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Australia
Private Equity

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This country-specific Q&A provides an overview of private equity laws and regulations applicable in Australia.

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Australia: Private Equity

1. What proportion of transactions have involved a financial sponsor as a buyer or seller in the jurisdiction over the last 24 months?

The proportion of transactions involving financial sponsors in Australia has fallen over the past 24 months, making up 25% of all transactions in Q3 of 2024 as compared to 47% in Q3 of 2022.

2. What are the main differences in M&A transaction terms between acquiring a business from a trade seller and financial sponsor backed company in your jurisdiction?

Warranties: Financial sponsors will generally require that warranties (beyond title and capacity warranties) are given on a 'no recourse' basis for the sole purpose of allowing the buyer to obtain W&I insurance. While some trade sellers also seek to adopt this approach, it is more common for trade sellers to stand behind the full suite of warranties themselves..

Pricing: Financial sponsors often prefer a 'locked box' pricing mechanism, which avoids a post-completion true-up of the purchase price and the possibility of having to return funds to the purchaser, which would delay the ability of financial sponsors to distribute sale proceeds to investors.

Restraints: Generally, financial sponsors resist giving broad restraints whereas trade sellers are expected to provide fulsome restrictive covenants.

3. On an acquisition of shares, what is the process for effecting the transfer of the shares and are transfer taxes payable?

Share transfers are effected by both parties executing a share transfer form and delivering it to the target company. Transfers must be approved by the target company's board of directors, as required by the company's constitution. Once approved, the company's share register is updated to reflect the new ownership, and a new share certificate is issued to the buyer.

Whether the transfer of shares attracts landholder duty (effectively as a deemed indirect disposal of real property interests) will be dependent on the nature of the assets held by the target company. Broadly, where the target company has freehold or leasehold interests in real property that exceed certain value thresholds, landholder duty will be payable. Each Australian state has different, complex rules which may apply.

4. How do financial sponsors provide comfort to sellers where the purchasing entity is a special purpose vehicle?

A financial sponsor will commonly provide an 'equity commitment letter' to the seller, pursuant to which the relevant fund entity agrees with the seller to provide funds sufficient to cover the equity portion of the purchase price to the SPV purchaser entity. In addition, a financial sponsor will provide evidence to the seller that it has available debt commitments sufficient to cover the debt portion of the purchase price.

5. How prevalent is the use of locked box pricing mechanisms in your jurisdiction and in what circumstances are these ordinarily seen?

Locked box pricing mechanisms are common in Australia but not used in the overwhelming majority of deals. They are seen most often in private equity exits.

6. What are the typical methods and constructs of how risk is allocated between a buyer and seller?

Risk allocation is achieved via the warranty and indemnity package. Sellers will give fundamental warranties (title to shares and capacity and authority to transact) as well as business warranties (which vary depending on the relevant sector but will most commonly include warranties as to solvency, accuracy of accounts, material contracts, material assets, litigation, compliance with laws and quality of information provided during due diligence).

A seller will give warranties at the time of entry into the sale document and will often (but not always) repeat many of those warranties at completion.

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Sellers will also customarily give a tax indemnity covering liability for tax prior to completion (other than tax incurred in the ordinary course since the locked box date, in the case of a 'locked box' pricing mechanic).

A seller's liability will be limited in a number of ways, the most notable of which are as follows:

a. by any matter fairly disclosed to the buyer, including by reference to all of the documents disclosed to the buyer during the course of the due diligence process;
b. a de-minimis in the range of 0.05% – 0.1% and a basket in the range of 0.5% – 1%, which may be a threshold or a tipping basket;
c. aggregate liability caps, customarily 100% for fundamental warranties and between 10% – 30% for business warranties; and
d. time limits on claims, which can vary from 6 months – 3 years for warranty claims, other than tax and sometimes title related claims which often survive for 4 – 7 years.

7. How prevalent is the use of W&I insurance in your transactions?

W&I is increasingly prevalent in Australian M&A transactions, particularly in the case of financial sponsor exits. Where a financial sponsor seller is giving business warranties, it is usually on the basis that the buyer's only recourse is to W&I insurance. Where management sellers give business warranties, the buyer often supplements any financial recourse against management with a W&I insurance policy.

8. How active have financial sponsors been in acquiring publicly listed companies?

Take privates by financial sponsors accounted for approximately 20% of all transactions in Australia in 2024.

9. Outside of anti-trust and heavily regulated sectors, are there any foreign investment controls or other governmental consents which are typically required to be made by financial sponsors?

Australia operates an extensive foreign investment approval regime governed through Treasury's Foreign Investment Review Board (**FIRB**). This regime has expanded significantly over recent years and covers investments in Australian land, real estate, and commercial acquisitions including an Australian business. The requirement to obtain approval for investment in Australia depends on the interest being acquired, the value of the assets or securities, and the characteristics of the investor. Importantly, ownership is traced above the acquisition vehicle to determine the characteristics of investors, with any foreign government investment critical to determine whether FIRB approval is required.

10. How is the risk of merger clearance normally dealt with where a financial sponsor is the acquirer?

Currently, merger clearance in Australia is not mandatory. There is a legislative prohibition on the acquisition of shares or assets where the effect, or likely effect, is a substantial lessening of competition in a market in Australia. This requires an assessment of the competition implications of a transaction by reference to the relevant markets to determine whether there is a substantial anticompetitive effect.

Consolidation can be through the acquisition of a direct competitor or another operator in the industry. The outcome of the competition analysis will inform whether an approach to the competition regulator for informal clearance or authorization should be sought. Notwithstanding that Australia is not subject to mandatory merger control, the competition regulator will initiate its own assessment a potential acquisition if it becomes aware of a transaction through publicly available information or it is notified by the FIRB, and it considers that there are aspects to consider from a competition perspective.

From 1 January 2026, Australia will be subject to a mandatory and suspensory merger control regime. An acquisition that meets monetary thresholds will require approval from the competition regulator prior to completion. Transitional provisions will be implemented from 1 July 2025.

11. Have you seen an increase in (A) the number of minority investments undertaken by financial sponsors and are they typically structured as equity investments with certain minority protections or as debt-like investments with rights to participate in the equity upside; and (B) 'continuation fund' transactions where a financial sponsor divests one or more portfolio companies

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to funds managed by the same sponsor?

We have seen a small increase in the number of minority investments undertaken by financial sponsors.

Where financial sponsors do take minority interests, these investments are typically structured as equity investments with robust minority protections to safeguard the interests of the financial sponsor. Such protections often include board representation, veto rights on critical business decisions and pre-emptive rights on new issues and transfers. Where these investments are made into early stage or growth businesses, the financial sponsor may also enjoy downside protection mechanisms, such as dilution protection mechanics and liquidation preferences.

We have also seen an increase in continuation fund transactions. This is sometimes driven by a valuation divergence between sellers and buyers (in part driven by the continuing deferral of expected interest rate reductions), causing financial sponsors to find ways to provide liquidity to existing investors while continuing to manage high-potential assets. On other occasions, this has been driven by the desire of some existing investors to maintain exposure to high-performing assets which they know well and are comfortable with, notwithstanding the sponsor's need to deliver an exit for other investors in the fund.

12. How are management incentive schemes typically structured?

Management incentive schemes are commonly structured through share or option schemes. There can be a number of mechanisms used to align the interests of management with a private equity sponsor, including ratchets that adjust equity share based on company performance, and vesting based on performance or time hurdles. Equity allocated to the management team is typically in the range of 5% – 10%.

13. Are there any specific tax rules which commonly feature in the structuring of management's incentive schemes?

Australia provides a number of employee share scheme incentives which, subject to satisfying some relatively onerous conditions, can provide an exemption or deferral of the taxing point of the tax liability on any difference between the market value and the value of the options or shares provided to employees, with any subsequent gains being assessed on revenue (as opposed to capital) account.

'Loan-funded' share schemes are often used to ensure no upfront assessment of any discount to market value of shares provided to employees whilst maintaining capital account treatment.

Phantom or shadow equity schemes are sometimes used, however payments under these schemes are generally treated as salary and wages, with associated withholding and superannuation obligations.

14. Are senior managers subject to non-competes and if so what is the general duration?

Restraints of trade in Australia are prima facie unenforceable unless they are reasonable and protect the legitimate business interests of a company. Some courts have authority to modify restraint provisions to render them enforceable. In private equity transactions, senior managers are generally subject to non-compete clauses to safeguard the investment of the private equity sponsor. Typically, non-compete durations range from 12 to 24 months, varying by industry and role. The enforceability of these clauses depends on their reasonableness in terms of geographic area, duration, and scope of restricted activities.

15. How does a financial sponsor typically ensure it has control over material business decisions made by the portfolio company and what are the typical documents used to regulate the governance of the portfolio company?

Financial sponsors typically ensure control over material business decisions through governance mechanisms that grant it (a) control of the board of directors of the portfolio company, (b) the ability to appoint, terminate and replace senior management and (c) veto rights over significant business decisions, including. mergers and acquisitions, changes to capital structure, changes to the business plan or changes to the dividend or leverage policy

Typically, governance of a portfolio company is documented in a shareholders' agreement, the company's constitutional documents, management's employment contracts and detailed delegations of authority to management.

16. Is it common to use management pooling

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vehicles where there are a large number of employee shareholders?

Management pooling vehicles are commonly used by companies with large numbers of employee shareholders. These vehicles, such as employee share trusts or special purpose vehicles, simplify the administration of equity incentives by streamlining voting, dividend distribution, and exit processes. Another common approach is for a bare trustee to hold legal title to the shares and for the employees to be beneficial holders only. This results in there being only one shareholder of record (noting that the same bare trustee is used for all employees).

17. What are the most commonly used debt finance capital structures across small, medium and large financings?

A range of debt financing capital structures are used in Australia. These include lower levered senior secured loans arranged by domestic banks, higher levered senior/stretched-senior secured loans syndicated into the Asia-Pacific syndicated debt market, US style covenant-lite senior secured loans arranged by global investment banks and syndicated into the US institutional debt market (requiring, for liquidity reasons, a size of at least US$700 million upwards), private credit led unitranche financings, and combinations of bank debt and mezzanine or holding company financing structures.

The capital structure selected depends on key factors such as the debt quantum, pricing, leverage profile, number (or exclusion) of financial maintenance covenants, terms generally and the required tax structuring.

Debt Finance Capital Structures in Australia				
Features	**Traditional 'Senior Bank'**	**Unitranche**	**TLB (US$/€)**	**'Aussie TLB' (AUD$)**
Arrangers / Underwriters	Banks (domestic 'Big 4' Australian banks and local branches of international investment banks)	Banks and private credit funds	Investment banks	Banks
Targeted Syndication Participants	Domestic banks and funds (both private credit funds and local institutional investors)	No public market syndication; often arranged as a 'club deal'	Public market syndication	Within the Australian / APAC AUD$ loan market (includes banks, private credit funds and institutional investors)
Target Market Liquidity	AUD$150m-$450m	Flexible within AUD$500m-$1bn range if provided on a 'club' basis. Limited capacity for non-club underwrites > AUD$250m-$300m (some 'private credit 2.0' funds may be able to provide significantly larger commitments)	Entry into US$/€ syndicated debt market supports AUD$1bn+ deals	Limited beyond AUD$500m-$600m
(Indicative) Pricing	Base rate + 350-475 bps	Base rate + 500-650 bps	Base rate + 350-450 bps	TLB pricing + 25-75 bps premium
(Indicative) Leverage Range	3.0-4.5x range	Up to 5.5-7.0x range	Up to 5.5-6.5x range	Up to 5.5-6.5x range
Financial Covenants	Minimum two maintenance financial covenants (leverage and interest cover)	Typically one leverage maintenance financial covenant (often with two step downs)	Cov-lite (no maintenance financial covenants)*	Cov-lite (no maintenance financial covenants)*
Tenor	5 years	6 years	7 years	7 years

* RCF lenders will benefit from "springing" leverage financial covenant tied to utilisation of RCF.

18. Is financial assistance legislation applicable to debt financing arrangements? If so, how is that normally dealt with?

Under Australia's financial assistance regime (regulated by the *Corporations Act 2001* (Cth)), a company is generally prohibited from financially assisting a person to acquire shares in the company (or its holding company). In debt financing, this typically arises in relation to the granting of security or a guarantee by a company in support of a loan being made to fund the acquisition of shares in that company (or its holding company). However, financial assistance can be provided if a 'whitewash' procedure is completed, which involves obtaining prior approval from the shareholders of the company (and its holding company) as well as notifying and lodging explanatory documentation with the Australian Securities and Investments Commission at least 14 days before giving financial assistance. The parties to a debt financing will typically agree to complete the 'whitewash' procedure for the target group post-closing, in which case the lenders will not have security over the assets or property of the target group until the 'whitewash' procedure is complete.

19. For a typical financing, is there a standard form of credit agreement used which is then negotiated and typically how material is the level of negotiation?

For senior domestic bank financings and regionally syndicated senior/stretched-senior financings, the documentation will often be drafted from the Asia-Pacific Loan Market Association (**APLMA**) Australia branch form of facility agreement (or the lead bank's internal version of that). Senior loans syndicated into the US institutional debt market will typically be New York-law governed, and terms will be benchmarked to those recently accepted in the US market for similar sponsor or portfolio company characteristics (including industry, EBITDA, geographic earnings and asset base). Private credit unitranche financings will, depending on the transaction and the sponsor, adopt one or a hybrid of the above approaches.

The level of negotiation is influenced by a range of factors, including availability of an agreed sponsor precedent (or other fallback terms), leverage and earnings profile, credit support package (including whether it is domestic or cross-border), capital structure (including presence of other secured creditors), legal and regulatory requirements, and domestic and global market conditions. In a recent market development in Australia, top tier sponsors are increasingly seeking to move away

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from the traditionally more restrictive APLMA-based domestic precedents and impose their global precedents with documentation and terms more aligned to the US or European loan markets.

20. What have been the key areas of negotiation between borrowers and lenders in the last two years?

For lenders, following some high-profile liability management transactions globally, there has been increased focus and negotiation on protections against 'uptier', 'double dip' and 'drop-down' transactions, protections against leakage from obligor to non-obligor groups (or out of the 'restricted' group) and flexibility around non-obligor debt incurrence. There is also particular focus on the amendment regime, including the allocation of 'sacred' all lender rights, super majority rights and majority rights, and the ability to release guarantees and transaction security.

Sponsors are increasingly focused on flexible capital structures allowing leverage-supported acquisition growth and working capital optionality (including the ability to layer in super senior working capital debt, cash management facilities, pari passu 'side-car' facilities and junior secured debt capacity), while minimising (or removing) prepayment requirements under excess cashflow and disposal proceeds sweeps. Sponsors are also increasingly seeking portability provisions in refinancings of portfolio companies to maintain optionality for potential future buyers amid a market that has remained somewhat unfavorable for M&A exits.

21. Have you seen an increase or use of private equity credit funds as sources of debt capital?

In the mid-market and large cap space (and also in distressed/special situations), private credit has become more prevalent in the Australian market and, consistent with the US and European markets, increasingly provides direct lending solutions to top tier sponsors and their portfolio companies on flexible terms that are not typically available from domestic banks.

The Reserve Bank of Australia has indicated that private credit has grown faster than overall business debt (i.e. bank lending, syndicated lending, corporate bonds and other types of lending to businesses) over the past few years, and that although it slowed slightly in 2024, private credit growth was still 2 percentage points higher than the growth of overall business debt.[1]
Sponsors are attracted to the speed and certainty of private credit direct lending (compared to syndicated products), as it avoids management road shows, syndication flex terms and (relevant to US institutional debt market financings) the requirement to obtain a private credit rating. These advantages can often bridge the pricing differential on margin, make whole premium and fees as between a private credit unitranche financing and a senior or stretched-senior syndicated financing.

However, for non-Sponsor and domestic small and medium capital financings, domestic bank loans and syndicated loan facilities remain the dominant source of debt funding in Australia.

Footnote(s):

[1] See "Growth in Global Private Credit", Bulletin – October 2024, Reserve Bank of Australia.

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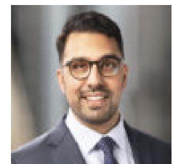

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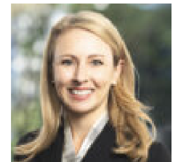

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