DOING BUSINESS IN AUSTRALIA

Supporting Foreign Investment in the Australian Market

LANDER & ROGERS

ABOUT US

Lander & Rogers is a contemporary 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, the firm 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 a fiercely independent and proudly Australian firm, we are also globally connected as the exclusive Australian member of the worldwide TerraLex law firm network and ideally positioned to help our clients with their international legal needs.

Our 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. We work with firms which reflect our distinctive culture.

Our areas of practice:

- Corporate
- Real Estate and Projects
- Workplace Relations and Safety
- Commercial Disputes
- Insurance Law and Litigation
- Compensation Law
- Family and Relationship Law

Our key sectors:

- Financial Services and Insurance
- Retail and Supply Chain
- Energy and Resources
- Real Estate
- Technology
- Education
- Sport
- Private Clients
- Government

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SECTION 1

OVERVIEW OF GOVERNMENT

Australia is a democracy with three levels of government, each with their 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.

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.

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.

SECTION 2

OVERVIEW OF LEGAL SYSTEM

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.

Australia also has an active arbitration system for the determination of disputes. The Australian Centre for International Commercial Arbitration (ACICA), Australia's international dispute resolution institute, was established in 1985 with its own facilities, secretariat, and panel of arbitrators. It can apply its own rules, the UNCITRAL Arbitration Rules of ad hoc processes agreed by the parties. Other arbitration centres also exist, some with a focus on and expertise in particular industries.

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 domestic banking, building societies, credit unions, insurance, collective investments, finance companies, credit providers and superannuation. Australia has a uniform licensing regime that applies to all persons and entities operating a financial services business or providing financial advice with the exception of credit providers who are licensed under separate credit legislation if they provide consumer loans. The industry is highly regulated and, as a result, provides a strong banking and financial services system for those wanting to do business in Australia.

Regulators

The two key regulators in this 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 the prudential regulator responsible for supervising the risk and financial stability of Australia's banks, insurance companies and most superannuation funds. APRA has established a number of prudential standards for compliance in each part of the industry.

All Australian banks must hold a banking licence issued by APRA. Insurance companies and superannuation funds are also required to be registered and licensed with APRA. APRA imposes capital adequacy requirements that are consistent with other developed countries.

The banking and financial services system is also regulated by ASIC. ASIC regulates all Australian companies, financial markets, and financial services organisations and professionals who provide financial products or deal in financial products or services. With certain exceptions, all participants in the financial services industry must have an Australian Financial Services Licence or be an authorised representative of an AFS licensee. Regular reports are required to be lodged with ASIC regarding a company's activities.

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

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 the opening of bank accounts to prevent tax evasion and money laundering.

There are also certain reporting obligations for some transactions which 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.

Australian Financial Services Licence

Persons and entities operating a financial services business must hold an Australian Financial Services Licence (**AFSL**). These licenses 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.

Banking

There are four major Australian banks, numerous regional banks, and a number of European, American, and Asian investment banks. Mortgages issued to home-buyers and loans for businesses and consumer credit make up the vast 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 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.

Managed funds

The funds management industry in Australia provides management services for insurance funds, public offer unit trusts, government funds, and funds sourced from overseas. The industry is made up of large institutional managers as well as boutique investment managers.

The Future of Financial Advice reforms introduced in 2013 have sought to reduce the benefits that fund managers can receive as a result of influencing the product which their client can acquire.

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 part of the industry provides underwritten insurance policies to individuals and businesses to protect against particular losses and other risks. Some key types of insurance offered include 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$2.3 trillion in assets. Superannuation funds operate as trusts and can be governed in numerous ways (e.g. a self-managed superannuation fund is managed by individual trustees while the trustee of a public sector fund is managed by government agencies).

In Australia, an employer must provide (through the private superannuation system) a minimum level of superannuation support for each of its employees, which is currently set at 9.5% of each employee's salary (this will gradually increase from 1 July 2021 until it reaches 12% on 1 July 2025). Contributions on salary over this amount can still be made, but are not required. Subject to the rules of the particular superannuation fund, members can make their own voluntary contributions.

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. In most cases, a superannuation fund also offers life insurance to its 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 unique legal characteristics and requirements, and should be considered in the context of your business needs and aims. We have outlined a number of the available options below. Each has its own tax considerations which are not addressed here but should also be taken into account when making a final decision on structure.

Australian companies

In Australia, business is commonly conducted by 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 (if any) also govern Australian companies and must be read in light of 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 unlimited or limited by shares and, unlike public companies, are prohibited from engaging in public fundraising activities to raise revenue by selling shares to the public.

  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 may be an attractive option, whether public or private. Advantages include recognised structures for debt and equity funding, the option of establishing a written shareholder 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 partners and 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, the relevant governing bodies mentioned above impose 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. Australian courts take a strict view of the interpretation of directors' duties and the application of appropriate corporate governance in line with the Corporations Act.

Registered foreign companies

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 as 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 in English.

A registered foreign company must have a registered office in Australia, and must appoint an agent in Australia to ensure compliance with the relevant governing law. 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 that there are no annual or other governance filings with ASIC, the paperwork is less complex, and no constitution is required. However, the foreign entity 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. The majority of partnerships are established and governed by a partnership agreement which sets out the obligations of the partners to each other, as well as 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.

Another advantage of choosing a 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 is not a separate legal entity, meaning that they cannot sue or be sued — and as such, individual partners are exposed to personal liability.

Joint ventures

A joint venture is a relationship between two distinct legal 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. It is the respective participating owner entities that are subject to the imposition of Australian tax.

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 joint ventures are not legal entities in their own right, it is common for the ownership parties to be corporations so that they obtain the benefit of limited liability. Consequentially, it is usual to find that the ownership parties are Australian companies or foreign companies registered in Australia.

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 particular tax liabilities. Trusts are useful when a commercial entity or business requires the contribution of capital from a number of various 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 in a company whereby the value from the unit trust is distributed to the unit holders in fixed proportions to the units they hold, thereby providing certainty to unit holders. Another advantage of unit trusts is that the unit holders are protected from the liabilities of the trustee.

Further, 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, 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 of a lower rate for foreign investors and an ability to elect certain assets as being capital and not taxed as revenue. The main disadvantage of an MIT is that there can be below average returns over a long period of time, usually impacted by trust fund charges and fees.

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.

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

There are no general business registration requirements imposed upon non-residents. However, when conducting business in Australia, there are administrative requirements including the need to hold an Australian Tax File Number (**TFN**) and an Australian Business Number (**ABN**). These are issued automatically 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 entirely 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$3.5 trillion in 2018, 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 which 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 6-month period;
- under rights issues;
- under dividend reinvestment plans;
- under takeovers/scheme of arrangement.

Takeovers

Takeovers and schemes of arrangement are the primary methods by which an acquirer seeks 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 less often 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.

Timing and process of a takeover bid 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.

A scheme is proposed by the target and a scheme (explanatory) booklet prepared. The scheme booklet and scheme process is 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 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 2 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 which 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

While merger notification to the ACCC is voluntary, it is advisable to notify the ACCC of any proposed merger which 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 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**).

Failure to notify of a Notifiable Action carries penalties (both criminal and civil) and may also result in the investment being unwound. Similarly, those same penalties can apply to transactions which the Treasurer considers to be Significant Actions for which no voluntary notification was made but where the transaction is considered contrary to the national interest, 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 an overseas resident, a foreign corporation or a foreign government holds an equity interest of at least 20% (or if two or more, an aggregate equity interest of at least 40%).

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

- investments of 20% or more in:
  - an Australian business or entity where the value of the interest is above the relevant monetary threshold (typically A$275 million); and
  - to "sensitive businesses" such as telecommunications, media, transport, human resources, military and defence and nuclear mines or facilities, where the value of that interest is above A$275 million (generally); and
- acquisitions of a direct interest in an Australian entity or Australian business that is an agribusiness, where the value of that interest (in aggregate with other existing agribusiness interests held) is above A$60 million.

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

- acquiring an interest in developed commercial land where the value of that interest is above A$275 million;
- acquiring an interest in developed commercial land which is considered sensitive (for example, acquisitions in mining or public infrastructure) where the value of that interest is above A$60 million;
- acquiring an interest in agricultural land where the value of that interest is above A$15 million; and
- 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 (being an entity where interests in Australian land account for more than 50% of the entity's total assets), if at least 90% of the type of land held by that entity is not vacant commercial land or residential land.
- 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;
  - 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.

National Interest Test

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

In assessing whether the proposed purchase will be contrary to the national interest, 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.

In making its assessment, it is not uncommon for the Treasurer to consult with federal, state, and territory government departments and agencies, notably the Australian Tax 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. Further changes to transactions and therefore the application may also contribute to delays.

Notwithstanding this consultation process, the Government respects any "commercial-in-confidence" information which it receives and ensures that it is kept secure. 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.

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 for the purposes of assessing the need for any additional applications for approval as this can cause commercial delays.

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.

Free Trade Agreement countries

Australia is currently party to 11 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. Depending on the specific country of origin, investors generally benefit from a higher threshold of A$1.19 billion instead of A$275 million. The applicable countries include USA, UK, New Zealand, Japan, Singapore, China (amongst others).

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$1,000 up to A$101,500 per Notifiable Action, depending on the value and classification of the proposed investment, 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.

The 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.

COVID-19 changes

As a result of the COVID-19 crisis, the Treasurer announced temporary changes to the foreign investment regime in Australia. These changes came into effect at 10.30pm on 29 March 2020 in relation to all agreements entered into after that time.

The main change to the regime is that all monetary thresholds have been reduced to nil. The result is that an action which was caught by FATA in the past but which did not meet the necessary monetary thresholds to be a notifiable action, will now meet the relevant threshold and require approval.

This is most relevant for lower value acquisitions of businesses and land, as well as leases of 5 years or more (which are considered an acquisition of an interest in Australian land).

At the same time, FIRB has advised that the statutory review period has been extended from 30 days to up to six months, to allow for the increased number of applications and additional scrutiny required.

There is no current end date provided in respect of the amending regulations, but it is expected that they will be in place for the whole of 2020.

TAXATION

Taxation in Australia — an overview

The Federal and state governments impose a number of taxes, including income tax, goods and services tax (GST), capital gains tax (CGT), 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 negotiate 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.

For the purposes of determining a company's tax residence, a company incorporated in Australia will be treated as an Australian resident, as will a company, although incorporated overseas, that has its central management and control in Australia.

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 but the 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 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 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 and which losses or outgoings are not of a capital, private, or domestic nature. 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 (2020 – 2021) 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

In addition, there is a healthcare levy of 2% of taxable income in most circumstances. There is also a Low Income Tax "Offset" for lower income earners (up to a maximum of $700) as well as a Low and Middle Income Tax Offset (up to a maximum of $1,080). Both offsets are amounts 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).

**On 6 October 2020, the Austrailan Federal Government announced a reduction in tax rates for the 2020-21 financial year.*

*For non-residents, the applicable tax rates (2020 - 2021) 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

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 27.5%. 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 $50 million for the 2019-20 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 will reduce to 26% in the 2020-21 income year and 25% in the 2021-22 income year. 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.

Superannuation or pension funds are generally taxed at the rate of 15% on various types of income.

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 which 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 which carry no franking credit are referred to as "unfranked dividends".

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.

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 taxes are 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.

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 which 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 principals. 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 principals. 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 that 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 which 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.

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, in order that an arrangement be treated as debt for tax purposes it is necessary that the "debtor" 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 which exceed 10 years.

With effect from 1 January 2019 rules have been introduced to address certain cross-border hybrid arrangements which 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.

Due to the complexity of the TOFA rules, the Government announced in the 2016–17 Budget that reforms would be made to the rules to reduce their scope and complexity. To date such reforms have not been introduced.

Capital Gains Tax

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 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 which are 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.

Anti-avoidance

Australia's tax laws contains 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 and "diverted profits tax" which can apply to the diversion of profits offshore by a SGE to minimise Australian tax.

Goods and Services Tax

In addition to income tax and CGT, the Federal Government also levies a GST of 10%. In effect, GST applies to the supply of most goods and services which are connected with Australia. It is similar to a value added tax and is a multi-stage tax with the end consumer bearing the full amount of tax. Any businesses in the chain before that point collect GST on the sales of goods and services on the full price of those goods and services, but then deduct any GST payable to any supplier.

Importantly, GST is generally payable by the supplier of a good or service and, should the supplier wish to recover an amount in respect of GST from the recipient of the supply, the contract between the supplier and recipient must contain a provision obliging the recipient 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 a 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.

Certain purchasers of new residential premises, or potential residential land, are obliged to withhold an amount in respect 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 which 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 9.5% of an employee's "ordinary time earnings" up to a specified level. It is proposed that this level gradually increase 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 plus an interest charge and administration fee.

Stamp duty

Each of Australia's states and territories impose stamp duty on certain transactions. With the introduction of GST, the revenue from which the Federal Government shares with the states and territories, the range of transactions to which stamp duty applies has been reduced in recent years. However, states and territories continue to impose stamp duty on certain transactions and, in particular, those involving real estate, including:

- the transfer of significant holdings of shares in private companies and trusts which hold real estate; and
- the transfer of interests in real estate.

Unfortunately, the legislation in each state and territory is not uniform. Some states and territories, for example, continue to impose duty on the transfer of interests in certain business assets within the relevant state or territory.

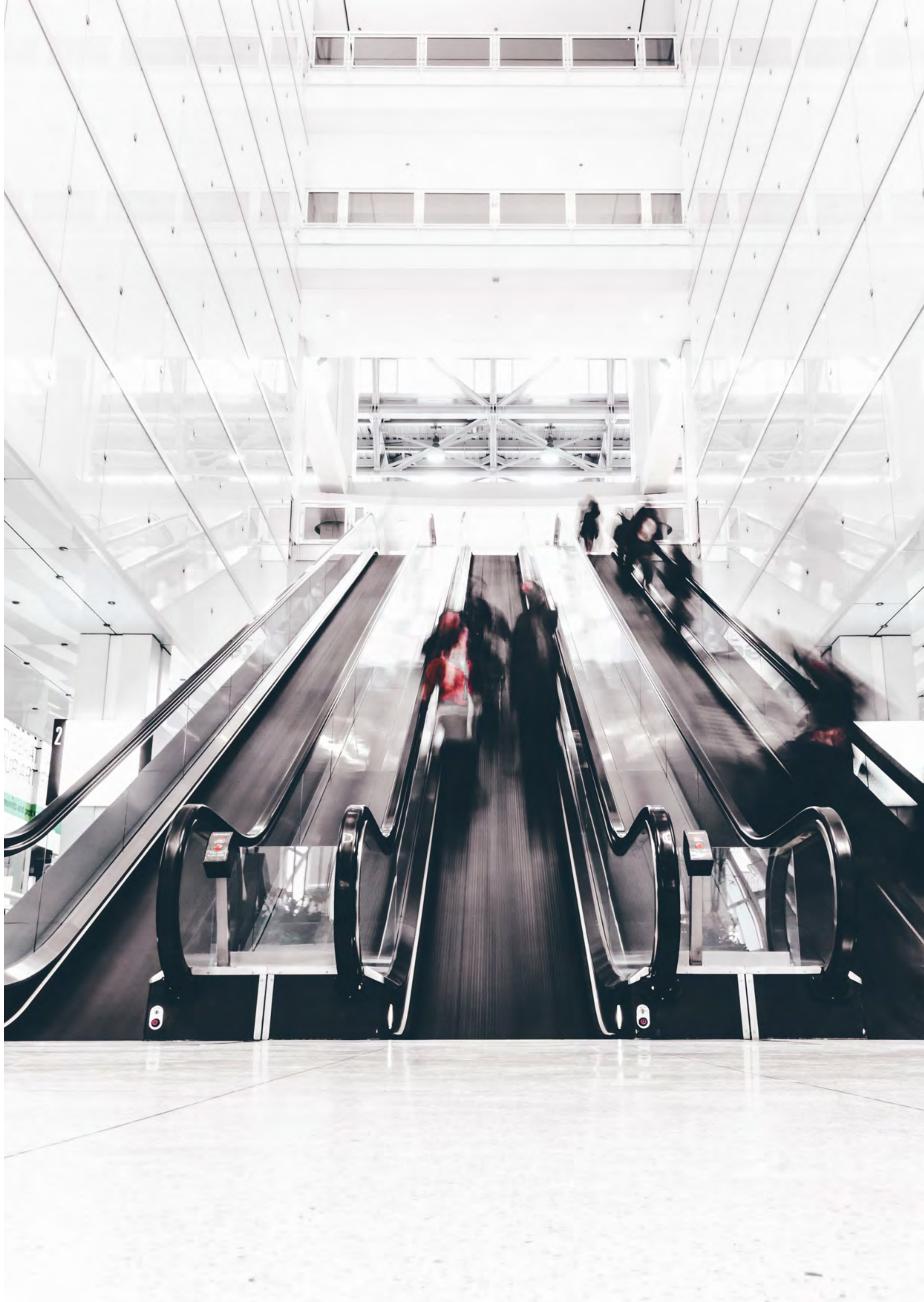
The rate of stamp duty varies among the states and territories and can be substantial. In New South Wales, for example, duty at rates of up to 7% of the transaction value can apply. In recent times, many states impose an additional stamp duty surcharge on acquisitions of residential property by foreign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

Payroll tax

Each of the states and territories impose payroll tax. This is a tax based on the amount of wages paid by certain employers where the annual wages paid by the employer exceed a specified threshold (which varies among the states and territories). The rates of payroll tax vary from approximately 5% to 7% of the annual payroll bill.

Land tax

Land tax is levied by the six states and by the Australian Capital Territory on the unimproved value of land. Some states also have imposed a land tax surcharge which applies to foreign owners of land. Generally concessions are granted in respect of agricultural land and residential land which 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, 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 which 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, and he/she must be an Australian resident. Public companies are required to have a minimum of three directors, two of which 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 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 interests. Independence and quality is regulated by various instruments including the Corporations Act, the Code of Ethics for Professional Accounts, and the Auditing Standards.

Anti-bribery and anti-corruption

The Australian government engages in a range of international anti-bribery and anti-corruption forums including the APEC Anti-Corruption and Transparency Working Group, G20 Anti-Corruption Working Group, OECD Working Group on Bribery and United Nations Convention against Corruption Working Groups.

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 8 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 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.

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. During this period, employees who earn less than $150,000 will generally be eligible for Parental Leave Pay for 18 weeks. Employers required to provide Parental Leave Pay are reimbursed by the Federal Government. It is important to recognise that employers sometimes 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, or sustains a life-threatening personal injury.

Family and domestic violence leave

All employees, including part-time and casual employees, are entitled to five days of unpaid family and domestic violence leave each year.

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).

Unpaid parental leave

All employees are entitled to up to 12 months unpaid parental leave and are able to request an additional 12 months unpaid leave.

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.

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.

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 which deal 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 is protected. The Fair Work Act prohibits the adverse treatment of an employee on the basis of his or her 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.

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

Senior executives and employees of companies in early stages of growth are often provided with 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.

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 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 and (unless they are covered by a modern award or enterprise agreement) earn less than A$148,700 (as at 1 July 2019). An employee who has been dismissed due to a "genuine redundancy" will not be protected by unfair dismissal laws.

Discrimination

Discrimination in an Australian workplace will be unlawful where a person is treated less favourably based on his or her possession of a "protected attribute" — this includes the person's age, sex, race, disability, or religion. Employers found to have discriminated against an employee will be liable to pay compensation.

Bullying

The Fair Work Act contains provisions which 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.

General protections

An employee, prospective employee, or independent contractor may bring a claim under the general protections provisions in the Fair Work Act where his or her employer has taken "adverse action" 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 no limit on the amount of compensation that an employer may be ordered to pay to a court in the event that it is found to have acted adversely towards an employee.

Superannuation

Employers are required to make superannuation or pension contributions on behalf of their employees. The current minimum level of contribution is 9.5% of the employee's gross earnings, although this is slated to increase to up to 12% in the coming years. Employers who fail to meet the minimum level of support are liable for 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 can make deposits into its preferred fund or a modern award may stipulate a "default fund".

Employees can access their superannuation once they reach a certain age.

Migration and visas

Companies seeking to employ overseas staff in Australia need to comply with a range of legislative requirements, including relevant visas.

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) (Competition and Consumer Act) 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$500,000 per contravention and be banned from being a company director or company manager for life. Corporations are subject to fines of up to A$10 million, or three times the value of the benefit gained, or, if the gain cannot be ascertained, 10% 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 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) which 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).

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, Malaysia, Korea, Japan, China, and the Association of South East Asian Nations (**ASEAN**).

Australia is also a party to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

Australia is a signatory to a number of free trade agreements which have not yet been enforced, including with Indonesia, Hong Kong and also the Pacific Agreement on Closer Economic Relations.

Bilateral investment treaties

Australia is party to bilateral investment treaties with a number of countries, including China, Vietnam, Indonesia, Hong Kong, and India.

Import controls

The *Customs Act 1901* (Cth) regulates the import and export of goods to and from Australia. Australian Customs 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, goods and services tax (**GST**) and any other taxes and charges that may apply, for all goods with a 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 are 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 Department of Immigration and Border Protection 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 Customs determines the value of goods imported into Australia based on the World Trade Organisation Valuation Agreement. This valuation system is used by many major trading nations.

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.

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

Australia adheres to United Nations Security Council (**UNSC**) sanctions regimes as well as Australian autonomous sanctions regimes.

UNSC sanctions regimes are 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 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 sanction regimes currently implemented under Australian sanction laws, including detailed information about the particular sanctions measures, can be found via this link: https://www.dfat.gov.au/node/123620

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 which 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 which have 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 which 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

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 Office of the Australian Information Commissioner (**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.

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 Office of the Australian Information Commissioner 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$360,000 for individuals and A$1.8 million for bodies corporate.

Spam

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

A message becomes an electronic commercial message when the message 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 online at 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, the owner, and any mortgage and (with a very limited number of exceptions) other third-party interests.

This means that buyers of real property in Australia have 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 buyer's purchase is registered, the buyer then has control over the creation of any new 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 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**), 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 companies or trusts where a foreign person holds a substantial interest, as well as foreign governments.

Currently, due to impacts of the COVID-19 outbreak, FIRB approval is required where a foreign person seeks to acquire an interest in real property in Australia regardless of value.

Obtaining FIRB approval requires the payment of an application fee and providing detailed information about the proposed transaction, including structuring, the commercial rationale, 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, for example, auction, private sale, or tender. Whichever method applies, once the seller and the buyer agree terms, they sign a written contract of sale, although 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 10% of the price), any conditions precedent (such as FIRB approval, where the buyer requires this), vendor 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 giving to the buyer the seller's ownership document (known as a "certificate of title") as well as a signed transfer of that title in the form required for the buyer to register itself as the new owner at the relevant land registry.

Until recently all settlements have been by way of a paper certificate of title and transfer that are physically submitted to the land registry for processing. However, Australia's states and territories are currently transitioning to an electronic settlement system, although the timing of this transition varies greatly across Australia's jurisdictions. Once in place the electronic system will streamline the settlement process and make it even easier to transact in Australian real property from outside Australia.

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. A party's principal place of residence is usually exempt from land tax.

Rates are a form of tax that are levied by the local 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 on land sales or revenue derived from land include capital gains tax, income tax and goods and services tax (**GST**).

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, as well as the outcomes desired by the parties involved in the transaction, including the legal and taxation implications.

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 for the benefit of the unit holders. In either case, liability is 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 has 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 which 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 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 its right to occupy the premises under the lease will be enforceable against anyone else who has or acquires an interest in the land.

Most states and territories have legislation to provide certain protection for tenants of retail premises that override any agreement between 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.

SECTION 14

ENVIRONMENT & PLANNING

Overview of environmental risk and regulation

Environmental laws in Australia are relevant to a broad range of industries, not simply energy, resources and manufacturing sectors, but any business with operational environmental impacts, such as waste production. Any business that owns or occupies land that is contaminated or potentially contaminated will also be regulated by environmental laws. These laws may include liability to clean-up land that is owned or occupied (in some situations, whether or not the business is the original polluter of the land).

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 environmental regulation. Environment and planning laws are different in each state and territory.

Complexity

One of the key challenges for business in Australia is understanding the specific requirements of the different states, territories and local government areas in which the business is located. Businesses which operate in multiple states and territories will be subject to several different laws. In each state and territory there are typically 8-12 distinct pieces of environmental legislation.

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 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 control; waste; contamination; water use and pollution; native vegetation and biodiversity conservation; protected areas; marine areas and heritage matters to name a few. Some jurisdictions also have regulation of climate change.

Environmental laws are principally found in Acts and Regulations. Regulations change approximately every 10 years. Given the number of different Acts and Regulations covering environmental matters, amendments to regulations are relatively frequent, even absent a major change to a specific Act. Environmental laws also provide for policies and guidance documents, which often contain the material standards for compliance. This enables legislators (and relevantly the environment regulators) to set, publish and update standards on a regular basis as environmental knowledge develops.

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 (QLD), Western Australia (WA) and the Northern Territory (NT), have government departments who 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 the Environment and Energy 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 law in the environmental context is the *Environment Protection and Biodiversity Conservation Act 1999*, which is intended to protect nationally protected species, ecosystems, and places. Federal laws also seek to regulate and report on Australia's carbon emissions, and other greenhouse gas and ozone depleting substances.

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 widely 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 A$2 million and/or imprisonment. It is not uncommon for fines to be ordered at a significant level (tens or hundreds of thousands of dollars). In the event that an environmental regulator does not proceed with a formal prosecution, there are a range of 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 a provision for directors and officers (and in some cases senior managers) to be held legally liable for the offences of the corporation (called derivative liability). Such offence provisions, enabling prosecution of individuals, may, depending on the jurisdiction, give a regulator the power to proceed against both individual(s) and the corporation, or in some cases, against only individual(s) at the regulator's discretion. The purpose of director liability is to ensure that at the highest levels of the corporate structure, environmental matters are given priority.

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. In most cases, what is required in order to meet this requirement is the identification of environmental risks, an assessment of those risks and implementation of measures to eliminate or minimise risks, including through use of technology and systems.

Licensing and approvals

Changes in land use or the development of land for operations may require a development approval under land use planning laws. 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 risk and liability are key issues for businesses, particularly following the 2019/2020 Australian bushfire season, which saw widespread environmental and business impacts from bushfires in many states and territories.

The Australian Securities and Investment Commission (**ASIC**) has particular guidance for directors on the disclosure of climate change risks that may "*pose a systemic risk that could have a material impact on the future financial position, performance or prospects of entities*". Directors need to demonstrate that they have exercised due care and diligence by properly considering climate change risk in the course of their duties. Climate change litigation is increasing and there is growing focus in many jurisdictions on renewables and stronger renewable energy targets.

Several jurisdictions also have major regulatory change underway, which modernises environmental regulation and enforcement. The main changes are occurring in the State of Victoria, with a new Environment Protection Act in force from 1 July 2020 and at federal level with a new national Australian Industry Chemicals Introduction Scheme (AICIS) from 1 July 2020. These changes replace existing laws that are 30-50 years old.

SECTION 15

Key regulators & 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 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
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

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