets owned or controlled "directly or indirectly" by an investor of a party; and
- provide for minimum standards of transparency requiring prompt publication of laws, regulations, administrative rules, procedures and rulings relating to matters covered by the treaty.

Australia also ratified the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* on 17 September 2020, by means of which Australia consents to the application of the UNCITRAL Transparency Rules to investment treaties concluded before 1 April 2014.

3.4 Has your jurisdiction given notice to terminate any BITs or similar agreements? Which? Why?

Australia has not given notice to terminate any BITs or similar agreements. All Australian BITs that have been terminated were terminated via consent, with the exception of the India–Australia BIT, which was unilaterally terminated by India in March 2017. All terminated Australian BITs have been replaced by new BITs or FTAs.

4 Case Trends

4.1 What investor-state cases, if any, has your jurisdiction been involved in?

Until 2023, Australia was a party to only one reported investor-State arbitration that ran its course. Two further cases against Australia were threatened or notified, but were ultimately not pursued. In 2023, at least one further case was commenced against the Australian Government.

- In 2012, Philip Morris commenced UNCITRAL arbitral proceedings against Australia under the Hong Kong–Australia BIT in response to Australia's implementation of tobacco plain-packaging laws. Ultimately, the tribunal dismissed Philip Morris' claims for jurisdictional reasons.
- In late 2015, US shareholders in NuCoal, an Australian mining company, expressed their intention to pursue claims under several FTAs, including the AUSFTA, against Australia over legislation enacted by the New South Wales Government that cancelled the company's mining licence without compensation. In November 2016, another US investor, power generation company APR Energy, notified a dispute against Australia under the AUSFTA. Broadly, the dispute related to the seizure of the claimant investor's power turbines by one of Australia's major private banks. In neither case was arbitration formally commenced.
- In 2023, Zeph Investments Pty Ltd (**Zeph**), the Singaporean parent company of Australia-incorporated Mineralogy Pty Ltd (**Mineralogy**), commenced UNCITRAL arbitral proceedings against Australia under the AANZFTA for alleged breaches over the passing of legislation by the Western Australian Parliament, which unilaterally amended an agreement between the State of Western Australia and Mineralogy, with the effect of extinguishing rights and preventing Zeph's ultimate owner, Clive Palmer, from seeking compensation in an arbitration over a Pilbara iron ore project. The first hearing (on preliminary objections) in this case was held in September 2024.
- In 2023, Zeph brought a second claim against Australia under AANZFTA arising from the Queensland State government's decision "to grant an environmental offset to a direct competitor" of Zeph over land in which Mr Palmer's Australian company, Waratah Coal Pty Ltd (owned, indirectly, by Zeph), held certain mineral exploration permits in the Galilee Basin of Queensland.
- In 2023, Zeph filed a third notice of intention to commence arbitration against Australia under the Singapore–Australia FTA. The claim is said to concern a decision by the Queensland Land Court not to recommend to the relevant Minister the approval of a coal project proposed by Waratah Coal Pty Ltd (a company indirectly owned by Zeph).

In terms of Australian claimants, since 2010 a number of arbitrations have been registered by investors whose home country is Australia. Known arbitrations have been brought against the Dominican Republic, Egypt, Georgia, India, Indonesia, Mongolia, Pakistan, Papua New Guinea, Poland and Thailand. Several proceedings remain pending. Two disputes have been decided in favour of the investor, and one in favour of the host State. The most recent claim by an Australian investor is the claim brought by TMA Group, a printing company, against the Philippines concerning paper production services. Details of the claim have not been disclosed (*TMA Australia Pty Ltd and others v. Republic of the Philippines* (ICSID Case No. ARB/24/41)). However, the claim is said to follow a failed US $600 million contract claim made by TMA Group and its local subsidiary against the Philippine Charity Sweepstakes Office (PCSO) arising out of PCSO's suspension of a joint venture agreement between it and TMA Australia to construct and operate a plant designed to produce thermal-coated paper and other products in the Philippines.

4.2 What attitude has your jurisdiction taken towards enforcement of awards made against it?

There have been no awards made against Australia.

4.3 In relation to ICSID cases, has your jurisdiction sought annulment proceedings? If so, on what grounds?

There is a lack of case law involving Australia on which to make any relevant observations. However, recent case law in Australia has clarified principles relevant to the recognition,

enforcement and execution of awards against States. This is discussed in question 7.3 below.

4.4 Has there been any satellite litigation arising, whether in relation to the substantive claims or upon enforcement?

There is a lack of case law involving Australia on which to make any relevant observations. However, recent case law in Australia has clarified principles relevant to the recognition, enforcement and execution of awards against States. This is discussed in question 7.3 below.

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

There is a lack of case law involving Australia on which to make any relevant observations. However, recent case law in Australia has clarified principles relevant to the recognition, enforcement and execution of awards against States. This is discussed in question 7.3 below.

5 Funding

5.1 Does your jurisdiction allow for the funding of investor-state claims?

In Victoria, New South Wales, South Australia, Tasmania, Western Australia and the Australian Capital Territory, third-party funding has been legalised. The High Court in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* (2006) 229 CLR 386 held that litigation funding was not contrary to public policy or an abuse of process (at least where maintenance and champerty had been abolished by statute). This decision is applicable to third-party funding of other dispute resolution proceedings, including arbitral proceedings.

The position in Queensland and Northern Territory is not as clear, as maintenance and champerty have not been abolished in these jurisdictions. However, the Queensland Court of Appeal's decision in *Murphy Operator Pty Ltd & Ors v. Gladstone Ports Corporation Ltd* (2020) 384 ALR 725 provides some guidance as to how these jurisdictions might consider the torts. At first instance, in *Murphy Operator Pty Ltd & Ors v. Gladstone Ports Corporation Ltd* [2019] 3 Qd R 255, the Supreme Court of Queensland held that in order for a third-party funding agreement to be champertous, it must not only provide for a percentage interest in the proceeds of the litigation as a condition on the provision of funds, but also an entitlement of the funder to control the litigation by selecting and appointing counsel. Having regard to the historical evolution of the tort of maintenance, the Queensland Court of Appeal held that unless an aspect of public policy renders the third-party funding improper, the law of maintaining has now been subsumed in the law of abuse of process ([82]). The Court observed that a degree of control maintained by litigation funders in expensive and complex litigation is inevitable and found that as long as the solicitor/client relationship is preserved and the funding is not contrary to public policy, the funding will be permitted.

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

There is no case law directly relating to the funding of investor-State claims.

5.3 Is there much litigation/arbitration funding within your jurisdiction?

The Australian litigation funding market, measured by revenue, is estimated to reach A$199.3 million in 2024, and this figure is expected to continue growing to a total of A$203.8 million by 2024–2025 (IBISWorld Report, April 2024). A significant proportion of litigation funding relates to consumer protection lawsuits, investor-related lawsuits, industrial relations lawsuits and environmental lawsuits. Funding claims being referred to arbitration in Australia is occurring more frequently, albeit still less often than litigation funding.

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

In other countries, claims have been initiated against host States for allegedly targeting officers and directors of foreign investors through unlawful criminal proceedings. In these instances, claimants have relied on standard treaty provisions such as national treatment and minimum standard of treatment, which exist in many of Australia's FTAs. For example, in the Singapore–Australia FTA, the minimum standard of treatment includes an express "obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings". Therefore, although the provisions have not been tested in the context of Australian treaties in this way, it is conceivable that similar provisions could be invoked to call into question a criminal investigation or domestic judgment.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

International arbitrations in Australia are governed by the IAA, which gives effect to the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**). Where the Model Law applies, national court intervention is limited to matters permitted by the Model Law (article 5). Permissible court interventions include the usual matters such as assistance with the appointment of an arbitral tribunal, providing parties with interim measures of protection, assistance in the taking of evidence, and determining whether an award can be set aside, recognised and enforced.

In contrast with the Model Law, arbitrations under the Washington Convention are self-contained; that is, all procedural issues are resolved by the International Centre for Settlement of Investment Disputes (**ICSID**) and the arbitral tribunals themselves. For example:

- the Chairman of ICSID's Administrative Council is responsible for appointing arbitrators where the parties cannot agree (Washington Convention, article 38; Rules of Procedure, article 4);

- the tribunal can order provisional measures if necessary (Washington Convention, article 47; Rules of Procedure, article 39); and
- ICSID, the tribunal, and *ad hoc* committees can (upon a party's application) interpret, revise, stay or annul awards (Washington Convention, articles 50–52; Rules of Procedure, articles 50–55).

Accordingly, the Australian courts' role in relation to ICSID arbitrations is limited to recognising and enforcing awards (Washington Convention, article 54; IAA, section 35).

6.3 What legislation governs the enforcement of arbitration proceedings?

The IAA governs the recognition and enforcement of arbitral awards (giving the Washington Convention the force of law in Australia; section 32). Part. IV of the IAA provides for the recognition and enforcement of ICSID awards. Arbitral awards made under the UNCITRAL Model Law are enforced under Part. II of the IAA.

6.4 To what extent are there laws providing for arbitrator immunity?

Section 28 of the IAA provides arbitrators with immunity for anything done or omitted to be done in good faith in his or her capacity as arbitrator.

6.5 Are there any limits to the parties' autonomy to select arbitrators?

Under the UNCITRAL Model Law, the principle of party autonomy enables the parties to select party-appointed arbitrators and determine how a tribunal is to be constituted (subject to the requirements of impartiality and independence). No requirement of nationality applies (article 11(1)).

In respect of ICSID arbitrations, the requirements of the Washington Convention apply:

- arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute, unless the sole arbitrator or each individual member of the tribunal is appointed by party agreement (article 39); and
- if a party appoints an arbitrator from outside the Panel of Arbitrators, the arbitrator must be "of high moral character and recognised competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment" (articles 14(1) and 40(2)).

Parties should also be aware of any limits imposed by the relevant treaty or agreement.

6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Under the IAA, if an appointment procedure is agreed by the parties and either a party fails to act as required by the procedure, the parties or arbitrators are unable to reach an agreement expected under the procedure, or a third party fails to perform any function under the procedure, any party may then request a State or Territory Supreme Court (depending on the place of arbitration) or prescribed authority to take necessary measures to apply the default procedure for the appointment of arbitrators (Model Law, article 11(4)).

In respect of ICSID arbitrations, the default procedure in the Washington Convention has the force of law in Australia. If the tribunal has not been constituted within 90 days after the notice of arbitration or any other agreed period, at the request of either party and after consultation, the President of the World Bank shall appoint the arbitrator or arbitrators not yet appointed (Washington Convention, article 38).

6.7 Can a domestic court intervene in the selection of arbitrators?

Generally, a domestic court will only intervene where the parties are unable to agree on the arbitrator or the method of appointment fails.

However, arbitrations conducted under the Washington Convention are effectively insulated from the interference of domestic courts. The Washington Convention provides a mechanism for tribunal constitution where the parties are unable to agree on the number of arbitrators or the method of appointment (article 37(2)(b)), or where the tribunal has not been constituted within time (article 38). Similarly, the Washington Convention provides a mechanism in respect of the proposed disqualification of an arbitrator (article 56).

For non-ICSID arbitrations, if an appointment procedure is agreed by the parties and it fails, any party may request a State or Territory Supreme Court (depending on the legal seat of arbitration) or prescribed authority to take the necessary measures to apply the default procedure for the appointment of arbitrators (Model Law, article 11(4)).

6.8 Are there any other key developments in the past year in your jurisdiction related to the relationship between international arbitration tribunals and domestic courts?

The High Court recently handed down judgment in *Carmichael Rail Network Pty Ltd v. BBC Chartering Carriers GMBH & Co KG & Anor* [2024] HCA 4; a decision that further cements Australia's pro-arbitration stance. The case concerned arbitration proceedings commenced by BBC against Carmichael in relation to the delivery by BBC of steel rails from South Australia to Queensland, which were found to be damaged in transit and consequently unusable. The delivery was the subject of a bill of lading issued by BBC to Carmichael, which contained an English choice of law clause and specified that any disputes related to the bill of lading were to be determined by arbitration before the London Maritime Arbitrators Association and seated in London. Despite the arbitration clause, Carmichael brought a claim for damages before the Federal Court of Australia. BBC then sought a stay of the Federal Court proceedings and referral to arbitration.

Carmichael argued that the choice of law clause and the arbitration agreement were unenforceable because they contravened:

- the *Carriage of Goods by Sea Amendment Act 1997* (Cth), which states that the Australian Hague Rules apply to contracts for the carriage of goods by sea between ports in Australia; and
- the Australian Hague Rules because an English tribunal's interpretation of the Hague Rules would lessen the carrier's liability.

Carmichael further argued that the need to adduce expert evidence on Australian law in any London-seated arbitration

before an English tribunal would increase the time and costs of resolving the dispute. In response, BBC gave an undertaking to the Federal Court that it would admit that the law governing the bill of lading is the Australian Hague Rules as applied under Australian law.

The Federal Court stayed the proceedings in favour of arbitration, finding that any risk of lessening the carrier's liability because of the application of English law was mitigated by BBC's undertaking and the Court's declaration as to the law applicable to interpretation of the bill of lading. The Federal Court also dismissed Carmichael's arguments regarding additional costs of arbitration as being irrelevant.

On appeal, the High Court approved the Federal Court's decision and held that Carmichael's concerns about the approach of an English tribunal were speculative and did not establish that, on the balance of probabilities, the carrier's liability would be lessened. Notably, the High Court held that Carmichael's concerns about cost and inconvenience of the London seated arbitration did not constitute a valid reason for refusing to enforce the arbitration agreement, as they did not go to BBC's liability.

Additionally, Australia continues to establish itself as a pro-arbitration jurisdiction in the context of recognition and enforcement of investment arbitration awards. As mentioned in section 3.1, the Federal Court held in *CCDM Holdings, LLC v. Republic of India (No 3)* [2023] FCA 1266 that India had submitted to the jurisdiction of the Court within the meaning of the *Foreign State Immunities Act 1985* (Cth) (**FSIA**) by becoming party to the New York Convention. The case concerned the recognition and enforcement of an award made against India following the Indian government's annulment of an agreement concerning the lease of space segment capacity on two Indian satellites between Devas Multimedia Private Limited (an Indian company to which three Mauritian persons were shareholders) and Antrix Corporation Ltd (an Indian State-owned enterprise). The Mauritian shareholders commenced arbitration against India under the India–Mauritius BIT and the arbitration was administered as an *ad hoc* arbitration under the UNCITRAL Arbitration Rules. The Court applied the principles adopted in the High Court's decision in *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 and held that India's ratification of the New York Convention constituted submission to the jurisdiction of the Court under FSIA "by way of clear and unmistakeable necessary implication".

A further recent example of Australian courts adopting a pro-arbitration approach in deference to international arbitration tribunals arose in the Queensland Supreme Court decision of *SFP Events Pty Ltd v. Little Swamp II, Inc & Anor* [2024] QSC 132. The First Respondent applied for a stay of proceedings and referral to arbitration pursuant to section 7 of the IAA. The Court accepted that it should give effect to the competence-competence principle, because to do so accords with the objects of the Act. Accordingly, the Court determined that it was not necessary for it to decide the question of whether a binding arbitration agreement existed between the parties. Rather, applying the reasoning of O'Callaghan J in *Degroma Trading Inc v. Viva Energy Australia Pty Ltd* [2019] FCA 649, Treston J found that the "*correct approach*" in the context of the doctrine of separability is that the Court need only be satisfied on a *prima facie* basis that an arbitration agreement exists, acknowledging that "*the competence-competence principle is wide enough to permit the arbitral tribunal to decide any question of jurisdiction, including whether the arbitration agreement came into existence*". Being so satisfied in this case, Her Honour made an order to stay the whole of the proceeding, enabling the arbitration to proceed in Los Angeles, California.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

Article 48(2) of the Washington Convention requires awards to be in writing and signed by the arbitrators. The award must also state the reasons upon which it is based (article 48(3)).

7.2 On what bases may a party resist recognition and enforcement of an award?

An ICSID award is binding and not subject to any appeal or any other remedy otherwise than in accordance with the Washington Convention.

Under article 54 of the Washington Convention, a State must enforce an ICSID award as if it were the final judgment of a court in that State. The Federal Court and the Supreme Courts of the States and Territories are designated for the purposes of article 54. A party cannot resist, and a court cannot deny, enforcement on grounds of public policy. Article 55 provides that article 54 of the Washington Convention is not to be construed as derogating from the law in force of any Contracting State relating to foreign sovereign immunity.

The grounds for resisting enforcement of an award under the New York Convention do not apply to an ICSID award (IAA, section 34).

For non-ICSID awards, the grounds for resisting recognition and enforcement under article V of the New York Convention apply.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Sovereign immunity from jurisdiction and execution is provided for under the FSIA. It provides for limited State immunity.

A foreign State is generally immune from the jurisdiction of the Australian courts unless it has submitted to the court's jurisdiction (section 10), or the proceedings concern the foreign State's commercial activities (section 11).

The property of a foreign State will generally not be subject to any order of the Australian courts for the enforcement of an arbitral award unless the foreign State has waived immunity (section 31) or the property is commercial (section 32).

The High Court considered these provisions in *Firebird Global Master Fund II Ltd v. Republic of Nauru* (2015) 258 CLR 31. A private fund, Firebird, held bonds issued through the Nauru Finance Corporation (**NFC**) and guaranteed by the Republic of Nauru. NFC defaulted and Nauru refused to guarantee the debt owing. Firebird obtained judgment against Nauru in the Tokyo District Court. Firebird then sought to register that judgment in Australia and to freeze Nauru's Australian bank accounts. The High Court held that Nauru was immune to any freezing order over its Australian bank accounts because Nauru used those accounts for non-commercial purposes. Although registered, the judgment against Nauru was practically toothless.

In *Lahoud v. The Democratic Republic of Congo* [2017] FCA 982, the Federal Court held that the Democratic Republic of Congo

was not immune because it had submitted to the jurisdiction of the ICSID tribunal by ratifying the Washington Convention.

This topic has received increased attention in Australia in recent years. In *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11, the High Court found that Spain and other Contracting States to the Washington Convention cannot resist "recognition" and "enforcement" of awards by pleading foreign State immunity. The High Court found that a waiver by agreement for the purposes of section 10(2) of the FSIA can be inferred even if an international agreement does not expressly use the word "waiver", provided that the implication is clear from the words used and the context. Applying this test, the High Court found that Spain's waiver for the purposes of section 10(2) was "unmistakable", and arose out of Spain's agreement to articles 53–55 of the Washington Convention.

The High Court also helpfully clarified the meaning of the terms "recognition", "enforcement" and "execution" in articles 53–55 of the Washington Convention. The Court adopted the definitions used in the recently approved version of the proposed Restatement of the Law: The US Law of International Commercial and Investor-State Arbitration:

- Recognition is the court's "determination … that an international arbitral award is entitled to be treated as binding", and involves the court's "acceptance of the award's binding character and its preclusive effects".
- Enforcement is "the legal process by which an international award is reduced to a judgment of a court that enjoys the same status as any judgment of that court".
- Execution is "the means by which a judgment enforcing an international arbitral award is given effect. The execution process commonly involves measures taken against the property of the judgment debtor by a law-enforcement official … acting pursuant to a writ of execution".

Similarly, as mentioned in section 6.8, in *CCDM Holdings, LLC v. Republic of India (No 3)* [2023] FCA 1266, the Federal Court held that India had waived foreign State immunity from recognition and enforcement of arbitral awards by becoming a party to the New York Convention. The fact that India ratified the New York Convention meant that it had submitted to the jurisdiction of Australian courts because the New York Convention requires contracting States to recognise arbitral awards as binding and enforce them within their jurisdiction, with no caveat for awards being enforced against States. The Court also held that the validity of the arbitration agreement is not a question for determination in the context of an argument about the waiver of foreign State immunity; rather, it is a matter to be determined together with any other grounds for resisting recognition and enforcement under article V of the New York Convention. This judgment was appealed by India and heard in May 2024.

This recent line of case law has already led to additional cases being brought before Australian courts. In May 2024, the Federal Court heard oral argument in recognition and enforcement proceedings launched by 9Ren, NextEra, RReef Infrastructure and Watkins against Spain. These cases will likely result in further expanded case law on this topic in Australia.

It should also be noted that Spain is currently seeking to set aside examination orders made by the Federal Court Registrar that were issued to two accredited consular officials of Spain's Sydney consulate following the *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 decision. The orders require the consular officials to present to the Court for the purposes of being examined and producing documents, which relate to bank accounts held by Spain, the names of debtors owing money to Spain and other assets that Spain might have within the jurisdiction. The basis of Spain's set-aside application is that the officials are protected by consular immunity under the *Vienna Convention on Consular Relations*. While the set-aside application has not yet been determined, Spain was recently required to pay security to bring this challenge after it lost its appeal challenging a security of costs order (*Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l. (Security for Costs)* [2024] FCAFC 113).

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

The FSIA expressly provides that separate entities (which are defined to include a body corporate that is an agency or instrumentality of a foreign State) are covered by the immunity from jurisdiction provided under section 9, and execution against their property under section 30. However, immunity from execution is more restricted in the case of separate entities (immunity applies only where the judgment upon which execution is sought arose in a case in which the separate entity was entitled to immunity but had waived this entitlement) (sections 22 and 35, respectively). The Full Court considered the definition of "separate entity" in *PT Garuda Indonesia v. ACCC* [2011] FCAFC 52. It held that a separate entity, being an agency or instrumentality, "is a body created by the state for the purpose of performing a function for the state".

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