DOING BUSINESS IN AUSTRALIA

Supporting Foreign Investment in the Australian Market

LANDER & ROGERS

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ABOUT US

Lander & Rogers is the leading independent Australian law firm servicing the commercial legal needs of listed and unlisted foreign and domestic clients, and all levels of government.

We're renowned for award-winning client service and providing advice that's practical, pragmatic and easily understood.

Established in 1946, Lander & Rogers now has offices in Melbourne, Sydney, and Brisbane from which we service all Australian jurisdictions.

The size of our firm means that we have the capacity to undertake large matters while remaining flexible enough to ensure that we are highly responsive and visible to our clients.

While we are fiercely independent and proudly Australian, we are also globally connected as the exclusive Australian member of the largest worldwide network of independent law firms, TerraLex. We are ideally positioned to help our clients with their international needs.

As a values-driven firm, we are active in supporting community and minimising our impact on the environment, leveraging our legal capability and innovation resources to impact meaningful change.

This commitment is embedded in our culture and forms part of our firm strategy.

TERRALEX

Cross-border work

We focus on foreign investment into Australia including acquisitions, divestments, joint business structures, restructures, and operational legal requirements.

Our goal is to be the independent firm of choice for international companies seeking to do business in Australia. Our partners travel throughout Asia-Pacific, to the UK, Europe and the US. We develop and build on our strong relationships with international clients and other leading independent law firms around the world. We seek out firms that share our commitment to excellence and exceptional client service, and work with firms that reflect our distinctive culture.

Areas of practice:

- Corporate
- Workplace Relations and Safety
- Real Estate and Projects
- Banking and Finance
- Commercial Disputes
- Pro Bono, Community and Environment
- Family and Relationship Law
- Insurance Law and Litigation
- Compensation Law

Key sectors:

- Financial Services and Insurance
- Retail and Supply Chain
- Energy and Resources
- Real Estate
- Infrastructure and Construction
- Technology and Digital
- Education
- Sport
- Biosciences
- Manufacturing
- Private Clients
- Government

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SECTION 1

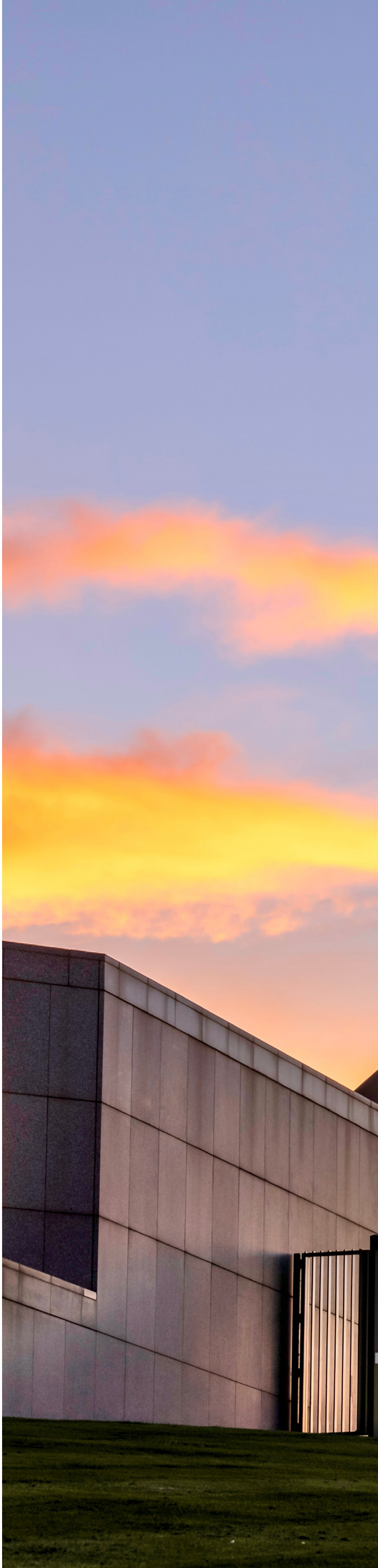
OVERVIEW OF GOVERNMENT

Australia is a democracy with three levels of government, each with its own responsibilities:

- federal;
- state and territory (six state governments and two self-governing territories); and
- local.

Each federal, state, and territory level of government has three arms — a legislature responsible for passing new laws, an executive responsible for carrying out the laws, and a judiciary responsible for interpreting and enforcing laws.

The division of power between federal and state governments is laid out in the Australian Constitution.



SECTION 2

OVERVIEW OF LEGAL SYSTEM

Australia is a common law jurisdiction.

Contracts

Australian contract law, which is of fundamental importance for business and investment, is largely based on case law and not on any codified law or statute law.

In this sense, Australian contract law is similar to English law and that of other common law countries. Parties to a contract are given freedom to agree to whatever terms they choose. Australian law does not usually intervene or impose limits on the terms included in a contract, although there are some exceptions:

The Australian Consumer Law under the *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**) provides certain non-excludable protections for consumers and small businesses including from unconscionable conduct (usually involving a significant imbalance of bargaining power), unfair contract terms in standard form contracts and a number of non-excludable statutory guarantees in relation to consumer transactions.

- Provisions that impose penalties on a defaulting party (as opposed to a genuine pre-estimate of damages) may be unenforceable.
- Arrangements that infringe the anti-trust provisions of the Competition and Consumer Act and unreasonable restraints of trade will not be enforceable.
- Certain statutes govern particular types of relationship – for example, the Partnership Acts in each state and territory govern the relationship of partners among themselves and with third parties, while the Franchising Code of Conduct regulates the terms of franchise agreements.
- Purported waivers of statutory rights or agreements not to sue or agreements to agree or negotiate or consult may not be enforceable.
- The enforceability of an obligation or document may be affected by statutory, common law and equitable provisions and principles including: limits on the time within which to bring an action for breach of contract; suspension of certain rights (including a right of termination or enforcement) where a party triggers certain insolvency events including administration and receivership; protecting innocent parties who rely on representations of counterparties; and frustration of a contract by intervening events.

The enforcement of a security interest granted over assets or other collateral owned or in the possession of a counterparty may be subject to prior registration under the *Personal Property and Securities Act 1999* (Cth).

It is recommended (but not necessary in most cases) that contracts be in writing.

Australia is a signatory to the Vienna Convention on Contracts for the International Sale of Goods. This convention provides uniform rules that govern the formation and performance of contracts for the international sale of goods. The parties to the contract may agree for the Convention rules not to apply and instead select local law as the applicable law.

Enforcement of legal rights

Legal rights and remedies, whether arising under contract or otherwise, are enforceable through the Australian court system. The Australian court system is similar to the English court system in terms of both procedure and implementation, except that Australia has a partially federal and partially state system.

Each Australian state and territory has its own system of courts, with the Supreme Court and Court of Appeal being the highest courts at state and territory level.

There is a separate system of federal courts. The High Court is the highest court of appeal from both federal and state courts.

Remedies available through the court system include damages, injunctions, and seizure of goods. Many Australian courts have the power to order parties to participate in mediation of their dispute before the court will continue to hear the matter.

In keeping with the Westminster system, the courts operate separately from the executive government.

SECTION 2

Sophisticated regulatory framework

Australia's transparent and efficient regulatory environment is world class. It is secure, certain and predictable, and is considered to demonstrate best practice among the OECD countries. Corporate governance practices in Australia are generally highly regarded.

Australia also has a sophisticated financial services sector.

OVERVIEW OF THE BANKING & FINANCIAL SERVICES SYSTEM

Industry structure

The financial services industry in Australia is made up of a number of different streams including advisory, banks, building societies, credit unions, mutuals, insurance, collective investments, finance companies, non-bank credit providers and superannuation. The central bank is the Reserve Bank of Australia.

Australia has a uniform licensing regime that applies to all persons and entities carrying on a financial services business in Australia (regardless of physical location) unless entitled to rely on an exemption. Additional regulations apply to the provision of consumer credit in Australia.

The financial services industry is highly regulated and, as a result, provides a sophisticated and competitive system for those wanting to do business in Australia.

Regulators

The two key regulators in the industry are the Australian Prudential Regulation Authority (**APRA**) and the Australian Securities & Investments Commission (**ASIC**). Both regulators recover their operating costs by charging levies on the entities that they regulate.

APRA is responsible for supervising the risk management and financial stability of Australia's banks, insurance companies and most superannuation funds. APRA sets capital adequacy requirements and has established several prudential standards for compliance in each part of the industry.

ASIC regulates all Australian companies, financial markets, and financial services organisations and professionals who provide financial products or deal in financial products or services in Australia. Regular reports are required to be lodged with ASIC regarding a company's activities.

The Australian Transaction Reports and Analysis Centre (**AUSTRAC**) is the regulator for Australia's anti-money laundering and counter-terrorism financing laws and is also a financial intelligence agency.

Licensing

All banks carrying out banking business in Australia must hold a banking licence issued by APRA (with certain limited exceptions). Insurance companies and superannuation funds are also required to be registered and licensed with APRA. Persons and entities carrying on a financial services business in Australia must either hold an Australian or foreign Financial Services Licence (**FSL**), be authorised by an AFS licensee to act as their representative, or be entitled to rely on an exemption from licensing. Australian FSLs are issued by ASIC. ASIC must be satisfied that the entity is competent to carry on the financial services business and has sufficient financial resources to do so.

If an entity is engaging in credit activities, it will also require an Australian Credit Licence (issued by ASIC) unless an exemption applies.

Anti-money laundering and counter-terrorism financing

Australia's anti-money laundering and counter-terrorism financing laws cover various functions of financial services entities. There are protective measures in place, such as identification processes for opening bank accounts to prevent tax evasion and money laundering.

There are also certain reporting obligations for some transactions that require financial institutions, financial corporations, insurance companies and intermediaries, securities dealers, futures brokers, and gaming institutions to report events such as:

- suspicious transactions;
- significant cash transactions (of A$10,000 or more,
- or the foreign currency equivalent); and
- international telegraphic or electronic transfers of funds and instructions transmitted or received on behalf of their customers.

Entities are also required to undertake regular training for their employees in this area.

Banks

There are four major Australian banks (Commonwealth Bank, Westpac, Australia and New Zealand Banking Group and National Australia Bank), numerous smaller/regional banks, and multiple offshore banks operating in the Australian market. These institutions comprise retail banks, commercial banks and investment banks.

Mortgage-backed loans issued to home buyers, and business loans and consumer credit make up the majority of products offered by the Australian banks.

The Reserve Bank of Australia (**RBA**) is responsible for formulating and implementing Australia's monetary policy. The RBA sets the target cash rate, which is the interest rate that banks pay or charge to borrow funds from other banks on unsecured overnight loans. The RBA is responsible for the stability of Australia's financial system and accountable to the Australian Federal Parliament. Its board meets on the first Tuesday of each month, moving to eight times a year commencing in 2024.

Similar to other central banks worldwide, in an effort to slow rapidly rising inflation in Australia the RBA increased the cash rate almost monthly in 2023. (In July 2023, the target cash rate was 4.10%, up 400 basis points since May 2022). Current RBA cash rates can be found on the RBA website.

Managed funds

The managed funds industry in Australia is made up of large institutional managers as well as boutique investment managers who charge a range of management fees. Funds are generally established as unit trusts, on a single asset (such as cash, fixed interest, property, share or alternative investment funds) or mixed asset/multi-sector basis (generally categorised by risk).

Most managed funds are unlisted; however, some are listed on an exchange, such as the Australian Stock Exchange. There has been a significant increase in credit funds operating in Australia in recent years, as non-bank lending is not currently subject to the same degree of regulation as bank lending.

Life insurance

Life insurance policies require an insurer to pay a benefit to an individual upon their death, disablement, terminal medical condition diagnosis, or other injury. These products are often complex and may have exclusions unique to each product. Superannuation funds are also able to offer life insurance products to their members through a group insurance policy purchased by the superannuation fund from a life insurer.

General insurance

This sector of the industry provides underwritten insurance policies to individuals and businesses to protect against specific losses and other risks. Types of insurance offered include building and contents insurance, contract works insurance, motor vehicle insurance, product liability insurance, travel insurance, employer's liability insurance, and professional indemnity insurance.

Superannuation

Australia's pension funds, known as superannuation funds, are one of the largest asset holders in Australia, currently holding around A$3.5 trillion in assets.

Superannuation funds operate as trusts and can be governed in various ways (a self-managed superannuation fund is managed by individual trustees, for example, while the trustee of a public sector fund is managed by government agencies).

In Australia, an employer must pay (through the private superannuation system) a minimum level of superannuation support for each of its employees, currently 11% of ordinary time earnings (increasing to 12% on 1 July 2025), capped at a maximum income of $62,270 per quarter for FY23/24.

Most recently established funds are accumulation-style funds (sometimes called defined contribution funds), meaning that contributions (made by the employer and often also by the member) accumulate over time in each member's account. Superannuation funds also offer insurance to members. The benefit that is paid to the employee upon a triggering event is simply the balance in the employee's account and, where applicable, an insured component. Examples of triggering events are death, disablement, terminal medical condition, or retirement.

However, some older funds provide "defined benefits". As the name indicates, this means that the benefit paid to the member is defined by a formula. Therefore, employers do not contribute a set rate as in an accumulation fund, but rather contribute in accordance with an actuary's recommendation, designed to ensure that the fund is adequately funded in order to pay out the promised benefits when they are due.

Benefits that accumulate or accrue in the superannuation system are generally "preserved" until the member reaches at least age 56 (or older, depending on the member's date of birth) so that superannuation benefits cannot be accessed by a member before this age except in limited circumstances.

ESTABLISHING A BUSINESS IN AUSTRALIA

Business structure

Businesses can operate in Australia in a number of ways. Each business structure has its own legal characteristics and requirements, which should be considered in the context of your business needs and aims. The available options are outlined below. Each has its own tax implications, which are not addressed in detail here but should also be considered when making a final decision on structure.

Australian companies

In Australia, business is commonly conducted using an Australian company which, when incorporated, forms a separate legal entity with the power to hold assets in its own name and limit liability for its shareholders. The holders of the shares in the company therefore have no liability to the creditors of the company, except for monies unpaid on the shares.

An Australian company is created when the Australian Securities & Investments Commission (**ASIC**), Australia's corporate, markets, and financial services regulator, approves a registration application and registers the proposed company. The *Corporations Act 2001* (Cth) (**Corporations Act**), company constitution, and shareholders' agreement govern Australian companies along with common, torts, and criminal law, including contractual and equitable principles.

There are two main types of Australian companies — public and proprietary.

Both public and proprietary Australian companies:

- are commonly limited by shares;
- must have a registered office within Australia;
- must have Australian resident directors, by whom the company is managed (at least two for public companies and one for proprietary companies);
- may have an Australian resident company secretary (compulsory for public companies and optional for proprietary companies);
- do not have residency restrictions on shareholders; and
- do not generally have minimum capital requirements for their establishment (other than in specific sectors such as banking).

The decision to choose either a public or proprietary company is usually dictated by the likely number of shareholders, the need to raise money from the public, and the desire, or otherwise, for the public disclosure of accounts and other information.

Public Australian companies

Public companies can be unlisted or listed on the Australian Securities Exchange (**ASX**) and can engage in fundraising activities to raise revenue by selling shares to the public.

Public companies typically have more than 50 non-employee shareholders, and no maximum shareholder limit. However, public companies are subject to stringent disclosure requirements and must disclose annual financial reports, directors' reports, and auditor's reports to shareholders.

Proprietary Australian companies

Proprietary companies are generally simpler and cheaper to administer than public companies where the company is a "small proprietary company" (being one which does not trigger certain revenue, gross asset, and employee hurdles). "Large proprietary companies" have financial reporting requirements similar to those of public companies.

Proprietary companies are private companies that can be limited by shares or unlimited with share capital.

Proprietary companies must not have more than 50 non-employee shareholders and must not engage in activity that would attract certain disclosure requirements of the Corporations Act that relate to fundraising through the sale or issue of securities.

Advantages and disadvantages of Australian companies

Setting up a business in Australia as an Australian company, whether public or private, may be an attractive option. Advantages include recognised structures for debt and equity funding, the option of establishing a written shareholders' agreement clarifying exit, governance, and dispute processes where there will be more than one shareholder, and enhanced company asset protection through the separation of ownership and operation of the company. Further, company shareholders are usually afforded limited liability, and the transfer of ownership by share transfer affords companies a level of flexibility in introducing new shareholders to the business with the same or different rights as to dividends and voting.

However, key disadvantages to note in determining whether to choose an Australian company business structure include business set-up and maintenance costs, a requisite understanding of company concepts, operations, and governance, and limited tax concessions, as well as strict regulation by ASIC and the Corporations Act.

Further, Australian law imposes substantial duties on directors of Australian companies, which include duties:

- to act in good faith in the best interests of the company as a whole;
- to act with care and diligence;
- to not improperly use information or the director's position; and
- to ensure that the company does not engage in insolvent trading.

Substantial fines and personal liability on the part of directors apply for a breach of these duties.

Registered foreign companies

For foreign investors, a common alternative to incorporating an Australian company is the registration of a foreign company in Australia. Foreign companies can conduct a business within Australia without using an Australian business structure (such as a subsidiary) by operating an Australian branch. The foreign company must register by submitting registration forms to ASIC accompanied by certain documents, including a certified copy of the company's foreign registration certificate. If these documents are not in English, translations must be provided.

A registered foreign company must have a registered office in Australia and must appoint an agent in Australia who will be responsible for any obligations the foreign company must meet and may be liable for any breaches or penalties.

In addition, once registered, the company is required to lodge copies of its financial statements (as prepared for its home jurisdiction) and to comply with various notification obligations under the Corporations Act.

Advantages of entering the Australian market as a registered foreign company include being able to operate directly in Australia and that no Australian company constitution is required. However, the primary disadvantage is that the foreign company is exposed to all the liability of the Australian business, as there is no intervening legal entity in which such liability is quarantined.

Partnerships

Partnerships can be formed when two or more individuals or companies carry on a business and are usually limited in size to 20 partners. Most partnerships are established and governed by a partnership agreement, which sets out the obligations of the partners to each other, in addition to applicable state and territory legislation.

A traditional partnership is an unincorporated relationship between people carrying on business, with a common view to profit in which the partners share profits in agreed proportions but are both jointly and separately liable for the liabilities of the partnership.

Limited partnerships can be formed in certain states when some (but not all) of the partners wish to limit their personal liability to the amount of their business investment, resulting in two classes of partners — general and limited. General partners' liability for partnership liabilities is unlimited, whereas the liability of limited partners is limited (as recorded on the register).

Limited partnerships can be registered with the relevant state or territory authority, which is advantageous for particular venture capital groups as it may attract favourable tax treatment.

Incorporated limited partnerships are a special corporate form of partnership primarily established for people engaged in high-risk venture capital projects. They are a separate legal entity from their constituent partners.

An advantage of choosing a traditional partnership is that income tax is paid at a partner level, meaning that each partner is entitled to their share of net profit and loss incurred by the partnership, which can be offset against the partner's other business gains and losses.

Limited partnerships, however, are taxed on a similar basis to a company.

A key consideration to note is that a partnership, other than an incorporated limited partnership, is not a separate legal entity, meaning that it cannot sue or be sued and its individual partners are exposed to personal liability.

Joint ventures

A joint venture is a relationship between two entities that enter into an agreement to work to achieve a shared strategic goal. Joint ventures can be either incorporated or remain as a contractual arrangement.

An advantage of unincorporated (contractual) joint ventures is that they are not regarded as separate entities for legal purposes under Australian law, although they may be required to lodge tax returns.

Unincorporated joint ventures are also an appropriate choice if the parties are seeking the flexibility to define the terms of their relationship within a contract, as opposed to legislation. As unincorporated joint ventures are not legal entities, it is common for the ownership parties to be corporations so that their investors obtain the benefit of limited liability.

Trusts

Trusts, which are governed by their respective trust deed and equitable principles, are widely used for a variety of investment and business purposes. A trust is an obligation imposed on a person (including an entity) to hold property for the benefit of beneficiaries. The trustee is responsible for managing the trust's tax affairs, including registering the trust in the tax system, lodging trust tax returns, and paying tax liabilities. Trusts are useful when a commercial entity or business requires the contribution of capital from a number of contributors. The trustee or trustees (who may be corporations or individuals) then operate the business for the beneficiaries.

Unit trusts are a specific type of trust where trust property is divided into fixed and quantifiable parts called units. Unit holders (beneficiaries) subscribe to units in a similar way to shareholders subscribing to shares in a company and the value from the unit trust is distributed to the unit holders in fixed proportions to the units they hold. Another advantage of unit trusts is that the unit holders are protected from the liabilities of the trustee.

Trusts do not usually pay tax — rather, beneficiaries pay their own tax on distributions made to them. The trust itself will be subject to tax (at penal rates) if the trust fails to distribute its net income in the tax year. Trusts also provide some tax advantages over corporations and other structures, and, for this reason, they are often used to purchase real estate. However, a main disadvantage of engaging in business through a trust is that losses are trapped in the trust and do not flow to beneficiaries, meaning that losses can only be offset against future trust income.

Managed investment trusts and schemes

A managed investment trust (**MIT**) is a type of unit trust in which members of the public collectively invest in commercially operated passive income activities, such as shares, property, or fixed interest assets. A trust qualifies as an MIT if it meets certain requirements for the income year that it is in operation, including:

- the trustee is an Australian resident;
- the trust is a managed investment scheme (**MIS**) (as defined and regulated by the Corporations Act and explored further below);
- the trust meets the "widely held" requirement as a genuine collective investment vehicle; and
- the trust is operated or managed by an appropriately regulated entity registered under the Corporations Act (retail) or the *Income Tax Assessment Act 1997* (Cth) (wholesale).

One of the advantages of an MIT is the tax benefits it may provide to a foreign investor.

An MIS is also known as a "managed fund", "pooled investment", or "collective investment". An MIS generally involves a large number of people who have contributed money to obtain an "interest" in the scheme. An "interest" in a scheme is a type of financial product and is regulated by the Corporations Act, ASIC, and if available, each scheme's written constitution. Some MIS are required to be registered pursuant to the Corporations Act.

A "responsible entity" operates the MIS and investors do not have day-to-day control over its operation.

MIS examples include:

- cash management trusts;
- Australian equity (share) trusts;
- international equity trusts;
- agricultural schemes (e.g. horticulture, aquaculture, commercial horse breeding);
- time-share schemes; and
- actively managed strata title schemes.

An advantage of an MIS is that costs are shared with the pool of investors, meaning that the cost of investing is reduced. Further, risk is theoretically reduced due to the diversification of investment, and the expertise of investment managers. However, it should be noted that, as for ordinary trusts, capital losses in a MIS cannot be distributed to members to offset against capital gains made outside the fund.

Corporate collective investment vehicles

Following five years of public consultation, the Corporate Collective Investment Vehicle Framework and Other Measures Bill 2021 (**the Bill**) is now set to commence from 1 July 2022.

The Bill introduces a new type of company for funds management, known as the Corporate Collective Investment Vehicle (**CCIV**), and establishes the accompanying regulatory and tax frameworks that will govern CCIVs. The CCIV regime blends elements of features of companies law under the Corporations Act and the MIS regime currently used in Australia, and drew upon inspiration from regimes in the EU, UK and Asia region.

A CCIV is a new type of company, limited by shares. The CCIV is an "umbrella vehicle" that has its own legal personality and must hold at least one sub-fund (being all or part of the CCIV's business that is registered by ASIC as a sub-fund of the CCIV). Each sub-fund does not have its own separate legal personality. A CCIV (and each sub-fund) is created when registered with ASIC.

The CCIV framework does not create a new tax regime for CCIVs; rather, it uses the existing trust taxation framework and the existing MIT regime. To utilise the MIT regime, the sub-fund of a CCIV must satisfy the MIT eligibility criteria (except that the requirement to be a MIS is replaced with a test for the CCIV sub-fund that essentially replicates the MIS requirements).

At the time of publication, it is unknown whether the new CCIV structure will be adopted by sponsors and investors.

Individual/sole trader

An individual can conduct business in Australia on their own behalf as a sole trader. Generally, only very small businesses carry on the business in the name of the individual owner. A sole trader is personally liable for all debts and obligations incurred by the business, and a personal income tax rate applies.

If an individual wishes to carry on business in a name other than their own, a trading or business name must be registered on ASIC's Business Names Register. There is no specific legislation governing sole traders; rather, applicable legislation depends on the nature of the sole trader's business.

Conducting a business as a sole trader is advantageous in that it is the simplest business structure — it is inexpensive, and there are few legal and tax formalities. However, a key disadvantage is that sole traders are legally and financially responsible for all aspects of their business, meaning that there is unlimited liability and personal assets may be at risk.

No requirement for local ownership

A business being established in Australia is not required to have any proportion of local ownership. As such, a non-resident may establish a wholly foreign-owned business in Australia.

Few business registration requirements

When conducting business in Australia there are a few administrative requirements, including the need to hold an Australian Tax File Number (**TFN**) and an Australian Business Number (**ABN**). These are issued upon an application being made to the Australian Taxation Office (**ATO**). Most businesses must also register for goods and services tax (**GST**) with the ATO in certain situations, including if the business or enterprise has a GST turnover (gross income minus GST) of A$75,000 or more.

There are also certain registration requirements in relation to the use of company and trading names in Australia. Any company operating a business in Australia (whether incorporated in Australia or incorporated outside Australia but registered as a foreign company) must be registered with ASIC. A company will only be permitted to be registered if its name is not identical to another company name that has already been registered with ASIC.

ASIC is the governing entity for the registration, renewal, and administration of business names in Australia.

Businesses must register a business name on ASIC's Business Name Register if they carry on business in Australia, unless they are operating under their individual or company name.

No minimum amount of capital

Companies incorporated in Australia and foreign registered companies are not generally required to have a minimum amount of capital, issued shares, or stock.

However, there are adverse tax consequences for Australian companies owned by overseas parent companies that are funded by the parent company primarily by way of loan or debt, as opposed to capital or share equity.

FOREIGN INVESTMENT

Australia is an ideal destination for strategic foreign investment. It attracts a high level of foreign direct investment in comparison with other developed economies and encourages foreign investments across its economy. The total value of foreign investment in Australia was A$4.5 trillion in 2022, demonstrating Australia's highly competitive position internationally for inbound foreign direct investment.

Acquiring a business in Australia

Most business or company acquisitions or investments in Australia are undertaken by private treaty. However, if the target is an Australian company or registered scheme that is listed on a stock exchange (such as the Australian Securities Exchange (**ASX**)) or an unlisted company with more than 50 members (**Relevant Entity**), then Chapter 6 of the *Corporations Act 2001* (Cth) (**Corporations Act**) must be navigated as part of any acquisition or investment.

The general rule is that a person is prohibited from obtaining a "relevant interest" in voting securities in a Relevant Entity if that would result in the person's voting power in the Relevant Entity:

- increasing from 20% or below to more than 20%; or
- increasing from a position above 20%.

A person's voting power is the aggregate of the relevant interests in the voting securities of the entity of that person and its associates. There are exceptions to the general rule, including acquisitions:

- where prior shareholder approval is obtained;
- of no more than 3% in a six-month period;
- under rights issues;
- under dividend reinvestment plans; and
- under takeovers/scheme of arrangement.

Takeovers

Takeovers and schemes of arrangement are the primary methods by which an acquirer can seek to take control of a Relevant Entity in Australia.

A takeover can either be a market bid or an off-market bid. In a market bid, the acquirer purchases the target's securities by bidding on the relevant stock exchange. The bid must be cash only and unconditional, so it is a less flexible and rarely used process.

An off-market bid is made directly to the target's security holders, can be conditional and offer any form of consideration. An off-market bid can also be used to acquire the target's unquoted securities such as options.

The process of a takeover bid and the timing of the steps in that process are prescribed by the Corporations Act, including the production and delivery of a bidder's statement and a target's statement.

Scheme of arrangement

A common alternative to a takeover bid is a scheme of arrangement effected under the Corporations Act. Schemes of arrangement are court regulated procedures between the target and its shareholders and, as a result, the process can only be used for a "friendly" acquisition.

After agreeing terms with the acquirer (which are usually contained in a scheme implementation deed), a scheme is proposed by the target and a scheme (explanatory) booklet prepared. The scheme booklet and scheme process are approved by the Australian Securities & Investments Commission (**ASIC**) and the court, before the target calls a meeting of its shareholders to approve the scheme.

A scheme must be approved by a majority of shareholders present and voting who between them hold at least 75% of the votes cast.

All takeovers and schemes are potentially subject to the jurisdiction of the Takeovers Panel, which is an expert panel designed to review and act quickly in relation to disputes regarding change of control transactions. Guidance published by the Takeovers Panel is relevant to the conduct of any takeover activity in Australia.

It should also be noted that there are public disclosure requirements once a person acquires a relevant interest in a listed entity of 5% or more. A disclosure must be made once a person's relevant interest reaches 5% or more, and then again if there is a movement of 1% or more in their interest or if they cease to have an interest of 5% of more. The disclosure must be made within two business days of the person becoming aware of the change and must be on a prescribed form containing the information required by the Corporations Act.

Competition Law

The *Competition and Consumer Act 2010* (Cth) (**Competition and Consumer Act**) prohibits mergers that are likely to substantially lessen competition in an Australian market. The provisions of the Competition and Consumer Act are enforced by the Australian Competition & Consumer Commission (**ACCC**). In determining whether a proposed merger would have the likely effect of substantially lessening competition, factors that are considered include:

- the actual and potential level of import competition in the market;
- the height of barriers to entry to the market;
- the 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 available or are likely to be available in the market;
- the dynamic 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.

Working with the ACCC

Parties to a merger are not required to notify the ACCC. However, the ACCC may intervene in a merger if it considers the merger may contravene the Competition and Consumer Act. This intervention may include an informal or mandatory request for information about the merger and approaching the Federal Court for an injunction to prevent the merger proceeding.

Under its merger guidelines, the ACCC recommends notification where the proposed merger will result in the merged firm having a post-merger market share of greater than 20%.

Parties have two avenues available to have a merger considered:

- informal merger review; and
- merger authorisation.

The informal merger review process provides the parties with the ACCC's informal view on whether a merger proposal is likely to breach the Competition and Consumer Act and whether the ACCC intends to intervene.

A merger authorisation will be granted by the ACCC where the parties can demonstrate net public benefit from the proposed merger.

Foreign investment regulation

Foreign investment in Australia is regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**). Under the FATA before undertaking certain activities in Australia, a "foreign person" may be required to notify and seek a "no objection" approval from the Treasurer (**Approval**). The review function for an approval is delegated by the Treasurer to the Foreign Investment Review Board (**FIRB**).

Broadly, the FATA outlines two primary categories of investments by foreign persons which may require FIRB approval – those requiring mandatory notification (**Notifiable Actions**) and those for which voluntary notification can be made (**Significant Actions**). On 1 January 2021, the FATA was substantially amended, introducing new approval categories with a focus on actions that may pose a risk to Australia's national security. The two new categories are "notifiable national security actions" (**Notifiable NSA**) requiring mandatory notification and "reviewable national security actions" (**Reviewable NSA**) for which voluntary notification may be made.

FIRB routinely seeks input from the ACCC (and other government agencies) on mergers that come before it. This will impact the parties' decision whether to voluntarily notify the ACCC of the merger beforehand.

Failure to notify of a notifiable action or notifiable NSA carries penalties (both criminal and civil) and may also result in the investment being unwound. Similar penalties can apply to transactions the Treasurer considers to be significant actions or reviewable NSAs for which no voluntary notification was made but where the transaction is subsequently considered contrary to the national interest or raises a national security risk, highlighting the importance of seeking advice on whether to obtain approval or not.

Foreign person

The definition of "foreign person" is broad, and generally covers overseas residents, foreign corporations or foreign governments and entities in which such people hold an equity interest of at least 20% (or if two or more, an aggregate equity interest of at least 40%).

Tracing

In considering whether a person is a "foreign person", the FATA requires interests in securities or control over voting power of 20% or more to be traced through a corporate group. The result is that the ultimate foreign shareholders of an entity may be deemed to be acquiring the same interests as that of its subsidiaries - meaning those ultimate foreign shareholders will require FIRB approval in addition to the subsidiaries. It is important to seek advice early in order to ascertain the full shareholding structure and relevant information to ensure all impacted parties are adequately captured in the one approval. Adding new applicants after an application has been lodged can cause delays in obtaining approval (even if those applicants are related or part of the same corporate group).

For example, an acquisition by an Australian group of companies which are ultimately foreign owned may still trigger a notifiable action, irrespective of the fact that it is an Australian entity actually making the acquisition.

Types of investment requiring FIRB approval

Certain investments in entities, businesses, or Australian land which are undertaken by foreign persons are typically notifiable actions under the FATA.

Notifiable actions

Notifiable actions for investments in **entities** or **businesses** include:

- investments of 20% or more in:
  - an Australian business or entity; and
  - "sensitive businesses" such as telecommunications, media, transport, human resources, military and defence, and nuclear mines or facilities; and
- acquisitions of a direct interest in an Australian entity or Australian business that is an agribusiness,

in each case which exceed in value the relevant monetary threshold, which varies depending on the location of the investor and type of action.

Notifiable actions for investments in **Australian land** include:

- acquiring an interest in developed commercial land (including interests in an Australian land corporation or land trust, being an entity where interests in Australian land account for more than 50% of the entity's total assets, or leases with a right to occupy which exceeds five years);
- acquiring an interest in developed commercial land which is considered sensitive (for example, where the land has public infrastructure on it);
- acquiring an interest in agricultural land;

again in each case which exceed in value the relevant monetary threshold, which varies depending on the location of the investor and the type of land involved.

In addition, acquiring an interest of any value in:

- residential land or vacant commercial land;
- a mining, production or exploration tenement; and
- an Australian land corporation or land trust (if more than 10% of the assets held by that entity are the above types of land, will be a notifiable action.

Notifiable actions for investments by **foreign government** investors may include (but are not limited to):

- acquisitions of an interest of 10% or more in an Australian business or entity (of any value);
- acquisitions (of any percentage) where that interest allows the investor to participate in the management and control of the business;

  - starting an Australian business; or
  - acquiring an interest (of any value) in Australian land.

Notifiable national security actions (NSAs)

Notifiable NSAs include:

- starting or acquiring a direct interest in a "**national security business**", which generally includes businesses involving:
  - critical infrastructure assets (such as ports, airports, telecommunication assets or carriers, utility assets);
  - storage or access to security classified information;
  - supplying goods, technology or critical services to defence or intelligence communities; and
  - storage or maintenance of personal information of the defence or intelligence community, which, if accessed could compromise Australia's national security; or
- acquiring an interest in "**national security land**", being Australian land which includes:
  - land owned or occupied by the Australian Defence Force (**ADF**) and "defence prohibited areas" (as those terms are defined under the *Defence Act 1903* (Cth)); and
  - land in which an agency in the intelligence community has an interest, if the interest is publicly known or could be known upon making reasonable enquiries.

National Interest Test

When reviewing an application involving a notifiable or significant action, the Treasurer's (with assistance from FIRB) key consideration is whether the proposed transaction will be "contrary to national interests" of Australia.

In undertaking this review, the Treasurer considers a range of factors, including:

- national security;
- competition;
- Australian government policies including taxation;
- impact on the community and economy; and
- the character of the investor.

If an application is made for a reviewable NSA or notifiable NSA only (and does not involve a notifiable or significant action), the application will be reviewed against the national security limb only.

In either case, when making its assessment, the Treasurer will consult with other government departments and agencies, notably the Australian Taxation Office and the ACCC. This process can result in various requisitions flowing from these consultation partners through FIRB to the relevant applicant for their response. To avoid delays, applicants should seek to address key tax, competition or other relevant national interest considerations in their initial application as far as possible. In addition, changes to transaction structures necessitate amendments to the relevant application and may also contribute to delays.

Despite this consultation process, the government respects any "commercial-in-confidence" information it receives and ensures that it is kept secure within each department it consults. It will not share applications with other third parties unless it has the applicant's permission or is ordered to do so by a court.

Powers of the Treasurer

The Treasurer can "**call in**" for review actions which do not have approval or were not otherwise notified, if the Treasurer considers that the action may pose a national security risk. The power can be used while an action is still "proposed" and up to 10 years *after* the action completes. For investments "called in", the Treasurer may give approval, prohibit the action, or require divestment. A foreign person can extinguish the Treasurer's ability to use the "call-in" power by voluntarily notifying.

The Treasurer also has a "**last resort**" power which allows the review of actions after 1 January 2021 (even if approval has been issued) where exceptional circumstances arise. Such circumstances include:

- where the business structure of the foreign person has materially changed since the original notification;
- if the Treasurer becomes aware of a materially false or misleading statement or omission in the original notification process; and

as a result of the above:

- the Treasurer is reasonably satisfied the circumstance raises or relates to a national security risk; and
- exercising its last resort powers is reasonably necessary to eliminate or reduce the national security risk; and
- the use of other options under the government's existing regulatory systems would not adequately reduce the national security risk.

As part of the review of an action under the last resort power, the Treasurer is obliged to negotiate in good faith with the applicant and consult with, and obtain advice from, the national intelligence community. Following conclusion of the review, the Treasurer may give approval (conditional or unconditional), vary or revoke pre-existing conditions on an approval, prohibit the action, undo a part or the whole of the action or require divestment.

Free Trade Agreement countries

Australia is currently party to 10 free trade agreements (**FTA**s) under which it has made various commitments relating to foreign investment screening. A key commitment is a variation to the monetary screening thresholds which may apply to investors from the relevant country or region. Depending on the specific country of origin, investors generally benefit from a significantly higher threshold. The applicable countries include USA, New Zealand, Japan, Singapore, China (amongst others) together with countries that are signatories to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

If interests in entities are traced through multiple jurisdictions, the fact that the ultimate parent is located in an FTA country will not guarantee that the higher monetary threshold would be available. FIRB will only apply the higher threshold if the entity taking the action is located in the FTA country.

Making an application to the FIRB

If approval is required, the relevant "acquirer" should apply for (and secure) approval from FIRB in advance of signing the relevant transaction documents. If this is not practicable, the parties may proceed with signing transaction documents provided they specify that approval is a condition precedent to the parts of the agreement which relate to the acquisition of the relevant interest.

Determining whether approval is necessary is critical as applications attract fees ranging from A$4,000 up to A$1,045,000 per notifiable action, depending on the value and classification of the proposed investment. These fees are in addition to the costs of obtaining advice and preparing the necessary applications. Application fees are usually not refundable. Once an application is filed (and the relevant fee paid) FIRB will examine the proposed acquisition and make a recommendation to the Treasurer on whether the proposal is suitable. As part of that process, FIRB may seek additional information. This may delay the consideration by FIRB so it is important to provide as much information as possible in the application.

FIRB has 30 days to consider the application with a further right to extend that period by up to 90 days via an interim order. Following the Treasurer's determination, FIRB has 10 days to notify an applicant of the outcome of the application.

Practically, if FIRB's review is still incomplete and the 30-day period is nearing expiry, it will likely approach the applicant to agree a voluntary extension of time.

The voluntary extension is far more flexible than an interim order as it can be agreed at any time, for any period, although usually it is a week or two weeks at a time, and multiple voluntary extensions may be sought.

Likelihood of application approval

The Treasurer has the power to prohibit or impose conditions on proposed transactions which the Treasurer determines are not in line with Australia's national interests. Conditions may also apply as a matter of course for certain transactions (e.g. development conditions for vacant commercial land acquisitions).

Transactions in relation to sensitive businesses may be subjected to greater scrutiny. Similarly, Australia's political relationship and the global economic climate may impact the level of scrutiny applied to investors from certain countries or investments made into certain industries.

TAXATION

Taxation in Australia — an overview

The Federal and state governments impose a number of taxes, including income tax, goods and services tax (**GST**), customs and excise duties, land tax (where land is owned), payroll tax, and stamp duty.

The taxation year for income tax purposes ends generally on 30 June and tax returns must be lodged within the specified period after that date. In certain circumstances a taxpayer may apply for a substituted accounting period instead of 30 June. This is more likely to be the case where the financial year needs to coincide with the financial year of a non-resident parent entity.

An individual will be treated as a tax resident if that person resides in Australia. An individual will be regarded as residing in Australia where they are domiciled in Australia (unless the authorities are satisfied that the person has a permanent place of abode outside Australia), or they are in Australia for at least 183 days in the year of income (unless the authorities are satisfied that the person has a usual place of abode overseas and does not intend to take up residence), or they are an eligible employee or member under certain superannuation legislation (or spouse or dependent child thereof).

A company will be treated as a tax resident if it is incorporated in Australia, as will a company that, although incorporated overseas, has its central management and control in Australia or its voting power controlled by Australian resident shareholders.

Income tax

Income tax is imposed by the Australian Federal Government on individuals, companies, and superannuation (or pension) funds. In some cases, the trustee of a trust estate may be subject to tax although it is more usual for the beneficiaries or unit holders, as the case may be, to be subject to tax. Partnerships and joint ventures are not separately taxed, although the net income entitlements of the partners or joint venturers will normally be subject to Australian tax.

The assessable income of an Australian resident includes gross income and net capital gains derived from all sources both inside and outside Australia.

The assessable income of a non-resident includes gross income derived from all sources in Australia and net capital gains on certain taxable Australian property.

All losses and outgoings are generally allowable deductions to the extent that they are incurred in gaining or producing assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income as long as those losses or outgoings are not of a capital, private, or domestic nature. For entities other than individuals and partnerships, to the extent that losses or outgoings exceed the income in any one year those losses can usually be carried forward and offset against income in a subsequent year. Companies and trusts may need to satisfy specified tests in order to carry forward losses.

The individual tax rates for Australian residents (2022 – 2023) are:

Taxable income (A$)	Tax on this income (A$)
0 – $18,200	nil
$18,201 – $45,000	19c for each $1 over $18,200
$45,001 – $120,000	$5,092 plus 32.5c for each $1 over $45,000
$120,001 – $180,000	$29,467 plus 37c for each $1 over $120,000
$180,001 and over	$51,667 plus 45c for each $1 over $180,000

From 1 July 2024, it is proposed that the 32.5% and 37.5% tax brackets will be merged into a single 30% tax bracket whereas the threshold for the top 45% tax bracket will increase from A$180,000 to A$200,000. In addition, there is a healthcare levy of 2% of taxable income in most circumstances, and a healthcare surcharge of up to 1.5% may apply where prescribed taxable income limits are exceeded and an appropriate level of private health insurance is not obtained.

There is also a Low Income Tax Offset for lower income earners (up to a maximum of A$700). This is subtracted from tax payable by taxpayers whose taxable income falls within certain thresholds and the entitlement to which is automatically calculated by the Australian Taxation Office (**ATO**).

For non-residents, the applicable tax rates (2022 - 2023) are:

Taxable income (A$)	Tax on this income (A$)
0 – $120,000	32.5c for each $1
$120,001 – $180,000	$39,000 plus 37c for each $1 over $120,000
$180,001 and over	$61,200 plus 45c for each $1 over $180,000

"Working holiday makers" are subject to a concessional tax rate of 15% on the first A$45,000 of income. Foreign residents are not required to pay the healthcare levy.

For companies the general rate of tax is 30% and this rate applies to all companies that are not eligible for a lower tax rate of 25%. Eligibility for the lower tax rate depends on whether the company is what is termed a "base rate entity". A base rate entity is a company that has an aggregated turnover of less than A$50 million for the 2019-20 income year or each subsequent income year **and** 80% or less of its assessable income is "base rate entity passive income" (that is, no more than 80% of the company's income includes certain passive types of income such as royalties, rent, capital gains and certain dividends and interest). The lower tax rate has been reduced from 26% in the 2020-21 income year and 27.5% in prior income years. Company tax is generally payable quarterly. The amount to be paid is based on income derived from the quarter multiplied by an instalment rate based on the last income tax return lodged.

Generally with trusts, it is the beneficiaries or unit holders, depending on the type of trust, that are subject to tax on their share of the net trust income at the tax rate applicable to the particular beneficiary or unit holder. The trustee will only be taxed (potentially at the maximum 45% rate) if the net income is not distributed to the beneficiaries of the trust by the end of the tax year. In those circumstances the trustee will be taxed and entitled to claim an indemnity out of the trust assets.

Certain types of trusts, such as public trading trusts, are taxed as if they were companies. Special tax rules apply to other types of trusts, such as those used for investment funds such as managed investment trusts (**MIT**s) and attribution managed investment trusts (**AMIT**s). There is a new regime applicable to corporate collective investment vehicles (**CCIV**s) which, although a type of company, will be subject to taxation as a trust on a similar basis to an AMIT. Superannuation or pension funds are generally taxed at the rate of 15% on various types of income as long as they are treated as, what is termed, a "complying fund".

Imputation of dividends

Australia has an imputation system of company taxation. Under this system, dividends paid by Australian resident companies to Australian resident shareholders, and on which those shareholders are taxed, are subject to a tax offset that is generally equal to the amount of tax paid by the company declaring the dividend in respect of its profits. This is designed to eliminate double taxation at the company level and the shareholder level.

Companies are required to maintain "franking accounts" which record the tax paid by the company and the amount of a "franking credit" that can be paid in respect of dividends paid to shareholders. Dividends carrying such franking credits are referred to as "franked dividends" and those that carry no franking credit are referred to as "unfranked dividends".

As a general rule, certain taxpayers are entitled to a refund if their tax offsets for franked dividends exceed their tax liability, ignoring those offsets. Once franking credits have been utilised to offset any income tax liabilities, any excess refunds will be refunded. The taxpayers entitled to the refund of excess franking credits include Australian resident: (a) individuals; (b) certain exempt institutions; (c) trustees assessed on an Australian resident beneficiary's share of trust income; (d) complying superannuation funds, and (e) life insurance companies. Companies are generally not entitled to refunds (with limited exceptions).

Consolidated groups

Australia has a complex tax regime applying to consolidated groups of entities. Under this regime a consolidated group is treated as a single entity for income tax purposes. This means that transactions between members of the group are largely ignored for income tax purposes. The head company of the group, which must be an Australian resident company, is responsible for the income tax liabilities of the group and files a single tax return for the group. An election must be made to form a consolidated group and each member of the group must be a wholly-owned Australian resident. The choice to form a tax consolidated group is optional but irrevocable.

In the case of wholly-owned Australian resident subsidiaries of foreign corporations, there are specific rules allowing for the formation of "multiple entry consolidated" (or **MEC**) groups to which the consolidation tax rules have application.

Withholding tax

Non-resident withholding tax is imposed on interest paid or credited to a non-resident. It is also imposed on interest paid to branches of Australian residents outside Australia. Interest withholding tax is imposed at the rate of 10% and in some cases reduced to nil under certain double taxation treaties. An exemption from interest withholding tax is also available for certain publicly offered debentures and dent interests.

Dividend withholding tax at the rate of 30% is payable on unfranked dividends paid to non-residents and, where a double tax treaty exists between Australia and the country to which the dividend is remitted, this rate of withholding is typically reduced. Dividends that are fully franked will not be subject to withholding tax, although the imputation credit attaching to the dividend will not be available to the non-resident. Withholding tax is also levied at the rate of 30% on royalties paid to non-residents, although this rate is reduced (typically to 5% or 10%) under the various double tax treaties.

Transfer pricing

Australia has robust transfer pricing laws. These laws seek to address arrangements that shift profits out of Australia through pricing arrangements with foreign entities. The provisions seek to evaluate whether such pricing arrangements can be justified according to arm's length pricing principles. Australia seeks to align its law in this regard with the OECD's transfer pricing guidelines.

Taxpayers are required to "self-assess" their compliance with the transfer pricing rules. Importantly, the laws require taxpayers to document how their arrangements satisfy arm's length pricing principles. The Commissioner of Taxation may, under the law, substitute the arrangements entered into by taxpayers with what the Commissioner considers to be arm's length pricing. This may result in an increase in the profits of the taxpayer subject to Australian tax and the imposition of penalties.

The ATO has indicated transfer pricing is a "key compliance focus" and has demonstrated an increased willingness to pursue taxpayers whom it believes have engaged in transfer pricing. It has had success in Australian courts in enforcing the transfer pricing laws.

Thin capitalisation

Australia maintains a thin capitalisation regime. In effect, Australian tax law will disallow a proportion of deductible finance expenses (such as interest) attributable to Australian entities which are foreign controlled and other foreign entities that either invest directly into Australia or operate a business through an Australian permanent establishment. The rules can also apply to Australian entities that control foreign entities or operate an overseas business. There are specific thin capitalisation provisions that apply to authorised deposit-taking institutions such as banks. The thin capitalisation provisions do not apply to taxpayers claiming annual debt expenses (particularly interest) of A$2 million or less.

The effect of these rules is that companies investing into Australia in a substantial way will need to ensure that they maintain the correct ratio of debt to equity in order to avoid having interest deductions disallowed by the ATO. There is a "safe-harbour" rule specified in the rules so that the amount of debt used to finance Australian operations will not be treated as excessive if it is not greater than a debt to equity ratio of 1.5:1. It is proposed that from 1 July 2023, new interest limitation rules will apply. In particular, the existing "safe-harbour" rule will be replaced by a new earnings-based "fixed ratio test" that limits an entity's net debt deductions to 30% of its tax determined earnings before interest, taxes, depreciation, and amortisation (**EBITDA**), with the ability to carry forward denied deductions for up to 15 years subject to an integrity rule. There are other more complex proposed changes.

Debt/equity rules

Financial arrangements entered into by corporate taxpayers can be tested under Australia's tax laws to determine whether, notwithstanding the legal form of those arrangements, those arrangements should be treated for tax purposes as debt or as equity. For example, a loan arrangement may be treated under these rules as equity for tax purposes with the result that interest payments on that loan may be denied as a deduction. Conversely, equity held in a company may, under the rules, be treated as debt and dividends paid on the equity may be allowed as a deduction. Whether an arrangement is treated as debt or equity under these rules is also relevant to the tax treatment of that arrangement under the thin capitalisation rules referred to above.

There are tests specified to determine whether an arrangement will be treated as debt or as equity for tax purposes. An arrangement that is treated as both debt and equity under these tests will be treated as debt.

In brief terms, for an arrangement to be treated as debt for tax purposes it is necessary for the "debtor" to have an effectively non-contingent obligation to repay the amount obtained. It also needs to be substantially likely that the amount repaid is at least equal to the amount initially obtained, and this is measured in nominal terms for arrangements of up to 10 years and in present value terms for arrangements that exceed 10 years.

There are also rules to address certain cross-border hybrid arrangements that have a mismatch in tax treatment under the laws of two or more countries. For example, a deduction is allowed for an interest payment under the arrangement in Australia but that payment is not subject to tax in the foreign country. The rules seek to address such mismatches by denying a deduction or including an amount in assessable income.

Taxation of financial arrangements

Australia has complex rules addressing the taxation of the gains and losses from certain financial arrangements. The rules have particular application to large financial entities such as banks, insurance companies, and superannuation funds. It is possible for taxpayers to elect that the Taxation of Financial Arrangements (**TOFA**) rules apply to financial arrangements to which they are a party. Where TOFA applies, gains and losses are recognised in accordance with various prescribed tax-timing methods including the compounding accruals method and the realisation method.

Capital Gains Tax (CGT)

Capital gains in Australia are generally taxed at the same rate as income tax. Resident individuals and superannuation funds may, however, qualify for a discounted rate of tax in relation to gains from the disposal of assets held for at least 12 months. In the case of individuals and trusts, the gains subject to CGT may be reduced by 50%, and in the case of superannuation funds the gains may be reduced by 33⅓%.

In very general terms the amount of capital gain taxed is the difference between the sale price of the asset and its cost plus certain acquisition costs. Capital losses may be offset against capital gains and may be carried forward to be offset against future capital gains. The resulting net capital gain is included in the assessable income of the taxpayer.

There are certain CGT exemptions or concessions applicable to individuals, trusts, and small businesses. For example, individuals who are Australian tax residents are generally not subject to CGT on any gain resulting from the disposal of their main residence.

Foreign residents are subject to CGT on the disposal of interests in a narrower range of assets referred to as “taxable Australian property”. That term includes Australian real property interests and interests of 10% or more in an entity that has more than 50% of the value of its assets referable to interests in Australian real property. A foreign resident disposing of such “taxable Australian property” may be subject to a withholding of 12.5% of the sale proceeds. The withholding obligation is imposed on the purchaser of the relevant property.

Anti-avoidance

Australia’s tax laws contain various provisions directed at tax avoidance schemes. These include general anti-avoidance provisions that can apply to schemes that have a dominant purpose of obtaining a tax benefit under the scheme. There are also provisions specifically directed at “significant global entities” (**SGE**s), which have a global annual income of A$1 billion or more, which include “multinational anti-avoidance laws” that can apply to certain structures adopted by a SGE to minimise Australian tax from Australian operations; “diverted profits tax” which can apply to the diversion of profits offshore by a SGE to minimise Australian tax, and country-by-country (**CBC**) reporting obligations.

Goods and Services Tax (GST)

In addition to income tax and CGT, the Federal Government also requires GST-registered entities to pay GST on their taxable supplies. The current GST rate is 10% and is calculated on the (GST exclusive) value of a taxable supply. Australia’s GST is a type of value-added tax, whereby the GST is imposed throughout the supply chain but with the end consumer usually bearing the full amount of tax. Generally, a GST-registered business in the supply chain will collect GST on their sales, but will deduct any GST they have incurred on their inputs.

Despite the name, GST applies to more than just the supply of goods and services. Any supply connected with Australia, including supplies of goods, services, real property, rights, licenses and intellectual property, is subject to GST if the supplier meets or exceeds the GST registration threshold, unless an exemption applies. Currently, a supplier meets the GST registration threshold if it makes supplies connected with Australia in excess of A$75,000 in any 12-month period.

In response to the growing digital economy, the scope of Australia’s GST has been significantly expanded to include certain supplies made by non-residents, or the operator of a digital marketplace, direct to Australian consumers. Essentially, a non-resident entity or operator of a digital marketplace may be required to register for, and pay, GST on any supply made to an “Australian consumer” of:

- intangible (digital) supplies, such as a service, software or licence (e.g., access to apps); or
- “low value goods”, being goods with a customs value of A$1,000 or less.

In this context, an “Australian consumer” is an entity or individual who is either not registered for Australian GST or, if GST-registered, not acquiring the supply from the non-resident as part of their enterprise. Strict evidentiary rules apply to non-residents in terms of substantiating whether they are making supplies to Australian businesses or Australian consumers.

While the liability to pay GST to the Federal Government generally rests with the supplier, typically the burden of GST is economically passed on to the recipient. In most cases, Australia's competition and consumer laws require any pricing to be displayed on a final GST-inclusive basis. As such, should a supplier wish to pass on the burden of GST to the buyer, the GST must either be built into the price displayed or there must be a clear contractual provision obliging the buyer to pay the supplier an additional amount in respect of GST. In the absence of a specific contractual provision, the supplier would not otherwise have an automatic right to recover GST from the recipient of the supply. The inclusion of such contractual provisions is the usual practice in drafting contracts in Australia in a business-to-business context.

Certain purchasers of new residential premises, or potential residential land, are obliged to withhold an amount on account of GST from the purchase price of the property acquired and remit the amount so withheld to the ATO.

Fringe Benefits Tax

Fringe Benefits Tax (**FBT**) is a federal tax payable by employers on the value of non-cash benefits provided to employees and their associates. FBT is imposed on employers due to the difficulty of collecting tax from employees on such non-cash benefits provided.

The types of benefits to which FBT can potentially apply include the provision of a motor vehicle, the provision of accommodation and payment of an employee's private expenses. Some benefits provided to employees are subject to concessional FBT treatment.

The rate of FBT imposed generally equates to the tax that would have been payable if, rather than the provision of a fringe benefit, an employee on the top marginal rate had been paid a cash amount. The FBT cost of providing fringe benefits to an employee is typically taken into account by the employer when structuring an employee's remuneration package.

Superannuation Guarantee Charge

Employers in Australia are required to provide a minimum level of superannuation (or pension fund) support to employees by making superannuation contributions to complying superannuation funds. At present, the minimum level of superannuation required to be paid is 10.5% of an employee's "ordinary time earnings" up to a specified level. This level will gradually increase by 0.5% each 1 July until it reaches 12% on 1 July 2025.

Employees have the right to choose the complying fund into which payments are to be made by the employer. Employees generally have access to these funds on their retirement from the workforce.

Employers who do not pay the minimum amount of superannuation required will be subject to the Superannuation Guarantee Charge based on the amount that the employer has failed to contribute (including super calculated on any overtime) plus an interest charge and administration fee.

Stamp duty

Each of Australia's states and territories imposes stamp duty on certain transactions. As stamp duty is a state-based tax, there are marked differences amongst the jurisdictions in terms of the types of assets that are dutiable. However, all states and territories continue to impose stamp duty on transactions involving real estate, including:

- the transfer of significant holdings of shares in private companies and trusts that directly or indirectly hold interests in land; and
- the direct transfer of interests in land.

The legislation in each state and territory is not uniform. For example, Queensland, Western Australia and the Northern Territory continue to impose duty on the transfer of "business assets" such as goodwill, intellectual property and licences located in the relevant state or territory. Further, each state and territory has its own definition of "land" which includes not only freehold land but also an entity's interest in a lease or any assets physically fixed to land (e.g. tenant fixtures and leasehold improvements).

The rate of stamp duty varies among the states and territories and can be substantial. In New South Wales, for example, duty at rates of up to 7% of the transaction value can apply. In recent times, many states impose an additional stamp duty surcharge of up to a further 8% on acquisitions of residential property by foreign persons.

Payroll tax

Each of the states and territories imposes payroll tax. This is a tax based on the amount of wages paid by certain employers where the annual wages or deemed wages paid by the employer exceed a specified threshold (which varies among the states and territories).
In this context, wages can include payments made to contractors and non-cash remuneration such as fringe benefits and share and share option schemes. The rates of payroll tax vary from 4% to approximately 7% of the annual wages bill.

SECTION 6

Land tax

Land tax is levied by the six states and by the Australian Capital Territory on the unimproved value of land. All states other than Western Australia also impose a land tax surcharge of up to 4% which applies to foreign owners of land. Generally, concessions are granted in respect of agricultural land and residential land that is owner-occupied. Although land tax is payable by the owner, in the case of commercial leases, the owner may seek to pass the land tax cost on to the tenant.

CORPORATE GOVERNANCE

Corporate governance is the framework of rules and policies directing the operation of a company. Corporate governance is driven internally by shareholders and directors, and externally by government, lawmakers, and regulatory authorities such as the Australian Securities & Investments Commission (**ASIC**) and the Australian Securities Exchange (**ASX**).

Ultimately, the objective of maintaining good corporate governance is to increase and protect shareholder wealth, whilst minimising risk.

Foreign companies

Companies registered outside of Australia can carry on business within Australia, provided that they are registered to do so with ASIC. ASIC regulates both Australian companies and foreign companies operating in Australia.

The *Corporations Act 2001* (Cth) (**Corporations Act**) includes a series of requirements for registration of a foreign company, including the use of an application form prescribed by ASIC. A foreign company must have a registered office in Australia for the purposes of communication, as well as an appointed local agent.

Australian companies

A foreign company may also choose to acquire an Australian company or establish an Australian subsidiary. There are a number of ways to structure your Australian business, however, the most common is the incorporation of a proprietary or public company. Incorporation gives a company a separate legal status along with its own powers, rights, and liability, distinct from its owners and employees. A proprietary (or private) company must have at least one shareholder and is limited in size to a maximum of 50 non-employee shareholders. A public company must have a minimum of one shareholder but is not limited in its number of shareholders.

There are some key differences between public and private companies, but generally private companies are more appropriate for small to medium-sized businesses. In both instances, the company is owned by its shareholders and managed by its directors.

For more information about establishing a business, see section 5 of this guide.

Corporations Act

The corporate standing and governance of Australian companies are broadly governed by three instruments:

- the Corporations Act;
- their constitution; and
- common law.

The primary source of legal governance is the Corporations Act. Administered by ASIC, the Corporations Act provides the overarching rules of compliance for Australian companies.

Amongst other things, the Corporations Act includes provisions that govern:

- administration of companies;
- financial reporting requirements;
- mergers and acquisitions;
- shareholders' disclosure;
- financial services licensing; and
- fundraising.

Constitution

Most Australian companies are also required to adopt a constitution either on or after registration. The constitution (formally known as a memorandum and articles of association) is a document that includes more specific rules for how the company will be governed internally. The Corporations Act provides a default set of internal rules known as the replaceable rules, which will form part of the company unless displaced or modified by the constitution.

The constitution — and therefore the rules of the company which are not law — can be amended. These amendments require a special resolution to be passed by the shareholders of the company.

A company's constitution and replaceable rules will have the legal effect of a statutory contract between each of the members, and between the company and its directors, company secretaries, and members.

ASX Listing Rules

In addition to the requirements under the Corporations Act, entities listed on the ASX must comply with the ASX Listing Rules. The ASX Listing Rules govern the quotation of securities and their admission to or removal from the official list of the ASX.

Any breach of the ASX Listing Rules may result in a company's suspension from quotation or removal from the official list of the ASX.

Amongst other things, the ASX Listing Rules provide guidance on admission to the list, quotations, continuous and periodic disclosure, securities, meetings, trading suspensions, and on-going listing requirements. Under the ASX Listing Rules, ASX listed entities are also required to include a corporate governance statement in their annual report.

In 2003, the ASX introduced the ASX Corporate Governance Council Principles and Recommendations (**Principles and Recommendations**). The 4th edition was published in 2019. The eight Principles and Recommendations are as follows:

- lay solid foundations for management and oversight;
- structure the board to add value;
- act ethically and responsibly;
- safeguard integrity in corporate reporting;
- make timely and balanced disclosure;
- respect the rights of security holders;
- recognise and manage risk; and
- remunerate fairly and responsibly.

Although these Principles and Recommendations are aimed at ASX listed entities, they also provide good guidance for the structure of non-listed corporations.

Board of directors

Proprietary companies are required to have at least one director, who must be an Australian resident. Public companies are required to have a minimum of three directors, two of whom must be Australian residents.

The directors are responsible for overseeing the management of the company. The board of directors is often described as the corporate organ, and is comprised of directors elected by the shareholders of the company.

The role of the board of directors is distinct from the role of the executives. The board of directors will generally be split between non-executive and executive directors. Executive directors will participate in the day-to-day management of the company, whereas non-executive directors will remain independent from management.

Although a company's constitution may delegate some function to the board of directors, there are certain circumstances where the Corporations Act will require the board of directors to seek approval of the company by way of general meeting. These include key decisions such as changing the constitution, or deciding to wind up the company. Additionally, for listed entities, the ASX Listing Rules may require certain transactions to be approved by the shareholders in a general meeting prior to the exercise of power by the board of directors.

The Chief Executive Officer of the company is the highest ranking executive responsible for the management of the company. The Chief Executive Officer will serve the board of directors and act in accordance with their instructions.

Directors' duties

Directors' duties in Australia are prescribed by the Corporations Act and common law.

A director has a duty:

- to exercise their powers with care and diligence;
- to exercise their powers in good faith in the best interest of the company and for a proper purpose;
- not to improperly use their position or information obtained through their position to gain an advantage or cause detriment to the company;
- not to cause detriment to the company; and
- not trade whilst insolvent.

Where the Australian company is part of a group, it may also be written into the company constitution that the directors can have regard to the interests of the ultimate holding company.

Disclosure obligations

Under the ASX Listing Rules and the Corporations Act, a listed entity has a duty of continuous disclosure. With exception, "once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information".

The continuous disclosure regime aims to improve timely release of information, equal access to information, commercial interests, and confidentiality of information withheld from disclosure.

A failure to comply with a company's duty of continuous disclosure is both a criminal and civil offence which may attract large fines against the corporation and responsible officers.

In circumstances where a company becomes aware of market sensitive information and is not in a position to release the information, the company may need to request a trading halt with the ASX.

Disclosure is not required where a reasonable person would not expect the information to be disclosed. The reasonable person is equipped with the qualities of a person who commonly invests in securities.

Reporting and auditors

A listed entity is required to lodge annual and half-yearly audited financial reports with ASIC. These reports must comply with account standards set by the Australian Accounting Standards Board.

A proprietary company is required to prepare a financial report for the financial year if there is a direction from shareholders, with at least 5% of the votes, or by ASIC.

If a financial report is prepared without direction from shareholders or ASIC, then the proprietary company is not required to obtain an audit of the financial report.

A company must retain its financial records for a minimum of seven years after the transactions covered by those financial records are completed.

An auditor is required to be independent from the company that is to be audited. Independence is necessary to avoid conflicts of interest. Independence and quality are regulated by various instruments including the Corporations Act, the Code of Ethics for Professional Accounts, and the Auditing Standards.

INTELLECTUAL PROPERTY & TECHNOLOGY

Intellectual property is protected in Australia under both federal statutory regimes and the common law. Copyright, registered trade marks, patents, appearance designs, plant breeders' rights and circuit layout rights are regulated by specific statutes. IP Australia administers the statutory regimes applicable to patents, designs, trade marks, and plant breeders' rights.

Copyright

The main source of copyright law in Australia is the *Copyright Act 1968 (Cth)* (**Copyright Act**). There is no system of registration for copyright in Australia; copyright automatically arises in a work or other subject matter upon its creation.

Protected subject matter

The categories of subject matter that can be protected by copyright are: literary, dramatic, musical and artistic works, sound recordings, films, broadcasts and published editions of works.

Rights

Copyright in works includes the right to:

- reproduce the work in a material form;
- publish the work;
- perform the work in public;
- communicate the work to the public;
- in the case of a literary work (other than a computer program) or a musical or dramatic work, enter into a commercial rental arrangement in respect of the work reproduced in a sound recording;
- in the case of a computer program, enter into a commercial rental arrangement in respect of the program; and
- make an adaptation of the work or do any of the above in relation to the adaptation.

Individual creators of works also have moral rights, being:

- the right to be identified as the author;
- the right to object to derogatory treatment; and
- the right not to suffer false attribution.

Moral rights are applicable to literary, dramatic, musical or artistic works, live performances and films. Moral rights do not apply to sound recordings, broadcasts or published editions of works.

Duration of copyright

In relation to works, copyright expires 70 years from the end of the calendar year in which the author dies.

Copyright in sound recordings and films expires 70 years from the end of the calendar year in which the recording or film is first published.

Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made.

Copyright in published editions expires 25 years from the end of the calendar year in which the work was first published.

Moral rights last until the expiry of copyright in the relevant work, with two exceptions. An author's right to object to derogatory treatment in respect of a film and a performer's right to object to derogatory treatment in respect of a recorded performance lasts only for the life of the author and the performer, respectively.

Trade marks

Trade marks may be registered under the *Trade Marks Act 1995* (Cth). In order to be registrable, a trade mark must be distinctive of the applicant's goods or services. The trade mark may either be inherently distinctive (a made-up word or logo) or have gained distinctiveness through use.

Registration gives the registrant the exclusive right to use the registered trade mark in relation to the goods or services for which it is registered. In Australia, a trade mark registration lasts for 10 years, but it may be renewed for further 10-year terms indefinitely.

At common law, rights can also exist in relation to unregistered trademarks, which are considered part of the goodwill of a business.

Patents

Patents are governed by the *Patents Act 1990* (Cth), which currently provides for two forms of patent:

- a standard patent, which has a term of 20 years from the date of filing of the application (and up to 25 years for pharmaceuticals); and
- an innovation patent, which has a lower threshold of patentability and a shorter term of eight years from filing. However, innovation patents are in the process of being phased out with no new applications accepted after 25 August 2021.

The term of a patent cannot be extended (except in the case of pharmaceuticals which may be extended for a further five years in certain circumstances).

In Australia, inventions may also be protected as confidential information under the common law.

In order for a patent to be granted, at the date of application the relevant invention must be new (that is, not disclosed or used anywhere in the world), useful, and inventive or innovative.

When granted, a patent will give the patentee exclusive commercial rights to the invention (a monopoly).

The applicant must provide an Australian address for legal service as well as an address for correspondence (which does not have to be in Australia).

Australia is a party to the Paris Convention and the Patent Co-operation Treaty, which allows a foreign applicant to file a patent application in Australia within a certain period of filing in another Convention country.

Registered designs

Appearance designs may be registered under the *Designs Act 2003* (Cth). Copyright protection is not available for articles produced in commercial quantities.

A design will be registered provided it is appropriate subject matter and there are no similar designs previously registered. Once registered, the owner has:

- protection for the visual appearance of the relevant product; and
- exclusive rights to commercially use, license, or sell the design.

However, a registered design may not be enforced against third parties until it has been examined and certified. To be certified, a design must be new and distinctive.

Registration protects the design for five years from the date the application was filed and can be renewed once for a further five years.

EMPLOYMENT, INDUSTRIAL RELATIONS, AND WORK HEALTH & SAFETY

Employment and industrial relations in Australia are predominately governed by the *Fair Work Act 2009* (Cth) (**Fair Work Act**). The Fair Work Act covers all private sector employees in Australia (with a limited exception in Western Australia). The practical application of the Fair Work Act in workplaces is overseen by the Fair Work Ombudsman and the Fair Work Commission. Alongside the Fair Work Act, state laws impose obligations on employers in respect of various employment matters including long service leave entitlements, equal opportunity employment, and workplace health and safety.

Safety net conditions

The Fair Work Act contains minimum standards, known as the National Employment Standards (**NES**), which apply to the terms and conditions of the employment of employees covered by the Fair Work Act. The NES are as follows:

Hours of work

The maximum weekly hours of work for an employee is 38 hours (subject to the exception of any reasonable additional hours).

Requests for flexible working arrangements

In certain circumstances, employees who have worked with the same employer for at least 12 months either in a permanent or casual capacity may request a change in their working arrangements. This may include changes to the hours, patterns, or locations of their work. A request for a flexible working arrangement may only be refused on reasonable business grounds.

Since 6 June 2023, employers must follow a more prescriptive process when determining whether to accept or refuse an employee's request for a flexible working arrangement. If employers intend to refuse a request, they must provide detailed reasons for doing so and propose any potential alternative options to accommodate the employee's needs. The Fair Work Commission will be able to arbitrate a dispute relating to flexible working arrangements and make orders in respect of an employee's request. The grounds to make a request will also be extended to include where an employee is pregnant, caring for a family member over the age of 55, or experiencing domestic violence.

Annual leave

All employees (other than those employed on a casual basis) are entitled to four weeks of paid annual leave each year.

Parental leave

Employees, including certain casual employees, who will or have primary responsibility for the care of a child are entitled to 12 months of unpaid parental leave and are able to request an additional 12 months of unpaid leave. An employee may also take their unpaid parental leave in the event they experience a stillbirth. Since 6 June 2023, new rules apply to employers who intend to reject an application from an employee who requests an extension of their unpaid parental leave.

Employees who earned $168,865 or less in the 2022-23 financial year will generally be eligible for federal government-funded Parental Leave Pay for 18 weeks. For children born or adopted from 1 July 2023 onwards, this will increase to 20 weeks. Employers required to provide Parental Leave Pay are reimbursed by the government. It is important to recognise that many employers decide to provide additional parental leave entitlements above these minimum requirements.

Personal/carer's leave

All employees (other than those employed on a casual basis) are entitled to 10 days of paid personal/carer's leave each year. Where an employee (including an employee employed on a casual basis) has exhausted their entitlement to paid leave, they are entitled to two days of unpaid carer's leave for each occasion.

Compassionate leave

All employees (other than those employed on a casual basis) are entitled to two days of paid compassionate leave for each occasion where a member of their family or household dies, contracts a personal illness, sustains a life-threatening personal injury, or suffers a miscarriage.

Family and domestic violence leave

Under the NES most employees, including part-time and casual employees, are now entitled to 10 days of paid family and domestic violence leave each year. Leave renews each year but does not accumulate year-to-year. For employers with fewer than 10 employees, these changes will come into effect on 1 August 2023.

Community service leave

All employees (other than those engaged on a casual basis) who engage in eligible community service activities may take unpaid leave for the duration of the activity.

Public holidays

All employees are entitled to be absent from work on gazetted public holidays (subject to the exception where an employee is reasonably required to work). Permanent employees are entitled to be absent whilst receiving their ordinary pay.

Notice of termination and redundancy pay

An employer is unable to terminate an employee's employment without the provision of written notice on the day of the termination (with the length of the notice depending on the duration of service of the employee). An employee may also be entitled to redundancy pay if their employment terminates because of the redundancy of their role.

Casual employment conversion

An employer has an obligation to offer permanent employment to casual employees who have been employed for 12 months, have worked a regular pattern of hours for at least six months and could continue working the same pattern as a part-time or full-time employee.

Fair Work Information Statement

All new employees must be presented with a Fair Work Information Statement which contains information about the NES, collective agreements and modern awards, trade union rights, and termination of employment. There is a separate Fair Work Casual Employment Information Statement. A Fixed Term Contract Information Statement will soon be introduced, which will need to be provided to some employees (discussed further below).

Awards

Employees in Australia may be covered by an industry-specific or occupation-specific modern award which sets out minimum terms and conditions of employment for those employees who fall within the scope of the award. Modern awards generally contain terms dealing with issues including minimum wages, hours of work, types of employment, consultation, and dispute resolution.

Enterprise agreements

Alternatively, employees in Australia may be covered by an enterprise agreement. An enterprise agreement is negotiated by an employer and its employees (or a trade union on behalf of the employees). Employees covered by enterprise agreements must be better off than they would be if the relevant modern award applied to them.

In some industries, trade unions remain prominent as representatives of their employee constituencies, at both the individual and collective bargaining levels. Australian employees' rights to associate with (or not associate with) a trade union are protected. The Fair Work Act prohibits the adverse treatment of an employee based on their union membership (or lack of union membership). The Fair Work Act also protects employees' rights to be represented by an employee organisation during a period of collective bargaining.

Recent amendments to the Fair Work Act have created new enterprise bargaining streams to provide employees and unions with enhanced abilities to bargain for multi-enterprise agreements.

Individual employment contracts

Employment agreements

Employers in Australia are not required to enter into written contracts with their employees. However, most Australian employees will be covered by some written allocation of rights, responsibilities, and risks. These include contracts at the individual level, "enterprise agreements" at the enterprise level, and "modern awards" at the industry and/or occupational level. Many awards require an employer to provide certain details of the employment in writing. An employment contract cannot exclude the NES.

Pay

Most workers in Australia are entitled to be paid a national minimum wage. Employers who pay below the national minimum wage may be liable for large penalties. The national minimum wage is less for employees under the age of 21 and for some apprentice employees. The national minimum wage does not apply to independent contractors who are not deemed by law to be employees, although some independent contractors are regulated by some forms of minimum standards. There are also laws which offer independent contractors recourse if the contract or its terms are deemed to be "unfair".

Employment benefits

Australia operates a compulsory superannuation or pension scheme. The provision of other benefits (including health or medical benefits) is at the discretion of the employer.

Employee incentive schemes

As part of the Australian Government's commitment, senior executives and employees of companies in early stages of growth are often given access to incentive schemes. These can be structured in various ways. The most common types include share option plans, performance rights plans, and share plans. These strengthen the alignment of interests of employers and employees and are sometimes used as a supplementary means of payment. To encourage employee share ownership and entrepreneurship in Australia, the Federal Government provides taxation incentives that promote the use of employee incentive schemes. The Australian Securities & Investments Commission has also widened the exemptions from various Australian prospectus and other fundraising requirements in respect of employee incentive schemes that are offered to Australian resident employees.

Fixed-term employment contracts

From 6 December 2023, fixed-term employment contracts will be prohibited where the contract is for a term of more than two years. This includes renewable and consecutive contracts for the same or substantially similar work. There are some limited exceptions to this, including:

- where the employee is engaged for specific types of work;
- where the employee earns more than $167,500 per annum or is a casual worker;
- where the position is funded by the government or relates to a governance position of predetermined duration; or
- where the relevant contract is otherwise permitted by a modern award.

Employees commencing a fixed-term employment contract will need to be presented with a Fixed Term Contract Information Statement, as prepared by the Fair Work Ombudsman, before or as soon as practicable after the employment contract is entered into.

These amendments will apply only to new fixed-term employment contracts and extensions. Where a contract purports to exceed the new limits, the term will cease to have effect, which will effectively convert the employment to a permanent position. Employers cannot alter an employment contract to avoid contravening these provisions. Breaches will attract a civil penalty of up to $93,900 (or $939,000 for a serious contravention).

Pay secrecy

As of 6 June 2023, an employee has the right to disclose information about their remuneration and to ask other employees about their remuneration. Pay secrecy clauses in contracts of employment cease to have effect if they hinder these rights. An employer will contravene these provisions if they enter into an employment contract which includes terms inconsistent with these new pay secrecy amendments. Breaches can attract a civil penalty of up to $93,900 (or $939,000 for a serious contravention).

Work Health and Safety

Employers in Australia must comply with Work Health and Safety (**WHS**) legislation. The WHS legislative regime is state-based and uniform, with the exception of Victoria and Western Australia, which is modelled on national WHS legislation.

Under the WHS regime, employers must do everything reasonably practicable to ensure the health and safety of their workers, any other person at their workplace, and any site connected with their business. This includes monitoring, on an ongoing basis, any risks to health and safety and, where necessary, taking active steps to minimise the risks.

A breach of a WHS law may be a criminal offence which may lead to the prosecution of the employer/company (and its officers) by the requisite authority and the imposition of fines or a custodial sentence for individuals.

Unfair dismissal

Under the Fair Work Act, an employee may bring a claim for unfair dismissal where the termination of their employment was "harsh, unjust or unreasonable".

In order to be eligible to bring a claim for unfair dismissal, an employee must have been employed for a minimum of six months (or 12 months for those employed by a small business) and (unless they are covered by a modern award or enterprise agreement) earn less than $167,500 (as at 1 July 2023 – this threshold is CPI-adjusted annually). An employee who has been dismissed due to a "genuine redundancy" will not be protected by unfair dismissal laws.

For small businesses (fewer than 15 employees), the Small Business Fair Dismissal Code prescribes the termination process. If the code is followed, termination is deemed fair, regardless of other considerations.

Discrimination

Discrimination in an Australian workplace will be unlawful where a person is treated less favourably based on their possession of a "protected attribute" — this includes the person's age, sex, race, disability, or religion. Recent amendments to the Fair Work Act have introduced breastfeeding, gender identity and intersex status as protected attributes. Employers found to have discriminated against an employee will be liable to pay compensation and may be ordered to implement remedial measures.

Bullying

The Fair Work Act contains provisions that prohibit workplace bullying, which occurs where a person or group of people repeatedly act unreasonably towards a person or a group of workers and this behaviour creates a risk to health and safety. Unreasonable behaviour includes victimising, intimidating, threatening, and humiliating.

An employee may apply to the Fair Work Commission for a "stop bullying" order. Except for a fine, compensation, or reinstatement, the Fair Work Commission may make any order it considers appropriate to prevent the employee being bullied.

Sexual harassment

The Fair Work Commission has the power to make "stop sexual harassment" orders. An employee who has been sexually harassed at work can apply to the Fair Work Commission to stop the sexual harassment. Under the Fair Work Regulations, the definition of "serious misconduct" has been amended to now include "sexual harassment".

The Fair Work Act has recently been amended to include a broad prohibition against sexual harassment in connection with work. While employees still have the option to seek "stop sexual harassment" orders, they can now also apply to the Fair Work Commission to deal with the dispute.

The *Sex Discrimination Act 1984* (Cth) has also been amended to include a new Part IIA which introduces a positive duty requiring an employer or a person conducting a business or undertaking to take reasonable and proportionate measures to eliminate, as far as possible, conduct that includes sexual harassment, harassment on the ground of sex, discrimination on the ground of a person's sex, conduct that subjects a person to a hostile workplace environment on the ground of sex and acts of victimisation.

General protections

An employee, prospective employee, or independent contractor may bring a claim under the general protections provisions in the Fair Work Act where their employer has taken "adverse action" for an unlawful reason – e.g. because the person has a workplace right, proposes to exercise a workplace right, or has exercised a workplace right. Unlike a claim for unfair dismissal, there is no minimum period of employment a person must serve in order to make a claim for adverse action. There is also technically no limit on the amount of compensation that an employer may be ordered to pay by a court in the event that it is found to have acted adversely towards an employee.

Casual employment

Under the Fair Work Act, a person will be a casual employee if they are offered and accept employment on the basis that the employer makes no firm advance commitment to continuing indefinite regular work.

In considering this definition, only these factors may be taken into account:

- whether the employer can elect to offer work to the employee, and whether the employee can elect to accept or reject work;
- whether the employee will only work as required according to the employer's needs;
- whether the contract of employment describes the employment as casual; and
- whether the person will be entitled to a casual loading (usually 25%) or a casual-specific rate of pay.

Superannuation

Employers are required to make superannuation (pension) contributions on behalf of their employees. The current minimum level of contribution is 11% of the employee's gross earnings. This is slated to increase further to 12% in the coming years. Employers who fail to meet the minimum level of support are liable to pay a superannuation guarantee charge which is not tax deductible.

An employee is entitled to nominate the fund into which their employer will make superannuation contributions. In the absence of a nomination, an employer must pay the contributions in accordance with the directions of the Australian Taxation Office.

Employees can access their superannuation once they reach a certain age or in defined circumstances of personal hardship.

SECTION 9

Migration and visas

Companies seeking to employ non-Australian overseas staff in Australia need to comply with a range of legislative requirements, including ensuring employees have relevant visas that provide working rights.

The Temporary Skill Shortage (subclass 482) visa (**TSS visa**) was introduced by the Federal Government in March 2018. The TSS visa has short-term and medium-term streams. The short-term stream provides applicants with occupations on the Short-Term Skilled Occupations List with visas up to two or four years (if an International Trade Obligation applies). The medium-term stream provides applicants with occupations on the Medium and Long-Term Strategic Skills List with visas up to four years.

The introduction of the TSS visa and removal of the former Temporary Work (Skilled) (subclass 457) visa has resulted in the number of occupations eligible for a visa being reduced or having restricted access.

We recommend consulting a migration law specialist for information on relevant visa requirements and conditions.

COMPETITION & CONSUMER LAW

Australia's competition and consumer regulation is found primarily in the Competition and Consumer Act 2010 (Cth) which applies nationally.

Competition law

Part IV of the Competition and Consumer Act prohibits the following anti-competitive practices:

- cartel conduct;
- concerted practices and arrangements which substantially lessen competition;
- misuse of market power;
- anti-competitive exclusive dealing;
- resale price maintenance; and
- mergers or acquisitions that are likely to substantially lessen competition in a market for goods or services in Australia.

Cartel conduct

Cartel conduct may be prosecuted as either a civil or criminal offence and can expose company executives and employees to imprisonment for up to 10 years. In addition, executives and employees can potentially face fines of up to A$550,000 per contravention and be banned from being a company director or company manager for life. Corporations are subject to fines of up to A$50 million, or three times the value of the benefit gained, or, if the gain cannot be ascertained, 30% of annual group turnover — whichever is the highest — for each violation.

Cartel conduct involves contracts, arrangements, or understandings between competitors that have:

- the purpose or effect of fixing, controlling or maintaining the price of goods or services; or
- the purpose of
  - restricting output (production and supply);
  - allocating customers, suppliers, or territories; or
  - bid-rigging.

There are limited statutory exceptions to the prohibition against cartel conduct in relation to:

- joint ventures;
- collective bargaining arrangements duly notified to the Australian Competition & Consumer Commission (**ACCC**);
- collective acquisition or joint advertising of goods;
- cartel provisions authorised by the ACCC; and
- arrangements between related bodies corporate.

Misuse of market power

Section 46 of the Competition and Consumer Act prohibits misuse of market power. It prohibits any corporation with a substantial degree of power in a market in Australia from engaging in conduct which has the purpose or is likely to have the effect of substantially lessening competition in that market or in any other market in which the corporation supplies or acquires goods or services. The mere acquisition or possession of substantial market power does not violate Section 46, however, once market power is acquired, the corporation must avoid conduct which has the proscribed purpose or effect.

Merger clearance

Section 50 of the Competition and Consumer Act prohibits acquisitions of shares or assets which have the effect or likely effect of substantially lessening competition in a market in Australia.

There is no mandatory pre-merger notification requirement and the ACCC has no power itself to prevent a merger. However, it may seek orders from the Federal Court if it forms the view that a merger is likely to contravene Section 50. The ACCC encourages parties to prospectively inform the ACCC of any proposed merger or acquisition where the relevant market share of the merged entity will be greater than 20%. If informal clearance is sought from the ACCC, it will consider the likely effects of the proposed acquisition, usually after making market enquiries, and will indicate whether it intends to intervene in the transaction.

Informal clearance can be sought confidentially, but the ACCC will usually decline to express a view without seeking input from other market participants.

Alternatively, parties can seek authorisation from the ACCC based on the net public benefit of the proposed acquisition.

Authorisation provides complete legal immunity with respect to the acquisition.

Consumer law

Anyone offering to supply goods or services to end users in Australia will be affected by federal, state and territory laws, regulations, and codes which provide rights and protections for consumers.

The key legislation is the Australian Consumer Law (**ACL**) which is a Schedule to the Competition and Consumer Act. The ACL contains various protections including:

- a general prohibition on misleading or deceptive conduct in trade or commerce;
- specific prohibitions on false or misleading representations in relation to the supply of goods or services or interests in land;
- consumer guarantees which apply to supplies of goods or services to a consumer;
- a prohibition on "unfair" terms in standard form small business and consumer contracts; and
- actions against manufacturers in respect of unsafe goods.

The ACL provides a set of consumer protection laws which apply both nationally and in each state and territory, and which apply to anyone engaged in business conduct (corporations, partnerships, associations, individuals) that involves or may affect consumers.

The ACL does not apply to conduct in relation to financial products and services, which is covered by the *Australian Securities & Investments Commission Act 2001* (Cth).

As well as the ACL, consumer protection regulation in Australia includes:

- mandatory codes of conduct (which are given force of law under various Acts and regulations); and
- voluntary codes of conduct (which are generally administered through industry-based bodies and associations).

Unfair contract terms

From 9 November 2023 the unfair contract terms regime in the Australian Consumer Law will be significantly strengthened, affecting any standard form contract with a "small business". A small business is now defined to include a business that has fewer than 100 employees (previously 20) or has a turnover for the last income year of less than A$10,000,000.

Penalties have also been increased. The maximum penalty (for each contravention) for an individual will be A$2.5m. The maximum penalty for a company will be the greater of:

- A$50m;
- three times the value of the benefit (if able to be determined); and
- 30% of the adjusted turnover during the period of the breach, or the previous 12-month period, whichever is longer.

Enforcement of the Competition and Consumer Act

The ACCC is responsible for enforcing the civil penalty provisions of the Competition and Consumer Act, although a variety of other agencies and institutions play roles as well. The Commonwealth Director of Public Prosecutions is responsible for the prosecution of criminal violations under the Competition and Consumer Act.

For consumer law, the ACCC and the various state and territory consumer protection agencies share the administration and enforcement of the ACL.

These agencies have broad powers to investigate breaches of the ACL and to bring proceedings in relation to such breaches, including on behalf of consumers.

Other government bodies and agencies also have responsibility for administration of consumer protection regulation. For example:

- the Australian Securities & Investments Commission is responsible for the administration of regulation governing financial products and services, including consumer credit; and
- the Australian Communications and Media Authority is responsible for the administration of regulation governing certain telecommunications products and services.

EXPORTS & IMPORTS

Free trade agreements

Australia has engaged in free trade agreements with the United States, Thailand, Singapore, New Zealand, Chile, India, Malaysia, Korea, Japan, China, Hong Kong, Peru, Indonesia and the Association of South East Asian Nations (**ASEAN**).

Australia is also a party to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, the Pacific Agreement on Closer Economic Relations Plus and the Regional Comprehensive Economic Partnership Agreement.

Australia also is a signatory to a free trade agreement with the United Kingdom and the Trans-Pacific Partnership, which are not yet in force.

Bilateral investment treaties

Australia is party to bilateral investment treaties with a number of countries, including China, Turkey, Argentina, Sri Lanka and Poland.

Import controls

The *Customs Act 1901* (Cth) (**Customs Act**) regulates the import and export of goods to and from Australia. The Australian Border Force does not require companies or individuals to hold import licences for the purposes of importing goods into Australia. However, under the *Customs (Prohibited Imports) Regulations 1956* (Cth), for some goods, and regardless of value, importers may need to obtain permits to clear certain goods.

All goods imported into Australia must be cleared by the Australian Border Force, whether imported by air, sea or post. Importers are responsible for obtaining a formal customs clearance, including submitting a completed import declaration form and paying duty, GST and any other taxes and charges that may apply, for all goods with a customs value above A$1,000.

Goods with a value equal to or less than A$1,000 may be subject to GST if the supply of the goods is taken to be connected with Australia.

Certain goods may either not be imported into Australia or may only be imported conditionally. A list of goods that might be subject to import prohibitions and restrictions is available from the Australian Border Force website.

Duties and taxes

Goods imported into Australia are subject to customs duty. Rates are determined by the tariff classification in the *Customs Tariff Act 1995* (Cth), with the average rate being 5%, and often the duty is determined by reference to the value of the imported goods.

Australian Border Force determines the value of goods imported into Australia based on valuation provisions in the Customs Act.

GST, Wine Equalisation Tax, and Luxury Car Tax are also imposed on goods imported to Australia. The Department of Home Affairs administers these taxes for goods imported to Australia, though this function is outsourced to the Australian Border Force.

Export controls

Australia has relatively few export controls on most exported goods and services. However, restrictions apply to some types of exports, such as:

- weapons and “dual-use” goods;
- certain therapeutic and chemical substances; and
- cultural and heritage items.

Trade sanctions

Australian law implements United Nations Security Council (**UNSC**) sanctions regimes as well as Australian autonomous sanctions regimes.

UNSC sanctions regimes are generally implemented under the *Charter of the United Nations Act 1945* (Cth) (**United Nations Act**) and its regulations. There is a separate set of regulations under the United Nations Act for each UNSC sanctions regime.

Australian autonomous sanctions regimes are generally implemented under the *Autonomous Sanctions Act 2011* (Cth) (**Autonomous Act**) and the *Australian Autonomous Sanctions Regulations 2011*. There is only one set of regulations under the Autonomous Act.

The Department of Foreign Affairs and Trade administers the United Nations Act, the Autonomous Act and their regulations.

A full list of sanctions regimes currently implemented under Australian sanction laws, including detailed information about the particular sanctions measures, can be found via www.dfat.gov.au.

PRIVACY & DATA PROTECTION

Overview of Australian privacy laws

Privacy laws have been enacted by the Federal Government and most states and territories. State and territory privacy laws primarily govern state and territory agencies.

The *Privacy Act 1988* (Cth) (**Privacy Act**) is federal legislation that applies to "APP entities" and regulates the handling of "personal information" about individuals. The Privacy Act is administered by the Office of the Australian Information Commissioner (**OAIC**).

Amongst other things, the Privacy Act confers on individuals the right to access personal information, reject unwanted direct marketing, correct personal information, and make a complaint to the OAIC regarding a breach of privacy.

What is an "APP entity"?

An "APP entity" is defined under the Privacy Act to mean an "agency" or "organisation".

Broadly speaking, an "agency" is a federal government department or agency or a body established by or under federal legislation for a public purpose.

An "organisation" is defined broadly to include an individual (e.g. a sole trader), a body corporate, a partnership, any unincorporated association or a trust, that is not a small business operator, a registered political party, an agency, a state or territory authority or a prescribed instrumentality of a state or territory.

The "small business operator" exemption applies to entities with an annual turnover of less than A$3 million and which do not handle health information.

What is "personal information"?

Personal information is defined under Section 6 of the Privacy Act to mean: "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".

Examples of personal information include information about a person's life, commentary or opinion about a person and a person's employment details.

Personal information that is considered "sensitive information" is afforded greater protection under the Privacy Act. Sensitive information includes health information, genetic information, biometric information, biometric templates, or information or opinion about an individual's racial or ethnic origin, political opinions, membership of a political association, religious beliefs or affiliations, philosophical beliefs, membership of a professional or trade association, membership of a trade union, sexual orientation or practices, or criminal record.

Australian Privacy Principles

The Privacy Act establishes 13 Australian Privacy Principles. These principles set out standards, rights, and obligations for the handling, holding, disclosure, use, access, and correction of personal information.

	Australian Privacy Principles	Summary
Consideration of personal information privacy	AAP1 Open and transparent management of personal information	Requires an APP entity to have a clearly expressed and up-to-date privacy policy that is available free of charge
	AAP2 Anonymity and pseudonymity	Individuals must have the option of not identifying themselves or using a pseudonym
Collection of personal information	AAP3 Collection of solicited personal information	Requires an APP entity to collect personal information only where it is reasonably necessary for its functions or activities and by lawful and fair means
	AAP4 Dealing with unsolicited personal information	Outlines how an APP entity should deal with the receipt of unsolicited personal information
	AAP5 Notification of the collection of personal information	Outlines when an APP entity should notify an individual about the collection of information and the requirements of such notification
Dealing with personal information	AAP6 Use or disclosure of personal information	Outlines how an APP entity may use or disclose personal information
	AAP7 Direct marketing	Outlines when an APP entity can use or disclose personal information for direct marketing
	AAP8 Cross-border disclosure of personal information	Outlines how an APP entity may disclose personal information outside Australia
	AAP9 Adoption, use or disclosure of government related identifiers	Limits the use of government related identifiers
Integrity of personal information	AAP10 Quality of personal information	Requires an APP entity to take reasonable steps to ensure personal information is accurate, complete and up-to-date
	AAP11 Security of personal information	Requires an APP entity to take reasonable steps to protect personal information
Access to, and correction of, personal information	AAP12 Access to personal information	Requires an APP entity to grant access to personal information
	AAP13 Correction of personal information	Requires an APP entity to take reasonable steps to correct personal information held

Privacy Act reform

In December 2022 a number of important amendments to the Privacy Act were introduced:

- expanding its extraterritorial reach;
- increasing penalties for serious or repeated interferences with privacy to A$2.5m for a person other than a body corporate and, for a body corporate, A$50m or three times the value of the benefit obtained from the conduct, if the court can determine this value, or if the court cannot determine the value of the benefit, 30% of the body corporate's adjusted turnover in the relevant period;
- strengthening the Notifiable Data Breaches scheme;
- introducing new information sharing powers between regulatory agencies; and
- enhancing the powers of the OAIC to investigate and resolve privacy breaches.

Further privacy reform has also been flagged by the Australian government, intended to bring Australia's privacy laws more into line with global standards. The proposals include:

- adopting the concepts of data "controller" and "processor", as used in European data protection laws;
- expanding the definition of personal information;
- removing the small business exemption, subject to certain qualifications;
- introducing an overriding '"fair and reasonable" obligation with respect to the collection, use and disclosure of personal information;
- introducing a right to erasure;
- introducing compulsory Privacy Impact Assessments for entities undertaking activities deemed to be high risk; and
- expanding the regulatory powers of the OAIC.

Mandatory notification of data breaches

The Privacy Act contains a mandatory data breach notification scheme (**Scheme**). Under the Scheme, an APP entity is required to notify the OAIC and affected individuals as soon as reasonably practicable if there are reasonable grounds to believe that an "eligible data breach" has occurred.

An "eligible data breach" occurs if the unauthorised access, disclosure or loss of the personal information is reasonably likely to result in serious harm to any of the individuals to whom the information relates.

If an APP entity suspects that an "eligible data breach" has occurred, the APP entity is required to engage in a self-assessment exercise to determine whether the breach is an "eligible data breach".

The OAIC has released four draft guidelines in relation to the Scheme which provide guidance on entities covered by the Scheme, notifying individuals about an eligible data breach, identifying data breaches and the Australian Information Commissioner's role in the Scheme.

Recent changes to the Privacy Act have strengthened the Notifiable Data Breaches scheme. The Commissioner is now empowered to request information and documents from an APP entity about an actual or suspected eligible data breach and may conduct assessments of an entity's compliance with the scheme.

State and territory-based privacy legislation

State and territory privacy laws primarily regulate state and territory agencies, which are generally not governed by the federal Privacy Act. However, in some states, there is also legislation governing the use of health information which applies to both public and private health service providers. For example, in the State of Victoria, the applicable state laws include the *Privacy Data and Protection Act 2014* (Vic) and the *Health Records Act 2001* (Vic).

Consequences of non-compliance

Amongst other things, the OAIC is empowered to investigate complaints made by individuals, investigate breaches of the Privacy Act on its own volition, accept an undertaking by an APP entity to comply with the Privacy Act, and make determinations requiring an APP entity to perform certain acts or refrain from specified action.

An APP entity may be liable for civil penalties for breaches of the Privacy Act. For example, liability for serious and repeated interferences with privacy can result in civil penalties of up to A$444,000 for individuals and A$2,220,000 for bodies corporate.

Spam

The *Spam Act 2003* (Cth) (**Spam Act**) is federal law that prohibits the sending of unsolicited commercial electronic messages with an Australian link.

A message becomes an electronic commercial message when it has a "commercial purpose". An example of a commercial electronic message can include an SMS or email offering goods or promoting a website.

A message has an Australian link if the message originates or was commissioned in Australia or is sent from outside Australia to an address accessed in Australia.

The Australian Communications and Media Authority administers the Spam Act and accepts complaints, reports, and enquiries about spam with an Australian link.

Do Not Call Register

The Do Not Call Register is a register of numbers that telemarketers and fax marketers are prohibited from calling. Registration of a number is free and can be completed www.donotcall.gov.au.

The onus is on an organisation in the telemarketing or fax marketing business to monitor whether a number has been registered on the Do Not Call Register. Upon registration of a number into the Do Not Call Register, telemarketers and fax marketers have 30 days to recognise the registration and subsequently refrain from contacting the registered number.

The Do Not Call Register was established by the *Do Not Call Register Act 2006* (Cth) and is administered by the Australian Communications and Media Authority.

REAL PROPERTY

Ownership of real property

Each Australian state and territory has a comprehensive system for the registration of ownership and other interests in real property (being land and the improvements located on the land). While the registration systems vary slightly, in every case the register provides a definitive record of the relevant real property, including its boundaries, and the owner.

These requests provide buyers of real property in Australia with a very high level of certainty as to the real property they are buying and any existing third-party interests in that real property. Once the transfer of the land to the buyer is registered, the buyer then has control over the creation of any new private sector interests in the real property.

The interest in real property that is most commonly bought and sold in Australia (other than in the Australian Capital Territory) is “freehold title”, which gives the registered owner permanent ownership. Long-term leasehold interests (which are limited in time, for example, 99 years) are also transacted, but this is less common.

Foreign Investment Review Board

Certain investments by foreign persons in Australia require approval from the Federal Treasurer. Approval is applied for through the Foreign Investment Review Board (**FIRB**). FIRB is an advisory body that makes recommendations to the Federal Treasurer in respect to proposed foreign investments, in accordance with the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and accompanying regulations.

A foreign person generally means an individual who does not ordinarily reside in Australia. The definition extends to Australian companies or trusts where a foreign person or foreign government holds a substantial interest.

Obtaining FIRB approval requires the payment of an application fee and the provision of detailed information about the proposed transaction, including structuring, the commercial rationale for the investment, and source of funds. FIRB will consider whether to approve the transaction with regards to the overall question of whether the transaction is in the “national interest” or not. The test is not defined in legislation, but generally includes considering national security, competition and economic impact factors relating to the transaction.

Buyer/seller contract

There are a number of methods for buying and selling real property in Australia, including auction, private sale, or tender. Whichever method applies, once the seller and the buyer agree terms, they sign a written contract of sale. In the case of an auction or sale by tender the ability for the buyer to negotiate terms may be limited.

Contracts of sale detail the commercial agreement between the parties, including the price, the deposit to be paid when the contract is signed (typically 5%-10% of the price), any conditions precedent (such as FIRB approval, where the buyer requires this), seller warranties and other agreed commercial terms, as well as setting out the legal obligations of each party leading up to “settlement” (or completion) of the contract.

Settlement of a contract of sale, at its simplest, involves the buyer paying the contract price to the seller (less any deposit paid when the contract was signed), and the seller transferring its interest in the land to the buyer by way of a signed transfer of land document to register itself as the new owner at the relevant land registry.

While historically settlement of land acquisitions required the passing of a paper certificate of title from the seller to the buyer, certificates of title across Australia have largely been digitised.

Duties and taxes

Stamp duty is a tax imposed by all Australian states and territories on certain instruments and transactions. The relevant stamp duty laws vary across each of Australia's jurisdictions. Differences include which instruments and transactions are dutiable, what duty rate applies, who is liable to pay the duty, and when the duty must be paid.

All states and territories require duty to be paid on the sale of freehold land, and while there are some exemptions these are unlikely to apply to the purchase of Australian real property by non-residents.

The applicable stamp duty rate is either a fixed amount (usually because a concession applies) or calculated on a sliding scale, with the duty rate increasing as the transaction value increases.

A duty surcharge is payable in relation to the acquisition of real property by a foreign person, in all Australian jurisdictions, other than the Northern Territory. The surcharge rate and the criteria for the application of the surcharge duty varies across each of the relevant jurisdictions.

Land tax is a state-based tax payable in relation to property owned by an entity in the relevant state, with limited exemptions. An individual's principal place of residence is usually exempt from land tax. In some jurisdictions additional land tax can be payable in respect of property owned by foreign persons or in respect to property that is vacant.

Rates are a form of tax that are levied by the local government council of the area in which the real property is located.

Buyers are able to obtain details of the amounts of rates and land tax that are levied on real property before signing a contract of sale.

Other taxes that may reflect to land sales or revenue derived from land include capital gains tax, income tax and goods and services tax.

Investors in real property should always seek specialist tax advice before entering into any transaction.

Structuring

The structure applied to a real property transaction will depend on the nature and size of the transaction, and the legal and taxation implications for the parties involved.

When investing in real property in Australia, investors usually choose between ownership through a corporation, whereby the corporation is registered as the owner of the real property for the benefit of its shareholders, or ownership by way of units in a trust, where the trustee is registered as the owner of the real property and holds the property for the benefit of the unit holders. In either case, liability is generally limited to the assets of the company or the trust and does not extend to the shareholders or unit holders.

A common form of trust that foreign investors use to hold real property in Australia is a Managed Investment Trust, as this provides tax concessions for foreign investors that other structures do not always provide.

Leasing

In Australia, real property (including part of the relevant land or building) can be leased for a limited period, usually a specified number of years. By granting the lease, the owner (the landlord) gives the person taking the lease (the tenant) the right to occupy and use the relevant area (the premises) for the agreed term.

The landlord and the tenant negotiate and then sign a written lease document that sets out all the terms of the occupancy, including the rent and other amounts the tenant must pay (usually monthly), the fixed term of the lease, the boundaries of the premises, the condition in which the landlord will provide the premises to the tenant and the allocation of responsibilities for repairs and maintenance of the premises during the term.

Provided certain procedural steps are taken (such as obtaining the consent of any mortgagee and, where applicable, registering the lease at the relevant land registry), the tenant has certainty that their right to occupy the premises under the lease will be enforceable against anyone else who has or subsequently acquires an interest in the land.

Most states and territories have legislation to provide certain protection for tenants of retail premises that override the terms of any agreement between the landlord and the tenant. Protections typically include a minimum acceptable term for retail leases, restrictions on how rent is varied, and a prohibition on the inclusion of certain onerous terms and conditions on tenants.

ENVIRONMENT & PLANNING

Overview of environmental risk and regulation

Environmental laws in Australia are relevant to a broad range of industries – not simply the energy, resources and manufacturing sectors, but any business with operational environmental impacts, such as waste production.

In addition, any business that owns or occupies land may be subject to contamination laws, which require that discoveries of contamination are to be notified to the relevant state or territory environmental regulator. Whilst Australia's environmental laws largely follow a "polluter pays" principle, owners or occupiers of contaminated sites may have (in some situations) an obligation to clean up contamination at a site in circumstances where they are not the original polluter (such as the clean up of historic contamination). This makes environmental due diligence prior to acquisition of a business or property assets an important aspect of risk management.

Complexity

One of the key challenges for business in Australia is understanding the specific legal requirements of the different states, territories and local government areas in which the business is located. Businesses that operate in multiple states and territories will be subject to several different laws.

Broadly, there are three sources of environmental regulation: local government; state and territory government, and federal government. State and territory governments are responsible for the administration and enforcement of the majority of Australia's environmental regulation. Importantly, environment and planning laws are different in each state and territory.

Environmental laws cover a significant range of environmental protection issues, which may be relevant during development of a site or during its operation.

These include laws on land use planning; environmental impact assessment; pollution and licensing; waste; contamination; water; native vegetation and biodiversity conservation and heritage matters, to name a few.

To meet legal compliance requirements it is usually necessary to develop tailored operational and risk management approaches for each jurisdiction. A "one size fits all" approach is unlikely to meet regulators' standards. Consequently, costs associated with environmental compliance may be greater than in other countries or for other aspects of regulatory compliance that are more harmonised.

Environmental laws and supporting policies change reasonably frequently. This enables legislators (and relevantly the environment regulators) to set, publish and update standards on a regular basis as environmental knowledge develops. Businesses are generally expected to operate an environmental management system that responds to changes in laws and legal standards. The frequency of changes to environmental laws requires that such management systems are regularly reviewed and updated.

Regulators

The key regulators are state and territory-level environment protection authorities (**EPA**s), which are usually independent or semi-independent agencies of government. Some jurisdictions, such as Queensland, Western Australia and the Northern Territory, have government departments that fulfil this role. EPAs are the principal regulators for pollution, contamination and waste regulation and the licensing of high-risk industries. Other state and territory government departments are responsible for administration and enforcement of other laws.

At the federal level, the Department of Climate Change, Energy, the Environment and Water is responsible for enforcement of the main federal environmental laws. Federal laws provide an additional "layer" of regulation and seek to address environmental protection issues at a national level.

The key national environmental law is the *Environment Protection and Biodiversity Conservation Act 1999*, which is intended to protect nationally protected species, ecosystems and places. There is likely to be material reform to this legislation in the next several years, which will include strengthening of environmental protection requirements and the establishment of a new independent federal EPA to enforce the law. Other federal laws additionally regulate Australia's carbon emissions and the import and export of waste and chemicals. For example, the *Industrial Chemicals Act 2019* regulates the importation and manufacture (and introduction) of new industrial chemicals to Australia, and is particularly relevant to businesses wishing to import new products or chemicals to Australia.

At a local level, municipal councils are also a key regulator. The landscapes of Australia are diverse, including coastal, desert, mountain and built environments. A significant area of the land mass is not urbanised. Accordingly, local laws may govern issues such as dust, erosion and specific local matters, such as local biodiversity and invasive species. In many jurisdictions, enforcement of state and territory laws in relation to planning and development, and public nuisance is delegated to local councils.

Energy and resources

There are separate (and in some cases additional) laws governing environmental issues at mining sites. Mine sites, depending on jurisdiction, may be regulated either solely by the relevant mining regulator (often a state or territory government department) or jointly by the relevant mining regulator and the environmental regulator.

Criminal and civil liability

Environmental laws are generally *criminal* in nature. Typical penalties vary between jurisdictions and reflect the circumstances of the offence. Penalties on conviction range from several thousands of dollars to maximum penalties, in some jurisdictions, of up to $5 million and/or imprisonment. It is not uncommon for fines to be ordered at a significant level (hundreds of thousands of dollars). In the event that an environmental regulator does not proceed with a formal prosecution, there are a range of other sanctions available to most regulators, such as warnings and infringement notices (lower level fines) as well as administrative powers requiring, for example, cessation of site activities or clean-up of contamination.

In addition to criminal liability for environmental offences, businesses must also be aware of civil liability to third parties (such as neighbours) arising from their actions.

Claims for negligence, nuisance, trespass and property damage or damage to human health are not uncommon, although many settle out of court. Many jurisdictions also have rights for third parties to participate in public licensing and planning approval processes, including limited rights to enforce the terms of development approvals.

Personal liability

Most of the primary state and territory environmental laws include provision for directors and officers (and in some cases senior managers) to be held personally liable for the offences of their corporation (often called derivative liability). The purpose of such offence provisions, enabling prosecution of individuals, is to ensure that at the highest levels of the corporate structure, environmental matters are given priority. Liability commences from the date of a person's appointment, which means that environmental due diligence is important prior to appointment of new directors following an acquisition in order that any compliance and risk matters can be promptly rectified.

There are defences available to individuals in relation to offences that carry derivative liability. These are commonly that the director, or person concerned in the management of the corporation, has "exercised all due diligence" or "taken all reasonable steps" to ensure that the offence was not committed.

Licensing and approvals

Changes in use of land or the development of land for operations may require a development approval. Additionally, certain specified types of industrial operations may also need to hold an environmental licence for their operations. In some jurisdictions there is an integrated approvals framework for planning and environmental approvals, however, in other jurisdictions, the approvals framework is separated. In almost all jurisdictions, it is necessary to hold both a development approval and an environmental licence (for sites that have discharges to the environment).

Key contemporary issues

Climate change and environmental, social and governance (**ESG**) reporting are key issues for Australian business. Climate change litigation is increasing and legislation applies to many entities around reporting on emissions and energy use, climate risk and environmental statements.

The Australian Securities and Investments Commission (**ASIC**) has developed rules in relation to market disclosure of climate change risks. Directors need to demonstrate that they have exercised due care and diligence by properly considering climate change risk in the course of their duties. In addition, the Australian Competition & Consumer Commission has prioritised enforcement of consumer and fair trading issues about environmental and sustainability claims to require businesses making claims about their environmental credentials to substantiate those claims with evidence.

The National Greenhouse and Energy Reporting Act 2007 (**NGER Act**) requires reporting by business of energy consumption and emissions (above a certain threshold) to the Clean Energy Regulator. Australia's largest greenhouse gas emitters are required to report and manage emissions to a specific limit and purchase carbon credits to offset emissions if needed. The NGER Act scheme can impact foreign corporations that operate directly in Australia without an Australian incorporated subsidiary and so is very relevant to foreign corporations wishing to do business in Australia.

There are growing opportunities in many jurisdictions for investment and development of renewable energy generation, battery storage and electricity transmission projects. In addition, many states have developed law and policy to promote a circular economy and strengthen waste laws to divert waste streams from export or landfill to domestic materials or energy recovery facilities (such as energy from waste facilities).

Key regulators and other key organisations

Organisation	Website
Austrade	www.austrade.gov.au
Australian Accounting Standards Board	www.aasb.gov.au
Australian Centre for International Commercial Arbitration (ACICA)	www.acica.org.au
Australian Communications and Media Authority	www.acma.gov.au
Australian Competition & Consumer Commission (ACCC)	www.accc.gov.au
Australian Competition Tribunal	www.competitiontribunal.gov.au
Australian Financial Complaints Authority	www.afca.org.au
Australian Prudential Regulation Authority (APRA)	www.apra.gov.au
Australian Securities & Investments Commission (ASIC)	www.asic.gov.au
Australian Securities Exchange (ASX)	www.asx.com.au
Australian Takeovers Panel	www.takeovers.gov.au
Australian Taxation Office (ATO)	www.ato.gov.au
Australian Transaction Reports and Analysis Centre (AUSTRAC)	www.austrac.gov.au
Clean Energy Regulator	www.cleanenergyregulator.gov.au
Fair Work Commission	www.fwc.gov.au
Fair Work Ombudsman	www.fairwork.gov.au
Foreign Investment Review Board (FIRB)	www.firb.gov.au
IP Australia	www.ipaustralia.gov.au
Office of the Australian Information Commissioner (OAIC)	www.oaic.gov.au
Reserve Bank of Australia (RBA)	www.rba.gov.au

Yurruwi table

Elegantly crafted by Indigenous furniture makers, Manapan, our boardroom table depicts the story of our nation's unique Indigenous heritage.

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