K&L GATES

DOING BUSINESS IN AUSTRALIA

2019

CONTENTS

WELCOME

klgates.com

WELCOME TO THE K&L GATES GUIDE TO DOING BUSINESS IN AUSTRALIA

Australia welcomes new business and foreign investment by providing a strong economy, a stable political environment and a skilled and talented workforce. At K&L Gates, we believe that a combination of these factors, rising domestic demand and foreign investment, reduced company tax rates and Australia's agility to adapt to changes in global demand, will continue to make Australia an attractive place for offshore investors to allocate their capital.

This Guide has been designed to assist you in understanding some of the key structuring issues and regulatory processes required when establishing a business or investing in Australia. It is necessarily general in nature, and we would be please to provide tailored advice for your circumstances.

We would be delighted to discuss any opportunities or concerns with you.

Nick Nichola

Managing Partner, Australia

Betsy-Ann Howe

Global Tax Practice Coordinator, Australia

FOREIGN INVESTMENT IN AUSTRALIA

FOREIGN INVESTMENT IN AUSTRALIA

OVERVIEW

Under Australia's foreign investment framework, foreign investors (including individuals, companies, trustees and governments) may need to apply for foreign investment approval prior to entering a proposed transaction. This Guide provides a high level overview of Australia's foreign investment framework for foreign persons who are considering investing in Australia.

Under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA), certain proposed actions by foreign persons to make investments in Australia are 'significant actions' or 'notifiable actions'. In these circumstances, a foreign person needs to determine whether they are obliged to, or should, provide prior notification to the Foreign Investment Review Board (FIRB) and seek a no objections notification.

Under the FATA, the Treasurer has the power to make a range of orders in relation to a 'significant action' that a person is proposing to take or has already taken. In particular:

- where the Treasurer is notified of a 'significant action' before it is taken, the Treasurer may decide that:
  - » they do not object to the action and give the person a 'no objection notification not imposing conditions'
  - » they do not object to the action provided the person complies with one or more conditions, and give the person a 'no objection notification imposing conditions'
  - » taking the action would be contrary to the national interest and make an order prohibiting the proposed significant action
- where the significant action has already been taken without notification to the Treasurer, the Treasurer may determine the action is contrary to the national interest and may (for instance) make a disposal order, which is directed at unwinding the action.

Some 'significant actions' are also 'notifiable actions' under the FATA. 'Notifiable actions' must be notified to the Treasurer before the actions can be taken. Offences and civil penalties may apply if a 'notifiable action' is taken without a notice having been given.

If a 'significant action' is not a 'notifiable action', a foreign person is not obliged under the FATA to notify that action to the Treasurer before it is taken. However, it is still prudent to notify any 'significant action' to the Treasurer, before the action is taken, given the powers of the Treasurer and the associated risks.

When making foreign investment decisions, the Treasurer is guided by the FIRB, which examines 'significant actions' and 'notifiable actions' and advises on the relevant national interest implications.

Monetary thresholds (which depend on whether or not the investor is from a free trade agreement partner country and whether or not the foreign investor is a 'foreign government investor') apply to determine whether prior notification to the Treasurer ought to be made with respect to a particular action. Thresholds are indexed annually.

A 'foreign person' is generally:

- an individual that is not ordinarily resident in Australia
- a foreign government or 'foreign government investor'
- a corporation, trustee of a trust or general partner of a limited partnership where a substantial interest of at least 20% is held by an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, or
- a corporation, trustee of a trust or general partner of a limited partnership in which two or more foreign persons hold an aggregate substantial interest of at least 40%.

A 'foreign government investor' is a foreign government or separate government entity, a corporation or trustee of a trust, or a general partner of a limited partnership in which:

- a foreign government or separate government entity holds a substantial interest of at least 20%, or
- foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country) hold an aggregate substantial interest of at least 40%.

APPROVALS

FIRB APPROVAL REQUIRED – NON LAND PROPOSALS

Investor	Action	Threshold – more than:
From Free Trade Agreement partner countries that have the higher threshold[1]	Acquisitions in non sensitive businesses	AUD1,154 million
	Acquisitions in sensitive businesses[2]	AUD266 million
	Media sector[3]	AUD0
	Agribusinesses	For Chile, New Zealand and United States, AUD1,154 million
		For Canada, China, Japan, Korea, Mexico and Singapore, AUD58 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person (with associates) in the entity)
Other investors	Business acquisitions (all sectors)	AUD266 million
	Media sector[3]	AUD0
	Agribusinesses	AUD58 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person (with associates) in the entity)
Foreign government investors	All direct interests in an Australian entity or Australian business	AUD0
	Starting a new Australian business	AUD0

FIRB APPROVAL REQUIRED – LAND PROPOSALS

Investor	Action	Threshold – more than:
Privately owned investors from Free Trade Agreement partner countries that have the higher threshold	Residential land	AUD0
	Agricultural land	For Chile, New Zealand and United States, AUD1,154 million
		For Canada, China, Japan, Korea, Mexico and Singapore, AUD15 million (cumulative)
	Vacant commercial land	AUD0
	Developed commercial land	AUD1,154 million
	Mining and production tenements	For Chile, New Zealand and United States, AUD1,154 million
		Others AUD0
Privately owned investors from non Free Trade Agreement partner countries countries and Free Trade Agreement partner countries that do not have the higher threshold	Agricultural land	For Thailand, where land is used wholly and exclusively for a primary production business, AUD50 million (otherwise the land is not agricultural land)
		Others AUD15 million (cumulative)
	Vacant commercial land	AUD0
	Developed commercial land	AUD266 million
		Low threshold land (sensitive land)[4], AUD58 million
	Mining and production tenements	AUD0
Foreign government investors	Any interest in land	AUD0
	Starting a new Australian business	AUD0

[1]Agreement country investors are Canadian, Chilean, Chinese, Japanese, New Zealand, South Korean, Singaporean and United States investors, except foreign government investors, and any country for which TPP-11 subsequently comes into force. Without limitation, we note that countries including China are further defined in the foreign investment legislation and regulations and a reference to China does not include a reference to a relevant World Trade Organization member including Hong Kong, Macao or the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

[2]Sensitive businesses include those in the following sectors: media; telecommunications; transport; defence and military related industries and activities; encryption and securities technologies and communications systems; the extraction of uranium or plutonium; or the operation of nuclear facilities.

[3]For investments in the media sector, a holding of at least 5% requires notification and prior approval regardless of the value of investment.

[4]Low threshold land includes mines and critical infrastructure (for example, an airport or port).

TIMING

The timeframe for making a decision in relation to a FIRB application will not commence until the correct fee has been paid in full. The Treasurer has 30 days to consider a foreign investment application and make a decision. The Treasurer may extend this period by up to a further 90 days by publishing an interim order (however, in practice, FIRB will generally seek the applicant's consent to extend the statutory deadline). Applicants will be informed of the outcome of their application within 10 days of the Treasurer's decision being made.

SECTOR SPECIFIC LEGISLATION

In addition to the FIRB requirements, foreign investment in various sectors is also governed by certain specific legislation. In this regard:

- foreign ownership in the banking sector must be consistent with the *Banking Act 1959* (Cth), the *Financial Sector (Shareholdings) Act 1998* (Cth) and banking policy
- aggregate foreign ownership in an Australian international airline (including Qantas) is limited to 49% (see *Air Navigation Act 1920* (Cth) and *Qantas Sale Act 1992* (Cth))
- foreign ownership of some airports is limited by the *Airports Act 1996* (Cth) to 49% with a 5% airline ownership limit, and this legislation also imposes certain cross-ownership limits between certain airport operator companies
- a ship is required under the *Shipping Registration Act 1981* (Cth) to be majority Australian-owned if it is to be registered in Australia, unless it is operated by a foreign resident under a demise charter and is exempted from the requirement to be registered during the term of the charter
- under the *Telstra Corporation Act 1991* (Cth), aggregate foreign ownership of Telstra is limited to 35% and individual foreign investors are only allowed to own up to 5%.

State requirements for foreign investors

Each state may also have state specific legislation which imposes obligations on foreign investors. For example Queensland has enacted legislation which requires a foreign person (which is similarly defined in the FIRB legislation) to notify the appropriate authority of the acquisition and disposal of an interest in Queensland land within 90 days. Further, a person who holds an interest in land and who subsequently becomes a foreign person or a trustee of a foreign person must also lodge a notification within 90 days.

Failure to comply with the notification requirements, or the provision of false or misleading information, may result in a fine exceeding AUD157,500 for an individual's first offence (and fines exceeding AUD787,500 for corporations) with provisions for forfeiture of the relevant interest.

More information about the FIRB can be found at www.firb.gov.au.

BUSINESS STRUCTURES

BUSINESS STRUCTURES

In determining which structure to use to make an investment in Australia, there are a range of legal, tax, accounting and regulatory issues which need to be considered. Business structures include:

- companies incorporated in Australia
- Australian branches of foreign companies
- partnerships
- joint ventures
- sole proprietorships
- trusts.

COMPANIES INCORPORATED IN AUSTRALIA

In Australia there are both proprietary (private) and public companies. Procedures exist for changing the status of a company, if required as the company and its operations evolve. The differences between a proprietary company and a public company are:

- A proprietary company's disclosure requirements are less onerous, but for this reason its shares may not be offered to the general public (and therefore cannot be traded on a public stock exchange).
- A proprietary company must have at least one member, but cannot have more than 50 non-employee members, whereas a public company can have an unlimited number of members and can raise funds from the public.
- Public companies may be listed on the Australian Securities Exchange (ASX), in which case they must comply with the ASX Listing Rules.
- Most companies, particularly small companies, are proprietary limited and must include the word 'Proprietary' and 'Limited' or 'Pty Ltd' in their name (whereas a public company is only required to include the word 'Limited' or 'Ltd') to indicate its structure to all relevant stakeholders.
- Proprietary limited companies are also classified as large or small. A proprietary company is classified as small only if it meets specified criteria relating to its consolidated revenue, consolidated gross assets, and the number of its employed persons.
- Most large proprietary companies are required to appoint an auditor and lodge appropriate financial statements with the Australian Securities and Investments Commission (ASIC). Small proprietary companies need only prepare audited financial statements if ordered to do so by ASIC or in particular circumstances, where required by its members or where it is controlled by a foreign company.
- The most common type of company in Australia is a proprietary company limited by shares. This type of company has shareholders and the liability of each shareholder to the company or its creditors is limited to the capital originally invested. A shareholder's personal assets are protected in the event of the company's insolvency, but money originally invested will be lost. Most limited liability companies (whether public or private) as noted above are required to have the word 'Limited' or 'Ltd' included in their names.
- Distinct from a company limited by shares is a no liability company. In Australia, no liability status is restricted only to mining companies whereby the company is not entitled to calls on the unpaid issue price of its shares. A no liability company must include the words 'No Liability' or 'NL' in its name.

An Australian Company Number (ACN) or an Australian Registered Body Number (ARBN) will be assigned by ASIC to each newly registered company or foreign company (meaning a foreign incorporated entity which is registered in Australia, as opposed to a foreign subsidiary which would be a locally incoporated entity). The ACN or ARBN must appear on all of the company's public documents, negotiable instruments and where relevant, the company seal.

AUSTRALIAN BRANCHES OF FOREIGN COMPANIES

A foreign company wishing to establish a place of business or carry on a business in Australia without incorporating a local subsidiary must register as a foreign company with ASIC and obtain an ARBN. The requirements for registration of a foreign company include:

- appointment of an Australian resident individual or company who will act as an agent for the service of notices and who may also be liable for acts of the foreign company in Australia

- maintenance of a registered office in Australia
- lodgement of a certified copy of its certificate of incorporation and constitution, and a list of its current directors including names, addresses, and dates and places of birth
- a list of powers of the Australian resident directors.

Foreign companies are prohibited from carrying on business in Australia without becoming registered. A registered foreign company may only trade under the specific name registered with ASIC. If the name of a registered foreign company changes, it must notify ASIC of the change within 14 days.

Most registered foreign companies must annually lodge with ASIC a copy of their balance sheet, profit and loss statement and cash flow statement for the previous financial year. These must be prepared in accordance with the laws of the company's place of incorporation, together with any other documents which they are required to prepare under the laws of their place of incorporation.

PARTNERSHIPS

Partnership law is set out in the relevant state or territory legislation and is also provided for by common law. A partnership is a valid agreement typically formed between two or more businesses or individuals in which the partners (owners) agree to carry on a business (any trade, occupation or profession) with a view to generating a profit. The partners ultimately share the profits or losses formed by the partnership. As a partnership must operate with a view to profit, charitable organisations cannot operate under this business structure. A partnership is not a separate legal entity and partners are, therefore, collectively and individually liable for the debts and obligations of the partnership.

LIMITED PARTNERSHIPS

State and territory legislation caters for limited partnerships, which have two types of partners - 'limited partners' and 'general partners' whose duties and liabilities vary. Limited partners are not involved in managing the limited partnership and their liability for its debts is limited to the amount of money contributed to that partnership as recorded in the relevant register for each state and territory. Limited partners therefore contribute to the capital of the partnership in return for a share of its profits. A general partner is responsible for the day to day management of the limited partnership and their liability for its debt is unlimited. There must be at least one general partner. Limited partnerships are formed upon registration as a limited partnership.

JOINT VENTURES

A joint venture (JV) is a term that describes the relationship between two or more parties entering into an agreement to work towards the same strategic goals while remaining separate legal entities. There is no law expressly governing JVs in Australia and the term 'joint venture' has no settled meaning under statute or common law in Australia.

A JV is usually constituted by a formal agreement which specifies the parties' rights and obligations. A JV may be incorporated, where each party subscribes for shares in a JV company, or unincorporated, where the parties agree by contract to a particular arrangement. Care must be taken in the constituent document to ensure the relationship does not, for tax and liability purposes at least, constitute a partnership.

Generally, the proceeds of an unincorporated JV are proportionately distributed to each of the joint venturers and, accordingly, each joint venturer may adopt differing accounting and tax treatments for the income and expenses of their part of the JV. In an unincorporated simple JV there is no other legal entity through which gains and losses must pass. However, to facilitate dealing with third parties, the title to the property of the JV may be held by a separate entity which may also serve as manager of the JV.

An alternative vehicle for two or more parties who wish to operate a business venture jointly is by means of a JV company. In this scenario, the shares and directorship in the JV company are proportionately held by the JV parties in accordance with their respective contributions to the project or venture. A written shareholders agreement (tailored to the specific requirements of the project, venture and parties involved) governs the relationship between the parties and the operation of the JV company. The main advantage of this structure is the limited liability conferred on its participants as shareholders in a proprietary limited company.

MOST FOREIGN COMPANIES OPERATE IN AUSTRALIA THROUGH A LOCALLY ESTABLISHED SUBSIDIARY COMPANY (RATHER THAN BY THE ESTABLISHMENT OF A BRANCH OFFICE) WITH THE BENEFIT OF LIMITED LIABILITY AND SEPARATE LEGAL STATUS.

SOLE PROPRIETORSHIPS

A sole proprietorship is a type of business entity that is owned and run by one individual and in which there is no legal distinction between the owner and the business. The owner receives all profits and is personally liable for all losses, debts and other obligations incurred by the business. Every asset of the business is owned by the proprietor and all debts of the business are the proprietor's. This means the owner has no less liability than if they were acting as an individual instead of as a business. If a sole proprietor uses a name other than their own name as the trading name of the business, that name must be registered in accordance with the applicable legislation. This requirement applies to all forms of business entity carrying on business under a name which is not the entity's name. This type of structure is rarely used by foreign persons investing in Australia or businesses of any significant size.

TRUSTS AND MANAGED INVESTMENT SCHEMES

A trust is a legal relationship which arises when a person (the trustee) holds property for the benefit of some persons (the beneficiaries) or for some object permitted by law (such as a charitable object) in such a way that the real benefit of the property accrues to the beneficiary or other object of the trust and not to the trustee. Relevantly:

- the trustee has a fiduciary relationship with the beneficiaries of the trust who may enforce those fiduciary obligations
- a business may be carried on by means of a trust where a trustee (often a proprietary limited company) owns assets of the business and carries on the trading activities on behalf of the beneficiaries of the trust
- the most common business trust is a unit trust under which the interest in the trust is divided into 'units'. Units may be transferred in a similar manner to shares of a company.

Collective Investment Vehicles – Managed Investment Trusts

Subject to laws regulating fundraising, the trustee of a trust may offer interests in that trust to the public for subscription and may also apply for listing of the trust and those interests on a securities exchange, provided the trustee and the trust satisfy certain regulations with respect to managed investment schemes. Managed investment schemes which have certain characteristics (i.e. widely held) may qualify for managed investment trust (MIT) status and be eligible for certain tax concessions when making distributions to non-residents. One type of trust which is commonly found listed on the ASX is an Australian Real Estate Investment Trust (A-REIT) which invests in real estate assets.

DISTRIBUTION AND FRANCHISING

Under a distribution agreement the distributor is usually granted 'sole' or 'exclusive' rights of distribution. It is vital that the rights and liabilities of the parties be defined with precision in a written agreement. Particular care must be taken not to infringe the Competition and Consumer Act 2010 (Cth) by entering into 'anticompetitive' agreements.

The advantage of dealing with a distributor is that an enterprise wishing to do business in this way need only deal with a single person whose credit and standing are capable of being accurately assessed. The distributor's profit is the difference between the buying and selling price of the merchandise, whereas an agent earns a commission.

Generally speaking a distributor is not an agent. Subject to some exceptions relating to manufacturers' liability, a distributor, as principal, will itself have legal responsibility to third parties, following distribution and sale of the supplier's products. By contrast, an agent will legally bind its principal in relation to the agent's dealings with third parties (unless acting outside the agent's authority). A disadvantage is that the price of the merchandise that an enterprise is attempting to market may be raised as a result of using a distributor, thus weakening the competitiveness of the merchandise in the local market.

Franchising is a fast growing business model and has spread to virtually every sector of the economy in Australia. 'Franchising' captures arrangements that meet the legal definition of being a 'franchise' even if they do not call themselves a franchise. It is important that the parties to an arrangement identify upfront whether the arrangement will be governed by laws regarding franchising. Franchising in Australia is highly regulated and franchisors must comply with the Franchising Code of Conduct if they propose to grant a franchise that will be operated in Australia.

AGENCY

Notwithstanding international measures aimed at unifying the principles of agency law, in particular the Convention on Agency in the International Sale of Goods, this is a complex area of law. In Australia, the relationships and rights created in contracts of agency are largely defined by common law rules. An agency agreement creates three relationships: principal/agent, principal/third party and agent/third party. Depending on whether the principal is undisclosed, unnamed or named, the third party may have the right to sue either the principal or the agent in the event of a breach of contract. In each case, the principal will be in a position to sue the third party should the latter be

at fault. Agents are bound to use reasonable diligence in carrying out their duties, to disclose material acts which concern their principals, not to make hidden or secret profits, not to divulge information of a confidential nature and, finally to account to their principals in respect of all agency transactions. A principal is bound to pay the agent's commission and to indemnify the agent on account of expenses and liabilities if incurred with the principal's approval.

ETHICAL SUPPLY CHAINS AND THE MODERN SLAVERY ACT

The Modern Slavery Act 2018 (Cth) was passed by the Australian Parliament on 29 November 2018 and came into effect on 1 January 2019 for many Australian businesses. Modern slavery exists in many forms and includes forced labour, wage exploitation, involuntary servitude, debt bondage, human trafficking and child labour, both in Australia and globally. The purpose of the legislation is to identify and remediate with a longer term aim to remove modern slavery from all supply chains.

This new law is relevant for businesses that fall within the following criteria:

- has a consolidated revenue of >AUD100 million over the 12 months reporting period, and
- is an Australian entity at the time of reporting, or
- is a foreign entity carrying on business in Australia at the time of reporting.

Australian businesses which are caught by the criteria above are required to prepare a Modern Slavery Statement and report to government annually. Businesses have to report within six months of the end of their full financial year (eg after 30 December 2019 or 30 June 2020).

The Modern Slavery Statement must address six areas as part of the mandatory criteria:

1. Identify your reporting entity.
2. Describe your business structure, operations and supply chains.
3. Describe the risks of modern slavery practices in your supply chains.
4. Describe actions your business takes (or will take) to assess and address risks.
5. Explain how your business will assess the effectiveness of your actions to address modern slavery risks?
6. Describe the process of consultation with any entities your business owns or controls.

K&L Gates has an established Global Ethical Supply Chain group which can provide guidance and support: www.klgateshub.com/categorylisting/?sectorsubject=Global+Ethical+Supply+Chains

The Australian Government's Department of Home Affairs has set up a website with further details: www.homeaffairs.gov.au/help-and-support/how-to-engage-us/overview.

FRANCHISING IS A FAST GROWING BUSINESS MODEL AND HAS SPREAD TO VIRTUALLY EVERY SECTOR OF THE ECONOMY IN AUSTRALIA.

CORPORATE GOVERNANCE

CORPORATE GOVERNANCE

Federal legislation enables the Australian Federal Government and the authority it established, Australian Securities and Investment Commission (ASIC), to assume responsibility for the regulation of companies and securities. The administration is regulated nationally, with ASIC's computer system containing a public record of certain particulars of all companies operating in Australia.

CAPITAL

Subject only to the requirement that there be at least one shareholder, there is no prescribed minimum for shareholders' capital. The thin capitalisation tax rule may influence the debt/equity capital structure. Share capital can also be consolidated or split as required, to allow for future investment and structuring requirements of the business, subject of course to any tax impact of such changes.

If certain procedures and requirements are met, companies may buy back their shares which are then cancelled. Different shareholder approval processes apply to equal reductions and selective reductions, but both require that approval be obtained at a general meeting. Before the notice calling the general meeting is sent to shareholders, the company is required to notify ASIC of the proposed buy back, thereby enabling creditors and other interested persons to receive advanced notice of a proposed reduction in capital. Also, the notice must include a statement which sets out all information known to the company that is material to the decision on how to vote on the resolution.

Companies may also cancel or reduce their issued share capital with requisite members' approval. In all cases, any return of capital must not render the company insolvent (unable to pay its debts in the ordinary cause).

THE BOARD OF DIRECTORS

For proprietary companies, a minimum of one director is required. At least one director of a company must be resident in Australia. Public companies require at least three directors, two of whom must be resident in Australia. One secretary resident in Australia is also required (that person can also be a director) for a public company.

The head of the board of directors (if any) is called the chairperson and he or she is also normally the chairperson of the company in general meetings. For tax purposes, a public officer (who also must reside in Australia) must be appointed and the Commissioner of Taxation must be notified of the details. All companies are required to maintain a registered office in Australia. Agreements and documents which are signed by a company may be signed by a duly authorised officer (usually a director or secretary) or under a power of attorney.

For more important or certain types of documents, a company may execute a document without a seal if the document is signed (or where a seal is fixed to the document and the fixing of the seal is witnessed) by:

- two directors of the company
- a director and a secretary of the company, or
- the director, in the case of a proprietary company that has a sole director who is also the sole company secretary.

If a company executes a document in the above fashion, the other party may assume that entry into the document was properly authorised without further enquiry. For this reason, proprietary companies ordinarily do appoint a company secretary. Execution of a deed or agreement, however, also remains subject to common law requirements as to enforceability and procedural matters related to signing.

A company is required under the *Corporations Act 2001* (Cth) to maintain a register of members, a register of office holders, a register of security interests affecting the company's property, and, if the company has issued any options or debentures, a register or option holders and debenture holders. It is this register which is deemed to reflect the legal position of the membership and officeholders of an Australian company. This means that while ASIC is required to be notified of changes, it is the company's registers and not ASIC's records that reflect the true legal position under Australian law.

DIRECTORS DUTIES

Under the Corporations Act and common law, directors must:

- act honestly
- exercise care and diligence
- act in good faith in the best interest of the company and for a proper purpose
- not improperly use their position or company information
- disclose their material personal interest and avoid conflicts of interest.

MEETINGS

A public company must convene and hold a general shareholders' meeting within 18 months after its registration and, thereafter, at least once in each calendar year and within five months after the close of each financial year (the annual general meeting). A proprietary company is not required by law to hold an annual general meeting, although it may be required to do so by its constitution.

The financial year of most Australian taxpayers ends on 30 June, so, for public companies, most annual general meetings must be held prior to 30 November. However, relief can be obtained from ASIC to align the year end with a foreign parent's year end.

The agenda for the annual general meeting includes:

- the presentation of the company's accounts, including group accounts where applicable, together with directors' and auditors' reports
- the resignations and appointments of directors – the constitutions of public companies usually provide that a proportion of the directors (eg one third) must retire by rotation each year, and the resignations and appointments of directors are also usually considered at the annual general meeting.

Other meetings may be convened by directors or members from time to time, in accordance with the company's constitution and the Corporations Act.

NOTIFICATION AND LODGEMENT

A public register of certain company information is maintained by ASIC, which may be accessed by the public for a small fee. Changes of name or address of shareholders (for proprietary companies only) or officers, allotment of shares, passing of special resolutions, registration of charges against the company and the like, are all required to be notified to, or lodged with, ASIC, usually within 28 days of the event happening (45 days for registration of a charge). ASIC will, within 14 days of the company's review date (which is based on the anniversary of the company's registration date), send each company (or its agent, if one is used) an annual statement to review and update, and an invoice statement to pay, which will include an annual review fee. The annual statement is a statement of the company details as held by ASIC (eg details of the current directors, issued shares, options, top 20 members, holding company) and any change must be notified to ASIC within 28 days after the issue date of the annual statement.

Public companies, large proprietary companies, and, in some circumstances, small proprietary companies must provide ASIC with a copy of their audited financial report, auditor's report and directors' report within three months (for disclosing entities) or four months (for all other companies) of the end of its financial year.

REGULATION OF MARKETS

REGULATION OF MARKETS

TAKEOVERS

In general, the Corporations Act prohibits any person (alone or together with associates) acquiring an interest of 20%, or more, of the securities of an Australian listed public company (or an unlisted company with more than 50 members); or increasing an existing 20%, or more, interest in a company, other than by way of one of the specific exceptions. The major exceptions are:

- making an off-market takeover bid under which target shareholders are offered either cash or scrip consideration
- making a cash only, on-market, takeover bid
- having the relevant acquisition approved by target shareholders
- implementing a scheme of arrangement, which must be approved by the court and target shareholders
- satisfying the 'creep' provisions (ie the number of target securities acquired by the person in any six month period does not exceed 3% of the target's securities on issue).

The principal laws which regulate share acquisitions in Australia are:

- the Corporations Act
- the *Competition and Consumer Act 2010* (Cth)
- the Foreign Acquisitions and Takeovers Act
- industry specific laws in areas such as broadcasting and banking.

DEALINGS IN SECURITIES

Dealings in securities (which include shares, debentures and options) are heavily regulated under Australian law.

For example:

- subject to limited exceptions, a person may not raise equity in Australia other than pursuant to a formal disclosure document (usually a prospectus) lodged with ASIC
- persons may not engage in misleading or deceptive conduct (either by act or omission) in relation to any dealings in securities
- persons may not trade on inside information
- various obligations are imposed on Australian listed public companies in relation to the public disclosure of price sensitive information
- participants in the securities markets (eg brokers, dealers and investment advisers) are also subject to additional licensing and regulatory controls.
- Companies listed on the official list of the ASX are subject to the ASX Listing Rules and other operating rules. Among other things, these rules regulate:
  - » issues and trading of shares and other securities
  - » the transfer of listed securities
  - » transactions involving related parties
  - » substantial transactions
  - » the disclosure to the market of price sensitive information.

Foreign companies may apply for admission to the ASX. To avoid being subject to all the requirements of the ASX Listing Rules, they can apply for 'exempt foreign entity' status. An exempt foreign entity is exempt from complying with the majority of the Listing Rules (including rules relating to the disclosure of price sensitive information) provided the foreign entity is subject to the equivalent rules of its home exchange. Companies with an ASX Foreign Exempt Listing will still be required to provide ASX with reports and documents on an ongoing basis. The criteria for admission as an exempt foreign company include:

- being a member of certain approved overseas exchanges (including the New York, London, Paris, Hong Kong, Tokyo and Amsterdam stock exchanges)
- having net tangible assets or a market capitalisation of at least AUD2,000 million or having an operating profit before tax over each of the last three years of at least AUD200 million per annum
- having at least 1,000 members with a parcel of securities in excess of AUD500 million
- being registered as a foreign company under the Corporations Act.

EXCHANGE CONTROL

Currently, few formal exchange control requirements apply. From time to time, Reserve Bank approval may be required in relation to transactions involving countries subject to international sanctions. Under the *Financial Transactions Reports Act 1988* (Cth), there are reporting obligations imposed upon cash dealers with respect to certain transactions involving amounts over AUD10,000. Individuals are also obliged to report transfers of Australian or foreign currency in or out of Australia of amounts greater than AUD10,000, to the Australian Transaction Reports and Analysis Centre (AUSTRAC).

CONSUMER PROTECTION

CONSUMER PROTECTION

The *Competition and Consumer Act 2010* (Cth) (CCA) is the federal legislation that regulates corporations and individuals in their business dealings. The CCA seeks principally to:

- encourage corporations and individuals to act fairly in their business dealings
- encourage competition and, through it, efficiency in the economy
- provide for consumer protection.

The CCA is administered by the Australian Competition and Consumer Commission (ACCC) and is enforced by Australian courts and tribunals. The ACCC's role includes:

- encouraging compliance by investigating breaches of the CCA and, if necessary, taking legal action
- ensuring that consumers are treated fairly
- determining whether businesses should be exempted from the restrictive trade practices provisions of the CCA on the grounds of public benefit under authorisation or notification procedures
- providing guidance on compliance with the CCA through education programs, publications and the media to make businesses and consumers aware of their rights and responsibilities under the CCA.

The ACCC also has wide powers to compel the production of information, to require evidence to be given on oath and to enter premises to inspect, copy and possibly seize documents.

ANTITRUST AND COMPETITION LAW

The CCA contains specific prohibitions against cartels and other forms of anti-competitive conduct. Set out below are the key prohibitions.

Cartel conduct	Cartel conduct including price fixing, restricting output, allocating customers and bid rigging is strictly prohibited by the CCA. The CCA contains civil and criminal contraventions for cartel conduct that can apply to corporations and individuals. Individuals found guilty of criminal cartel conduct face a maximum penalty of up to 10 years in jail in addition to financial penalties. The ACCC operates an immunity policy for companies and individuals who 'blow the whistle' on cartel conduct in certain situations and subject to a number of conditions. Given that immunity is generally available only to those who are first to report the relevant cartel conduct to the ACCC, the timing of any approach to the regulator can be crucial.
Price fixing	Price fixing occurs when a company enters into a contract, arrangement or understanding with a competitor that has the purpose, effect or likely effect of fixing, controlling or maintaining the price of goods or services. Price fixing may occur in the form of agreed: • selling or buying prices (this does not necessarily mean that prices are set at the same level by all parties to the agreement) • minimum prices • formula for pricing or discounting goods and services • rebates, allowances or credit terms. Such agreements may be in writing but are often informal and verbal. Price fixing need not have any impact on competition for it to be strictly prohibited conduct. Evidence that a contract, arrangement or understanding has been reached between competitors to fix prices will suffice.

Restricting output	Restricting outputs in the production or supply chain occurs when a company enters into a contract, arrangement or understanding with a competitor that has the purpose of directly or indirectly preventing, restricting or limiting: • the production, or likely production, of goods or services by any or all the parties • the capacity, or likely capacity, of any or all of the parties • the supply, or likely supply, of goods or services to persons or classes of persons by all or any of the parties.
Allocating customers	Allocating customers, suppliers or territories occurs when a company enters into a contract, arrangement or understanding with a competitor that has the purpose of directly or indirectly allocating between any or all of the parties: • customers or classes of customer of goods or services of all or any of the parties • suppliers or classes of suppliers of goods or services to all or any of the parties • geographical areas in which goods or services are supplied or acquired by all or any of the parties.
Bid rigging	Bid rigging occurs when a company enters into a contract, arrangement or understanding with a competitor that has the purpose of directly or indirectly ensuring that in the event of a request for bids: • one or more parties bid but one or more do not • two or more parties bid on the basis that one of those bids is more likely to be successful • two or more parties bid but not all of those parties proceed with their bids • two or more parties bid and proceed with their bids but on the basis that one of those bids is more likely to be successful • two or more parties bid but a material component of at least one of those bids is worked out between the bidders.
Some exceptions to cartel conduct	There are some limited exceptions to the strict prohibitions against cartel conduct. They include: • joint ventures • the buying and selling activities of joint (or co-operative) buying and selling groups • the joint advertising and re-supply of goods or services collectively acquired • genuine recommended price arrangements. If conduct between competitors falls within an exemption, it may still be prohibited if its purpose or effect is to substantially lessen competition.
Resale price maintenance	Minimum resale prices cannot be specified by a supplier to any customer nor can attempts be made to persuade a customer not to advertise or resell goods or services below a specified price. There is scope, however, to recommend resale prices but a prominent statement must be included on a product or a price list that the price is a recommended price only.

Concerted practices	A corporation cannot: • be a party to any contract, arrangement or understanding or • engage with one or more persons in a concerted practice which has the purpose or effect of substantially lessening competition in an Australian market. An example of a concerted practice may include using the confidential information of competitors as a substitute for competition.
Misuse of market power	A corporation with substantial market power must not engage in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market. A corporation may have substantial market power if it can act independently of, and not be constrained by, other competitors in the market. Corporations with market power must take care to consider the effect of their conduct on competition upfront.
Predatory pricing	A corporation that has a substantial degree of market power (or even a substantial market share) must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to it of supplying such goods or services, for the purpose of: • eliminating or substantially damaging a competitor • preventing a competitor from entering a market • deterring or preventing another person from engaging in competitive conduct in a market.
Exclusive dealing (including third line forcing)	Conditions cannot be imposed on the resupply or acquisition of goods or services if the purpose or effect of any such condition would be to substantially lessen competition in an Australian market. An example of this practice is supplying goods only on the condition a customer will not buy the same goods from a competitor of the supplier. Another example (known as 'third line forcing') occurs if a supplier forces or insists that a customer purchase goods or services from a particular third party as a condition of its supply of goods or services to that customer. Certain exclusive dealing arrangements may be notified to the ACCC on public benefit grounds which, if accepted, provide immunity.
Anti-competitive mergers and acquisitions	A corporation is prohibited from acquiring shares in a body corporate, or assets from a body corporate, or a natural person, if the effect would be to lessen competition substantially in any market in Australia. The CCA sets out a list of matters which must be considered when determining whether an acquisition is likely to lessen competition substantially in any market including, for example, the actual and potential level of import competition in the market, barriers to entry and market concentration levels. The ACCC has also published useful guidelines on merger regulation to which any company considering an acquisition or merger should refer. In Australia, there are no mandatory filing thresholds that require parties to file a proposed merger or acquisition with the ACCC (however, filing with the ACCC is recommended in many circumstances, particularly if the parties' combined market share were to exceed 20%). Parties seeking to have a merger cleared by the ACCC can choose between the informal clearance process or the merger authorisation process. Most mergers proceed through the informal clearance process whereby the ACCC assesses whether the merger will substantially lessen competition in any Australian market. The merger authorisation process is more costly but can be advantageous for contentious mergers as a merger can be authorised if it will result in benefits to the public that outweigh any public detriments (which includes any lessening of competition).

KEY CONSUMER PROTECTION PROVISIONS

The CCA includes a number of consumer protection provisions which form part of the Australian Consumer Law. Some important provisions are detailed below:

- Individuals and corporations are prohibited from engaging in conduct in trade or commerce that is misleading or deceptive. It is irrelevant whether the person engaging in the conduct intended to mislead or deceive. A claim or statement is misleading if it is likely to lead an ordinary member of the public into error.
- Although there are no criminal sanctions or fines that apply to misleading or deceptive conduct, the ACCC or an aggrieved party can seek damages, compensatory orders or an injunction to restrain misleading or deceptive conduct. Further, the ACCC may apply for probation, community service or corrective advertising orders.
- It is unlawful to make false or misleading representations in connection with the supply or promotion of goods or services, including making false or misleading representations relating to:
  - the standard, quality, value, grade, price of or need for goods or services
  - the newness, composition, style, model or history of goods
  - testimonials or sponsorships
  - the place of origin of goods
  - the availability of repair facilities or spare parts for goods
  - any conditions, warranties, guarantees or rights of remedy, including the statutory guarantees.
- Unconscionable conduct in trade or commerce is prohibited. 'Unconscionable' conduct essentially involves the unfair exploitation of a weaker party by a stronger party. Certain prohibitions require the weaker party to suffer from a special disability or disadvantage, while other prohibitions may extend to protect from unfair exploitation a party who is less sophisticated, not legally represented, may not possess all relevant information and may have a weaker bargaining position than the other party.
- Specific types of unfair trading and marketing practices, including bait advertising, pyramid selling and referral selling, are prohibited in Australia. The practice of offering gifts, prizes, rebates or other free items, as well as unsolicited supplies, is also regulated.
- The CCA contains provisions governing unsolicited selling, including door-to-door selling, telesales and other direct or indirect marketing which, amongst other things, regulates the times during which unsolicited sales approaches can be made and provides for a 10 day cooling off period.
- The CCA contains detailed rules relating to lay-by agreements, including requirements that these agreements must be in writing and transparent, and any termination charges must reflect the reasonable costs to the business of the agreement being terminated.
- Consumers have certain statutory guarantees that:
  - goods are of acceptable quality
  - goods are reasonably fit for any disclosed purpose
  - goods match their description or correspond to the sample or demonstration model
  - repair facilities and spare parts are reasonably available for a reasonable period after the goods have been supplied.
- The CCA contains provisions governing product safety and liability. This regime specifically provides provisions relating to:
  - product safety and information standards
  - unsafe goods
  - interim and permanent bans
  - voluntary and compulsory product recalls
  - safety warning notices.
- The CCA provides that unfair contract terms in standard form consumer and small business contracts are void and sets out the relevant criteria in order to determine whether a term of a consumer contract is unfair. This has become a major priority for the ACCC, particularly in business-to-small business contracts and the ACCC has recently commenced proceedings against a number of companies seeking court orders to make certain terms void. The ACCC is also lobbying to make unfair terms illegal and subject of penalties.

In 2009, the Commonwealth Government introduced the *Personal Property Securities Act 2009* (PPS Act) and the online PPS Register commenced operation in early 2012. The PPS Act introduces a new regime for the registration of security interests in virtually all forms of property other than land and some statutory licences. Such personal property includes goods and equipment, inventory, intellectual property (such as trademarks and patents), currency, contractual rights, shares, units and debt securities, livestock, crops and artworks. The PPS Act also introduces new rules for the creation, priority and enforcement of security interests in personal property.

These reforms bring together the different Commonwealth, state and territory laws and registers under one national system.

ANTI-MONEY LAUNDERING

The *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (AML/CTF) addresses Australia's obligations concerning anti-money laundering and counter terrorism financing. The legislation brings Australia's laws into line with international money laundering and counter terrorist financing standards as established by the Financial Action Task Force (which is the international inter-governmental body responsible for setting those standards).

Many foreign businesses, particularly financial services providers, are subject to AML/CTF regimes abroad and would therefore be familiar with the principles underlying anti-money laundering and anti-terrorist financing regulations generally. However, there are obligations imposed by the Australian regime which are specific to Australia and may be different to regulatory requirements in other jurisdictions. The Australian AML/CTF regime applies to those who provide what is defined as a 'designated service'. This includes a wide variety of banking and financial services, such as lending funds in the course of conducting a lending business, opening bank accounts, operating managed investment schemes and trading in securities and foreign exchange on behalf of another person. It also includes gambling services and bullion dealing.

All those who provide designated services are considered 'reporting entities' and will generally have onerous obligations imposed on them to identify and verify their customers and monitor their customers' transactions, with a view to mitigating the risk of money laundering and terrorist financing. Reporting entities are required by law to, among other things:

- have in place an AML/CTF Program, which must comprise risk-based systems and controls designed to identify, manage and mitigate the money laundering and terrorist financing risks a reporting entity may reasonably be exposed to when it provides designated services to its customers
- conduct customer due diligence in accordance with the requirements set out in the AML/CTF regime
- report certain types of matters and transactions to AUSTRAC, including suspicious matters and international fund transfer instructions
- conduct due diligence on correspondent banking relationships.
- There are also significant financial penalties and, in some cases, criminal penalties for persons who do not comply with their obligations under the AML/CTF regime.

In April 2018, legislation amending the AML/CTF Act came into effect. The amendments expanded Australia's AML/CTF regime to digital currency exchanges. Under these amendments, exchanging digital currency for money (whether Australian or not) and vice versa, where the exchange is provided in the course of carrying on a digital currency exchange business, will attract obligations under the AML/CTF regime, as described above.

BRAND AND IP PROTECTION

BRAND AND IP PROTECTION

Intellectual property is protected in Australia primarily by federal legislation. Australia is also a party to most of the prominent international treaties dealing with intellectual property rights, including:

- the Paris Convention
- the Berne Convention
- the Universal Copyright Convention
- the Hague Agreement
- the General Agreement on Tarrifs and Trade (GATT) Agreement on Trade Related Aspects of Intellectual Property
- the World Intellectual Property Organisation, the Patent Cooperation Treaty and the Madrid Protocol.

PATENTS

Patents in Australia are regulated by the *Patents Act 1990* (Cth). The grant of a patent confers on the patentee the exclusive right during the term of the patent to exploit (or allow another person to exploit) the invention and prevent unauthorised use of the invention by third parties. The Patents Act allows for the registration of two types of patents; a standard patent for a term up to 20 years (with extensions available for pharmaceutical patents in certain circumstances), and an innovation patent for a term up to eight years from the date of the patent.

An invention, the subject of a patent, must be a 'new manner of manufacture', which is usually in respect of a vendible product or process that:

- has a distinct commercial value
- has not been anticipated by prior use or publication
- involves an inventive step (for a standard patent) or an innovative step (for an innovation patent).

To be novel, the invention must not have been publicly disclosed or used anywhere in Australia or around the world prior to the filing date (however Australia does allow for a 12 month grace period in which use or disclosure can occur prior to filing without destroying novelty).

A patent application lodged at the Australian Patent Office must be either a complete application or a provisional application. A provisional application must describe the invention in a way that is clear and complete enough for it to be performed by a person skilled in the relevant art, and it allows time to further develop the invention.

To continue the protection initiated by the provisional application, the applicant must lodge a complete application for the invention within the 12 month period of filing. The complete application must include all the claims and the essential elements of the invention, and the invention must be clearly disclosed by the provisional application to preserve the priority date of the filing of the provisional application. The claims must also be clear, succinct and supported by the material disclosed in the specification.

An applicant may also file a single international application under the Patent Cooperation Treaty (PCT) within 12 months of filing the provisional application, nominating the countries of interest on the PCT application into which the applicant intends to enter National filings within 30-31 months (depending upon the country) from the earliest priority date of the patent.

COPYRIGHT

Copyright in Australia is regulated by the *Copyright Act 1968* (Cth). Copyright confers no product monopoly, but simply gives to the copyright owner the exclusive right to certain acts in relation to a literary, dramatic, musical or artistic work, or a sound recording, cinematograph film, broadcast or published edition. In Australia there is no system of registration of copyright work. For copyright to subsist it must be an 'original work' from the person claiming to be its author, meaning that the person has originated it or brought it into existence and has not copied it from another. The fact that another similar work is already in existence is not necessarily a bar to copyright subsisting in both.

The period for which copyright subsists depends on the type of work. For literary, dramatic, musical or artistic works, sound recordings, films, television and sound broadcasts, copyright subsists for 70 years after the end of the calendar year in which the author died. For published editions of works, copyright subsists for 25 years after the calendar year in which the edition was first published.

The Copyright Act also provides for moral rights of authors, giving creators of certain works rights of attribution as owner and rights to prevent unfair treatment of the work. These moral rights are personal and therefore not assignable and are separate from the commercial exploitation rights. The Copyright Act provides that the holder of moral rights may consent to the doing of acts which would otherwise infringe those moral rights.

The Copyright Act also provides for a resale royalty right (of 5%) applicable only to art works. This scheme is administered by a collecting society.

International treaties such as the Berne Convention, TRIPS Agreement and Rome Convention facilitate automatic protection of Australian copyright material overseas, whereby other treaty members would extend the same rights to Australian copyright owners as they would to their own nationals.

DESIGNS

Designs in Australia are regulated under the *Designs Act 2003* (Cth). A design, as defined in the Designs Act, in relation to a product, means the overall appearance of the product resulting from one or more visual features of the product such as its shape, pattern or ornamentation. Design protection only operates to protect the appearance of articles, rather than the way they are made or how they operate (which may instead constitute patentable subject matter).

To be registrable in Australia, a design must be 'new or distinctive'. This is an absolute novelty requirement and Australia has no grace period for use of designs prior to filing, which means a design cannot have been shown to members of the public prior to an application being filed.

A design will be considered 'new' unless it is identical to a design that forms part of the prior art base. The design must also not have been used prior to the design application being lodged. A design is considered to be distinctive unless it is substantially similar in overall impression to a design that forms part of its prior art base. The 'prior art base' for a design includes designs publicly used in Australia, published anywhere in the world or disclosed in other design applications with earlier priority dates. In considering whether a design is substantially similar in overall impression to an existing design, more weight is given to the similarities between the two designs than the differences between them.

A person will be found to have infringed a registered design if the person, without the consent of the owner of the registered design, makes, imports, sells, hires or offers for sale or hire "a product, in relation to which the design is registered, which embodies a design that is identical to, or substantially similar in overall impression to, the registered design". The considerations set out in relation to the registrability of designs must be assessed in determining whether a design is substantially similar in overall impression.

Under the Designs Act, the maximum term of protection that is afforded to a registered design is 10 years.

Design applications can also be filed in other countries. As Australia is party to relevant international conventions governing industrial designs, if an international design application based on an Australian design application is filed within six months of the Australian application, it is possible to claim 'convention priority' of the earlier priority date of the Australian application. If an international application for a design the subject of an Australian design application is filed more than six months after the Australian application, the Australian priority date cannot be claimed and the newness of the design may be affected.

TRADE MARKS

Trade marks in Australia are regulated by the *Trade Marks Act 1995* (Cth). A trade mark is a sign that is used to indicate the trade origin of goods or services. A trade mark can include, or comprise of any combination of, any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent. The trade mark must be able to be represented graphically to be registrable.

Registration of a trade mark provides the owner of the trade mark with the right to exclusively use the trade mark in relation to the goods or services (and goods or services closely related to the goods and services) for which the mark is registered. Applications are examined by IP Australia in order of filing, to see if they meet the requirements of the Trade Marks Act.

To be registrable as a trade mark in Australia, generally a trade mark must not be the same as, substantially identical with or deceptively similar to another trade mark which is the subject of a prior application or registration in Australia. A further consideration under the Trade Marks Act is the extent to which the trade mark is capable of distinguishing the applicant's goods and services. If a trade mark is not capable of distinguishing the applicant's goods and services from those of others, the trade mark will be initially rejected. In certain circumstances IP Australia may decide that a trade mark is capable of distinguishing an applicant's goods or services if the trade mark has acquired distinctiveness.

Once accepted by IP Australia, the trade mark is advertised for acceptance for two months. Opposition to registration may be filed by any person, but is generally filed by a person who will be in some way affected by the presence of a trade mark on the register. The opposition process provides for such a person to make out a case under the grounds specified in the Trade Marks Act for the purpose of persuading the Registrar that the trade mark should not be registered. The opposition process is streamlined so that an opposition will succeed without the filing of any evidence where a trade mark applicant does not file a notice of intention to defend the opposition after it is commenced.

Once achieved, registration of a trade mark can be maintained indefinitely provided renewal fees are paid every 10 years.

Unregistered trade marks in Australia or 'common law' trade marks, are capable of being protected in the Australian courts through a common law action for passing off, and in appropriate circumstances, the misleading and deceptive conduct provisions of the CCA.

Since July 2001 Australia has been a signatory to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol). The Madrid Protocol enables trade mark applicants to seek protection in all or any of the countries that are currently signatories to the Madrid Protocol by filing a single application in Australia. Applicants can also designate countries which become members in future without filing a new application. The application will then be considered by the trade marks office of each designated country and, if registration is achieved, the mark will be granted the same protection afforded to marks registered in that country.

In order to seek protection under the Madrid Protocol an application must be based on an Australian trade mark registration or application. Therefore the specifications for goods and services must be the same as those detailed in the corresponding Australian application or registration. International registrations achieved under the Madrid Protocol will continue to exist indefinitely, subject to renewal every 10 years. Any further maintenance of the trade mark such as assignment or change of address will be streamlined through IP Australia.

CIRCUIT LAYOUTS

Original layout designs for integrated circuits and computer chips are protected under the *Circuit Layouts Act 1989* (Cth).

Similar to copyright, the protection provided under the Circuit Layouts Act is automatic and no registration is required. To qualify for protection, the circuit layout must be original and made by an Australian person or corporation or first commercially exploited in Australia. Original circuit layouts created by a citizen, resident or national of a Word Trade Organisation member country, or first commercially exploited in such a country, are also protected.

The maximum term of protection under the Circuit Layouts Act is 20 years.

DOMAIN NAMES

Although not strictly intellectual property, domain names are important to consider. The rules governing the registration of domain names vary depending upon the level of the domain name (for example, .com, .biz, .info and .org). The .com.au domain is administered by .au Domain Administration Ltd (auDA). To register a .com.au domain name, the applicant must have an Australian business, partnership, statutory body, association, company or licensed trading name or a registered or pending trade mark application from which the domain name can be derived. Domain names are granted to registrants meeting these criteria on a first come, first serve basis. As there can be numerous parties with a legitimate interest in any one domain name, it is therefore important to assess the availability of and apply to register your business' preferred domain names at the earliest opportunity.

Where a party without a legitimate interest in a domain name has registered or used the domain name in bad faith, it may be possible to have the domain name transferred to a party with a legitimate interest in the domain name by filing an application under the .au Dispute Resolution Protocol (in the case of .com.au domain names) or the Uniform Dispute Resolution Protocol (in the case of most other domain names, including .com domains). Depending upon the circumstances, such conduct may also amount to trade mark infringement or passing off.

BREACH OF CONFIDENCE

Generally the cause of action known as breach of confidence protects the holder of confidential information from an improper use of that information by another party. The elements of the action are that the information must be confidential, have been imparted in circumstances which the law regards as creating an obligation of confidence, and have been used without the owner's actual or implied consent.

Accordingly, it is considered best practice in Australia to disclose confidential information to a third party in circumstances where they have entered into a written agreement to keep the information confidential. If such an agreement is breached, the aggrieved party may wish to seek injunctive relief from a court to restrain the further communication or distribution of the confidential information.

Click here for the K&L Gates IP blog: www.iplawwatch.com.

PRIVACY

PRIVACY

Under the *Privacy Act 1988* (Cth), the public sector is subject to rules concerning collection, use of, and access to, personal information. Since December 2001, the private sector has been subject to similar obligations. The privacy provisions do not apply to small businesses – those with a turnover of less than AUD3 million – unless the business deals with certain types of information. The provisions also do not generally apply to employee information.

Personal information is any information that can be used to identify an individual and may relate to information such as the individual's name, date of birth, bank account details and email address.

The Privacy Act applies to personal information that is collected, stored, used or disclosed by an organisation that is Australian (including Australian subsidiaries of non-Australian organisations) or that otherwise has an 'Australian link'.

An organisation has an 'Australian link' if it carries on business in Australia and collects or holds personal information in Australia. These concepts are broad and depend on the particular circumstances of the organisation's operations.

An organisation does not need a physical presence in Australia in order to 'carry on business' in Australia. The Office of the Australian Information Commissioner (OAIC) has indicated that organisations that have an online presence in Australia and that collect personal information from individuals who are physically present in Australia will 'carry on business' in Australia.

Organisations may also be subject to the Privacy Act without an 'Australian link', if they deal with an Australian organisation that discloses personal information to them – for example, in the course of a transaction or in the provision of services to or from the Australian organisations. In these circumstances, the Australian organisation may request that the overseas organisation complies with the Privacy Act as part of its negotiation on contractual terms.

Questions an organisation should consider to determine whether Australia's Privacy Laws apply to them include:

- is personal information collected from someone in Australia?
- is the collection or use in accordance with the Privacy Act?
- does your organisation have a privacy policy compliant with the Privacy Act?
- does the personal information get disclosed outside of Australia?
- does the personal information get used for direct marketing?

For the K&L Gates' CyberWatch Australia blog visit: www.cyberwatchaustralia.com.

WORKPLACE REGULATION

INDUSTRIAL RELATIONS

The *Fair Work Act 2009* (Cth) is the primary piece of legislation governing relationships between employers, their employees and, where relevant, unions. In addition to this, modern awards, enterprise agreements and employment contracts are critical for the creation, management and termination of employment relationships.

The Fair Work Act prescribes the minimum safety net of terms and conditions of employment for employees. This safety net is comprised of 10 minimum terms and conditions of employment, which are known as the National Employment Standards (NES).The NES includes terms and conditions of employment regarding the maximum hours of work on a weekly basis, annual leave, personal/carer's leave, parental leave, community service leave, long service leave, public holidays, requests for flexible working arrangements, notice of termination and redundancy. Employers that fail to comply with the NES or any applicable modern award may be heavily penalised.

Modern awards prescribe minimum terms and conditions of employment which cover employees engaged in certain industries and occupations, and who fall within specified classifications. Modern awards provide terms and conditions of employment in relation to both monetary and non-monetary matters, including minimum wage rates, overtime and penalty rates, allowances, dispute resolution procedures and consultation.

The Fair Work Act allows for the establishment of enterprise agreements which set out the terms and conditions of employment for particular workplaces and employees. Employees have the right to be represented by bargaining representatives of their choice during negotiations for an enterprise agreement, with the default position being representation by any union of which the employees are members. The employer and employee representatives must bargain in good faith, which means they must, amongst other things, attend and participate in meetings, give genuine consideration to any proposals put forward by the other party, and refrain from engaging in capricious or unfair conduct. A government body known as the Fair Work Commission (FWC) has powers to facilitate bargaining and deal with bargaining disputes.

Under the Fair Work Act, employers must not take adverse action against employees and contractors, and prospective employees and contractors, for specified reasons. These reasons include circumstances where the person is entitled to the benefit of a workplace law or instrument, has made a complaint or inquiry in relation to his/her employment (if an employee), or the person is, or is not, a member of a union, or has, or has not, engaged in industrial activity. Generally, adverse action includes terminating the employment or contractor relationship, altering the position of the employee or contractor to the employee or contractor's prejudice, and refusing to employ or engage the prospective employee or contractor, as a result of any of the abovementioned specified reasons. Notably, a threat to take such action or organising for such action to be taken, is also considered a form of adverse action.

In Australia, industrial action is unlawful unless it meets specific criteria, in which case it will be 'protected'. Employees may generally only take industrial action to support or advance claims in relation to a proposed enterprise agreement and the action must be approved by a majority of employees. An application must be made to the FWC for approval to conduct the vote. The Fair Work Act enable employers to also initiate action in response to industrial action taken by employees. If it appears to the FWC that unlawful industrial action is happening, threatened, or impending, it is required to make an order that the industrial action stop, not occur or not be organised. Significant penalties are available against organisations and persons involved in unlawful industrial action.

In addition, unions in Australia have limited rights of entry into workplaces. Right of entry is available to union officials who hold entry permits for the purpose of investigating suspected breaches of industrial legislation that relate to, or affect a member of, the union and suspected contraventions of occupational health and safety legislation. Right of entry is also available for the purpose of holding discussions with employees whose industrial interests the union is entitled to represent. Unless FWC has issued an exemption certificate for the entry, the permit holder must give at least 24 hours' notice of the intention to enter the workplace.

An employer may exclude or vary its award obligations by entering into an enterprise agreement with its employees. To be valid, the employees to be covered by the enterprise agreement must be 'better off overall' under the agreement than they would be under any applicable modern award. The enterprise agreement must also be approved by a majority of employees who are subject to the agreement and vote. The parties must (amongst other things) comply with specific good faith bargaining obligations when negotiating an agreement.

An employer in the process of setting up a new business may seek to make an enterprise agreement with relevant unions before any employees are employed. Further, a group of employers carrying on the same type of business, such as in

a franchise situation, may seek to make a multi-enterprise agreement which would set the terms and conditions of employees employed by all the employers involved.

Under the Fair Work Act, employers must not terminate the employment of particular employees in a manner that is harsh, unjust or unreasonable. This means that the employer must have a valid reason for the termination (such as poor performance or misconduct) and must afford the employee procedural fairness in the termination process (such as an opportunity to respond). The primary remedy for breaching this requirement is reinstatement of employment or, where impractical, compensation of an amount equal to up to six months remuneration (less mitigation).

Employers in Australia also have obligations under federal and state legislation not to discriminate against their employees or prospective employees on certain grounds including age, sex, race, disability and family responsibilities. Employers are not permitted to discriminate when hiring, in the terms and conditions of employment they offer to employees, during employment, or when terminating an employee's employment.

Under federal and state legislation, employers (also referred to as Persons Conducting Businesses or Undertakings in some jurisdictions) must also satisfy work health and safety obligations. These obligations generally require employers and persons conducting businesses or undertakings to take reasonably practicable steps to ensure the health and safety of their workers (defined to include employees and contractors). Both corporations and individuals involved in making key decisions for their organisations may be liable for breaches of these obligations. Amongst other things, corporations and individuals convicted of breaches may be subject to criminal penalties including fines. Individuals may also be subject to terms of imprisonment for more serious offences.

IMMIGRATION

IMMIGRATION – TEMPORARY AND PERMANENT

Non-Australian citizens coming to Australia may only do so with a valid visa. To be able to work in Australia, that visa must contain work rights. The primary pieces of Australian immigration legislation are the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth).

The rules and criteria governing any change of status from visitor or temporary resident to permanent resident for business or employment reasons are strict. Generally, people applying for Australian temporary or permanent residence visas must undergo health and character checks as part of the migration application process, as well as fulfil a number of other specific criteria. The health requirement for temporary workers varies according to the type of visa and the country of origin.

There are a number of options for people seeking to live and work temporarily or permanently in Australia. It is important to remember that only lawyers or migration agents registered with the Migration Agents' Registration Authority are permitted to give advice in relation to migration issues in Australia.

Temporary visas

Broadly, there are three types of visas that address the needs of Australian businesses:

- A short-term visitor visa for people who have a genuine intention to come to Australia for business visitor purposes for periods of up to three months at any one time. The Australian Government has also introduced electronic travel authorities, which are available for this type of visa in some participating countries. Visa holders can only perform 'business visitor activities' and will not be permitted to work without first obtaining an alternative work visa.
- A short-term working visa which allows people to travel to Australia to do short-term, highly specialised, non-ongoing work. Generally the stay period allowed is up to three months but up to six months may be considered by the Department of Home Affairs in limited circumstances (and when supported by a strong business case).
- A medium to long-term stay visa which is most commonly used when companies wish to sponsor foreign employees for employment in Australia. Temporary residence is generally permitted for periods of up to four years depending on the type of visa and the stream, although it may be possible to apply for a subsequent visa to effectively extend the initial period of temporary residence, depending on the circumstances involved in each case.

Permanent migration

The Economic Migration Program is intended to attract migrants with entrepreneurial or specific skills and may be divided into the Employer Nomination, Independent Skilled and Distinguished Talent categories.

Under the Employer Nomination Scheme, Australian employers who sponsor highly skilled, experienced personnel from overseas can offer permanent employment in specific positions.

The employer must be able to show (amongst other things) that:

- the position is highly skilled
- there is a genuine need for the position
- it has a satisfactory record of training permanent residents and citizens
- the position is for at least two years (evidenced by a contract)
- (at least) the minimum market salary is paid.

The applicant must (amongst other things):

- have their skills positively assessed by a relevant authority and have at least three years of relevant work experience, or
- have worked for the Australian employer while holding a Temporary Sponsored Business Visa for at least three years (unless a transitional arrangement applies), and
- be under 45 and demonstrate English language proficiency, unless exempt.

Independent skilled migration scheme

This visa is for points-tested skilled workers who are not sponsored by an employer or family member or nominated by a state or territory government. Such visas are designed for applicants who are relatively young and well qualified, with matching skills, English language ability and experience. Skilled applicants generally must pass a 'General Points Test', with points awarded for various factors including age, qualifications, experience and training and English language ability.

Distinguished Talent Visa

This visa is designed for applicants with unique and beneficial talents and experience (eg a profession, sport, the arts or academia and research) and an exceptional record of achievement in their field. Relatively few Distinguished Talent Visas are granted each year as the applicant's achievements are required to be acclaimed as exceptional in the country where the relevant field is practised. Furthermore, the relevant field needs to have both international standing and recognition in Australia.

Other options

- Family Migration includes visas for spouses, prospective spouses, dependent children, fiancées, retired parents, parents who have at least half of their children residing in Australia, aged dependent relatives and remaining relatives of permanent residents or citizens in Australia.
- Student Visas are also available for people wishing to undertake schooling, undergraduate, postgraduate and non-award courses in Australia.
- Visitor Visas are available for either single or multiple-entry travel for people who intend to visit Australia as a tourist, for prearranged medical treatment, to visit relatives or for short term academic purposes (of less than three months).

AUSTRALIAN REAL ESTATE

AUSTRALIAN REAL ESTATE

Land ownership

Land ownership in Australia generally provides the owner with unrestricted control of the land, subject to certain rights and minerals reserved to the state or territory. In some cases, the government retains control of the land and 'ownership' takes the form of a long-term lease over the land.

Interests in land are generally registered on a common land titles system for each state or territory, which allows interested third parties to search the land register and understand who else has an interest in the land.

Caveat emptor – buyer beware and the need for due diligence

Real estate in Australia is generally purchased in the state and condition it is in at the time of contract and subject to various disclosure requirements, warranties and termination rights contained in the various contract forms.

Both vendors and purchasers should consider whether there are any prescribed disclosure requirements including:

- information relating to title, encumbrances and outgoings
- prescribed documents which must be annexed to the Contract of Sale (such as planning certificates and drainage diagrams)
- building disclosures which will apply if the property is a strata property
- whether there are any implied warranties which are deemed to be given.

Accordingly, it is important for purchasers to undertake due diligence inquiries before entering into the Contract of Sale including (as appropriate):

- undertaking a physical inspection of the property
- obtaining and reviewing title searches to verify the information provided by the vendor
- reviewing the terms of easements, restrictions on use and leases affecting the title to the property
- reviewing the planning controls affecting the property, including the local planning scheme, to ensure that the intended use of the property will be permitted
- obtaining a survey report to identify any encroachments on or by the property
- obtaining reports in relation to the condition and state of repair of any buildings, plant, machinery and equipment on the property
- obtaining a contamination report or an environmental audit.

Buying 'off-the-plan'

Buying 'off-the-plan' occurs where a property is purchased before a particular building has been constructed on the property. Prospective purchasers view architectural plans and models or visit display suites in order to see what they will be purchasing. Each state in Australia has statutory protections for these types of purchases.

Contracts for off-the-plan sales can be complicated and subject to restrictive terms and conditions. Purchasers must be aware of the:

- quality of construction and need to ensure that the vendor is contractually obliged to deliver the promised product within an acceptable timeframe
- ongoing costs and contractual arrangements entered into by the body corporate on establishment of a strata scheme
- effect of price increases
- risks associated with delays in the vendor providing the finished product
- wording of variation, withdrawal and sunset clauses.

Properties bought off-the-plan are usually part of larger complexes governed by an owners' corporation (Victoria and New South Wales) or body corporate and community management statement (Queensland). In Western Australia the equivalent to the 'owners' corporation' is the strata company.

Owners' corporations / strata companies / body corporates

Where a property is a unit in a building or townhouse/villa, it is often subject to a collective ownership scheme known as strata title or community title. In these kinds of schemes, the building or the 'common areas' are owned by an owners' corporation/strata company. These entities are created upon the registration of a plan of subdivision (Victoria, New South Wales and Queensland) or strata plan or survey strata plan (Western Australia), and all lot owners on the plan automatically become members.

Any area of property that is co-owned among several property owners is called common property. Owners' corporations/strata companies/ body corporates operate to provide a democratic process by which to govern this common property. In Queensland body corporates often enter into long-term contracts for management, caretaking, letting and other services. These arrangements must be included in pre-contract disclosure. Standard rules are established under state regulations, but additional rules can be created by resolution of the owners' corporation/strata company/body corporates.

The Contract of Sale

Contracts of Sale for land are ordinarily prepared by the solicitors for the vendor. The standard form of contract varies depending on the state or territory in which the property is located. The contract is formed

when it is signed by both parties, often referred to as 'exchange'.

Settlement

Settlement (also known as 'completion' in some jurisdictions) is the date on which the balance of the purchase price is to be paid to the vendor and when the title of the property is handed to the purchaser. This date is normally stated in the Contract of Sale and:

- in Victoria is often 30, 60 or 90 days after the date of the Contract of Sale
- in New South Wales, is normally 42 days after the date of the Contract of Sale
- in Western Australia, is often 30, 60 or 90 days after the date of the Contract of Sale
- in Queensland, is normally 30 days after the date of the Contract of Sale, and cannot be less than 14 days after title is required.

A 60 day settlement period is most common (except in New South Wales and Queensland), although it is ultimately a matter for agreement between the vendor and the purchaser.

A Statement of Adjustments/ Settlement Statement is prepared at the final stage of settlement, detailing the purchase price, the deposit and the pro-rata adjustment of rates such as council, water and owners corporation/strata fees.

Typically, the purchaser will also be liable to pay stamp duty on the purchase price of the property.

LEASING OF PROPERTY

Most businesses in Australia operate from leased premises, whether they are commercial, industrial or retail. While some business owners choose to purchase business premises rather than lease, the leasing of business premises is far more common, particularly for commercial offices and retail shops. Leasing premises rather than purchasing offers numerous advantages to business owners, including:

- less capital is required to lease premises as opposed to having to purchase the premises
- a more flexible arrangement where a business owner is able to exit the premises after a set period of time, without having money tied up in the premises
- rent is fully tax deductible, as opposed to purchasing premises where payments towards the premises are not deductible, other than the interest on borrowings to purchase the premises.

Legal nature of a lease

In basic terms, a lease is a right granted by the owner (usually called a lessor or landlord) for the occupant (usually called a lessee or tenant) to use land or a building or part of a building in return for a regular payment of rent (usually monthly).

A lease constitutes a legal interest in the land. By having a legal interest in the land, the tenant has various rights which flow from that interest, including the following:

- the lease is binding on subsequent purchasers (although if it is a lease of property in any state or territory other than Victoria, then it might need to be registered to be binding on subsequent purchasers, depending on the length of the term of the lease). This means that if a landlord sells the land after having leased it to a tenant, the purchaser will buy the land subject to the terms of the lease
- a tenant is usually able to transfer its lease interest to another party (for instance, if the tenant wanted to sell its business, it is able to transfer the lease to the purchaser, subject to certain conditions specified in the lease including obtaining landlord consent)
- a tenant is usually able to mortgage the lease, so that if a tenant requires finance for its business, a bank is able to take a mortgage over the lease and loan against the security of the lease (again, subject to certain conditions specified in the lease including obtaining landlord consent)
- a tenant may have certain statutory rights, including the right to have a lease reinstated, where the lease is terminated by a landlord for breach by a tenant, subject of course to the terms of the lease and the ability of a tenant to remedy any breach of the lease
- where the lease is of a retail premises a tenant will have various rights which arise under retail leases legislation in Australia.

NATIVE TITLE

Australian laws give recognition to the prior interests in land held by Aboriginal and Torres Strait Islander people under their traditional laws and customs. This prior interest is referred to as native title and is protected and regulated by statute under the *Native Title Act 1993* (Cth) and state-based laws. Generally speaking, native title is extinguished over all land which prior to 1 January 1994:

- was owned by a private individual or a company (most land on which development is carried out falls within this category); or
- was subject to dedication for a public use, such as a road.

However, if native title has not been extinguished (because, for example, the land remains owned by the Crown) then it is necessary to comply with specific processes under the native title legislation in order to obtain a valid property interest in the land. These processes can take some time to resolve so it is important to ensure that any native title issues are identified at an early stage in carrying out new developments.

PLANNING AND DEVELOPMENT

State regulation of development Australian laws require planning and environmental approvals to authorise most new developments and uses of land. While each state and territory has its own land-use planning and environmental laws, it is possible to identify the following common themes across all Australian jurisdictions:

- **Zoning:** Local planning instruments typically divide land into zones (for example, 'industrial' or 'residential' zones), or apply on an overlay or other planning control which regulates the use, development and subdivision of land. Within each zone, particular types of land use or development may be either:
  - permitted without the need for any approvals
  - permissible with approval
  - prohibited.
- **Requirement for planning approval:** In general, planning approval is required to change the use of land or a building (for example from a light industry to a warehouse) or to erect any substantive structure, such as a building, on land. An application for planning approval is typically, though not always, placed on public exhibition and may be subject to third party appeal rights to planning appeal tribunals or courts. Planning approvals are typically issued subject to detailed conditions. A failure to comply with a condition imposed on a planning approval is a criminal offence.
- **Secondary environmental approvals:** A range of additional environmental related approvals may also be required for specific types of development and uses including:
  - environment licences for large scale industrial activities or to authorise discharges to land, air or water
  - resource specific leases and licences for coal, mineral and petroleum exploration, mining and production activities
  - heritage permits for activities which will impact on historic or cultural heritage artefacts
  - approvals to clear native vegetation
  - water licences and approvals to authorise the take and use of water from natural water sources.
- **Consequences of breach:** In general, if all required planning and environmental approvals have not been obtained or are not being complied with, there is a risk that:
  - the relevant governmental authority may prosecute the occupier of the land for a criminal offence
  - the relevant governmental authority may issue an order requiring the occupier to stop using the land without all required approvals
  - in some jurisdictions, a third party may commence civil enforcement proceedings to restrain any breach of environmental or planning legislation.
- **Federal regulation of development:** The most significant federal legislation regulating development is the Environment Protection and Biodiversity *Conservation Act 1999* (EPBC Act). The EPBC Act requires that 'controlled actions' that are likely to have a significant impact on a matter protected under the EPBC Act including:
  - Commonwealth land; and
  - a matter of national environmental significance such as World Heritage properties, National Heritage places, Ramsar wetlands of international significance, listed threatened species and ecological communities and listed migratory species, be subject to a rigorous assessment and approval process.

An 'action' includes a project, development, undertaking, activity or series of activities. If a person proposing to carry out an action thinks that the action may be a 'controlled action' under the EPBC Act, then they must refer the action to the Commonwealth Minister for the Environment for a determination as to whether or not the action is in fact a 'controlled action'.

AUSTRALIA'S TAXATION SYSTEM

AUSTRALIA'S TAXATION SYSTEM

TAXATION

Tax is imposed in Australia at both a federal and state (or territory) level. The Australian Taxation Office (ATO) is charged with addressing the tax laws which are imposed at the federal level - primarily income tax and goods and services tax (GST) - and the states and territories each have their own administrative body for the laws imposed in their jurisdiction.

Australia does not impose death or gift duties.

INCOME TAX

Australia has a self-assessment income tax system where taxpayers are required to lodge annual income tax returns for the 12 months to 30 June each year and pay tax in accordance with those returns. Returns may be subject to a subsequent audit by the ATO, generally for a period of four years subsequent to lodgement of the returns. Subsidiaries of non-resident companies often obtain permission from the Commissioner of Taxation to lodge tax returns with a year-end other than 30 June (a 'substituted accounting period') corresponding with the accounting and tax year end in their home jurisdiction.

A distinction is drawn between residents and non-residents, with residents being liable to pay tax on their worldwide income and non-residents generally only on their Australian sourced income. Rather than impose a separate tax on capital gains, Australia's Capital Gains Tax (CGT) legislation is incorporated in the income tax legislation and net capital gains are included in a taxpayer's assessable income.

Entity	Residence Test
Individual	An individual is a tax resident if he or she resides in Australia. This is extended to include, among others, a person who does not reside in Australia but who: • is in Australia for at least 183 days (whether continuously or not) in a year of income unless the Commissioner is satisfied that his or her usual place of abode is outside Australia and that he or she does not intend to take up residence in Australia, or • is domiciled (a legal concept) in Australia unless the Commissioner is satisfied that his or her permanent place of abode is outside Australia.
Company	A company is a resident of Australia if it: • is incorporated in Australia, or • carries on business in Australia and either: » its central management and control is in Australia, or » voting power is controlled by Australian resident shareholders.
Trust	A trust is a resident of Australia if: • the trustee is an Australian resident, or • central management and control of the trust is in Australia.
Trust for CGT purposes	For non-unit trusts, the test is the same as the normal trust residence test. For unit trusts, residence for CGT purposes will exist where: • trust property is located in Australia, or • the trust carries in business in Australia and either: » central management and control of the trust is in Australia, or » Australian resident beneficiaries hold more than 50% of the income or property of the trust.

INCOME TAX RATES – 1 JULY 2019 TO 30 JUNE 2020

Individual Residents

Taxable Income AUD	Tax payable AUD
0 – AUD18,200	Nil
AUD18,201 – AUD37,000	19 cents for each AUD1 over AUD18,200
AUD37,001 – AUD90,000	AUD3,572 plus 32.5 cents for each AUD1 over AUD37,000
AUD90,001 – AUD180,000	AUD20,797 plus 37 cents for each AUD1 over AUD90,000
AUD180,001 and over	AUD54,097 plus 45 cents for each AUD1 over AUD180,000

Individual Non-Residents

Taxable Income AUD	Tax payable AUD
0 – AUD90,000	32.5 cents for each AUD1
AUD90,001 – AUD180,000	AUD29,250 plus 37 cents for each AUD1 over AUD90,000
AUD180,001 and over	AUD62,550 plus 45 cents for each AUD1 over AUD180,000

Residents are also liable to pay a Medicare Levy equal to 2% of taxable income.

Companies

Companies, including non-resident companies, carrying on business in Australia or deriving Australian sourced income that is not subject to withholding tax or otherwise exempt, are taxed at 30% (although a 27.5% rate applies to some companies with an annual turnover of less than AUD50 million).

Superannuation funds

The income of most superannuation funds, known as complying superannuation funds, is taxed at 15%. Income includes superannuation contributions for which the contributor has received a tax deduction, and investment returns. Capital gains made on assets held by complying superannuation funds for more than 12 months are taxed at 10%. The income of non-complying superannuation funds is taxed at 45%.

Capital Gains Tax (CGT)

Capital gains are taxed as part of the income tax regime. For residents, the CGT rules bring into the tax net gains from the disposal of assets acquired on or after 20 September 1985. Net capital gains are included in a taxpayer's overall assessable income.

For non-residents, CGT applies only in respect of gains arising from a disposal of an asset that is taxable Australian property. This includes:

- direct and interests in Australian land
- shares, units or other interests in entities whose principal assets are interests in Australian land
- an asset used in carrying on a business in Australia at or through a permanent establishment
- options to acquire any of the abovementioned assets.

Capital losses can only be offset against capital gains. To the extent that capital losses exceed capital gains, the excess can be carried forward to offset capital gains made in future years. They cannot be offset against revenue gains.

Net capital gains, on the other hand, can be set off against revenue losses.

When a non-resident becomes a resident for tax purposes, the law deems the former non-resident to have acquired those assets that were not already subject to CGT and which were actually acquired on or after 20 September 1985 to have been acquired at the time of the change of residence for their then market value.

When a resident taxpayer becomes a non-resident for tax purposes, the taxpayer is deemed to have disposed of all assets that are not taxable Australian property and that were acquired on or after 20 September 1985, for their current market value, unless certain elections are made.

Foreign source income

There are special rules for the taxation of foreign source income of residents. In addition to a system of foreign income tax offsets (in essence, foreign tax credits), Australia operates a controlled foreign companies (CFC) system and a controlled foreign trust/transferor trust (CFT) system. The aim of the CFC and CFT systems is to tax foreign source income accumulated offshore at low rates of tax in the hands of Australian controllers of the offshore entity. These systems allow Australia to tax certain income and gains that have not been repatriated to Australia.

Tax consolidation

Wholly owned groups of companies may elect to form a tax consolidation group. This means that the group is treated as a single entity for tax purposes.

Imputation

Australian tax paid by resident companies gives rise to franking credits that attach to dividends paid from those taxed profits to shareholders. Such dividends are 'franked dividends'. Resident shareholders include both the cash dividend and the franking credit in their income, and can then apply the franking credit against their tax liability. Individuals and superannuation funds are eligible to claim refunds of franking credits where their franking credits exceed the tax otherwise payable on their income. Non-resident shareholders receive franked dividends free of withholding tax (discussed below).

Withholding tax

Unfranked dividends, interest and royalties paid to non-residents are subject to withholding tax. If withholding tax is paid, then no further tax is payable in Australia on that income.

The general rates of withholding tax are set out below:

- interest – 10%
- unfranked dividends – 30%
- royalties – 30%.

Note that lower rates are usually prescribed in applicable tax treaties, and certain domestic exemptions may also apply (for example, interest paid on certain types of offshore debt is exempt from withholding tax).

Withholding tax may also apply to distributions from MITs. Those distributions may be subject to withholding at either 10%, 15% or 30% depending upon the classifications of the MIT and the nature of the income being distributed.

Additionally, where a non-resident disposes of certain types of taxable Australian property, the purchaser will be required to withhold a non-final withholding tax at a rate of 12.5% of the purchase price, and remit the amount withheld to the ATO.

Conduit foreign income rules

Special rules allow 'conduit foreign income' to flow through Australian resident companies to foreign shareholders without being taxed in Australia. 'Conduit foreign income' is foreign income that is ultimately received by foreign residents, through one or more interposed Australian resident companies.

Australian resident companies that receive an unfranked distribution that is declared to be conduit foreign income will not pay Australian tax on that income if the conduit foreign income is on-paid to shareholders within a certain period. In such cases, the conduit foreign income will not be assessable to the Australian resident company. Conduit foreign income is also exempt from dividend withholding tax when it is on-paid to a foreign resident as an unfranked distribution.

Losses

Losses can be carried forward indefinitely by individuals.

Losses can be carried forward indefinitely by corporate taxpayers subject to the taxpayer satisfying one of two tests. The first is the continuity of ownership test, which requires that a majority underlying ownership of the company is maintained in the same hands in the loss recoupment year as was the case in the year the losses were incurred. The alternative test is the same business test, which requires that the same or a similar business is conducted in the loss recoupment year as was conducted immediately prior to the failure of the continuity of ownership test.

Different and more complex tests apply for the recoupment of losses by trusts.

Revenue losses can be offset against assessable income, which may include both income and capital gains. Capital losses can only be utilised against capital gains.

Thin capitalisation

Broadly, Australia's thin capitalisation rules operate to disallow deductions for interest paid on loans from related parties, where the amount of related offshore debt exceeds a permitted level, having regard to the amount of related offshore equity capital. The rules apply to both foreign controlled Australian corporates and to Australian corporates with offshore operations.

Transfer pricing

Australia's transfer pricing rules are broadly in accordance with the OECD model. These rules require that related party cross-border transactions are conducted on arm's length terms. Taxpayers undertaking related cross-border transactions are required to disclose details of these transactions with their annual income tax return.

The ATO has undertaken a number of audits and other reviews that have resulted in substantial adjustment to the taxable income of taxpayers where it is has been found that the rules have not been complied with.

Companies are required to maintain contemporaneous documentation in relation to related party cross-border transactions, and a transfer pricing policy.

Double tax treaties

Australia is a party to many bilateral double tax treaties dealing with income and, in most cases, capital gains. These treaties set out to regulate the taxing rights between the countries involved. Most of the treaties follow the OECD model agreement and provide for reduced rates of withholding tax as well as relief from double taxation by either foreign tax credit or exemption. Business profits earned by a resident of one country from sources in the other country are generally exempt from tax in the source country, unless the profits have been earned through a permanent establishment in the source country.

GOODS AND SERVICES TAX

A 10% GST applies to most supplies connected with Australia, at each step along the production chain. It also applies to most importations. Registered suppliers are obliged to remit GST on supplies they make. For the most part registered recipients of supplies will be entitled to a credit for any GST included in the price of acquisitions they make. Non-residents may be entitled to register, thereby enabling input tax credits (GST credits) to be claimed in relation to expenses incurred in Australia.

GST does not apply to limited categories of goods and services, including (amongst others):

- exports
- financial supplies
- residential accommodation
- basic food
- a supply of a going concern.

From an administrative perspective, the GST system relies on registration of businesses and the issuance of tax invoices by the suppliers of taxable goods and services.

Australian Business Number (ABN)

The ABN is a unique identifying number used by all businesses in their dealings with the ATO and other government departments. All enterprises registered for GST must have an ABN. It follows that non-residents which register for GST must also apply for an ABN. Non-residents which are not registered for GST but carry on an enterprise in Australia should also consider applying for an ABN. Business customers of non-residents which make supplies in the course or furtherance of an enterprise carried on in Australia must withhold 47% of amounts payable to the non-resident unless they are provided with an ABN.

FRINGE BENEFITS TAX (FBT)

FBT is imposed at 47% on the grossed up value of benefits provided to employees in respect of employment. The effect of taxing fringe benefits in this way is that employers pay FBT equivalent to the income tax that an employee on the top marginal rate of tax receiving the benefit would have paid had they purchased the benefit themselves from their after tax income. FBT is deductible to the employer for income tax purposes. Certain benefits, such as superannuation, are exempt from FBT while other benefits, such as motor vehicles, are concessionally taxed.

STATE TAXES

As mentioned earlier, the states and territories also impose taxes. These include stamp duty, payroll tax and land tax.

Stamp duty

Stamp duty, or 'duty', is generally a tax payable on transactions, including the transfer or conveyance of property or assets situated in, or attributable to, that state or territory. Generally, the amount of duty is calculated on the higher of the consideration or the unencumbered value of the property transferred.

Stamp duty is usually payable by the purchaser or transferee. The stamp duty rates vary between each state and territory. Stamp duty is an important factor in any purchase of land, or purchase of an interest in a company or trust which has interests in land.

Stamp duty must also be considered in the context of the purchase of a business, but the rules on which assets are dutiable vary from state to state, and can operate differently if a different mix of assets is acquired (for example, an asset may be exempt from duty if acquired in isolation, but brought into the duty net if acquired along with land).

In most jurisdictions, a foreign purchaser of residential premises will be liable for a surcharge rate of duty.

Payroll tax

Payroll tax is a tax levied in each state and territory on the gross salaries and wages paid by an employer for services rendered by employees in the state or territory. Certain payments to contractors may also be deemed to be wages. It is payable on a monthly basis with a final reckoning at the end of the year. The rates vary across the states and territories as do the thresholds from which point the tax becomes payable.

Land tax

Land tax is a tax levied annually on the unimproved value of freehold land held within a state. Some lessees may be deemed to own the freehold land for tax purposes. The rate of land tax varies from

state to state. Generally, land tax is calculated using a progressive tax scale, however, the threshold level for the imposition of the tax also varies from state to state. An owner's principal place of residence is generally exempt from land tax, as is land used for primary production. Non-resident owners of residential land may be subject to a land tax surcharge.

SUPERANNUATION GUARANTEE

Employers are required to provide the prescribed minimum level of superannuation contributions in respect of an employee during a contribution period (a quarter) to a complying superannuation fund. In order to meet their superannuation guarantee obligations, employers are required to contribute a minimum of 9.5% of each employee's earning base for each quarter. There is a cap on the maximum contributions payable in respect of any particular employee.

If an employer fails to provide the prescribed minimum level of superannuation contributions in respect of an employee during a contribution period (a quarter) to a complying superannuation fund, it will be liable for a charge equivalent to the amount of the shortfall plus an interest component and an administrative charge.

Unlike the employer's payment of superannuation contributions, the payment of the superannuation guarantee charge is not deductible for income tax purposes.

INDUSTRY SECTORS

GAS AND ELECTRICITY ACCESS

Access

To facilitate competition, legislative provisions and access arrangements ensure that entities wishing to establish new operations may access existing gas and electricity infrastructure services, subject to capacity.

Under the National Electricity Law, National Electricity Rules, National Energy Retail Law and National Energy Retail Rules (applicable to most of the eastern states and territories), registered generators and end-use customers are entitled to connect to transmission and distribution systems and access network services provided by them in accordance with those laws. Retailers are also entitled to use of the networks. Economic regulation by an independent regulator is applied to the pricing of network services. State-based legislation in some of the eastern states confers similar rights. Western Australia and the Northern Territory have separate electricity access regimes with similar aims.

In respect of gas pipelines, third party access is addressed in the National Gas Law and National Gas Rules. Pipeline service providers may also need to have an approved access arrangement, depending on the classification of particular pipelines. Very large users of gas would generally negotiate an access arrangement with a pipeline operator while other gas users would rely on the access arrangement put in place between their gas retailer and a pipeline operator.

Wholesale and retail markets

In the electricity sector, a national wholesale spot market for trading electricity operates in Queensland, New South Wales, the Australian Capital Territory, Victoria, South Australia and Tasmania.

In the National Electricity Market, electricity generators and other participants (generally retailers) participate in a pooled system of exchange which instantaneously matches supply with demand. The spot market price is calculated at half hourly intervals and has a cap and a floor. For most participants in this market, the spot market is supplemented by bilateral contracts such as hedges. Given its geographical distance from the states participating in the National Electricity Market, Western Australia has established a separate wholesale electricity market.

Electricity users who have not registered to participate in the National Electricity Market, or the wholesale electricity market, will generally buy electricity from a retailer at fixed prices. Full retail competition exists in the eastern states and territories, and retail competition for large customers exists in Western Australia. Supply to small customers is highly regulated, including retail price regulation in some jurisdictions.

In all jurisdictions, wholesale contracting, for a long term supply of gas, takes place through direct bilateral contracts. However, the Victorian Gas Market and the Short Term Trading Market (which operates in New South Wales, South Australia, and Queensland) allows participants in these markets to adjust their long term position by trading quantities of gas. The retail supply of gas is regulated in a similar manner to the retail supply of electricity.

Trading in environmental products

A national renewable energy scheme operates under which renewable energy generators may create and sell tradeable certificates, separate from the electricity generated. Demand for these certificates is placed on electricity retailers who must acquire and surrender a certain number each year.

In addition, many states and territories have enacted schemes designed to encourage energy efficiency measures (Victoria, South Australia, New South Wales and the Australian Capital Territory), some of which are tradeable credit schemes.

Various trading markets have arisen to assist parties buying and selling these products.

There is also an emissions trading scheme at the national level, however, as at the date of this publication, the Federal Government has introduced bills to abolish it. Whether those bills will be successful remains to be seen.

TELECOMMUNICATIONS

The Australian telecommunications sector has grown rapidly in recent years pushed along by deregulation, the impact of the internet and technology advancements.

The telecommunications and radio communications regulator in Australia is the Australian Communications and Media Authority (ACMA). The ACCC also has a role in relation to competition and consumer law in the telecommunications industry.

Telstra, Optus and Vodafone Hutchison Australia own and operate Australia's national mobile networks. The introduction of Mobile Number Portability in 2001, and 3G services in 2003, has led to increased competition in the mobile market. Each of the three mobile carriers has commenced widespread commercial rollout of 4G technology.

Telstra (now a listed company, but previously a government-owned monopoly telecommunications carrier in Australia) has, by far, the largest fixed line telecommunications network in Australia. Its main fixed line competitor is Optus (wholly owned by Singtel). The unbundling of the local loop and the growth of ADSL and broadband services throughout

the Australian telecommunications market has introduced greater competition between providers of fixed line services.

The Federal Government is building a national broadband network (NBN), with the stated aim of bringing affordable high-speed broadband services to Australians. NBN Co (owned by the Government) was established to build and operate the NBN. The Labor Government (in power from 2007 to 2013) directed NBN Co to plan and implement a fibre to the home network (FttH) connecting 93% of the population and to connect the balance of the population with high speed wireless and satellite technologies. The rollout of the NBN over this period has been slow and well behind the original rollout targets.

A Liberal/National Party Government was elected in 2013 with a policy to deploy an NBN more rapidly by using fibre to the node technology (FttN) instead of FttH. FttN makes use of the existing copper wire network to connect local users to a fibre connected node. The FttN technology will provide slower speed connections for end users, however, the cost and time taken to deploy FttN is expected to be much lower than FttH. The NBN will be an open access, wholesale-only network. Service providers will link to the NBN at access points. All retail services comprising NBN capacity will be sold by service providers (and not by NBN Co).

Rollout of the NBN has involved large structural changes to the telecommunications industry. The structural changes include decommissioning of existing customer access networks, moving customer connections to the NBN and providing NBN Co with access to existing ducts and facilities. Further structural changes may occur following the outcomes of the reviews being conducted by the Liberal/National Party Government.

ELECTRONIC COMMERCE

More and more Australian businesses are using the internet and email to conduct transactions. Laws that affect any contract, marketing or public document continue to apply in the electronic environment and will need to be considered in relation to e-commerce transactions. In addition, various authorities play a role in overseeing certain aspects of e-commerce. These include the Information Commissioner, ACMA and the ACCC. Some industries also have codes of conduct in place dealing with e-commerce transactions that are registered with relevant government authorities. Examples include the Australian Direct Marketing Association and the Internet Industry Association. State and Commonwealth Electronic Transactions and Evidence Acts make provision for the enforceability of certain electronic transactions. The Corporations Act and taxation legislation also recognise electronic records. Amendments made to state and commonwealth crimes acts to protect electronic communications and data storage recognise the importance of e-commerce. Government funding is available on application for information economy research and development projects which meet relevant government criteria.

For more information please visit K&L Gates FinTech blog at: www.fintechlawblog.com.

CONTACTS

CONTACTS

Cameron Abbott

Corporate and Technology

+61 3 9640 4261
cammeron.abbott@klgates.com

Jim Bulling

Financial Services

+61 3 9640 4338
jim.bulling@klgates.com

Jonathan Feder

Intellectual Property

+61 3 9640 4375
jonathan.feder@klgates.com

Betsy-Ann Howe

Tax

+61 2 9513 2365
betsy-ann.howe@klgates.com

Michaela Moloney

Labor, Emplaoyment & Workplace Safety

+61 3 9640 4430
michaela.moloney@klgates.com

Jason Opperman

Restructuring & Insolvency

+61 2 9513 2435
jason.opperman@klgates.com

Sandra Steele

Real Estate and Construction

+61 2 9513 2528
sandra.steele@klgates.com

Tim Webster

Litigation & Dispute Resolution

+61 2 9513 2500
tim.webster@klgates.com

LOCATIONS

AUSTRALIAN OFFICES

BRISBANE

Level 16, 66 Eagle Street
Brisbane QLD 4000
Phone: +61 7 3233 1233
Fax: +61 7 3233 0900

MELBOURNE

Level 25, 525 Collins Street
Melbourne VIC 3000
Phone: +61 3 9205 2000
Fax: +61 3 9205 2055

PERTH

Level 32, 44 St. Georges Terrace
Perth WA 6000
Phone: +61 8 9216 0900
Fax: +61 8 9216 0901

SYDNEY

Level 31, 1 O'Connell Street
Sydney NSW 2000
Phone: +61 2 9513 2300
Fax: +61 2 9513 2399

klgates.com

K&L GATES

K&L Gates is a fully integrated global law firm with lawyers located across five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants, and entrepreneurs in every major industry group, as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit klgates.com.