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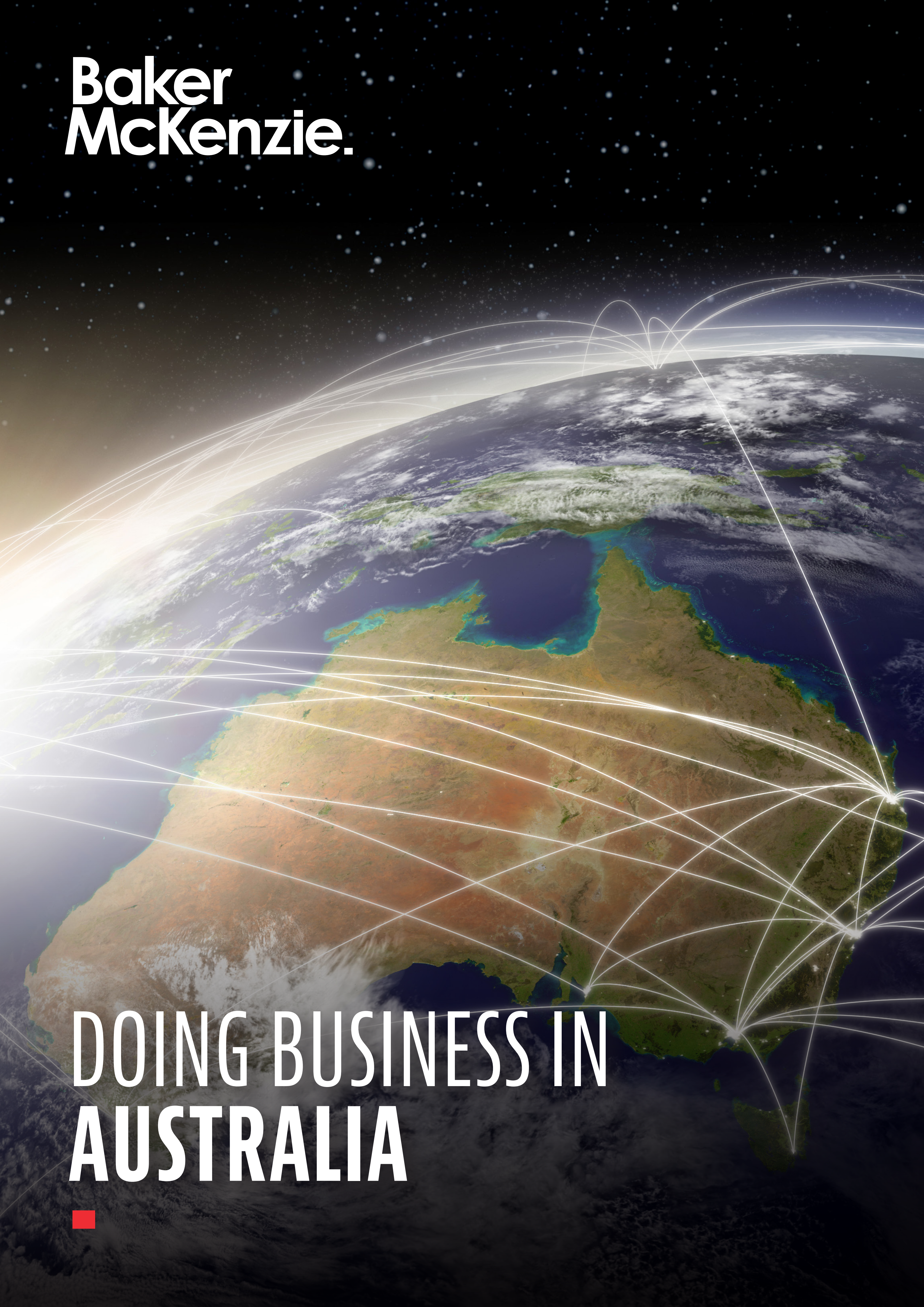

DOING BUSINESS IN **AUSTRALIA**

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2020

About Baker McKenzie Australia

Baker McKenzie is unique among Australian law firms in our ability to deliver the knowledge, experience and capabilities of our global network to our clients in the local market. Companies benchmark themselves against the best practice in their sectors, globally, not just domestically. We provide our clients with the innovative legal solutions they expect from the global top-tier law firm, together with commercial pragmatism and seasoned experience as leaders in Australia. Baker McKenzie has been an integral part of the Australian legal landscape since 1964.

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1. Australia – An Overview

Our government

The Commonwealth of Australia comprises a federation of six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia), and two major mainland territories (the Northern Territory and the Australian Capital Territory) and a number of minor territories.

Australia obtained de-facto independence from Great Britain in 1901, when the federation was formed and the Australian Constitution was adopted. Full independence was formally achieved in 1986. Since federation, Australia has enjoyed a history of stable government based on a parliamentary system similar to the British Westminster system, where the government exercises executive authority but is directed by and accountable to the parliament via the head of government (known as the Prime Minister) and his or her ministers.

While it is independent, Australia continues to be a constitutional monarchy with Queen Elizabeth II as its current ceremonial head of state. The Queen is represented by a Governor General, who is appointed by the Queen on the advice of the Prime Minister.

Economy and industries

Australia offers significant opportunities for foreign investment in a range of sectors, including agribusiness, mining and minerals processing, renewable energy, medical technology and wealth management. Investors regard Australia as an excellent place to invest because of its population growth, highly skilled workforce, strategic location, strong record of economic management and stable governance and regulatory environment.

Australia's economy is primarily services based, although in recent years it has enjoyed the success of a strong resources sector. Australia is a major global commodity producer of natural resources such as coal, iron ore, uranium, gold, natural gas and lithium. In recent years, the biggest industries in Australia have included health and education, mining, financial and insurance services, construction and manufacturing. Other significant industries include tourism, scientific and technical services, agriculture, forestry and fishing.

Eight nations in the Asia region are top 10 trading partners of Australia, namely China, Japan, South Korea, Singapore, India, New Zealand, Thailand and Malaysia, along with the United States and the United Kingdom. Australia is also a major destination for foreign investors, and was ranked as the world's eighth most attractive destination for foreign direct investment in 2018.

Australia has built up bilateral trade relationships with Japan, Indonesia, Malaysia, China and the United Arab Emirates over many years. It is party to a number of Free Trade Agreements, notably with the United States, China, Japan and Korea. The Australian and the United Kingdom governments have expressed their intention to negotiate one of the UK's first post-Brexit Free Trade Agreements.

The federal and state systems

Overview

There are three levels of government in Australia: federal, state and local. Australia has a Westminster system of government (based on the United Kingdom) and an independent judiciary.

Australia is a representative parliamentary democracy. Therefore, members of federal and state parliaments (and local governments) are chosen from and elected by the people. Voting is compulsory for Australian citizens from the age of 18 in federal, state and local government elections.

Foreign companies doing business in Australia must comply with laws made by all three levels of government. Businesses operating in multiple states and territories may have to comply with different legal/regulatory arrangements in different states or territories.

Division of powers

The Australian Constitution governs the division of powers between the federal and state parliaments. Generally, the federal parliament is vested with specified powers to legislate in areas such as defence, foreign affairs, immigration, taxation, customs and currency, as well as corporations, interstate and overseas trade and commerce, bankruptcy and insolvency, communications, banking, insurance, intellectual property and industrial relations. Remaining powers are vested in the state parliaments, which have the right to legislate on all matters that the Australian Constitution does not consign exclusively to the federal parliament.

The state governments are mainly responsible for day-to-day matters such as justice (including most criminal and commercial law), education, health, housing, police, agriculture, lands, forests, water, mineral resources and transportation (but not family law). Although the federal government is the main taxation authority, the state governments also raise revenue by means of various duties, levies and royalties (e.g. mining royalties and property duties). The federal government funds many state activities and functions, often attaching conditions to the use of funds.

There are three "arms" of each federal and state government:

- The legislature (or parliament) is responsible for debating and voting on new laws to be introduced.
- The executive is responsible for enacting and upholding the laws established by parliament. Certain members of parliament (i.e. ministers) are also members of the executive, with special responsibilities for certain areas of the law.
- The judiciary is responsible for enforcing the laws and deciding whether the other two arms are acting within their powers. It is independent of the other two arms.

Federal (or Commonwealth)

Federal legislative power is vested in the federal parliament which consists of the House of Representatives (the lower house) and the Senate (the upper house). The party which holds the majority of seats in the lower house forms the federal government, and the leader of the majority party becomes the Prime Minister. Executive power is exercised by the cabinet, which consists of ministers drawn from the majority party members of parliament and is headed by the Prime Minister.

State government

Each state has its own constitution and each state government has power to govern and to pass laws within the state so long as they are consistent with the state's constitution and are not matters controlled by the Commonwealth under the Australian Constitution. The parliaments of each state, except Queensland, also have two chambers, a lower house and an upper house. Again, executive power is exercised by the state cabinet which is headed by the Premier, who is the leader of the majority party in the lower house.

Local government

Local governments are established by state governments to take responsibility for certain community services and derive their authority from statutes passed by state parliaments. Local governments have a legislative body and an executive body, but not a judiciary. Local governments regulate local community matters such as property zoning and planning, local environment (e.g. waste collection), local roads and public recreation facilities. They raise revenue by levying rates on land ownership.

The legal system

Australia's legal system is inherited from the British model under which laws are created and amended not only by parliament but also through the decisions of the courts, which are independent from the parliament and the executive. This judge-made law, also known as "common law" or "case law", is binding on future decisions of lower courts unless there are features that distinguish a case from the prior decisions or a higher court has overruled the prior decisions.

Australia has both a federal and a state system of courts. The system is headed by the High Court of Australia which decides all constitutional matters and is the country's final court of appeal from both federal and state courts. The Federal Court of Australia, the Federal Circuit Court and the Family Court form the other branches of the federal system of courts. The federal courts have jurisdiction to decide all matters of federal law such as corporations law and interstate trade and commerce, copyright, trade marks and patents, competition and consumer law, immigration, insolvency and bankruptcy and family law.

The state court systems each comprise a Supreme Court and minor courts (at local and district levels). They have the jurisdiction to decide all matters of state law (such as criminal and property law) but in many cases also have the right to hear federal matters.

2 Foreign Investment Regulation

2. Foreign Investment Regulation

Temporary changes have been made to Australia's foreign investment review framework in response to the COVID-19 pandemic. All monetary review thresholds have been reduced to zero until further notice, so that all proposed foreign investments into Australia will require approval, regardless of value or the nature of the foreign investor, provided the other statutory requirements for notification are met (including any applicable percentage interest thresholds, which remain unchanged as set out in this chapter).

This change does not apply to agreements entered into prior to 10.30 pm AEDT 29 March 2020, including in relation to acquisitions that have not yet occurred, regardless of whether there are unmet conditions or not. That is, the usual monetary thresholds (as set out in this chapter) continue to apply to such acquisitions.

In addition, the Foreign Investment Review Board will work with existing and new applicants to extend timeframes for reviewing applications from 30 days to up to six months.

This chapter should be read in light of these changes while they are in force.

Updated to February 2020.

Overview

Foreign investments in Australian entities, businesses and land are regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) and related legislation and Australia's Foreign Investment Policy (Policy). The Foreign Investment Review Board (FIRB) administers the legislation and Policy and assists the Treasurer of the Commonwealth of Australia (Treasurer) to make decisions on foreign investment proposals submitted for approval. The Australian Taxation Office (ATO) also has a range of responsibilities, including screening certain real estate and reorganisation applications and advising on the tax impact of proposals.

A "foreign person" that proposes to invest in an entity, business or land in Australia must apply for approval (typically referred to as "FIRB approval") if the transaction involves a "notifiable action". If the transaction involves a "significant action" (but not a notifiable action) it is not mandatory to seek approval but the Treasurer may prohibit or reverse the transaction if it is contrary to Australia's national interest. There is no specific definition of "national interest" in the legislation, although the Policy provides some guidance. Whether an investment by a foreign person involves a notifiable action and/or a significant action depends on the nature of the investment and, in most cases, the extent of the interest acquired and the value of the investment or the relevant entity or business.

Certain exemptions may apply to exclude a transaction from requiring approval. It may also be possible to obtain an "exemption certificate" to allow a series of future transactions.

Who is a "foreign person"?

Under the FATA, a "foreign person" includes:

- an individual not ordinarily resident in Australia;
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government investor holds a "substantial interest" (i.e. a shareholding of 20% or more);

- a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government investor, hold an "aggregate substantial interest" (i.e. a total shareholding of 40% or more);
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government investor holds a substantial interest of 20% or more;
- the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government investor, hold an aggregate substantial interest of 40% or more; or
- a foreign government or foreign government investor (see below).

Who is a "foreign government investor"?

There is greater scrutiny of investments by foreign government investors, given that such acquisitions may be more likely to raise national interest considerations.

A "foreign government investor" is:

- a foreign government or separate government entity (e.g. a state owned enterprise (SOE)); or
- a corporation, trustee of a trust or general partner of a limited partnership in which a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest of 20% or more, or in which foreign governments or separate government entities of more than one foreign country, together with their associates, hold an aggregate substantial interest of 40% or more.

In determining whether a substantial interest or an aggregate substantial interest exists the FATA deems all foreign government investors from a single country to be associates. This is also relevant for determining whether the definition of "foreign government investor" applies and whether the transaction involves a notifiable acquisition of a direct interest by a foreign government investor and its associates.

One of the main implications of being a foreign government investor is that the monetary thresholds discussed below do not apply to their investments. This means that, regardless of the value of the investment, all foreign government investors must obtain FIRB approval before:

- acquiring a "direct interest" in an Australian entity or business, which includes an interest of 10% or more (unless the foreign government investor is merely creating a new wholly-owned subsidiary);
- starting an Australian business (including starting an Australian business which is not incidental to or is different from an existing activity of an existing Australian business of the foreign government investor);
- acquiring a legal or equitable interest in an exploration, mining or production tenement or an interest of at least 10% in securities of a mining, production or exploration entity; or
- acquiring an interest in Australian land.

If a foreign government investor already holds an interest of 10% or more in an entity or business, further approval is required before increasing that interest, regardless of the value of the additional investment, unless the investor has obtained an exemption certificate that covers the acquisition (see below).

Additionally, foreign government investors do not have the benefit of an exception available to other foreign persons under which certain offshore acquisitions are not mandatorily notifiable. Instead, a foreign government investor which makes an offshore acquisition may need FIRB approval to acquire a "direct interest" in an Australian entity which is traced through the foreign target and any other entities in the chain of ownership. However, this rule does not apply if the Australian assets of the foreign target are non-sensitive, valued below A$55 million, and constitute less than 5% of its total value.

Notifiable and significant actions

The FATA distinguishes between "notifiable actions" and "significant actions".

Only notifiable actions must be mandatorily notified to the Treasurer and failure to do so constitutes an offence.

It is not mandatory to notify the Treasurer of significant actions. However, if the Treasurer is not notified, the Treasurer may block, unwind or place conditions on a significant action if it is considered contrary to the national interest.

In addition, investments in certain sectors are subject to more stringent requirements, including investments in the telecommunications, media, transport and defence sectors. For instance, an investment of 5% or more in an entity or business in the media sector will require FIRB approval, regardless of value.

Notifiable actions

Subject to the threshold tests being met (see below), a foreign person must obtain FIRB approval before acquiring:

- a "direct interest" in an Australian corporation, unit trust or business that is an agribusiness;
- a "substantial interest" in an Australian corporation or unit trust (which is not an agribusiness); or
- an interest in Australian land, subject to certain exemptions (see below).

A person acquires a "direct interest" in an Australian entity or business if it acquires:

- an interest of at least 10% in the entity or business;
- an interest of at least 5% in the entity or business and has also entered into a legal arrangement relating to the person's business and the entity or business (such as an agreement to secure the offtake of commodities); or
- an interest of any percentage in the entity or business if the person is in a position to influence or participate in the central management and control of the entity or business, or influence, participate in, or determine the policy of the entity or business.

A person holds a "substantial interest" in an entity or trust if the person (together with its associates) holds an interest of at least 20% in the entity, or for a trust (including a unit trust) if the person (together with its associates) holds a beneficial interest in at least 20% of the income or property of the trust.

In addition to these general notifiable actions, certain actions by foreign government investors and certain investments in the media sector are also notifiable actions and significant actions (see above).

For corporate reorganisations, it is important to note that even an intra-group transfer of an Australian entity or business between two commonly controlled Australian entities could be a notifiable action if the threshold test is met and there is a substantial foreign interest in the group. This is due to tracing provisions in the FATA which deem the acquiring Australian entity to be a foreign person if a foreign person directly or indirectly holds a substantial interest in it.

If a transaction requires FIRB approval it is still possible to enter into documentation for the transaction provided the documentation is made conditional upon obtaining any necessary FIRB approval.

Significant actions

Some notifiable actions like an acquisition of an interest in Australian land or of a direct interest in an agribusiness are also classified as significant actions.

Additionally, subject to the threshold tests being met, a foreign investment is a "significant action" if it involves:

– the acquisition of an interest in securities of an entity with a relevant Australian nexus (broadly, an Australian entity, a foreign corporation that holds Australian land or securities in an Australian entity, or a holding entity of such an entity), even if the interest acquired is less than a substantial interest of 20%;

– the acquisition of interests in assets of an Australian business;

– entering into certain agreements or altering the constituent documents of an Australian entity which enables a foreign person to control senior officers of the entity; or

– entering into or terminating significant agreements with an Australian business (i.e. agreements relating to using the assets of the business or participating in its profits or management and control).

Further, for a transaction involving an Australian entity or business to be a significant action, there must generally be a "change of control" involving a foreign person as a result of the transaction. This requirement, however, does not apply to the acquisition of an Australian agribusiness so that, subject to the threshold test being met, the acquisition by a foreign person of a direct interest in an Australian agribusiness is a significant action.

There are also tracing provisions which may mean that even an acquisition completed outside Australia may fall within the FATA requirements, if the relevant group of companies or business includes an Australian entity or business that meets the necessary threshold requirements.

Threshold tests

For non-government foreign investors, even if a transaction is within one of the categories of actions discussed above, it will only be a notifiable action or significant action if the value of the transaction, entity or business exceeds the monetary thresholds in the table below, subject to any exemption that may apply.

In some instances, higher thresholds apply for investments in sectors other than sensitive sectors (e.g. defence and telecommunications) for "agreement country or region investors" from certain jurisdictions with which Australia has a Free Trade Agreement. Currently this comprises investors from the United States, New Zealand, Chile, Japan, South Korea, China, Singapore, Canada, Mexico, Vietnam, Hong Kong and Peru, except foreign government investors.[1] For such agreement country or region investors, the higher threshold of A$1,192 million applies to investments in non-sensitive sectors. For most agreement country or region investors, the standard thresholds of A$275 million for investments in sensitive sectors, and A$60 million and A$15 million for investments in relation to agribusiness and agricultural land respectively, continue to apply.

These thresholds do not apply to foreign government investors so they will have to notify and obtain approval from FIRB for such investments and actions regardless of their value.

Most of these thresholds (other than for agricultural land) are indexed annually so that they will increase each calendar year, based on Australian inflation rates.

[1] Brunei Darussalam and Malaysia will become agreement countries once the Trans Pacific Partnership enters into force for them.

Type of investment or action	Thresholds for foreign persons (other than foreign government investors)	Thresholds for agreement country or region investors (other than foreign government investors)[2]
Entities / Businesses		
Acquisition of interest in an Australian business or entity which is non-sensitive	A$275 million For investments in entities, calculated on the higher of: – total asset value of the entity; or – total issued securities value of the entity (based on consideration for the acquisition) For investments in business assets, calculated on the value of the consideration for the acquisition	A$1,192 million
Acquisition of interest in an Australian business or entity which is sensitive	A$275 million (calculated as above)	A$275 million
Acquisition of a direct interest in an agribusiness	A$60 million (cumulative, i.e. based on value of the consideration for the acquisition and the total value of other interests held by the foreign person in the entity or business)	A$1,192 million for investors from the United States, New Zealand and Chile A$60 million for other agreement country or region investors (cumulative, i.e. based on value of the consideration for the acquisition and the total value of other interests held by the foreign person in the entity or business)
Acquisition of 5% or more in an entity or business in the media sector	Must notify of all acquisitions regardless of value	Must notify of all acquisitions regardless of value

[2] "Agreement country or region investors" are non-government investors from the US, New Zealand, Chile, Japan, South Korea, China, Singapore, Canada, Mexico, Vietnam, Hong Kong, Peru and, once the Trans Pacific Partnership enters into force for them, Brunei Darussalam and Malaysia.

Type of investment or action	Thresholds for foreign persons (other than foreign government investors)	Thresholds for agreement country or region investors (other than foreign government investors)[2]
Land		
Agricultural land	A$15 million (cumulative, i.e. based on value of the consideration for the acquisition and the total value of other interests held by the foreign person in agricultural land) A$50 million for investors from Thailand	A$1,192 million for investors from the United States, New Zealand and Chile A$15 million for other agreement country or region investors (cumulative, i.e. based on value of the consideration for the acquisition and the total value of other interests held by the foreign person in agricultural land)
Non-sensitive developed commercial land	A$275 million	A$1,192 million
Sensitive developed commercial land (e.g. telecommunications or critical infrastructure)	A$60 million	A$1,192 million
Residential land or vacant land (both commercial and residential)	Must notify of all acquisitions regardless of value	Must notify of all acquisitions regardless of value
Acquisition of mining or production tenement	Must notify of all acquisitions regardless of value	A$1,192 million for investors from the United States, New Zealand and Chile Other agreement country or region investors must notify of all acquisitions regardless of value
Exploration tenement	Approval generally not required	Approval generally not required

Agribusiness

Foreign persons (other than foreign government investors or certain agreement country investors) who propose to enter into an agreement to acquire a “direct interest” (see “Notifiable actions” above) in an agribusiness where the value of the investment is more than A$60 million are required to notify FIRB and obtain approval for the investment. A higher threshold of A$1,192 million applies to investors from the United States, New Zealand and Chile. All proposed direct investments by foreign government investors, including in agribusiness, will require approval regardless of value.

An “agribusiness” is defined by reference to specified and well recognised industry classifications as set out in the Australian and New Zealand Standard Industrial Classification Codes. These industry classifications include agriculture, forestry, fishing and also most food manufacturing or what has been described as "first stage downstream manufacturing".

A business or entity will be considered an agribusiness if the business or entity (or a subsidiary of the entity) carries on such activities and at least 25% by value of the assets of the business/entity are used in, or at least 25% of its earnings are derived from, carrying on such activities.

Australian land

Subject to the threshold tests being met, proposals involving the acquisition of interests in Australian land by foreign persons require prior FIRB approval and are subject to rigorous scrutiny, unless one of various exemptions applies.

Under the FATA, "Australian land" is divided into four categories, namely, agricultural land, commercial land, residential land and mining or production tenements. Key concepts are:

- "Agricultural land" refers to land used, or that could reasonably be used, for a primary production business (e.g. a business of cultivating or propagating plants, maintaining animals for the purpose of selling them or their bodily produce, or planting or tending trees that are intended to be felled). Subject to certain exceptions, if a foreign person proposes to acquire freehold or certain leasehold interests in agricultural land that will be used for a primary production business or residential development, approval will generally not be granted unless the land or entity was offered for sale through an open and transparent sale process (e.g. publicly marketed to potential Australian bidders for at least 30 days). The ATO maintains an agricultural land register to track foreign ownership of agricultural land. Regardless of whether approval is required, the acquisition by foreign persons of all freehold interests, and leasehold interests likely to exceed five years, in agricultural land must be notified to the ATO within 30 days.
- "Commercial land" means land in Australia other than residential land or land used wholly and exclusively for a primary production business.
- "Residential land" means land in Australia that has at least one dwelling but is not commercial land or agricultural land. Different types of residential land have different treatment under the FATA. For example, the acquisition of established residential dwellings by a foreign person is generally prohibited. As with agricultural land, foreign persons who acquire residential real estate are required to register their purchase with the ATO within 30 days.
- "Vacant land" means land with no substantive permanent building on it that can be lawfully occupied by persons, goods or livestock, unless a wind or solar power station is located on its surface. Vacant land (which is not being used wholly and exclusively for primary production) will be either vacant commercial land or vacant residential land.

"Interest" in Australian land

The definition of an "interest" in Australian land is extremely wide and includes options over freehold land, leases with a term exceeding five years (including any option for a further term) and any financing or other arrangements for the sharing of profits from investment in Australian land. Further, any proposed foreign investment in an Australian land corporation or Australian land trust (or an investment above the threshold value in an agricultural land corporation or agricultural land trust) will also require prior FIRB approval. An entity is an Australian land corporation or Australian land trust if the value of its interests in Australian land exceeds 50% of its total assets. However, a passive investment in Australian land that is an acquisition of an interest of less than 10% of the shares or units in a listed land entity (including an Australian land corporation or Australian land trust) or an interest of less than 5% of the shares or units in an unlisted land entity generally does not require FIRB approval.

Exemptions

Proposals involving the acquisition of interests in Australian land by foreign persons that fall within specific exemptions do not require FIRB approval. The major exemptions include:

- exemption certificate for new dwellings: a developer may apply for a residential development "exemption certificate" if they propose to acquire or have acquired Australian land and propose to sell to foreign persons the new dwellings that will be or have been built on that land. The exemption certificate will specify the developer and the interest to which the certificate relates and will allow foreign purchasers to acquire dwellings in the development without the need for FIRB approval. The development must, however, involve 50 or more dwellings (other than townhouses) and a single investor may only rely on the exemption certificate for acquisitions of up to a cumulative total of A$3 million in any one development. A foreign investor wishing to purchase dwellings over this value will individually need to seek FIRB approval;
- near-new dwelling exemption certificate: this type of exemption certificate was introduced for failed off-the-plan purchases in a development. A near-new dwelling is a dwelling which has previously been "sold" (i.e. a binding purchase agreement has been entered into) but the sale was not completed and the developer is entering into a new agreement to sell the dwelling;
- exemption certificate for a program of acquisitions: a foreign investor with a high volume of acquisitions of interests in Australian land may apply for an exemption certificate to obtain advance approval for multiple acquisitions, relieving them of the requirement to notify and seek FIRB approval for each individual acquisition within a given period. It is within FIRB's discretion whether or not to grant the exemption, and the length of time for which the exemption is granted. FIRB will assess each application on a case by case basis. Certain acquisitions will only be covered by a certificate if the land was offered for sale under an open and transparent sale process (e.g. publicly marketed to potential Australian bidders for at least 30 days);
- passive investments: a passive investment in Australian land that is an acquisition of an interest of less than 10% of the shares or units in a listed land entity (including an Australian land corporation or Australian land trust) or an acquisition of an interest of less than 5% of the shares or units in an unlisted land entity generally does not require FIRB approval (provided certain other conditions are met);
- visa holders: acquisitions of residential property by foreign persons who hold permanent visas, by New Zealand citizens, or by foreign persons purchasing as joint tenants with their Australian, New Zealand citizen or permanent resident spouse, do not require FIRB approval;
- direct acquisitions from government: acquisitions of an interest in Australian land directly from the Commonwealth or a state, territory or local government do not require FIRB approval (unless the acquirer is a foreign government investor or the acquisition includes an interest in certain critical infrastructure);
- time-share schemes: acquisitions of an interest in a time-share scheme where the entitlement of the foreign person and any of that person's associates to access the land does not exceed an aggregate of four weeks in any year do not require FIRB approval; and
- an aged care facility, retirement village or certain student accommodation, provided the interest is not above the relevant threshold.

Commonly approved investments in Australian land

Proposals of the following nature will normally be approved by FIRB unless judged contrary to the national interest:

- acquisitions of vacant land for development. However, approvals of such proposals are often subject to conditions requiring, for example, continuous substantial construction to commence within five years of the date of approval, a minimum of 50% of the acquisition cost or market value of the land (whichever is greater) to be spent on the development, and that the foreign person does not sell the land until construction is complete;

- acquisitions of developed commercial residential premises (including hotels, motels, hostels and guesthouses) valued above the relevant monetary thresholds.

Wind and solar farms

Developed wind and solar farms

Land containing a wind or solar power station may be treated as developed commercial land rather than agricultural land or vacant commercial land, which means that a significantly higher monetary threshold applies before FIRB approval is required for the acquisition of an interest in that land (see above). This applies to a wind or solar power station which is recognised as an accredited power station under the *Renewable Energy (Electricity) Act 2000* (Cth).

The higher threshold for developed commercial land of at least A$275 million will apply to an acquisition if either:

- the land is not currently used predominantly for a primary production business (otherwise, it will be treated as agricultural land); or
- regardless of primary production use, the interest is acquired by an owner or operator of a wind or solar power station (or their associate) for the sole purpose of acquiring or operating a wind or solar power station already located on the land.

Undeveloped wind and solar farms

If an interest in land is acquired for a wind or solar power station yet to be developed, such as greenfields projects, the land will be treated as agricultural land if it is being used at that time predominantly for a primary production business. The monetary threshold for agricultural land acquisitions of A$15 million (on a cumulative basis) is significantly lower than for developed commercial land.

If the land is not being used predominantly for primary production and does not contain any substantive permanent building, it will be treated as vacant commercial land if a government approval (including accreditation) for establishing or operating a wind or solar power station on the land is in force or pending, or the land was acquired solely or is used wholly or predominantly to meet a condition of such an approval relating to other land. In this case, any acquisition of an interest in the land requires FIRB approval regardless of value.

Mining and oil and gas

Investments in Australian mining and oil and gas tenements may require FIRB approval depending on the type of tenement, the value of the investment, the type of underlying land, who the tenement is being acquired from and whether the foreign person is a foreign government investor.

Acquisitions of interests in an exploration tenement by foreign persons (other than foreign government investors) are generally not notifiable or significant actions, regardless of the value of the tenement, unless the interest also constitutes an interest in Australian land such as a long-term lease over the property on which exploration will take place.

Acquisitions of interests in a mining or production tenement by foreign persons (excluding certain agreement country investors) are notifiable and significant actions regardless of the value, except if acquired directly from the Australian Government. For acquisitions by non-government investors from the United States, New Zealand and Chile, a higher threshold of A$1,192 million applies.

Foreign persons may apply for an exemption certificate to cover a program of tenement acquisitions.

Sensitive businesses

To reflect national security concerns regarding investments by foreign persons in certain sectors, there are specific restrictions on foreign investment in "sensitive businesses" and, depending on the nature of the investment, different monetary thresholds or other requirements may apply. The following are prescribed sensitive businesses:

- a business carried on wholly or partly in the media sector, telecommunications sector or transport sector (including a business relating to infrastructure for those sectors);
- a business that wholly or partly involves:
  - the supply of training or human resources to, the manufacture of military goods, equipment or technology for, or the supply of military goods, equipment or technology to, the Australian Defence Force or other defence forces;
  - the manufacture or supply of goods, equipment or technology able to be used for a military purpose;
  - the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; or
  - the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of a nuclear facility.

Media

All proposals by foreign persons to acquire an interest of at least 5% in an Australian media business (including newspapers, television and radio), irrespective of value, are subject to prior approval by FIRB. In addition, under the *Broadcasting Services Act 1992* (Cth), a foreign person that acquires shares or certain other interests of at least 2.5% in an Australian media company must notify the Australian Communications and Media Authority within 30 days.[3]

Airports

Proposed acquisitions of interests in Australian airports by foreign persons will be examined on a case by case basis in accordance with the standard FIRB notification and approval requirements. In addition, some major airports are also subject to the *Airports Act 1996* (Cth), which provides for a 49% foreign ownership limit, a 5% airline ownership limit and a 15% limit on cross-ownership between Sydney airport (together with Sydney West) and Melbourne, Brisbane and Perth airports.

Critical infrastructure

Some acquisitions by non-government foreign investors from state and territory governments are not subject to FIRB review. However, FIRB review and approval is required for acquisitions by all foreign investors of "critical infrastructure assets" sold by state and territory governments, with a focus on national security. The Critical Infrastructure Centre has been established to identify Australia's critical infrastructure and develop national security risk assessments and provide advice to support government decision making on investment transactions, including supporting FIRB.

[3] This test differs in a number of ways from the FATA test, and a media acquisition that requires FIRB approval will not necessarily require notification to the ACMA.

Critical infrastructure assets include:

- public infrastructure (such as an airport or airport site, a port, infrastructure for public transport, electricity, gas, water and sewerage systems);
- existing and proposed roads, railways, inter-modal transfer facilities that are part of the National Land Transport Network or are designated by a state or territory government as significant or controlled by the government;
- telecommunications infrastructure; and
- nuclear facilities.

FIRB approval will also be required for acquisitions of Australian entities and businesses which hold interests in such critical infrastructure assets.

Investment in certain critical infrastructure, particularly in relation to all electricity transmission and distribution assets and some generation assets, will be subject to ownership restrictions or conditions. Applications will be assessed by FIRB, assisted by the Critical Infrastructure Centre, taking into account factors such as the cumulative level of ownership within a sector, the need for diversity of ownership and the asset's critical importance.

This special treatment of critical infrastructure is particularly relevant to acquisitions of key assets sold as part of government privatisation transactions.

Financing transactions

Approval is not required in relation to an interest in securities, assets, a trust, Australian land or a tenement where:

- the interest is held solely by way of security, or acquired by way of enforcement of a security held solely, for the purposes of a moneylending agreement; and
- the holder or acquirer of the interest is:
  - the entity (Lender) that entered into the moneylending agreement;
  - a subsidiary or holding entity of the Lender or a person who is (alone or with others) in a position to determine the investments or policy of the Lender;
  - a security trustee on behalf of the Lender; or
  - a receiver, or a receiver and manager, appointed in relation to a person or entity referred to above.

A moneylending agreement includes an agreement entered in good faith, on ordinary commercial terms and in the ordinary course of carrying on a business of lending money.

For an interest in residential land, where the foreign person entering into the moneylending agreement is not a foreign government investor, this moneylending exemption applies only if that entity or a holding entity of that entity:

- is an authorised deposit-taking institution (ADI) or otherwise licensed (whether or not in Australia) as a financial institution; and
- if that entity or its holding entity is not an ADI, it or its holding entity has at least 100 holders of securities in it or is listed for quotation in the official list of a stock exchange (whether or not in Australia).

For an interest acquired by a foreign government investor by way of enforcement of a security, this moneylending exemption applies only if:

- the foreign government investor holds the interest for less than 12 months (if it is an ADI or a subsidiary of an ADI) or otherwise less than six months; or
- the foreign government investor is making a genuine attempt to dispose of the interest.

Examples of the kinds of actions that may constitute a genuine attempt to dispose of an interest include deciding on the method of disposal, and complying with any requirements of a law that apply before the interest can be disposed of.

State regulation of foreign investment

Although foreign investment is primarily regulated by the Commonwealth, various states have introduced measures to regulate foreign investment in areas such as gaming and real estate. For example, various states have requirements for foreign investors to register their interests in real estate or to pay a higher level of stamp duty on real estate acquisitions. In addition, FIRB will often consult with the relevant state government in connection with proposals relating to activities in that state. A number of state governments have released guides for investors which set out their attitude to various types of foreign investment.

Business exemption certificates

If a foreign person wishes to make a series of investments in an entity or business, rather than seeking individual approval for each acquisition, the investor may apply for an exemption certificate covering the entire program of investment. Exemption certificates can be particularly useful to:

- investors making an initial investment, and proposing to make subsequent bolt-on investments;
- underwriters who may acquire an interest in securities of entities as part of their ongoing underwriting activities;
- investment funds, especially those with low risk foreign government investors, such as pension funds; and
- foreign government investors, including those which already hold at least 10% of an entity or business and would otherwise require approval for each further investment regardless of value.

In determining whether to grant an exemption certificate and the conditions attached to any approval, FIRB will have regard to the nature and scale of the proposed investment (including target business or industry), whether the proposal could be contrary to the national interest, and the duration of the exemption sought (typically more than 12 months). Exemption certificates are likely to be granted only for “low risk” investors and transactions and not, for example, for acquisitions involving “sensitive” entities or businesses, critical infrastructure assets or agribusinesses.

A key consideration will be the applicant’s track record of compliance with Australian laws. In the case of foreign government investors, their track record and the nature of the proposed investment will be subject to a high level of scrutiny.

A full exemption is only likely to be granted where the proposed acquisitions can be assessed against the national interest test at the time of application, the investor is very low risk, and/or the target or sector typically does not raise national interest issues.

An exemption certificate typically will be given subject to conditions, generally including a limit on the total consideration covered (usually lower than A$1 billion) and periodic reporting requirements.

FIRB approval process

Making an application

Applications for FIRB approval must be made in writing and submitted online via the FIRB portal.

An application is made in the form of a letter and needs to include at least the information set out in the application checklist issued by FIRB, which includes matters such as:

- details of the parties, including whether the applicant or any of its associates is a foreign government investor;
- details of the proposed acquisition or investment, including whether it involves an entity, business and/or land;
- the consideration value and basis of calculation;
- the value of the entity, total assets or any interests in land;
- the rationale for the investment or acquisition, including the purchaser's intention for the business;
- any submissions the applicant wishes to make in relation to national interest criteria;
- copies of transaction documents, any ownership structure diagrams or step plans; and
- copies of financial statements for the target entity or business.

Further information may also be required depending on the nature of the parties, acquisition or investment involved.

Review by FIRB

Once an application is made and the applicable fee has been paid, the Treasurer has 30 days to decide whether to approve or object to the foreign acquisition, and a further 10 days to notify the applicant of the decision. Generally, this is done by providing an applicant with a no objection notice. An interim order can be made extending the initial 30 day decision period for up to a further 90 days if the Treasurer considers that further time is required to assess the proposal. However, to avoid any potential negative implications of an interim order, an applicant may request the Treasurer to extend the 30 day decision period.

The Treasurer has the power to prohibit notifiable actions or significant actions if they are contrary to the "national interest". When considering whether a foreign investment proposal is contrary to the national interest, the Treasurer and FIRB will consider factors such as the character of the investor, existing government policy and law (particularly tax), national security interests, competition, any impact on Australia's economic development and the community as a whole and, in the case of a foreign government investor, the commerciality of the investment (including whether the investor may be pursuing broader political or strategic objectives).

Conditions on approval

The Treasurer may impose conditions on any approval given in order to prevent the relevant action from being contrary to Australia's national interest. In particular, the Treasurer and the ATO can consider the potential impact of an action on Australian tax revenues and the integrity of the tax system, and often impose tax conditions on certain transactions, particularly on corporate restructurings, to ensure that investors fully comply with Australian tax requirements, such that:

- if the Treasurer (or delegated decision maker) considers that tax conditions need to be applied to protect the national interest (including to address a risk to the integrity of the tax system and/or tax revenue), "standard" tax conditions may be imposed which broadly require an investor to comply with Australia's tax laws, produce information requested by the ATO, pay any outstanding tax debt and provide an annual compliance report to FIRB; and

– if an action is considered to have a significant or particular tax risk, additional tax conditions may be imposed, which may include conditions requiring the investor to engage in good faith with the ATO (e.g. to negotiate an advance pricing arrangement or request a private ruling) and/or to provide information periodically, including forecasts of tax payable.

Fees

The FATA imposes fees on FIRB applications on a "user pays" system. For example:

<table>
<tr><th>Action</th><th>Consideration</th><th>Fee</th></tr>
<tr><td rowspan="3">Acquisition of securities or business assets or a direct interest in an agribusiness</td><td>Above A$1 billion</td><td>A$105,200</td></tr>
<tr><td>Above A$10 million and not more than A$1 billion</td><td>A$26,200</td></tr>
<tr><td>A$10 million or less</td><td>A$2,000</td></tr>
<tr><td colspan="2">Internal reorganisation</td><td>A$10,400</td></tr>
<tr><td colspan="2">Foreign government investor starting a business</td><td>A$10,400</td></tr>
<tr><td rowspan="3">Acquisition of commercial land</td><td>Above A$1 billion</td><td>A$105,200</td></tr>
<tr><td>Above A$10 million and not more than A$1 billion</td><td>A$26,200</td></tr>
<tr><td>A$10 million or less</td><td>A$2,000</td></tr>
<tr><td rowspan="3">Acquisition of residential land or application for exemption certificate</td><td>A$1 million or less</td><td>A$5,700</td></tr>
<tr><td>Above A$1 million and less than A$10 million</td><td>A$11,500 to A$104,100</td></tr>
<tr><td>A$10 million and above</td><td>As advised by the ATO based on amount of consideration</td></tr>
<tr><td colspan="2">Application for an exemption certificate for businesses and entities</td><td>A$36,200</td></tr>
</table>

Reduced fees apply in certain circumstances. Where multiple fees apply, the applicant is only required to pay the higher fee.

The applicable fee must be paid before an application will be considered and is non-refundable.

Confidentiality

Most foreign investment applications will contain "commercial-in-confidence" information and FIRB has processes in place to ensure the confidentiality of information provided by applicants.

FIRB may share applications with other government departments and agencies for consultation purposes, but will not provide them to third parties outside of the government unless it has permission from the applicant or it is ordered to do so by a relevant court.

Penalties

The legislation imposes significant criminal and civil penalties for non-compliance.

Offences include:

- failing to notify the Treasurer before taking a notifiable action;
- giving notice of a significant or notifiable action and taking the action before the end of the time period in which the Treasurer may object; and
- contravening an order made by the Treasurer.

The maximum criminal penalties are, for an individual, a fine of A$157,500 and/or three years' imprisonment and a fine of A$787,500 for companies.

The criminal and civil penalties extend to third parties including company officers, lawyers, accountants and real estate agents if they knowingly assist a foreign investor to breach the legislation.

The Treasurer also has broad powers to make disposal or other orders in relation to a breach.

3 Forms of Business Organisation

3. Forms of Business Organisation

Introduction

When formulating an investment proposal, foreign investors need to determine which form of business organisation is the most appropriate for their requirements. The major types of investment vehicles used in Australia by both residents and non-residents are:

- companies, including branch offices of foreign companies;
- joint ventures;
- partnerships; and
- trading trusts.

Specific advice as to the appropriate vehicle should be sought on a case by case basis.

Companies

An overseas company wishing to carry on business in Australia may elect either to register a subsidiary or to establish a branch office by registering itself as a foreign company. Registration of a subsidiary or branch under the *Corporations Act 2001* (Cth) automatically confers the right to carry on business throughout Australia.

Choice of branch or subsidiary

The main factors to consider when deciding whether to establish a branch or subsidiary are:

- A subsidiary is a separate entity from its parent corporation. It has limited liability and the parent is not normally liable for the debts or obligations of a subsidiary. A parent company can be held liable for the debts of its subsidiary where:
  - that subsidiary was insolvent or becomes insolvent at the time of incurring debt;
  - there were reasonable grounds for suspecting that insolvency; and
  - the parent corporation, or one or more of its directors, suspected insolvency or should reasonably have suspected insolvency.
- An Australian branch of an overseas corporation is not a separate legal entity and the corporation will therefore be liable for all debts and obligations of the Australian branch.
- From a taxation viewpoint, if a subsidiary is chosen, some establishment expenses will not be deductible at all from the company's assessable income and other establishment expenses will not be of use until the subsidiary is earning sufficient assessable income. Different registration and filing requirements for the goods and services tax (GST) apply to subsidiaries and branches. Also see Chapter 6 (Taxation) regarding the different tax treatment of branch profits and dividends paid by a subsidiary.
- The annual return of a branch office (which is available to the public) must include the worldwide financial accounts of the company of which it is a branch, unless exempted by the Australian Securities and Investments Commission (ASIC). Disclosure is not limited to the local branch operations.

- The use of a branch may lead to practical difficulties in dealing with Australian government organisations, financiers or other third parties. For example, in arranging Australian finance, institutions will normally require audited financial statements relating to the Australian operations of the applicant which may not be readily available in an acceptable form in the case of a branch.
- Third parties dealing with a branch may need to be satisfied as to the nature of the foreign corporation's legal structure and the means by which it is able to bind itself to obligations in Australia.

Public company or proprietary company

Several types of companies are available. The two most common company types are:

- public companies; and
- proprietary (or private) companies, which are further divided into large and small proprietary companies.

The major differences between public and proprietary companies are:

- A proprietary company cannot have more than 50 non-employee shareholders whereas a public company may have an unlimited number of shareholders.
- A proprietary company must either be limited by shares or be an unlimited company that has share capital. A public company may be limited by shares, limited by guarantee (e.g. charities), unlimited or a no liability company (only for mining companies).
- A proprietary company cannot engage in any activity that would require the lodgement of a prospectus, such as offering shares to retail investors.
- A proprietary company must generally have at least one director who must also be ordinarily resident in Australia, while a public company must have at least three directors, at least two of whom must be ordinarily resident in Australia. There are no specific qualifications to be satisfied to enable non-residents to act as directors of Australian companies, provided they are at least 18 years of age and have otherwise consented to act as directors.
- Proprietary companies are not usually required to lodge all their constituent documents with ASIC, while public companies are required to do so.
- Proprietary companies are not required to have a secretary, but if one or more secretaries are appointed, one must be resident in Australia, whereas public companies must have a company secretary who resides in Australia.

In all cases, both directors and secretaries must be individuals, not companies.

A proprietary company will usually be more appropriate if the entity is to be a wholly-owned subsidiary of a foreign company and if a public offering of shares or debentures is not intended. A proprietary company may be converted into a public company at any time.

For a description of the registration requirements for companies and other regulations concerning the operations of companies in Australia, see Chapter 4 (Companies and Securities Regulation).

Joint ventures

A foreign investor may wish to enter into a joint venture arrangement with one or more other parties with respect to the conduct of an Australian enterprise. Such arrangements may be either unincorporated or incorporated. There is no legislation directly regulating joint venture arrangements of either type.

Unincorporated joint ventures

In an unincorporated joint venture, the respective rights and obligations of the participants are essentially determined by contract. These rights and obligations are usually set out in detailed joint venture documents and may be interpreted and supplemented by reference to general contract law. A joint venture of this type is most suitable for specific projects or business ventures.

Careful structuring is required to ensure that the joint venture is not treated as a partnership for partnership law and tax purposes. This may carry with it certain taxation advantages and generally involves the joint venture agreement providing for the sharing of the product of the joint venture rather than any sharing of profits.

Incorporated joint venture

A joint venture will often be conducted by a corporate entity owned by the joint venture participants. In this case, the participants normally enter into a shareholders agreement and Australian company laws will apply to many aspects of their relationship.

Partnerships

General

A partnership under Australian law is an association of persons who carry on business in common with a view to profit. Business partnerships of more than 20 persons are prohibited, except for certain professional partnerships.

A partnership is formed by agreement between the parties and the rights and obligations of the partners are usually set out in a written partnership agreement. Partnership Acts in each state and territory apply to regulate certain rights and obligations of partners. Subject to the terms of the partnership agreement, each partner is entitled to participate in the management of the partnership.

In a general partnership, the liability of partners for the debts of the partnership is unlimited, so that each partner is fully liable and may be sued personally.

Limited partnerships

Limited partnerships comprise two classes of partners:

- "limited partners" whose liability is limited to a pre-contributed sum; and
- "general partners" whose liability is unlimited and who generally undertake a managerial role.

A limited partnership must be registered with the relevant state authority.

Limited partnerships are not generally used as they are generally taxed as companies in Australia.

Trading trusts

A trading trust is a trust arrangement under which a trustee (usually a limited liability company) conducts a business or holds an investment on behalf of certain beneficiaries. To establish the trust, a nominal amount is normally settled by a party (the settlor) to be held by the trustee on behalf of and on trust for the beneficiaries. Once the trust is created, the trustee acquires the business or investment and holds it on trust for the beneficiaries in accordance with the terms of the trust instrument.

The duties owed by the trustee to the beneficiaries are regulated by the trust deed, state or territory legislation and the general law. Trusts fall broadly into two categories: discretionary trusts and unit trusts.

Discretionary trusts

Under this form of trust, the trustee has a discretion over the distribution of the income and capital of the trust to any of the beneficiaries identified in the trust deed. Discretionary trusts have historically been employed for family tax planning purposes as a means of splitting income among various family members. Discretionary trusts are usually inappropriate as investment vehicles.

Unit trusts

Unit trusts are trusts in which investors subscribe for units issued by the trustee. Each unit confers upon the holder a proportionate interest in the overall assets and undertaking of the trust. Unit trusts have been used as vehicles for public investment schemes.

Sole trader

Any person may carry on business as an individual using either their own name or a registered business name. A sole trader is personally liable for all debts incurred by them in carrying on that business.

Comparative business advantages

The choice of an appropriate structure will depend upon the facts of any particular case. As a general indication, some advantages usually associated with the different structures are set out below.

Companies (and incorporated joint ventures)

The major advantages in adopting a corporate structure include:

- the liability of shareholders is usually limited to the amount of their capital contribution in the company;
- the corporate structure facilitates the coordination of the interests of a large number of investors under a well-defined legal framework in situations where other business forms may be unworkable;
- public companies are able to raise finance from the general public through offers to subscribe for securities;
- profits may be accumulated and re-invested by the company without the need for distribution to shareholders; and
- the differential between the corporate tax rate of 30% (or 27.5% for "base rate entities") and the top effective personal tax rate of 47% may give rise to tax-planning opportunities in certain circumstances.

Partnerships

The major advantages of partnerships include:

- the partnership structure is often more flexible than other structures;
- partnerships are under no obligation to make public disclosures of reports and accounts;
- in contrast to the use of companies and trusts, a partnership enables the participants to offset losses and expenditure incurred in relation to unrelated activities against the income of the partnership for tax purposes. However, these benefits do not extend to limited partnerships; and
- where professionals conduct business jointly with other members of the same profession, legal or ethical restrictions may exist which limit the conduct of the business as a company and the partnership structure may be appropriate.

A limited partnership also offers the benefit of limited liability for some of the partners.

Trusts

Advantages of trusts include:

- trusts may be more effective for tax purposes where assets are to be held for ultimate sale;
- a trust may be structured so that the liability of the unitholders or beneficiaries of the trust is limited;
- trusts facilitate certain public investment schemes, where an independent trustee (called a “responsible entity”) is required to protect the interests of the investing public; and
- the trust structure is often more flexible than the company structure. For example, the legal restrictions which apply to reductions in the capital of a company do not apply to similar reductions in the capital of a trust.

4 Companies and Securities Regulation

4. Companies and Securities Regulation

The national scheme

All corporations in Australia are required to comply with provisions of the *Corporations Act 2001* (Cth) (Corporations Act). The legislation is administered by a single national regulatory authority called the Australian Securities and Investments Commission (ASIC).

ASIC regulates the registration of companies and the registration of foreign companies or branches in Australia. ASIC also maintains a publicly available database on each registered entity and regulates and oversees all aspects of corporate and securities law activity and transactions, including the release of regulatory guides for use by corporations and their advisers.

Registration requirements

Incorporation

A person may choose to incorporate a company themselves or to purchase all of the shares in a clean shelf company (a company that has not traded) from a solicitor, accountant or specialist company formation service.

A company (whether a proprietary company or a public company) is registered by ASIC as an Australian company in the following manner:

- If a particular company name is requested it may be reserved with ASIC by lodging an application and paying the prescribed fee (otherwise the registration number will be the company's name).
- Written consent must be obtained from each person who will become a director, secretary and public officer of the company and from each person who will become a shareholder of the company (for example, the parent entity). In general, a proprietary company must have at least one director, but need not have a secretary, and at least one director and secretary (if any) must ordinarily reside in Australia.
- An application for registration must be lodged with ASIC accompanied by certain prescribed documents and the necessary filing fees.
- A certificate of registration is issued, entitling the company to carry on business in every state and territory of Australia.

The company's name can be changed, subject to availability, by special resolution of the shareholders and the issue of a certificate of registration of change of name by ASIC.

Constitution

A company's internal management will be contained in:

- the replaceable rules which are set out in the Corporations Act;
- its own constitution; or
- a combination of replaceable rules and the constitution.

The replaceable rules are optional provisions contained in the Corporations Act which relate to the internal management of a company, but they do not deal with every aspect of corporate governance. In general, companies (proprietary and public) choose to adopt their own constitution instead of relying on the replaceable rules. A company will adopt a constitution either:

– on registration, if each proposed initial shareholder agrees in writing to the terms of a constitution before the application is lodged; or

– after registration, if the company passes a special resolution adopting a constitution.

If a company does not choose to adopt its own constitution, it will be taken to automatically adopt the replaceable rules.

Companies may choose to have a common seal for executing documents but this is not mandatory and is not often done in practice. To execute a document without a common seal, the document may be signed by either two directors or a director and a secretary or, in the case of a sole director/secretary proprietary company, by that director/secretary.

Foreign companies

A foreign company is an incorporated or unincorporated body that is formed in an external territory of Australia or outside Australia, and which can sue and be sued or may hold property in the name of its secretary or other officer. Corporations sole, exempt public authorities, and unincorporated bodies that have their head office or principal place of business in Australia are excluded from the definition of a foreign company.

If a foreign company elects to carry on business in Australia (for example, through a branch office in Australia), the company must be registered with ASIC as a foreign company. Whether a body is "carrying on business" in Australia will depend on a number of factors. Generally, carrying on business involves some kind of systematic and regular commercial activity. A company does not carry on business in Australia merely because, for example, it has a bank account, is involved in a proceeding or dispute, or invests funds or holds property in Australia.

To register as a foreign company, the company must:

– lodge the relevant application form with ASIC, accompanied by certified copies of its constituent documents including an equivalent certificate of registration and its constitution;

– provide details of its registered office in Australia;

– lodge a memorandum of appointment of a local agent (who must be a resident) to carry out limited functions such as accepting service of process and certain notices; and

– pay the relevant fees to ASIC.

A foreign company is not required to have resident directors or secretaries in order for it to operate a branch office in Australia.

Rather than carry on business in Australia itself, a foreign corporation may instead use an Australian incorporated subsidiary which may be a proprietary or public company.

Representative office

If a foreign corporation does not wish to register as carrying on business in Australia, it may be possible to establish a representative office to engage only in activities which do not amount to, or form part of, the carrying on of the relevant business in Australia. For example, having a nominated person employed by a local affiliate to handle enquiries.

Publication requirements

Both Australian companies and registered foreign companies are required to display their name and Australian Company Number or Australian Registered Body Number on all public documents and negotiable instruments. Under the Corporations Act "public documents" are broadly defined and include business letters, statements of account, invoices, receipts, orders and official notices or publications of the company. Registered foreign companies are also required to specify their place of origin on these documents and instruments.

Compliance and reporting requirements

Registered office

Every company must have a registered office in Australia from the date of registration. The company's name must be prominently displayed at every place where it carries on business and that is open to the public. The registered office of every public company must be open to the public for at least three hours between 9 am and 5 pm on each business day. A proprietary company may keep its registered office closed, but it must provide access to its registers upon request.

Preparation of accounts

All public companies, registered managed investment schemes (MIS) and large proprietary companies are required to prepare, and lodge with ASIC, an annual financial report that complies with the accounting standards and gives a true and fair view of the company's financial position for that period, as well as an annual directors' report. In some cases, a company may seek relief from ASIC in respect of this requirement.

The annual financial report consists of financial statements for the year, notes to these financial statements, and directors' declarations about the financial statements, including a declaration as to whether the company will be able to pay its debts as and when they become due and payable. A disclosing entity (for example, a listed company) or registered MIS must lodge its financial reports within three months of the end of the financial year. Disclosing entities must also lodge half yearly accounts within 75 days of the end of the half year. All other reporting companies must lodge their financial reports within four months of the end of the financial year.[1]

A small proprietary company is required to maintain proper accounting records but it will only have to prepare an annual financial report and directors' report and lodge them with ASIC if it is:

- required to do so by ASIC, or if it is required to do so by shareholders who hold at least 5% of the votes; or
- controlled by a foreign company which has not lodged audited consolidated accounts with ASIC.

From 1 July 2019, a small proprietary company is defined as a company which satisfies at least two of the following three conditions:

1. The consolidated revenue of the company and its controlled entities for the financial year is less than A$50 million.
2. The total value of its consolidated gross assets at the end of the financial year is less than A$25 million.
3. It has fewer than 100 employees at the end of the financial year.

[1] As at 13 May 2020, due to the COVID-19 pandemic, ASIC has extended the statutory financial reporting deadlines such that (i) unlisted entities have one additional month to lodge financial reports for year ends from 31 December 2019 to 7 July 2020, and (ii) listed entities have one additional month to lodge full year and half-year financial reports for 21 February 2020 to 7 July 2020 balance dates.

Registered foreign companies are required to lodge financial statements with ASIC at least once every calendar year and at intervals of not more than 15 months. Financial statements comprise a copy of the company's balance sheet, profit and loss statement and cash flow statement (all made up to the end of the last financial year) and any other documents the company is required to prepare by the law that applies in the company's place of origin, together with an ASIC document to verify those financial statements.

A foreign-controlled small proprietary company may apply to ASIC for relief from lodging an annual financial report and directors' report.

Auditors

Every public company and large proprietary company must appoint an auditor. A public company must do this within one month after registration. If a small proprietary company is required to prepare audited financial statements, it will need to appoint an auditor. This requirement also applies where the company is controlled by a foreign company which has not lodged audited consolidated accounts with ASIC or otherwise qualified for relief.

Annual general meeting

Unless its constitution provides otherwise, a proprietary company is not required to hold an annual general meeting of its shareholders (AGM). A public company must hold an AGM within 18 months after registration and must hold an AGM at least once every calendar year within five months of the end of its financial year.[2] The auditor of a public company must attend AGMs.

All general meetings, including the AGM, require at least 21 days' notice or, in the case of a public company listed on the Australian Securities Exchange (ASX), at least 28 days' notice.

All resolutions of a proprietary company may be passed by a written circulating resolution signed by all of the shareholders.

Annual statement filing

Every company has an annual review date which is usually the anniversary of its registration date. Companies can apply to ASIC to alter their review date. Each year, soon after its annual review date, ASIC issues a company with an annual statement and an invoice for the company's annual review fee. An annual statement contains information about the company such as details of its registered office, shareholders, officeholders and share structure. The annual statement is available for inspection by the public.

The obligation to respond to the annual review documents is a separate obligation from the financial report obligations discussed above.

Continuous disclosure by disclosing entities

Disclosing entities (typically only listed public companies or trusts) must also disclose, on a continuous basis, information that a reasonable person would expect to have a material effect on the price or value of the entity's securities. There are limited carve-outs available (for example, for information that is incomplete and remains confidential or is a trade secret). Most listed entities adopt rigorous monitoring and reporting systems to enable price-sensitive information to be identified and disclosed to the market in a timely fashion.

Civil penalties apply for non-compliance with the continuous disclosure requirements. ASIC has the power to fine entities which do not comply with the requirements. Directors may be criminally liable if the failure to disclose is

[2] As at 13 May 2020, due to the COVID-19 pandemic, ASIC has permitted public companies with financial years ending 31 December 2019 to 7 July 2020 to hold their AGM up to seven months after year end, even if this means the requirement to hold an AGM in calendar year 2020 is not satisfied.

intentional or reckless. If the failure to disclose is negligent, the entity and any of its directors knowingly involved in the contravention may incur civil liability to any person suffering loss as a result.

The continuous disclosure requirements applicable to Australian disclosing entities are not applicable to branch offices of a foreign company (unless the foreign company is listed on the ASX). A foreign company's branch must also make certain, but more limited, continuing disclosures.

Ongoing filing requirements

A company's minute book and registers must be kept at its registered office or its principal place of business within Australia. The company register might also be kept at the place where the register is maintained (for example, the company's solicitor's office) or elsewhere if permission has been granted by ASIC. Shareholders are entitled to inspect the minute books free of charge.

In addition to the minutes of directors' and shareholders' meetings, a company must maintain registers of shareholders, option holders and debenture holders. Any changes to the company's name, officers, registered office and certain other matters concerning the company must be notified to ASIC using the appropriate form within a certain prescribed period after those changes occur (otherwise late fees and penalties apply) and the company's registers must be updated to reflect these changes.

A company must also maintain accurate records on the personal property securities register of the creation or discharge of any registrable security interests in respect of its personal property under the *Personal Property Securities Act 2009* (Cth) (PPSA). Generally the PPSA will apply to personal property which is located in Australia or if the grantor of the security interest is Australian. The PPSA is a priority based regime meaning that a failure to register promptly may result in the company losing its priority in respect of the security interest (and potentially its title in the underlying personal property) or the security interest becoming unenforceable in the insolvency or bankruptcy of the grantor – see Chapter 7 (Banking and Finance) for more information on the PPSA.

Proprietary companies are not required to file their constitution on the public record at the time of registration or when resolutions effecting changes to the constitution are made, unless the resolutions are related to the name, share capital or status of the proprietary company.

Company directors: duties and liabilities

Directors' duties

Under the Corporations Act, a company's directors must:

- exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person with the same position and responsibilities would exercise in the circumstances;
- act in good faith in the best interests of the company (by acting for the benefit of the company as a whole) and for a proper purpose;
- not improperly use their position, or information obtained from their position, to gain an advantage for themselves or someone else or to cause detriment to the company; and
- prevent the company from trading while it is unable to pay its debts.

The duty of care and diligence requires the directors to acquaint themselves with the company and its business, and take responsibility for the company's overall strategy, systems and risk management. The duty applies to both executive directors and non-executive directors. A director is expected to be capable of understanding the company's affairs to the extent of actually reaching a reasonably informed opinion of its financial position. A director must, in the performance of their duties, exercise a degree of skill that may reasonably be expected from a person of like knowledge and experience. A director may not be able to argue a lack of formal training or knowledge of financial statements to avoid their duties, nor can directors rely unquestioningly on management to satisfy their duties.

The standard of care required of a director must be assessed by reference to the particular circumstances of the director concerned, including any special skills for which the director was appointed. A breach of the duty of care and diligence will only give rise to civil sanctions (e.g. the director being disqualified from office or being forced to pay compensation) and will not provide a basis for a criminal offence.

Business judgement rule safe harbour

The Corporations Act contains a statutory business judgement rule which deems a director to have met the requirements of the statutory duty of care and diligence, and the equivalent duties at common law and in equity, in respect of a business judgement if the director:

- made the judgement in good faith for a proper purpose;
- did not have a material personal interest in the subject matter of the judgement;
- informed themselves about the subject matter of the judgement to the extent they reasonably believed to be appropriate; and
- rationally believed that the judgement was in the best interests of the company.

The business judgement rule further provides that the director's belief that the judgement is in the best interests of the company is rational unless the belief is one that no reasonable person in their position would hold.

Conflict of interest

Directors must avoid any actual or potential conflicts between personal interests and their duties to the company. Generally, directors have a duty to notify the other directors of any "material personal interest" in a matter relating to the company's affairs, subject to certain exceptions. Even if the director does not profit from a particular transaction in which they have an interest, the director may be in breach of this duty. In addition, there are specific restrictions on voting and attendance at directors' meetings for directors of public companies where they have a material personal interest in the matter under consideration, even where this interest has been appropriately disclosed.

A conflict may also arise where the director has a personal interest in a contract made by the company or when a director is a director of two or more companies which are parties to a contract.

A director may not take advantage of a commercial opportunity that may have been available to the company unless full disclosure to, and consent from, the shareholders is obtained.

Financial benefit

A public company must not give any "financial benefit" to a "related party". "Financial benefit" broadly includes anything that confers a financial advantage, such as the making of a payment, entering into an agreement or giving an indirect financial benefit. A "related party" includes a director of the company, a close relative of a director, a parent company, or a company controlled by any of those people.

A public company may, however, give a financial benefit to a related party where it has obtained shareholder approval and the benefit is conferred within 15 months of approval being given. There are also certain benefits which are exempted from the prohibition and do not require shareholder approval, including arm's length transactions on commercial terms, and the payment of "reasonable remuneration" to an officer. In practice, these exemptions are commonly relied upon by public companies.

Statutory derivative action

The Corporations Act contains a statutory derivative action which enables shareholders, directors or officers of a company to bring an action on behalf of the company for a breach of duty by a director or officer (or a claim against a third party) where the company is unwilling or unable to bring the action itself. The individual seeking to bring the action on behalf of the company is required to satisfy the court of certain criteria in order to be granted leave. The rationale behind this ability is to encourage company management to be more accountable to the shareholders for decisions they make.

Directors' insurance and indemnities

A company will often agree to indemnify directors, to the extent permitted by law, against certain liabilities and legal costs incurred by the directors as officers of the company, and will maintain and pay the premium on a directors and officers (D&O) insurance policy in respect of the directors.

The Corporations Act prohibits a company or a related body corporate from exempting a person, whether directly or through an interposed entity, from a liability to the company incurred as a director or other officer of the company. A company and its related companies are also prohibited from indemnifying a director or other officer of the company (except in relation to legal costs) where:

- the liability is owed by the officer to the company itself or a related body corporate;
- a civil penalty or compensation order is imposed on the officer under the Corporations Act; or
- the liability is owed by the officer to someone other than the company and it did not arise out of conduct in good faith.

Indemnities given by the company to an officer of the company for legal costs are permitted, except where:

- the officer is defending proceedings in which the officer is liable on one of the above three grounds;
- the officer is found guilty in a criminal proceeding;
- ASIC has established a successful action against the officer; or
- the court has denied relief sought by the officer.

The company may loan or advance the officer money to cover the costs of legal proceedings, but that money must be repaid if the director loses the proceedings. The advance may be retained as an indemnity if the officer wins the proceedings.

A company and its related companies are prohibited from taking out insurance or paying premiums, whether directly or through an interposed entity, to insure against liability incurred by an officer of the company which involves:

- a wilful breach of duty in relation to the company; or
- the improper use of company information or the officer's position to gain an advantage or cause detriment to the company.

A company may take out insurance and pay the premiums to protect its directors and officers from other risks, including costs and expenses in defending civil and criminal proceedings, whatever the outcome.

Insolvent trading

The duty to prevent insolvent trading is one of the most important duties imposed on company directors. It allows for enforcement by creditors and it allows for the personal assets of directors to be used for the repayment of a company's debts. Under the Corporations Act, directors have a positive duty to prevent their company from trading while insolvent and may incur civil liability (and in some cases criminal liability) if they breach this requirement.[3]

In determining a breach, the timing of the incurrence of a debt and the reasonable knowledge of the director at the relevant time will be relevant. The circumstances in which a debt may be incurred include, for example, the issue of redeemable preference shares, entry into a buy-back agreement, purchase of goods from suppliers, drawdown of loan facilities, or the payment of a dividend. If the company is insolvent when a debt is incurred or becomes insolvent by incurring the debt, then the directors risk personal liability for the debt.

The provisions apply to debts incurred where there are reasonable grounds to suspect that the company will not be able to pay its debts as and when they become due and payable. In determining this issue, consideration is given to both what the director actually knew and what the director ought reasonably to have known. There are various statutory defences under the Corporations Act which the directors may rely on provided that they can prove certain elements – for example, that they had reasonable grounds to expect that the company was solvent, that they had taken reasonable steps to prevent the company from incurring the debt or that they were relying on a competent person to provide them with information as to the affairs of the company.

In addition, "safe harbour" provisions enable a director to avoid personal liability for insolvent trading on certain debts if, after suspecting insolvency, the director takes steps that are reasonably likely to lead to a better outcome for the company. The safe harbour is intended to relieve directors from personal liability in connection with insolvent trading during an informal workout. Directors seeking to rely on the safe harbour bear the evidentiary burden to prove that they have taken appropriate steps.

Other liabilities

The Corporations Act may also impose personal liability on directors in certain circumstances where provisions of the Act are breached. These may include a failure to comply with the requirements as to company and business names, insider trading in a company's securities, inaccuracies or omissions in the contents of a company prospectus, breach of the prohibition on financial assistance for share acquisitions, and breach of provisions relating to the preparation of accounts.

Directors may be personally liable for breaches by the company of other legislation, including laws relating to work health and safety, competition and consumers, environmental protection, equal opportunity, discrimination and taxation.

Directors may also be made personally liable for certain state and federal taxes that are not paid by the company.

Offerings of securities

The Corporations Act regulates capital raising activities of both local and foreign corporations in Australia. Generally, a company is prohibited from offering securities (including shares, options and debentures) in Australia unless it first lodges a disclosure document (such as a prospectus) with ASIC that complies with certain content and procedure-related statutory requirements.

[3] Under temporary amendments made due to the COVID-19 pandemic, the duty to prevent insolvent trading, and the associated personal liability for directors, will not apply to debts incurred in the ordinary course of a company's business on or after 25 March 2020 until 24 September 2020. This period could be further extended by regulation.

Offers which are exempt from the disclosure document requirement include:

- personal offers where no more than 20 people invest during any 12 month period for amounts up to A$2 million in aggregate;
- offers where the minimum subscription is A$500,000 by each person to whom the offer is made;
- offers made to "sophisticated investors", i.e. persons with net assets of at least A$2.5 million or gross income of at least A$250,000 per annum, or persons whom a licensed securities dealer certifies to be "sophisticated" based on previous investment experience;
- offers made to "professional investors", for example, financial services licensees, listed entities and persons who have more than A$10 million in assets under management;
- certain offers to employees and directors under an employee incentive scheme (see further below);
- certain offers to present security holders, including via dividend reinvestment plans or bonus security plans; and
- certain offers of securities which are separately regulated, such as an offer of shares in a bidder in connection with a regulated takeover offer – see Chapter 5 (Mergers and Acquisitions) for more detail.

The most common form of regulated disclosure document is a prospectus. Other types of disclosure document include an offer information statement if the amount of money to be raised, when added to all amounts previously raised, is A$10 million or less, or a profile statement in connection with ASIC approved offers where a prospectus has been lodged.

The onus lies on the issuer to ensure that the disclosure document complies with the disclosure requirements set out in the Corporations Act. A prospectus must contain all the information investors and their professional advisers would reasonably require and reasonably expect to find in the prospectus for the purpose of making an informed investment decision.

The company, directors and expert advisers may benefit from a "due diligence" defence for misleading or deceptive statements in a prospectus, or the omission of required material from the prospectus, if they can prove they made all reasonable inquiries and they believed on reasonable grounds that the prospectus did not contain any misleading or deceptive statements and that there was no omission. Professional advisers (such as independent accountants) will only be liable for statements in a prospectus that have been attributed to them with their consent.

A special disclosure regime exists for offers of interests in a managed investment scheme (such as units in a unit trust).

ASIC has issued certain exemptions providing relief from procedural requirements for prospectuses lodged and distributed both in Australia and in another country where the issuer has securities quoted on a foreign stock exchange. However, the disclosure requirements of the Corporations Act are still required to be met by the company offering the securities.

ASX listings of securities of foreign companies

The ASX has detailed listing rules which set out the pre-conditions to listing a company on the ASX and official quotation of the securities, and which prescribe requirements to be satisfied by listed companies on an ongoing basis.

Foreign corporations may apply for listing on the ASX in one of two ways. First, if the foreign corporation is listed on another stock exchange and complies with the listing rules of its overseas home exchange, it may qualify as an "exempt foreign company" under the ASX listing rules. An ASX foreign exempt listing requires, among other things, an entity to have at least A$200 million in operating profit for each of the preceding three years, or to have net tangible assets or a market capitalisation of at least A$2 billion. For NZX-listed entities only lower thresholds apply, namely an aggregated profit of A$1 million for the past three financial years or net tangible assets of A$4 million or a market capitalisation of A$15 million.

A foreign exempt listing means that the entity is not subject to most of the ASX listing rules, but it must continue to comply with the listing rules of its overseas home exchange, maintain an informed market (which would be satisfied by sending ASX copies of all documents lodged by the foreign company with its home stock exchange) and allow for electronic share registration and transfers in Australia.

A foreign company which does not meet the above thresholds may also seek admission to ASX under the "standard" ASX listing route, which applies the same criteria as for an Australian entity. One significant requirement for an ASX listing is that the entity issues a disclosure document (typically a prospectus) which must be lodged with ASIC and provided to ASX. A foreign entity seeking an admission under the standard ASX listing process will then be subject to all of the ASX listing rules, even if it is also listed on another stock exchange.

Trading in securities and takeovers

The Corporations Act also regulates:

- trading in securities and the conduct of participants in the securities industry; and
- the acquisition of shares in listed and certain unlisted companies. Generally, a person is prohibited from acquiring more than 20% of the voting shares of a listed Australian company, or more than 20% of the voting interests of a listed trust. Exceptions to the prohibitions include takeover offers to all shareholders where the offer documents are lodged with ASIC and acquisitions which are first approved by shareholders – see Chapter 5 (Mergers and Acquisitions) for more detail.

Employee share and option plans

The Corporations Act and ASX listing rules impose various approval requirements on the adoption of employee share or option plans by listed companies. Employee plans can take the form of an employee share purchase plan, which provides employees with means for acquiring existing or new shares, an employee option plan which provides employees with options to acquire shares in the future at a fixed exercise price, or other forms of incentive such as restricted stock units (RSUs).

Once the employee share or option plan is established, it will usually be implemented by an offer of securities to employees or executives. Any such offering in Australia by a listed company will often be exempt from the prospectus provisions of the Corporations Act due to various exemptions that have been granted by ASIC. ASX listed entities have additional shareholder approval requirements in certain circumstances, such as for a proposed grant of equity awards to a director.

Return of capital

The Corporations Act sets out a relatively simple procedure to enable a company to reduce its share capital (such as returning capital to shareholders) or offer to buy back its own shares.

Reductions in share capital generally

In general, a company may reduce its share capital provided the reduction in capital is fair and reasonable to the company's shareholders as a whole, does not materially prejudice the company's ability to pay its creditors and is approved by shareholders.

An equal reduction of share capital (where the reduction applies to all ordinary shareholders in equal proportions) requires an ordinary resolution of the company's shareholders.

For a selective reduction in capital (e.g. where the company repays capital only to selected shareholders), special shareholder approval is required, either by:

- a special resolution passed at a general meeting of the company, where any person who is to receive consideration as part of the reduction or whose liability to pay amounts unpaid on shares is to be reduced, or any of their associates, are unable to vote in favour of the resolution; or
- a resolution which is agreed to at a general meeting by all ordinary shareholders.

If the selective reduction involves the cancellation of shares, the reduction must also be approved by a special resolution passed at a meeting of the shareholders whose shares are to be cancelled.

Buy-backs

A proprietary or public company may buy back its own shares if the buy-back does not materially prejudice the company's ability to pay its creditors and the company complies with the procedural requirements set out in the Corporations Act. Except in the case of selective buy-backs, shareholder approval will be required if the buy-back will result in more than 10% of the company's issued shares being acquired in a 12 month period. Listed companies can undertake on-market buy-backs without shareholder approval within this 10% limit.

A selective buyback requires the unanimous approval of all shareholders, or a special resolution of shareholders must be passed on which no vote is cast by the selling shareholders or their associates.

Certain information must be provided to shareholders and to ASIC before some buy-backs can be implemented to ensure that shareholders receive all material information known to the company at the time of the buy-back. Directors must ensure that the buy-back does not result in the company becoming insolvent to ensure that they do not breach the insolvent trading provisions in the Corporations Act.

Corporate insolvency

General

The Corporations Act provides a uniform set of laws governing the various forms of insolvency administration for companies in Australia, although there are procedural differences observed in the various state Supreme Courts and in the Federal Court of Australia, all of which have jurisdiction in this area.

Voluntary administration

The voluntary administration procedure is a short-term insolvency administration designed to maximise the chances of the company (or as much as possible of its business) continuing in existence or, if it is not possible for the company or its business to continue in existence, to achieve a better return for the company's creditors than would be the case if the company were to be wound up.

A voluntary administration is usually commenced by the directors of a company resolving that, in their opinion, the company is or is likely to become insolvent and that an administrator should be appointed. Although less common, a secured creditor, who is entitled to enforce a security interest over the whole or substantially the whole of the property of the company, or a liquidator of the company may also appoint an administrator in certain circumstances.

The appointment of an administrator to a company operates to stay all proceedings against the company and restrictions are imposed upon the rights of owners, lessors and secured creditors to seize and reclaim their property or security (subject to a number of limited exceptions set out in the Corporations Act).

The administrator must inform the company's creditors of the appointment and call meetings of creditors within strict time limits (the first meeting must be held eight business days after the administrator's appointment). The administrator must also convene a meeting of creditors at which the creditors may resolve to bring the administration to an end and return the company to the control of its directors (but only if it is solvent), put the company into liquidation or have the company enter into a deed of company arrangement (if one has been proposed).

Deed of company arrangement

A deed of company arrangement (DOCA) is a statutory contract between the company and its creditors that governs the relations between the company and its creditors after the end of the voluntary administration. A DOCA is administered by a deed administrator who is usually (but is not necessarily) the same person who was appointed as the voluntary administrator of the company.

A DOCA itself has very few formal requirements and will be tailored to suit the particular circumstances of the company. For example, it may allow the company to continue to trade, including under the control of its directors, and will provide for a fund for distribution to creditors. Such a fund will often be contributed by a third party (such as a director or shareholder), and be funds that would not be available for the benefit of creditors in a winding up of the company.

The administration of the company will come to an end when the DOCA is terminated. If the deed is terminated because its objectives have been met, the company can continue to trade and control will revert to the company's directors and officers. However, if the DOCA is terminated for other reasons and the objectives of the DOCA have not been met, then it is likely that the company will transition to liquidation. Additionally, the Corporations Act provides for a DOCA to be set aside on an application to the court (in particular circumstances), and for a DOCA to be varied including by resolution of creditors.

A DOCA is an alternative to a scheme of arrangement to effect a reorganisation of a company's affairs. There are reasons for and against using a scheme of arrangement or a DOCA (chief among which are time, cost and complexity), depending on the individual circumstances of the company.

Liquidation

A liquidation (also known as a winding up in insolvency) is a terminal procedure intended to realise a company's assets and distribute them among its creditors in accordance with the priorities in the Corporations Act.

Liquidation may be effected on a voluntary basis where a company's shareholders or creditors resolve to wind up the company. In these circumstances, control of the winding up process and appointment of a liquidator will generally be in the hands of the shareholders if the company is solvent, or creditors if it is insolvent. Alternatively, compulsory liquidation occurs where a creditor or other applicant applies to a court for an order that the company be wound up and a liquidator appointed.

There is also an interim procedure, known as a provisional liquidation, where the court appoints a "provisional liquidator" as an urgent measure after the filing of a winding up application and before the making of a winding up order to maintain the status quo in a company.

In both compulsory and voluntary liquidations, there is a statutory stay of proceedings against the company, and a prohibition on enforcement (by unsecured creditors) against the property of the company, other than with the consent of the liquidator or leave of the court. Unsecured claims against the company should generally be pursued by the proof of debt procedure. The liquidator's primary role and duty is to preserve, collect and sell the assets of the company and distribute the available proceeds in the order provided for by the Corporations Act.

In terms of the impact of winding up on contracts, akin to the United States position, and as a result of the "ipso facto" reforms to the Corporations Act which became effective from 1 July 2018, there is a general prohibition on a counterparty terminating a contract based on an insolvency event of default (subject to a range of exclusions).

The liquidator has the role of investigating the company and is entitled to possession of its books and records and to question its directors to ascertain the reasons for the company's failure. A liquidator must also investigate the company's pre-liquidation transactions, which may uncover transactions that are voidable under the Corporations Act. Setting aside such transactions increases the pool of assets available for distribution to the company's creditors. A liquidator may also consider actions against directors and officers of the company for insolvent trading or breaches of directors' duties. A liquidator also has the power to disclaim onerous property of the company, such as land burdened with onerous covenants or unsaleable property, including unprofitable contracts.

Once a distribution of funds (if any) to creditors is complete, the liquidation will be finalised and the company deregistered.

In a winding up, all unsecured creditors with debts or claims (including contingent, unliquidated and future claims) against the company are entitled to participate for dividends from the available assets in respect of their debt or claim if the circumstances giving rise to their debt or claim arose before the "relevant date" for the liquidation. The relevant date is usually the date on which the winding up order was made, or the date of the appointment of the administrator if the winding up was preceded by a voluntary administration. Insolvency set off may be available where a creditor has a claim against and a liability to the company. Specified debts and claims will take priority over the claims of unsecured creditors, being in general terms:

- expenses incurred by an administrator or liquidator in preserving and realising the property of the company;
- the costs and expenses of obtaining any order for liquidation; and
- priority employee entitlements.

The Commonwealth has established the Fair Entitlements Guarantee, under which employees of a company that is wound up may be eligible to receive a payment from the Commonwealth in respect of specified entitlements up to a maximum amount. The Commonwealth then subrogates to the position of the employees for the distribution of dividend in the winding up.

All other unsecured debts rank equally according to the pari passu principle and, if the property of the company is insufficient to meet them in full, they must be paid proportionately.

Certain registrable security interests that are not perfected by the company may be void upon liquidation of the company. See Chapter 7 (Banking and Finance) for a detailed discussion of the perfection of security interests under the PPSA.

Receiverships

A receivership is a form of external administration that can be commenced either by a secured creditor or, in limited circumstances, by a court order. The most common form of receivership involves a secured creditor exercising its powers under a security interest held over some or all of a company's assets and appointing a receiver over those assets. A receiver must be a registered liquidator with ASIC. Additionally, there are a range of circumstances disqualifying a person from accepting an appointment as a receiver which are designed to ensure that receivers are appropriately independent.

A receivership may occur concurrently with a liquidation or administration. The receiver will usually (but not always) act as the agent for the company and will have extensive powers, as prescribed in the security document and under the Corporations Act, to arrange for the orderly sale of the secured assets for the benefit of the secured creditor. In realising that property, as a general proposition, receivers are under a duty when selling or exercising a power of sale of secured property to take all reasonable care to:

- obtain not less than market value for the property if, when it is sold, it has a market value; or
- obtain the best price reasonably obtainable, if it does not have market value.

This obligation is designed to ensure that the receiver does not simply sell the property that is subject to the security interest for an amount sufficient to pay the secured creditor in full. Instead, the receiver is obliged to obtain the best possible price for the property to ensure that whatever surplus equity there is in the property is available for subsequent secured creditors, unsecured creditors or the company (as applicable).

The powers of directors of the debtor company are limited by the appointment of a receiver. However, the directors will retain their powers to deal with assets of the company other than the secured assets.

A receivership does not operate to stay proceedings against the company, and the company may still be placed in liquidation by an unsecured creditor.

The receivership is concluded once the receiver has paid out their costs and expenses of the receivership, the debt of the secured creditor and certain statutory priority payments. Once the receivership is terminated, control of the company reverts to the directors (unless it is also in liquidation or administration).

Mortgagee in possession

A mortgagee of a company's assets may itself take possession of, collect and sell secured assets (in reduction of secured debt), or it may appoint an insolvency practitioner or some other person to act as its agent to take those steps. In the instance of an appointment of an agent, the agent acts as the agent for the mortgagee and is personally liable (subject to any indemnity the agent has obtained) for their dealings with the secured assets on behalf of the mortgagee. The duty of receivers to obtain not less than market value or the best price reasonably obtainable also applies to mortgagees exercising powers of sale in relation to secured assets (whether as mortgagee or through an agent for the mortgagee).

Schemes of arrangement

A creditors' scheme of arrangement is a compromise or arrangement between a company and its creditors (or some of them) effected pursuant to the process prescribed in the Corporations Act.

Unlike creditors voting to approve a DOCA (where voting is done on the basis that all creditors form the one class), in a creditors' scheme of arrangement voting is by each class of affected creditors. Broadly, the process requires:

- ASIC being provided with a draft of the scheme documents to be sent to affected creditors (colloquially referred to as a scheme booklet) at least 14 days in advance of the initial or first court hearing;
- an initial or first court hearing at which orders are made convening a meeting or meetings of the affected creditors and to seek approval of the material to be despatched to those creditors;
- a meeting or meetings of the affected creditors being held to vote on the proposed scheme of arrangement;
- a second court hearing to approve the proposed scheme of arrangement, assuming it has been passed by the requisite majority at the meeting or meetings of creditors; and
- the lodgement of the orders made at the second court hearing with ASIC in order for the creditors' scheme of arrangement to become effective.

A creditors' scheme of arrangement is generally considered to be costly, time consuming and cumbersome, which is why the voluntary administration and DOCA processes are more suitable (and commonly used) in many cases. Unlike in an administration and DOCA, the court is heavily involved in a creditors' scheme of arrangement, and ASIC also has a critical role in assisting the court.

Informal workouts and restructures

Outside of the various formal processes, it is commonplace in Australia for bilateral or multilateral compromises to be reached between debtors and creditors (or groups of creditors), with or without the assistance of insolvency advisers.

The terms of those compromises may take a number of forms: they may contemplate the rescheduling of debts, reduction or cancellation of debts, effecting debt-for-equity swaps, or any number of variations. Those compromises can be effected through private contracts without the need for the involvement of the courts or other government bodies (although certain transactions involving publicly listed companies may require shareholder approval and be subject to various takeovers regulations, and transactions involving foreign parties may require Foreign Investment Review Board approval). Those new contractual rights will be enforceable in accordance with their terms as against the parties to them.

For example, the loan-to-own structure is becoming an increasingly popular restructuring technique, which involves lenders taking control of the company in default through converting debt obligations into equity stake in the post-restructured entity. The main objective of the loan-to-own strategy is to de-lever the distressed company, return it to a financially healthy position and then realise maximum value in a subsequent sale of its equity.

Deregistration

A company remains registered with ASIC even after it ceases trading. While registered it is still subject to the requirements set out in the Corporations Act, including payment of the annual review fee each year, notification of changes relating to the company and financial reporting.

ASIC has the power to deregister a company if ASIC does not believe that it is carrying on business, if the company has not responded to a compliance notice or if it has not paid its annual review fee for at least 12 months after the due date.

A company may apply to ASIC for deregistration if it meets certain requirements including that all shareholders of the company agree to deregister, the company is not carrying on business, the company's assets are worth less than A$1,000, the company has no outstanding liabilities and is not a party to any legal proceedings and the company has paid all fees and penalties payable under the Corporations Act.

5 Mergers and Acquisitions

5. Mergers and Acquisitions

Overview

Australia historically has had a healthy and vigorous mergers and acquisitions (M&A) market when international financial conditions have been favourable. Both hostile and negotiated takeover bids are frequently made for the shares of listed companies and Australia regularly ranks highly compared to other countries in terms of national M&A activity.

The Australian Government welcomes foreign investment, which can take a number of forms including setting up a new company, investing in an existing entity, or establishing a joint venture. For a detailed description of the restrictions on foreign investment into Australia, see Chapter 2 (Foreign Investment Regulation).

Australia has a diversified economy, with a particularly strong primary industries base. Some areas that have undergone significant M&A activity in recent years include healthcare, energy, financial services, business services, information technology, transport/utilities, mining, industrials and chemicals, and real estate.

Private companies

Sale and purchase of private companies

A private business acquisition in Australia usually takes the form of either an asset acquisition, where the assets of a business are purchased and certain liabilities are assumed, or a share acquisition.

A share acquisition may proceed by way of:

- the purchase of shares in an Australian company (direct share acquisition); or
- the purchase of shares in a non-Australian corporation which holds the shares of the Australian company (indirect share acquisition).

The legal consequences may differ depending upon whether the share acquisition is direct or indirect.

The table below compares the key features of asset acquisitions and share acquisitions.

Key features of asset acquisitions and share acquisitions

Feature	Asset acquisition	Share acquisition
Deal structure	An asset acquisition involves the purchase of specific business assets from the seller. The parties select which assets will be purchased, and can be precise about the extent to which the liabilities of the business will be retained by the seller or assumed by the buyer. The seller retains all liabilities not specifically assumed by the buyer.	The acquisition of the shares of a target company involves the purchase of the target company together with all of its assets and liabilities (including contingent or undisclosed liabilities such as undisclosed tax liabilities, breaches of legislation affecting the business or claims by customers or employees) which may have an impact on the value of the shares being acquired.

Feature	Asset acquisition	Share acquisition
	As a consequence of selecting the assets that will be acquired, it is necessary to separately deal with and transfer each asset and assumed liability in accordance with the contractual, legislative or other requirements governing that particular asset or liability.	
Due Diligence	Due diligence enquiries relating to the acquisition of assets are generally more targeted than those relating to a share acquisition, as the buyer only has to do due diligence on those assets and liabilities that it is taking on rather than on the entire company. Depending on the outcome of the due diligence, this can result in fewer warranties and indemnities being required when compared to a share acquisition.	Due diligence enquiries relating to the acquisition of shares are often more extensive than in an acquisition of assets because the buyer is acquiring the target company together with all assets and liabilities (including contingent or undisclosed liabilities). Due diligence enquiries relating to an acquisition of shares can involve the legal review of the target company's: – corporate governance; – business and assets; – properties; – material contracts; – regulatory affairs; – intellectual property; – employee affairs; – insurance coverage; – historical transactions; – actual, pending or threatened litigation or disputes; and – related party arrangements.
Assignment, novation and third party consents	An asset acquisition may involve the assignment or novation of contracts, licences, permits and other authorisations to the purchaser. This will often require the consent of the contracting counterparty or other relevant third party.	An acquisition of the shares of a company will result in a change of control. During due diligence it is advisable that material contracts are reviewed to identify if any change of control provisions exist and if the acquisition of shares will require the consent of the contracting counterparty.

Feature	Asset acquisition	Share acquisition
Warranties and indemnities	The warranties and indemnities in an asset acquisition agreement focus on the assets being acquired and the liabilities being assumed.	The warranties and indemnities in a share acquisition agreement are usually extensive and cover the entire business of the target company. It is not uncommon for a share acquisition agreement to contain specific warranties and indemnities in relation to risks identified during due diligence (as outlined above). This particularly applies in relation to taxation issues.
Tax	Capital gains tax (CGT) may apply to disposals of assets held on capital account. Non-residents for Australian tax purposes are generally not liable to CGT unless the assets are "taxable Australian property". Special rules apply with respect to assets held on revenue account and trading stock. For further information, see Chapter 6 (Taxation).	CGT may apply to disposals of shares held on capital account. Non-residents for Australian tax purposes are generally not liable to CGT unless the shares are, broadly, non-portfolio interests (10% or more) in entities that hold a majority of assets, by market value, that comprise Australian real property. For further information, see Chapter 6 (Taxation).
GST	Provided the relevant conditions are satisfied, goods and services tax (GST, which is similar to VAT) may not apply if a business is sold as a "going concern" – see Chapter 6 (Taxation) for more details.	GST does not apply on a sale of shares. However, there may be limited recovery of input tax credits for both seller and buyer on a share sale in certain cases – see Chapter 6 (Taxation) for more details.
Stamp duty	Stamp duty generally applies on an asset acquisition at rates of duty up to 5.95% (although more generally settling at 5.5% depending on the state or territory in which the particular asset is located). Depending on the nature of the asset acquired, surcharge duty rates of up to an additional 8% can also apply where the buyer is a foreign person, entity or trust. At law the liability to pay the duty is generally on the buyer, but in some jurisdictions the liability for duty is joint and several. If GST is payable on the asset acquisition, stamp duty is calculated on the GST inclusive price – see Chapter 6 (Taxation) for more details.	There should be no stamp duty on a share acquisition, provided the target company does not hold significant land assets, including fixtures and fixed plant, in excess of certain value thresholds (which vary across each Australian state and territory). If the target does hold land assets over the relevant value threshold, landholder duty may apply to the acquisition of shares, subject to exemptions (e.g. corporate reconstruction relief, if relevant).

Letter of intent

It is not unusual for negotiated acquisitions to begin with (or include) the negotiation of a letter of intent (LOI), which can also be known as a memorandum of understanding, heads of agreement or term sheet. The LOI is a useful outline of the transaction and may also serve to (among other things):

- prevent a seller from negotiating with other parties;
- allow relevant governmental approval processes to begin;
- facilitate fundraising for the transaction;
- define a buyer's inspection and due diligence rights;
- provide for the treatment of confidential and proprietary information; and
- establish a schedule for completing all matters necessary to close the transaction.

The LOI may be expressed to be binding or non-binding, either wholly or in part. Unless drafted carefully, a court may decide that the document is non-binding, even if it states that it is intended to be binding.

Buyer due diligence

The buyer can reduce the legal and commercial risks of an acquisition through a number of procedures. For example, it may require comprehensive warranties in the acquisition agreement. However, this method is generally not adequate by itself because a breach of warranty is only enforceable by litigation or arbitration, both of which can be costly and time consuming. The effectiveness of this method also depends on the seller's and/or the warrantors' financial means at the time the judgment is enforced. Additionally, some liabilities may not reveal themselves until after the warranties have expired. The buyer, therefore, will usually also carry out pre-contractual investigations, commonly known as due diligence.

The purpose of due diligence is to gather information and identify any risks or problems associated with the acquisition, and to assist the buyer in assessing the level and nature of legal risk in the business to be acquired. Based on the due diligence findings, the buyer will decide whether to proceed with the transaction, to modify the transaction (for example, by revising the purchase price, seeking additional warranties or excluding certain assets with onerous liabilities from the acquisition) or to abandon the transaction. In addition to legal due diligence, a buyer will often also conduct commercial, financial and accounting due diligence.

The form of the acquisition will usually have an impact on the types of issues to be considered in the legal due diligence process. For example, if the transaction takes the form of an asset acquisition, due diligence may focus on the title to and transferability of those assets. Where the transaction involves a share acquisition, it will be necessary to consider the risks associated with each aspect of the target company's business (as outlined in the table above).

The level of due diligence undertaken often depends on the size or significance of the acquisition. Basic due diligence may simply consist of searches of publicly available information, such as:

- the database of the Australian Securities and Investments Commission (ASIC) to determine the identity of the shareholders and officers of the target;
- the Personal Property Securities Register to determine the existence of registered security interests over the assets of the target;
- the local land office to determine title to real property;

- the national trade marks, patents and design registers to determine ownership of intellectual property rights and the existence of third party interests in those rights; and
- the local court system for any litigation or winding up proceedings involving the target.

In more significant acquisitions, a seller may make a physical or online data room of information available to potential buyers and their advisers. A data room allows potential buyers and their advisers access to documents relevant to the proposed transaction that may not otherwise be publicly available (for example, key business contracts, leases, workplace agreements and policies, insurance policies, details of disputes, tax returns and other relevant information).

Vendor due diligence

Vendor (or seller) due diligence (VDD) has become increasingly common in Australia in competitive bid processes. VDD is similar to traditional buyer due diligence but is commissioned at the seller's request and cost. The end product is a report that aims to address key concerns of a prospective buyer. Depending on the basis on which the report has been prepared it may potentially be relied upon by a buyer and its financiers.

Some advantages of conducting VDD may include the following:

- It allows the seller to evaluate the findings and to rectify, or at least mitigate, any problem areas before the sale process begins.
- it can serve to speed up the buyer due diligence process by providing a useful guide to the legal structure of the business and the key legal issues affecting the business.
- It can serve to reduce disruption to the seller's business as the majority of the due diligence questions are likely to be raised by the seller's lawyers in preparing the VDD report. This means that the business only has to deal with these questions once, as opposed to having to respond to the same questions from multiple buyer due diligence teams.
- It limits the amount of due diligence that a buyer is required to undertake. This saves a potential buyer time and money in conducting their own due diligence and can encourage more potential buyers to participate in the bid process.
- It assists in identifying any relevant issues likely to arise in the sale process that might need to be dealt with in the sale documentation.

Misleading or deceptive conduct

Although a seller has no positive duty to disclose information to a potential buyer, a seller may face liability under the *Corporations Act 2001* (Cth) or the *Competition and Consumer Act 2010* (Cth) if it engages in conduct that is misleading or deceptive, or is likely to mislead or deceive. It is prudent for a seller to conduct an internal due diligence review to ensure it does not provide a potential buyer with misleading or incorrect information.

Public companies

The Corporations Act prohibits a person from acquiring a "relevant interest" in issued voting shares in a listed public company if, because of the transaction, either that person's or someone else's voting power in that company increases:

- from 20% or below to more than 20%; or
- from a starting point that is more than 20% and less than 90%,

unless the acquisition is made under one of the exceptions to the prohibition (discussed below).

The prohibition also applies to:

– voting shares in an unlisted Australian company with more than 50 shareholders; and

– voting interests in a listed managed investment scheme (such as a listed unit trust).

The key concept in determining whether an acquisition breaches the 20% limit is the "voting power" which results from the acquisition. "Voting power" is a term which aggregates the "relevant interests" held by a person (a term which widely draws in all direct and indirect holdings) together with the relevant interests of the person's "associates".

Acquisitions of voting shares in a company (including by acquiring existing issued shares and by being issued new shares) above the 20% limit are permitted under the Corporations Act in a number of circumstances, including:

– acquisitions made under an off-market takeover bid for either all or a fixed proportion of each shareholder's shares in the company;

– acquisitions under an unconditional on-market takeover bid for all of the shares in the company;

– acquisitions made with the prior approval of the company's shareholders in general meeting;

– "creeping" acquisitions of up to 3% of the company's shares every six months by a shareholder who already holds at least 19%;

– an acquisition under a pro-rata rights issue;

– certain acquisitions by underwriters;

– certain downstream acquisitions which are deemed to result from upstream takeovers; and

– an acquisition under a scheme of arrangement.

On-market and off-market takeover bids and schemes of arrangement are the primary methods of obtaining control of a public company in Australia, and are discussed further below.

Takeover bids

A takeover is essentially a regulated offer made to all of a target company's shareholders to buy their shares. The form of offer varies depending on which of the two takeover bid procedures is used: on-market (for quoted securities of listed targets only) or off-market (for listed or unlisted targets, and quoted or unquoted securities of a listed target). Takeover bids can be made in both "friendly" and "hostile" circumstances.

On-market bids must be unconditional and can offer only cash consideration. Target shares are acquired by the bidder on the Australian Securities Exchange (ASX) rather than by way of off-market acceptances. On-market bids are less common due to the fact that they are less flexible than off-market bids. However, they can be implemented quickly – a bidder may acquire shares on-market within hours of announcing the bid.

Off-market bids can be conditional (for example, on obtaining sufficient acceptances to gain control or obtaining regulatory approvals) and consist of separate but identical offers of any form of consideration, including cash or securities of the bidder (or a mixture of both). Due to this increased flexibility, off-market bids are more common in Australia than on-market bids.

If, following a bid, the bidder achieves a holding of 90% or more in the target, the bidder will generally be able to compulsorily acquire the shares held by (or "squeeze out") the remaining minority shareholders at the bid price.

For further information regarding the takeover regime in Australia, including a detailed description of the types of takeover bids and bid procedure, refer to Baker McKenzie's *Takeovers Guide: Australia*.

Schemes of arrangement

An alternative acquisition structure to a takeover bid is a "scheme of arrangement". A scheme of arrangement is a court-approved form of corporate reconstruction under which a bidder may acquire control of a target company. Schemes are processes that are driven by the target company and, accordingly, can generally only be implemented in "friendly" transactions.

The scheme structure involves a target company proposing a scheme to its shareholders and target shareholders voting on the proposal rather than offers being made by a bidder to, and accepted by, each shareholder individually (as occurs in a takeover bid). It delivers an "all or nothing" result. If a scheme is approved by target shareholders and by the court, the scheme of arrangement binds all of the target company's shareholders, including those who voted against it (or did not vote at all). Conversely, if a scheme is not approved by target shareholders or the court then it does not become effective, even for those shareholders who voted in favour of the scheme.

The shareholder approval thresholds for a scheme are:

- approval by at least 75% of the shares which are voted on the scheme resolution (the "value test"); and
- approval by more than 50% in number of shareholders who vote at the meeting, regardless of how many shares they hold (the "headcount test").

While it may appear that obtaining a 75% vote in favour of a scheme would be a much easier path to obtaining control of a company than obtaining 90% acceptance of the takeover offers made under a takeover bid, this is not necessarily the case. The 75% approval requirement can be riskier than the 90% acceptance threshold for a takeover because:

- the bidder cannot vote any of the target shares it already holds, and shareholder turnout for votes is generally not high. Accordingly, a shareholding of less than 25% (and potentially even less than 10%) can constitute a blocking stake; and
- the headcount test can be a hidden trap if there is grassroots opposition to the scheme. A blocking stake could be only a small percentage of the target by value if the blocking stake is widely held.

A scheme of arrangement may, however, have particular advantages depending on the characteristics of the target company and whether special corporate actions need to be undertaken in connection with the transaction, such as amending the target's constitution or approving a share buy-back. The structuring flexibility afforded by a scheme of arrangement is a key advantage compared with the prescriptive requirements for takeovers. However, a disadvantage is the difficulty of altering the terms of the scheme once they have been approved by the court, meaning that bidders should be wary of using the scheme structure where a competing bid is likely.

Schemes of arrangement are also popular in private equity funded "public to private" transactions given the flexibility in transaction structure that they offer. For example, different kinds of shareholders can be offered different kinds of consideration.

Takeover regulation

ASIC and the Takeovers Panel (Panel) are responsible for the supervision of compliance with the takeovers provisions in the Corporations Act. The Panel was established to act as the main forum for the resolution of disputes stemming from changes in control or relating to the acquisition of substantial interests in a company. The Panel is made up of industry practitioners and experts in the field (including lawyers, investment bankers and company directors). The

Panel has significant powers and anyone affected by the circumstances of the acquisition or an ASIC decision may apply to the Panel for a declaration, order or review. Contravention of the Panel's orders is an offence.

Under a scheme of arrangement, it is the court which oversees the scheme process (with the assistance of ASIC and having regard to the guidance offered by the Panel) and ultimately approves the scheme.

In addition, other industry-specific rules may be relevant, such as for broadcasting or gaming industry transactions.

Insider trading

Australia's insider trading laws apply to publicly listed companies and prohibit a person (including the target listed company) from providing a potential buyer of the listed company's shares with information that is materially price-sensitive and not generally available to the public. A potential buyer in possession of such information cannot acquire the shares. However, a potential buyer of shares in a listed company may draw comfort from the fact that the company is required to keep the market fully informed and to publicly release price-sensitive information immediately.

Direct investment in listed entities

A foreign investor seeking to invest in an entity listed on the ASX may engage an Australian based stockbroker to acquire publicly traded securities in that entity. ASX operates Australia's major financial market for various financial securities including equities and derivatives, and has a diverse domestic and international customer base.

The Clearing House Electronic Subregister System (CHESS) is ASX's settlement system. CHESS facilitates the efficient transfer of legal title and settlement of market transactions with an electronic subregister system that provides irrevocable transfer of ownership and cleared funds without using paper documentation.

Investors with access to the US markets are also able to invest in certain ASX-listed entities by way of American Depositary Receipts (ADRs). An ADR is a security that trades in the United States but which represents a specified number of securities in a non-US entity. Transfers of ADRs take place on the depositary's books in the US rather than in Australia, and settlements of sales of ADRs are in US dollars and within the customary US settlement period.

6 Taxation

6. Taxation

General

The federal government is the largest taxing authority in Australia. Taxes imposed by the federal government include income tax (which incorporates capital gains tax), fringe benefits tax, goods and services tax (GST), customs duty on certain imports and excise duty on certain goods.

Australian income tax is generally based on a 30 June year end, although foreign corporations and their subsidiaries can generally obtain approval to lodge tax returns based on a substituted accounting period where, for example, the foreign parent company has a different fiscal year end.

The state and territory governments levy taxes such as stamp duties, land tax and payroll tax. The state governments do not impose a tax on income or capital gains. Local governments impose tax in the form of rates and levies.

Income tax

The most significant tax levied in Australia is income tax which is assessed in accordance with the *Income Tax Assessment Act 1936* (Cth), the *Income Tax Assessment Act 1997* (Cth) and the *Taxation Administration Act 1953* (Cth) (together the Tax Acts). Generally, a resident of Australia is assessable to tax on income and capital gains derived by it from all sources, whether within or outside Australia. A non-resident is assessable to tax only on income derived by it from Australian sources and on capital gains made (or deemed to be made) on assets that are classed as "taxable Australian property" (TAP). Very broadly, TAP includes direct interests in Australian real property; non-portfolio interests (10% or more) in entities that hold a majority of assets, by market value, that comprise Australian real property; business assets of an Australian permanent establishment; and options or rights to acquire the preceding assets. Capital gains made in respect of assets are usually only assessable if the asset was acquired on or after 20 September 1985.

Certain types of income, such as dividends, interest and royalties, may be assessed to non-residents of Australia and offshore permanent establishments of Australian residents, on a gross basis, by way of withholding tax. Other types of income and capital gains are taxed on a net basis, that is after allowing for expenses and other allowances to be deducted from the gross income and capital gains. If the country in which the non-resident entity is resident has a double tax agreement (DTA) with Australia, that agreement may result in an exemption or a reduction in the rate of tax applicable.

The income tax system is administered by the Australian Taxation Office (ATO). The impact of Australia's income tax rules will depend on the structure of the Australian operations.

Companies generally

An Australian resident company is liable to pay Australian tax on income and capital gains derived from all sources, either within or outside Australia. Tax is, in general, imposed on the company's net income. The rate of company tax is 30%. For "base rate entities", the company tax rate is 27.5% for the 2019-20 income year. Broadly, a base rate entity is a company that both:

- has an aggregated turnover less than the aggregated turnover threshold. The aggregated turnover threshold for the 2019-20 income year is A$50 million; and
- 80% or less of its assessable income is base rate entity passive income. Base rate entity passive income includes, among other things, royalties and rent, interest income and a net capital gain (some exceptions apply).

A non-resident company is liable to pay Australian tax on income derived from Australian sources (other than income subject to withholding tax) and capital gains made on TAP. The rate is also 30% on the net amount (or 27.5% in the case of a base rate entity for the 2019-20 income year).

In addition to tax on income, the company will be required to pay tax on taxable fringe benefits provided to employees. The current fringe benefits tax rate is 47%.

Tax losses are able to be carried forward indefinitely and utilised, provided the company satisfies either the continuity of ownership test or the business continuity test.

Groups of Australian resident companies that have a 100% common Australian resident parent may be eligible to form a tax consolidated group. Wholly-owned Australian resident subsidiaries of a foreign resident company may also be eligible to access the consolidation regime by forming a multiple entry tax consolidated (MEC) group. Where a tax consolidated group or MEC group is formed, the head company is treated as the sole taxpayer for income tax purposes with the other members of the group being effectively regarded as parts of the head company. A tax funding agreement (TFA) is normally entered into by the group in order to determine each member's liability for the group's income tax liability. If the head company defaults in the payment of the group's income tax (and certain related taxes), then the other members of the group become jointly and severally liable for the unpaid tax unless the group has entered into a valid tax sharing agreement (TSA). Broadly, a TSA allocates responsibility for income taxes.

Taxation of dividends

Dividends paid out of income which has been subject to taxation at the company level are known as "franked" dividends under the Australian imputation system.

Broadly, the extent to which a company can "frank" a dividend depends upon the balance of its "franking account" at the relevant time.

The franking account represents an accumulation of the amount of profits subjected to corporate tax, either directly through tax paid or indirectly through franked dividends received from other companies. For example, given the current 30% company tax rate for non-base rate entities, for each A$100 of taxable profit A$30 of tax must be paid and an amount of A$70 can be paid as a fully franked dividend.

The imputation system allows Australian resident shareholders to receive franked dividends partially tax free or effectively tax free where the taxpayer's marginal rate is less than or equal to the relevant corporate tax rate of the company paying the dividend. If the taxpayer's marginal tax rate exceeds the relevant corporate tax rate, any franked dividends received will be subject to additional tax in their hands.

If the shareholder's marginal tax rate is, for example, 47% (being the top marginal tax rate for individuals), the dividend would be subject to an additional 17% tax where the company paying the dividend is subject to corporate tax at 30%. In this case, if the marginal rate is less than 30%, taxpayers are entitled to offset their "excess franking credit" against tax on other income. Australian resident individuals and certain superannuation funds are allowed a refund of excess credits.

Fully franked dividends paid to non-residents are exempt from dividend withholding tax. Partially franked dividends and unfranked dividends are subject to withholding tax (but only on the unfranked portion of the dividend). The rate of dividend withholding tax is 30% unless a DTA applies to reduce the rate. The rates allowed by the various DTAs are set out in Appendix 1 to this Guide.

Dividend payments made by an Australian corporate entity or trust to a non-resident which represent "conduit foreign income" (broadly, income which is derived from a source outside Australia) are not subject to Australian dividend withholding tax provided certain conditions are met. The conduit foreign income rules are designed to encourage the use of Australian corporate entities as holding companies for foreign entities.

Branches

Australia does not impose a separate branch profits tax. There is no withholding tax imposed on the remittance of profits of an Australian branch to its head office.

Rather, any income or capital gains derived by the branch would be subject to the general income tax provisions and any applicable DTA.

No taxable presence

Non-resident companies (that are resident in countries with which Australia has a DTA) may be able to organise their Australian operations without creating a permanent establishment. This is often the case with buy/sell operations. Such companies will not be taxable in Australia on their business profits if they do not have a permanent establishment in Australia (but may still be liable for tax on income subject to withholding tax and on capital gains in respect of TAP).

Partnerships

A "partnership" is defined for tax purposes to mean an association of persons carrying on business as partners or in receipt of income jointly but does not include a company. A general partnership is not a separate taxable entity, although it is required to lodge a tax return. The partnership return determines the net partnership income or loss for the year. Each partner must then include in their personal individual income tax return their individual share of partnership income (or loss) and pay tax on this income accordingly. The net income or loss of a partnership is calculated as if the partnership were an Australian resident taxpayer.

Non-resident partners who are partners in an Australian partnership need only pay Australian tax on their share of the net income of the partnership attributable to sources in Australia. A partnership is not treated as an entity for Australian capital gains tax purposes; instead each partner is considered to own a fractional interest in partnership assets. Consequently, any capital gain or loss made on the disposal of such fractional interests is made by a partner rather than the partnership. A non-resident partner is only liable to Australian capital gains tax in respect of fractional interests in assets which constitute TAP.

Limited partnerships formed in Australia, and those formed outside Australia but which carry on business in Australia, are in most instances treated as resident companies for income tax purposes and are taxed accordingly. Distributions to partners of those limited partnerships are taxed as dividends.

Trusts

For Australian tax purposes, trusts are not separate legal entities. As such, a trust is not liable to pay income tax although the trustee of a trust must lodge an income tax return on behalf of the trust. In certain limited circumstances, the trustee is liable to be assessed and to pay tax on the net income in the trustee's representative capacity. Australian resident beneficiaries are assessable on their share of the net income at their own individual marginal tax rate if they are presently entitled to the income of the trust at year end and are not under a legal disability.

In the case of non-resident beneficiaries, Australian tax law differentiates between managed investment trusts and other types of trusts.

Very broadly, an Australian resident trust is a "managed investment trust" if it is a managed investment scheme for the purposes of Australian corporate law, is operated by an entity that has an Australian financial services licence and is considered widely held for Australian tax purposes. A trust will not be a managed investment trust if a foreign resident individual holds 10% or more of the interests in the trust.

Broadly, distributions of Australian-sourced income (other than dividends, interest and royalties, which are subject to separate withholding tax rules) from a managed investment trust to a foreign beneficiary are subject to a final withholding tax. The rate at which the withholding tax applies depends on where the foreign beneficiary is resident and what the payments are attributable to. The highest rate of withholding that may apply (regardless of whether the recipient is in an information exchange country) is 30%.

Where a foreign resident is a beneficiary of an Australian resident trust that is not a managed investment trust, then the trustee is liable to pay tax on the foreign beneficiary's share of the trust's net income. The tax rate that applies depends on whether the foreign resident beneficiary is a company (30%) or an individual/trustee beneficiary (47%). A foreign beneficiary that is a company or individual is required to lodge an Australian tax return and include the gross distribution in its assessable income. The beneficiary may deduct the tax already paid by the trustee and may claim a refund if the tax paid by the trustee exceeds the actual tax payable on the distribution.

Losses incurred in any particular year by a trust cannot be distributed to the beneficiaries and therefore remain within the trust. Losses can be carried forward and offset against future income of the trust provided certain trust loss rules are satisfied.

Certain public unit trusts (e.g. "public trading trusts") are treated as companies for tax purposes (and taxed at the corporate rate of tax, currently 30%) and distributions from these trusts are taxed as if they were dividends.

Individuals

Resident individuals are assessable to income tax on income and capital gains from all sources, whether within or outside Australia. A non-resident is generally assessable to tax only on income derived from Australian sources and capital gains on TAP. Broadly, a person is a resident of Australia for tax purposes if the person:

- ordinarily resides in Australia;
- is domiciled in Australia, unless the person's permanent place of abode is outside Australia;
- has actually been in Australia for more than half the year, unless the person's usual place of abode is outside Australia and they do not intend to take up residence in Australia; or
- meets certain other tests relating to government funded superannuation.

Resident individuals are currently taxed on a net income basis at marginal rates from nil (on income of less than A$18,200) to 45% (on income in excess of A$180,000). In addition, a Medicare levy of 2% is payable on an Australian resident's taxable income. Individuals who do not have private medical insurance may be liable for an additional Medicare levy surcharge of 1%, 1.25% or 1.5%, depending on their income level. The surcharge applies to individuals with taxable income over A$90,000 or A$180,000 for a couple.

Non-resident individuals also pay the top marginal rate of 45% on income in excess of A$180,000. However, the lowest rate on non-residents' income is 32.5%. Non-residents are not liable to pay the Medicare levy.

The relevant rates of tax are set out in Appendix 2 to this Guide.

Australians engaged overseas

Salary or wages of an Australian resident subject to tax in a foreign country may be exempt from Australian tax, provided the individual is overseas for a continuous period in excess of 90 days and the foreign service is directly attributable to any of the following:

- the delivery of Australia's overseas aid program by the individual's employer;

- the activities of the individual's employer in operating a developing country relief fund or a public disaster relief fund;
- the activities of the individual's employer being a prescribed institution that is exempt from Australian income tax;
- the individual's deployment outside Australia by an Australian government (or an authority thereof) as a member of a disciplined force; or
- an activity of a kind specified in the regulations.

Foreign debt funding and interest withholding tax

Very broadly, Australian interest withholding tax is levied at a 10% rate on interest paid from Australia to a non-resident or Australian resident in respect of a business carried on by a permanent establishment located outside Australia.

Interest withholding tax is a final tax on the interest income.

There are exemptions from interest withholding tax in respect of interest paid on certain debentures and syndicated loan facilities issued by certain companies and certain widely held trusts which satisfy a public offer test.

DTAs which Australia has entered into with other countries may reduce the rate of interest withholding tax to nil. For example, interest income derived by a financial institution that is wholly unrelated to and deals wholly independently with a borrower is exempt from Australian interest withholding tax where the financial institution is a resident of the United States, the United Kingdom, Norway, Japan, South Africa, Finland, France, New Zealand, Switzerland or Germany and is able to claim the benefits of the DTAs that Australia has with those countries.

Thin capitalisation

Thin capitalisation arises where an investment in Australia is excessively geared. In this regard, legislation discourages excessive gearing by denying debt deductions (including interest and borrowing costs) where an entity's debt levels exceed certain prescribed thresholds. The debt deductions are denied to the extent of the excess. The main thresholds in relation to foreign investment in Australia are:

- broadly, the average value of total debt must not exceed 60% of the average value of the total assets (subject to some adjustments for non debt liabilities and associate entity equity); or
- if debt exceeds the threshold outlined above, the debt satisfies an "arm's length" test.

The characterisation of debt and equity for the purposes of applying the thin capitalisation rules is based, broadly speaking, on economic substance rather than legal form.

There is a de minimis rule which provides that where the total debt deductions of the entity and its associate entities do not exceed A$2 million for an income year, the thin capitalisation rules will not apply to deny the entity's debt deductions regardless of the entity's gearing ratio.

The thin capitalisation rules contain specific provisions for financial entities.

The transfer pricing provisions may also limit the Australian investment vehicle's ability to claim debt deductions if the Federal Commissioner of Taxation (Commissioner) determines that these costs exceed their arm's length amount. The transfer pricing provisions are applied first to require an arm's length consideration for debt funding that is provided on a non-arm's length basis with the thin capitalisation provisions then operating on the amount of debt deductions determined based on that consideration.

Corporate reconstruction

Following the introduction of the tax consolidation rules, the restructuring of groups that are not consolidated for Australian income tax purposes will be difficult as only very limited reconstruction relief is available.

Royalties

Generally, royalties paid by an Australian to a non-resident are subject to withholding tax. Tax is levied at the rate of 30% of the gross royalty paid. This is reduced to 10% by most of Australia's DTAs. The DTAs Australia has with the United States, the United Kingdom, Finland, Norway, Japan, South Africa, New Zealand and France reduce this rate to 5%. See Appendix 1 to this Guide for further details on royalties.

Management and service fees

A parent company may wish to charge its subsidiary a fee for services actually rendered as a manager and coordinator of group activities, such as planning and advising in service areas of finance, investment, production, marketing, insurance, personnel, legal research and the like. The fee will be exempt from Australian tax if the service fee does not have an Australian source or, where there is a relevant DTA, the fee is not attributable to a permanent establishment of the service provider in Australia.

If the fee is subject to Australian tax it must comply with the "arm's length" requirement of the Australian transfer pricing rules.

Foreign exchange gains and losses

Realised exchange gains are generally assessable and exchange losses generally deductible.

With respect to a branch office, foreign exchange "losses" arising out of transactions between an overseas company and its Australian branch office are not deductible (nor are exchange "gains" assessable) since there is only one recognised entity involved in the transaction.

Taxation of financial arrangements

Australia has a specific regime regarding the taxation of gains and losses on financial arrangements. The definition of "financial arrangement" is broad and seeks to encompass, for example, loans, hedging contracts, certain foreign exchange transactions and so on.

Broadly, these rules seek to align the tax treatment of certain gains and losses over the life of a financial arrangement to prevent tax timing mismatches. To this extent, these rules will generally apply to the exclusion of other applicable rules. There are exemptions for specific types of entities and certain kinds of financial arrangements.

Certain tax timing methods are prescribed to allow a particular entity to recognise gains and losses from a financial arrangement, including elective tax timing and character hedging rules that are designed to minimise tax timing and character mismatches. The rules also allow eligible taxpayers to elect to have their financial arrangements taxed on a fair value or retranslation basis, or to rely on their financial reports for taxation purposes. Taxpayers to which the taxation of financial arrangement provisions apply who do not elect to use these methods will be required to apply the accruals and realisation rule.

Transfer pricing

Certain rules are aimed at reducing the ability of companies to shift profits out of Australia to another tax jurisdiction, whether by transfer pricing or other means.

The rules are contained in Subdivisions 815-B (for entities), 815-C (permanent establishments), and 815-D (trusts and partnerships) of the Tax Acts, as well as in Subdivision 284-E of Schedule 1 of the *Taxation Administration Act 1953* (documentation and penalties).

Subdivision 815-B covers dealings between separate legal entities. It requires certain amounts (taxable income, a loss of a particular sort, tax offsets and withholding tax payable) to be calculated only after regard is had to the "internationally accepted arm's length principle". Broadly, the premise of these laws is to require entities to hypothesise the arm's length conditions that would have operated between independent entities in similar circumstances to the actual conditions that have operated, having regard to both the form and economic substance of the relations. If that analysis suggests a transfer pricing benefit has arisen then a taxpayer should self-assess on this basis but in any case the Commissioner has the capacity to make an adjustment having regard to what the actual conditions would require.

Subdivision 815-B must be applied as consistently as possible with relevant guidance, which includes the OECD Transfer Pricing Guidelines and the OECD Model Tax Convention on Income and Capital. The subdivision applies to non-arm's length dealings between an Australian taxpayer and a foreign entity regardless of whether that entity resides in a treaty partner country.

Under Division 284 of Schedule 1 of the *Taxation Administration Act 1953*, an entity is liable to administrative penalties if a transfer pricing benefit arises under Subdivision 815-B of the Tax Acts. The penalties are higher if the entity's transfer pricing treatment was not reasonably arguable.

Subdivision 284-E has the effect that an entity must meet the transfer pricing documentation requirements in the subdivision for its transfer pricing treatment to be reasonably arguable, notwithstanding the possibility the taxpayer's position is ultimately not sustained.

Country-by-country reporting for significant global entities

Additional reporting requirements, introduced by subdivision 815-E, apply to certain entities, for income years starting on or after 1 January 2016.

Subdivision 815-E requires an entity to lodge annual statements to the Commissioner if, during the immediately preceding income year, the entity was a "significant global entity" (SGE). Broadly, an entity will be an SGE if: (i) it is a parent entity with annual global income of at least A$1 billion, or (ii) the entity is a member of a group of entities that are consolidated for accounting purposes as a single group, and the group has an annual consolidated global income of at least A$1 billion. The second part of this SGE definition can mean that Australian subsidiaries of foreign multinational groups will qualify as an SGE, notwithstanding that the Australian subsidiary itself may be relatively small in the context of the global group.

Where an entity qualifies as an SGE, it will generally be subject to Australian country-by-country (CbC) reporting (subject to some limited exceptions). Where CbC reporting applies, the entity will be required to provide the Commissioner with three statements, being a CbC report, master file and local file. These statements contain details regarding the international related party dealings, revenues, profits and taxes paid by jurisdiction.

Significant penalties may apply for any failure by an SGE to lodge CbC statements in the approved form by the due date. Penalties range from A$105,000 for lodgements between one and 28 days late, to a maximum of A$525,000 for lodgements more than 112 days late.

General purpose financial statements filing obligation for SGEs

A company may be required to file general purpose financial statements (GPFS) with the Commissioner in certain circumstances. Broadly, this will be the case if: (i) it is an Australian resident company; (ii) it is an SGE for the relevant income year; and (iii) it does not file general purpose financial statements with the Australian Securities and Investments Commission (ASIC) for the financial year most closely corresponding to its income year.

Note that if a company is an SGE, the ATO filing requirement may apply even if the company is exempt from filing accounts, or qualifies for limited disclosure (e.g. special purpose financial statements) under the Corporations Act. Moreover, where a company is required to file GPFS with the ATO, the ATO will then provide a copy of those statements to ASIC. Financial statements given to ASIC are then publicly available.

If a company has a filing obligation with the ATO, it must provide its GPFS to the ATO on or before the day it is required to lodge its income tax return.

Significant penalties may apply for any failure by an SGE to lodge GPFS in the approved form by the due date. Penalties range from A$105,000 for lodgements between one and 28 days late, to a maximum penalty of A$525,000 for lodgements more than 112 days late.

Capital gains tax

Capital gains realised on assets acquired after 19 September 1985 are subject to income tax unless specifically exempted. An "asset" for capital gains tax purposes is defined as any kind of property (including intangible as well as tangible property) or a legal or equitable right that is not property.

A net capital gain (capital gains less capital losses) is included in a taxpayer's assessable income. Income tax is imposed at the taxpayer's marginal rate of tax on any net capital gain made by the taxpayer.

In some cases, the market value of the asset will be substituted for the consideration (if any) received on disposal of the asset. This will occur, for example, in the case of gifts and certain disposals not at "arm's length".

A capital loss, being broadly the difference between the unindexed cost of an asset and the proceeds of sale, may be offset only against capital gains. Most capital losses can be carried forward indefinitely until absorbed against future capital gains (subject to satisfying either the continuity of ownership test or the business continuity test).

Australian residents are subject to tax on the disposal of all worldwide assets. Non-residents will generally be liable for tax on gains in respect of TAP. Very broadly this includes direct interests in Australian real property; non-portfolio interests (10% or more) in entities that hold a majority of assets, by market value, that comprise Australian real property; business assets of an Australian permanent establishment; and options to acquire the preceding assets. Non-residents otherwise liable to capital gains tax on the disposal of TAP may have the protection of a DTA (for example, when the capital gain represents a business profit).

Australian individuals (and certain other taxpayers such as trusts and complying superannuation entities) may be able to claim a discount on capital gains made on the disposal of certain assets which they have held for at least 12 months. Companies cannot claim the benefit of the discount. Broadly the discount exempts a portion of the capital gain made from tax. For complying superannuation entities the discount portion is 33.33%, and the discount for individuals and trusts is 50%. This discount concession is available to Australian residents and non-residents. Where an entity claims the discount concession, they are required to calculate their capital gain without indexing for inflation (as described above). Non-residents are not eligible for the 50% discount on capital gains earned after 8 May 2012 on taxable Australian property, such as real estate and mining assets. Non-residents are still entitled to a discount on capital gains accrued prior to 8 May 2012 (after offsetting any capital losses), provided they choose to value the asset as at that time.

Foreign resident capital gains withholding

Withholding rules apply to vendors disposing of certain taxable Australian property under contracts entered into from 1 July 2016. A 12.5% non-final withholding will be applied to these transactions at settlement, to be withheld and paid by the purchaser. The vendor may claim a credit against any withholding tax paid by filing an income tax return for that year.

Australian resident vendors selling real property can obtain a clearance certificate from the ATO prior to settlement in which case the withholding does not apply. For other asset types (e.g. indirect Australian real property interests and options or rights to acquire real property) that are in scope, a vendor declaration that they are not a foreign resident will also mean withholding does not apply. Applications to vary the rate of withholding can also be made by the vendor in some cases.

Taxation of foreign source income

Australia taxes its residents on their worldwide income subject to:

- an exemption system for certain non-portfolio income derived by Australian resident companies from foreign companies in which the Australian resident company holds an interest of 10% or more;
- an exemption for income taxed on an accruals basis under the controlled foreign corporation rules or the foreign investment fund rules; and
- a foreign tax income offset system for income that is not exempt. Australia generally does not tax non-residents on income which is not sourced in Australia

Fringe benefits tax

Fringe benefits tax at the rate of 47% is imposed on employers (both resident and non-resident) on the taxable value of fringe benefits provided to employees or associates of employees in Australia. There are specific rules for determining the taxable value of various types of fringe benefits, including the private use of motor cars, free or low-interest loans, release of debts, payments of private expenses, free or subsidised residential accommodation, living away from home allowances, and free or discounted goods or services. However, certain other benefits may be treated as direct taxable income to the employee rather than a fringe benefit. The fringe benefits tax is tax deductible for ordinary income tax purposes. The fringe benefits tax year is the 12 months beginning 1 April and ending 31 March.

Employees are exempt from tax on fringe benefits.

Goods and services tax

Australia's GST is a broad-based consumption tax on supplies of goods, services, real property, intangibles and other rights in the course of an enterprise (among other things). The rate of GST is 10%. This is a flat rate on all taxable supplies.

The GST operates in the same way as similar value-added taxes in comparable jurisdictions such as Canada, the United Kingdom and New Zealand. While makers of taxable supplies will be liable to GST on those supplies, they will be able to offset this liability with input credits to which they are entitled as a result of taxable supplies they themselves have acquired.

There are a limited number of exemptions. Importantly, the acquisition of a going concern (for example, the sale of a business) should generally be exempt from GST subject to satisfaction of certain statutory requirements. Exports, supplies of certain food and medical supplies are also exempt. Such supplies are often referred to as zero-rated in other jurisdictions, but for Australian purposes are known as "GST-free". This results in no GST being payable on the supply of the goods or services with the supplier being able to claim an input tax credit for GST paid on any inputs acquired in making the supply.

Some other supplies are "input taxed". This means that no GST will be payable on the supply but the supplier will need to absorb some or all of the GST costs passed on to it by its own suppliers. Certain financial supplies (for example, making of loans, transfer and issue of shares in companies, among other things) and residential real property make up the bulk of input taxed supplies. Merger and acquisition activity is likely to result in an entity making financial supplies with the effect that the entity may need to deny recovery of all or some of its input tax credits.

From 1 April 2018, where an entity makes a taxable supply of new residential premises or a subdivision of potential residential land by way of sale or long-term lease, the recipient of the supply (the purchaser) will be required to make a payment of part of the consideration (the GST amount) to the ATO directly, prior to or at the time consideration is first provided for the supply (other than where money is provided as a deposit). However, this "withholding obligation" does not apply if the recipient of the new residential taxable supply is registered for GST, and acquires potential residential land for a creditable purpose. This ensures that the obligation does not apply to certain business to business transactions, such as a developer purchasing newly subdivided land from another developer.

Customs duty

Customs duty may be payable on imported goods. The amount of customs duty is generally calculated by multiplying the duty rate (generally expressed as a percentage) by the customs value of the imported goods. In Australia, customs duty rates are most commonly between zero and 5%. However, some industries (for example, textiles, clothing, footwear, automotive, alcohol, tobacco and petroleum) are subject to higher rates. As there can be variations in the rates of duty between different tariff items, it is important to determine the correct classification of goods.

The Comptroller-General of Customs administers the Australian customs legislation and any schemes for either removing the liability to pay customs duties (for example, where there are no substitutable goods produced in Australia) or deferring the liability to pay customs duties (for example, manufacturing in bond).

See Chapter 13 (Importing and Exporting) for further details on customs issues.

Stamp duty

Stamp duty is a tax levied on transactions by state and territory governments including conveyances of property (including business assets) and certain dealings in real estate. The duty applies to transactions evidenced by instruments, as well as transactions effected without a document being brought into existence.

The legislation imposing duty varies between states and territories. Different rates of duty apply to the dealings in different types of transactions. As at the date of this Guide, the highest effective rate of duty is 5.95% (although the rate more generally settles at 5.5% depending on the state or territory in which the particular asset is located). In addition, depending on the nature of the asset acquired (in particular residential property), surcharge duty rates of up to an additional 8% can also apply where the buyer is a foreign person, entity or trust.

It is important to note that a party to a transaction subject to duty will usually not be able to enforce its rights under the contract unless the relevant document has been presented at the appropriate State Revenue Office and has been duly stamped. The parties to a transaction subject to duty have a limited period of grace from the date on which the document was first signed to lodge the document for stamping and pay any estimated duty without attracting any penalties. The relevant grace period ranges from 30 days to six months depending on the state or territory involved.

Stamp duty may also be payable on transactions involving a change in ownership of Australian property, even if the change occurs through an acquisition of a non-Australian entity by a non-Australian from a non-Australian.

Where the transaction subject to duty is between certain related parties (for example, members of the same corporate group) as part of a restructure, stamp duty relief may be available where certain statutory requirements are met.

Over recent years, there has been a program of abolition of stamp duty on certain transactions, for example, on some share dealings, loan security arrangements and business asset transfers. Each state and territory has a different abolition program and so it is important to seek advice to confirm the current state of the abolition program depending on the nature of the transaction contemplated.

Land tax

Land tax is an annual tax levied on the ownership of real property by state and territory governments. It applies regardless of whether the land owned is a freehold estate (for example, fee simple or life estates), a leasehold estate (where that estate is leased from the Crown), or a strata lot. Other persons may also be deemed to be owners and subject to land tax (for example, shareholders in a company title unit scheme).

Land tax is calculated on the aggregate land values of all taxable lands owned by a taxpayer in a particular land tax year (ending either 30 December or 30 June) over relevant thresholds. The rates of land tax vary between states and territories. As at the date of this Guide, the highest effective rate is 3.7%. Surcharge rates apply in some jurisdictions for trusts, absentee owners and foreign owners.

Some exemptions from land tax are available, principally in respect of land used as the principal place of residence of the owner or land used for primary production purposes. Land tax payable on ownership of commercial real estate may in some cases be able to be recouped from tenants as an outgoing under the terms of the commercial lease.

Australian Business Number

Businesses that make supplies in the course of carrying on an enterprise in Australia should generally register for an Australian Business Number (ABN). This is because if the business fails to quote its ABN to a recipient of its supplies then any consideration receivable by the business may be subject to a 47% withholding tax. Applying for an ABN is not compulsory.

The ABN will eventually replace the Australian Company Number (ACN) and will ordinarily be based on the ACN with an additional two digits. It will be a single identifier for each business dealing with the ATO and other government bodies and should streamline business reporting requirements.

A company must use its ACN on its common seal, negotiable instruments, public documents and wherever else an ACN is required or permitted to be used under Commonwealth law. However, if the last nine digits of a company's ABN are the same as its ACN then the company may use its ABN instead of its ACN for these purposes.

Payment of tax

Self-assessment system

Australia has a self-assessment system, that is, taxpayers are responsible for determining their own assessable income. The self-assessment system is supported by a binding ruling system that allows taxpayers to obtain advance rulings from the ATO. A taxpayer can challenge an unfavourable ruling.

GST is a self-assessment tax whereby businesses account to the ATO for their GST liabilities and credit entitlements by making a GST return in their Business Activity Statement (BAS) which is filed monthly, quarterly or, for some smaller businesses, annually.

Stamp duty is also a self-assessment tax whereby taxpayers (or their advisers) determine the duty liability on the transaction and lodge documents and pay the estimated duty within the statutory timeframes. Private rulings on the duty consequences of a transaction may be obtained in certain circumstances.

Land tax is paid on a returns basis following the issue of a notice of assessment by the relevant state or territory Revenue Commissioner.

Companies

Companies must pay their income tax in advance by way of quarterly instalments or, in some instances, an annual instalment of taxation. The quarterly instalments are payable within 21 days after the end of each quarter with the amount based on the ordinary income for that quarter.

An annual income tax return must also be lodged by companies showing the total income and deductions (as well as other disclosure information) for the year. The balance of any unpaid tax must then be paid.

Other entities

Taxpayers other than companies (such as individuals, trusts and, for these purposes, partnerships) must lodge a return of income each year. Such taxpayers may also be liable to pay tax in advance on a quarterly basis.

Obligations of employers

Entities and persons employing other persons in Australia are required to deduct tax from payments of salary or wages to those employees. The amounts deducted must then be forwarded to the ATO. Substantial penalties apply for failure to observe these requirements. Similar obligations apply in relation to some contractors.

Exchange control and tax screening requirements

Exchange controls were effectively abolished in Australia for most transactions. Notwithstanding this change, there is a requirement that exports and imports of Australian and foreign cash in the amount of A$10,000 or more must be reported to the Australian Transaction Reports and Analysis Centre (AUSTRAC). AUSTRAC is Australia's anti-money laundering and counter-terrorism financing regulator and specialist financial intelligence unit. AUSTRAC does not have any power to restrict a person from transferring currency to or from Australia; rather, its role is limited to collecting data and forwarding it to various governmental authorities and security, social justice and revenue agencies.

Double tax agreements

Australia has agreements for the avoidance of double taxation with a large number of countries, and undertakes an active program to pursue additions to its double tax agreements (DTA) network. Countries with which Australia has DTAs are set out in Appendix 1 to this Guide. These treaties are largely modelled on the OECD draft agreement but in important instances they diverge markedly from that model. Various treaties including those with the United States and the United Kingdom provide for information sharing with overseas revenue authorities to varying degrees.

Australia signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, also known as the Multilateral Instrument (MLI), on 7 June 2017. The MLI entered into force for Australia on 1 January 2019. Broadly, the MLI modifies the operation of Australia's DTAs to implement measures to address multinational tax avoidance and more effectively resolve tax disputes. The extent to which the MLI modifies Australia's DTAs depends on the adoption positions taken by each country.

Research and development tax incentive

The research and development (R&D) tax incentive is an entitlement program that helps businesses offset some of the costs of doing R&D. The program aims to help more businesses do R&D and innovate.

The program operates by means of a 43.5% refundable tax offset for eligible entities with an aggregated annual turnover of less than A$20 million, so long as the entity is not also income tax exempt. For all other eligible entities, the tax offset is reduced to 38.5% and made non-refundable. The offset applies both to expenditure on eligible R&D activities and to depreciation on assets used for those activities.

The R&D tax incentive is available to a company incorporated:

– under an Australian law;

– under a foreign law where the company is an Australian resident for tax purposes; and

– under a foreign law where the company is a resident of a foreign country with a double tax agreement with Australia and carries on business through a permanent establishment (as defined in the DTA) in Australia.

The ATO and the Department of Industry, Innovation and Science (on behalf of Innovation and Science Australia) are responsible for administering the R&D tax incentive.

Hybrid mismatch rules

Australia has hybrid mismatch rules which prevent the exploitation of the different tax treatments adopted by different jurisdictions in respect of the same entity or instrument. Broadly, the rules operate to neutralise mismatches by either cancelling deductions or including amounts in assessable income.

7 Banking and Finance

7. Banking and Finance

General

Australia is well served by a wide range of local and foreign financial institutions providing a comprehensive range of financial services.

The Australian financial sector is subject to the supervision of the Australian Prudential Regulation Authority (APRA), the Reserve Bank of Australia (Reserve Bank) and the Australian Securities and Investments Commission (ASIC). These agencies are members of the Council of Financial Regulators, which is the non-statutory coordinating body for Australia's main financial regulatory agencies, and which contributes to the efficiency and effectiveness of financial regulation and promotes stability of the Australian financial system.

APRA has responsibility for prudential regulation of all banks, insurance companies, superannuation funds, credit unions, and friendly and building societies. APRA is also responsible for the collection of statistical data from registered financial corporations, APRA-regulated entities and subsidiaries of authorised deposit-taking institutions (ADIs), among others.

The Reserve Bank has responsibility for the overall stability of the Australian financial system, for regulation of the payments system and for setting monetary policy.

ASIC is responsible for corporate regulation of financial services, consumer protection and market integrity functions in respect of banks, finance companies, merchant banks, building societies, credit unions, friendly societies, superannuation interests, retirement savings accounts and general and life insurance products.

Classes of financial institutions and their regulation

Authorised deposit-taking institutions

An authorised deposit-taking institution (ADI) is a body corporate which is granted an authority to carry on "banking business" (which consists of both taking deposits and making advances) in Australia by APRA under the *Banking Act 1959* (Cth) (Banking Act). The fact that a body corporate has an authority to carry on banking business in Australia does not mean that it may call itself a "bank". APRA's consent is required before an ADI can assume or use the words "bank", "banker" or "banking" (in any language) in its name or in connection with its business.

There are four major domestic banks and a number of smaller banks and foreign-owned banks operating in Australia as ADIs. The ADI category also includes building societies and credit unions which engage principally in the provision of personal finance to the retail market. The Australian Government has a policy known as the "Four Pillars Policy", which establishes that there should be no fewer than four major domestic banks to maintain appropriate levels of competition in the banking sector. Foreign banks are permitted to operate in Australia through a branch or through a locally incorporated subsidiary. A locally incorporated subsidiary or a branch of a foreign bank wishing to carry on banking business in Australia must be an ADI and regulated under the Banking Act, or obtain an exemption from the requirement to be an ADI.

APRA is responsible for the prudential regulation of all ADIs under the Banking Act. ADIs are required to observe capital adequacy standards set by APRA. ADIs are also required to provide information to APRA if requested, including statements of assets and liabilities and other prescribed information on a regular basis.

Ownership of ADIs is subject to restrictions under the *Financial Sector (Shareholdings) Act 1998* (Cth). The Act restricts a person from holding, together with the interests of the person's associates, more than 20% in a financial sector company without the prior approval of the Federal Treasurer.

Under the *Financial Sector (Collection of Data) Act 2001* (Cth) (FSCOD Act), APRA may determine reporting standards for ADIs and require them to provide APRA with information about their businesses and activities. APRA's current requirements for ADIs include the provision of information relating to capital adequacy and off balance sheet business. ADIs, however, are not "registrable corporations" under that Act and therefore the registration regime under that Act does not apply to them.

Investment banks and other financial corporations

Investment banks offer a number of financial services to the corporate market. Often the investment banks are owned by foreign banks not themselves authorised to conduct banking business in Australia.

Such investment banks may operate without authorisation from APRA if they are not conducting banking business in Australia for the purposes of the Banking Act. However, such an investment bank will not be permitted by APRA to use the term "bank" and its derivatives in its name or business unless it is authorised as an ADI.

Investment banks may be subject to the requirement to register under and otherwise comply with the FSCOD Act.

The FSCOD Act, with limited exceptions, applies to foreign corporations, and trading or financial corporations formed within Australia, that are not ADIs if the following requirements are satisfied:

- the corporation engages in the "provision of finance" in the course of carrying on business in Australia; and
- either:
  - the sum of the debts due to the corporation (and its related corporations) which are assets in Australia and resulting from transactions entered into through the provision of finance by the corporation is more than A$50 million (by valuing the debt asset at the time the loan or other financing arose); or
  - the sum of the principal amounts outstanding on loans or other financing (that arose in the most recent completed financial year) funded by the corporation exceeds A$50 million.

"Registrable corporations" under the FSCOD Act must register under that Act with APRA. Under that Act, APRA is required to prepare a list of registered corporations (which are known as "registered entities" or "Registered Financial Corporations") in which the corporations are divided into such categories as APRA determines. Categories of corporations under the FSCOD Act include money market corporations, intra group financiers and other corporations (such as finance companies, general financiers and pastoral finance companies). Investment banks are usually placed in the category of money market corporations.

Under the FSCOD Act and its regulations, a registered corporation is required to furnish to APRA statements of assets and liabilities and other prescribed information on a regular basis for statistical purposes. Corporations registered under the FSCOD Act are prohibited from advertising that they are "registered under the *Financial Sector (Collection of Data) Act 2001*" or "registered with APRA".

The major source of regulation of investment banks and other non-ADI financial corporations is the *Corporations Act 2001* (Cth) (Corporations Act), particularly in the areas of licensing, conduct and the taking of deposits.

Others

Finally, there are a number of other financial institutions including superannuation funds, friendly societies, insurance companies and finance companies, engaging principally in the provision of personal finance to the retail market. Superannuation funds, building and friendly societies, credit unions and insurance companies are subject to the prudential supervision of APRA.

Foreign banks operating in Australia

Foreign banks may operate through locally incorporated subsidiaries, through branches or through representative offices in Australia, or may also hold a dual authority to operate both as a locally incorporated subsidiary and as a branch. APRA has issued prudential statements which clarify the conditions attaching to the operation and the entry criteria for foreign banks wishing to operate in these ways.

"Banking business" consists of both taking deposits and making advances. To carry on banking business in Australia, foreign banks must obtain a banking authority issued by APRA under the Banking Act. A banking authority may be granted by APRA subject to conditions, and these may be varied, revoked, or added to at any time by APRA by notice in writing.

The granting of an authority to carry on banking business comes with the right to use the expression "authorised deposit-taking institution" (ADI). Additional consent from APRA is required to use the words "bank", "banker" or "banking" (in any language) in a name or in connection with a business.

Only bodies corporate can carry on banking business in Australia.

Applicants for a banking authority are expected to be able to comply with APRA's prudential requirements, which are set out in various prudential statements, from the commencement of their banking operations.

There are no restrictions on the number or size of operations of foreign banks operating as subsidiaries or branches in the Australian market.

Locally incorporated subsidiaries of foreign banks

Foreign bank subsidiaries incorporated in Australia are expected to maintain a significant presence in Australia and add some depth to the local banking markets.

A locally incorporated subsidiary of a foreign bank must satisfy many of the same legislative and prudential requirements as Australian-owned banks.

A foreign bank subsidiary applying to operate in Australia must satisfy a number of criteria.

Branches of foreign banks

Foreign banks operating as branches in Australia (which are also known as "foreign ADIs") must submit their local operations to the prudential supervision of APRA and provide information to APRA on request in connection with their prudential responsibilities. Foreign bank branches, unlike locally incorporated subsidiaries, are not subject to the depositor protection provisions of the Banking Act. They are not required to maintain endowed capital in Australia and are not subject to any capital-based large exposure limits. As there is less protection for depositors with branches compared to those with locally incorporated banks, foreign bank branches are required to confine their deposit-taking activities to "wholesale" markets.

In particular, they are not permitted to accept initial deposits and other funds from individuals and non-corporate institutions of less than A$250,000, but they are able to accept deposits and other funds in any amount from incorporated entities, non-residents and their employees.

Moreover, they must disclose to customers that they are not subject to the depositor protection provisions of the Banking Act. There are no other specific restrictions placed on sources of funding or on the use of funds. Specifically, cheque accounts and credit card accounts may be offered subject to the above.

If foreign banks wish to undertake "retail" deposit taking, locally incorporated banking subsidiaries must be established.

A foreign bank applying to operate a branch in Australia must satisfy a number of criteria.

Operating both a branch and a locally incorporated subsidiary

A foreign bank may operate both a branch and a locally incorporated banking subsidiary in Australia, but the branch and subsidiary must conduct their business so as to make clear their separate legal status and banking authorisation. In particular, the branch and locally incorporated banking subsidiary are required to have:

– separate books of account;

– separate statistical (including prudential) reporting to APRA;

– separate internal risk monitoring and management systems;

– separate systems of delegation;

– separate chief executive officers responsible for the proper management and prudent operation of the branch and subsidiary respectively; and

– processes to ensure customers understand which entity they are dealing with and the implications for their interests when staff are undertaking dual roles for both the branch and the locally operated subsidiary.

Banking transactions between a subsidiary bank and a branch should be at “arm’s length” and, therefore, the subsidiary would not normally be expected to purchase assets from the branch. The branch and the subsidiary may share premises and support services such as personnel, financial control and treasury operations.

A limit is placed on the exposure (both direct and indirect) of a banking subsidiary to its parent bank (including its Australian branch).

Representative offices

A foreign bank wishing to establish a representative office in Australia is required to meet minimum entry standards and comply with operating conditions set by APRA. An applicant must satisfy APRA that it:

– is recognised as a bank under the laws of its home country;

– is of substance and good repute;

– is subject to adequate standards of prudential supervision in its home country; and

– has received approval from its home supervisor to establish a representative office in Australia.

A representative office must only conduct liaison services and must not conduct any form of banking business in Australia. The range of prohibited activities includes soliciting or receiving deposits, granting loans, dealing in or issuing securities, dealing in derivatives products, and buying or selling foreign exchange. The representative office must not engage directly in financial transactions, except those necessary or incidental to the maintenance of the office in Australia.

The activities of the representative office must be kept separate from any financial enterprise operating in Australia. The foreign bank establishing a representative office must be registered as a foreign company under the Corporations Act.

APRA has indicated that it prefers that a representative office be established before the parent entity seeks to establish an ADI in Australia so that APRA can readily liaise with a local entity through the authorisation process.

Restricted ADI licences

The Banking Act was amended in 2018 to permit the issue of a new form of ADI licence, known as a restricted ADI licence (RADI licence). RADI licences allow eligible new entrants to the banking industry (domestic or foreign) to undertake very limited banking activities at an earlier stage of the licensing process than had previously been the case for a period of two years. During this two year period, the new entrants are permitted to build up their capabilities and resources to demonstrate that they are capable of meeting the requirements under the full prudential framework for an ADI licence. If they are unable to do so, they will be required to cease banking operations.

Regulation of financial services

Chapter 7 of the Corporations Act regulates licensing, product disclosure and conduct in relation to the provision of financial services and the operation of financial markets in Australia.

An Australian financial services licence is required to carry on a business of providing financial services. For more detail, see Chapter 16 (Financial Services Regulation).

Regulation of related activities

Financial transaction reports

Under the *Financial Transaction Reports Act 1988* (Cth) (Financial Transaction Reports Act), all "cash dealers" are required to hold certain account information and signatory information in relation to each account held by them before allowing withdrawals from the account. Cash dealers must also report to the Australian Transaction Reports and Analysis Centre (AUSTRAC):

– significant cash transactions: transactions of A$10,000 or more in Australian currency or the equivalent of A$10,000 or more in foreign currency (also covered by the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML/CTF Act) as a "threshold transaction"); and

– suspect transactions, which is any transaction that the cash dealer has reasonable grounds to suspect may be relevant to investigation of criminal activity, including tax evasion (also covered by the AML/CTF Act).

"Cash dealers" include:

– ADIs (that is, banks, building societies and credit unions), which are referred to as "financial institutions";

– motor vehicle dealers who act as an insurer or insurance intermediary;

– Australian financial services licensees who deal in securities and/or derivatives (as defined in the Corporations Act);

– a trustee or manager of a unit trust;

– persons carrying on a business of issuing, selling or redeeming travellers cheques, money orders or similar instruments;

– currency and bullion sellers;

– persons who carry on a business of operating a gambling house or casino;

– bookmakers; and

- persons carrying on the business of collecting and holding currency on behalf of others, exchanging currency and remitting or transferring currency into or out of Australia.

The Financial Transaction Reports Act provides penalties for avoiding reporting requirements and providing false or incomplete information.

Note that, while still effective to regulate "cash dealers", the AML/CTF Act applies Australia's new and more broadly applicable anti-money laundering regime and has in effect replaced the Financial Transaction Reports Act, including by also applying to "cash dealers".

Anti-money laundering and counter-terrorism financing

The AML/CTF Act sets out a "risk-based" legislative regime aimed at aligning Australia's anti-money laundering and terrorist financing regulatory framework with international best practice. The AML/CTF Act is administered by AUSTRAC. AUSTRAC has set out both AML rules and guidance notes to assist the regulated "reporting entities" to comply with their obligations.

"Reporting entities" are captured by the AML/CTF Act if they provide certain "designated services" which are set out in the AML/CTF Act and relate to banking and financial services, bullion and the gambling industry.

Reporting entities must comply with the prescriptive requirements in the AML/ CTF Act, including by preparing and implementing a "risk-based" AML/CTF program with the goal of identifying, mitigating and managing the risks of money laundering and terrorism financing.

Other key obligations under the AML/CTF Act include that reporting entities must:

- report transactions of A$10,000 or more (threshold transactions) in Australian currency or the equivalent of A$10,000 or more in foreign currency or e-currency;
- report international funds transfer instructions;
- report suspicious transactions including any transaction which the reporting entity has reasonable grounds to suspect may be relevant to investigation of criminal activity, such as tax evasion, terrorism financing, or money-laundering or where the reporting entity has reasonable grounds to suspect that the counterparty in the transaction is not who they say they are;
- engage in customer and employee identification and due diligence procedures;
- maintain a record-keeping system of the provision of designated services to customers; and
- develop and maintain an AML/CTF compliance program, as they may be required to provide reports to AUSTRAC.

Consumer credit

The provision of credit to consumers for domestic, personal or household use or for residential investment property purposes is regulated by the Commonwealth under the National Credit Code throughout Australia. The *National Consumer Credit Protection Act 2009* (Cth) also regulates consumer credit by imposing a credit licensing regime and responsible lending obligations.

General banking

Designed to protect users of electronic payment facilities in Australia, the ePayments Code regulates payments including ATM, EFTPOS and credit card transactions, online payments and BPAY (an electronic bill payment system). Almost all banks, credit unions and building societies in Australia subscribe to the ePayments Code.

Secured financing

Types of securities

Traditionally, the principal types of security over property in Australia available to a financier included the mortgage and the company charge (which, since the introduction of the *Personal Property Securities Act 2009* (Cth) (PPSA) are documented under general or specific security agreements).

All kinds of property, both real and personal (including rights under contracts) may be the subject of a legal or equitable mortgage or a company charge. An equitable mortgagee will have the right to perfect its title to the secured property as legal owner on the terms of the relevant mortgage. Mortgagees, chargees and secured parties have a power of sale (together with other security rights) over the secured property that is exercisable on default. Mortgagees and chargees are subject to general law duties as well as specific obligations under legislation in relation to enforcement of their security.

Most real property is held under the Torrens System (see Chapter 13, Real Property and Environmental Law) and a mortgage over such property is typically effected under statute by registration against the statutory title to the mortgaged property.

The PPSA has implemented a legal framework for security over personal property. The PPSA governs security taken over all types of personal property (excluding real property and certain other specific property) given by all types of legal entities. It adopts a functional approach by looking to the substance of a transaction, rather than the form. The central element of the PPSA is that all transactions which in substance secure payment or performance are treated as security interests, regardless of the form of the transaction and irrespective of which party has title to the property. In addition, certain transactions which do not secure payment or performance of an obligation are also deemed to give rise to a security interest under the PPSA, including, for example, assignments of receivables and certain leases or other bailments of goods.

A security interest over personal property that is subject to the PPSA may be perfected under the PPSA by registering a financing statement on the single national online register of personal property securities, or by taking possession or, for certain types of personal property, by taking control of the collateral within the meaning of the PPSA.

Failure to perfect a security interest in the manner provided under the PPSA may result in the loss of priority or, in the case of a security interest created by an Australian company, the security interest becoming unenforceable in the insolvency or bankruptcy of the grantor. It is therefore critical for secured parties to consider the impact of the PPSA on their businesses and to adjust their policies and procedures to ensure that security interests are sufficiently and appropriately protected.

Priority

For real property mortgages, priority is determined according to the order of registration on the relevant land title.

The general principle under the PPSA is that, for perfected security interests, priority is determined by time of registration of the security interest, unless the security interest is perfected by control or possession, in which case priority is determined by the time of control or possession. There are, however, certain exemptions to this general principle, including, for example, where a security interest is granted for the financing of the purchase of goods subject to the security interest (in which case, that security interest will generally prevail).

Stamp duty on security

Mortgage duty has been abolished in all states and territories, most recently in New South Wales on 1 July 2016. Accordingly, there is no liability for mortgage duty in NSW (or any other jurisdiction in Australia) arising where a secured loan or further advance under an existing secured facility is made on or after 1 July 2016.

8 Intellectual Property

8. Intellectual Property

Updated to February 2020.

General

Commonwealth legislation provides for the registration and protection of intellectual property such as trade marks, patents and industrial designs. Copyright is also protected under Commonwealth law, without requiring registration. The registration of company and business names is available under the *Corporations Act 2001* (Cth) (Corporations Act) and under Commonwealth business names legislation. There is separate legislation providing protection for original circuit layouts (that is, the representation of the three-dimensional location of the electronic components of an integrated circuit) and for unique plant varieties. Australia also has a system of geographic indicators for some Australian wines.

The law in each of these areas is complex. Specific advice should be sought if a particular name, mark, product or design is to be manufactured, marketed or used in Australia. A brief description of the major features of some of these laws is set out below.

Trade marks

Distinctive signs used or intended to be used in relation to particular goods and/or services are protectable under the *Trade Marks Act 1995* (Cth) (Trade Marks Act). "Signs" are broadly defined and expressly include words, numbers, logos, names, colours, shapes, sounds and scents, and extend to sensory marks, holograms, moving images and gestures.

While trade mark registration is not mandatory, the benefits are significant. Briefly these are:

- A registered trade mark owner has the exclusive right to use its registered trade mark as a brand name for the goods and/or services specified in the registration.
- In enforcement (infringement) proceedings, a registered trade mark owner is in a stronger position to stop other people from using an identical or deceptively similar trade mark on the same or similar goods or services as those covered by a trade mark registration. There is no need for the registered owner to establish a reputation in the trade mark or that use of the offending mark is likely to deceive or confuse the public.
- A trade mark registration acts as a deterrent on the public record to others who may be considering adopting the same or a similar mark.
- A trade mark registration is a readily identifiable intellectual property right that can be sold or used as security.
- Registration provides a defence to a third party's claim of infringement if the mark is used as registered.

Not all signs are registrable as trade marks in Australia. The basic requirements for registration are that the sign:

- is not substantially identical with, or deceptively similar to, a sign which is the subject of a prior registration or application in respect of similar goods and/or closely related services; and
- is distinctive or capable of becoming distinctive. There is no need to show that the mark has been used if the mark is sufficiently distinctive.

The registration process in Australia is relatively straightforward and, where no objections or oppositions are encountered, registration can be achieved in 8 to 10 months from filing.

The registered owner of a trade mark can, and in order to protect the mark should, bring an action for infringement if a person who is not an authorised user uses a sign which is substantially identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered, or on similar goods or closely related services. "Well known" registered trade marks are given protection against use, even on unrelated goods and services.

Registered trade marks can be licensed or assigned and are renewable every 10 years. They can also be removed for non-use. If a mark has been registered for more than five years but has not been used during the last three years, either by the owner or an authorised user, the registration can be removed on the application of a third party. For trade marks filed on or after 24 February 2019, a non-use action can be filed after three years from the date the particulars of the relevant trade mark were entered into the register.

Name protection

Under the Corporations Act, every company carrying on business in Australia is required to register its name with the Australian Securities and Investments Commission (ASIC). In addition, any company or individual carrying on business under a name other than its own is required to register that business name with ASIC.

Business names and company names are allocated on a "first come, first served" basis. The obligation to register a business name or company name is a legal obligation which is entirely separate to any steps that business owners may take to protect any intellectual property rights in a name or brand. Registering a business or company name does not provide any proprietary rights in that name; only a trade mark registration can provide that kind of protection.

An application for registration of a company or business name will not be rejected unless it is determined that:

- in the case of a business name, the name is the same as, or would be confused with, other existing company or business names registered in Australia;
- in the case of a company name, the name is identical to an existing company or registered business name; or
- the name is offensive or otherwise prohibited.

A company name can be "reserved" for up to two months at a time with extensions of further two month periods at the discretion of ASIC.

Domain names

Internet domain names within the Australian .au domain space are administered by an industry self-regulatory body, .au Domain Administration Ltd (auDA).

The .au domain space is divided into a number of second level domains (2LDs). The most popular 2LD open to the general public is com.au, which is for use by commercial entities.

The current eligibility requirements for registration of a com.au domain are set out in auDA's Domain Name Eligibility and Allocation Policy. Registrants must be:

- an Australian-registered company or incorporated association;
- trading under a registered business name in any Australian state or territory;

- a foreign company licensed to trade in Australia;
- an Australian partnership or sole trader; or
- the owner of, or applicant for, an Australian registered trade mark.

Domain names are allocated on a first come, first served basis (provided the registrant satisfies the eligibility rules). It is not possible to reserve a domain name. Domain names must be unique within the com.au sub-domain space, be at least two characters long, contain only alpha numeric characters and hyphens, and not be included on auDA's Reserved List, which includes names and words protected by statute.

The domain name must:

- exactly match the registrant's registered company or business name or the words comprising the registrant's Australian trade mark registration or application;
- be an acronym or abbreviation of the registrant's company or business name or the words comprising the registrant's Australian trade mark registration or application; or
- be otherwise closely and substantially connected to the registrant, for example, because the domain name refers to a product or service which the registrant sells or provides.

There is a Dispute Resolution Policy for .au domain names which is an adaptation of ICANN's Uniform Dispute Resolution Policy and its purpose is to provide a cheaper, more efficient alternative to litigation for the resolution of domain name disputes.

auDA also has a policy on the transfer of .au domain names known as the Transfers (Change of Registrant) Policy. The policy allows a registrant to transfer their domain name licence to another eligible entity. However, a domain name may not be registered for the sole purpose of resale.

Copyright

Copyright is regulated under the *Copyright Act 1968* (Cth) (Copyright Act). The Copyright Act protects copyright in literary, dramatic, musical and artistic works and subject matter other than works, such as cinematograph films and sound records. There is no statutory system of registration of copyright in Australia. Copyright automatically arises when the work or other subject matter is created, provided certain threshold criteria are met (for example, material form, originality etc). The owner of a copyright work which has been infringed can bring an action to seek an injunction and obtain damages or an account of profits and a wide range of other remedies.

Australia is a party to various international treaties dealing with copyright, including the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS), the Berne Convention, the Rome Convention and the Universal Copyright Convention and, as a result, works and other copyright subject matter created by the citizens of member countries or first published in the relevant member country are entitled to the same protection in Australia as if they had been created and first published in Australia. Australia has also acceded to the World Intellectual Property Organisation (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Copyright generally lasts for 70 years following the death of the author, but the exact term of copyright protection differs depending on the type of work or other subject matter that is being protected and, in some instances, the publication date.

Moral rights held by individuals in relation to literary, dramatic, musical or artistic works and cinematographic films are given protection in Australia. These rights include the right of attribution of authorship, the right not to have authorship of a work falsely attributed and the right of integrity in a work. Moral rights continue in force until copyright ceases to subsist in the work, with the exception of the right of integrity in a cinematographic film which ceases on the death of the author. Performers' moral rights in relation to performances (corresponding to the moral rights of authors noted above) are also provided for in the Copyright Act. Remedies for infringement of moral rights include an injunction, damages, a declaration that a moral right has been infringed and other orders.

Patents

Australia's *Patents Act 1990* (Cth) (Patents Act) confers upon patent owners the exclusive right to make, use, sell, hire and otherwise exploit a patented invention. Standard patents are granted for a period of 20 years. In most circumstances, the period commences from the date the patent application was filed. Australia, in line with the United States and Europe, allows a patentee to apply for an extension to the term of a standard patent that claims a pharmaceutical substance by up to five years in certain circumstances.

For an invention to be patentable, it must be a "manner of manufacture" (an artificially created state of affairs of economic significance), novel, involve an "inventive step" (i.e. not be obvious when compared with the prior art base that existed before the priority date of the patent), and useful.

There is a grace period which applies in Australia in relation to public disclosures of an invention made on or after 1 April 2002. Certain disclosures may be disregarded for the purposes of assessing novelty, inventive step and innovative step if a complete patent application is filed (and protection subsequently obtained) within a period of 12 months of the disclosure.

Australia is a party to the Paris Convention for the Protection of Industrial Property, one principle of which is the right of priority. Gaining priority means that once an application has been made in a convention country, thereby securing a priority date, it is possible to claim the same priority date for a subsequent Australian application made within 12 months. Australia is also a contracting party to the Patent Cooperation Treaty, which provides for the filing of international applications. The Australian Patent Office acts as an International Searching Authority and an International Preliminary Examining Authority for international applications originating in Australia.

Innovation patents

An innovation patent, which is for a term of eight years, is an alternative form of protection to that given by a standard patent. The purpose of the innovation patent system is to ensure easy and inexpensive short-term protection for lower level or incremental inventions. To obtain an innovation patent, the invention must be novel and involve an innovative step, which is a lower threshold than that required for standard patents. The innovation patent system facilitates the grant of patents without substantive examination.

Generally, an innovation patent is granted after it passes a formalities check, usually within a month. No opposition proceedings are permitted at this stage. Substantive examination only occurs if required by the Patent Office or specifically requested by the patentee or a third party. Once an innovation patent has been examined and certified it can be opposed. An innovation patent will only be legally enforceable if the innovation patent has been examined and certified by the Patent Office.

On 26 February 2020, amendments to the Patents Act were passed to gradually phase out the innovation patent system. The amendments commence on 26 August 2021 and any new innovation patent applications must be filed before that date. However, divisional applications will still be accepted after the commencement date if the parent application was filed before the commencement date. Additionally, standard patent applications may be converted to innovation patent applications if the standard patent application was filed before 26 August 2021.

Registered designs

Design features of products, such as shape, configuration, pattern or ornamentation may be protected from imitation by registration of those features as designs under the *Designs Act 2003* (Cth) (Designs Act). The registered owner of a design has the right to use, and authorise others to use, the design. Once the registered design is examined and certified, the owner may sue for infringement if the registered design is used without permission.

To be valid, a design registration must be for a design which is new and distinctive. Prior use in Australia or publication (within or outside Australia) will mean that a design is not new or distinctive.

The term of registration of a design is five years with the right to renew the registration for a further five years.

A design may fall within the definition of "design" in the Designs Act and also be an "artistic work" within the meaning of the Copyright Act. Where an artistic work is industrially applied as a design and articles made using this three dimensional design are put on the market in Australia, copyright protection may not be available. However, if the design is registered, it will be protected under the Designs Act.

There is some overlap between design legislation and trade mark legislation, which permits the registration of shapes as trade marks. Traders may potentially register their product as both a design and a trade mark and obtain protection under both regimes.

Under the Paris Convention, an applicant for a design application in a member country has a period of six months within which to file a corresponding design application in Australia, in which case the Australian application has the priority date of the overseas application.

Confidential information and trade secrets

Trade secrets are part of the broader concept of confidential information which is protected by the courts. The term "trade secret" refers broadly to information which is of commercial value to the holder of the information and which, if disclosed to a competitor, would be liable to cause real or significant harm to the owner of the secret and is known only by the holder or others to whom the holder has disclosed the information subject to an obligation of confidentiality. Customer lists, marketing techniques, software, know-how, product specifications and manufacturing processes can all be trade secrets.

It is generally accepted in Australia that trade secrets are simply information, and property rights do not attach to them. Trade secrets are protected either by express contractual obligations to maintain the secrecy of confidential information or by application of the general principle that anyone to whom confidential information is communicated in circumstances of confidence has an obligation of good faith to maintain the confidentiality of the information.

It is common to impose express obligations of confidentiality in employment, licensing and sales contracts. As protection for trade secrets is lost once the information is no longer secret, or becomes part of the public domain, a contractual obligation which outlives the secrecy of the information or which otherwise relates to information which is not confidential may be unenforceable as an unreasonable restraint of trade, or at least ineligible for relief in the event of a breach.

Injunctions can be obtained to restrain the disclosure of trade secrets and delivery up or destruction of material to prevent further disclosure. If the secret has already been disclosed, damages are available to compensate for the loss suffered as a result of unauthorised use or disclosure, or alternatively an account of profits made as a result of the use or disclosure.

Exploitation of intellectual property rights

Intellectual property rights can be bought and sold, licensed and the subject of joint ventures and other collaborations. Central to any intellectual property transaction is a clear understanding of ownership and limits on usage of such property. Issues such as ownership of rights generated by the activities of employees, contractors or collaborators need to be addressed before many transactions proceed and are part and parcel of the due diligence process. Similarly, extensive searching often needs to be undertaken, and enquiries often need to be made, in order to establish clear title to rights.

The ownership position in Australia will not necessarily correspond to that in other countries. For example, in Australia, where a copyright work is made by an employee pursuant to the terms of a contract of employment, the copyright will usually be owned by the employer. Contractors or consultants will usually own the intellectual property rights in their own work in the absence of an assignment of those rights. Special rules apply to photographs, portraits or engravings commissioned for a private or domestic purpose.

Specific Australian advice should be obtained on the form of assignments and licences including:

- whether a licensee has any specific rights under the relevant Australian legislation, such as the rights of an "authorised user" under section 26 of the Trade Marks Act (which include the right to bring an action for infringement) or the right of an exclusive licensee to commence infringement proceedings under section 120(1) of the Patents Act;
- whether there are any anti-trust or competition law concerns resulting from the identity of the licensor and licensee, or the proposed terms of the transaction;
- whether there are any income tax, capital gains tax, stamp duty, GST or transfer pricing issues arising out of the transaction;
- the rights of the parties in relation to or following any termination of a licence; or
- whether or not any statutory warranties or conditions are implied or imposed by law in connection with the transaction, and the extent to which liability can be limited for breach of any such warranties or conditions.

Franchising

Franchising is regulated by the Franchising Code of Conduct (Code), a mandatory industry code of conduct under the *Competition and Consumer Act 2010* (Cth) (CCA). All business arrangements that fall within the scope of a "franchise agreement" must comply with the Code. This term is defined broadly and includes traditional business format franchises as well as certain distribution arrangements and other commercial relationships not ordinarily considered to be "franchises".

The Code requires, among other things, disclosure of certain information regarding the franchised business and a cooling-off period providing the franchisee with the right to terminate within seven days of entering into the agreement. The Code also prohibits franchise agreements from containing release from liability provisions, provides for transfers and terminations of franchise agreements and requires compliance with prescribed dispute resolution provisions.

Non-compliance with the Code may result in the imposition of injunctions, damages, undertakings, corrective advertising or other such orders as a court thinks appropriate. In addition, breaches of certain provisions carry civil penalties of up to A$63,000. Parties who are only indirectly involved in a breach of the Code may also be found liable for breach. This includes any party that aids, abets, counsels, induces or is in any way knowingly concerned in or a party to the contravention. Under the Code, both franchisees and the Australian Competition and Consumer Commission may take action against a franchisor for a breach of the Code.

Enforcement of rights

Intellectual property rights are usually enforced by way of a civil action in the Federal Court of Australia, Federal Circuit Court or the Supreme Court of the relevant state or territory. In addition to final relief granted after a full trial, in certain circumstances it may be possible to obtain:

- an interlocutory injunction to prevent further allegedly infringing activities until trial;
- a summary judgment disposing of the proceedings without the need for a trial;
- a delivery up order, forfeiting infringing goods;
- an "Anton Piller" or search order for the inspection and preservation of documents and articles pending trial;
- a "Mareva injunction" or freezing order to prevent the infringer disposing of assets or absconding from the jurisdiction; or
- a "Norwich Pharmacal" order for disclosure of the identity of infringers.

Costs and settlement

The costs of bringing an infringement action to an interlocutory or final hearing can be high. Costs include court fees, legal fees, costs of expert witnesses and costs of any independent solicitors. Costs may be awarded to a successful party, along with damages or an account of profits, but will usually only amount to approximately half of the actual costs of litigation.

Urgent applications for an interlocutory hearing may be brought within two weeks. It may take one or two years to reach a final hearing, although this period is likely to be reduced if an interlocutory injunction is in place.

Where settlement is reached prior to a final determination (as is usually the case), the infringer can be required to submit to orders or give undertakings to the court. Serious consequences would flow from subsequent infringing activities, as a breach of the undertakings would constitute contempt of court punishable by imprisonment or sequestration.

Revocation and opposition proceedings

Application can be made to revoke a patent, design or trade mark. Such applications must generally be made in a court, and can be made by counterclaim in infringement proceedings. An application to revoke a trade mark registration can also be made to the Trade Marks Office within 12 months of registration if it appears that registration should not have occurred.

The registration of a trade mark and the grant of a patent can be opposed before the Trade Marks Office and Patent Office, respectively. In the case of trade marks, a notice of intention to oppose must be filed within two months of the acceptance of the trade mark application being advertised in the Official Journal of Trade Marks. For a standard patent, a notice of opposition must be filed within three months of the patent application's acceptance being advertised in the Official Journal of Patents. An innovation patent can be opposed at any time after it is certified.

Border seizures

The Copyright Act and the Trade Marks Act provide for intellectual property owners to object to the importation into Australia of infringing goods. This is done by way of written notice to the Australian Border Force (the frontline operational agency within the Department of Immigration and Border Protection). The intellectual property owner therefore has a chance to have counterfeit goods seized before they are distributed and seek an order to prevent their importation.

The Copyright Act and Trade Marks Act have restricted application in preventing "grey" or "parallel" imports, that is, genuine manufactured goods not intended for the Australian market. Parallel importation of legitimate sound recordings is permitted, regardless of whether the sound recordings are accompanied by other copyright material. Parallel imports of software (including computer games) are also lawful. It is not possible to block parallel imports on the basis of copyright in accessory items. However, parallel imports will only be permitted in certain circumstances, for example, the imported work may need to have been published in a country that is party to the Berne Convention or a member of the World Trade Organisation.

Other causes of action

Intellectual property owners may also be able to access other rights, including:

- at common law, for example, an action for "passing off", where one party takes advantage of the goodwill or reputation built up by another, by misrepresenting that some relationship exists between the parties or their respective goods or services; and
- under the Australian Consumer Law (set out in Schedule 2 of the CCA), which (among other things) prohibits persons from engaging in misleading or deceptive conduct in the course of trade or commerce.

9 Privacy

9. Privacy

Updated to May 2020.

Overview

Australian privacy law is primarily regulated by the *Privacy Act 1988* (Cth) (Privacy Act). The Privacy Act sets out the obligations for the handling of personal information by Commonwealth agencies and corporate entities. The Privacy Act also includes a credit reporting regime regulating the handling of credit-related personal information.

State-based legislation, similar to the Privacy Act, also applies to the handling of personal information by state government entities. Specific additional legislation also applies for:

- surveillance (at both state and federal levels);
- email and telemarketing (the *Spam Act 2003* (Cth) and *Do Not Call Register Act 2006* (Cth)); and
- the management of health records and healthcare identifiers.

Other confidentiality and privacy requirements can also apply on a sector and fact-specific basis (e.g. certain communications information is protected under the *Telecommunications Act 1997* (Cth) and bank customer information is protected at common law by a banker's common law duty of confidentiality). There is also a sector-specific "consumer data right" which is currently being implemented in the banking sector.

This chapter deals only with the general requirements of the Privacy Act, not credit reporting or other data and/or security-related requirements.

An entity's main obligations under the Privacy Act are set out in the Australian Privacy Principles (APPs). Penalties of up to A$420,000 for individuals and A$2.1 million for corporations may apply for repeated and serious privacy breaches. There are proposals to increase these penalties and make other changes to the Privacy Act (see below) but no draft legislation has yet been published.

Unlike the European General Data Protection Regulation, the Privacy Act does not distinguish between "data controllers" and "data processors". The requirements of the Privacy Act apply equally to all organisations which fall within its remit, whether they control the purposes for which personal information is collected or held, or only process it for a third party.

The Office of the Australian Information Commissioner (OAIC) is the main privacy regulator in Australia, which enforces, and provides guidance regarding, the requirements of the Privacy Act.

Extraterritorial application

The Privacy Act has extraterritorial application in certain circumstances. In the case of private sector organisations, it has extraterritorial application where the organisation has an "Australian link". This includes where the organisation is:

- incorporated in Australia; or
- a foreign organisation which carries on business in Australia, and collects or holds personal information in Australia before or at the time of an act or practice.

To illustrate the first point, if an Australian subsidiary collects or handles personal information about individuals in Australia, it will be subject to the Privacy Act even if that personal information is collected or held offshore.

In relation to the second point, guidelines from the OAIC indicate that whether an entity is "carrying on business" focuses on whether activity is undertaken in Australia as part of the entity's business. Factors that may be considered for this assessment include whether: an entity has a place of business or personnel in Australia, and/or a website that offers goods or services to countries including Australia; Australia is a country on a drop-down menu on an entity's website; web content forming part of the operation of the business was uploaded by or on behalf of the entity in Australia; business or purchase orders are assessed or acted upon in Australia; and the entity is a registered proprietor of trademarks in Australia. Personal information is collected "in Australia" if it is collected from an individual who is physically present in Australia, regardless of where the collecting entity is located or incorporated. This applies even if the information is collected via a website hosted offshore and owned by an offshore entity.

Application of the APPs

The APPs apply (with limited exceptions) to all organisations and government agencies (APP entities) who collect and handle personal information in Australia.

"Personal information" covers information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- whether the information or opinion is true or not; and
- whether the information or opinion is recorded in a material form or not.

Key exemptions

"Small business operators" are exempt from the requirements of the APPs. A "small business" is a business whose annual turnover for the previous financial year is A$3 million or less, unless an exception applies (e.g. where the business operator has previously had an annual turnover of A$3 million or more while operating that business, or where the business operator is related to a body corporate that carries on a business that is not a small business).

An act or practice of an organisation that is or was an employer of an individual is exempt from the requirements of the APPs if it is directly related to:

- a current or former employment relationship between the employer and the individual; and
- an employee record held by the organisation and relating to the individual.

An employee record, in relation to an employee, means a record of personal information relating to the employment of the employee. Examples of personal information relating to the employment of the employee are health information about the employee and personal information about engagement, training, disciplining or resignation of the employee (further examples are set out in the Privacy Act).

Personal information relating to an employee which does not fall within the definition of an "employee record" or the (rather narrow) exemption will be subject to Australian privacy laws including the APPs. In particular, personal information concerning contractors, company officers or job applicants and staff personal emails will not constitute employee records.

There are various other exemptions from the requirements of the APPs, such as for individuals in a non-business capacity, journalism, contracted service providers for Australian states and political parties.

APP summary

There are 13 APPs in total which form the basis of Australia's privacy law framework. Below is a summary of the APPs, as they apply to private sector APP entities:

Number	Name	Summary of requirements
APP 1	Open and transparent management of personal information	In dealing with personal information, an APP entity is required to: – take reasonable steps to implement practices, procedures and systems that will ensure it complies with the APPs generally; and – have and make available free of charge a clear and up-to-date policy about the management of personal information (a privacy policy) containing information about: ▪ the kinds of personal information it collects; ▪ how it collects and holds personal information; ▪ the purposes for which it collects, holds, uses or discloses personal information; ▪ how an individual can access personal information held or seek correction of such information; ▪ how an individual may complain about the breach of an APP and how the organisation will deal with such a complaint; and ▪ whether the organisation is likely to disclose personal information to overseas recipients and, if so, the countries in which such recipients are likely to be located, if it is practicable to specify those countries.
APP 2	Anonymity and pseudonymity	Individuals must have the option of dealing with an APP entity anonymously or using a pseudonym unless: – the entity is required or authorised by law to deal with individuals who have identified themselves; or – it is impracticable for the entity to deal with individuals who have not identified themselves.
APP 3	Collection of solicited personal information	An APP entity must not collect personal information unless the information is reasonably necessary for its functions or activities. In addition, as a general rule, the entity must not collect sensitive information about an individual unless the individual consents to the collection.

Number	Name	Summary of requirements
		"Sensitive information", which is a subset of personal information, includes information relating to race or ethnicity, political opinion, membership of trade associations, religious beliefs, sexual preferences and health. In all cases, the information must be collected by lawful and fair means and, unless it is unreasonable or impracticable to do so, from the individual to which the information relates.
APP 4	Dealing with unsolicited personal information	Where an APP entity receives personal information which it did not solicit, the entity must within a reasonable period determine whether or not it could have collected the information under APP 3. If not, it must (unless the information is contained in a Commonwealth record), as soon as practicable, but only if lawful and reasonable, destroy the information or de-identify it. If the entity keeps the information, it must comply with the APPs in handling that information.
APP 5	Notification of collection of personal information	An APP entity must take reasonable steps to notify individuals or otherwise ensure they are aware of the following matters at or before or, if that is not practicable, as soon as practicable after collecting those individuals' personal information. It might be possible to do this by providing individuals with a copy of the entity's privacy policy depending on the circumstances and what information is being collected: – the entity's full name and contact details; – the fact that the entity collects, or has collected, personal information about the individual from a third party (if applicable) and the circumstances of that collection; – the fact that the collection of personal information is required or authorised under law or a court/tribunal order if applicable (including name of law, or details of court/tribunal order, that requires or authorises the collection); – the purposes of collecting the personal information; – the main consequences (if any) for the individual if all or some of the personal information is not collected by the entity; – any other entities to which the entity usually discloses personal information of the kind collected; – that the entity's privacy policy contains information about how the individual may access and correct their personal information; – that the privacy policy contains information about how the individual may complain about a breach of the APPs, and how the entity will deal with such a complaint; and

Number	Name	Summary of requirements
		– whether the entity is likely to disclose the personal information to overseas recipients, and if so, the relevant countries, if it is practicable to specify them.
APP 6	Use and disclosure of personal information	If an APP entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose it for another purpose (the secondary purpose) unless: – the individual has consented to the use or disclosure; – the secondary purpose is related (directly, in the case of sensitive information) to the primary purpose of collection and reasonably expected by the individual; or – another emergency or legal compliance/enforcement exception applies, e.g. the use or disclosure is required or authorised by an Australian law or court/tribunal order, a permitted health situation or permitted general situation (types of emergency situations listed in the Privacy Act) exists, or the use or disclosure is reasonably believed to be reasonably necessary for enforcement-related activities of an enforcement body.
APP 7	Direct marketing	An APP entity must not use or disclose non-sensitive personal information for the purpose of direct marketing unless all the criteria for one of the following exceptions are met: Exception 1: – The APP entity collected the information from the individual; and – the individual would reasonably expect the entity to use or disclose the information for direct marketing; and – the entity makes it easy for the individual to request not to receive direct marketing communications and the individual has not made such a request to the entity. Exception 2: – The APP entity collected non-sensitive personal information: ▪ from an individual who would not reasonably expect the entity to use the information for direct marketing, or ▪ from someone other than the individual; and – the individual consents to the use of the information for that purpose; or – it is impracticable to obtain consent and:

Number	Name	Summary of requirements
		▪ the entity makes provision for the individual to easily request not to receive the direct marketing communication; and ▪ each direct marketing communication includes a prominent statement that the individual may make a request not to receive the direct marketing communication; and ▪ the individual has not made such a request. If an APP entity wishes to use or disclose sensitive information about an individual for the purpose of direct marketing, it must have the individual's consent. The above does not apply to direct marketing by email, SMS, MMS or other instant messages. The *Spam Act 2003* (Cth) sets out the obligations which need to be complied with in relation to electronic commercial messages. Separate obligations also apply in relation to telemarketing under the *Do Not Call Register Act 2006* (Cth).
APP 8	Cross-border disclosure of personal information	Before disclosing personal information about an individual to an overseas recipient, an APP entity must take reasonable steps to ensure the overseas recipient does not breach the APPs in relation to the information. Further, subject to limited exceptions, the entity will remain liable for any breaches of the APPs by the overseas recipient regardless of contractual arrangements to the contrary. An APP entity will not be liable for APP breaches of an overseas recipient if: – the entity reasonably believes the overseas recipient is subject to a law or binding scheme that has the effect of protecting the information in a substantially similar way in which the APPs protect the information, and there are mechanisms that the individual can access to take action to enforce the law or scheme; – the entity has informed the individual that if they consent to the disclosure of the information to an overseas recipient, APP 8.1 will not apply to the disclosure and, after being so informed, the individual consents to the disclosure; – the disclosure is required or authorised by or under an Australian law or a court/tribunal order; or – certain permitted general situations exist in relation to the disclosure of the information by the APP entity.

Number	Name	Summary of requirements
APP 9	Adoption, use or disclosure of government-related identifiers	An APP entity must not adopt a government-related identifier of an individual as its own identifier of the individual, unless required or authorised by Australian law or a court/tribunal order or prescribed by regulations. An APP entity must not use or disclose a government-related identifier of an individual except in limited circumstances listed in APP 9.2.
APP 10	Quality of personal information	An APP entity must take reasonable steps to ensure that: – personal information it collects is accurate, up-to-date and complete; and – personal information it uses or discloses is accurate, up-to-date, complete and relevant, having regard to the purpose of the use or disclosure.
APP 11	Security of information	An APP entity must take reasonable steps to: – protect personal information it holds from misuse, interference, loss and unauthorised access, modification or disclosure; and – destroy personal information it holds – or ensure it is de-identified – if that information is no longer needed for a purpose for which it may be used or disclosed under the APPs, it is not contained in a Commonwealth record, and the entity is not required to retain it under an Australian law or court/tribunal order.
APP 12	Access to personal information	An APP entity must give an individual access to his or her personal information on request, subject to limited exceptions set out in APP 12.3. An APP entity is required to respond to requests for personal information within a reasonable period after the request is made. Where an individual's request for personal information is refused, the individual must be given reasons for the refusal and advised of mechanisms available to complain about the refusal. Any charges for giving access must not be excessive and must not apply to the making of the request.
APP 13	Correction of personal information	An APP entity must take reasonable steps to correct personal information it holds where requested by an individual, or where the entity is satisfied that the information it holds is inaccurate, out-of-date, incomplete, irrelevant or misleading. If an individual's amendment request is refused, the individual must be given reasons for the refusal and advised of mechanisms available to complain about the refusal.

Number	Name	Summary of requirements
		An APP entity must respond to amendment requests within a reasonable time and cannot charge for amendment requests or for correcting personal information.

Mandatory notifiable data breach scheme

The Privacy Act includes a notifiable data breach (NDB) scheme, which imposes certain obligations in relation to "eligible data breaches" (EDBs). An EDB is where:

- there is unauthorised access to, or unauthorised disclosure of, the information and a reasonable person would conclude that the access or disclosure would be likely to result in serious harm to any of the individuals to whom the information relates; or
- information is lost in circumstances where unauthorised access to, or unauthorised disclosure of, the information is likely to occur and, assuming that it does, a reasonable person would conclude that the access or disclosure would be likely to result in serious harm to any of the individuals to whom the information relates.

The NDB scheme applies in respect of personal information, tax file numbers, credit reporting information and credit eligibility information held by an entity or disclosed by the entity to overseas recipients.

If an entity subject to the Privacy Act is aware of reasonable grounds to suspect an EDB has occurred in relation to information it holds or which it has disclosed to overseas recipients – but not that the relevant circumstances amount to an EDB – it must (unless an exception applies):

- carry out a reasonable and expeditious assessment of whether there are reasonable grounds to believe that the relevant circumstances amount to an EDB of the entity; and
- take all reasonable steps to ensure that the assessment is completed within 30 days after the entity becomes aware of the circumstances.

If an entity subject to the Privacy Act is aware of reasonable grounds to believe that the entity has suffered an EDB, it must (unless an exception applies):

- prepare and give a copy of a statement covering certain specified matters about the EDB to the OAIC as soon as practicable; and
- notify individuals who are likely to be at risk of serious harm from the EDB, unless sufficient early remedial action is taken or an exception applies.

Exceptions include where:

- sufficient remedial action is taken so that there is no eligible data breach;
- the eligible data breach has already been notified by another entity; and
- the OAIC declares that no notification is required.

Failure to comply with the NDB scheme may result in complaints to the OAIC and subsequent enforcement action.

Future proposed reforms

The Australian Competition and Consumer Commission's recent Digital Platforms Inquiry report made a number of privacy related recommendations, including that a number of specific changes be made to the Privacy Act and that the Privacy Act be reviewed more generally to ensure it is fit for purpose in the digital age. Key recommendations included: introducing a binding online privacy code, strengthening notification requirements, strengthening consent requirements and providing for higher penalties for breach of the Privacy Act.

The government's response to the Digital Platforms Inquiry report includes plans to:

- undertake a consultation on the proposed Privacy Act reforms from 2020-2021, giving particular attention to the definition of "personal information", notification requirements, consent requirements and pro-consumer defaults, and introduction of direct rights of action for individuals; and
- draft new legislation in 2020 to increase the maximum civil penalties under the Privacy Act to match those under the Australian Consumer Law and to require development of a binding online privacy code applicable to social media and other online platforms that trade in personal information.

10 Competition and Unfair Commercial Practices

10. Competition and Unfair Commercial Practices

Updated to May 2020.

General

In Australia, there is Commonwealth and state legislation that prohibits anti-competitive conduct and provides protection for businesses and consumers from unfair practices in their dealings, in trade and commerce, with corporations and other persons.

The legislation is complex and wide-ranging. An overseas company proposing to manufacture or distribute goods or enter into transactions with other companies or consumers in Australia should first seek specific advice as to how these legislative regimes may affect its operations.

The main statute dealing with competition or antitrust law is the *Competition and Consumer Act 2010* (Cth) (CCA). The Australian Consumer Law (ACL), which is Schedule 2 to the CCA, is the main legislation regulating consumer protection and unfair commercial practices. Similar protections are set out in state legislation.

Administration and enforcement

The CCA is administered and enforced by the Australian Competition and Consumer Commission (ACCC), an independent statutory authority. The ACCC, as well as the Australian Securities and Investments Commission (ASIC) (for financial products and services) and the state and territory fair trading authorities, also administer and enforce the ACL. The ACCC's main goals are to promote competition and fair trading, and to protect consumers in their dealings with business.

The ACCC has extensive powers to investigate potential contraventions of the CCA and ACL, including powers to require persons to furnish information, produce documents and attend for examination. The ACCC also has the power to obtain search warrants to conduct "dawn raids" and, for serious cartel matters, seek warrants for the use of surveillance and interception devices.

If the ACCC believes that there has been a contravention of the CCA or the ACL, it can bring proceedings in the Federal Court of Australia seeking penalties and other remedies against the primary contravener and other persons involved in the contravention. The ACCC also has the option of administratively resolving potential contraventions, including through the acceptance of court enforceable undertakings and, for certain ACL contraventions, the issue of infringement notices.

The ACCC encourages compliance with the law by educating and informing consumers and businesses about their rights and responsibilities under the CCA and ACL. It also works with other federal and state agencies to coordinate approaches to enforcement and education.

The ACCC has responsibilities in relation to granting certain authorisations and notifications under which immunity can be granted for certain conduct that would otherwise breach the prohibitions against anti-competitive conduct in the CCA, provided the benefit to the public outweighs the anti-competitive detriment.

The Commonwealth Director of Public Prosecutions (CDPP) has responsibility for prosecuting criminal offences under the CCA and ACL.

Anti-competitive conduct

Cartel conduct

Cartel conduct is strictly prohibited in Australia. There are parallel criminal offences and civil penalty provisions for making or giving effect to a contract, arrangement or understanding that contains a "cartel provision". A cartel provision is a provision in a contract, agreement or understanding between two or more competitors that has the:

- purpose, effect or likely effect of fixing, controlling or maintaining prices;
- purpose of directly or indirectly preventing, restricting or limiting production, capacity, supply or acquisition by any or all of the parties;
- purpose of allocating customers, suppliers or territories between the parties; and/or
- purpose of rigging bids or tenders.

There are various exceptions, exemptions and defences to the cartel prohibitions, including for joint ventures, notified conduct, collective acquisitions and certain "vertical" arrangements including exclusive dealing.

Immunity policy

The ACCC has an Immunity and Cooperation Policy for Cartel Conduct. Under this policy, immunity from ACCC prosecution is available to the first member of a cartel to apply for immunity. Generally, the ACCC will not grant conditional immunity if, at the time of application, the ACCC is already in possession of evidence that is likely to establish at least one contravention of the CCA arising from the cartel conduct. Immunity is also subject to compliance with strict conditions, including that the applicant has not coerced others to participate, that they provide full, frank and truthful disclosure and that they fully and expeditiously cooperate with the ACCC. The ACCC will usually require an applicant to enter into a cooperation agreement.

For criminal contraventions, Annexure B to the Prosecutions Policy of the Commonwealth deals specifically with immunity from prosecution in serious cartel offences. This is essentially in the same terms as the ACCC's immunity policy.

The ACCC is responsible for granting immunity from civil enforcement proceedings, and the CDPP is responsible for granting immunity from criminal proceedings (although the ACCC recommends to the CDPP whether immunity should be granted). As a matter of practice, applicants will need to apply for both civil and criminal immunity at the same time.

Anti-competitive contracts, arrangements, understandings and concerted practices

The CCA prohibits provisions of contracts, arrangements or understandings and also concerted practices that have the purpose, effect or likely effect of substantially lessening competition in a market. The expression "arrangements or understandings" is interpreted broadly by the courts. There is no requirement that an arrangement be in writing or enforceable at law. All that is required is a "meeting of minds" between the parties.

This prohibition goes beyond the prohibition in relation to cartel conduct as:

- the parties to the contract, understanding, arrangement or concerted practice do not have to be competitors or potential competitors; and
- the prohibition applies to provisions of a contract, arrangement or understanding or any concerted practice which has the requisite anti-competitive purpose or effect, and is not limited to the four types of cartel provision.

Concerted practices

The CCA prohibits concerted practices which have the purpose or likely effect of substantially lessening competition. The term "concerted practice" is not defined in the CCA.

The Explanatory Memorandum to the Bill that introduced the concerted practices prohibition into the CCA describes a concerted practice as "any form of cooperation between two or more firms (or people) or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition".

Substantial lessening of competition

The CCA does not define what constitutes "substantial lessening of competition". It is generally accepted that conduct will substantially lessen competition when it interferes with the competitive process in a meaningful and sustainable way by deterring, hindering or preventing competition. Whether or not conduct has the effect or likely effect of substantially lessening competition is assessed by application of the counterfactual test, i.e. comparing competition in the market with and without the relevant agreements or conduct.

Misuse of market power

The CCA prohibits a corporation that has a substantial degree of power in a market (market power) from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in that or any other market in which the corporation (or a related body corporate) supplies or acquires goods or services.

Substantial market power is generally understood as the power to act in a way that is not constrained by competitors, potential competitors and other market participants, although it does not mean that the firm must substantially control the market or that it has an absolute freedom from constraint.

While market share is a relevant consideration in assessing whether a corporation has substantial market power, there are no market share or other thresholds in Australia above which substantial market power will be presumed. Other factors, such as the competitive constraints imposed by other market participants (both competitors as well as suppliers and customers) and the height of barriers to entry are usually more determinative in an assessment of whether a corporation has substantial market power.

The categories of conduct which may amount to a misuse of market power are not closed. Examples of the types of conduct which may, depending on the circumstances, amount to a misuse of market power include:

- refusal to deal;
- product bundling or tying;
- loyalty discounts/rebates;
- below cost or predatory pricing; and/or
- margin/price squeezes.

Resale price maintenance

Suppliers of goods or services in Australia are prohibited from specifying a minimum resale price, and may not withhold supply on the basis that the reseller has refused to comply with a specified minimum resale price.

Resale price maintenance is strictly illegal. It is, however, permissible for a supplier to specify a *maximum* price for resale, so long as this does not amount to a de facto actual price at which the reseller must sell. It is also permissible for a supplier to issue a recommended resale price provided that the price is a recommendation only and there is no obligation to comply.

The ACCC can, through its authorisation and notification processes, permit a company to engage in conduct that would constitute resale price maintenance where it is satisfied that the public benefit of the conduct outweighs any competitive detriment.

Exclusive dealing

Exclusive dealing occurs where a corporation supplies or offers to supply goods or services (including at a particular price or with a discount or rebate) to a reseller on the condition that it accepts some restriction on its ability to deal with those goods or services or on its freedom to supply or acquire goods or services from third parties. Exclusive dealing also occurs where a corporation acquires goods or services (including at a particular price or with a discount or rebate) on the condition that the supplier accepts some restriction as to who else it supplies. Examples of exclusive dealing include:

– a restriction on the reseller acquiring competing products;

– a restriction on the reseller supplying the goods or services to particular customers or in particular places (including online); and

– a restriction on the supplier selling to other resellers.

Exclusive dealing also includes conduct known as "third line forcing". This occurs when a corporation supplies goods or services (including at a particular price or with a discount or rebate) on the condition that the purchaser acquires other goods or services directly or indirectly from a third party.

Refusal to supply or acquire on the grounds that the other party has not agreed to accept such conditions also constitutes exclusive dealing.

Exclusive dealing is only prohibited if it has the purpose, effect or likely effect of substantially lessening competition in a relevant market.

Secondary boycotts

The CCA prohibits two persons acting in concert from hindering or preventing a third person trading with a fourth person (the target) where the purpose or likely effect of the conduct is to cause a substantial lessening of competition in any market in which the target is involved. Trade unions engaging in boycotts are specifically addressed in Part IV of the CCA.

Mergers and acquisitions

The CCA prohibits the acquisition of shares or assets if that acquisition would have the effect or likely effect of substantially lessening competition in any market for goods or services in Australia.

Notification of a proposed merger to the ACCC is a voluntary process and as a result there are no penalties for failing to notify a transaction to the ACCC. However, if the parties do not notify a transaction, the ACCC can always initiate its own review both pre-completion and post-completion and, if it considers appropriate, take court proceedings to intervene in the transaction. The ACCC's Merger Guidelines indicate that the ACCC will want to examine a merger where:

– the products of the merger parties are either substitutes or complements; and

– the merged firm will have a post-merger market share of greater than 20% in the relevant market(s).

If the ACCC takes action and a transaction is found to be in breach of the CCA, pecuniary penalties may be imposed. The ACCC can apply to the court for injunctions to prevent anti-competitive mergers taking place and for divestiture orders if an anti-competitive merger has completed. Private parties cannot obtain injunctions to prevent an anti-competitive merger from taking place but can seek damages and other remedies for any loss or damage sustained as a result of the merger, as well as divestiture orders.

The CCA requires a non-exhaustive list of merger factors to be taken into account in assessing whether a merger would be likely to substantially lessen competition in a market. These include:

- the actual and potential level of competition in the market;
- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- the extent to which substitutes are or are likely to be available in the market;
- the characteristics of the market, including growth, innovation and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- the nature and extent of vertical integration in the market.

The CCA also prohibits certain acquisitions which occur outside Australia that have anti-competitive effects within Australia.

The ACCC can be notified of a proposed merger or acquisition and clearance sought through its informal merger review process or by applying for merger authorisation.

Informal merger review

Informal merger clearance is by far the most common option and is encouraged by the ACCC. Under this process, the ACCC can provide a statement to the effect that it "does not propose to intervene" in a proposed merger. The ACCC's Merger Review Process Guidelines provide guidance on ACCC processes for informal merger reviews.

Merger authorisation

Under the CCA, merger parties may seek statutory protection from legal action in relation to a merger by lodging an application for merger authorisation. The ACCC will only grant an authorisation if it is satisfied that either:

- the acquisition would not be likely to have the effect of substantially lessening competition; or
- the likely public benefit resulting from the proposed acquisition outweighs the likely public detriment.

Liability and enforcement

Penalties and other remedies

The ACCC has become increasingly vigilant (and successful) in enforcing the laws against anti-competitive conduct. More recently, the ACCC has been seeking greater penalties for cartel and other anti-competitive conduct.

A breach of the civil prohibitions against anti-competitive conduct in the CCA may lead to the following maximum penalties per breach:

- for corporations, other than in relation to secondary boycotts, the greater of
  - A$10 million,
  - three times the value of the benefit received from the anti-competitive conduct, or
  - if the value of the benefit cannot be determined, 10% of annual group turnover connected with Australia in the preceding 12 months;
- in the case of secondary boycotts, A$750,000; and
- for individuals, A$500,000.

Serious cartel conduct can be referred by the ACCC to the Commonwealth Director of Public Prosecutions (CDPP) for criminal prosecution.

The maximum criminal penalties for criminal cartel offences for individuals are imprisonment for 10 years and/or a fine of 2,000 penalty units (currently A$420,000). The maximum criminal penalties for corporations are the same as the penalties for a breach of the civil prohibitions listed above.

A corporation (including its related bodies corporate) is prohibited from indemnifying its directors, officers or employees against any liability to pay a pecuniary penalty and for any legal costs incurred in defending or resisting proceedings in which the individual is found liable to pay a pecuniary penalty.

The ACCC can also seek a range of other remedial orders including injunctions, declarations, compensatory orders and orders disqualifying a person who has contravened or has been involved in a contravention of the CCA from managing corporations.

Private actions (including class actions) may be brought against corporations and individuals who have contravened the CCA seeking damages, other compensation, injunctions and other remedial orders.

Exceptions

The CCA provides a number of exceptions to certain (but not all) of the prohibitions in the CCA against cartel and other anti-competitive conduct. These include:

- a contract of employment to the extent that the contract relates to the remuneration, conditions of employment, hours of work or working conditions of employees;
- restraint of trade clauses for employees or independent contractors; and
- a provision in a contract for the sale of a business or shares that is solely for the protection of the purchaser in respect of the goodwill of the business.

Authorisation and notification

In certain cases, a corporation may apply to the ACCC for an authorisation of proposed conduct which would otherwise breach certain prohibitions against anti-competitive conduct in the CCA, including cartel conduct and misuse of market power. The ACCC may grant authorisation and thereby immunity for the conduct where the benefit to the public outweighs the anti-competitive detriment.

In addition, immunity may be obtained through an ACCC notification process for exclusive dealing conduct, as well as certain forms of collective bargaining conduct.

Detection and investigation

The ACCC uses a range of detection and investigation tools and methods to enforce the CCA. These include:

- requesting information voluntarily from parties who might have relevant information about a possible contravention of the CCA;
- statutory notices requiring the production of documents and information, or for persons to attend for examination, under section 155 of the CCA. Failure to comply with a section 155 notice is an offence;
- the power to enter premises to search for and seize evidence pursuant to a search warrant issued by a magistrate; and
- surveillance and telecommunications interception powers in relation to serious cartel conduct.

Cooperation policy

In addition to the immunity policy, the ACCC also has a cooperation policy for enforcement matters that applies to alleged contraventions of the CCA and ACL. There are incentives provided for cooperation, such as joint submissions to the court in relation to penalty, pre-litigation settlements or complete or partial immunity from action by the ACCC. Each case is assessed according to its own facts and circumstances and the requirements set out in the policy. These include providing evidence of a contravention of which the ACCC is otherwise not aware or has insufficient evidence to commence proceedings, fully cooperating with any investigation and making full and frank disclosure.

In determining the appropriate penalty, the ACCC will take into account the value and level of cooperation as well as the nature and seriousness of the conduct. However, despite any agreement on penalty between the ACCC and the contravening party, it is the role and responsibility of the Federal Court to determine the appropriate penalty that should be ordered and the ACCC and private parties can only make a recommendation as to the appropriate penalty.

The cooperation policy does not provide any protection against private actions.

Extraterritorial application

The prohibitions against anti-competitive conduct in the CCA apply to conduct engaged in outside Australia by a company incorporated or "carrying on business" in Australia, or by an Australian entity or person ordinarily resident within Australia. If the anti-competitive conduct involves exclusive dealing or resale price maintenance, a less strict territorial nexus applies: those prohibitions apply to any person outside Australia provided that the person supplies the goods or services to persons within Australia.

The prohibitions against anti-competitive conduct in the CCA also have an extended extraterritorial application under the Competition Code and will apply to conduct outside Australia by persons "otherwise connected with" a state or territory of Australia.

Access regimes

Part IIIA of the CCA, known as the National Access Regime, establishes a legal regime to facilitate third party access to services of certain facilities that are considered critical to competition in related markets.

This sets out a number of mechanisms by which access can be obtained to essential facilities including:

- declaration and arbitration;
- access undertakings; and
- certification of effective state access regimes.

The matters that must be established before any service is "declared" are complex, and require consideration of factors which include:

- whether access, on reasonable terms and conditions, as a result of a declaration of service would promote a material increase in competition in at least one other market;
- whether the facility used to provide the service could meet the total foreseeable demand in the market over the period for which the service would be declared and at the least cost compared to any two or more facilities;
- whether the facility or service is of national significance having regard to its size and/or its importance to interstate or international trade or to the national economy; and
- whether access, on reasonable terms and conditions, as a result of a declaration of service would promote the public interest.

Part IIIA is not limited to any particular set of industries. The types of services that may be covered by Part IIIA are typically provided by facilities such as railway tracks, airport facilities and sewage pipelines.

There is a separate access regime for telecommunications set out in Part XIC of the CCA. This complements the regime for regulating anti-competitive conduct in the telecommunications industry which is set out in Part XIB. Part XIB gives the ACCC additional powers to require the filing of tariffs by carriers, to impose record-keeping requirements and to give a "competition notice" stating that certain conduct by a carrier contravenes the CCA.

Australian consumer law

The main consumer protection laws, as well as prohibitions against unfair commercial practices, are found in the ACL, along with state-level equivalents.

In many cases, the ACL provides protections to all individuals and businesses, where the relevant conduct is in trade or commerce. However, some provisions of the ACL provide protection only to a defined class of consumer or consumer transactions. The definition of consumer or consumer transaction varies in the ACL according to the context.

Misleading conduct

The ACL contains a broad prohibition against misleading or deceptive conduct in trade or commerce.

Section 18 of the ACL prohibits a person or corporation engaging, in trade or commerce, in misleading or deceptive conduct or conduct that is likely to mislead or deceive. This prohibition is of very wide application and applies to misrepresentations made in the course of private negotiations and contracts (such as in connection with the sale of a business) as well as to misrepresentations made to the public (such as in advertisements). It is not possible to exclude liability under section 18 by contract.

Civil penalties and criminal sanctions do not apply to a breach of section 18 because of its wide scope. However, a breach of the section can lead to other remedies including injunctions, orders for damages and compensatory orders.

The ACL also contains specific prohibitions against certain types of false or misleading conduct which are subject to both civil and criminal penalties, including:

- making false or misleading representations about a range of matters in connection with the supply of goods or services, including with respect to:
  - price;

- standard, quality or grade;
- country of origin;
- performance characteristics, uses or approval;
- testimonials;
- the requirement to pay for a contractual right that a consumer already has; and
- warranties, guarantees, rights or remedies;

– engaging in misleading conduct as to the nature of goods or services;

– making false or misleading representations in relation to land or employment.

Unconscionable conduct

Under the ACL, a person must not engage in unconscionable conduct in connection with the supply or acquisition of goods or services. Unconscionable conduct is generally understood to mean conduct that is contrary to good conscience. It is something more than mere unfairness or unreasonableness. The courts will consider a variety of factors when determining whether a person has engaged in unconscionable conduct. These factors include:

– the relative bargaining strength of the parties;

– whether the customer could understand the documentation used;

– the use of undue influence, pressure or unfair tactics by the supplier;

– the requirements of applicable industry codes;

– the willingness of the supplier to negotiate; and

– the extent to which the parties acted in good faith.

Consumer guarantees

The ACL imposes statutory consumer guarantees in relation to the supply of goods and services to "consumers". For the purpose of the consumer guarantees, a "consumer" is someone who acquires goods or services that are priced at less than A$40,000. A person is also a consumer if they acquire goods or services that are priced at more than A$40,000, but they are "of a kind ordinarily acquired for personal, domestic or household use or consumption".

The consumer guarantees do not apply to goods supplied for the purpose of re-supply or use in manufacture.

In relation to goods, the consumer guarantees include that:

– they are of an acceptable quality. This means that they must be fit for all of the purposes for which goods of that kind are commonly supplied, are acceptable in appearance and finish, are free from defects, are safe and are durable;

– they comply with their description or conform to a sample or demonstration model (where applicable);

– they are reasonably fit for a purpose that a consumer makes known to the supplier or manufacturer, expressly or by implication;

– the supplier has the legal right to sell the goods to the consumer; and

- they are free from any security, charge or encumbrance that was not disclosed to the consumer.

In relation to services, the guarantees include that:

- they are rendered with due care and skill;
- they are reasonably fit for a purpose that a consumer makes known to the supplier, expressly or by implication; and
- they are provided to consumers within a reasonable time if the time is not otherwise fixed or agreed.

The ACL provides for a variety of remedies in the event that consumer guarantees are not met. If a failure to comply with a consumer guarantee is not a "major failure" and can be remedied, then the supplier can remedy the failure by providing the consumer with a repair, replacement or refund.

A "major failure" is a failure to comply with a consumer guarantee where:

- a reasonable consumer would not have purchased the goods had they been aware of the failure;
- the goods are unsafe;
- the goods are substantially unfit for purpose; or
- the goods depart significantly from a specified description, sample or demonstration model.

If there has been a major failure or a failure that cannot be remedied, then the consumer has the right to reject the goods within the "rejection period" and obtain either a refund or a replacement from the supplier of the goods, or recover compensation for any reduction in the value of the goods.

Where there has been a breach of the consumer guarantees, a consumer has a statutory right to seek compensation for loss or damage suffered from either the supplier or the "manufacturer" of the goods. Manufacturer is defined broadly under the ACL and can include the importer of goods if the actual manufacturer does not have a place of business in Australia.

Any clause that attempts to exclude or modify a consumer guarantee is void under the ACL. Including void exclusion clauses in contracts is also likely to amount to a false or misleading representation about consumer guarantees under section 29 of the ACL.

Product safety

Any person who, in trade or commerce, supplies consumer goods or product-related services, is responsible for complying with the product safety provisions of the ACL.

For the purpose of these provisions, consumer goods are things that are intended for or likely to be used for personal, domestic or household use or consumption.

Product-related services are services for or relating to the installation of consumer goods, maintenance, repair or cleaning of consumer goods, assembly of consumer goods, or delivery of consumer goods.

Under the ACL, the government can:

- issue a safety warning notice in respect of a product;
- impose an interim or permanent ban on a product;
- impose mandatory safety standards; and

- issue a compulsory recall notice that requires a supplier to recall a product.

There are mandatory product safety and/or information standards for a range of products including children's toys, children's nightwear, vehicle jacks, bicycle helmets, sunglasses, cosmetic ingredient labelling and tobacco labelling. The ACL regulates recall (both voluntary and mandatory) of defective products in certain circumstances. Suppliers are required to notify the ACCC within 48 hours of initiating a product recall or becoming aware that a consumer good or product-related service supplied has, or may have, caused the death or serious injury or illness of any person.

A consumer who suffers loss or damage as a result of defective goods may issue proceedings seeking compensation from a manufacturer or can lodge a complaint with the ACCC, which may take action on the consumer's behalf.

The ACL provides for strict liability for loss or damage arising from defective products. A product is defined as defective if its safety is not such as persons generally are entitled to expect. This statutory liability applies to all manufacturers as well as many importers and distributors of goods supplied in Australia, and cannot be excluded by contract.

A supplier may be found guilty of a criminal offence if they fail to comply with a ban, a mandatory safety standard or a compulsory recall notice, or fail to notify the minister within 48 hours of a recall or serious incident. The maximum fine is A$500,000 for an individual or A$10 million for a body corporate.

Unfair contract terms

The ACL also provides certain protections against unfair contract terms in "standard form consumer contracts" and standard form contracts with small businesses. For the small business protection to apply, one of the parties to the contract must be a "small business" (defined as a business that employs fewer than 20 people) and the upfront price payable under the contract must be no more than A$300,000 or, if the contract is for a term of more than a year, A$1 million.

Under the ACL an unfair contract term is void. A term will be unfair if it:

- causes a significant imbalance of the parties' rights and obligations under the contract;
- is not reasonably necessary to protect the legitimate interests of the party advantaged by the term; and
- would cause detriment (including financial detriment) to a consumer if it were relied on.

The ACL exempts certain terms from these provisions, including terms that define the subject matter of the contract or set the upfront price payable under the contract.

Other prohibitions

The ACL prohibits a range of other unfair practices, in addition to the prohibitions against misleading or unconscionable conduct.

Component pricing

The ACL prohibits component pricing, being the advertising of a price in its component parts rather than as a single figure without prominently specifying the single minimum price. The total minimum consideration payable for the goods or services (including any tax, duty, fee, levy or other additional charge) should be specified just as prominently as the most prominent component.

Bait advertising

The ACL prohibits the advertising of goods or services at a specified price if there are reasonable grounds for believing that the trader will not be able to offer those goods or services in reasonable quantities and for a reasonable period at that price.

Unsolicited supplies

Under the ACL, a person must not send unsolicited debit cards and credit cards, or invoices in respect of unsolicited goods or services. Similarly, a person cannot assert a right to payment for unauthorised directory entries or advertisements.

Referral selling

Referral selling occurs where consumers are induced to acquire goods or services because of promises about rebates, commissions or other benefits in exchange for introducing other consumers to the product. This type of selling is prohibited as any rebate or benefit received will depend on a third party performing an action that may never occur.

Pyramid selling

Pyramid selling involves a scheme in which those who join the scheme are induced to do so on the basis that they can subsequently earn payments for inducing others to join the scheme. The ACL prohibits both the promotion of, and participation in, pyramid schemes.

Consumer transactions

The ACL regulates unsolicited consumer agreements, as well as lay-by agreements.

Gift cards

The ACL regulates the supply of gift cards. Most gift cards supplied on or after 1 November 2019 must be redeemable for at least three years after the date of purchase and must prominently display the expiry date and redemption period of the gift card. Additionally, retailers are not allowed to require the payment of a post supply fee in relation to a gift card.

Penalties and other remedies

If the ACCC believes that there has been a contravention of the ACL, it can commence court proceedings and for contraventions of many provisions, including most of those referred to above, seek penalties of up to:

- for corporations, the greater of:
  - A$10 million;
  - three times the value of the benefit received from the contravening conduct; or
  - if the value of the benefit cannot be determined, 10% of annual group turnover connected with Australia in the preceding 12 months; and
- for individuals, A$500,000.

The ACCC can also seek a range of other remedies including compensation orders or damages for non-party consumers, undertakings, injunctions, declarations, adverse publicity orders, probation orders, disqualification of individuals from managing corporations, redress on behalf of consumers, community service and information disclosure orders.

The ACCC can also elect to resolve a matter administratively. In addition to accepting court enforceable undertakings, it can also issue "on the spot" infringement notices (with penalties of up to A$126,000 for a listed corporation, A$12,600 for any other corporation, and A$2,520 for an individual) for contraventions of certain ACL provisions.

Certain practices (such as making false representations about specific matters) may also constitute criminal offences and attract criminal penalties up to the same maximum penalty as for civil penalties.

Private parties can bring court proceedings (including class actions) seeking damages, injunctions, and other remedial orders such as corrective advertising.

Detection and investigation

As with contraventions of the CCA, the ACCC has a range of tools available to investigate potential contraventions of the ACL. It has the power to issue section 155 notices in relation to potential contraventions, as well as substantiation notices requiring a person to provide documents and/or information substantiating or supporting a claim or representation.

The ACCC actively engages with and educates the public about consumer rights issues and encourages consumers to lodge complaints to it or other state-based fair trading bodies. Complaints from the public are a key source of detecting breaches of the ACL and are often the impetus for ACCC investigations.

Cooperation policy

As described above, the ACCC also has a cooperation policy for enforcement matters that applies to alleged contraventions of the CCA and ACL.

Extraterritorial application

The prohibitions in the ACL apply to conduct engaged in outside Australia by a company incorporated or "carrying on business" in Australia, or by an Australian entity or person ordinarily resident within Australia.

Miscellaneous legislation in relation to goods

There is also legislation in Australia regulating the packaging, labelling, ingredients, marketing and sale of certain products and general weights and measures regulations of which overseas suppliers need to be aware. The importation and sale of products that are packaged and labelled overseas will often not be legally acceptable in Australia without modification.

Australia is also a party to the Vienna Convention on the Sale of Goods which governs many international sales of goods in which Australian parties are involved. Where the convention applies, it will prevail over any Australian legislation (including that outlined above) which concerns the rights and obligations of the parties under a contract, subject to contrary agreement by the parties.

11 Labour Laws

11. Labour Laws

Temporary changes have been made to the *Fair Work Act 2009* (Cth) and some modern awards in response to the COVID-19 pandemic. These changes provide employers, who have experienced a requisite downturn in business, with more flexible options in managing their workforce. The changes to the *Fair Work Act 2009* (Cth) include allowing eligible employers to:

- stand down an employee (including by reducing their hours or days of work);
- change an employee's usual duties;
- change an employee's location of work.

These changes will remain in effect until 28 September 2020.

A number of modern awards have also been temporarily amended to provide for:

- two weeks' unpaid pandemic leave; and
- the ability to take up to twice as much annual leave at half pay.

Some modern awards provide for additional measures, including in relation to directions to take annual leave, operational flexibility and agreed temporary reductions in ordinary hours.

This chapter should be read in light of these changes while they are in force.

Updated to May 2020.

Overview

Labour relations are highly regulated in Australia. They are governed by a complex mix of contractual laws, statutory laws and industrial instruments and are supervised by statutory regulators, tribunals and courts at the federal and state levels.

Over the years, the laws governing Australian workplaces have undergone material changes. In March 2006, the then conservative federal government significantly amended the *Workplace Relations Act 1996* (Cth) when it introduced the "Work Choices" reforms. Later, a Labor federal government replaced much of that legislation with the "Fair Work" reforms.

The 2006 amendments signalled a shift away from collective bargaining over minimum terms and conditions of employment (for instance, through unions) to individual agreement-making. These Work Choices amendments also eliminated state industrial relations systems for the vast majority of employees in an attempt to create a national system. This national system was retained by the Fair Work reforms.

In this Guide, we focus on employees who fall within the national system referred to above. Employees who are employed by incorporated entities, whether Australian or foreign entities, that carry on business in Australia, are covered by the federal system. Most state jurisdictions signed an agreement in 2009 to refer their powers to the Commonwealth for the purpose of creating a truly national industrial relations system. A small number of employees who are employed, for example, by non-corporate entities or government bodies in certain states do not fall within the federal system. For example, in New South Wales, Queensland and South Australia the national system does not apply to most public sector employees or the local government sector.

Businesses looking to establish a presence in Australia should seek advice at the time of establishment, in order to comply with the current industrial law instruments.

Sources of employment law

Australian employment laws are derived from a number of sources.

Contracts of employment

All employees have a contract of employment, usually (but not necessarily) in writing. This contract sets out the agreed terms of employment.

Contracts of employment cannot override statutory minimum entitlements (such as the National Employment Standards, discussed below) and only in very limited circumstances (also discussed below) can they modify the operation of applicable modern awards.

Modern awards

Modern awards are instruments which set out minimum terms and conditions of employment for employees in certain industries (e.g. retail, banking, finance and insurance, and manufacturing) or occupations (e.g. clerical and administrative staff, commercial travellers, and professional engineers and scientists), over and above statutory minimums. These instruments are made by a statutory body called the Fair Work Commission.

These awards have superseded the many older awards made under previous state and federal statutory regimes.

Enterprise agreements

These are "collective" agreements made by a group (or all) of the employees with the employer. They are usually (but not necessarily) negotiated by a trade union. A majority of employees to be covered by the agreement must agree to the agreement. These agreements can override applicable modern awards. However, they must satisfy a "better off overall test" (administered by the Fair Work Commission) before they become operative.

Some collective agreements made under past statutory regimes still survive.

Australian workplace agreements (AWAs)

These were individual agreements between an employee and an employer made under the Work Choices laws. Since 28 March 2008, employers and employees have not been able to create or vary an AWA and there are no longer many in existence.

Individual transitional employment agreements (ITEAs)

These are special transitional agreements for employees that had AWAs in place prior to March 2008. There are no longer many of these in existence.

State and federal legislation and regulations

The principal piece of legislation is the *Fair Work Act 2009* (Cth) (Fair Work Act) and the regulations made under that Act.

Federal superannuation and privacy legislation also impacts employees in Australia.

Entitlements to long service leave and workers' compensation (for workplace injuries and illnesses) are both still governed by state and territory legislation.

There is also legislation at the federal and state levels dealing with occupational health and safety and discrimination.

The accumulated case law of the common law courts and statutory tribunals

The common law governs employment contracts. This law is also the primary source for determining the distinction between employment and independent contractor relationships.

Case law is also made by statutory tribunals (the most important of which is the Fair Work Commission).

Regulated and non-regulated employees

It is important when considering Australian employment law to distinguish between two classes of employees.

Regulated employees

The first class consists of those employees who are covered by industrial awards or collective workplace/enterprise agreements. These can be "blue-collar" employees in sectors such as the mining, construction, manufacturing and agricultural industries and "white-collar" employees working in sales, administration, government, health, media, education, much of the not-for-profit sector, as well as professionals such as engineers, scientists and information technology specialists.

The terms and employment benefits of these employees have traditionally been set by awards and/or collective workplace/enterprise agreements. Failure to comply with these awards and industrial agreements may lead to prosecution and civil penalties. With only some minor exceptions (for example, an AWA made under the Work Choices laws, an individual flexibility agreement made under a modern award or via a guarantee of annual earnings given under a modern award), an employer and employee cannot contract out of the terms contained in an award or collective workplace agreement by entering into a private agreement. However, an employer can supplement these minimum benefits by agreeing to provide the employee with additional or more generous benefits.

Non-regulated employees

Non-regulated employees are not covered by awards or enterprise agreements. Non-regulated employees are usually senior managers, executives and professionals (other than professional engineers, scientists or IT professionals in the IT industry). Other than various minimum benefits and rights, which are discussed below, the rights and obligations of these employees are governed by privately negotiated employment contracts.

Terms and conditions of employment and legislative benefits

All Australian employees have the benefit of the National Employment Standards (NES) which are contained in the Fair Work Act. An employer and employee cannot contract out of these standards by entering into a private agreement including an individual employment agreement. The NES are outlined in the following table.

Ordinary hours of work	Employees must not be required to work beyond a maximum of 38 hours per week plus "reasonable" additional hours. If an employee is not covered by a modern award or enterprise agreement, the employer and employee may agree in writing to average these hours over a specified period not longer than six months. If an employee is covered by a modern award or enterprise agreement, then averaging may only occur in accordance with that industrial instrument. In determining what are reasonable additional hours, a court

	will review a number of factors including the nature of the employment, the employee's personal circumstances and the employer's operational requirements.
Requests for flexible working arrangements	Employees who are (i) parents to (or who have responsibility for the care of) a child under school age; (ii) carers; (iii) disabled; (iv) over 55 years of age; (v) experiencing domestic violence; or (vi) caring for a family or household member who is experiencing domestic violence, may request a change in their working arrangements (including working on a part-time basis). The NES do not limit the type of changes which may be requested. The employer may only refuse a request for a flexible working arrangement on reasonable business grounds. Employees must have worked for the employer for at least 12 months before making such a request, or must be long-term casuals with an expectation of ongoing employment.
Annual leave	20 days of paid annual leave per year (calculated pro-rata for part-time employees). An additional week is available to shift workers employed in a business in which shifts are continuously rostered 24 hours a day for seven days a week and are regularly rostered to work those shifts and regularly work both Sundays and public holidays. Annual leave accumulates from year to year if not taken by an employee, and accrues progressively based on ordinary hours of work. Employers may require an employee to take a period of paid annual leave, but only if such requirement is reasonable. Certain employees are able to "cash out" annual leave by mutual agreement.
Personal leave	10 days of paid leave per year, which can be taken as sick or carer's leave. This leave accrues progressively and accumulates from year to year. There is an additional two days of unpaid carer's leave available for unexpected emergencies.
Compassionate leave	Two days of paid compassionate leave is available where an employee's immediate family or household member contracts an illness or sustains an injury that poses a serious threat to life or dies.
Community service leave	Employers must allow their employees to take unpaid leave for eligible community service activities, such as jury duty or voluntary emergency management. Employers need to pay "make-up pay" to employees undertaking jury duty. Make-up pay is the difference between any jury duty payment received by the employee from the court and the employee's base rate of pay for their ordinary hours of work.
Long service leave	There are different entitlements under the long service leave legislation in each state and territory.
Public holidays	Employees are entitled to be absent from work on a day or part-day that is a public holiday in the place where the employee is based for work purposes. An employer must pay a base rate of pay for ordinary hours that would have been worked on that day. There are eight days prescribed as public holidays under the NES.

Notice of termination	Employers must give employees a minimum period of prior notice in writing before terminating employment. This notice period depends on the employee's period of service (see further below).
Redundancy pay	Employers must pay redundancy benefits to employees who are terminated on the grounds of redundancy in accordance with a scale which varies depending on the employee's period of service with the employer (see further below).
Parental leave	Up to 24 months of unpaid leave upon the birth or adoption of a child. This applies to permanent full and part-time employees, and certain eligible casuals who have worked for an employer for at least 12 months. Employees are entitled to return to their position following the period of leave or to a position for which they are qualified and capable of performing (even if a lesser salary) if their original position has ceased to exist. Where an employee seeks to extend their unpaid parental leave beyond 12 months, the employer can only refuse the request on reasonable business grounds.
Family & domestic violence leave	All employees are entitled to five days of unpaid family and domestic violence leave each year of their employment. This includes part-time and casual employees. The five day entitlement renews every 12 months but does not accumulate from year to year.

Leave

Annual, personal, community service, parental and family and domestic violence leave

Annual, personal, parental, community service and family and domestic violence leave entitlements form part of the National Employment Standards (listed in the above table).

Eligible employees are currently also entitled to paid parental and dad and partner pay which is government-funded.

Long service leave

Long service leave entitlements are dealt with under state legislation. Depending on the relevant jurisdiction, the entitlement to take long service leave accrues after 7 or 10 years of service and is generally calculated on the basis of one-sixtieth of the period of employment.

In some jurisdictions, employees who are entitled to commissions or bonuses may be entitled to long-service leave paid at a rate which includes commissions or bonuses. Long service leave legislation in some states also includes rules regarding counting service with related bodies corporate (for example, parent entities) in other jurisdictions as service for the purposes of calculating long service leave.

Pro-rated long service leave is generally paid out on termination of employment after five years of service depending upon the nature of termination.

Public holidays

Employees are entitled to be absent from work without loss of pay on the days of the year which are declared public holidays and gazetted by state or federal parliament.

Superannuation

Under the Superannuation Guarantee Scheme, all employers are required to make minimum levels of superannuation contributions on behalf of employees who earn more than A$450 per month. The current rate of contribution is 9.5% of "ordinary time earnings". This rate will remain 9.5% until 1 July 2021, at which time it is scheduled to increase to 10%. Further increases of 0.5% per year will ensue up until 2025.

The scheme applies to all employees (including casual employees) and some independent contractors. Employees under the age of 18 must work 30 hours per week to qualify for superannuation contributions. This obligation ceases when the employee's wages reach the "maximum contribution base" (A$55,270 per quarter for the 2019-20 income year, indexed annually).

Superannuation contributions must be made to a complying fund, and failure to do so will attract a tax or charge.

Where employers fail to make contributions on behalf of employees they may be liable for a superannuation guarantee charge – a tax equivalent to the unpaid contribution plus some penalties and interest.

Superannuation obligations are administered by the Australian Taxation Office, and form part of an employer's quarterly reporting obligations.

Restraints of trade

An employer may, by agreement, bind an employee to post-employment restraints of trade. A restraint of trade will only be enforceable if the employer can establish that the restraint is reasonably necessary to protect its "legitimate business interests", is in the public interest, and is not otherwise unreasonable.

"Legitimate business interests" include the employer's confidential information and client relationships.

The "reasonableness" of a restraint will depend on the nature, duration and geographical reach of the restraints and all the surrounding circumstances.

New South Wales has legislation which empowers courts to vary restraints which would otherwise be judged as unreasonable.

Confidentiality

Confidentiality obligations are implied into all employment contracts and exist under statute (the *Corporations Act 2001*).

An employer may also expressly require an employee to undertake not to disclose (except where required by law) information that is confidential to the employer.

These confidentiality obligations generally continue after the employee's employment ends.

The courts will not protect the know-how and skill of an employee that is acquired as a necessary consequence of the way the employee is employed or trained. An employee is free to use this skill and know-how after the employment relationship has ended.

Termination of employment

Termination of employment is the most litigated area of employment law in Australia. There is no concept of "employment at will" in Australia. Other than in cases of serious and wilful misconduct justifying summary dismissal, Australian employment laws impose minimum notice of termination provisions which apply to all employees.

An employer who is considering terminating the employment of an employee should check the notice provisions in the contract of employment, and reconcile these provisions with the minimum standards in any applicable industrial instrument (i.e. a modern award or enterprise agreement) and under the NES.

Minimum notice requirements

Under the NES, an employer is required to provide a permanent employee with at least the following minimum periods of notice of termination, or a payment in lieu of notice of at least the amount of remuneration the employee would have received at the employee's full rate of pay until the end of the minimum period of notice.

Employee's period of continuous service with the employer	Period of notice
Not more than 1 year	At least 1 week
More than 1 year, but not more than 3 years	At least 2 weeks
More than 3 years, but not more than 5 years	At least 3 weeks
More than 5 years	At least 4 weeks

An employee is entitled to a further week of notice if the employee is over 45 years old and has completed at least two years of continuous service with the employer at the end of the day on which notice of termination is given.

If no period of notice has been agreed between the employee and employer, a court can imply an obligation that the employer provide a "reasonable" period of notice in excess of the minimum requirements. Reasonable notice is not defined and requires consideration of the circumstances of each termination, including the employee's seniority and length of service.

Contractual rights

It is usual for an employment contract to provide that either party can terminate the employment for any reason by simply giving the other party a specified period of prior notice that the termination is to occur.

If an employer fails to give the appropriate period of notice, then the employee is entitled to sue the employer for breach of the employment contract. Compensation is generally (but not always) limited to the remuneration which the employee would have received if the employee worked out the full notice period, less any amount that the employee has received elsewhere.

An employer has the right to dismiss an employee summarily (i.e. without notice) if the employee is guilty of serious misconduct. Fraud, dishonesty, assault, repeated and wilful disregard of the employer's directions, and gross negligence are examples of serious misconduct. Unsatisfactory performance and minor breaches of the employer's policies usually do not amount to serious misconduct.

Legislative rights

State and federal parliaments have enacted legislation which regulates an employer's right to terminate employment.

Fair procedure

Many employees can challenge the termination of their employment under federal and state unfair dismissal laws, which generally require that an employer does not terminate an employee's employment in circumstances where the termination would be "harsh, unjust or unreasonable".

Certain categories of employees are not protected from "unfair dismissal" under the Fair Work Act. These categories of employees include:

- employees who are paid more than the "high income threshold" (currently A$148,700 per annum, indexed annually) and who are not covered by a modern award or enterprise agreement;
- employees who have not completed the minimum employment period (which is six months for employees employed by employers with more than 15 employees and 12 months for employees of employers with fewer than 15 employees);
- fixed-term and short-term casual employees; and
- employees whose employment has been terminated because of "genuine redundancy".

The Small Business Fair Dismissal Code must be complied with by small business employers (employers with fewer than 15 employees).

Termination on unlawful grounds

The Fair Work Act and state anti-discrimination legislation also prohibit termination of employment for various reasons, including:

- temporary absence from work because of illness or injury;
- trade union membership or non-membership;
- any protected attribute such as race, colour, sex, sexual preference, transsexuality, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- the taking of authorised leave; and
- the filing of a complaint or participation in proceedings against an employer involving an alleged violation of laws or regulations, or recourse to competent administrative authorities.

These restrictions apply to all employees, irrespective of their income or award coverage.

Termination of employment on any of the above grounds is unlawful and the employee may seek reinstatement and/or compensation. Penalties may also be awarded against the employer.

Redundancy

An employee is entitled to additional severance payments if his or her employment is terminated because of redundancy.

An employee's position is considered to be redundant where:

- the employer has made a definite decision that it no longer requires the job the employee has been doing to be done by anyone;
- the decision is not due to the ordinary turnover of labour;
- the decision leads to the termination of the employee's employment;
- the termination of the employee is not on account of any personal act or default on the part of the employee.

Redundancy benefits are usually calculated by reference to an employee's length of service, up to a capped amount.

Employee's period of continuous service with the employer	Redundancy pay period
More than 1 year, but less than 2 years	4 weeks
More than 2 years, but less than 3 years	6 weeks
More than 3 years, but less than 4 years	7 weeks
More than 4 years, but less than 5 years	8 weeks
More than 5 years, but less than 6 years	10 weeks
More than 6 years, but less than 7 years	11 weeks
More than 7 years, but less than 8 years	13 weeks
More than 8 years, but less than 9 years	14 weeks
More than 9 years, but less than 10 years	16 weeks
More than 10 years	12 weeks

Bona fide redundancy payments are subject to favourable tax treatment.

Federal legislation (and some industrial instruments) contain procedural requirements which must be complied with before a termination on the ground of redundancy can take effect.

Further, federal unfair dismissal laws impose additional criteria relating to "genuine redundancy". Under the federal unfair dismissal laws, a dismissal is only a case of genuine redundancy if the employer has complied with applicable consultation obligations in a modern award or enterprise agreement. Further, a dismissal is not a genuine redundancy if it would have been reasonable for the person to be re-deployed with the employer or an associated entity.

Record-keeping requirements

Under the industrial relations legislation in most Australian jurisdictions, employers are required to maintain certain records in relation to their employees, including records detailing remuneration paid, hours worked, leave entitlements, and records relating to other conditions of employment.

Under recent changes to some modern awards which took effect on 1 March 2020, employers who pay employees an annualised salary under the terms of those awards have additional record-keeping and reconciliation obligations.

Anti-discrimination law

There are numerous federal, state and territory statutes which deal with anti-discrimination. They set out various prohibitions on discrimination and harassment, possible defences and the penalties and remedies which may apply. All of these statutes prohibit discrimination and harassment in the employment context.

Anti-discrimination legislation also establishes boards or tribunals to investigate and deal with complaints of discrimination. At the federal level this is the Australian Human Rights Commission.

Protected attributes under anti-discrimination laws include:

- age;
- race, colour, descent, national or ethnic origin and immigration;
- sex, sexual characteristics, marital status, family responsibility, pregnancy and breastfeeding;
- sexual preference or activity;
- transgender status, gender identity and interest status;
- religion, political opinion, and trade union activity;
- criminal record;
- physical features;
- physical or mental disability, intellectual or psychiatric disability, medical record, HIV/AIDS status; and
- parental status or family or carer responsibilities.

This legislation draws a distinction between two types of discrimination, direct and indirect. Direct discrimination occurs when a person with one of the relevant attributes is treated less favourably than a person without the attribute would be treated in the same or similar circumstances. Indirect discrimination occurs when a person attempts to impose an unreasonable condition on the receipt of a benefit or opportunity and the impact of this condition is that a disproportionate number of persons of the protected class are unable to comply with that condition.

A person who lodges a complaint does not need to establish that the alleged discriminator intended to discriminate.

Harassment (including sexual harassment) is specifically prohibited in all anti-discrimination legislation.

Under state and federal anti-discrimination legislation, discrimination or harassment which is committed by an employee is deemed also to have been engaged in by the employer (that is, the employer is vicariously liable for the employee's conduct), unless certain defences can be established. Under federal anti-discrimination legislation, to avoid liability an employer must show that it took all reasonable steps to prevent its employees from performing and engaging in unlawful discrimination or harassment.

The defences are similar under most state and territory legislation. For example, under New South Wales anti-discrimination legislation, the primary defence is that the employer did not authorise the employee to engage in unlawful discrimination. An employer will be taken to have authorised unlawful conduct if the employer was aware of the conduct and failed to take effective action to prevent or stop the conduct.

State and federal anti-discrimination laws impose duties on employers to take positive steps to protect their employees from unlawful discrimination and harassment. At a minimum, to comply with anti-discrimination legislation, an employer must prepare, distribute and properly administer an anti-discrimination and harassment policy which provides employees with an avenue to lodge a complaint, and a procedure for the investigation of the complaint.

In a number of jurisdictions, anti-discrimination legislation also imposes a positive duty to make "reasonable adjustments" to a job for employees or job candidates with a disability.

Work health and safety law

In addition to an employer's common law duties of care, work health and safety legislation in each state and territory imposes broad general obligations, including obligations to:

- ensure, so far as reasonably practicable, the health, safety and welfare of all persons performing work for the employer (including employees, labour hire workers and contractors); and
- ensure, so far as reasonably practicable, that persons other than workers are not exposed to risks to their health or safety arising from the employer's business activities.

All Australian states and territories except Victoria and Western Australia have introduced (relatively) uniform work health and safety legislation.

Work health and safety legislation imposes strict liability obligations. Strict liability means that persons who have obligations under the legislation are liable for offences if they fail to comply with their obligations.

However, obligations in work health and safety legislation are qualified by what is reasonably practicable. A person conducting a business or undertaking must ensure, so far as reasonably practicable, the health and safety of workers and other persons. A duty holder must assess what measures are reasonably practicable to eliminate or minimise health and safety risks.

Work health and safety legislation also imposes personal obligations on the officers (including directors and senior managers) of a company or organisation. In many jurisdictions these obligations include exercising due diligence to ensure that the company or organisation complies with its work health and safety obligations.

Obligations under work health and safety legislation are broad and onerous. Employers must be aware of and comply with work health and safety obligations which are prescribed by or given effect through:

- occupational health and safety legislation and regulations;
- industry specific regulations;
- codes of practice;
- court decisions;
- safety alerts, notices and directions issued by regulatory authorities; and
- Australian Standards.

The focus of the legislation is not accidents but risks. There is no need for an accident or injury to occur in order for an offence to be established. There simply needs to be a risk to health and safety. An obvious example is risks which arise when an employer allows an employee to use an inadequately guarded piece of machinery, irrespective of whether the employee ultimately injures himself or herself.

The Australian Capital Territory, Queensland, Northern Territory and Victoria have each introduced a specific offence of industrial or workplace manslaughter. The ACT first introduced industrial manslaughter laws in 2003 under its general criminal legislation. Queensland introduced an industrial manslaughter offence as an amemdment to its work health and safety legislation in 2017. Victoria and the NT passed their workplace manslaughter laws at the end of 2019 as amendments to their existing work health and safety regimes. The ACT and Queensland laws apply only to the deaths of workers, while the offences in Victoria and the NT extend more broadly to "other persons", including customers, visitors to a site and members of the public.

Workers' compensation

Legislation in each state requires employers to take out and maintain workers' compensation insurance in respect of their employees and certain categories of contractors (who are deemed to be "workers").

Workers' compensation legislation provides compensation for workers who suffer illnesses and injuries which arise out of or in the course of their employment.

With only some very limited exceptions, a worker who suffers a work related injury or illness is entitled to compensation. It does not matter whether the worker or the employer is at fault.

Anti-bullying

A worker who is subject to the Fair Work Act has the right to lodge a "workplace bullying" complaint with the Fair Work Commission if the worker reasonably believes he or she has been bullied at work.

Bullying is defined as repeated unreasonable behaviour by an individual or group of individuals towards a worker which creates a risk to health and safety.

While the Fair Work Commission has the power to conciliate bullying claims and make orders, the Commission cannot award compensation to an applicant worker.

Reasonable management action carried out by an employer in a reasonable manner is excluded from the workplace bullying provisions in the Fair Work Act.

The Commission's powers to make anti-bullying orders are limited to where a worker has been bullied "at work" and there is a risk that the worker will continue to be bullied at work. These laws do not apply to former employees.

Modern slavery

Australia's *Modern Slavery Act 2018* came into force on 1 January 2019. This Act establishes a modern slavery reporting requirement. Large Australian entities and foreign entities carrying on business in Australia are required to submit modern slavery statements within six months of the end of the entity's financial year or other annual accounting period specifying the actions they have taken to assess and address modern slavery risks in their operations and supply chains.

Foreign entities will be considered to be carrying on business in Australia if, among other things, they have a place of business in Australia, use a share transfer or registration office in Australia, or deal with property in Australia.

Entities with an annual revenue below A$100 million will not be required to report. "Revenue" is the consolidated revenue of the reporting entity and any entities it owns or controls. Consolidated revenue is determined in accordance with the Australian Accounting Standards, even if those standards do not otherwise apply to the entity.

The Act is not punitive – it does not provide for any financial penalties for non-compliance. It is considered that the threat of reputational damage alone will motivate reporting entities to comply. However, the Minister can request a non-compliant entity to provide an explanation and undertake specified remedial action in relation to non-compliance with the reporting requirement. The Minister is also empowered to identify non-compliant entities.

Trade unions

State and federal industrial relations legislation provides for a system of registration of unions. This legislation governs the administration of trade union affairs, including the use of union funds and election of office holders.

Each trade union also has its own detailed set of rules which, among other things, specifies the eligibility requirements for employees to become members.

Industrial disputes and negotiation of collective agreements

Industrial disputes are regulated by legislation.

The federal legislation sets out a framework for taking protected (i.e. lawful) industrial action in the course of workplace bargaining and provides recourse for employers in circumstances where industrial action is not protected.

Under the Fair Work Act, a secret ballot of the workers must be taken before protected action can take place. An application must be made to the Fair Work Commission to conduct such a ballot. The Fair Work Commission is able to refuse the application if the applicant has not genuinely tried to reach agreement or is engaging in pattern bargaining. To approve the industrial action, 50% of eligible voters must vote and more than 50% of the votes cast must approve of the action. Industrial action cannot be taken before the expiry date of an applicable enterprise agreement.

Under the Fair Work Act, parties who are negotiating an enterprise agreement must bargain in good faith. This involves participating in meetings at reasonable times, providing relevant information, responding to proposals in a timely fashion, giving genuine consideration to the needs of other parties, and refraining from capricious or unfair conduct.

12 Immigration

12. Immigration

Overview

It is important to note that Australia does not offer any visa waiver or visa-free travel to any country except for New Zealand passport holders, who are granted a Special Category visa (subclass 444) on their arrival in Australia, and APEC Business Travel Card holders, who are travelling to Australia for general business activity purposes.

All foreign nationals who travel to Australia are required to hold the correct type of visa that aligns with the purpose of their stay and the activities they intend to undertake in Australia.

Each visa has specific criteria that the visa applicant must satisfy at the time of application and grant of the visa.

Business visitor visa

Foreign nationals intending to travel to Australia for a short business visit are able to apply for a business visitor visa.

Business visitor visa holders are not permitted to work, and the business visitor visa clearly sets the parameters of the permitted activities. The activities that business visitor holders are permitted to undertake are limited to seeking a general business or employment enquiry, and attending a conference, seminar or trade show without receiving remuneration for their participation.

If the proposed activity or event in Australia does not fall under the permissible business visitor activities, the activity or event is classified as work.

"Work" is defined as any activity that normally attracts remuneration in Australia, and it is irrelevant that the visa holder will not be paid for undertaking the proposed activity in Australia. The simple fact that such activity would otherwise attract remuneration in Australia is sufficient for the activity to fall under the definition of work.

The proposed activity that the visitor visa holder intends to undertake in Australia must not impose any adverse consequences on the employment conditions or the employment and training opportunities of Australian citizens and permanent residents.

Business visitor visas are comprised of three subclasses depending on the country of the passport held by the visa applicant:

- subclass 601 Electronic Travel Authority (Business stream);
- subclass 651 eVisitor (Business stream); and
- subclass 600 Visitor (Business stream).

The subclass 601 Electronic Travel Authority (Business ETA) is an electronic visa designed to facilitate travel by foreign nationals of countries who, on the basis of statistical data, have been shown to be genuine business visitors, and are unlikely to overstay or contravene their visas. These countries include Austria, Belgium, Canada, France, Germany, Ireland, Japan, Malaysia, Singapore, Sweden, the United Kingdom and the United States.

The Business ETA is valid for use for a period of 12 months and allows multiples entries, but each entry permits a stay of three months only.

The subclass 651 eVisitor visa is also an electronic visa with the same effect and operation as the Business ETA. The holder of this visa may enter Australia for a maximum of three months on each occasion during the 12-month validity of the visa. This visa is available to most European countries, including Austria, Belgium, France, Germany, Ireland, Italy, Luxembourg, Netherlands, Sweden, Switzerland and the United Kingdom.

The subclass 600 Visitor visa is for business travel to Australia for those passport holders who are ineligible for a Business ETA or subclass 651 eVisitor visa. The visa validity and duration is at the discretion of the Department of Home Affairs or the issuing Australian mission in the applicant's country of residence. Typically, the visa holder will be granted multiple entries and the length of stay will depend on the applicant's business requirements in Australia.

Temporary work visa (short stay)

The subclass 400 visa is a short stay work visa, which allows the visa holder to work in Australia on behalf of their overseas business/employer for up to six months.

The 400 visa does not require employer sponsorship, but the activity that the visa applicant intends to undertake must be of a highly-specialised and non-ongoing nature.

The 400 visa holder must be, and remain, employed by their overseas employer/business, which is engaged by an Australian business to deliver goods or services to an Australian business.

The 400 visa requires a visa applicant to have specialised technical skills, knowledge and/or industry experience, which cannot be found or are extremely limited in Australia, and would be beneficial to the Australian business. The visa applicant's position overseas must also be considered highly skilled and must correspond to the skilled occupation code classifications.

"Non-ongoing" means the proposed activity is likely to be completed within the specified period, and there is no expectation for the visa applicant to stay in Australia for the same nature of the event, activity or work after the end of the stay period.

The visa applicant must be outside Australia at the time of lodgement and the grant of the business visitor visa.

The proposed activity the visa applicant intends to undertake in Australia must not have adverse consequences on ongoing employment or training opportunities, or conditions, for Australian citizens or permanent residents.

It is important to note that the 400 visa program cannot be utilised to rotate different overseas workers through one position on the 400 visa to carry out the same nature of activity or work.

Under current immigration policy, the normal stay period of the 400 visa is up to three months, but a stay period of six months may be granted where there is a strong business case.

The visa applicant may request a single entry or multiple entries depending on their needs to travel to and outside of Australia during the stay period. If multiple entries are granted, each new entry will not trigger a new period of stay. This means the stay period will start on the date of the visa holder's first arrival in Australia.

Long stay work visa

The subclass 482 Temporary Skilled Shortage (TSS) visa program allows eligible businesses to employ skilled foreign nationals on a short-term to medium-long term basis.

The TSS visa allows the primary visa holder to:

– work for their sponsoring employer or the sponsoring employer's associated entity in their approved occupation;

– bring their dependants with them to Australia who will have full work and study rights; and

– travel in and out of Australia throughout the visa validity period.

The TSS visa program consists of three stages, namely business sponsorship, nomination and the visa.

Stage 1: Business sponsorship

This stage is for an eligible business applying to become an approved sponsor.

Both start-up businesses and established businesses can apply to become a business sponsor.

Foreign businesses without an operating base or representation in Australia are also eligible to become a sponsor for the purposes of bringing in skilled foreign nationals to work in Australia for various purposes, including the establishment of business operations in Australia or the fulfilment of contractual obligations of Australian businesses.

The business sponsorship, once approved, is valid for five years and the approved business sponsor is able to apply to nominate eligible foreign nationals in the eligible skilled occupations over the validity period of their business sponsorship.

Stage 2: Nomination

This involves the approved business sponsor nominating an eligible skilled position for a prospective TSS visa applicant or existing TSS visa holder.

The sponsor is required to pay the Skilling Australians Fund (SAF) levy for each year they wish to nominate the position. The SAF levy is tax deductible and must be paid in full by the sponsor at the time of the nomination application.

The maximum validity period of the TSS visa is determined by the number of years for which the sponsor needs to nominate the proposed position.

There are two skilled occupation code lists, which determine the maximum term of the visa.

Short-term Skilled Occupation List (STSOL)

The Short-term stream visa is for the occupations listed on the STSOL and can be renewed once only while the visa applicant is in Australia unless international trade obligations apply.

The occupations on the STSOL can be nominated for up to two years, and the associated visa is granted for the same number of years nominated by the business.

If the nominated foreign nationals are intra-corporate transferees from countries to which Australia has commitments under international trade obligations, and are nominated in the occupations which are classified as Executive or Senior Manager by the Department of Home Affairs, the sponsors may nominate the positions for up to four years and therefore the corresponding visa may be granted for up to four years.

Executive or Senior Manager occupations are as follows: Advertising Manager; Chief Executive or Managing Director; Chief Information Officer; Corporate General Manager; Corporate Services Manager; Finance Manager; Human Resource Manager; Sales and Marketing Manager; and Supply and Distribution Manager.

Medium and Long-Term Strategic List (MLTSSL) or Regional Occupation List (ROL)

The Medium-term stream visa is for the occupation codes listed on the MLTSSL or ROL. The occupations on the MLTSSL and ROL may be nominated for up to four years without limitation on the number of TSS visa renewals.

The ROL is available for positions nominated by businesses in the regional, remote and low population growth areas classified by the Department of Home Affairs.

Business sponsors seeking to nominate foreign nationals must demonstrate that they tested the local labour market to seek and offer local Australians the employment opportunities first before nominating foreign nationals. Business sponsors are required to demonstrate such efforts by submitting evidence that they have advertised the nominated position in the Australian labour market for at least four weeks in a manner prescribed by the Department of Home Affairs before offering the position to foreign nationals. This requirement is commonly known as Labour Market Testing.

Labour Market Testing is not required in certain circumstances, such as where international trade obligations apply or applications are made to facilitate intra-company transfer or the proposed salary for the nominated position is at least A$250,000 per annum.

Labour Market Testing is also not required where it would be inconsistent with Australia's commitments under international trade obligations, including Free Trade Agreements and the World Trade Organization (WTO) General Agreement on Trade in Services (GATS).

Under international trade obligations, nominations for the following are exempt from Labour Market Testing:

- a citizen of China, Japan or Thailand, or citizen/national/permanent resident of Chile, Korea, New Zealand or Singapore;
- a foreign national currently employed by the business sponsor's associated entity, which is located in Chile, China, Japan, Korea, New Zealand, or any ASEAN member country (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam);
- a foreign national who is currently employed by the business sponsor's associated entity or an overseas business sponsor operating in a WTO member country, and is nominated in the occupation code considered as an Executive or Senior Manager and will be in charge of the entire or a substantial part of the Australian operation; and
- a citizen of a WTO member country who is being nominated by an employer for which the nominee has worked in Australia for two years continuously on a full-time basis immediately before the application.

Intra-company transferees may remain employed and paid by their home-country company while they are sponsored by the Australian host company provided that the two entities are "associated entities" as defined by Australian corporations law.

Regardless of whether nominated foreign nationals will remain employed by their home company overseas or the host company in Australia, sponsors are required to give an undertaking that the employment terms and conditions offered to foreign nationals will be no less favourable than those they offer or would offer the comparable local employees in Australia.

Stage 3: Visa

The final stage is for the foreign national identified in the nomination stage to obtain a visa to work in the skilled occupation proposed by the approved business sponsor.

The TSS visa applicant must be appropriately skilled and experienced, and must have at least two years of full-time employment experience closely related to their nominated occupation.

The primary visa applicant (i.e. the foreign national nominated in the approved occupation) must also demonstrate they satisfy the English language proficiency level, health and character requirements.

Any dependent family members included in the visa application will need to satisfy the character and health requirements.

Training visa

The Training (subclass 400) visa program is designed for foreign nationals seeking to enhance their skills or education by undertaking structured workplace-based training activities, including classroom-based professional development activities in Australia.

The Training visa may also be used by overseas students who are required to undergo a period of workplace-based training to satisfy their course requirements.

The Training visa requires trainees to be nominated by an Australian business or a government organisation for three different types of occupational training, namely registration, skills enhancement and capacity building overseas.

The training provided must be a clearly structured program that is workplace-based, and the training program must show how the trainees' skills or area of expertise would be improved without adversely affecting the occupational training opportunities of Australian workers.

Employer sponsored permanent residency

Australian businesses may sponsor skilled foreign nationals for permanent residency under the applicable employer sponsored permanent residency programs.

There are two common pathways for the employer sponsored permanent residency program.

The first pathway is through the TSS visa sponsorship. The sponsor may nominate the Medium-term TSS visa holder once the visa holder has worked in their nominated occupation for their sponsor (or the sponsor's associated entity) for at least three full years.

The second pathway is through the direct nomination of a foreign national by their eligible prospective or current employer. The nominated occupation must be listed on the MLTSS. In order to be eligible under this pathway, the foreign national is required have their qualifications and skills formally assessed by the skills assessing organisations appointed by the Department of Home Affairs for the nominated occupation.

There is also a separate regional employer sponsored permanent residency program for businesses and nominated positions in regional, remote or low population growth areas classified by the Department of Home Affairs. These businesses may nominate the occupations listed on the ROL.

13 Importing and Exporting

13. Importing and Exporting

Tariff protection

Australia is a member of the World Trade Organisation (WTO) which shapes many aspects of Australia's trade laws. Within the general framework of the WTO, the Australian Government is seeking to expose Australian industry to increased competition from imports. At the same time, the WTO is being used as a forum for voicing Australian complaints on restrictive trade policies of other countries.

The WTO prohibits discrimination between member states in relation to rates of duty, although preferences which existed at the time the WTO was formed are permitted to continue. Australia maintains some preferential policies, particularly in relation to products that are manufactured in nominated developing countries. The list of countries and places which are eligible for preferential arrangements for customs duty was updated with effect from 1 July 2017. In addition, the amended regulations provide Developing Countries rates of duty to apply to certain countries.

Classification of goods and rates of duties

The applicable rates of duty for imported goods are specified in schedules to the *Customs Tariff Act 1995* (Cth). There can be variations in the rates of duty between different tariff items and it is important to determine the correct classification of goods.

Like many other countries, Australia classifies goods by applying the Harmonized Commodity Description and Coding System, commonly referred to as the Harmonized System.

Tariff concession system

The main purpose of tariffs or customs duties is to foster the development and expansion of domestic industries, rather than to raise revenue. Where there is no domestic industry, the need to impose trade barriers in the form of customs duties disappears. Australia's tariff concession system permits duty-free entry of imports in cases where there is no competitive domestic industry. Importers of goods can apply for a Tariff Concession Order (TCO) under this system for concessional rates of duty to be applied. Once a TCO has been granted for goods, it will apply to all importers of the goods. TCOs may be revoked upon request of a producer of substitutable goods or at the initiative of the Comptroller-General.

In order to obtain a TCO, it is necessary to establish that, on the day the application was lodged, no substitutable goods were produced in Australia in the ordinary course of business. Substitutable goods are Australian-produced goods that are put to a use that corresponds with a use to which the imported goods can be put. If this criterion is satisfied, it is possible to obtain a TCO and to import otherwise dutiable goods into Australia free of duty.

Certain goods are precluded from eligibility for TCOs, including foodstuffs, clothing and passenger motor vehicles.

Customs valuation

The Australian valuation system is a self-assessment system under which it is the responsibility of the importer to correctly value imports. Mistakes in valuation may attract penalties.

The Australian legislation largely conforms to the terms of the WTO agreement on customs valuation. Imported goods are valued under one of nine different methods of valuation. These valuation methods cannot be selected at will and must be adopted in the sequence set out in the legislation. The first and most common is the transaction-value method, being the price actually invoiced by the supplier to the importer, subject to various adjustments.

Alternative methods will be used where the transaction-value method is inappropriate, for example, where goods are exported to Australia on consignment or where price is not determined on an arm's-length basis.

Anti-dumping

Dumping occurs when an exporter sells goods into Australia at a price that is below the "normal value" of the goods. The normal value will usually be the domestic price of the goods in the country of export. The margin of dumping is usually the amount by which that normal value exceeds the "export price" of the goods. When this occurs, dumping duties can be imposed on those exports, provided it is also shown that the dumped goods cause or threaten material injury to Australian manufacturers of the same goods. If any dumping duties are imposed, they are payable on importation by the importer.

The Anti-Dumping Commission (Commission) administers Australia's anti-dumping system. Since the Commission's establishment in 2013, there has been a large increase in anti-dumping related investigations.

The maximum amount of duty which can be imposed is the amount of the "dumping margin", being the difference between the normal value and the export price. Duty of less than the dumping margin may be imposed if the Commission considers that the imposition of a lesser duty would be sufficient to remove the injury being caused to the Australian industry.

The legislation also contemplates the imposition of a "countervailable subsidy" if financial assistance (or income or price support) has been paid by a foreign government that benefits an exporter, either directly or indirectly, and which is specific to an enterprise or industry or group of enterprises or industries.

If there are reasonable grounds for the publication of a dumping and/or countervailing notice, the Commission will initiate an investigation. The Commission has up to 155 days to investigate and report to the Minister (unless the timeframe is extended by the Minister). The Minister generally has 30 days to decide whether or not to accept the Commission's recommendations and final report. Following the Minister's decision, measures may be imposed.

Controls and requirements for particular types of imports

In addition to complying with usual customs clearance procedures, there may be other regulatory obligations imposed on an importer wishing to bring an item into Australia for Australian use. Some examples are below.

Importers will need a permit to import certain commodities into Australia such as particular plant and animal and food products, weapons and other sensitive items.

Importers must apply trade descriptions to imported goods in accordance with the prescribed requirements. There is also specific consumer law regulation of country of origin representations.

Specific labelling requirements apply to certain items, such as customer telecommunications equipment and particular radio communications equipment. The label displays that the equipment complies with the relevant standards.

Rules for prohibited imports into Australia can be stricter than other jurisdictions. For example, Australia has a comprehensive ban on asbestos. In contrast, some other countries allow low levels of particular types of asbestos. Importers must ensure imported goods are "asbestos free" according to Australian requirements.

Export controls

A permit is required to export from Australia controlled goods and technology. The list of controlled items (the Defence Strategic Goods List) reflects the list set by member countries to the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies.

Australia has a permit system for intangible transfers from within Australia to outside Australia of controlled subject matter (e.g. by email or allowing remote access).

Exports of some goods and other transactions connected with certain nations or designated entities or individuals may be subject to United Nations Security Council Sanctions or Australia's autonomous sanctions regime. Sanctions extend to imports, services and other activities.

There are also export permit and licensing requirements for other sensitive subject matter such as hazardous waste.

Industry development requirements

Overseas firms proposing to supply certain goods, information or services to federal, state/territory or local governments should be aware of the following programs and government procurement requirements which have been implemented to encourage the development of internationally competitive activities in Australia, and which place obligations on overseas suppliers to undertake certain activities.

Local job and industry preference plans

Some state governments will apply local job preference policies to their procurements. For example, the policy may allow a preferential evaluation weighting to be applied to a tender that contains a certain level of small and medium enterprises' (SMEs) participation.

Commonwealth procurement rules

Commonwealth government procurement is primarily conducted under the Commonwealth Procurement Rules which are issued under regulations. The rules create a framework for Commonwealth government officers to follow when conducting procurement. The key principle behind the rules is to provide for value for money, based on a comparative analysis of the costs and benefits and the promotion of competition.

Under the rules, all potential suppliers to government must, subject to the rules, be treated equitably based on their commercial, legal, technical and financial abilities. They must not be discriminated against due to their size, degree of foreign affiliation or ownership, location or the origin of their supplies.

There is also a requirement that officials should not apply procurement practices that unfairly discriminate against SMEs so that they have an appropriate opportunity to compete for business. SMEs are Australian or New Zealand entities with fewer than 200 full-time equivalent employees. The government's policy is that agencies should source at least 10% of procurement by value from SMEs.

Defence supplies – Australian Industry Capability

The Australian Industry Capability (AIC) program has replaced the Australian Industry Involvement (AII) program. Unlike the AII program, the AIC program does not support offsets.

Defence procurement policy requires AIC plans for all contracts valued at A$20 million or more, or where the procurement will impact on particular industry capabilities. The AIC plan is to describe the cost-effective use of Australian industry in a contract, as well as any work that the contractor is required to perform in-country that delivers strategically important industry capabilities aligned to Australian Defence Force capability.

Free trade agreements

Australia is party to a number of free trade agreements, including the following.[1]

ANZCERTA and Government Procurement Agreement

The Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) is a comprehensive bilateral free trade agreement. It covers substantially all trans-Tasman trade in goods, including agricultural products, and was the first to include free trade in services.

Australia and New Zealand have also agreed the Government Procurement Agreement (GPA). The GPA is intended to enable Australian and New Zealand suppliers to compete for government work on an equal and transparent basis and so that Australian and New Zealand suppliers are treated as a single market of "local" suppliers.

Singapore-Australia Free Trade Agreement

The Singapore-Australia Free Trade Agreement (SAFTA) entered into force on 28 July 2003. The SAFTA improves market access to services including education, the environment, telecommunications and professional services.

Australia-United States Free Trade Agreement

The Australia-United States Free Trade Agreement (AUSFTA) entered into force on 1 January 2005.

The AUSFTA bans offsets and other local preferential arrangements for local content, technology transfer or export performance. Under the AUSFTA, the parties have agreed a principle of non-discrimination in government procurement (subject to some exceptions). Under this principle, the covered government agencies for each government are required to afford the suppliers, goods and services of the other country the same treatment that applies to domestic suppliers. There are some exceptions. Australia has reserved the right to maintain its Australian industry involvement program (or its successor) for defence procurement and to continue with procurement policies which assist SMEs. A similar non-discrimination principle is contained in several of Australia's other FTAs. However, the AUSFTA was particularly significant as it resulted in several updates to Australian government procurement policies.

Thailand-Australia Free Trade Agreement

The Thailand-Australia Free Trade Agreement (TAFTA) entered into force on 1 January 2005. Most tariffs have now been eliminated, with a phasing to zero or elimination of the remaining tariffs by 2025.

ASEAN-Australia-New Zealand Free Trade Agreement

The ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA) was concluded on 28 August 2008 and has entered into force for all member countries. Members of ASEAN are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar (Burma), the Philippines, Singapore, Thailand and Vietnam.

The AANZFTA provides for the progressive reduction or elimination of tariffs over specified periods and the scheduling of market-access commitments for services by each of the parties. The timetables for the reductions are different for each signatory. The AANZFTA also provides for regional rules of origin.

[1] Some material in this section is sourced from the Department of Foreign Affairs and Trade website (www.dfat.gov.au).

Australia-Chile Free Trade Agreement

The Australia-Chile Free Trade Agreement (ACFTA) entered into force on 6 March 2009. The ACFTA resulted in the immediate elimination of tariffs on 97% of goods traded between Australia and Chile. From 2015, all tariffs were eliminated except in relation to sugar.

Malaysia-Australia Free Trade Agreement

The Malaysia-Australia Free Trade Agreement (MAFTA) entered into force on 1 January 2013. Under the MAFTA, Malaysia eliminated tariffs on 97.6% of goods imported from Australia from day one, rising to 99% in 2017. Australia eliminated all tariffs on goods from Malaysia on day one.

Australia-US Defense Trade Cooperation Treaty

The Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation entered into force on 16 May 2013. The treaty creates a framework for trade in eligible defence articles between approved entities in Australia and the US, known as the Approved Community, without the need to apply for export licences.

Korea-Australia Free Trade Agreement

The Korea-Australia Free Trade Agreement (KAFTA) entered into force on 12 December 2014. Under the KAFTA, 84% of Australia's merchandise exports to Korea, by value, enter duty free, rising to 99.8% when the KAFTA is fully implemented.

Japan-Australia Economic Partnership Agreement

The Japan-Australia Economic Partnership Agreement (JAEPA) entered into force on 15 January 2015.

For exports from Australia, the JAEPA provides reduction and removal of tariffs and duty free quotas across a number of agricultural and dairy products. Additionally, 99.7% of Australia's exports of resource, energy and manufacturing products will enter Japan duty-free.

For imports to Australia, the JAEPA provides cheaper import prices on a range of goods, including cars, white goods and electronics.

The JAEPA also provides market access benefits to several services areas including educational, telecommunications and professional services.

China-Australia Free Trade Agreement

The China-Australia Free Trade Agreement (ChAFTA) entered into force on 20 December 2015. The ChAFTA will provide for removal of a number of tariffs on Australian exports to China of food and agricultural, resources and energy, pharmaceutical and other manufactured products. ChAFTA will also facilitate market access across a range of service sectors.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) was signed by the 11 member countries on 8 March 2018. The CPTPP entered into force on 30 December 2018 for Australia, Canada, Japan, Mexico, New Zealand and Singapore, and on 14 January 2019 for Vietnam.

The CPTPP incorporates, by reference, the provisions of the Trans-Pacific Partnership (TPP) excepting some suspended provisions. The CPTPP maintains a market access package covering goods and services market openings and commitments on regulations on foreign investment. The CPTPP also contains measures to support the development of e-commerce, in particular on flow of data across borders.

Australia-Hong Kong Free Trade Agreement

The Australia-Hong Kong Free Trade Agreement (A-HKFTA) entered into force on 17 January 2020. The agreement has measures to provide Australian businesses greater certainty to trade and investment activities in Hong Kong.

The A-HKFTA will provide continued access to the Hong Kong market for Australian exporters of education, financial and professional services, as well as guarantee that Hong Kong will not apply tariffs to Australian goods in the future.

Peru-Australia Free Trade Agreement

The Peru-Australia Free Trade Agreement (PAFTA) entered into force on 11 February 2020. The PAFTA provides Australian exporters to Peru with substantial new trade and investment opportunities and provides Australian service providers a more transparent and predictable operating environment in Peru.

Concluded free trade agreements not yet in force

Australia has recently concluded the following free trade agreements.

The Indonesia-Australia Comprehensive Economic Partnership Agreement (IA-CEPA) was signed by Australia and Indonesia on 4 March 2019 and will enter into force on 5 July 2020.

The Pacific Agreement on Closer Economic Relations (PACER) Plus was signed on 14 June 2017. PACER Plus offers an opportunity to help Pacific Islands Forum countries benefit from enhanced regional trade and economic integration. The Agreement was signed by Australia, New Zealand and eight Pacific Island countries: Cook Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tonga and Tuvalu.

Free trade agreements under negotiation

Australia is negotiating a number of other free trade agreements, as set out below.

The Regional Comprehensive Economic Partnership (RCEP) negotiations were launched by leaders from ASEAN and ASEAN's FTA partners in Cambodia in November 2012. RCEP is an ASEAN-centred proposal for a regional free trade area, which would initially include the 10 ASEAN member states and those countries which have existing FTAs with ASEAN (Australia, China, India, Japan, Republic of Korea and New Zealand). The RCEP will build on and expand the AANZFTA. The Australian Government is working towards the signing of the RCEP in 2020.

Australia and the Pacific Alliance launched negotiations for a free trade agreement on 30 June 2017. The Pacific Alliance is a regional trading bloc comprising Chile, Colombia, Mexico and Peru.

Australia and the European Union launched negotiations for a free trade agreement on 18 June 2018. There have been several negotiating rounds and information sessions.

Australia and India launched negotiations to conclude a Comprehensive Economic Cooperation Agreement in May 2011. The agreement would include coverage of investment and trade in goods and services. The last negotiation round was in 2015.

Australia-Gulf Council Free Trade Agreement (AGCCFTA) negotiations with the Gulf Cooperation Council (GCC) commenced in July 2007. The GCC comprises Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. The Australian Government has indicated no progress is expected on an agreement with the GCC while the intra-Gulf tensions which commenced in June 2017 remain unresolved.

Australia, with the United States and the European Union, is leading negotiations on a services-only free trade agreement known as the Trade in Services Agreement (TiSA). Formal TiSA negotiations began in early 2013 but there have been no negotiations since December 2016.

Government incentive schemes for exporting

Governments at both the federal and state/territory levels aim to foster economic growth and improve Australia's balance of payments position through assistance to selected business enterprises. This may be provided by direct grants or loans, concessions available under taxation legislation, administrative, research and educational assistance, restrictions on competition and other measures.

Export Market Development Grants

The Export Market Development Grants (EMDG) scheme administered by Austrade can provide an incentive to small and medium Australian exporters of goods, services, industrial property rights and know-how that are substantially of Australian origin.

Under the EMDG scheme, taxable cash grants are available to subsidise certain expenditures incurred primarily for the purpose of creating or seeking opportunities, or creating or increasing demand, for export sales of eligible goods, services, industrial property rights or know-how.

Classes of eligible expenditure include overseas market research, certain overseas transport costs, establishment and maintenance of overseas sales representatives, advertisements (such as brochures) for overseas distribution, overseas promotions such as trade fairs and exhibitions, and costs related to quotations and tenders for overseas export business.

Export insurance and finance

Austrade, through Export Finance Australia, provides insurance against commercial and political risks and assistance with arranging financing for exports and related overseas transactions. Commercial and political risks covered include bankruptcy of the buyer, indemnification against non-payment of goods by the buyer which have been accepted after the due date for payment, repudiation by the buyer under an enforceable contract and political risk insurance.

Manufacturing in Bond

The Manufacturing in Bond (MiB) program allows the manufacturing of goods in a Customs-licensed warehouse using imported components on which duty has not been paid. A firm with MiB approval will be able to import dutiable goods into a licensed warehouse free of goods and services tax and duty. If the goods are later re-exported, either in their original or manufactured form, no goods and services tax or duty is incurred.

14 Real Property and Environmental Law

14. Real Property and Environmental Law

Introduction to estates in land

An estate in (or title to) land describes the type and quality of interest which may be held by a person in respect of that land.

The most common estates in land are freehold estates and leasehold estates. These estates are discussed below, as is the further development of estates in "strata title" (in respect of apartment, mixed-use and commercial developments). Additionally, case law in Australia has enshrined the existence of "native title", which describes certain rights held by indigenous Australians in respect of traditional lands and waters.

Freehold estate

Freehold estate is the most unrestricted interest in land. A freehold estate is the most widely held interest in land, granting the freehold owner an interest in land for an indeterminate period of time. There are two primary forms of freehold estate, "fee simple" and "life estate".

Fee simple

The most common and unrestricted form of freehold estate is an "estate in fee simple". An estate in fee simple is synonymous with absolute ownership enabling the owner to enjoy possession without interference from others and in perpetuity. An owner of an estate in fee simple is free to deal with that land as they choose, subject to complying with all relevant legislation as to ownership and use and any encumbrances (such as mortgages and easements) registered on title. Where the owner is an individual (rather than a body corporate), their fee simple estate will be transferred to an heir if the owner dies without having prepared a will.

Life estate

Although rare in Australia, this form of freehold ownership entitles the owner to use and possess land for his or her life. Ownership of the land reverts back to the person granting the right (or his or her descendants, if applicable) at the death of the person to whom it is given.

Leasehold estate

A leasehold estate is an interest in land which entitles the holder (known as a tenant or lessee) to exclusive occupation and use of the land for a limited period of time. At the end of the term of the leasehold estate, the right to occupy and use the leased estate or premises reverts to the owner of the freehold estate.

The leasehold estate is granted by virtue of a lease agreement entered into between the owner of the underlying freehold title and the tenant. Subject to complying with the terms of the lease, the tenant enjoys exclusive use and occupation of the leased land for the term of the lease.

The lease confers on the tenant an interest in land, not merely a contractual right. This interest entitles the tenant to rights granted to those with interests in land and, most importantly, the right to specific performance as a remedy for default, not merely damages.

The majority of leasehold estates in Australia are of partial interests in a building, such as the right to occupy certain premises in a retail centre, commercial office building or on an industrial estate. These rights are discussed further in the section "Leases and Licences to Occupy", below.

Federal, state and local governments, and other public authorities or bodies created by statute, also lease parcels of land to third parties. Land subject to this type of leased estate is often considered to be of special or strategic importance, such that the relevant authority considers it prudent to ensure the land reverts back to it at the end of the term of the lease. An example in this category is land which surrounds strategic defence positions, Australian icons or the country's airports, harbours and ports.

Strata title

In Australia, a category of legal estate in land has evolved to effectively manage community living issues. "Strata" or "unit" title is commonly found in apartments, condominiums, home units, townhouses and other group housing arrangements. It is also used to regulate ownership of partial estates in some commercial buildings and industrial estates. Each Australian domestic jurisdiction has its own legislation regulating some type of strata title system.

While each jurisdiction takes a slightly different approach, generally upon strata subdivision of a building or parcel of land (called a "strata scheme") a freehold strata title conferred under the Torrens Title system can be freely transferred in the same manner as freehold estate in fee simple. Each owner in a strata scheme is a member of an owners corporation, which has powers, authorities, duties and functions imposed upon it in relation to the control, management and administration of common property. A strata scheme also adopts a set of by-laws (either by adopting the standard statutory list of by-laws which can be adapted or added to to suit the strata scheme or by creating unique set of by-laws) which govern how each owner may utilise the common property.

New South Wales also permits strata schemes to be created on certain leasehold land under the *Strata Schemes (Leasehold Development) Act 1986* (NSW). Certain considerations apply in determining whether leasehold land is suitable for conversion to strata title in leasehold estates.

Native title

A further type of title in Australia is native title. Native title is the term used to describe certain rights held by indigenous Australians in respect of traditional land and water. First recognised by Australia's High Court in the 1992 decision of *Mabo v State of Queensland No 2*, it was held that the Meriam People (of whom the claimant was a member) held native title to certain land that survived European settlement, subject to the sovereignty of the Crown.

This case prompted the Australian Government to pass new Commonwealth legislation, the *Native Title Act 1993* (Cth), which took effect from 1 January 1994. Each state subsequently enacted their own legislation in various forms, governing the validity of land dealings affecting native title and establishing a process for native title claims.

Though still a developing area of law, the following are some recognised principles which apply in relation to native title claims:

- Native title can only exist in relation to land or water where the claimant group has and maintains a traditional connection with the land, and where the government has not granted any inconsistent rights.
- Native title therefore cannot exist in relation to freehold land or in certain land leased from the government for commercial premises or in respect of which exclusive possession has been granted. In these cases, the government is deemed to have granted rights which are inconsistent with, and effectively extinguish, a native title claim.
- Native title interests are most likely to affect investments in vacant land or mining interests, especially where the investment relies on a government grant or sale.

A register of native title interests is kept. Searches may be obtained from relevant courts and the National Native Title Tribunal to establish whether a parcel of land is subject to a native title claim or interest. If a native title claim exists or has been registered over land, an investor will have to follow procedural requirements under the native title legislation and negotiate agreements with the claimants or native title holders, such as access sharing arrangements or payment of compensation. While the Native Title Act does not state how the amount of monetary compensation should be calculated, the case of *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 is important as it was the first favourable compensation case where the court set out how compensation may be calculated.

Native title generally is not an issue of concern where an investor is purchasing urban real estate interests. These interests are almost invariably comprised of freehold land, and native title cannot exist in relation to freehold land.

In late 2019, the Commonwealth government introduced the *Native Title Legislation Amendment Bill 2019* to Parliament as a means of streamlining the claims process. It is currently before the House of Representatives and includes recommendations from native title claimant groups, the Council of Australian Governments (COAG) and the Australian Law Reform Commission. The Amendment Bill comes as a response to the Federal Court decision in *McGlade v Native Title Registrar* [2017] FCAFC 10, which found that section 31 agreements (which are negotiated between the industry and claimant groups to enable land access to industry) were only valid if signed by every single representative in a claimant group (not just a majority) even if a signature couldn't be obtained due to a representative being deceased. The Amendment Bill aims to establish a registrar for section 31 agreements, validate all agreements affected by the *McGlade* decision and ensure future negotiations can be carried out on behalf of a claimant group majority.

Torrens Title: title by registration

Most land in Australia is subject to a system of conveyancing called the Torrens Title system. The fundamental premise of the Torrens Title system is a prioritisation of interests in a parcel of land by chronology of registration, not execution. Put simply, it is a system of title by registration. Upon registration, the registered proprietor holds its interest subject to prior registered interests, but free from any interest which is not so registered.

A number of jurisdictions in Australia have recently adopted a compulsory system of electronic lodgement and settlement for conveyancing transactions, managed through Property Exchange Australia (PEXA). Electronic conveyancing is currently functioning in Victoria, Queensland, New South Wales, South Australia and Western Australia, and enables parties to lodge documents and complete settlements and various registrations online. Lawyers or conveyancers must obtain client authorisations to electronically sign and lodge Title Office documents on a client's behalf. This eliminates the need to physically attend settlement, reduces risks of identity fraud and allows for instantaneous stamping and lodgement of dealings on the day of settlement or registration.

Land for which title is recorded in the Torrens Title system is known as Torrens land. Once registered, the registered proprietor's interest in Torrens land generally cannot be overturned or challenged. In Australia, this concept is known as indefeasibility of title. There are some limited statutory exceptions, such as fraud, misdescription of boundaries and short-term leases (or leasehold interests generally in Victoria). However, in principle, Torrens Title is guaranteed by the state.

Each state has its own central registry kept by a government authority (Titles Office). While there are differences in the administration of each Titles Office, they share the same fundamental principles of the Torrens Title system. Primarily, title or ownership is determined by the act of registration at the Titles Office. As such, under the Torrens Title system, the holder of an unregistered interest has an equitable interest only in the land, and will lose priority to subsequently registered interests.

To enjoy the protection of indefeasibility of title, transfers of land, easements, mortgages, covenants and similar interests must be registered at the relevant Titles Office. On the sale of Torrens land, a prescribed form of transfer of land, signed by the seller and by or on behalf of the buyer, will be registered at the relevant Titles Office (or electronically via PEXA as required). Certain leases are also required to be registered in some states. These interests are recorded on the certificate of title to the relevant property.

Interests in land recorded in the Torrens Title system

In Australia, there are several other recognised interests in land which should be registered on the title to the applicable land and, incidentally, recorded in the Torrens Title system.

Mortgages

As is common worldwide, a mortgage is typically created in favour of a party (often a financial institution, but also any third-party lender) to secure payment of a loan or other financial arrangement.

When land is purchased with funds obtained from an institutional lender, on completion the mortgage will be registered on title and the lender will either hold control of the electronic title to the land or, in those jurisdictions which still issue paper titles, hold the duplicate original certificate of title to the land for safe-keeping. This provides the lender with comfort that its consent must always be granted to the registration of any other interest in that parcel of land.

Easements

There are many different forms of easement. Easements generally create a right to use land or particular parts of it, rather than a right to occupy that land. Easements often grant rights to third parties (often an adjoining land owner, a local authority or utilities provider) and are commonly registered to procure the delivery of services (electricity, water and sewerage) to or across one piece of land to another. Easements can also grant other rights, such as a right of way enabling third parties (with or without vehicles, depending on the terms) to cross a parcel of land.

Covenants

Similar to easements, covenants generally require an owner to use, or prevent that owner from using, all or part of their land in a particular way. For instance, a restrictive covenant may prevent an owner from building over a particular part of its land, so that services laid under that land may continue to be freely accessed by the authority that laid them.

Similarly, a restrictive covenant may restrict the type of dwelling or building materials that can be used on a parcel of land. Such a covenant is common where a parcel of land is subdivided into several residential or industrial lots as part of a new development. Likewise, a positive covenant may require an owner to do certain things, such as to ensure that a shared driveway is maintained, or that underground tanks are regularly checked and maintained.

Leases

Each state takes a different approach as to whether and when a lease is required to be registered at the Titles Office. Further details are set out below under "Leases and licences to occupy".

Non-Torrens land: Commonwealth, Crown and Old System land

The vast majority of land in Australia is Torrens land. However, some categories of land have not yet been converted to Torrens land, the main categories of which are:

- Commonwealth land: Land owned by the Commonwealth of Australia (being federal, rather than state ownership). Depending on the use of the Commonwealth land, it may be leased by the Commonwealth to third parties.
- Crown land: Land owned by a particular state or territory. Depending on the use of the Crown land, it may be leased by the Crown to third parties.

- **Old System land:** Land which has been the subject of a Crown Grant by the state and for which title is evidenced by deed following the practice of old English land law prior to 1886. The deeds to Old System land are also recorded at the Titles Offices in the General Registry of Deeds. However, title under this deeds system is not guaranteed by the state and therefore does not have the protection of being indefeasible.

With few exceptions, the majority of remaining Old System land is rural land or land which has been rarely transferred or dealt with and therefore has not undergone the conversion procedure to Torrens land. The conversion process, through a procedure of applications and public notices, involves determining the boundaries of the parcel of land and investigating the Old System Title's documentation to ensure that the current owner has an unchallenged right to own the land.

Leases and licences to occupy

Arrangements between landlords and tenants are primarily governed by lease and licence documentation. These documents, especially those used by institutional landlords, contain detailed provisions which regulate the relationship between the landlord and the tenant and the permitted use(s) of the area to be leased.

It is important to note that legislation and the common law overlay certain rights and obligations into lease and licence agreements:

- **Retail leases:** Most states have enacted retail lease legislation, to enshrine certain statutory protections upon retail tenants who are considered to have lesser bargaining power as compared with their institutional landlords.
- **Common law:** Common law implies certain covenants into leases, whether or not they are expressly stated in the lease. Leases are often drafted to incorporate these implied covenants, but the covenants are also enshrined in property or conveyancing legislation in most states.
- **Consumer protection:** Consumer protection legislation, including protection against misleading conduct or misrepresentations, is implied into leases whether expressly stated in the lease or otherwise. These protections cannot be contracted out of by the parties.
- **Workplace health and safety:** Both landlords and tenants are subject to workplace health and safety legislation governing the provision of a safe place of work. These obligations primarily affect the landlord through its capacity as owner of the building premises, and the tenant through its capacity as employer, or person in "control" of the workplace.

Leases

Unlike a simple contractual arrangement, leases in Australia confer on the tenant a legal interest in land, as well as granting contractual rights against the landlord. The grant of a lease gives the tenant the exclusive right to occupy and to use the leased area, which (except to the extent agreed in the lease) overrides the landlord's rights as owner.

Because a lease provides the tenant with an interest in land, the tenant's redress against a landlord's default includes the right to seek specific performance as well as damages.

There are two primary categories of leasehold estate:

- **Fixed term:** The most common form of leasehold for commercial leases, a fixed-term lease is for a defined period of time, after which it lapses. For a fixed-term lease to be enforceable, the start date and end date of the lease must be known (or at least able to be determined) before it commences. As with any leasehold estate, the premises or property that is the subject of the leasehold estate should be clearly defined or able to be clearly defined, and there should also be sufficient certainty about the terms of the lease.

- **Periodic:** A tenancy known as a periodic tenancy is created when a lease is granted on a weekly, monthly or yearly basis. Generally, such a lease can be ended by either the owner (landlord) or the occupant (tenant) giving the agreed period of notice.

Many fixed-term leases are converted to periodic tenancies once they reach their end date, in circumstances where the occupant continues to remain in the premises with the owner's consent. In most commercial leases, the term of a periodic tenancy created in these circumstances will be month-to-month.

In addition to fixed-term and periodic tenancies, there are two further categories of leasehold interest:

- **Tenancy at will**, which is for an indefinite period of time and may be terminated by either party at any time.
- **Tenancy at sufferance**, which arises by implication of law and is most commonly created where a tenant remains in possession after the expiry of a lease without the landlord's consent or dissent (for example, if the lease does not contain any provision for holding over).

In both cases, acceptance of rent by the owner will convert the tenancy to a periodic tenancy.

Commercial leases

Commercial leases are commonly net leases, meaning the tenant pays an agreed rent (subject to increase on agreed terms) as well as a contribution to the landlord's operating expenses for the building. The proportion of the tenant's contribution to operating expenses generally is calculated by reference to the proportion (expressed as a percentage) that the lettable area of the tenant's premises bears to the total lettable area of the building.

Sometimes, the rent agreed with a tenant comprises a notional amount for operating expenses, based on the operating expenses that were payable by the landlord in a given base year. In these cases, the tenant's contribution to a proportion of operating expenses is limited to any increases in actual operating expenses payable in a lease year above those which were paid in the base year.

The term of a commercial lease for an office premises is usually between 5 and 10 years, with or without rights to extend. For industrial premises, the term may be longer especially if the industrial premises were purpose-built for the tenant.

For major retail leases, such as those to anchor supermarket or department store tenants, lease terms significantly exceed 10 years and generally include a series of rights to extend, sometimes to a total of 40 years.

Retail leases

The states treat retail leases to smaller tenants differently to commercial leases, based on an assumption that retail landlords and retail tenants have very unequal bargaining power. Each state and territory has enacted retail lease legislation.

The retail lease legislation differs between states, including as to what falls within the category of a "retail lease" in that jurisdiction. One of the primary criticisms made by both national landlords and national tenants of the retail lease legislation in force in Australia is its lack of harmonisation. To date, the states have not been able to collectively address these issues, leaving landlords and tenants in the position of having to comply with different regimes throughout Australia's various states and territories.

All states and territories share the common objective of legislating to ensure that retail tenants are entitled to certain minimum conditions which override any provision to the contrary in a lease. Some states are similar in their treatment of large retail tenancies (1,000 square metres or greater), rendering them outside the classification of a "retail lease" and therefore unable to rely on the legislative protection granted to smaller tenancies.

Registration

In most circumstances it is necessary (or at least prudent) to register leases on the title to the property, to ensure that the tenant who has been granted an interest in the land via the lease also enjoys the protection of indefeasibility of title.

The criteria for registration varies between the states. As a guide to best practice:

- New South Wales, Queensland, Northern Territory, Tasmania and Australian Capital Territory – when the duration of the lease (including any options for renewal) exceeds three years the lease should be registered. (Note that NSW legislation actually requires the landlord (owner) to execute a lease in a form suitable for registration where the term (including options) exceeds three years.)
- South Australia – when the duration of the lease (including any options for renewal) exceeds one year the lease should be registered.
- Western Australia – when the duration of the lease (including any options for renewal) exceeds five years the lease should be registered.
- Victoria – it is not necessary to register leases for any term to a tenant in actual possession given the breadth of the exception to indefeasibility.

Licences

Occupancy or other use rights are sometimes granted by licence, rather than lease. A licence is a contractual arrangement between the licensor (the grantor) and the licensee (the person with the benefit of the grant). Unlike a lease, it does not bestow an interest in land, meaning that remedies for breaches of the licence are limited to damages.

Institutional land owners generally prefer that certain rights are granted to its building occupants by way of separate licence, rather than in their premises lease, for instance, car park use rights, storage space use rights, and access to and joint use of non-leased areas for telecommunications equipment.

Often, a licence is the most appropriate form of occupancy right because the particular licensed areas are not exclusively occupied or used by the tenant, and therefore cannot be the subject of a lease which grants an interest in land bestowing exclusive occupation rights to the tenant. As such, for multi-tenanted commercial office buildings, it is quite common for the owner to grant a lease and one or more licences to its occupants.

Because they do not bestow interests in land, licences are not registrable under the Torrens Title system.

Duties

Previously, a significant cost imposed on a tenant when entering into a lease was lease duty. Lease duty was calculated on the estimated rent payable for the term of the lease, and on any statutory outgoings for which the tenant was liable through its contribution to building operating expenses. The particular rates of lease duty varied significantly between states. However, all states and territories have now abolished lease duty on commercial leases with some exceptions. For example:

- in the Australian Capital Territory, the grant of a lease with a term greater than 30 years including any renewal options is liable to duty at conveyance rates; and
- in all jurisdictions, duty will be charged on the grant of a lease for which any consideration other than rent reserved is paid or agreed to be paid, either in respect of the lease or the acquisition of certain rights or

interests pertaining to the underlying land (for example, where an up-front "premium" is paid for the grant of the lease).

Green building credentials

With the aim of improving the energy efficiency of Australia's large office buildings, the Commonwealth government's *Building Energy Efficiency Disclosure Act 2010* (Cth) requires a constitutional corporation that wishes to sell, lease or sublease office space of 1,000 square metres or more net lettable area to disclose an up-to-date Building Energy Efficiency Certificate (BEEC).

A BEEC must include:

– a NABERS Energy star rating for the building; and

– an assessment of tenancy lighting in the area of the building that is being sold or leased.

BEECs are valid for 12 months and must be publicly accessible on the online Building Energy Efficiency Register. Certain exceptions and exemptions apply.

The National Australian Built Environment Rating System (NABERS) is administered by the New South Wales Government but available nationwide. NABERS focuses on the operation of existing buildings, and can be used for the whole building or specific tenancies. It has separate tools to assess energy use (called "NABERS Energy", the most commonly used NABERS rating tool), water use, waste and indoor environment quality. While initially developed for office buildings, NABERS has also developed rating tools for residential houses, hotels and retail buildings. NABERS is also developing tools for schools, hospitals and transport and aims to cover every major building type by 2023.[1]

The NABERS Energy rating benchmarks the actual *operational* energy use of existing commercial office buildings, measuring the energy use per square metre of net lettable area. Each building is awarded from one star (for poor performance) to six stars (for exceptional performance) depending on the energy efficiency and greenhouse performance of the rated space. Data must be collected for a period of 12 months before an assessment can be made.

The Green Star Rating system is a system developed by the Green Building Council of Australia. It is also widely used in Australia and is typically used to assess the sustainability of the building design (as opposed to actual operational energy use) for a new building. It considers nine criteria, including energy, emissions, transport, water, materials and indoor environment quality.

The Property Council of Australia (Australia's national organisation of building owners and managers) will only award a new office building "Grade A" or "Premium" status if the building obtains certain ratings under both Green Star and NABERS Office Energy. The "Grade A" or "Premium Grade" status is important for encouraging tenants concerned about their own energy consumption to lease space.

In addition, federal and some state governments have set minimum rating standards for buildings owned or leased by government agencies. A summary of these requirements for office buildings is set out in the table below.

[1] Source: NABERS, Five-Year Strategy 2019-2023 (15 April 2019) https://www.nabers.gov.au/publications/strategic-plan (accessed 24 January 2020); NABERS, Energy and Water for Offices Rules (17 April 2019) https://www.nabers.gov.au/publications/nabers-energy-and-water-offices-rules (accessed 24 January 2020).

Government	NABERS Energy for Offices	NABERS Water for Offices	NABERS Energy for Data Centres
Commonwealth[2] (for office spaces over 2,000m²)	4.5 stars for new buildings, new leases and major refurbishments		
New South Wales[3] (for office spaces over 1,000m²)	4.5 stars for leased/owned offices by June 2020 4.5 stars for leased office buildings in areas outside Sydney, Wollongong and Newcastle by June 2020 New buildings and fitouts to be designed to reach at least 4.5 stars (from 2015)	4 stars for leased/ owned and new buildings where cost effective	4.5 stars for infrastructure and IT equipment
Australian Capital Territory[4]	4.5 stars (Base Building Rating) for new leases 4.5 stars (Tenancy Rating) for new fitout in leased offices		
Victoria[5]	4.5 stars (Base Building Rating) for new buildings 4 stars (Base Building Rating) for existing buildings 5 stars (Tenancy Rating) for new fitout in leased offices		
South Australia[6]	5 stars (Base Building Rating) for new buildings Preference for 4.5 star existing buildings (Base Building Rating) for leased offices	Policy in development	

[2] Source: Australian Government, Energy Efficiency in Government Operations, Department of the Environment and Energy https://www.energy.gov.au/government-priorities/energy-productivity-and-energy-efficiency/government-buildings (accessed 24 January 2020).
[3] Source: NSW Government, Resource Efficiency Policy (2019), Office of Environment and Heritage https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Energy-savings-and-resource-efficiency/nsw-government-resource-efficiency-policy-180458.pdf (accessed 24 January 2020).
[4] Source: ACT Government, Carbon Neutral ACT Government Framework (August 2014) https://www.environment.act.gov.au/__data/assets/pdf_file/0007/1163239/Carbon-Neutral-ACT-Government-Framework_Accessible_2014.pdf (accessed 24 January 2020).
[5] Source: Victorian Government, Office Accommodation Guidelines 2007 (December 2007), Department of Treasury and Finance https://www.dtf.vic.gov.au/sites/default/files/2018-02/Office-Accommodation-Guidelines.pdf (accessed 24 January 2020).
[6] Source: Government of South Australia, Government Buildings Energy Strategy 2013-2020 (2013), Department for Energy and Mining http://www.energymining.sa.gov.au/__data/assets/pdf_file/0019/322129/GBE-strategy.pdf (accessed 24 January 2020).

Government	NABERS Energy for Offices	NABERS Water for Offices	NABERS Energy for Data Centres
Western Australia[7] (for office spaces over 1,000m²)	4.5 stars (Base Building Rating / Whole Building Rating) for new buildings 3.5 stars (Base Building Rating) for new leases in existing buildings 4.5 stars (Tenancy Rating) for new fitout for leases in existing buildings 4 stars (Tenancy Rating) for existing tenancies		
Northern Territory[8] (for office spaces over 2,000m²)	5 stars (Base Building Rating) for new buildings 4.5 stars (Base Building Rating) for existing buildings		
Queensland[9] (for office spaces over 2,000m²)	4.5 stars for new buildings, new leases and major refurbishments		
Tasmania	None		

Note: In addition to the above Energy Ratings, there are also ratings for water, waste and environment, with different take-up levels across the states.

Smoking prohibition

Smoking in public places, including office buildings, has been banned by parliament.

[7] Source: Government of Western Australia, Government Office Accommodation Standards (March 2018), Department of Finance https://www.wa.gov.au/sites/default/files/2019-10/Government%20Office%20Accommodation%20Standards.pdf (accessed 24 January 2020).
[8] Source: Legislative Assembly of the Northern Territory, Written Question No. 346 (10th Assembly, 2005-2008) https://parliament.nt.gov.au/__data/assets/pdf_file/0020/551144/Aqst-346-Higgins-Property-Leasing-Services.pdf (accessed 24 January 2020); Northern Territory Government, Building and Energy Efficiency (7 March 2019) https://nt.gov.au/property/building-and-development/build-or-renovate-your-home/building-and-energy-efficiency (accessed 24 January 2020).
[9] Source: Queensland Government, Environmental Rating Systems and Government Buildings (December 2011), Department of Housing and Public Works https://www.hpw.qld.gov.au/__data/assets/pdf_file/0015/5631/bapfenviroratingsystems.pdf (accessed 24 January 2020); Queensland Government, Letter to the Minister for Public Works, Housing and Information and Communication Technology (19 May 2008) https://www.parliament.qld.gov.au/apps/E-Petitions/Home/DownloadResponse/4c94fee3-b55e-4c71-a8f9-c63533fd8b9d (accessed 24 January 2020).

Environment and land-use planning

Updated to May 2020.

Traditionally, land-use planning and environmental matters have been the jurisdiction of state and local governments (except where directly regulated by international treaty arrangements ratified by Australia). In recent years, the federal government has been increasingly involved in environmental matters – especially in the area of climate change and renewable energy – although the federal government is in the process of devolving the regulation of some of its planning powers to the states.

Planning

State governments and local councils primarily control the development and use of land throughout Australia, through a combination of legislation and planning policies and instruments. The regulatory framework differs from state to state, and from council to council.

Councils generally regulate, assess and approve the majority of developments within their local government boundaries, with the following two exceptions:

- Projects of regional or state significance or major developments and infrastructure projects can fall within the jurisdiction of the particular state government. In most states, certain projects, categories of projects or development sites are designated as state significant projects by various planning instruments or by declaration of the relevant Minister for Planning. Projects that fall within these categories will be assessed by the relevant planning department within the state government and be approved by the relevant Minister for Planning or a special panel or commission established to assess and approve such state significant projects. Different assessment and approval requirements will apply to those projects assessed at the state level, compared to smaller developments assessed and approved at the local level.
- Projects that may have an impact on matters of national environmental significance, such as world heritage items, may require referral to the Commonwealth Department of the Environment as part of the state or regional based assessment process.

At a state level, environmental planning policies establish broad guidelines and requirements for projects within certain categories of development or within certain areas of the state which are considered to be of state or regional significance. These state environmental planning policies may:

- suspend the operation of local planning laws for those particular projects;
- provide guidelines for councils in conducting assessments of those projects, or provide for referral of projects to the particular state government; or
- confer council's functions as an approval authority to regional bodies for approval or for the imposition of conditions in addition to those conditions imposed by the local council.

At a local level, local environmental plans designate zones for all land under a council's jurisdiction (for example, residential, commercial, industrial and the like, with further divisions within each category), and then prescribe the types of development that will be permitted or prohibited within each zone. Where development is permitted, the local environmental plans also determine the type of approval required. Generally, very little development is permitted without some type of consent. Some councils have also implemented development control plans which contain further guidelines for development in particular zones.

State significant projects and other projects which are likely to have a significant environmental impact may require an Environmental Impact Statement (EIS). An EIS is a detailed technical document, often requiring input from a variety of experts. Depending on the nature of the project, these may include engineers, quantity surveyors, planners, ecologists, geologists, traffic management experts and the like. The preparation of an EIS often involves consultations with the relevant local council, relevant state government departments, stakeholders and the local community.

Carrying out any development without first obtaining the required consents is a criminal offence, and can result in the imposition of substantial penalties against not only the companies involved but also their individual directors.

Use and consents

Updated to May 2020.

Development consent: construction certificate

As well as obtaining consent to the proposed development, consent must also be obtained before any building works may commence. Again, the requirements vary from state to state and from council to council, but common to all is the requirement for detailed construction (and in some cases landscaping) plans and specifications to be submitted to council (or a private certifier in some cases) for consideration. Once approved, the council (or private certifier) will issue consent documents – usually one giving general development approval, and the second permitting the commencement of construction in accordance with the approved plans. These will contain the conditions that must be met when carrying out the works.

These consents are also required for works undertaken in existing buildings including office towers, such as works to partition separate tenancies, to refurbish services to the building, or to refurbish parts of the building in general. Generally, the property manager for a particular building will manage this process for an institutional landlord, as the process can be quite time consuming and often the property manager's relationship with particular officers at the council will assist in getting the proposals considered and determined within a reasonable timeframe.

Occupancy certificate

Once obtained, building works must be completed in accordance with the consent documents and the conditions imposed by them. When this has been achieved, the council (or private certifier, in some cases) will issue an occupation certificate which enables the building or areas of new works to be occupied and used.

Essential services certificates

Annual certification of essential services is also a requirement in all states. Annual essential services certificates are designed as a means of ensuring that the building is safe, particularly in relation to fire safety issues. Again, the property manager for a particular building will generally ensure that the annual certifications are kept current.

Licences and permits

Depending on the nature of the use of the property, other licences may have to be obtained. For example, if a business uses hazardous materials or stores large quantities of fuel for use in back-up generators and the like, it must obtain and comply with a licence in relation to the storage, use and transportation of those materials.

Often, such licences or permits relate to the business operated by a tenant from the building, not the building itself. Accordingly, a building owner generally will, as a condition of the grant of a tenant's lease, oblige the tenant to obtain and comply with all licences required for its use and occupation of the premises.

Workplace health and safety

In Australia, owners, managers and lessors of commercial properties have specific and strict liability obligations to ensure workplace health and safety (WHS). See Chapter 11 (Labour Laws) for a summary of WHS laws.

In determining liability, the courts will seek to apportion blame to those who had control over events which caused the WHS risk. Therefore, it can be impossible for owners of commercial properties to contract out of these obligations (such as through a lease or a property management contract) when the WHS risk arises as a result of the building's own design and plant.

Accordingly, it is increasingly common for owners of commercial premises to implement additional measures that seek to identify and eliminate (or control) the WHS risk at their premises. Typically, this is achieved by preparing a WHS Plan, which includes a requirement that regular risk assessments are completed on those areas of the building which remain under the owner's control.

Environmental law

Updated to May 2020.

Whether operating in the utilities, resources, manufacturing or waste management sectors or providing a portfolio of commercial properties for lease, most commercial uses of land in Australia are subject to the operation of a growing body of environmental law, violation of which may attract criminal and civil penalties.

State legislation and agencies

Through state-based legislation and environmental protection agencies (EPAs), each state regulates and manages systems for pollution control, contamination, hazardous materials, waste disposal and biodiversity protection.

While the states take different approaches in some areas regarding environmental matters, environmental laws share many common elements:

- Pollution control: All states regulate the discharge of pollutants into the air, land and water. EPAs and other regulatory agencies generally require polluting industries and activities to obtain licences, which establish limits on permitted discharge quantities for specific pollutants.
- Hazardous materials: Most states regulate the storage, use and transportation of hazardous materials and waste. Generally, any enterprise which generates, transports or treats waste requires a permit, as do operators of waste landfills.

State environment laws are actively enforced and the penalties imposed on offenders are influenced by the circumstances in which a violation occurred, including the intention of the offender and the severity of the harm caused to the environment. These penalties may be significant, especially where the harm is found to have been intentionally caused. Such penalties can exceed A$5 million in worst cases, and include imprisonment for individuals. Company directors and managers can be held directly liable for pollution offences committed by their corporation.

Contaminated land

Each state has its own regime regulating the notification, clean-up and remediation of contaminated land. The regimes differ from state to state, but generally each jurisdiction uses a definition of contamination similar to "a condition of land or water where any chemical substance or waste has been added as a direct or indirect result of human activity at above background level and represents, or potentially represents, an adverse health or environmental impact".

Usually the person who caused the contamination bears the primary responsibility for cleaning up contaminated land and groundwater. However, if the polluter cannot be found or has become insolvent, then the authorities may require the owner or occupier of the land to clean up the contamination. In some states, there is a greater risk to owners and occupiers of land, with some authorities having the power to require the owner or occupier to clean up the contamination, regardless of whether they caused the contamination.

As noted above, most states enable criminal prosecution for any contravention of environmental laws that results in serious environmental harm, including any pollution event that results in contamination. It is not an offence simply to own contaminated land, but it is an offence to fail to comply with a clean-up or remediation order issued by the relevant authority.

In a number of states, owners have an obligation to inform the relevant authority if they are aware of significant contamination on their land. Significant penalties can apply for failing to report known contamination, or even for failing to report contamination that an owner ought to have investigated and become aware of.

Due to the potential liability for clean-up that may arise if the polluter cannot be found, it is important that purchasers of land, particularly land that is known to have been occupied by a hazardous industry, carry out environmental due diligence to determine whether the land they are acquiring is contaminated and assess the potential clean-up costs.

Climate change and emissions trading

Updated to May 2020.

The federal government ratified the Kyoto Protocol in December 2007 and its second commitment period in 2015, under which Australia has committed to reduce emissions by 5% below 2000 levels by 2020 (equivalent to 13% below 2005 levels).

The federal government ratified the Paris Agreement on 10 November 2016, under which the federal government committed to a long-term target to reduce Australia's emissions by 26-28% below 2005 levels by 2030. While some countries have indicated that they will update their targets, known as Nationally Determined Contributions (NDCs), in 2020, the federal government has not communicated any intention to do so (and has reiterated its position that Australia's existing target is a fair and ambitious target).

Australia has national greenhouse and energy reporting legislation that requires controlling corporations of a corporate group which emits greenhouse gases in excess of 50 kilotonnes of carbon dioxide equivalent, or produces or consumes 200 terajoules of energy or more, to register and report annually to the Clean Energy Regulator.

Australia has previously introduced a national-level carbon price, the Carbon Pricing Mechanism (CPM), which commenced in 2012 but was abolished in 2014.

Following the repeal of the CPM, the federal government introduced the Emissions Reduction Fund (ERF) which is a voluntary scheme whereby eligible carbon abatement projects are able to generate Australian carbon credit units (ACCUs) for purchase by the Clean Energy Regulator through periodic reverse auctions. In 2014, the federal government pledged A$2.55 billion to fund the purchase of ACCUs through the ERF. As of May 2020, there have been 10 auctions of ACCUs and the majority of the funding has now been committed.

In 2019, the federal government established the Climate Solutions Fund, which will receive A$2 billion in funding between 2020 and 2030. The Climate Solutions Fund will operate as a re-branded ERF and is likely to incorporate the majority of existing project methodologies under the ERF. The Clean Energy Regulator will hold reverse auctions in March and September every year, with the aim of delivering approximately 100 million tonnes of emissions reductions by 2030. An expert panel appointed by the Minister for Energy and Emissions Reductions is currently examining opportunities for further abatement.

To ensure these emissions reductions are not displaced significantly by a rise in emissions elsewhere in the economy, the federal government introduced a safeguard mechanism which commenced on 1 July 2016. The safeguard mechanism requires companies with operational control over facilities with direct (scope 1) emissions that exceed 100,000 tonnes of carbon dioxide equivalent per year (responsible emitters) to keep their emissions at or below a baseline set by the Clean Energy Regulator. Facilities covered by the safeguard mechanism may purchase and surrender ACCUs to offset any emissions over their set baseline.

Renewable energy

Commonwealth legislation and schemes

National Electricity Market (NEM)

The NEM, which commenced operation in December 1998, is a pooled wholesale market for the supply of electricity across Australia (excluding Western Australia and the Northern Territory). The NEM's assets are owned and operated by either governments or privately owned entities. The NEM is the marketplace to which all front-of-meter renewable energy assets are connected. This includes both distributed energy assets (such as roof-top solar) and utility scale renewable energy projects.

The National Electricity Rules (NER) govern the operation of the NEM and are made under the National Electricity Law (NEL). The NEM covers the states of Queensland, Victoria, New South Wales, Tasmania, South Australia and the Australian Capital Territory. Electricity in Western Australia is supplied through the Wholesale Electricity Market. In the Northern Territory, a wholesale market called the Interim Northern Territory Electricity Market exists. Each are governed by their own respective rules.

What is driving growth in renewables?

Over the past decade the Australian Government's 2020 Renewable Energy Target (RET) scheme played a key role in driving the growth in renewable energy in Australia, with the 33,000 GWh target being met a year early. Renewable energy now accounts for 24% of electricity consumption across Australia.

While there are no current plans to extend the RET, renewables continue to grow as a share of electricity generation, driven largely by competitive price as the cheapest source of new-build generation and other technology or state-specific policies. The favourable market conditions have resulted in over 10 GWs being under construction or committed as at May 2020.

Furthermore, the Australian renewable energy sector continues to receive the support of two unique government-owned lending and fund administering institutions – the Clean Energy Finance Corporation and the Australian Renewable Energy Agency, each of which has a mandate to support the continued growth of renewable and clean energy technologies.

In addition, Australia continues to be a leader in innovative technologies – there has been a significant rise in utility scale battery storage projects with some of the largest in the world, and continued increases in waste-to-energy projects as well as distributed energy generation through roof-top solar PV, including by way of virtual power plant arrangements. The Australian Government has recently approved the National Hydrogen Strategy, the purpose of which is to position Australia as a "green hydrogen" leader by 2030. The strategy looks at Australia's clean hydrogen potential and includes a set of nationally coordinated actions involving governments, industry and the community.

Corporate PPAs

The market for corporate power purchase agreements has become increasingly buoyant over the last two years with key global and national corporates contracting for significant volumes of renewable capacity under long-term offtake contracts. This has been a further positive effect on the continued growth of the market by enabling renewable project developers to access debt financing on the back of fixed prices for their output over a long-term period.

Electricity retailers

Having largely satisfied their purchasing obligations under the RET, retailers are now obliged to comply with the retailer reliability obligation (RRO) to support reliability in the NEM by incentivising retailers and some large energy users to contract or invest in dispatchable and "on demand" resources. The Australian Energy Market Operator (AEMO) identifies any potential reliability gaps in each NEM region, in particular as the NEM's thermal fleet is retired and renewable energy generation increases. The RRO commenced on 1 July 2019.

Outlook

The COAG Energy Council has identified that there is a significant transition towards more distributed, intermittent generation sources with the proportion of renewables continuing to grow, being driven by technology improvements and falling costs. Over two million Australian households have rooftop solar PV, providing over 10 gigawatts of generation capacity. As such, the COAG Energy Council has tasked the Energy Security Board (ESB) with developing the "Post 2025 Market Design for the National Electricity Market (NEM)" which will provide advice on a market framework supporting reliability and system-security measured from the mid-2020s.

Furthermore, AEMO in conjunction with the ESB has developed the Integrated System Plan (ISP) that is a whole-of-system plan which provides an integrated roadmap for the efficient development of the NEM over the next 20 years and beyond, with a focus on facilitating the development of renewable energy zones (REZs).

State legislation and schemes

A number of the state and territory governments have also introduced schemes to incentivise the development and implementation of renewable energy projects.

Victoria

The Victorian Government has legislated the Victorian Renewable Energy Target (VRET) committing Victoria to generating 25% of its electricity from renewable energy by 2020, and 40% by 2025. The Victorian Renewable Energy Auction Scheme was established in 2017 to achieve this. The scheme has seen project developers compete to be the lowest cost provider, with the successful bids being awarded long-term offtake contracts to support their projects. On 30 October 2019, the Victorian Government increased the VRET 2030 target to 50% by 2030.

Australian Capital Territory

In 2016, the ACT Government legislated a renewable energy target of sourcing 100% renewable energy electricity by 2020. In November 2019, the ACT Government announced a new renewable electricity auction to be held over 2019 and into 2020.

New South Wales

The NSW Government currently has no state-based renewable energy target. The NSW Government has a strategy to target REZs in the state's Central-West, New England and South-West regions, which coincides with the NSW Transmission Infrastructure Strategy and AEMO's ISP.

Queensland

The Queensland Government's Powering Queensland Plan sets out a strategy to guide Queensland through the short-term and long-term challenges facing Australia's energy market. Under this plan, it confirmed the Queensland Government's commitment to a 50% renewable energy target by 2030 (QRET) and CleanCo, a publicly owned clean energy company, was established. Under the QRET scheme, the Queensland Government has committed to running a reverse auction scheme for up to 400 MW of renewable capacity, including 100 MW of storage.

South Australia

South Australia had a 75% renewable energy target by 2025, which has become a target of 100% net renewable energy by 2030.

Western Australia

The Western Australian Government has introduced an aspirational target of net zero emissions by 2050.

Northern Territory

The Northern Territory Government has committed to a target of 50% renewable energy by 2030.

Tasmania

The Tasmanian Government is on track to achieve its target of 100% renewable energy by 2022. In March 2020, the Tasmanian Government announced a new target of 200% renewable energy by 2040 with a new Renewable Energy Action Plan to be released in April 2020.

15 Real Estate Investment Trusts

15. Real Estate Investment Trusts

General

A Real Estate Investment Trust (REIT) is a unit trust that provides investors with the opportunity to buy an interest in a professionally managed and diversified portfolio of income-producing commercial real estate under a tax transparent structure. REITs are often listed on a securities exchange, but also can be unlisted. Australia currently has one of the most highly securitised property markets in the world. Australian REITs invest in a variety of commercial real estate sectors, including retail shopping centres, office buildings, industrial estates, hotels, warehouses and car parks.

Listed REITs are now one of the largest sectors on the Australian Securities Exchange (ASX). Australian REITs have made significant investments in foreign real estate in recent years, prompting debt and foreign exchange management to become increasingly sophisticated. Offshore investment has occurred principally in the United States, the United Kingdom, Japan, New Zealand, Singapore, Hong Kong and Europe.

REITs are structured as unit trusts with corporate trustees. Such trusts fall within the definition of a managed investment scheme under the *Corporations Act 2001* (Cth) (Corporations Act) and are accordingly regulated by the Australian Securities and Investments Commission (ASIC).

Stamp duty is payable on the establishment of a REIT and on the acquisition of real property by the REIT, and may also be payable on changes in ownership of interests in the REIT. Rates of duty vary between Australian states and territories. Stamp duty is discussed in further detail in Chapter 6 (Taxation).

For the avoidance of doubt, this chapter deals with registered schemes, except where otherwise indicated.

Registration of managed investment schemes

The Corporations Act requires that a REIT operated as a scheme must be registered with ASIC if:

- it has more than 20 members; or
- it is promoted by a person who is in the business of promoting schemes; or
- it is offered to a retail client under a product disclosure statement (PDS).

Registration significantly increases a REIT's establishment and ongoing compliance costs due to the statutory obligations imposed on operators of a registered scheme. For example, a PDS (a regulated form of offer document) is required for any offer of units in the scheme to retail clients.

The trustee of a registered scheme is known as the responsible entity (RE). The Corporations Act regulates the activities of the RE and provides that the RE performs those functions conferred by the Corporations Act and the scheme's constitution (i.e. the deed of trust, some of the contents of which are prescribed by the Corporations Act and ASIC policy).

The RE of a registered scheme must be a public company which holds an Australian financial services licence (AFSL) authorising it to operate the scheme. See Chapter 16 (Financial Services Regulation) for a discussion of Australia's financial services licensing regime.

The RE will usually appoint a related corporate entity to manage the assets of the REIT (the fund manager). The fund manager selects the investment properties and is generally responsible for all maintenance, administration, leasing and improvement of the underlying real estate investments.

The payment of fees relating to the operation of the scheme (including performance fees) is permitted under the Corporations Act, provided the fees paid comply with the terms of the constitution and are fully disclosed in any disclosure documents. Fees may be paid to the RE and/or to the fund manager out of the assets of the scheme. The payment of volume-based shelf-space fees to platform providers is prohibited under the Corporations Act.

Investment strategies

Investment strategies are generally described in the REIT's offering documentation or constitution.

There are no minimum capital requirements for REITs and generally there is no barrier to a REIT in investing in vacant land, property under development or major refurbishment, or mortgages. However, the trustee of the REIT should not carry on any development business or any other trading business from which it derives profits if it wishes to maintain its "flow-through" tax status and does not wish to be taxed as a company. Therefore, any development activity should be for the purpose of the REIT deriving rent from the developed property.

Subject to the terms of the offer document and the REIT's trust deed, an Australian REIT may invest in property-related products such as mortgage-backed securities, securities of property companies or interests in other REITs.

The RE is permitted to acquire an interest in the REIT, provided that doing so would not disadvantage other members and that the interest is acquired for at least the amount payable by any other person. For a listed REIT, member approval is required to allow an issue of REIT securities to a related party, such as the RE, or a party whose relationship to the RE, in the opinion of the ASX, is such that member approval is required. Member approval is also required where the REIT wishes to acquire substantial assets from a related party (see "Related party transactions" below).

Rules applicable to assets

The RE must ensure that:

- the REIT property is clearly identified as such, and held separately from the RE's own property and the property of any other scheme;
- the REIT property is valued at appropriate times in accordance with the REIT offer documentation and constitution; and
- all payments out of the REIT property are made in accordance with the REIT's constitution and the Corporations Act.

The RE is authorised to appoint agents to do anything which the RE is authorised to do in connection with the REIT. Commonly, the assets of a REIT will be held by a third-party custodian appointed by the RE. However, the RE will remain ultimately liable to investors for the proper administration of the REIT.

Disclosure requirements

Generally, offers of interests in a scheme require the preparation of a disclosure document. For example, the offer of an interest in a registered scheme under the Corporations Act requires the preparation and issuance of a PDS. A PDS must contain all information that investors would reasonably require in order to make a decision to invest, as well as other information prescribed by the Corporations Act. ASIC Regulatory Guides 45, 46 and 240 set out additional benchmarks and disclosure principles for mortgage schemes, unlisted property schemes and hedge funds that are open to retail investment.

By contrast, an offer of interests in an unregistered scheme will usually involve the preparation of a disclosure document referred to as an Information Memorandum (IM). An IM is a largely unregulated form of disclosure provided to “wholesale clients”, being high net worth or institutional investors who are considered capable of making certain enquiries independently.

Significant corporate governance issues

Listed REITs

In addition to meeting the legislative requirements of the Corporations Act, REITs listed on a securities exchange must also comply with the rules of the relevant exchange.

For example, ASX listed REITs are encouraged to adopt the best practice recommendations set by the ASX Corporate Governance Council and must include a statement of corporate governance practice in each annual report including reasons for not following any particular recommendations.

Duties of the responsible entity

The RE holds the REIT property as trustee on trust for its members, and therefore all the common law duties of a trustee apply to the RE. In addition, the Corporations Act imposes similar duties on the RE itself as well as duties on the officers of the RE. The overriding principle of these duties is to act honestly, efficiently, fairly and in the best interests of the REIT’s members.

Related party transactions

The Corporations Act extends the provisions which deal with related party transactions involving public companies to registered managed investment schemes, which include REITs.

A financial benefit cannot be given to an RE unless member approval has first been obtained (with some exceptions). The RE is, however, allowed to pay itself fees and exercise rights to an indemnity in accordance with the scheme’s constitution.

The ASX listing rules require that the RE of a listed REIT must obtain member approval if it intends to acquire or dispose of a substantial asset (which is defined under ASX Listing Rule 10.2 as being an asset the value of which is 5% or more of the equity interests of the REIT) from a related party and also require specific member approval of any issue of equity securities to a related party (with some exceptions).

Members’ meetings

The RE may call a meeting of the scheme’s members as it sees fit. The RE must call and hold a meeting of members to consider and vote on a proposed special resolution or proposed extraordinary resolution when requested to do so by members with at least 5% of the votes that may be cast on the resolution or at least 100 members who are entitled to vote on the resolution.

Removal of the responsible entity

The RE may retire voluntarily but must call a meeting of members to enable the members to choose a new company to be the RE of the scheme. The members of a scheme may remove the RE of a listed scheme by special resolution (where at least 75% of the votes are cast by scheme members entitled to vote) or, in the case of an unlisted scheme, by an extraordinary resolution (at least 50% of the votes cast by scheme members entitled to vote).

Compliance

A registered scheme must have a compliance plan which identifies compliance risks and establishes an internal protocol to ensure that each risk is properly monitored and managed. The compliance plan ensures compliance with the Corporations Act and the scheme’s constitution.

The RE must also establish a compliance committee, unless at least half of the directors of the RE are independent external directors. The compliance committee must have at least three members, the majority of whom are external members. The compliance committee monitors compliance by the RE with the scheme's compliance plan and oversees the implementation of the plan.

Governance of the responsible entity

In addition to the responsibilities imposed by virtue of its appointment as an RE, as a company an RE must also comply with the requirements discussed in Chapter 3 (Forms of Business Organisation) and Chapter 4 (Companies and Securities Regulation).

REIT regime and foreign entities

An interest in a REIT is an interest in Australian land for the purposes of Australia's foreign investment laws. Accordingly, the discussion in Chapter 2 (Foreign Investment Regulation) is also applicable to REITs.

Stapled securities

A REIT may be part of a stapled group, in which case an investor is exposed to a funds management and/or property management or development company as well as the real estate portfolio. The company undertakes the active business activities of the stapled group and the REIT holds the passive property investments to derive the rental income.

The conditions of the "stapling" are usually provided in a stapling deed to which the REIT and the company are both parties. Specific provisions are included in the constitutions of both the REIT and the company.

Taxation of REITs

Taxation of foreign members of trusts

Assuming that a trust is not taxed as a company, the general position is that non-resident members will be subject to Australian taxation on their entitlement to the net income to the extent that the income has an Australian source.

The rate of tax applicable to non-resident members will depend on the nature of the relevant income or gain. For example, in relation to Australian source income which consists of dividends, interest or royalties, the income will be subject to Australian withholding tax at the applicable withholding tax rate. Interest income is generally subject to Australian withholding tax at the rate of 10% (although lower rates may be applicable under certain double taxation agreements).

Special rules apply in respect of the taxation of Australian source income and gains other than dividends, interest and royalties. These rules include provisions requiring tax to be paid by the responsible entity. The rate of tax applicable to the RE is generally the rate of tax applicable to the member (that is the marginal tax rates for individual members).

An RE of a managed investment trust (MIT) may be required to withhold tax at a rate of up to 30% on certain distributions to non-residents (not including distributions of interest, dividends and royalties and non-Australian source income). This is discussed in further detail in Chapter 6 (Taxation).

Attribution Managed Investment Trusts

There is a special tax regime for trusts that are Attribution Managed Investment Trusts or AMITs. The principal additional requirement for an MIT to be an AMIT is that the interests of members in the trust are clearly defined at all times when the trust is in existence during the income year. Existing MITs need to exercise a choice to adopt the

AMIT regime. MITs that do not qualify for the AMIT regime continue to be taxed under the standard trust tax provisions discussed above.

The MIT withholding tax regime is available to MITs whether they are AMITs or not.

Under the AMIT regime, trust components (which include both taxable income and some non-taxable income) may be allocated or attributed to members of the trust on a fair and reasonable basis, rather than based on present entitlement to a share of the trust income. In addition, the regime also includes special rules such as: a formal system to allow errors in calculating taxable income to be rectified by making adjustments in the year they are discovered; the ability to make an irrevocable election to treat income and assets attributable to a class of units as a separate AMIT; cost base adjustment rules to increase as well as decrease the cost base of units for CGT purposes; and the treatment of the trust as a "fixed trust", which has important consequences for the trust loss and franking provisions.

16 Financial Services Regulation

16. Financial Services Regulation

Chapter 7 of the *Corporations Act 2001* (Cth) (Corporations Act) governs licensing, product disclosure and general conduct in relation to the provision of financial services and the operation of financial markets in Australia. The Australian Securities and Investments Commission (ASIC) is the regulatory authority that has primary responsibility for administering and enforcing Chapter 7 of the Corporations Act.

The Corporations Act provides for a uniform licensing regime for all persons who provide financial services. It also provides a separate licensing regime for financial markets and clearing and settlement facilities.

Financial services licensing regime

Overview

The Corporations Act requires that a company that carries on a business that provides financial services in Australia must, unless an exemption applies, obtain an Australian financial services licence (AFS Licence). Each AFS Licence contains specific authorisation conditions that set out the financial services that the AFS Licensee is authorised to provide, the classes of financial products for which they may be provided, and the type of clients (wholesale clients and/or retail clients) to whom they may be provided.

An AFS Licensee must make certain disclosures to clients when providing financial services. The level of disclosure required depends upon the type of financial service provided and whether the client is classified as a "wholesale client" or "retail client".

Generally speaking, from 1 April 2020, if foreign companies want to provide financial services in Australia, they will require a Foreign AFS Licence or a full AFS Licence, unless they have the benefit of an exemption (see "Foreign AFS Licensing regime" below).

Financial services

A person provides a "financial service" if they engage in any of the following activities:

- providing "financial product advice", which is defined as a recommendation, statement of opinion or report that is intended to influence (or could reasonably be regarded as having intended to influence) a person in making a decision in relation to a particular financial product or class of financial products (or an interest in that product or class of products);
- dealing in financial products, which is:
  - applying for or acquiring a financial product;
  - issuing a financial product;
  - in relation to securities or interests in managed investment schemes, underwriting the securities or interests;
  - varying a financial product;
  - disposing of a financial product; or
  - arranging for any of the above, unless the person deals in the product on their own behalf or as an agent, in which case the principal will be deemed to be dealing in the financial product;

- making a market in financial products, which occurs (subject to certain exceptions) when:
  - a person regularly states the price at which they propose to acquire or dispose of financial products on their own behalf; and
  - other persons have the reasonable expectation that they will be able to regularly effect transactions at the stated prices;
- operating a registered managed investment scheme – see Chapter 15 (Real Estate Investment Trusts); or
- providing custodial or depository services, which occurs when a provider holds a financial product on trust for, or on behalf of, a client or its nominee.

Financial products

A "financial product" is a facility through which a person:

- makes a financial investment – such as subscribing for, or purchasing, shares, derivatives, interests in managed investment schemes, government bonds or other securities;
- manages financial risk – for example, by taking out insurance or hedging a liability by acquiring a futures contract, entering into a currency swap arrangement or entering into a foreign exchange contract that is settled some time in the future; or
- makes non-cash payments – including payment by cheques (including travellers cheques), direct debit and deposit accounts and certain other payment facilities such as smart cards.

The following are specifically excluded from the definition of financial products:

- re-insurance and credit contracts (other than margin lending facilities);
- foreign exchange contracts that are settled immediately;
- an interest in an "unregistered" managed investment scheme that has 20 or fewer members, is not promoted by a person or an associate of a person who is in the business of promoting managed investment schemes, and is not deemed to be closely related to other scheme(s) where the schemes in aggregate have more than 20 members;
- credit cards, credit facilities (other than margin lending facilities) and letters of credit; and
- bank cheques and bank guarantees.

The Corporations Act also provides that if a financial product is a component of a broader facility that has other components, the AFS Licensing regime only applies to the facility to the extent that it consists of the financial product.

Obtaining an AFS Licence

To obtain an AFS Licence, applicants must show ASIC that they:

- are competent to carry on the kinds of financial services business for which they are applying;
- have sufficient financial and organisational resources and expertise to carry on the business; and
- can meet certain other requirements imposed by law.

AFS Licence applications are made on a standard ASIC form and must be accompanied by the following Core Proofs:

- A5 Proof: Business Description – which must include an overview of the proposed financial services business and contain a chart showing the organisational structure of the business.
- B1 Proof: Organisational Competence – which must contain descriptions of the qualifications and experience of the people who will be making the day-to-day business decisions of each aspect of the financial services business, who are known as responsible managers. The B1 Proof must also include information concerning the procedures that the business will put in place to:
  - ensure compliance with its AFS Licence conditions and other legal requirements;
  - manage the outsourcing of key services such as legal, accounting and audit services;
  - monitor, supervise and train its employees; and
  - manage the risks associated with its financial services business.
- People Proofs: Containing personal information about the proposed responsible managers to help ASIC assess organisational competence and whether the responsible managers are of good character.
- B5 Proofs: Financial Statements and Financial Resources – which identifies the financial requirements which apply to the proposed financial services business and demonstrates to ASIC that the applicant can comply with the relevant financial requirements.

Once granted, each AFS Licence will specify the financial services the AFS Licensee is authorised to provide, the classes of financial products for which those services may be provided, and the type of clients (wholesale clients and/ or retail clients) to whom the services may be provided. For example, a standard stockbroker's AFS Licence might authorise the broker to provide financial product advice, deal in a financial product and apply for, acquire or dispose of a financial product on behalf of another person for the following financial products:

- deposit and payment products
- derivatives
- foreign exchange contracts
- debentures, stocks or bonds issued, or proposed to be issued, by a government
- interests in managed investment schemes
- securities
- superannuation
- margin lending facilities
- to retail clients and wholesale clients.

Foreign AFS Licensing regime

The Foreign AFS Licensing regime is a modified version of the AFS Licensing regime with tailored conditions and exemptions to bring ASIC's regulation of offshore providers in line with international regulatory practices.

The Foreign AFS Licensing regime repeals the "passporting exemptions" and the "limited connection exemption" with effect from 1 April 2020, with a transition period of 24 months until 31 March 2022 for foreign financial services providers to comply with the new requirements of the Foreign AFS Licence. The new "funds management exemption" will be introduced with effect from 1 April 2022.

The transition periods allow foreign financial services providers to:

- identify one or more other AFS Licence exemptions to cover their activities;
- apply for and obtain a Foreign AFS Licence or a full AFS Licence; or
- decide to cease providing financial services to Australian clients,

before the transition periods lapse.

For further detail see "Exemptions from the need to obtain an AFS Licence" below.

Ongoing AFS Licence obligations

The Corporations Act provides a number of ongoing obligations for an AFS Licensee which require it, at all times, to:

- do all things necessary to ensure that the financial services covered by the AFS Licence are provided efficiently, honestly and fairly;
- have in place adequate arrangements for the management of conflicts of interest;
- comply with the conditions on the AFS Licence;
- comply with, and take reasonable steps to ensure that its representatives comply with, financial services laws;
- have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the AFS Licence and to carry out supervisory arrangements;
- maintain the competence to provide the financial services;
- ensure that its representatives are adequately trained and are competent to provide the financial services;
- if the financial services are provided to persons as retail clients, have in place a compliant dispute-resolution system;
- have adequate risk-management systems; and
- if the AFS Licensee is a foreign entity that is not a foreign company, always have an agent resident in Australia which is authorised to accept service of process and notices and notify ASIC of any change in contact details as required.

Exemptions from the need to obtain an AFS Licence

Generally speaking, financial services businesses must be licensed if they want to carry on business in Australia. However in many instances, businesses can avoid the need to obtain an AFS Licence by engaging an AFS Licensee to provide financial services as an agent on their behalf (this may have taxation implications and specific advice should be sought before relying on this exemption). Also, the Corporations Act specifies a number of circumstances where an offshore financial services provider does not require an AFS Licence even though it may be operating in Australia. These include (among others):

- financial services provided to AFS Licensees acting on their own behalf;

- passporting exemptions: Financial product advice or dealing services provided by an offshore provider who is regulated by an overseas regulatory authority specified in writing by ASIC which is considered "sufficiently" comparable to ASIC (for example, the Securities Exchange Commission in the United States, the Financial Services Authority in the United Kingdom, the Monetary Authority of Singapore, the Securities and Futures Commission in Hong Kong and the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) of Germany);
- limited connection exemptions, including (among others):
  - financial services provided to an Australian citizen or resident, where the offshore provider does not engage in conduct intended to or likely to induce people in Australia to use the service, and the service is provided offshore;
  - financial services relating to products traded on a licensed market in Australia (in which the offshore provider participates), where the client is outside Australia (or the offshore provider reasonably believes this is so);
  - financial product advice or dealing services provided by an offshore provider where:
    - the service relates to a financial product acquired in circumstances where the client initiated the contact with the offshore provider or when the client was not in Australia, or supplements or is of the same kind as and is substitution for such a financial product; and
    - the offshore provider does not actively solicit persons in Australia in relation to the financial products; and
  - financial services provided to professional investors by an offshore provider from offshore and which consist of any or all of the following:
    - dealing in derivatives or foreign exchange contracts;
    - providing advice on derivatives or foreign exchange contracts; and
    - making a market in derivatives or foreign exchange contracts; and
- funds management exemption: Financial services provided to professional investors in Australia by a foreign funds management services provider. This exemption will become effective from 1 April 2022.

With the introduction of the Foreign AFS Licensing regime (see above), ASIC has repealed the passporting exemptions and the limited connection exemptions with effect from 1 April 2020, with a transition period of 24 months until 31 March 2022, and replaced them with the funds management exemption from 1 April 2022.

There are certain other circumstances where ASIC will provide specific relief from certain provisions of the Corporations Act to allow offshore financial service providers to carry on business in Australia, including where the financial services are being provided through an authorised representative or intermediary.

Disclosure requirements for AFS Licence holders

AFS Licensees must make prescribed disclosures when providing financial services to retail clients. This disclosure regime is based on three documents:

- the Financial Services Guide (FSG);
- the Statement of Advice (SOA); and
- the Product Disclosure Statement (PDS).

An AFS Licensee must provide an FSG to retail clients when it provides financial services to them. The FSG must include specified disclosures. In addition the FSG must contain sufficient information so that the client can determine whether to acquire the financial service from the Licensee.

An AFS Licensee must provide an SOA to retail clients when it provides personal advice to them. Personal advice is advice that considers the specific objectives, financial situation and needs of the client. The SOA must include specified disclosures and contain sufficient information so that the client can determine whether or not to act on the advice. It must disclose any interest in the service or product on which the AFS Licensee is advising (that might reasonably be expected to be capable of influencing the advice).

An AFS Licensee must provide a PDS (which is similar to a prospectus) for financial products (other than securities where a prospectus is required) if it issues, recommends or sells financial products to retail clients. The PDS must include specified disclosures and any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the financial product.

The disclosure regime outlined above relates only to the provision of financial services to retail clients. The regime relating to wholesale clients (including sophisticated investors) is much less rigorous.

Retail and wholesale clients (including sophisticated investors)

Financial services are provided to clients as “retail clients” unless they are provided to them as “wholesale clients”.

Financial services are provided to clients as “wholesale clients” if one or more of the following apply:

- the value of the financial product or service exceeds an amount specified by regulations made under the Corporations Act (which is currently A$500,000 and must include non-superannuation-sourced money);
- the financial product or service is provided for use in connection with a business that is not a small business (a small business is one that employs fewer than 20 staff or, in the case of a manufacturing business, fewer than 100 staff);
- the client provides the AFS Licensee with a certificate that states that the client has either:
  - net assets of an amount specified by regulations made under the Corporations Act (which is currently A$2.5 million or greater); or
  - gross income over the last two financial years of an amount specified by regulations made under the Corporations Act (which is currently A$250,000 or greater per annum);
- the client is a “professional investor”; or
- the client is a “sophisticated investor”.

A person will be a “professional investor” for this purpose if one or more of the following apply:

- the person is an AFS Licensee;
- the person is a body regulated by the Australian Prudential Regulation Authority (APRA), other than a trustee of any of the following within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth):
  - a superannuation fund;
  - an approved deposit fund;
  - a pooled superannuation trust; or

- a public sector superannuation scheme;

– the person is a body registered under the *Financial Corporations Act 1974* (Cth);

– the person is the trustee of:

  - a superannuation fund;
  - an approved deposit fund;
  - a pooled superannuation trust; or
  - a public sector superannuation scheme,

  within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cth) and the fund, trust or scheme has net assets of at least A$10 million;

– the person controls at least A$10 million (including any amount held by an associate or under a trust that the person manages);

– the person is a listed entity, or a related body corporate of a listed entity;

– the person is an exempt public authority;

– the person is a body corporate, or an unincorporated body, that:

  - carries on a business of investment in financial products, interests in land or other investments; and
  - for those purposes, invests funds received (directly or indirectly) following an offer or invitation to the public, the terms of which provided for the funds subscribed to be invested for those purposes; or

– the person is a foreign entity that, if established or incorporated in Australia, would be covered by one of the preceding paragraphs.

A client will be a "sophisticated investor" for this purpose if the AFS Licensee that is providing the financial product or service is satisfied that the client has sufficient experience in investing in financial products and/or using financial services that allows the client to assess:

– the merits of the product or service;

– the value of the product or service;

– the risks associated with holding the product;

– the client's own information needs; and

– the adequacy of the information given by the AFS Licensee.

The AFS Licensee must provide the sophisticated investor with a written statement setting out why it is satisfied of these matters, and the financial product must not be provided for use in connection with a business. Finally, the sophisticated investor must provide the AFS Licensee with written acknowledgement that the licensee:

– has not given the client a PDS or any other document that would be required if the client was a retail client (such as an FSG or SOA); and

– does not have any other obligations to the client as a retail client.

The definitions of wholesale client, retail client and sophisticated investor do not apply when the financial product being provided is an insurance or superannuation product, in which case the products are generally provided to persons as retail clients.

Enforcement

Methods of enforcement of the Corporations Act have changed after the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, including a shift in ASIC's litigation policies, increased penalties available for breaches of the Corporations Act, and new methods of registering complaints against AFS Licensees.

ASIC's "why not litigate?" policy

ASIC has established an internal Office of Enforcement designed to centralise enforcement practices and strengthen enforcement culture. The Office of Enforcement is also responsible for the adoption of ASIC's "why not litigate?" approach, which requires ASIC to consider whether there is a practical benefit in not litigating a matter where a breach is more likely than not to have occurred and litigating would be in the public interest.

Penalties under the Corporations Act

The Corporations Act provides a suite of penalties that have been significantly increased following the Royal Commission, including maximum penalties of:

- for criminal offences, 15 years' imprisonment and/or a fine the greater of:
    - A$945,000 for an individual or A$9.45 million for a body corporate;
    - three times the benefit gained and detriment avoided by the offence; or
    - for a body corporate, 10% of its annual turnover; and
- for civil breaches, a pecuniary penalty the greater of:
    - A$1.05 million for an individual or A$10.5 million for a body corporate;
    - three times the benefit gained and detriment avoided by the breach; or
    - for a body corporate, 10% of its annual turnover, up to A$525 million.

Australian Financial Complaints Authority (AFCA)

AFCA is a recently established external dispute resolution scheme for financial services. It considers complaints that were previously handled by the Financial Ombudsman Service, the Credit and Investment Ombudsman and the Superannuation Complaints Tribunal, covering a range of financial products. AFCA can make binding decisions and make orders for compensation of losses, but will not make pecuniary orders against a financial institution.

AFCA has replaced a wide variety of external dispute resolution services and is now the "one-stop-shop" for external dispute resolution in the financial services industry.

17 Anti-bribery and Corruption

17. Anti-bribery and Corruption

Updated to May 2020.

Overview

Australia has anti-bribery laws at Commonwealth, state and territory levels.

The Commonwealth anti-bribery legislation governs bribery offences relating to Commonwealth public officials and foreign public officials, as well as false accounting offences. These offences are set out in the *Criminal Code Act 1995* (Cth) (Criminal Code).

The anti-bribery laws in each Australian state and territory apply to bribing public officials and commercial bribery (also referred to as "private bribery" or "secret commissions"). Although the private bribery laws differ in each jurisdiction, they generally make it an offence for an agent or fiduciary to receive (or for someone to offer to an agent or fiduciary) something of value as an inducement to act in a particular way, in relation to the affairs of that agent's principal. However, some offences do not require an agent/principal relationship to exist.

For the majority of Australia's anti-bribery laws, both the person offering the benefit as well as the person receiving the benefit are deemed to have committed an offence. The concept of a benefit is very wide and can include intangible benefits such as hospitality and entertainment. There is no minimum amount of benefit to be provided or offered to invoke the offences.

Domestic bribery

Bribery of a Commonwealth public official

Under Divisions 141 and 142 of the Criminal Code, it is illegal to:

- promise or offer a bribe or corrupting benefit to a Commonwealth public official; or
- provide or cause to be provided a bribe or corrupting benefit to a Commonwealth public official.

Individuals and corporations may be charged with these criminal offences and it is not necessary to prove that the defendant, whether that is an individual or corporation, knew that the official was a Commonwealth public official.

Each Australian state and territory also has laws prohibiting bribery and corruption of state or territory public officials or officers.

Definition of bribery

The bribery offence requires intention and conduct. The conduct must be to dishonestly provide or offer a benefit (or cause it to be provided or offered) to a Commonwealth public official. The intention must be to influence the public official in the exercise of the public official's duties. The benefit may be intangible, such as the provision of hospitality or entertainment.

Unlike providing or offering a bribe, providing or offering a corrupting benefit does not require an intention to influence the official. It is sufficient that the receipt or expectation of the receipt of the corrupting benefit would tend to influence a public official in the exercise of their duties. It is not necessary for a defendant to have known that the official was a Commonwealth public official or that the duties were duties as a Commonwealth public official.

Australian state and territory laws are similar, although some target different types of public officials, for example, specific laws for bribery of elected state officials.

Definition of a Commonwealth public official

The Criminal Code contains a lengthy definition of a Commonwealth public official, including categories or classes of individuals. The definition expressly includes Australian Commonwealth public service employees, defence force members, members of the Australian Federal Police, members of statutorily appointed bodies (such as chancellors of universities) or Commonwealth holders of office such as members of parliament, judicial officers and the Governor-General.

It may include some employees of publicly owned companies in Australia depending on whether they are considered to be employed by the Commonwealth and whether they exercise powers or perform functions conferred on them by a law of the Commonwealth. It also includes service providers contracted to or on behalf of the Commonwealth.

Australian state and territory laws are usually equally broad, although specific laws apply to different types of state or territory public officials.

Penalties

The penalties for committing or attempting to commit an offence of corruption of a Commonwealth public official, including aiding, abetting, counselling, procuring or conspiring to commit those offences, are set out in the table below.

Offence	Individual	Corporation
Bribery of a Commonwealth public official	– Up to 10 years' imprisonment; and/or – A fine of up to 10,000 penalty units[1] (currently equivalent to A$2.1 million).	Up to the greatest of: – 100,000 penalty units (currently equivalent to A$21 million); – triple the value of the illicit benefit; or – 10% of the annual turnover of the corporation in the year preceding the offence.
Offering or providing corrupting benefits to a Commonwealth public official	– Up to five years' imprisonment; and/or – A fine of up to 300 penalty units (currently equivalent to A$63,000).	A fine of up to 1,500 penalty units (currently equivalent to A$315,000).
Incitement	– Up to five years' imprisonment; and/or – A fine of up to 300 penalty units (currently equivalent to A$63,000).	A fine of up to 1,500 penalty units (currently equivalent to A$315,000).

[1] The value of a penalty unit is prescribed by the *Crimes Act 1914* (Cth) and is currently A$210 for offences committed on or after 1 July 2017. On 1 July 2020, the value of one penalty unit will be indexed based on the formula in section 4AA of the *Crimes Act 1914*.

Private bribery

There is no Commonwealth private bribery. However, private bribery/secret commissions is a criminal offence under some Australian state and territory laws. For example, in New South Wales, this is governed by the *Crimes Act 1900* (NSW) (NSW Crimes Act).

The scope of the private bribery offences varies between Australian states and territories. For example, under the NSW Crimes Act the law prohibiting bribery is focused on agent and principal relationships. It is an offence when an agent dishonestly accepts money or benefits from a third party in return for departing from a duty they owe to that agent's principal.

The NSW Crimes Act does not establish quantitative limitations on hospitality expenses but those types of benefits could fall within the scope of the offences.

The penalties for private bribery are prescribed by the laws of each Australian state and territory. For example, under the laws of New South Wales the penalties for individuals involved are:

- up to seven years' imprisonment;
- a fine of up to 1,000 penalty units (currently equivalent to A$110,000); and/or
- repayment of the benefit received.

The penalties in other states are higher. For example, Victorian offences carry 10 year maximum terms of imprisonment.

Political contributions

Contributions to political parties or associated entities are regulated under Part XX of the *Commonwealth Electoral Act 1918* (Cth). In general terms, contributions to political parties are allowed but must be disclosed if exceeding A$14,000 over the year (effective 1 July 2019 to 30 June 2020). The threshold is indexed to the official inflation measure so it generally increases each year.

Separate provisions apply for individual states and territories. These are often far more proscriptive. For example, in New South Wales, total yearly donations above certain limits are banned, which for the year 1 July 2019 to 30 June 2020 ranged from A$2,900 to A$6,400 per year, depending on the person or group to whom the donation is made.

Foreign bribery

Division 70 of the Criminal Code makes it illegal under Australian law to bribe a foreign public official.

The law requires the bribe to have intention and conduct. The conduct must be to dishonestly provide or offer a benefit (or cause it to be provided or offered) to a foreign public official. The intention must be to influence the official in the exercise of the official's duties in order to obtain or retain a benefit or business advantage that is not legitimately due.

The benefit may be intangible, such as the provision of hospitality or entertainment. The Criminal Code does not contain quantitative limitations on hospitality expenses even though these are within the concept of a "benefit" for the purposes of bribery or corrupting benefits.

The bribery of a foreign public official needs to have a connection with Australia: the conduct has to occur wholly or partly in Australia or on board an Australian aircraft or Australian ship or, if the conduct occurs outside Australia, the person must be a citizen or resident of Australia, or body corporate incorporated in Australia.

Definition of foreign public official

A foreign public official is defined broadly and includes employees or officials of foreign government bodies (including military or police service people), contractors to foreign government bodies, intermediaries of foreign public officials, members of the judiciary of a foreign country, employees of public international (inter-governmental) organisations, persons performing duties for an office under a law of that country, and any person in the service of a foreign government body.

Liability of corporation for its representatives

Under the Criminal Code, a corporation will be liable for bribery of foreign public officials committed by an employee, agent or officer of the corporation where the conduct was within the scope of the person's employment or within their actual or apparent authority, and either intention, knowledge or recklessness is attributable to the corporation that expressly, tacitly or impliedly authorised or permitted the commission of the offence. Such authorisation or permission may be established in circumstances where:

- the board of directors or a high managerial agent knowingly or recklessly carried out, or expressly or impliedly authorised or permitted the conduct;
- a corporate culture existed that directed, encouraged, tolerated or led to non-compliance with the law; or
- the corporation failed to create and maintain a corporate culture that required compliance with the law.

In December 2019, the federal government tabled the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019* (Combatting Corporate Crime Bill). If the Combatting Corporate Crime Bill is enacted, companies can be charged with a criminal offence if an "associate" commits the offence of foreign bribery for the profit or gain of the corporation, unless the corporation can establish that it had adequate procedures in place.

An "associate" includes a person who is an officer, employee, agent, contractor or subsidiary of the other person, is controlled by the other person, or otherwise performs services for or on behalf of another person.

Defences

There are two defences under the Criminal Code to bribing a foreign public official. The first defence is where the provision of the benefit is permitted or required by the written law of the place where the conduct occurred.

The second defence is the facilitation payment defence. The making of a facilitation payment can constitute a defence to the charge of bribing a foreign public official but is not available for bribing a Commonwealth public official. The defence requires that:

- the benefit was minor;
- the provider made a written record of the conduct as soon as practicable; and
- the benefit was offered to expedite or secure the performance of a routine government action of a minor nature.

Penalties

The penalties for bribing a foreign public official are the same as the penalties for bribing a Commonwealth public official:

- For individuals involved:
  - up to 10 years' imprisonment; and/or

  - a fine of up to 10,000 penalty units (currently equivalent to A$2.1 million).

- For corporations, the maximum penalty is the greatest of:
  - 100,000 penalty units (currently equivalent to A$21 million);
  - triple the value of the illicit benefit; or
  - 10% of the annual turnover of the corporation in the year preceding the offence.

False accounting

Under Part 10.9 of the Criminal Code it is an offence for an individual or corporation to intentionally or recklessly facilitate, conceal or disguise in their accounting documents an occurrence of bribery, corruption or loss to a person that was not legitimately incurred.

The offence applies to any account, record or document made or required for an accounting purpose, or any financial report, financial record or register required under the *Corporations Act 2001* (Cth) (an accounting document). Specifically, the offences operate by criminalising any conduct by a corporation or individual to either:

- make, alter, destroy or conceal an accounting document; or
- fail to make or alter an accounting document where the person is under a legal duty to do so,

with the intention or recklessness to facilitate, conceal or disguise the bribery.

The Commonwealth penalties for false accounting offences are set out in the table below.

Offence	Individual	Corporation
Intentional false accounting	– Up to 10 years' imprisonment; and/or – A fine of up to 10,000 penalty units (currently equivalent to A$2.1 million).	Up to the greatest of: – 100,000 penalty units (currently equivalent to A$21 million); – triple the value of the benefit obtained from the conduct; or – 10% of the annual turnover of the corporation during the 12 months prior to the conduct.
Reckless false accounting	– Up to five years' imprisonment; and/or – A fine of up to 5,000 penalty units (currently equivalent to A$1,050,000).	Up to the greatest of: – 50,000 penalty units (currently equivalent to A$10.5 million); – 1.5 times the value of the illicit benefit; or – 5% of the annual turnover of the corporation for the year preceding the offence.

False accounting provisions which are not specific to concealing benefits also exist under the Corporations Act and the laws of each state and territory.

Compliance programs

As mentioned above, the Criminal Code imposes criminal liability on a corporation:

- where it is proven that a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the relevant provisions; or
- where the corporation failed to create and maintain a corporate culture that required compliance with anti-corruption law.

Corporations rely on compliance programs to discourage and prevent bribery and corruption within their organisation and this will assist in demonstrating that an appropriate culture exists. Even if during a criminal prosecution a compliance program is found to be inadequate and does not fully exculpate a corporation, it may be a mitigating factor for the purpose of sentencing.

It is not an offence under the Criminal Code to be without a compliance program; it is only a factor that can be taken into account if a corporation is charged with bribery as a result of an employee's or agent's conduct.

If the Combatting Corporate Crime Bill comes into force then compliance programs will also be an important element in establishing adequate procedures.

Deferred prosecution agreements

If enacted, the Combatting Corporate Bill will introduce a Deferred Prosecution Agreement (DPA) regime to encourage companies to self-report serious misconduct to Australian authorities. The terms of the DPA may require the corporation to cooperate with an investigation, pay a financial penalty, admit to agreed facts detailing its misconduct, and implement or improve a compliance program.

Whistleblower protections

On 1 July 2019, the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) (Whistleblower Laws) came into force, significantly enhancing statutory protections available to eligible whistleblowers in Australia. The provisions are contained in sections 1317AA–1317AK of the Corporations Act and Part IVD of the *Taxation Administration Act 1953* (Cth).

The Whistleblower Laws apply to disclosures that are made on or after 1 July 2019. If the detrimental conduct to which the disclosure relates occurred before 1 July 2019, the Whistleblower Laws will apply provided the disclosure is made as if the Whistleblower Laws had been in force at the time the disclosure was made.

Who can be an eligible whistleblower?

To qualify for protection, a "qualifying disclosure" must be made by an "eligible whistleblower" (Whistleblower). A Whistleblower includes current or former officers, employees, suppliers/contractors, employees of a supplier/contractor and relatives and dependants of a person who is or used to fall within one of those categories.

A "regulated entity" includes any company registered in Australia and some other corporations and authorised entities particularly in the banking, insurance and superannuation sectors.

What is a qualifying disclosure?

The Whistleblower Laws will apply to disclosures of information which the Whistleblower has reasonable grounds to suspect concerns misconduct or an improper state of affairs relating to the company (or any of its related bodies corporate).

This includes but is not limited to:

- a contravention of a law, including the Corporations Act, the *Australian Securities and Investments Commission Act 2001* (Cth) or the *Banking Act 1959* (Cth);
- an offence which is punishable by imprisonment for a period of 12 months or more; and/or
- conduct which represents a danger to the public or the financial system.

"Personal work-related grievances" are generally excluded from whistleblowing protections.

For the new protections to apply, a Whistleblower must make their qualifying disclosure to the Australian Securities and Investments Commission, the Australian Prudential Regulation Authority, a prescribed Commonwealth authority or an "eligible recipient". Eligible recipients include senior managers, officers, auditors, actuaries, or any person authorised by the entity to receive qualifying disclosures. For superannuation entities specifically, this includes trustees, directors of a trustee entity or other persons authorised by the trustee to receive qualifying disclosures.

The Whistleblower Laws also allow for public interest disclosures and emergency disclosures to be made to a journalist or parliamentarian but only in very limited circumstances.

Protections afforded to Whistleblowers

Legal immunity

Whistleblowers will receive immunity from civil, criminal, and administrative liability (including disciplinary action) when they make a qualifying disclosure. No contractual or other remedy may be enforced against them on the basis of their disclosure.

Anonymity and confidentiality

Qualifying disclosures can be anonymous disclosures. Revealing the Whistleblower's identity, or any information which is likely to lead to their identification, without consent can be a criminal and civil offence, even where the disclosure is made internally for the purpose of an investigation.

Protection from victimisation

Whistleblowers are protected from victimisation under the Whistleblower Laws. Causing "detriment" to a Whistleblower will also constitute a criminal and civil offence. "Detrimental" conduct includes dismissal, a disadvantageous change of position, discrimination, harassment, intimidation, injury (including psychological harm), damage to property, reputation or business, or any other damage to the person.

Penalties

The penalties in relation to qualifying disclosures will differ depending on the date on which the conduct occurred. The table below sets out the civil and criminal penalties for individuals and companies who breach the Whistleblower Laws.

Contravention	Penalty
Civil penalty provisions (Corporations Act)	
– Breach of confidentiality of identity – Victimisation or threatened victimisation	For an individual: – 5,000 penalty units (A$1.05 million); or – three times the value of the benefit derived or detriment avoided. For a body corporate: – 50,000 penalty units (A$10.5 million); or – three times the value of the benefit derived or detriment avoided; or – 10% of the body corporate's annual turnover, up to 2.5 million penalty units (A$525 million).
Criminal offences (generally under the Corporations Act and Taxation Administration Act)	
– Breach of confidentiality of identity	For an individual: – 60 penalty units (A$12,600); and/or – six months' imprisonment. For a company: – 2,400 penalty units (A$504,000).
– Victimisation or threatened victimisation	For an individual: – 240 penalty units (A$50,400); and/or – two years' imprisonment. For a company: – 2,400 penalty units (A$504,000).

Compensation

Who can seek compensation?

A Whistleblower can seek compensation from a person who causes, or threatens to cause, detriment to them (Victimiser) on the basis that the Victimiser believed that the Whistleblower has or may have made or proposes to make or could make a qualified disclosure. A person other than the Whistleblower who suffers loss as a result of the Victimiser's conduct can also seek compensation.

Who can be liable?

The Victimiser may be an individual or a company (including a third party). A court may also make orders against the employer of the Victimiser. In doing so, the court may take into account a number of different factors, including whether the employer took reasonable precautions and exercised due diligence to avoid the detrimental conduct occurring and to what extent the employer's whistleblowing policy was implemented and given effect.

What types of compensation orders are available?

Compensation orders may include:

- monetary compensation (jointly or severally between the person who causes the detriment and/or the employer);
- an injunction to prevent or stop the detrimental conduct;
- an order requiring the person engaging in the detrimental conduct to apologise;
- reinstatement of a terminated employee;
- an order requiring the first person to pay exemplary damages; or
- any other order the court may think appropriate.

Requirement for implementing a compliant whistleblower policy

All public companies, "large proprietary companies", and proprietary companies that are a trustee of a registrable superannuation entity are required to implement a compliant whistleblowing policy. Failure to implement a compliant policy is an offence under the new laws.

The Australian Securities and Investments Commission has published guidelines which provide information about what a compliant policy must contain along with general good practice recommendations for whistleblowing policies and procedures.

A failure to have in place a compliant whistleblower policy carries penalties of 60 penalty units (currently equivalent to A$12,600) for individuals and 600 penalty units (currently equivalent to A$126,000) for companies.

Appendices

Appendix 1 – Rates of withholding tax

Treaty countries	Dividends (%)	Interest (%)	Royalties (%)
Argentina	10-15	12	10-15
Austria	15	10	10
Belgium	15	10	5
Canada	5-15	10	10
Chile	5-15	5-10	5-10
China	15	10	10
Czech Republic	5-15	10	10
Denmark	15	10	10
Fiji	20	10	15
Finland	0-15	0-10	5
France	0-15	0-10	5
Germany	0-15	0-10	5
Hungary	15	10	10
India	15	15	10-15
Indonesia	15	10	10-15
Ireland	15	10	10
Israel	0-15	0-10	5
Italy	15	10	10
Japan	0-15	0-10	5
Kiribati	20	10	15
Korea (Republic of)	15	15	15
Malaysia	0-15	15	15
Malta	15	15	10
Mexico	0-15	10-15	10
Netherlands	15	10	10
New Zealand	0-15	0-10	5
Norway	0-15	0-10	5
Papua New Guinea	15-20	10	10
Philippines	15-25	10-15	15-25
Poland	15	10	10

Treaty countries	Dividends (%)	Interest (%)	Royalties (%)
Romania	5-15	10	10
Russia	5-15	10	10
Singapore	0-15	10	10
Slovakia	15	10	10
South Africa	5-15	0-10	5
Spain	15	10	10
Sri Lanka	15	10	10
Sweden	15	10	10
Switzerland	0-15	0-10	5
Taiwan	10-15	10	12.5
Thailand	15-20	10-25	15
Turkey	5-15	10	10
United Kingdom	0-15	0-10	5
United States	0-30	0-10	5
Vietnam	10-15	10	10
Non-treaty countries	30	10	30

Dividend withholding tax only applies to the unfranked portion of a dividend. The franked portion of a dividend is generally exempt from withholding tax. Dividends which constitute conduit foreign income are not subject to dividend withholding tax.

Appendix 2 – Personal rates of tax

Resident individuals: 2019-20 income year

Taxable income	Rate
A$0 – A$18,200	0%
A$18,201 – A$37,000	19%
A$37,001 – A$90,000	32.5%
A$90,001 – A$180,000	37%
A$180,001 and over	45%

The above rates do not include the Medicare levy of 2% (resident individuals are generally liable to pay a Medicare levy on their taxable income). For low-income taxpayers a reduced levy or no levy may be payable. Individuals who do not have private medical insurance may be liable for an additional Medicare levy surcharge.

Non-resident individuals: 2019-20 income year

Taxable income	Rate
A$0 – A$90,000	32.5%
A$90,001 – A$180,000	37%
A$180,001 and over	45%

Baker McKenzie helps clients overcome the challenges of competing in the global economy.

We solve complex legal problems across borders and practice areas. Our unique culture, developed over 70 years, enables our 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in our clients.

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