DOING BUSINESS IN AUSTRALIA

A Guidebook for Investing in Australia

INTRODUCTION

Australia welcomes new business and foreign investment by providing a strong economy, a stable political environment, and a skilled and talented workforce. 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 will likely prompt inquiries into other related issues.

Our lawyers are experienced in dealing with inbound investments and operations of foreign companies across Australia. With offices in Brisbane, Melbourne, Perth, and Sydney we provide international clients with advice and counsel on legal issues on a broad array of matters impacting business operations. We would be delighted to discuss any opportunities or issues you may have when considering Australia as your investment location.

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Acknowledgement of Country

K&L Gates acknowledges the Traditional Custodians of country throughout Australia and recognises their continuing connection to land, waters and cultures. We pay our respects to their Elders past, present and emerging.

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Legal and Regulatory System

LEGAL AND REGULATORY SYSTEM

Australia is a Western liberal democratic federation which formed in 1901 with six states (New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania) and two territories (Northern Territory and Australian Capital Territory) on the mainland, and six smaller territories remote from the mainland. Australia's system of government is modelled on the British Westminster system.

There are three levels of government in Australia: federal, state, and local. Each of these governments has its own powers, responsibilities, and services. In some instances, there may be some overlap or shared responsibility for certain areas (for example, education and health). Companies doing business in Australia must take careful consideration in ensuring they comply with the laws of all three governments. Businesses operating across different local governments, states and territories should be aware of the distinct laws in each of these levels of governments across different borders.

The Levels of Government in Australia

The federal government's powers are expressly limited by the Australian Constitution, with most law-making powers residing with the states. Local governments—often referred to as councils, municipalities, or shires—make by-laws concerning local matters and provide services to towns. The following table summarises this in further detail:

Level	How Many in Australia	Roles and Responsibilities
Federal	1	The Commonwealth Parliament derives its powers from the Australian Constitution. Federal legislation is binding across all jurisdictions and, in the event of inconsistency with laws in other levels of government, federal laws prevail. Its responsibilities include: • Banking and financial services • Climate change and environmental matters • Competition and antitrust laws • Corporations Act • Education • Employment • Foreign investment approvals • Goods and services tax • Health • Immigration • Income tax • Insurance • Intellectual property • Privacy • Trade and commerce

Level	How Many in Australia	Roles and Responsibilities
State	8	States and territories can pass laws in their parliaments. Such laws are only enforceable in their jurisdiction. Their responsibilities include: • Education • Energy • Health • Land tax • Landholder duty • Mining • Occupational health and safety • Payroll Tax • Planning and infrastructure • Policing • Transfer duty
Local	537	Local governments deal with “local” issues limited to local residents and businesses. Responsibilities Include: • Development approvals • Local infrastructure (such as roads, parks, and libraries) • Social planning

Key Regulators

Some of the key regulators in Australia are:

- The Australian Securities and Investments Commission (ASIC) administers the *Corporations Act 2001* (Cth) (Corporations Act).
- The Australian Taxation Office (ATO) is the statutory authority responsible for administering federal tax legislation.
- The Australian Securities Exchange (ASX) operates Australia’s natonal exchange for equities, derivatives and enterprise trading markets.
- The Australian Prudential Regulation Authority (APRA) is a statutory authority responsible for ensuring prudent management of financial institutions.
- The Australian Competition and Consumer Commission (ACCC) monitors competition, fair trading and consumer protection issues. It administers the *Competition and Consumer Act 2010* (Cth).

Foreign Investment

FOREIGN INVESTMENT

Overview

The Australian government welcomes foreign investment. Under Australia's foreign investment framework, foreign persons (explained below) may be required or encouraged to apply for foreign investment approval prior to taking certain actions. The approval is provided by the Australian Treasurer and confirms that the Commonwealth of Australia does not object to a particular action. It is commonly referred to as FIRB Approval as the Treasurer receives advice from the Foreign Investment Review Board (FIRB) when deciding whether or not to approve an action. This guide provides an overview of the foreign investment framework, which is complex and regularly changes. Accordingly, it is not exhaustive and legal advice should always be sought.

The framework is comprised of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) and the *Foreign Acquisitions and Takeovers Regulations 2015* (Cth) (FATR). Additionally, Australia's Foreign Investment Policy and guidance notes provide further commentary and guidance.

Who Needs Approval?

A foreign person is generally:

- An individual not ordinarily resident in Australia;
- A corporation, trustee of a trust or general partner of a limited partnership where:
    - An interest (or a beneficial interest in the income of property of a trust in the case of a trustee) of at least 20% (Substantial Interest) is held by an individual not ordinarily resident in Australia, a foreign corporation, or a foreign government; or
    - In which two or more foreign persons hold an aggregate interest (or a beneficial interest in the income of property of a trust in the case of a trustee) of at least 40% (Aggregate Substantial Interest); or
- A foreign government or foreign government investor (see below).

Due to the tracing provisions under the FATA an entity may still be considered to be a foreign person due to indirect upstream ownership interests by foreign persons.

A foreign government investor is a:

- Foreign government or separate government entity; or
- A corporation or trustee of a trust, or a general partner of a limited partnership in which:
    - A foreign government, separate government entity or foreign government investor holds a Substantial Interest (at least 20%); or
    - Foreign governments, separate government entities or foreign government investor of more than one foreign country (or parts of more than one foreign country) hold an Aggregate Substantial Interest (at least 40%).

The definition of foreign government investor can capture, among other things, public sector pension funds, public universities, investment funds or portfolio companies for investment funds in which state-

owned enterprises, sovereign wealth funds, public sector pension funds or public universities have a direct or indirect interest.

When is Approval Required?

Under the FATA and FATR there are four categories of actions:

1. **Notifiable actions:** Actions for which FIRB Approval must be obtained prior to the action being taken.
2. **Notifiable national security actions:** Actions for which FIRB Approval must be obtained prior to the action being taken.
3. **Significant actions:** Actions that if the Treasurer considers the action to be contrary to the national interest the Treasurer has the power to make orders, including orders to prohibit the action or to require divestment where the action has already occurred. FIRB Approval is not required unless the Significant Action is also a Notifiable Action. However, voluntarily seeking FIRB Approval will prevent the Treasurer from exercising their powers (except the last resort power - see below).
4. **Reviewable national security actions:** Actions for which FIRB Approval is not required however, the Treasurer may call-in such actions for review for a period of 10 years if FIRB Approval is not voluntarily obtained and there is a national security concern. While used sparingly the Australian government has provided guidance outlining the instances where it encourages foreign persons to voluntarily seek FIRB Approval prior to undertaking the relevant action.

The rules contained in the FATA and FATR for when FIRB Approval is required are very complex and factually specific, so foreign investors should seek advice for each and every investment into Australia. A summary of the key types of transactions which fall within each category of action are set out below:

Type of Action	Description of Action
Notifiable actions for all foreign persons	Acquiring an interest in Australian land. Australian land includes, among other things, an interest in a lease or licence reasonably likely to exceed 5 years, an interest in an Australian land entity or Agricultural land entity and an interest in a mining and production tenement if the relevant monetary threshold is met.
	Acquiring a direct interest[1] in an Australian entity or Australian business that is an agribusiness if the relevant monetary threshold is met.
	Acquiring a Substantial Interest (generally 20% or more) in an Australian entity if the relevant monetary threshold is met.
	Acquiring 5% or more in an Australia media business.

[1] A direct interest is an interest of:

- at least 10% in an entity or business;
- an interest of at least 5% in an entity or business where the foreign person has also entered into a legal arrangement relating to the entity or business; or
- any percentage in an entity or business if the foreign person is in a position to influence or participate the central management or control or determine the policy of an entity or business.

Type of Action	Description of Action
Notifiable national security actions for all foreign persons	Acquiring a direct interest in a national security business (defined below) or an entity that carries on a national security business.
	Starting a national security business.
	Acquiring an interest in national security land (defined below).
	Acquiring an interest in an exploration tenement in respect of national security land.
Additional notifiable actions for foreign government investors	Acquiring a direct interest in an Australian entity or business.
	Starting an Australian business.
	Acquiring an interest in a tenement.
	Acquiring at least 10% of a mining, production, or exploration entity.
Significant actions (that are not also notifiable actions)	Acquisition of assets in an Australian business that results in a change of control of the business where the relevant monetary threshold is met (see below).
	Entering an agreement or altering a constituent document so that the entity's senior officers are obliged to act in accordance with the wishes of a foreign person who holds a Substantial Interest that results in a change of control of the business where the relevant monetary threshold is met.
	Entering or terminating a significant agreement with an Australian business that results in a change of control of the business where the relevant monetary threshold is met.
	Acquisitions of interests in foreign entities involving an Australian subsidiary that is not an Australian land corporation, media business or national security business that results in a change of control of the business where the relevant monetary threshold is met.
Reviewable national security actions - Actions that are not otherwise significant, notifiable or notifiable national security action	Acquiring a direct interest in an entity or business or the assets of an Australian business.
	Being in a position (or more of a position) to influence or participate in the central management, control or policy of the entity or business.
	Entering an agreement relating to the affairs of an entity or altering a constituent document of an entity under which the senior officers of the entity will be under an obligation to act in accordance with the wishes of a foreign person who holds a direct interest in the entity.
	Acquiring an interest in Australian land.

Special rules apply to a number of the situations identified above. Additionally, the FATA and FATR contain a number of exemptions that may apply to a transaction.

National Security Business

A national security business is a business carried on wholly or partly in Australia which is known or could be known on making reasonable enquiries to be:

- **Critical infrastructure:** An operator or direct interest holder of a critical infrastructure asset as defined in the *Security of Critical Infrastructure Act 2018* (Cth). Critical infrastructure assets include ports, water, gas and electricity assets, banks, financial market infrastructure assets, broadcasting and also certain assets in the freight infrastructure or services, insurance, superannuation, critical food and grocery assets, liquid fuel, data storage and processing and domain name system sectors;
- **Telecommunications:** A telecommunication carrier;
- **Defence providers:** A manufacturer or supplier of critical goods, services or technology intended to be for military or intelligence use by defence and intelligence personnel, the defence force of another country, or a foreign intelligence agency;
- **Information with a security classification:** A business that stores or has access to information with a security classification; and
- **Information on a defence and intelligence personnel:** A business that stores, maintains collects or has access to information on defence and intelligence personnel as part of an arrangement with the Australian defence force, the Department of Defence, or an agency in the national intelligence community which, if accessed or disclosed could compromise Australia's national security.

National security land is "defence premises" (as defined in applicable legislation) or land in which an agency in the national intelligence community has an interest if the existence of that interest is publicly known or could be known upon the making of reasonable enquiries.

Monetary Thresholds as at September 2023[2]

FIRB Approval Monetary Thresholds – Non-land Proposals		
Investor	**Action**	**Threshold – More Than**
All investors	National security business	AU$0
	Australian media business	AU$0
Private investors from Free Trade Agreements (FTA) partner countries that have the higher threshold[3]	Non-sensitive businesses	AU$1,339 million
	Sensitive businesses[4]	AU$310 million
	Agribusinesses	For Chile, New Zealand and United States, AU$1,339 million
		Others, AU$67 million (based on the value of the consideration for

[2] The monetary thresholds are revised on 1 January each year.

[3] Agreement country or region investors are those from: the United States of America, New Zealand, United Kingdom, Chile, Japan, the Republic of Korea, China, Singapore, Peru, Hong Kong, and any other countries (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), done at Santiago on 8 March 2018, is in force (i.e. Canada, Mexico, Malaysia and Vietnam).

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

FIRB Approval Monetary Thresholds – Non-land Proposals		
Investor	**Action**	**Threshold – More Than**
		the acquisition and the total value of other interests held by the foreign person (with associates) in the entity)
Other private investors	Business acquisitions (all sectors)	AU$310 million
	Agribusinesses	AU$67 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)
	Service businesses (non-sensitive)	For India, AU$500 million
Foreign government investors	All investments	AU$0

FIRB Approval Monetary Thresholds – Land proposals		
Investor	**Action**	**Threshold – More Than**
All investors	National security business	AU$0
	Australian media business	AU$0
	Vacant commercial land	AU$0
Private investors from FTA partner countries that have the higher threshold[5]	Agricultural land	For Chile, New Zealand and United States, AU$1,339 million
	Developed commercial land	AU$1,339 million
	Mining and production tenements	For Chile, New Zealand and United States, AU$1,339 million
		Others, AU$0

[5] Agreement country or region investors are those from: the United States of America, New Zealand, United Kingdom, Chile, Japan, the Republic of Korea, China, Singapore, Peru, Hong Kong, and any other countries (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), done at Santiago on 8 March 2018, is in force (i.e. Canada, Mexico, Malaysia and Vietnam).

FIRB Approval Monetary Thresholds – Land proposals		
Investor	**Action**	**Threshold – More Than**
Other private investors	Agricultural land	For Thailand, where land is used wholly and exclusively for a primary production business, AU$50 million
	Developed commercial land	AU$310 million
		Where the land is sensitive[6], AU$67 million
		For India, non-sensitive land for the supply of services, AU$500 million
	Mining and production tenements	AU$0
Foreign government investors	All investments	AU$0

Last Resort Power

Even if FIRB Approval is obtained the Treasurer also has a “last resort power” which gives the Treasurer a final opportunity to impose conditions, vary or revoke conditions that have been imposed, and make orders prohibiting or requiring the undoing of a part or whole of an action even if FIRB Approval has already been obtained. This power is expected to be used rarely in exceptional circumstances and a number of requirements must be met before this power can be exercised.

The National Interest Test

When considering whether FIRB Approval should be granted in respect of a Notifiable Action or Significant Action actions are assessed against a national interest test.

While the Treasurer has broad discretion in determining what is in the national interest, relevant considerations include:

- **Character of the investor:** Does the investor operate transparently and ethically?
- **Competition:** Will the investment impact the concentration of ownership within Australia? This will be examined by the ACCC in consultation with Treasury and FIRB.
- **National security:** Does the investment threaten or weaken the national security of Australia?
- **Tax and environment:** How will the foreign investment impact on other Australian government policies like tax revenues and the environment?
- **Economy and community:** How will the investment impact the economy and community including changes in employment, investment in the local area, and the entity’s future plans.

[6] Sensitive developed commercial land includes mines and critical infrastructure (for example, an airport or port).

Notifiable National Security Actions and Reviewable National Security Actions are assessed against the narrower national security test.

Application Process

Applications are filed online, either by the applicant or the applicant's advisers.

The FATA allows the Treasurer 30 days to consider the application and make a decision. The Treasurer may extend this period by a further 90 days by notifying the investor in writing, and a further 90 days if the Treasurer publishes an interim order. In practice applicants are usually asked to voluntarily request an extension to the statutory 30-day period to allow the Treasury to consider the application. The decision period above only commences once the relevant application fee is paid (see below).

Fees

Investors are required to pay a fee to Treasury with their application. The following is a list of fees as at September 2023 as published in Guidance Note 10.[7]

<table>
<tr><th colspan="2">Kind of Action</th><th>Applicable Fees</th></tr>
<tr><td rowspan="3">Land</td><td>Residential land</td><td>Fee tiers increase every AU$1 million of consideration
Fees start at AU$14,100 for acquisitions of AU$1 million or less, rising to a maximum of AU$1,119,100 for acquisitions of more than AU$40 million</td></tr>
<tr><td>Agricultural land</td><td>Fee tiers increase every AU$2 million of consideration
Fees start at AU$14,100 for acquisitions of AU$2 million or less, rising to a maximum of AU$1,119,100 for acquisitions of more than AU$80 million</td></tr>
<tr><td>Commercial land and tenements</td><td rowspan="2">Fee tiers increase every AU$50 million of consideration
Fees start at AU$14,100 for acquisitions of AU$50 million or less, rising to a maximum of AU$1,119,100 for acquisitions of more than AU$2 billion</td></tr>
<tr><td colspan="2">Businesses and entities (excl. land entities)</td></tr>
<tr><td colspan="2">Starting an Australian business (including starting a national security business)</td><td>AU$4,200 flat fee</td></tr>
<tr><td colspan="2">Entering agreements and altering documents</td><td>AU$28,200 flat fee</td></tr>
<tr><td colspan="2">Internal reorganisations</td><td>AU$28,200 flat fee</td></tr>
</table>

Where FIRB Approval is voluntarily sought for a Reviewable National Security Action the fee payable is 25% of the equivalent fee for a Notifiable Action. A fee of AU$4,200 applies where the consideration value is less than AU$75,000.

[7] The fees are indexed and revised on 1 July each year.

Conditions to Approval

Often FIRB Approval is granted subject to certain conditions. The types of conditions imposed depend on the nature of the action and the government agencies consulted on as part of the application. It is common for certain tax conditions to be imposed on most FIRB Approvals and for conditions on an entity's board and governance to be imposed where national security concerns are raised. Conditions aimed at protecting Australian data are also common for actions involving businesses with bulk or sensitive data sets.

Exemption Certificates

As an alternative to obtaining FIRB Approval for each individual action foreign persons may also apply for exemption certificates. Exemption certificates provide upfront approval for a program of acquisition of interests in assets of an Australian business, securities in an entity or interests in land often without a specific target in mind.

Exemption certificates are assessed on a case-by-case basis and are subject to time and financial limits and generally require the submission of reports once an action has been made under a certificate and then again on a periodic basis.

Anti-Avoidance

The FATA also contains anti-avoidance provisions which allows the Treasurer to make certain orders (including orders prohibiting proposed actions or disposal orders) where persons enter into or being to carry out a scheme where the sole or dominant purposes of the scheme is to avoid the application of a provision of the FATA and the scheme has or would achieve such a purpose.

Penalties

Breaches of the FATA are subject to significant criminal and civil penalties which can in some instances include (as at September 2023):

- Criminal penalties of up to 10 years imprisonment or a monetary penalty of AU$4.695 million for an individual or AU$46.95 million for a corporation;
- Civil penalties that are the lesser of:
  - AU$782.5 million; or
  - the greater of:
    - AU$1.565 million for individuals or AU$15.65 million; and
    - The amount worked out by reference to the value of the action. Generally, this is 75% of the greater of the following: the value of the consideration for the acquisition or the market value of the interest acquired.

Criminal liability and civil penalties may also extend to officers of a corporation that is in breach.

Additionally, a 3-tier infringement notice regime for contraventions of the Act which may be issued by the Treasurer without legal proceedings being brought.

- Tier 1 penalties apply if the person self-discloses an alleged contravention of the FATA before the person is notified by the Commonwealth that the conduct is being investigated;

- Tier 2 applies in all other cases, except (generally) for high-value acquisitions that are captured by tier 3; and
- Tier 3 for non-compliance in relation to high-value acquisitions (i.e. above AU$275 million).

The penalties that can be issued under the infringement notice regime are set out in the table below.

Tier	Individual	Corporation
1	12 penalty units - AU$3,756	60 penalty units - AU$18,780
2	60 penalty units - AU$18,780	300 penalty units - AU$93,900
3	300 penalty units - AU$93,000	1,500 penalty units - AU$469,500

Register of Foreign Ownership

From 1 July 2023 foreign persons must also give notice of certain actions relating to Australian land, water, entities, businesses, and other assets to the Registrar of the Register of Foreign Ownership of Australian Assets. Notice must generally be given within 30 days of the day on which the action is taken. This is a notification obligation only however, it arises not just in the context of acquisitions but where a person becomes a foreign person while holding an interest that requires notification, a person ceases to hold an interest that requires notification and a change in the nature of the interest in land. The information on the Register is not public and can only be used, recorded, or disclosed in accordance with the FATA.

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Business Structures

BUSINESS STRUCTURES

Overview

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;
- Franchises; and
- 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 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 audited financial statements with the 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 plus any unpaid capital where partly-paid shares have been issued. A shareholder's personal assets are protected in the event of the company's insolvency, but money originally invested can be lost.

- Distinct from a company limited by shares is a no liability company or a company limited by guarantee. 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. A company limited by guarantee is a common company structure used for not-for-profit and charitable organisations in Australia where the liability of the members is limited to the amount of the guarantee they agree to give on becoming a member, which is typically a nominal amount.

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 incorporated 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; and
- 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 that 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 individuals or legal entities 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 debt 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 the general partner's liability for debts of the limited partnership is unlimited. For this reason, it is typical for general partners themselves to be proprietary limited companies (or limited partnerships whose own general partner is a proprietary limited company). 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 specific and separate 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.

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.

Generally, the proceeds of an unincorporated JV are proportionately distributed to each of the joint venturers in accordance with an agreed joint venture (or participating) interest 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 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, including the parties' rights to appoint the JV's directors. The main advantage of this structure is the limited liability conferred on its participants as shareholders in a limited company.

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 proprietors. 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

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 owes fiduciary obligations to the beneficiaries of the trust;
- 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; and
- The most common business trust is a unit trust under which the beneficiaries' interests in the trust are divided into "units". Units may be transferred in a similar manner to shares of a company.

Distribution and Franchising

Under a distribution agreement, the distributor is usually granted "sole" or "exclusive" rights of distribution in a territory. 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) (Competition and Consumer Act) by entering into "anticompetitive" agreements.

The advantage of dealing with a distributor is that an enterprise wishing to do business in this way in a territory 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, as distinct from an agent that earns a commission.

Franchising remains a popular business model despite well-publicised issues in recent years.

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 Code of Conduct

Overview

In Australia, franchisors and franchisees have certain rights and obligations under the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (Cth) (Franchising Code of Conduct or Code).

The Franchising Code of Conduct is regulated by the ACCC. Pecuniary penalties apply for breaches of certain provisions of the Code and the ACCC can also issue infringement notices where it has reasonable grounds to believe a franchisor has breached a civil penalty provision. It is important to be aware that in some cases, certain kinds of breaches (such as a breach of the obligation to make required disclosure of materially relevant facts) can result in a maximum pecuniary penalty for a corporation being the greater of:

- AU$10 million; or
- If the court can determine the value of the "reasonably attributable" benefit obtained, three times that value; or
- If the court cannot determine the value of the "reasonably attributable" benefit obtained, 10% of the annual turnover in the preceding 12 months.

Some of the key aspects of the Franchising Code of Conduct (which are examined further below) include the following:

- A franchisor is required under the Code to give certain information and documents to a prospective franchisee before a franchise agreement is signed and to a franchisee after a franchise agreement is entered;
- Franchisees have rights to terminate their franchise agreement during an applicable 14 day cooling off period;
- The Code also regulates the ways in which a franchise agreement can be terminated and prohibits the inclusion of certain kinds of terms in a franchise agreement;
- Franchisors and franchisees are subject to an obligation to act in good faith;
- The Code regulates the process for resolution of disputes between franchisors and franchisees;
- Franchisors are also required to create and update a franchise profile online containing certain required information on the Franchise Disclosure Register hosted by the Australian government; and
- The Code also regulates motor vehicle dealerships.

It is also important to be aware that in addition to the Franchising Code of Conduct, various other provisions of the *Competition and Consumer Act 2010* (Cth) apply to franchising such as:

- Restrictions on unfair contract terms in "small business contracts";
- Prohibitions on engaging in misleading or deceptive conduct or unconscionable conduct; and

- Restrictions on engaging in anti-competitive conduct such as, for instance, exclusive dealing with the purpose of substantially lessening competition.

What is Captured?

The Franchising Code of Conduct is applicable to contractual arrangements that fall within the definition of a "franchise agreement" under the Code (subject to some limited exceptions).

What is a Franchise Agreement?

The ACCC has indicated that an arrangement is likely to be caught by the Franchising Code of Conduct (and constitute a "franchise agreement") where all of the following features are present in an arrangement:

- One person (the franchisor) grants another person (the franchisee) the right to carry on a business in Australia of offering, supplying, or distributing goods or services under a specific system or marketing plan substantially determined, controlled or suggested by the franchisor or its associate;
- The business is associated with a particular trademark, advertising or a commercial symbol owned, used, licensed, or specified by the franchisor or its associate; and
- The franchisee must make, or agree to make, certain types of payments to the franchisor or its associate before starting or continuing the business (some kinds of payments are exempted).

Master Franchising

The Code also regulates master franchising arrangements. Master franchisors give permission to another person (a subfranchisor) to grant subfranchises to other persons. Potentially, the subfranchisor may be restricted to only granting subfranchisors the right to grant and manage franchises in a particular state or territory.

A subfranchisor is both a franchisee (in relation to the master franchise granted to it by the master franchisor) and also a franchisor (in relation to any subfranchise granted by it under the master franchise).

Disclosure Requirements for Prospective Franchisees

The Franchising Code of Conduct requires a franchisor to give to a prospective franchisee:

- Under subclause 9(1A) of the Franchising Code of Conduct, at least 14 days before the franchisee signs their franchise agreement or makes a non-refundable payment the following documents:
    - A copy of the franchise agreement in the form in which it is to be executed;
    - A disclosure document and a key facts sheet containing certain required information relating to the franchise that have been updated as required by the Code; and
    - A copy of the Franchising Code of Conduct.
- An information statement (in the form published on the ACCC's website) as soon as practicable (and not later than seven days after the franchisee formally applies or expresses an interest in acquiring a franchised business and before the franchisor gives the franchisee the documents described in subclause 9(1A) of the Code).

Depending on the circumstances, a franchisor may also be required to give a prospective franchisee certain other information within particular timeframes including:

- Leasing information if the franchisee is leasing or occupying premises from the franchisor or its associate;
- A copy of the existing franchise agreement and other relevant documents, if an existing agreement is being transferred to a new franchisee; and
- Copies of any other agreements that a franchisee has to enter as a condition of the franchise agreement.

Further, a franchisor must not enter into a franchise agreement or receive a non-refundable payment unless it has received from the prospective franchisee a written statement that the prospective franchisee has received, read, and had a reasonable opportunity to understand the disclosure document and the Code.

The franchisor must also receive from the prospective franchisee (before entering a franchise agreement) certain specific signed statements regarding independent legal, business and accounting advice about the proposed franchise agreement or franchised business.

Disclosure Requirements for Franchisees

Disclosure obligations under the Franchising Code of Conduct also apply on renewing, extending the term and extending the scope of a Franchise Agreement. Other matters to note include:

- Certain obligations to update disclosure documents and key facts sheets on an annual basis and to provide these documents to existing franchisees if requested in writing; and
- Requirements to disclose to franchisees certain “materially relevant facts” within required timeframes. This includes (for example) matters such as changes in majority ownership or control of a franchisor, judgments in civil or criminal proceedings and changes in intellectual property ownership or control of intellectual property.

Franchise Disclosure Registry

Certain franchisors operating a franchise system in Australia will also need to create a franchise profile online and publish key disclosure information about their franchise on the Franchise Disclosure Register. They are also required to maintain their profiles and disclosure information on the Franchise Disclosure Register within 14 days following the franchisor’s annual obligation to update their disclosure document.

Franchise Agreement—Regulation of Terms

The Franchising Code of Conduct places some restrictions and limitations on including various terms in franchise agreements. For instance, this includes:

- Terms requiring the franchisee to pay certain legal costs of the franchisor or costs incurred by the franchisor in settling a dispute;
- Terms giving the ability to a franchisor to make changes to a franchise agreement that apply retrospectively;

- Clauses requiring the franchisee to bring legal proceedings or conduct arbitration or mediation in relation to a dispute under the franchise agreement outside of Australia or in a State or Territory outside that in which the franchised business is based;
- General releases of the franchisor from liability towards the franchisee; and
- Waivers of any representations the franchisor makes to franchisees, either verbally or in writing.

The Code also contemplates that a restraint of trade clause in a franchise agreement is of no effect if a franchisor does not extend a franchise agreement in certain circumstances.

Dispute Resolution

Franchisors are required by the Franchising Code of Conduct to have an internal procedure for handling complaints. If the parties cannot agree how to resolve a dispute within 21 days, either party may refer the matter to mediation or conciliation facilitated by an independent third party. Arbitration may also be used to resolve disputes when both parties have agreed to this process. Dispute resolution services are provided by the Australian Small Business and Family Enterprise Ombudsman.

Motor Vehicle Dealerships

Since June 2020, the Franchising Code of Conduct has affected how new motor vehicle dealerships can be entered into and exited by manufacturers and dealers. A dealership agreement will constitute a “new vehicle dealership agreement’ if the motor vehicle dealership predominantly deals in ‘new passenger vehicles or new light goods vehicles (or both)”. The Code captures renewals or extension of dealership agreements that take effect on or after 1 June 2020.

The Code regulates how manufacturers must review and plan towards end of term arrangements, significant capital expenditure requirements and engage in dispute resolution. In particular, the Code requires manufacturers to give at least 12 months’ notice of their intention when renewing or extending a new vehicle dealership agreement. The Code regulates circumstances in which franchisees undertake “significant capital expenditure” and requires disclosures be made around this. The Code provides for the good faith consideration by manufacturers of group dispute resolution where a group of dealers have a dispute “of the same nature” (for new vehicle dealership agreements entered into on and from 1 June 2020).

Agency

Notwithstanding international measures aimed at unifying the principles of agency law, in particular the Geneva 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 and agent, principal and third party and agent and 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.

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Investment Funds

INVESTMENT FUNDS

Investment Fund Vehicles

In Australia, the legal structures typically used for investment funds are unit trusts, limited partnerships, and companies. The structure of a fund will commonly be determined based on the types of investors in the fund (i.e. wholesale or retail), the jurisdiction of investors, the types of investments of the fund and their location.

Unit Trusts

In Australia, investment funds are predominantly structured as unit trusts as they generally provide flow-through tax treatment. Under a unit trust structure, the trustee holds the assets of the fund on trust for investors (unitholders) who hold units in the fund. The governing rules of a unit trust are set out in a trust deed, which typically provides broad discretionary powers of management for the trustee. These management powers are often delegated to an investment manager. The trustee of a unit trust has certain fiduciary obligations imposed on it under Australian general law and also pursuant to legislation in each state and territory of Australia.

Most unit trusts will fall within the definition of a “managed investment schemes” under the *Corporations Act 2001* (Cth). A managed investment scheme is a collective investment vehicle where investor contributions are pooled for a common purpose and investors do not have day-to-day control over the scheme.

A managed investment scheme typically requires registration with ASIC if it has more than 20 members or is promoted by a person, or an associate of a person, who is in the business of promoting managed investment schemes. One exception is if the offer of interests does not require the giving of a Product Disclosure Statement in accordance with the Corporations Act. For example, the offer of interests is made only to wholesale clients. A registered managed investment scheme must be operated by a responsible entity who holds an appropriate Australian Financial Services Licence (AFSL).

While a number of investment funds that are managed investment schemes are unlisted, it is common for managed investment schemes to be listed on a stock exchange, often as a real estate investment trust or a listed investment trust.

Exchange-traded products (ETPs) are also becoming increasingly popular in Australia. ETPs are generally registered managed investment schemes that are quoted on a securities exchange operated by the ASX or Cboe Australia Pty Ltd. ETPs include managed funds that are actively managed, or rules based and passively managed funds that track the performance of an index, a currency, or a commodity.

Managed Investment Trusts

A Managed Investment Trust (MIT) is a unit trust which meets certain requirements under Australian tax laws (including that it is a managed investment scheme) that allows beneficial tax treatment for investors. This has made unit trusts that are MITs a popular investment structure in Australia.

Limited Partnerships

Limited partnerships are a less common structure than unit trusts and, in Australia, are typically only used for private equity and venture capital funds due to the tax concessions available for venture capital limited partnerships (VCLP) or early-stage venture capital limited partnerships (ESVCLP) (see further below). While there was a proposal to make a limited partnership structure attractive for other asset classes, this has been abandoned for the time being.

A private equity fund or venture capital fund may comprise one limited partnership, or a primary limited partnership alongside parallel and feeder funds (which may be structured as limited partnerships or unit trusts) to cater for different stages of investment and investor types.

Under a limited partnership structure, the general partner is responsible for managing the partnership and has unlimited liability for the debts of the partnership, while limited partners (investors) have limited liability unless they play a role in management of the partnership.

Limited partners obtain limited partnership interests and are required to contribute capital to the fund in accordance with the limited partnership agreement.

The general partner or manager of the limited partnership will generally be required to be authorised under an AFSL for its activities in relation to the limited partnership unless an exemption applies.

Venture Capital Limited and Early-Stage Venture Capital Limited Partnerships

The VCLP and ESVCLP regimes were introduced by the federal government in order to encourage investment in Australian venture capital. VCLPs and ESVCLPs offer flow-through tax treatment and certain tax concessions for investors.

In order to qualify and obtain registration as a VCLP or ESVCLP, the limited partnership must meet certain criteria set out in the *Venture Capital Act 2002* (Cth). These criteria are prescriptive and extensive. VCLPs and ESVCLPs must hold only “eligible venture capital investments”. For an ESVCLP, it must have committed capital of at least AU$10 million and each of its investee entities must not have total assets of more than AU$50 million at the time of acquisition, and for a VCLP, this limit is AU$250 million. Additionally, investee companies, businesses and trusts must not primarily engage in “ineligible activities”, including property development, land ownership, banking, securitisation, or construction.

Companies

Another form of investment structure in Australia is the listed investment company. Listed investment companies (LICs) are investment vehicles incorporated as companies. Investors generally acquire shares in the LIC on a stock exchange. Through their investment in the LIC, investors are provided with exposure to the underlying assets of the LIC which typically include listed securities and other financial products.

An alternative corporate investment structure (the Corporate Collective Investment Vehicle) has recently been introduced and is described further below.

Australian Financial Services Licensing

Unless an exemption applies, the entities involved in establishing and operating a fund in Australia (e.g. the trustee and the investment manager) will generally be required to hold an AFSL that authorises them to carry on their activities in relation to the fund, regardless of how the fund is structured and the types of investors.

An AFSL is issued by ASIC and AFSL holders are subject to a range of obligations under the Corporations Act in relation to organisational competence, capital adequacy, resources, risk management and reporting requirements.

A foreign financial services provider (FFSP) that intends to provide financial services in Australia must either hold an AFSL or be entitled to rely on an exemption. On 7 August 2023, the Australian government released exposure draft legislation which seeks to codify licensing exemptions for FFSPs to facilitate cross-border financial services. If passed, the proposed legislation will take effect on 1 April 2024. These exemptions include:

- **Professional investor exemption:** FFSPs that provide financial services from outside Australia to professional investors will, subject to eligibility, be exempt from the requirement to hold an AFSL. This exemption prescribes certain requirements on the FFSP, which extends to representatives of FFSPs who conduct “marketing visits” to Australia; and
- **Comparable regulator exemption:** FFSPs that are foreign companies or partnerships formed outside of Australia that provide financial services to wholesale clients are exempt from the requirement to hold an AFSL provided the FFSP is authorised, registered, or licensed by a comparable regulator to legally provide the same or substantially the same financial service in a comparable jurisdiction. Comparable regulators include:
  - **US:** Securities and Exchange Commission and the US Federal Reserve;
  - **UK:** Financial Conduct Authority;
  - **Singapore:** Monetary Authority of Singapore;
  - **Hong Kong:** Securities and Futures Commission;
  - **Germany:** Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin);
  - **Luxembourg:** Commission de Surveillance du Secteur Financier;
  - **Sweden:** Finansinspektionen;
  - **Denmark:** Finanstilsynct or the Danish Financial Supervisory Authority;
  - **France:** Autorité des marchés financiers of France and the Autorité de contrôle prudentiel et de résolution of France; and
  - **Ontario, Canada:** Ontario Securities Commission.

FFSPs who rely on existing relief will continue to be able to rely on that relief for a transitional period until 31 March 2025.

Distinction Between Retail and Wholesale Investors

Different legislative and regulatory requirements apply depending on whether fund managers deal with investors as wholesale or retail clients. The AFSL financial and compliance requirements applying to fund managers dealing with wholesale clients are less onerous than those applying to retail clients.

Subject to limited exceptions, if interests in a managed investment scheme are offered to retail clients, the managed investment scheme must be registered with ASIC and will be subject to prescriptive requirements under the Corporations Act, including in relation to operation and disclosure.

For retail clients, a product disclosure statement or prospectus must be provided (depending on the form of investment vehicle), whereas for wholesale clients, there is no prescribed disclosure document which must be provided under the Corporations Act.

There is usually no requirement to register a managed investment scheme with ASIC where it is only offered to wholesale clients. However, there are still AFSL considerations that apply when establishing a wholesale fund.

On 8 March 2023 the Treasury announced a review the managed investment scheme regulatory framework which includes a review of whether the current thresholds that determine whether an investor is a retail or wholesale client remain appropriate. We expect that changes to these thresholds or to the categories on which these thresholds are calculated will result from the conclusion of this review to bring this test more in line with other offshore jurisdictions.

Investment Fund Initiatives and Reforms

Corporate Collective Investment Vehicles

The Corporate Collective Investment Vehicle (CCIV) structure was introduced in July 2022. The CCIV regime is modelled on similar international regimes, such as the United Kingdom’s open ended investment company and Singapore’s variable capital company. The CCIV is intended to attract more foreign investment into Australia as it is a more internationally recognised investment vehicle than the trust-based funds structure typically used in Australia.

The CCIV is a conventional company limited by shares with most of the powers, rights, duties, and characteristics of a company. Rather than individual directors, a CCIV must have a corporate director that holds an appropriate AFSL. In addition, a CCIV must have one or more sub-funds and, while each sub-fund is not a separate legal entity, it must have segregated assets and liabilities. In order to maintain regulatory parity, certain features of Australia’s managed investment scheme regime also apply to the CCIV.

The CCIV is designed to be taxed in a similar way to most managed investment schemes.

Asia Region Funds Passport

The Asia Region Funds Passport (ARFP) is a regime to allow eligible funds in one member economy to be “passported”, or marketed and offered, to retail investors across other participating member economies with limited additional regulatory requirements. The ARFP is intended to support the development of an Asia-wide investment management sector through improved market access and regulatory harmonisation. Australia, Japan, New Zealand, and South Korea have signed the Memorandum of Cooperation on the Establishment and Implementation of the ARFP and Australia has implemented the ARFP through legislative amendments.

In order to qualify as an ARFP fund, the fund must satisfy specific requirements in its “home economy” and in the “host economy” into which it is passported.

Fintech

Fintech Regulatory Environment

Similar to the general financial regulatory regime, the specific regulatory requirements for fintech companies depend on the type of financial services they provide:

- **Payments:** In June of 2023, the Federal Government has released a number of consultation papers on the future of payments regulation in Australia. These covered a broad spectrum of issues and will drastically reform the payments industry once implemented. For now, issuers of “non-cash payment facilities” may be required to hold an AFSL (exemptions apply) and in

some circumstances are regulated by APRA under the authorised deposit-taking institution regime. The provision of payment facilities may also trigger application of the Australian anti-money laundering (AML) regime.

- **Open Banking:** The Consumer Data Right (CDR), also known as Open Banking, gives consumers the ability to consent to sharing their banking data with trusted third parties that have been accredited by the ACCC. The CDR Rules are still the subject of significant change, with the Government working to expand the CDR into other sectors and deepen CDR functionality in the future.
- **Lending:** Lenders may need an Australian Credit Licence[8] (where the National Credit Code[9] applies), however there are several kinds of credit activities that fintechs may engage in which are exempt. Even when licensing is not required for particular lending, there may be other regulatory requirements such as consumer protection laws, prohibition of unfair contract terms, design and distribution obligation.

In order to facilitate fintechs and others developing innovative financial products and services, the Australian government has created a “regulatory sandbox”. This allows businesses to test certain innovative financial services over a period of 24 months without first obtaining licenses. Domestic or foreign fintech companies may also be able to rely on a specific regulatory sandbox, which could allow them to test their financial services without the need for licensing. This exemption is subject to a range of caps and restrictions.

Cryptocurrencies, Digital Assets and Blockchain Technology

For most purposes in Australia, cryptocurrencies are treated as assets (like another commodity), rather than as money or a currency. This has a range of flow on implications, including in relation to tax. Furthermore, cryptocurrencies are generally not treated as financial products, however there are a number of exceptions to this. There are also specific rules for the following products:

- **Crypto-exchanges:** Crypto-exchanges are “designated services” for the purpose of Australia’s AML laws, imposing a range of reporting, record-keeping, and other obligations. However, there are no other regulatory licences required if crypto-exchanges exchange “pure” cryptocurrencies (i.e. currencies like bitcoin and ethereum which are not financial products as described below).
- **Tokens that are financial products:** Australia’s financial services regulatory regime operates, for the most part, in a technology-neutral manner. As such, they will be regulated in accordance with their particular features. In particular, it is possible that a crypto-asset may be characterised by ASIC as a security, derivative, interest in a managed investment scheme or a non-cash payment facility. This will depend on an assessment of the features of the asset and rights of the holders.
- **Non-fungible tokens (NFTs):** An NFT may be deemed a financial product depending on the features of the NFT and the rights of token holders. This would mean the NFT issuer would need to hold an AFSL (or qualify for an exemption). The additional consideration for NFTs is

[8] An Australian Credit Licence is a licence given by ASIC that allows people or companies to legally engage in credit activities.

[9] The National Credit Code is contained in the *National Consumer Credit Protection Act 2009* (Cth) and regulates providers of consumer credit. ASIC is responsible for enforcing the Code.

the extent to which they are regarded as a digital currency for anti-money laundering purposes.

In March 2022, the Australia Government launched a major consultation on crypto-asset regulation, which outlines the Governments approach to the introduction of a regulatory and licensing regime for crypto asset secondary service providers. Although it is still at an early stage, this will have profound changes on the industry once implemented.

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Corporate Governance

CORPORATE GOVERNANCE

Overview

Federal legislation enables the Australian federal government and the authority it established, 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 rules however may influence debt or 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 to any tax impact of such changes.

If certain procedures and requirements are met, companies may reduce their share capital. The most common form of a reduction of capital is where a company buy backs its own shares, which are then cancelled. Different shareholder approval processes apply to equal buy backs and selective buy backs, but both require that approval be obtained at a general meeting and that the buyback does not materially prejudice the company's ability to pay its creditors. 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 advance notice of a proposed reduction in capital. In addition, 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. A buy back must be fair and reasonable to the company's shareholders as a whole.

The Board of Directors

For proprietary companies, a minimum of one director is required and at least one director must be resident in Australia. Public companies require at least three directors, two of whom must be resident in Australia. One company secretary resident in Australia is also required (that person can also be a director) for a public company. A proprietary may, but is not required to, appoint a company secretary.

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 public officer. 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.

A person dealing with a company is entitled to assume a document is validly executed by the company if it is signed on behalf of the company by:

- Two directors of the company; or
- A director and a secretary of the company; or
- In the case of a proprietary company that has a sole director, that director, if the director is also the sole company secretary or the company does not have a 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. Further, documents may generally be executed by electronic means. Notwithstanding, execution of a deed or agreement, however, does remain subject to common law requirements as to enforceability and procedural matters related to signing.

New directors (including foreign resident directors) of Australian companies or registered foreign companies must apply for a Director Identification Number before they are appointed (if they do not already hold a Director Identification Number).

A company is required under the Corporations Act to maintain a register of members, a register of officeholders, a register of security interests affecting the company's property, and, if the company has issued any options or debentures, a register of option holders and debenture holders. It is these registers that are 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 are the determinative records under Australian law.

Directors' Duties

Under the Corporations Act and common law, directors must, amongst other things:

- Act honestly;
- Exercise care and diligence;
- Act in good faith in the best interests of the company and for a proper purpose;
- Not improperly use their position or company information;
- Disclose any material personal interest they have in a matter relating to the affairs of a company and avoid conflicts of interest; and
- Prevent the company from trading while insolvent.

The accepted position in Australia is that acting in the best interests of the company means to act in the best interests of the shareholders as a whole and not in the interest of any particular shareholder or group of shareholders.

Where a director is a director of a wholly-owned subsidiary, the director is taken to act in the best interests of the subsidiary if the director acts in the best interests of the holding company, provided the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company.

If directors breach the duty to prevent insolvent trading and cannot take advantage of defences such as safe harbour laws, directors can be pursued for the value of the debts incurred during the period that the company traded whilst insolvent and risk exposure for prosecution for contravening the Corporations Act.

Prevent the Company From Trading While Insolvent

If directors breach the duty to prevent insolvent trading and cannot take advantage of defences such as safe harbour laws, directors can be pursued for the value of the debts incurred during the period that the company traded whilst insolvent, and risk exposure for prosecution for contravening the Corporations Act.

Safe Harbour Laws

The safe harbour provisions may grant directors protection against liability for insolvent trading if after a director suspects the company is or may become insolvent, the director starts to develop "one or more courses of action that are reasonably likely to lead to a better outcome for the company" and if certain other qualifying criteria are satisfied. A "better outcome" is one that is "better than the immediate appointment of an administrator or a liquidator". If a company is facing financial difficulties, the board of directors ought to obtain professional advice as to the company's options, which may include utilising the insolvency processes described in more detail on page 53 of this guide.

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; and
- The resignations and appointments of directors—the constitutions of public companies usually provide that a proportion of the directors (e.g. one-third) must retire by rotation each year and must be re-appointed.

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 and the like, are all required to be notified to, or lodged with, ASIC, usually within 28 days of the event happening. 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 (e.g. details of the current directors, issued shares, 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.

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 >AU$100 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 that are caught by the criteria above, are required to prepare a publicly available annual statement (Modern Slavery Statement). Businesses must report within six months of the end of their full financial year (e.g. 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; and
6. Describe the process of consultation with any entities your business owns or controls.

K&L Gates has an environmental, social, and corporate governance (ESG) taskforce that operates at a global level to monitor trends and developments in the various regulatory environments. Visit https://www.klgates.com/ESG to learn how the ESG taskforce can provide guidance and support:

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.

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Regulation of Markets

REGULATION OF MARKETS

Offering Securities

An offer of securities (including shares, options, and debentures) in Australia is generally required to be made by way of a disclosure document (such as a prospectus) that is filed with ASIC. The disclosure document is required to include certain information that is prescribed by the Corporations Act, in particular, all information that investors and their professional advisers would reasonably require to make an informed assessment of the investment.

There are a number of circumstances where an offer of securities can be made without a disclosure document, including:

- Offers made to "sophisticated investors", including persons with net assets of at least AU$2.5 million or gross income of at least AU$250,000 per annum for 2 years;
- Offers made to "professional investors", including persons who have more than AU$10 million in assets under management;
- Offers with a minimum subscription of AU$500,000;
- Personal offers where no more than 20 people invest during any 12-month period for amounts of no more than AU$2 million (in aggregate);
- Certain offers to employees and directors under an employee incentive scheme; and
- Certain offers to existing security holders, including under a dividend reinvestment plan or bonus share plan.

Offers of units in a registered managed investment scheme are also required to be made by way of a disclosure document (a product disclosure statement) that is filed with ASIC.

Trading in Securities

Trading in securities is regulated in Australia under the Corporations Act.

Acquisitions over 20% in a listed company, listed trust or unlisted company with more than 50 shareholders.

The Corporations Act prohibits any person acquiring an interest of 20% or more in the voting securities of an Australian listed company or trust (or unlisted Australian company with more than 50 shareholders), or increasing an existing interest of 20% or more, other than by one of the specified exceptions. In calculating a person's interest in voting securities, the interests of the person's associates are included.

The major exceptions are acquisitions of securities:

- By way of an off-market takeover bid under which target security holders are offered either cash or scrip consideration;
- By way of a cash only, on-market takeover bid;
- That are approved by the target security holders;

- By way of a scheme of arrangement, which must be approved by the court and target security holders; and
- By a person in any six-month period that does not exceed 3% of the target's securities on issue (known as the "creep" exception).

Insider Trading and Market Misconduct

The Corporations Act prohibits persons trading in securities while in possession of inside information. Engaging in misleading and deceptive conduct in trading securities and market manipulation (and other related practices) is also prohibited.

Listed Companies

The primary securities exchange in Australia is the ASX. Companies listed on the ASX are subject to the ASX Listing Rules and other operating rules. Among other things, these rules regulate:

- Issues and trading of securities;
- Transactions involving related parties;
- Substantial transactions; and
- The disclosure to the market of price sensitive information.

Under the ASX Listing Rules, a listed company or trust has an obligation to immediately tell the ASX on becoming aware of information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities. There are some exceptions to this rule, including where the information concerns an incomplete proposal or negotiation.

Persons who begin to hold an interest in voting securities of a listed company or trust of 5% or more are required to provide a substantial holder notice to the entity and the ASX. Thereafter, a person must notify the entity and the ASX of any movement of 1% or more in their holding or if they cease to have a holding of 5% or more.

Foreign Listings on the ASX

Foreign entities may apply for admission to the ASX. Foreign Entities which are listed on another securities exchange and meet certain eligibility criteria can apply to the ASX to be listed as an "ASX Foreign Exempt Listing". A Foreign Exempt Listing is exempt from complying with the majority of the ASX Listing Rules (including rules relating to the disclosure of price sensitive information) provided it is subject to, and complies with, the listing rules of its home exchange. A Foreign Exempt Listing will still be required to provide ASX with reports and documents on an ongoing basis. The criteria for an entity to be admitted as a Foreign Exempt Listing include:

- Being listed on certain approved overseas exchanges (including the New York, New Zealand, London, Paris, Hong Kong, Tokyo, and Amsterdam stock exchanges);
- Having net tangible assets or a market capitalisation of at least AU$2,000 million or having an operating profit before income tax over each of the last three years of at least AU$200 million per annum; and
- Being registered as a foreign company under the Corporations Act.

Different criteria for admission as a Foreign Exempt Listing apply to entities established in New Zealand, including a lower threshold for the assets and profits test, namely net tangible assets of at least AU$4 million or a market capitalisation of at least AU$15 million or an aggregated profit from continuing operations for the last three full financial years of at least AU$1 million and consolidated profit from continuing operations for 12 months to a date no more than two months before the date the entity applied for admission of more than AU$500,000.

Exchange Control

Currently, few formal exchange control requirements apply in Australia. From time to time, approval from the Reserve Bank of Australia may be required in relation to transactions involving countries subject to international sanctions. Under the *Financial Transactions Reports Act 1988* (Cth) (FTR Act), there are reporting obligations imposed upon cash dealers with respect to certain transactions involving the transfer of currency amounts over AU$10,000. Individuals are also obliged to report transfers of Australian or foreign currency into or out of Australia of amounts greater than AU$10,000 to AUSTRAC and in some cases, a customs officer.

The Government is currently consulting with industry on proposed reforms regarding the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (AML/CTF Act). One of the proposed reforms is the repeal of the FTR Act and the transfer of the reporting obligations on “cash dealers” and solicitors to the AML/CTF Act, such that obligations are consolidated under one single piece of legislation. This proposed repeal and reform is currently the subject of consultation with industry and being managed by the Australian government. Financial Services Regulation

Financial regulation in Australia is split mainly between ASIC and APRA. Other regulators like Australian Transaction Reports and Analysis Centre (AUSTRAC), Australian Financial Complaints Authority, the ACCC, the Reserve Bank of Australia and the Department of Treasury also share certain roles or functions under the Australian financial regulatory regime.

ASIC

ASIC is the financial sector conduct regulator who is generally responsible for the conduct of Australian companies and registered managed investment schemes, authorised financial markets, financial services businesses and people and businesses who engage in consumer credit activities. ASIC has general regulatory power over Australian financial services and credit licencing, training of licensees, financial product disclosure, consumer protection and enforcement within the sector. Generally, the financial services regulatory regime will apply equally to Australian entities and foreign-registered entities targeting Australian clients, unless an exemption applies.

Some entities looking to provide financial services from outside Australia may qualify for mutual recognition arrangements. However, these arrangements are limited in scope and are the subject of potential reforms.

APRA

APRA is the financial system prudential regulator responsible for the licensing and regulatory oversight of financial institutions to protect the interests, in particular, of depositors, insurance policyholders and superannuation fund members. It mainly supervises banks, credit unions, different types of insurance companies and a large part of the superannuation industry.

AUSTRAC and Anti-Money Laundering

AUSTRAC regulates financial businesses against financial criminal abuse and uses financial intelligence to disrupt money laundering, terrorism financing and other serious crimes. It is also a member of national and state taskforces and provides specialist financial intelligence to national security and regulators internationally.

AUSTRAC applies its anti-money laundering and counter-terrorism financing (AML/CTF) supervision by supervising "designated services" as defined under the AML/CTF Act. The provision of a "designated service" includes a wide variety of banking and financial services, such as making a loan in the course of carrying on a loans business, opening bank accounts, operating managed investment schemes and trading in securities and foreign exchange on behalf of another person, gambling services, bullion dealing and digital currency exchange.

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. Their obligations under the current AML/CTF laws mainly include that the entity must:

- Have in place an AML/CTF program which comprises Part A (general) and Part B (specific customer identification procedures) 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 and set out the applicable customer identification procedures for customers of the reporting entity;
- Conduct customer due diligence like Know-Your-Customer checks in accordance with the requirements set out in the AML/CTF regime;
- Report certain types of matters and transactions to AUSTRAC, including threshold transaction reports, suspicious matters reports and international fund transfer instructions reports; and
- Conduct due diligence prior to entering into correspondent banking relationships and conduct ongoing due diligence assessments throughout the period of the relationship.

In April 2023, the Australian government committed to reforming Australia's AML/CTF regime, including by broadening the types of businesses which will be subject to the regime (such as to lawyers, accountants, trust and company service providers, real estate agents and dealers in precious metals and stones).

If implemented, the proposed reforms will extend the AML/CTF regime to a broader range of reporting entities, including providers of professional services and real estate agents and property developers involved in transactions to buy or sell real estate. The proposed reforms are subject to further industry consultation and, if implemented will see, amongst other reforms, changes to the requirements of the AML/CTF program, including risk mitigation and due diligence requirements.

Fintech and the Enhanced Regulatory Sandbox

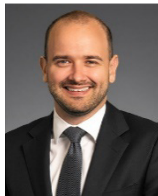
The fintech industry has been experiencing an extraordinary rise in Australia over the last few years and has attracted various financial regulators' responses. Similar to the general financial regulatory regime outlined above, the specific regulatory requirements for fintech companies depend on the type of financial services they provide. For instance, a fintech company must determine whether an Australian financial services licence or an Australian credit licence is required, whether it needs to

apply to be regulated as a bank, and whether it is subject to Australian anti-money laundering laws, among other considerations.

During 2023, the Australian government are consulting on changes to licensing requirements for payments businesses (including a range of intermediaries providing payments services) and cryptocurrency exchanges and custodians).

Fintech companies looking to launch in Australia often look to do so by partnering with an existing regulated entity without the need for licensing in their own name. Domestic or foreign fintech companies may also be able to rely on the "enhanced regulatory sandbox" introduced by the Australian government, which allows the company to test their financial services or credit activity without the need for licensing. The exemption applies for a maximum testing period of up to 24 months and is subject to a range of eligibility criteria, caps, and restrictions. Even if a company is able to rely on the enhanced regulatory sandbox exemption, it will still be required to comply with other applicable laws, such as prohibitions against misleading or deceptive conduct and anti-money laundering and privacy requirements.

Key Contacts



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Consumer Protection

CONSUMER PROTECTION

Overview

The Competition and Consumer Act is the federal legislation that regulates corporations and individuals in their business dealings. The Competition and Consumer Act seeks principally to:

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

The Competition and Consumer Act is administered by the ACCC and is enforced by Australian courts and tribunals. The ACCC's role includes:

- Encouraging compliance by investigating breaches of the Competition and Consumer Act 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 Competition and Consumer Act on the grounds of public benefit under authorisation or notification procedures; and
- Providing guidance on compliance with the Competition and Consumer Act through education programs, publications, and the media to make businesses and consumers aware of their rights and responsibilities under the Competition and Consumer Act.

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 Competition and Consumer Act 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 Competition and Consumer Act. The Competition and Consumer Act 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.

<table>
<tr><td>Price fixing</td><td>
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; and
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.
</td></tr>
<tr><td>Restricting output</td><td>
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;
Capacity, or likely capacity, of any or all of the parties; and
Supply, or likely supply, of goods or services to persons or classes of persons by all or any of the parties.

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<tr><td>Allocating customers</td><td>
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; and
Geographical areas in which goods or services are supplied or acquired by all or any of the parties.

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<tr><td>Bid rigging</td><td>
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;

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	• 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; and • 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: • JVs; • 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; and • 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 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; and • 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 Competition and Consumer Act 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 Competition and Consumer Act 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; and
    - 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 Competition and Consumer Act 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 Competition and Consumer Act 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; and
    - Repair facilities and spare parts are reasonably available for a reasonable period after the goods have been supplied.

- The Competition and Consumer Act 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; and
    - Safety warning notices.

- The Competition and Consumer Act 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 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. From 9 November 2023, financial penalties will apply for the inclusion of, and reliance on, unfair contract terms in standard form contracts with consumers and small businesses.

In 2009, the commonwealth government introduced the *Personal Property Securities Act 2009* (PPS Act) and the online Personal Property Securities 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.

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Insolvency

INSOLVENCY

Insolvency Processes

In light of the COVID-19 pandemic, a simplified debt restructuring process and simplified liquidation process is now available to eligible small businesses. It allows financially distressed small businesses to either appoint a small business restructuring practitioner using a “debtor in possession” model or use a streamlined creditors voluntary liquidation process which reduces or removes obligations involved in a traditional liquidation.

Both reforms have a restricted eligibility criteria and are only available to companies with liabilities of less than AU$1 million, excluding employee entitlements.

The three principal corporate insolvency processes in Australia are:

1. Receivership;
2. Administration (sometimes referred to as voluntary administration); and
3. Liquidation (also referred to as winding up).

Receivership

Receivers are usually appointed under, and governed by, the terms of a security. A receiver can also be appointed by the court.

A receiver takes possession and control of secured property and realises it in order to pay the proceeds to the security holder. The loan agreement or the court may also confer powers to manage the company. A company can continue to trade while in receivership.

Administration

This involves the appointment of an external administrator to take control of a financially troubled company. The purpose of administration is to investigate the business, property, and affairs of an insolvent company (or a company nearing insolvency). Administrators consider possible outcomes for the company that is to:

- Enter a Deed of Company Arrangement (DOCA);
- Liquidate; or
- Return to the control of directors.

During an administration, the company continues to trade. The directors’ and officers’ powers are suspended and there is a moratorium on the enforcement of debts. An administration must adhere to a strict timeline for giving notice, calling meetings of creditors, investigating the financial position of the company, and executing a DOCA.

An administration will progress to a DOCA when creditors resolve to execute a DOCA at the second meeting of creditors.

A DOCA is a binding compromise agreement on the company and its creditors, officers, and shareholders. The DOCA may provide for realising assets, closing down the business or restructuring

the company, as well as the distribution of payments to creditors. Once the tasks are completed and creditors are paid, the company is released from those debts and the DOCA terminates.

Liquidation

Liquidation is the process of winding up a company's affairs. A company is placed into liquidation by a court order, by ASIC, voluntarily by a special resolution of shareholders, or by resolution of the creditors at the second meeting of creditors during administration.

A liquidator controls the company and acts as its agent. The powers of directors and officers are suspended, and the company ceases to carry on its business, except as necessary for the disposal of the company's assets.

The purpose of a liquidation is to realise the company's assets (including recoveries from voidable transactions or insolvent trading claims as outlined below), administer creditors' claims and distribute the realisations to creditors and if there is a surplus, to shareholders. The company's existence will then be brought to an end by deregistration.

Voidable Transactions

Certain transactions entered into before a company is wound up can be unwound by the liquidator of the insolvent company. Directors and others can be liable for claims made in relation to transactions deemed "voidable transactions", as discussed below.

Unfair Preferences

An unfair preference is a transaction between the company and a creditor carried out at a time when the company was insolvent (or the company became insolvent as a result of the transaction) that results in the creditor receiving from the company, in respect of an unsecured debt, more than the creditor would receive on a winding up of the company.

Uncommercial Transaction

An uncommercial transaction is a transaction that a reasonable person in the company's position would not have entered into, having regard to the benefits and detriment to the company of entering into the transaction, the benefits to the other parties to the transaction of entering into it and any relevant matters.

Unreasonable Director-Related Transaction

An unreasonable director-related transaction involves payments (or other dispositions of property) made by a company to a director or a close associate, or someone on their behalf. It applies the same considerations as an uncommercial transaction to determine if the payment is unreasonable.

Unfair Loan

An unfair loan is voidable if the interest charged on the loan, or the charges in relation to the loan, were extortionate when the loan was made or have since become extortionate.

Security Interests Granted in Anticipation of Insolvency

A security interest is a voidable transaction if granted by the company in respect of "circulating assets" in the six-month period leading up to the liquidator's appointment (except, generally, where the

security interest relates to a new advance). Security interests which are taken in the six-month pre-insolvency period may also risk being unenforceable if not perfected (e.g. by on-time registration).

Creditor-Defeating Dispositions

A creditor-defeating disposition is a new category of voidable transaction, which seeks to prevent illegal phoenixing. It applies to a disposition, which was less than either the market value or the best price reasonably available, and has the effect of preventing, or hindering or significantly delaying, property from becoming available for the benefit of creditors in a wind-up.

Risk Mitigation: Protecting Your Position in Event of a Third-Party Insolvency

In the event a third party, such as a contracting supplier, becomes insolvent, enforceable security arrangements will provide the most effective method of protecting rights to payment and goods.

It is important to enter into a security agreement prior to providing finance or goods on credit terms. Register that security interest over supplied goods on the Personal Property Securities Register within the relevant timeframe.

Priority agreements may be required if there are multiple security interests registered over the supplied goods.

Failure to register a security interest over goods supplied on credit terms may lead to loss on insolvency of the counterparty.

The ability to terminate a contract with an insolvent counterparty may be restricted by an ipso facto moratorium, depending on the precise circumstances.

In the event of a counterparty insolvency, it is important to establish the precise nature of the insolvency (e.g. by conducting an ASIC search) before determining the commercial strategy and priorities and considering whether to extend further supplies or credit.

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Intellectual Property Protection

INTELLECTUAL PROPERTY PROTECTION

Overview

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

Patents

Patents in Australia are regulated by the *Patents Act 1990* (Cth) (Patents Act). 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: standard patents and innovation patents. A standard patent lasts for a term of up to 20 years (with extensions available for pharmaceutical patents in certain circumstances).

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; and
- Involves an inventive step.

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 a complete application, 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.

Australian law previously provided for a second-tier patent system known as the innovation patent. The innovation patent has now been phased out, but existing patent holders will not be disadvantaged. In contrast to a standard patent, an innovation patent proceeded to grant without substantive examination and had an eight-year term of protection. Examination and certification of an innovation patent was required to have enforceable rights. While innovation and standard patents were required to meet the same novelty requirement, the "innovative step" inventiveness standard for an innovation patent was lower than for a standard patent.

The Australian government phased out the innovation patent system on 25 August 2021. Innovation patent applications filed on or before this date were afforded their full term. It is possible to seek innovation patent protection, provided pending standard patent rights existed in Australia on or before 25 August 2021.

Copyright

Copyright in Australia is regulated by the *Copyright Act 1968* (Cth) (Copyright Act). Copyright confers no product monopoly, but simply gives the copyright owner exclusive rights to do certain acts in relation to a literary, dramatic, musical, or artistic work, or a sound recording, cinematograph film, broadcast or published edition. The rights granted by copyright depend on the nature of the copyright material, but generally includes the exclusive right to reproduce the copyright material and to communicate it to the public.

In Australia, there is no system of registration of copyright. For copyright to subsist in a work 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. Originality does not require novelty. The fact that another similar work is already in existence is not necessarily a bar to copyright subsisting in both. Copyright subsists in recordings, films, broadcasts, and published editions by virtue of being made or published.

The period for which copyright subsists depends on the type of work. For literary, dramatic, musical, or artistic works, copyright subsists for 70 years after the end of the calendar year in which the author died. For sound recordings and films, copyright subsists for 70 years after the year it was first made or first made public (depending on the circumstances). Copyright in broadcasts subsists for 50 years after the year of the first broadcast. 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.

International treaties such as the Berne Convention, TRIPS Agreement and Convention on Damage Caused by Foreign Aircraft to Third Parties (Rome Convention) facilitate automatic protection of Australian copyright material overseas, whereby other treaty members would extend the same.

Designs

Designs in Australia are regulated under the *Designs Act 2003* (Cth) (Designs Act). 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).

Once filed, an Australian designs application proceeds to registration without substantive examination. However, examination must be requested, and certification achieved in order to obtain enforceable designs rights.

To be valid, a design must be “new and distinctive”. A design will be considered new unless it is identical to a design that forms part of the prior art base. 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 in a document anywhere in the world or disclosed in other design applications with earlier priority dates, more than 12 months prior to the priority date of the subject design. 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 that is 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.

Amendments to the Designs Act came into force at the end of 2021, which provide for a 12-month grace period for publication of a design prior to filing, and a prior use defence for third parties who use a published design during the grace period, among other things. This means it is still possible to obtain protection of a registration design if it was first disclosed within 12 months of the filing date.

Trade Marks

Trade marks in Australia are regulated by the *Trade Marks Act 1995* (Cth) (Trade Marks Act). 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 exclusive right to use and authorise others to 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 to see if they meet the requirements of the Trade Marks Act.

To be registrable as a trade mark in Australia, 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 in relation to similar or closely related goods and services. A further consideration under the Trade Marks Act is the extent to which the trade mark is inherently 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 as a result of being used extensively in Australia for the goods or services for which registration is sought.

Once accepted by IP Australia, the trade mark is advertised for opposition for two months. Any person may oppose registration, but an opposition is generally filed by a person who will be in some way affected by the presence of a trade mark on the register. The Trade Marks Act prescribes several grounds upon which registration of a trade mark may be opposed. Oppositions may be heard by a court or, more commonly, in administrative proceedings before IP Australia. The opposition process before IP Australia is streamlined so that an opposition will succeed if the trade mark applicant does not file a notice of intention to defend the opposition within a prescribed period after it is commenced.

Registration of a trade mark, once achieved, can be maintained indefinitely provided renewal fees are paid every 10 years. However, third parties can apply to revoke or remove a trade mark registration on several grounds, including where the owner of a trade mark has not used, or controlled the use of, the trade mark for the registered goods or services in Australia within a three-year period. An application for removal of a trade mark for non-use can only be made after three years from the date the trade mark achieved registration (if the trade mark was filed after 24 February 2019) or five years from the date of filing the trade mark (if filed before 24 February 2019), unless the owner had no good faith intention to use the trade mark at the time of filing.

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 Competition and Consumer Act.

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 generally be granted the same protection afforded to marks registered in that country.

In order for an Australian resident or company incorporated in Australia to seek protection under the Madrid Protocol, an application must be based on an Australian trade mark registration or application.

As Australia is also a signatory to the Paris Convention, any trade mark application filed in Australia within six months of the first application for the same mark in a convention country will have the same priority date as that first application. Similarly, where a trade mark application is filed in Australia, any application filed in a convention country within six months of the Australian application will have the same priority date as the Australian filing date.

Circuit Layouts

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

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 World 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 .au top level domain is administered by .au Domain Administration Ltd. To register a domain in the .au domain space, the applicant must be an Australian business, partnership, statutory body, association or company, a foreign company with an ARBN, or own a registered or pending trade mark application corresponding exactly with the domain name. It is therefore critical that foreign companies without a ARBN or Australian subsidiary that seek to register a domain name under the .au top level domain also apply for registration of a corresponding trade mark to ensure the validity of the domain registration.

Domain names are granted to registrants meeting these criteria on a first come, first served 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 .au domain names) or the Uniform Dispute Resolution Protocol (in the case of most other top level 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 only 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.

Plant Breeders Rights

Plant Breeder's Rights (PBR) are regulated in Australia under the *Plant Breeder's Rights Act 1994* (Cth) and provide the rights holder exclusive marketing rights to a registered plant variety for a period of 20 years (or 25 years in the case of tree or vine species). Specifically, the rights holder has the exclusive right to do any of the following relating to propagating material of their variety:

- Produce or reproduce the material;
- Condition the material for the purpose of propagation (e.g. seed treatment);
- Offer for sale or sell the material;
- Import or export the material; and
- Stock the material for any of the above purposes.

In some instances, the rights may extend to material harvested from the variety (e.g. its fruit or flowers), and products of the material (e.g. wine or olive oil).

To obtain PBR in Australia, a plant variety must be:

- New;
- Distinct;
- Uniform; and
- Stable.

If an application fails to comply with any of these criteria, protection will not be granted.

A plant variety is "new" if plant material has not been exploited (e.g. sold, disposed of, or used commercially) within Australia with the breeder's consent more than one year before the date on which the application was lodged. It is also possible for the novelty of a variety to be lost if there has been a sale or disposal outside of Australia more than six years before the application date in the case of trees and vines, or, in other cases, not more than four years before the lodgement date.

A plant variety is "distinct" if it is clearly distinguishable by one or more characteristics, which can be clearly described, from any other variety whose existence is a matter of common knowledge at the time of application.

A plant variety is “uniform” if it is sufficiently consistent in those characteristics that make it distinct. This means that nearly all individual plants among a population of the variety must bear the characteristics that make the variety distinct.

Lastly, a plant variety is “stable” if it remains true to description after repeated propagation or reproduction.

A PBR application is lodged in two parts (Part 1 and Part 2). The initial application provides details of the applicant, origin of the variety and a *prima facie* case for eligibility. If the variety is already commercialised in Australia, then time limits apply (as noted above). The application is examined by the PBR office and objections may be raised and dealt with accordingly. On acceptance of the Part 1 application, the variety is provisionally protected in Australia.

Part 2 application provides information in support of the claims made in Part 1 and provides a detailed description of the variety. Details of differences from other similar varieties are also included. An accredited qualified person generally completes the Part 2 application and plans and supervises any comparative or verification trial of the variety that is necessary.

K&L Gates provides services in relation to both parts of the application process.

Click on the link provided for the K&L Gates IP Law Watch blog: www.iplawwatch.com.

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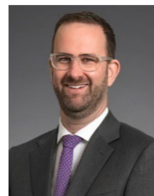

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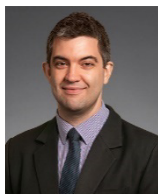

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Privacy

PRIVACY

The *Privacy Act 1988* (Cth) (Privacy Act) regulates how Australian government agencies and organisations with an annual turnover of more than AU$3 million, handle personal information. Some small businesses, with a turnover of less than AU$3 million that deal with certain types of information or engage with personal information in a particular way, may still be subject to the Privacy Act and the Australian Privacy Principles (APPs).

The Privacy Act includes 13 APPs which apply to some private sector organisations as well as most Australian government agencies. The Privacy Act also regulates the privacy component of the consumer credit reporting system, tax file numbers and health and medical research. Personal information is any information, or an opinion, about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not and whether the information or opinion is recorded in material form or not. What is personal information will vary, depending on whether a person can be identified or is reasonably identifiable in the circumstances. The APPs extend to an act done, or practice engaged in, outside Australia and the external Territories by an organisation, or small business operator, that has an Australian link.[10]

An organisation has an Australian link if it "carries on business in Australia". Recently, the *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Enforcement Measures Act*)* came into force on 13 December 2022 and repealed s 5B(3)(c) of the Privacy Act (the second requirement below) that was used to establish whether an organisation had an "Australian link". Previously, the overseas business would need to:

- Carry on business in Australia or an external territory; and
- Collect or hold personal information in Australia or an external territory.

The effect of this is that even if entities do not collect or hold Australian personal information directly from an Australian source, they are now subject to the Privacy Act if they carry on business in Australia. An example is the collection of personal information from an individual who is physically located in Australia or an external Territory, via a website that is hosted outside Australia. This applies even if the website is owned by a company that is located outside of Australia or that is not incorporated in Australia.[11]

Overall, this concept is broad but still depends on the particular circumstances of the organisation's operations.

The Privacy Act also includes a mandatory data breach notification and reporting regime in respect of data breaches which are likely to result in serious harm. The Enforcement Measures Act strengthened the Notifiable Data Breaches Scheme to ensure the Information Commissioner has comprehensive knowledge of the information compromised in an eligible data breach to assess the particular risk of harm to individuals. Organisations should prepare data breach response plans to address the requirements and ensure they are well prepared for responding to data breaches when they occur, which also helps mitigate the risks of business interruption, loss, and reputational damage arising from a data breach.

[10] APP Guidelines, paragraph [B.10]

[11] APP Guidelines, Paragraph [B.25]

In addition to the changes noted above to the data breach scheme, the Enforcement Measures Act most notably increased maximum penalties for serious or repeated privacy breaches as below:

	Previous Penalty	Amended (and Current) Penalty
Maximum civil penalty for organisations	AU$2.2 million	The greater of: • AU$50 million; • Three times the value of benefits obtained or attributable to the breach (if quantifiable); or • 30% of the corporation's "adjusted turnover" during the "breach turnover period" (if the court cannot determine the value of benefit obtained).
Maximum civil penalty for non-corporate entity	AU$444,000	AU$2.5 million

These recent changes bring the penalties more in line with those under the Australian Consumer Law regime and are intended to act as a deterrent so that privacy breaches are not seen as "the cost of doing business".

Further reform is also on the horizon in 2023, with the Attorney General's Department releasing its long-anticipated Privacy Act Review Report on 16 February 2023, indicating more significant regulatory changes are expected to follow in the near term.

When an organisation doesn't clearly meet the Privacy Act thresholds (e.g. does not turnover AU$3 million annually) but deals with a significant amount of personal information in the ordinary course of their business activities or may carry on business in Australia, determining whether the Privacy Act and the APPs applies to it can be a complex exercise to ensure that all elements have been considered and addressed. If you are unsure whether the Privacy Act or the APPs are applicable to your organisation, we encourage you to get in touch.

Click on the link provide for the K&L Gates' Cyber Law Watch blog: https://www.cyberlawwatch.com.

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Workplace Regulation

WORKPLACE REGULATION

Industrial Relations

The *Fair Work Act 2009* (Cth) (Fair Work Act) 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 and carer's leave, parental leave, compassionate leave, paid family and domestic violence 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 or 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 enables 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 under the Fair Work Act.

An employer may exclude or vary its award obligations by entering into an enterprise agreement with its employees. The parties must (amongst other things) comply with specific good faith bargaining obligations when negotiating an agreement. The enterprise agreement must be approved by a majority of employees who are subject to the agreement who cast a valid vote. Following employee approval, the agreement must be submitted to the Fair Work Commission. In order to approve the enterprise agreement, the Fair Work Commission must be satisfied, amongst other things, that the employees to be covered by the enterprise agreement will be "better off overall" under the agreement than they would be under any applicable modern award.

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 similar business activities under the same franchise or who have clearly identifiable common interests, may seek, or may be required by the Fair Work Commission, to bargain for 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 reinstatement is inappropriate, 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 all jurisdictions except Victoria) 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). Breaches of these obligations are generally criminal offences. 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.

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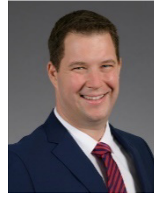

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Immigration

IMMIGRATION

Overview

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:

1. Short-term visitor visas 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 applicants from 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.
2. 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).
3. Medium to long-term stay visa which are 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 (or five years in regional Australia) 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. The subclass 482 (Temporary Skilled Shortage) is most common of these categories of visas.

Permanent Migration

The Skilled Migration Program is intended to attract migrants with entrepreneurial or specific skills and may be divided broadly into the Employer Nomination Scheme; Skilled Independent/State or Territory Nominated; and Distinguished Talent and Global Talent categories.

Employer Nomination Scheme Visa

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;
- The position is for at least two years (evidenced by a contract); and
- 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 their Australian sponsoring employer while holding a Temporary Skilled Shortage visa for at least two years (unless a transitional arrangement applies); and
- Be under 45 and demonstrate English language proficiency, unless otherwise exempt.

This visa type has two streams: Direct Entry and Temporary Residence Transition.

Skilled Independent/State or Territory Nominated Visas

Skilled Independent visas are for points-tested skilled workers who are not sponsored by an employer or family member. Another type of visas exists for situations when a state or territory government nominates the visa applicant. Such visas are designed for applicants who are well qualified, with matching skills, high English language ability and work 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 and Global Talent Visa

The Distinguished Talent visa is designed for applicants with unique and beneficial talents and experience (e.g. 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.

The Global Talent Scheme visas intend to attract high-calibre individuals with recognised achievements/reputation in a few select "target industries". Applicant must demonstrate their ability to attract a high salary and be nominated by an Australian organisation or individual with notable reputation in their field.

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).

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Real Estate

REAL ESTATE

Acquiring Land

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 most cases, ownership takes the form of outright “freehold” title. In certain jurisdictions or particular scenarios, the government retains “ownership” and a long-term lease over the land is granted.

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 “as is where is”—in the state and condition at the time of contract, subject to various disclosure requirements, warranties and termination rights contained in state and territory legislation. The form of sale contract, including various state or territory standard forms, may prescribe limited warranties however these are typically confined to matters affecting title.

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 or subdivided property; and
- Whether there are any implied warranties, particularly building 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):

- Considering whether FIRB approval is required (see Foreign Investment);
- Undertaking a physical inspection of the property;
- Obtaining and reviewing title searches to verify the information provided by the vendor;
- Reviewing the terms of any mortgages, 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; and

- Ordering searches of the contamination registers maintained in each justification and obtaining a contamination report from an environmental consultant if there is a risk that material contamination may be present.

Buying Off-the-Plan

Buying “off-the-plan” occurs where a property is purchased before land has been subdivided or consolidated or, where a particular building has been constructed on the property. In the case of a proposed development, prospective purchasers can generally view architectural plans and models or visit display suites in order to see what they will be purchasing.

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;
- Application of statutory protections under state and territory legislation; and
- Wording of variation, withdrawal, and sunset clauses.

There are particular protections under state and territory legislation which apply to the purchase of property “off-the-plan”. These include requirements that apply to deposit payments, additional disclosure arrangements and protections that apply to termination of a contract pursuant to “sunset dates” for construction or subdivision. Properties bought off-the-plan are often part of larger strata complexes or subdivided estates and may include common parts or structures under the management and control of an “owners corporation” (Victoria and New South Wales), “body corporate and community management statement” (Queensland) or “strata company” (Western Australia).

Strata Title

Where a property is a unit in a building or townhouse or villa, or perhaps a lot in a subdivided estate, 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 owner’s corporation or 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 or strata companies or body corporates operate to provide a democratic process by which to govern this common property. Managers are often appointed to deal with maintenance, letting and other services. These arrangements typically 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 or strata company body corporate.

In some cases, developers will seek to retain ongoing rights associated with the management or provision of services to common property. In some cases, the ability of a developer (or a related person) to retain such rights is regulated by state and territory legislation.

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 and is negotiated between the solicitors or conveyancers for the vendor and the purchaser. The contract is formed when it is signed and dated by both parties, often referred to as “exchange”. “Conveyancing” refers to the process of transferring ownership of a property from the vendor to the purchaser. Electronic conveyancing, using online settlement platforms, has been widely adopted in Australia and is now mandatory in Victoria, New South Wales, South Australia, and Western Australia (with other jurisdictions to follow). Electronic conveyancing removes the requirement to attend a physical settlement, reduces risks of identity fraud and allows for transfers and other dealings to be lodged (and potentially registered) on the day of settlement.

eConveyancing

Electronic conveyancing (E-Conveyancing) is a new, efficient, and secure way of conducting the settlement and lodgement process for conveyancing transactions. E-Conveyancing is carried out by a platform provided by Property Exchange Australia Limited (PEXA) and replaces many of the paper processes that were typically involved in conveyancing transactions. E-Conveyancing allows lawyers, conveyancers, and financiers to virtually interact with each other when attending to a transaction. The representatives of each party (and their financiers) will participate in an electronic workspace on PEXA, where:

- Instruments that need to be registered are prepared and electronically signed (e.g. a transfer, lease, discharge of mortgage, release of mortgage);
- Duty is paid as a settlement disbursement;
- The balance of the purchase monies is inserted into the PEXA workspace and agreed between the parties;
- At the agreed settlement date and time (and provided the documents are in order for registration) the balance of purchase monies will be paid, and proceeds of settlement will be disbursed; and
- The relevant registry instruments are electronically lodged for registration (which usually follows on the same day, provided the relevant land titles office for the state or territory in which the transaction is occurring does not find any issues with the registrability of the instrument).

PEXA (and therefore E-Conveyancing) is currently available in all states and territories except Tasmania and Northern Territory.

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;

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

A 30–90-day settlement period is most common, although it is ultimately a matter for agreement between the vendor and the purchaser. Substantially longer settlements are not uncommon, particularly for significant built form assets, commercial and industrial properties and “off the plan” purchases.

A statement of adjustments or settlement statement is prepared at the final stage of settlement, detailing the purchase price, the deposit paid and the pro-rata adjustment of rates such as council, water and owners corporation or strata fees.

Typically, the purchaser will also be liable to pay stamp duty on the purchase price of the property (see Taxation System section).

Leases and Licences to Occupy Land

Leases

Many 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;
- Greater flexibility to exit the premises after a set period of time, without having money tied up in the premises; and
- 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 referred to as a “lessor” or “landlord”) for the occupant (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 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.
- It is typically the landlord’s responsibility to register a Lease (where registration is required), however this will ultimately depend on the terms of the lease agreed to between the parties. Registration requirements vary between jurisdictions, often based on the duration of the lease.

- A tenant is usually able to transfer its interest in the 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 within a prescribed class of retail premises (which can included certain commercial uses) a tenant will have various rights, which arise under retail leases and commercial tenancies legislation. Such legislation typically imposes pre-lease disclosure requirements on landlords and also provides certain protections, including minimum term requirements. While retail and commercial tenancies legislation have mandatory application, there are various exclusions in all jurisdictions (including, typically, based on premises area, lease occupancy costs and where the tenant is a subsidiary of a listed corporation).

Licences

Occupancy rights can also be granted under a licence, which is a contractual arrangement, rather than an interest in land.

Unlike leases, licences do not grant exclusive possession of the land.

Licences are often used in multi-tenant office or retail tenancies for ancillary areas, such as car parking, storage, or seating areas, particularly where the tenant will not have exclusive use of the area.

Australia’s First Nations

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) as well as state and territory 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
- 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, such as mining tenements or pastoral leases) 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. This may require project proponents to negotiate or consult with native title holders or claimants, or to comply with any existing native title agreements. 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 or activities where native title rights may exist.

Indigenous Cultural Heritage

Separate from native title, Australian states and territories have also enacted laws which recognise and protect Australia's Aboriginal and Torres Strait Islander cultural heritage. Cultural heritage legislation generally protects places and objects of significance to Aboriginal and Torres Strait Islander peoples. Places and objects of cultural heritage may continue to exist on land and in waters where native title has been extinguished.

Most states and territories maintain registers of indigenous cultural heritage sites. It is important to note that the registers are not a comprehensive record of all cultural heritage places or objects that are protected under the applicable state and territory laws. Where there is potential for an activity (such as land development) to adversely impact on indigenous cultural heritage, it is prudent for project proponents to liaise with the relevant state or territory government agency responsible for protecting cultural heritage.

It may be necessary for proponents to carry out a cultural heritage assessment, including site surveys, to determine whether there are any cultural heritage sites or objects present before any ground is disturbed. A plan may also be required for the management of cultural heritage during the construction or operation of a project.

Under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the commonwealth government also has the ability to protect indigenous cultural heritage that is under threat, where state or territory laws have failed to protect it, by making declarations to protect traditional areas and objects of significance to Aboriginal and Torres Strait Islander peoples from threats of injury or desecration.

Planning and Development

State and Local Government Regulation of Development

Australian laws often require planning or environmental approvals to authorise most new developments and uses of land, expansions to existing land uses or development, or changes to existing land use activities. While each state and territory have its own land-use planning and environmental laws (with planning controls generally managed by local governments), 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 planning approvals;
  - Permissible with planning approval; or
  - 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), to erect any substantive structure, such as a building, on land or undertake earthworks. This is particularly the case when a development or land use is inconsistent with the zoning in which the land is

located. 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, or to undertake the development in accordance with the planning approval which has been given, is an offence.

- **Environmental approvals:** A range of additional environmental related approvals may also be required for specific types of development and uses including:
  - 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;
  - Approvals to undertake work within proximity to waterways;
  - Approvals to clear native vegetation; and
  - 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 before the commencement of the development or land use, or are not being complied with, there is a risk that:
  - The relevant government authority may fine or prosecute the owner or occupier of the land for an offence, or undertake other enforcement action (which varies in each jurisdiction);
  - The relevant government authority may issue an order requiring the occupier to stop using the land without all required approvals; or
  - In some jurisdictions, a third party may commence proceedings to restrain any breach of environmental or planning legislation.

Building approvals are also required for all new buildings or structures, or any modification to existing buildings or structures. A building approval is separate to any planning or environmental approval which may be required. It is typically obtained subsequent to the planning approval being granted. A change of building classification may be required if different land use activities are intended to be undertaken within the building. A building final or certificate of occupation will be required upon completion of the construction before the building can be lawfully occupied.

Federal Regulation of Development

The most significant federal legislation regulating development is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). If a project has the potential to have a significant impact on a "matter of national environmental significance" (MNES), it must be referred to the Commonwealth Minister for the EPBC Act.

MNES include the following:

- World Heritage properties;
- National Heritage places;
- Wetlands of international importance (e.g. Ramsar sites);
- Listed threatened species and ecological communities;
- Listed migratory species;

- Commonwealth marine environments;
- Great Barrier Reef Marine Park;
- Nuclear actions, including uranium mining; and
- Water resources, in relation to coal seam gas and large coal mining development.

If the Minister determines that a project has, will have or is likely to have a significant impact on a MNES, it is deemed to be a “controlled action”. A project involving a controlled action must be referred to the minister for assessment. Once the proposal has been assessed, the minister decides whether to approve or refuse it. This involves assessment of the potential impacts of the action against relevant provisions of the EPBC Act and international legal obligations. There are significant penalties, including fines and imprisonment, for taking a controlled action without approval.

Pollution Control and Contamination

Each Australian state and territory have enacted laws regulating pollution and contamination. Generally speaking, these laws deal with the following:

- **Environmental licences:** Require that environment licences be obtained and complied with for any development which has the potential to cause environmental damage, large-scale industrial activities (including mining) or to authorise discharges to water.
- **Environmental offences:** Make it an offence to pollute or contaminate air, water or land unless authorised by an environmental licence or controlled as required by environmental regulation. In each jurisdiction:
    - Primary legal responsibility for a pollution incident rests with the person in occupation of the premises from which the pollution emanates, or the person who holds the environmental licence for the premises; and
    - Directors and persons concerned in the management of a company can be personally liable for environmental offences committed by the company unless they can establish an available defence (for example, that they used all due diligence to prevent the offence by the company).
- **Obligations to notify regulators of pollution incidents and contamination:** Each Australian jurisdiction imposes an obligation on persons (including companies) to notify environmental regulators if they cause:
    - Contamination of land or groundwater or become aware that land they own is materially contaminated; or
    - A material pollution incident.
- **Powers to require clean-up:** Environmental regulators have broad powers to require persons responsible for pollution incidents or contamination to take clean up action. Liability for clean-up is generally directed to the person responsible for the pollution incident or contamination. However, if that person cannot be found or lacks capacity to clean up, land owners may become liable.
- **Contamination registers:** Environmental regulators in each jurisdiction maintain a register of contaminated land. These registers can be searched. However, the registers do not record all land, which is potentially impacted by contamination.

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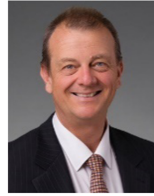

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Taxation System

TAXATION SYSTEM

Overview

Tax is imposed in Australia at both a federal and state (or territory) level. The 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.

The following summary highlights key tax law concepts you should consider prior to investing or doing business in Australia.

Income Tax

The federal government has jurisdiction to tax the worldwide income of entities that are Australian tax residents and the Australian sourced income of non-residents. Before investing or doing business in Australia, to determine your future tax liabilities, it is important to consider:

- Whether you are a resident of Australia for tax purposes; and
- If you are a non-resident, whether your income will be sourced in Australia.

Residency

Australian tax legislation contains residency tests to determine whether an entity is a resident for tax purposes. Those tests are summarised in the following table:

<table>
<tr><th>Entity</th><th>Residence Test</th></tr>
<tr><td>Individual</td><td>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 of Taxation 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 of Taxation is satisfied that his or her permanent place of abode is outside Australia.</td></tr>
<tr><td>Company</td><td>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
Its voting power is controlled by Australian resident shareholders.</td></tr>
</table>

Entity	Residence Test
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 capital gains tax (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:
	  • The central management and control of the trust is in Australia; or
	  • One or more Australian residents hold more than 50% of the income or property of the trust.

Source

Determining whether income is “sourced” in Australia is a question of fact, guided by common law principles and any applicable double taxation agreement (DTA). A non-resident may have Australian sourced income if the location of the business’s trading activities and where contracts are formed and concluded are in Australia.

Process of Taxation

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.

Rather than impose a separate tax on capital gains, Australia’s CGT legislation is incorporated in the income tax legislation and net capital gains are included in a taxpayer’s assessable income.

Income Tax Rates – 1 July 2023 to 30 June 2024

Individual Residents	
Taxable Income	**Tax payable**
AU$0 – AU$18,200	Nil
AU$18,201 – AU$45,000	19 cents for each AU$1 over AU$18,200
AU$45,001 – AU$120,000	AU$5,092 plus 32.5 cents for each AU$1 over AU$45,000
AU$120,001 – AU$180,000	AU$29,467 plus 37 cents for each AU$1 over AU$120,000
AU$180,001 and over	AU$51,667 plus 45 cents for each AU$1 over AU$180,000

Individual Non-Residents	
Taxable Income	**Tax payable**
AU$0 – AU$120,000	32.5 cents for each AU$1
AU$120,001 – AU$180,000	AU$39,000 plus 37 cents for each AU$1 over AU$120,000
AU$180,001 and over	AU$61,200 plus 45 cents for each AU$1 over AU$180,000

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 25% rate can apply to some companies with an annual turnover of less than AU$50 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

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, subject to the applicable DTA. Taxable Australian property includes:

- Direct interests in Australian real property;
- Indirect interests in Australian real property;

- An asset used in carrying on a business in Australia at or through a permanent establishment; and
- Options or right 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. Capital losses 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.

In certain circumstances, subject to satisfying the eligibility requirements, Australian resident individuals and trusts may reduce their capital gains by 50% and complying superannuation funds may reduce their capital gains by 33%. The CGT regime also provides several “rollover” provisions which enable CGT to be deferred or, alternatively, disregarded. For example, where shares or units in one company or unit trust are exchanged for shares or units in another company or unit trust, rollover relief may be available.

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 Grouping

Australia’s tax grouping regime is known as “consolidation”. Consolidation is common in large and complex corporate structures. Wholly owned groups of companies may elect to form a tax consolidation group or multiple entry consolidated group. This means that the group is treated as a single entity for income tax purposes, (i.e. a single income tax return is required to be lodged by the head entity of the tax consolidated group). Consolidation is optional but irrevocable.

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 that receive franked dividends are not subject to dividend withholding tax (discussed below).

Withholding Tax

Unfranked dividends, interest and royalties paid by Australian residents 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%; and
- Royalties – 30%.

Note that lower rates are usually prescribed in applicable DTAs, and certain domestic exemptions may also apply (for example, certain Australian resident companies that satisfy the “public offer test” at the time of issuing debentures and syndicated loan facilities are exempt from interest 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. The similar business test, however, only applies to losses incurred in an income year beginning on or after 1 July 2015.

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 expenses and borrowing costs 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. There are a number of different debt limits for calculating the maximum debt allowed, including the "safe harbour" limit, the '"arm's length" limit and the "worldwide gearing" limit, but these debt limits vary depending on the kind of entity. The rules apply to both foreign controlled Australian corporates and to Australian corporates with offshore operations. Specifically, companies and trusts subject to the thin capitalisation regime must complete an "International Dealings Schedule" as part of their income tax return.

Transfer Pricing

Australia's transfer pricing rules are broadly in accordance with the Organisation for Economic Co-operation and Development (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 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. Certain taxpayers may qualify for the simplified record keeping options.

Double Tax Treaties

Australia is a party to over 40 bilateral income tax treaties (or DTA) which aim to reduce or eliminate double taxation caused by overlapping tax jurisdictions. These DTAs, therefore, set out to regulate the taxing rights between the countries involved over different categories of income and provide rules to resolve dual claims in relation to the residency status of taxpayers or the source of income. Most of the treaties follow the OECD model agreement and provide for reduced rates of withholding tax or tax relief from double taxation by allowing a taxpayer to either apply for foreign tax credits or specific exemptions (where relevant). 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 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; and
- 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.

Like income tax consolidated groups, a GST group may also be formed by two or more associated business entities so that they may operate as a single business for GST purposes. To this effect, the representative member of the group completes activity statements and accounts for GST on behalf of the whole group.

Australian Business Number

The Australian Business Number (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

Fringe Benefits Tax (FBT) is imposed at 47% on the grossed-up value of benefits provided to employees in respect of their 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 taxes include transfer duty, payroll tax and land tax.

Transfer Duty

Transfer 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. Transfer duty is usually payable by the purchaser or transferee. The transfer duty rates vary between each state and territory. Transfer 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.

Transfer 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.

Landholder duty

Landholder duty is a separate head of duty which may apply to acquisitions of significant interests in companies and unit trusts that hold land in a particular state or territory. All states and territories impose landholder duty, but the rules do vary widely.

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 that state or territory. Certain payments to contractors may also be deemed to be wages. Payroll tax 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.

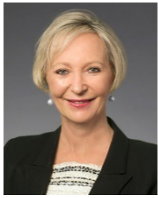
Superannuation Guarantee

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 (this rate will increase to 10% for eligible employees from 1 July 2021). 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.

Key Contacts



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International Trade and Sanctions

INTERNATIONAL TRADE AND SANCTIONS

Australia imposes sanctions through its own independent sanctions programs (known as "autonomous" sanctions) and by implementing sanctions imposed by the UN Security Council into Australian law as a UN Member Nation. *The Autonomous Sanctions Act 2011* (Cth) and the *Charter of the United Nations Act 1945* (Cth) are the main laws which implement these sanctions.

The autonomous sanctions regime essentially creates two types of sanctions measures:

1. Those prohibiting certain commercial dealings with individuals and entities in particular regions, which includes:
   - Import and export bans;
   - Provision of certain professional services; and
   - Bans on specific commercial activity.
2. Those declaring particular persons for targeted financial sanctions, which include:
   - Asset freezing; and
   - Travel bans.

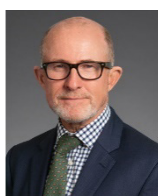
Generally, the Australian government will "designate" particular entities or individuals with whom businesses are prohibited from undertaking commercial activity. Businesses involved in providing professional services to sanctioned regions should be cognisant of Autonomous Sanctions Laws. This can include (among other things) the provision of financial services and financial assistance.

Businesses that wish to establish a presence in Australia should be aware that Australia's autonomous sanctions regime can apply extra-territorially to foreign companies registered in Australia. Similarly, Australian sanctions can also apply to any offending activity of Australian citizens overseas.

Similarly, sanctions based on those imposed by the UN Security Council programs can restrict businesses from dealing with particular persons, countries or regions or impose asset freezes and travel bans.

The Department of Foreign Affairs and Trade maintains a public list of applicable sanctions programs, as well as a "Consolidated List" of persons which are subject to autonomous or UN sanctions. Details are available at https://www.dfat.gov.au/international-relations/security/sanctions/about-sanctions.

Key Contacts



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Industry Sectors

INDUSTRY SECTORS

Energy and Resources

Regulatory Framework

Australia's mining and petroleum industries are regulated at the commonwealth, state, and territory levels. Generally, minerals are owned by the Crown, (i.e. the commonwealth and state and territory governments), which authorise companies and individuals to undertake specific mining activities in designated areas in accordance with regulations.

The regulations cover the life cycle of resources projects from exploration, retention, development, operations, and sales.

A range of licences and permits cover each aspect of this life cycle including:

- Exploration tenements authorising exploration activities;
- Retention tenements reserving title pending development; and
- Production tenements authorising production of resources and related operations.

Tenements may be applied for and granted in respect of certain minerals, a class of minerals or for minerals generally. Typically, transfers of tenements require relevant ministerial consent to ensure tenement holders have the financial and operational credibility to develop Australia's resources.

Beyond specific tenements, regulations extend to Planning and Development (page 82), Native Title (page 81), Taxation System (page 86), Industrial Relations (page 68), and Corporate Governance (page 34) of industry participants.

Australia's electricity and gas industries are similarly regulated. The Australian Energy Market Agreement sets out the legislative and regulatory framework for Australia's energy markets. It provides for national legislation that is implemented in each participating state and territory. South Australia is the lead legislator and other jurisdictions introduced application legislation to give effect to the South Australian legislation.

Mining Sector

Mining rights may be applied for on a first-come, first-served basis or via a formal tender process (where applicants submit detailed work program bids or cash bids) depending upon the jurisdiction and mineral class involved.

Rights of access to land to undertake mining activities may be obtained via legislation or contracts with private landowners.

Mining tenements are generally granted on conditions including minimum works and expenditures, payment of royalties, compliance with employment and environmental laws and rehabilitation requirements.

Industry Specific Codes

The industry specific code for mining is the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (JORC Code) that sets minimum standards for public reporting by way of annual reports, information memoranda and other disclosure documents.

The JORC Code applies to all public reporting companies and has been embedded within the ASX Listing Rules so that all ASX-listed companies must comply with the JORC Code when reporting their exploration results, mineral resources, and ore reserves.

Although the JORC Code applies to the reporting of mineral resources and ore reserves by all public companies, the ASX Listing Rules also expressly require any report by an ASX-listed company on its exploration results, mineral resources, or mineral reserves to comply with the JORC Code.

Petroleum Sector

Like the mining sector, the petroleum sector is regulated by the Crown. State and territory governments allocate and administer petroleum titles on land and up to three nautical miles from the shoreline, and the commonwealth regulates offshore petroleum activities beyond that point under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth).

Such titles include exploration, retention and production tenements but also include infrastructure and pipeline licenses to govern the construction and management of those critical assets. In areas not covered by titles, companies may apply to the Titles Administrator for a Special Prospecting Authority to undertake survey work.

Access to natural gas transmission facilities is governed by the National Gas Law (NGL).[12] For further information on the NGL and the wholesale and retail gas markets see Wholesale and Retail Markets sub-section of this Energy and Resources sub-chapter which sets the rules for the trading of the commodity in the market, establishes an independent market operator and sets the access arrangements for pipelines.

Power Sector

Similarly, access to electricity transmission facilities is governed by the National Electricity Law (NEL).[13] For further information on the NEL and the wholesale and retail electricity markets, see the Wholesale and Retail Markets sub-section of this Energy and Resources sub-chapter.

Australia's generation mix has, historically, been primarily coal-based together with gas-fired generation for peak periods. In recent years, with the increased uptake of renewable generation, Australia's power sector has been through and continues to go through unprecedented change. Energy security, reliability and affordability remain key priorities and shape the core regulatory reforms. Australia's policy on reducing carbon emissions also continues to oscillate, and balancing this with the core priorities means regulatory frameworks in the power sector remain unsettled and continue to evolve.

Clean Energy and Renewables Focus

Much of the early growth in the Australian renewable energy industry was facilitated by the Australian federal government's 2020 Renewable Energy Target (RET) scheme. The RET scheme was designed to reduce greenhouse gas emissions and boost the generation of electricity from

[12] National Gas Law (NGL). The NGL is contained in the Schedule to the *National Gas (South Australia) Act 2008*. It establishes the governance framework and key obligations relating to the access to gas pipelines, including AEMO's role and functions; it also establishes a gas market bulletin board.

[13] National Electricity Law (NEL). The NEL is set out in a schedule to the *National Electricity (South Australia) Act 1996* (SA) by South Australia and adopted by each of the other participating jurisdictions through mirroring legislation (with some modifications from jurisdiction to jurisdiction). The NEL codifies the obligations of participants in the NEM, establishes the AEMO and sets out the processes for the implementation, adoption, and amendment of the National Electricity Rules. The NEL is supported by regulations adopted in each of the participating jurisdictions.

sustainable and renewable sources. The Australian renewable energy industry accounted for 35.9% of Australia's total electricity generation in 2022, up from 32.5% in 2021.[14]

Under the RET, 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 as part of the mandatory RET requirements. Outside of the mandatory RET requirements, Australia has an active market for certificate trading as these certificates are increasingly used as offsets for businesses to achieve sustainability targets on a voluntary basis.

The target of generating 33,000 gigawatt hours of renewable energy under the RET scheme was met in 2020, a year ahead of schedule. While there are no current indications of extending the RET scheme, growth in renewable energy projects continues. Further, states and territories have also introduced their own schemes to incentivise the development and implementation of renewable energy projects and broader energy efficiency measures (Queensland, Victoria, South Australia, New South Wales, and the Australian Capital Territory), some of which are tradeable credit schemes.

Capacity Investment Scheme

On 23 November 2023, the Australian government announced an expansion of the Capacity Investment Scheme (CIS) to target a total of 32 GW of new capacity nationally. The CIS provides a national framework to encourage new investment in renewable capacity (such as wind and solar), as well as clean dispatchable capacity, such as battery storage.

The CIS is proposed to be made up of:

- 23 GW of renewable capacity; and
- 9 GW of clean dispatchable capacity.

The expanded CIS is anticipated to be implemented from 2024 to 2027. There will be regular competitive tenders held approximately every six months, starting in April or May 2024.

Projects selected through competitive tenders will be offered long-term Australian government underwriting agreements for an agreed revenue "floor" and "ceiling".

This means that if:

- A project's earnings exceed the net revenue ceiling, the owner will pay the Australian government an agreed percentage of revenue above the revenue ceiling; and
- A project earns below the revenue floor, the Australian government will cover a portion of the difference between the revenue floor and zero revenue.

The Australian government will seek further consultation on the CIS expansion in February 2024.

ACCUs

There is also an emissions reduction fund under which the government will purchase lowest cost of abatement in the form of Australian Carbon Credit Units (ACCUs) to encourage the proactive reduction of emissions.

[14] Clean Energy Council, *Clean Energy Australia Report 2023*, 7

An ACCU is a unit issued by the Clean Energy Regulator, which represents one tonne of carbon dioxide equivalent net abatement by a project. This can be achieved through emissions reduction or carbon sequestration.

There are a number of requirements that a project must satisfy to be classified as an eligible offsets project, allowing for the issue of an ACCU. The requirements currently include the following:

- The project must be carried out in Australia;
- The person carrying out the project must be a fit and proper person pursuant section 60 of the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) (CFI Act);
- There must be an approved methodology for the type of project and the project must be undertaken in accordance with the approved methodology;
- The level of abatement delivered by the project must be in addition to what would occur in the absence of the project;
- The person responsible for the project must carry out various reporting requirements including reports regarding the conduct of the project and the abatement achieved (certain reports must be accompanied by registered greenhouse and energy auditor reports); and
- Satisfaction of the additionally requirements contained in section 27 of the CFI Act, being:
    - The newness requirement - that the project has not begun to be implemented;
    - The regulatory additionally requirement - that the project is not required to be carried out by or under a law of the Commonwealth, a State or Territory; and
    - The government program requirement - that the project would be unlikely to be carried out under another Commonwealth, State or Territory government program or scheme if it was not deemed an eligible offsets project.

CEFC and ARENA

The Australian renewable energy sector continues to receive support from government institutions, such as Clean Energy Finance Corporation (CEFC) and the Australian Renewable Energy Agency (ARENA). Both CEFC and ARENA fund and invest in renewable projects, clean energy technologies and knowledge sharing in Australia. CEFC is responsible for investing AU$12.7 billion[15] and as at 2023, ARENA has invested AU$2.25 billion in 663 renewable energy projects, with a total project value of AU$9.75 billion.[16]

Corporate PPAs

Outside of conventional bi-lateral agreements between generators and retailers, favourable market conditions have allowed for a boom in corporate power purchase agreements (PPAs) with long-term offtake periods. This has enabled renewable project developers and sponsors to access senior debt financing to assist with funding CAPEX for the construction of projects over the medium to long-term. As at 2022, the total value of large-scale renewable capacity bought through PPAs is approximately AU$3.2 billion.[17] The corporate PPA market continues to feature strong demand from large retail companies, information technology companies and the resources sector.

[15] Clean Energy Finance Corporation, https://www.cefc.com.au/

[16] Australian Renewable Energy Agency, *ARENA Investment Plan 2023*, 6

[17] Business Renewables Centre Australia, *Corporate Renewable Power Purchase Agreements in Australia: State of the Market 2022*, 8

Hydrogen Strategy

The federal government has published Australia's National Hydrogen Strategy, which focuses on making Australia a major global player in the clean hydrogen industry by 2030. Australia has a distinct competitive advantage in establishing and expanding its clean hydrogen industry, as well as being well placed for both the domestic use and export of hydrogen. Australia has particular comparative advantages due to the strength of its existing liquefied natural gas (LNG) production and export operations, the potential for synergies with its developed renewables industry, demand for hydrogen imports from Australia's largest trading partners in the Asia-Pacific region, and opportunities for domestic use of hydrogen due to Australia's reliance on the importation of liquid fuels and comparatively high price of LNG. Since the release of Australia's National Hydrogen Strategy, AU$127 billion of investment in hydrogen has been announced, with 15 projects having passed final investment decision and over 80 upcoming hydrogen projects in the pipeline.[18] For further information on hydrogen in Australia, see The H_2 Handbook.[19]

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 NEL, National Electricity Rules[20], National Energy Retail Law[21] and National Energy Retail Rules[22] (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 NGL and National Gas Rules.[23] 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.

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[18] Department of Climate Change, Energy, the Environment and Water, Growing Australia's hydrogen industry

[19] Hydrogen-Handbook-AUSTRALIA.pdf

[20] National Electricity Rules (NER). These set out the detailed provisions governing the operation of the NEM. The NER are made under the NEL and carry the force of law.

[21] National Energy Retail Law (NERL). The schedule to the *National Energy Retail Law (South Australia) Act 2011* (SA) is implemented in South Australia and mirrored in participating jurisdictions in a similar way to the NEL (with some modifications from jurisdiction to jurisdiction).

[22] National Energy Retail Rules governs the sale and supply of energy (electricity and natural gas) from retailers and distributors to customers).

[23] National Gas Rules governs access to natural gas pipeline services, as well as broader elements of the natural gas markets.

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. This market is an "energy-only" market. 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, which operates as a "capacity and energy" market. The Northern Territory also operates its own wholesale electricity market, which similarly operates as a capacity and energy market.

Electricity users who have not registered to participate in the National Electricity Market, or the wholesale electricity markets, 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.

Project Structuring

One of the most popular structures for developing energy and resources assets in Australia are unincorporated joint ventures (UJV). Each participant holds its interests and entitlements to project assets as tenants in common and a UJV agreement between the participants governs the rights and obligations of each participant and the operator, or manager of the UJV.

Farm-in arrangements are also frequently used in Australia and involve a new participant assuming some expenditure obligations (typically in the exploration phase) in exchange for earning a participating interest in the unincorporated JV.

An alternative structure is an incorporated JV (IJV) where two or more project proponents establish a special purpose vehicle (SPV) to own and operate a project and a shareholders agreement governs the operations of the IJV and how the project is to be administered.

In the power sector, the most popular structures for developing energy assets are incorporated companies or simple trusts. Participants hold interests as shareholders or unitholders and a shareholders' or unitholders' agreement governs the rights and obligations each participant has to each other in respect of the decision making and operational management (among other things) of the energy asset.

Each structure has different particular legal, commercial, financial and taxation implications.

Foreign Investment

Mining and petroleum tenements and power assets are specifically governed by Australia's foreign investment laws given that they are interests in Australian land.

Many, if not most, investments by foreign persons in the Australian mining, petroleum and power sectors are likely to require approval from the treasurer via FIRB. For further information, see Foreign Investment section.

Taxes and Royalties

Royalties are payable to state or territory governments upon the production of minerals or petroleum. While calculated on a quantity of production basis, the rates differ depending upon production methods and between jurisdictions and different types of commodities.

Further, oil and gas projects in commonwealth waters are subject to the Petroleum Resource Rent Tax[24], which is a tax generally on profits generated from the sale of marketable petroleum commodities such as crude oil, condensate, liquefied petroleum gas and ethane.

Environmental, Native Title and Heritage Issues in Energy and Resources Sectors

Environmental approvals for energy and resources projects are regulated at state and territory level.

In addition, the EPBC Act applies to projects of national environmental significance. Many resources projects are of such significance and bilateral arrangements between state and territory governments and the commonwealth have facilitated a streamlining of environmental approvals to minimise inefficient duplication.

For more information on environmental consideration for energy and resources projects, see Real Estate section.

As noted on page 81 of this guide, Native Title describes the land rights granted to Aboriginal and Torres Strait Islander peoples under their traditional laws and customs. If a resources project is developed on land subject to native title, project proponents must comply with the procedures of the *Native Title Act 1993* (Cth), as well as any state or territory legislation that may apply. Amongst other things, achieving compliance with native title requirements may involve negotiations, and entry into indigenous land use agreements, with such native title holders or claimants to facilitate the use of land and waters. Compensation is likely to be payable to native title holders. Additionally, it is important to be aware of the law around the protection of cultural heritage, including a duty of care to avoid any damage to cultural heritage. Cultural heritage requirements can vary from state to state, and significant sanctions can follow any damage that may be caused to cultural heritage. The processes required to survey and clear a site of cultural heritage, including engagement with relevant cultural heritage groups, can take some time to resolve so it is important to ensure that cultural heritage is addressed at an early stage when developing new projects or extending existing projects.

Infrastructure

Resources projects often involve significant infrastructure investment, such as rail lines, pipelines, and ports. Australia's access regime allows for third party market entrants to potentially access such significant infrastructure.

Other Reporting Duties

Entities with a consolidated revenue of at least AU$100 million for an annual reporting period must comply with obligations under the *Modern Slavery Act 2018* (Cth). One of the key reporting criteria requires relevant entities to report on the risks of modern slavery in their supply chain and the actions they are taking to mitigate those risks.

Large emitters of greenhouse gasses have reporting obligations under the *National Greenhouse and Energy Reporting Act 2007* (Cth). The current thresholds for facilities are 25 kt of greenhouse gas

[24] Petroleum Resource Rent Tax is levied on the taxable profits of (predominantly offshore) petroleum projects above a specified rate of return.

emission, or production or consumption of 100 TJ of energy; and for corporate groups, 50 kt of greenhouse gasses, or production or consumption of 200 TJ of energy.

Businesses must keep up to date with legislative updates, regulatory reforms, and general developments in regard to emerging topics such as climate change and social impact issues as they may lead to new compliance standards or reporting duties.

Transport

Sea

As a major exporter and importer of goods, in particular bulk commodities, agricultural products and consumer goods, Australia relies heavily on both local and international shipping services. Approximately 99% of Australia's total international trade by volume is transported by sea.[25]

Sydney and Melbourne are among the largest container ports in the Southern Hemisphere and are hub ports for cargo movements to and from Tasmania, South Australia, and New Zealand.

The majority of shipping services into and out of Australia are conducted by non-Australian shipowners. Sydney and Melbourne are among the largest container ports in the Southern Hemisphere and are hub ports for cargo movements to and from Tasmania, South Australia, and New Zealand. The expansion of online retailing since the COVID-19 pandemic has placed greater capacity pressures on all of the nation's major ports—especially those in the major population centres of Sydney and Melbourne.

Regional centres such as Newcastle, Port Kembla, Geelong, and Portland are linked to specific products, including grain, coal, and metals. These regional centres also have a modest container handling capacity. Single commodity ports, exporting principally iron ore and coal have also become major industrial ports in recent years—e.g. ports such as Dampier and Port Hedland in Western Australia for the export of iron ore and Dalrymple Bay, Wiggins Island and Abbot Point in Queensland for the export of coal.

Import and export liner trade is largely organised through formal shipping conferences. Government policy is to permit liner carriers to operate through conferences, provided that the conference complies with the requirements of the Competition and Consumer Act and is registered with the Register of Liner Shipping. There are strict requirements for registration, including an obligation to negotiate rates and cargo volumes with the peak shipper bodies, formed to represent cargo shippers. Registration provides limited exemption from some of the antitrust provisions of the Competition and Consumer Act.

In Australia, the past decade has seen significant reform in the shipping area, with a number of acts passed under the policy title "Stronger Shipping for a Stronger Economy". The key areas of reform were:

- Tax, with zero corporate tax on qualifying shipping revenues, accelerated depreciation on certain vessels, abolition of royalty withholding tax on certain charter transactions and tax exemptions for Australian seafarers working substantially outside Australia;

[25] Australian Government, Department of Infrastructure and Regional Development, *Trends: Transport and Australia's Development to 2040 and Beyond* (Report, 2016) 47.

- The establishment of a new Australian International Shipping Register, with crewing cost advantages;
- An overhaul of the way in which cabotage is regulated, with the abandonment of the former licence and (single or continuing) voyage permit system, and the introduction of three classes of licence (General, Temporary and Emergency);
- Introduction of a Maritime Workforce Development Forum; and
- The harmonisation of state-based commercial vessel safety regulations into a single, uniform national standard.

Australia has adopted many international maritime conventions in relation to the carriage of cargo. The Hague Rules were adopted in 1924 followed by the adoption of the Visby and Special Drawing Rights Protocols in 1991. In 1998, Australia introduced a hybrid cargo liability regime still based on the Hague-Visby Rules but incorporating some features of the Hamburg Rules. Amongst other things, these changes extended the carriers' liability to cargo, from the ships' rail to the container yard gate. Australia is yet to sign up to the Rotterdam Rules.

Ship arrest in Australia is relatively straightforward and inexpensive in comparison to a number of other jurisdictions in the Asia Pacific region. Australia is not a signatory to the Arrest Convention, although there are many similarities between the Arrest Convention and Australia's governing legislation for ship arrest, the *Admiralty Act 1988* (Cth).

The Brisbane International Cruise Terminal developed by the Port of Brisbane was designed to handle the new generation of mega cruise liners and is well-positioned to service this industry.

Apart from the United States, Australia is the only country that has a full visa system for foreign seafarers. Maritime crew visas have been introduced as a means of strengthening Australia's border security. Any foreign seafarer on a vessel entering Australia without a passport and a visa can be subjected to a substantial fine or detention.

Protection of the environment continues to be a high priority for federal and state governments alike with both commonwealth and state and territory legislation governing the area. Australian laws provide for some of the most severe penalties in the world for breach of environmental legislation and defences are limited. Apart from some defined small craft, all Australian-owned vessels are required to be registered under commonwealth legislation, being the *Shipping Registration Act 1981* (Cth). Liens, mortgages, and charges over vessels are registered on the Personal Property Security Register.

Air

In a country as large and as isolated as Australia, air travel is a necessity. Australia therefore has a number of air carriers operating nationally and internationally. The two major carriers are the Qantas Group and Virgin Australia.

The Qantas Group (which includes QantasLink and Jetstar) operates an average of 5,600 domestic flights and around 970 international flights every week, serving more than 182 destinations in 44 countries. Virgin Australia also services the domestic and international market.

All of Australia's state capital cities are serviced by major international airports. Sydney Airport, the nation's busiest, conducts around 900 aircraft movements per day and caters to around three million passengers each month. The air route between Melbourne and Sydney is one of the busiest air routes in the world. In July 2020, Brisbane Airport opened its second rA380 capable runway. The

development of the Western Sydney Airport is also in progress and is due to open in late 2026 to help ease congestion at the main Mascot Airport. Perth, Adelaide, Canberra, and Melbourne airports have all recently enjoyed significant modernisation and capacity upgrade works. There are also a vast number of major regional airports, some of which are capable of handling international services. All airports close to the capital cities and major regional centres are serviced by efficient local transportation.

The resources boom of recent years has seen huge growth in charter operations known as Fly-In-Fly-Out, particularly in Queensland and Western Australia (in between intermittent state border travel restrictions). These operations carry workers and equipment from the more highly populated regional centres and urban areas to remote mining operations. A number of these airports regularly cater to the Antonov 124, among the world's largest aircraft, ferrying mining and military equipment. Other than limited curfew arrangements there are no restrictions on access to any of Australia's main airports, other than for some limited peak controls at Sydney airport, which have little effect on international or domestic regular public transport.

Airfares, airport, and other user charges are competitive on an international basis. Australia's air and safety record is unparalleled. Australia's domestic and international airline operations are among the safest in the world and to date, Australia maintains a Category 1 safety rating according to a US Federal Aviation Administration.[26]

Australia ratified the Montreal Convention 1999 over a decade ago through amendments to the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) (Carriers' Liability Act). The Carriers' Liability Act also gives the provisions of the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, Montreal Protocol No. 3, and Montreal Protocol No. 4 the force of law in Australia. Australia previously ratified the Rome Convention but denounced the Rome Convention in 1999 and in lieu thereof enacted the *Damage by Aircraft Act 1999* (Cth), which imposes a strict and unlimited liability regime in Australia on aircraft engaged in overseas or interstate operations. Complimentary legislation also imposing a strict liability regime for damage by aircraft has been enacted in all Australian states.

Australia maintains a sophisticated regulatory environment in relation to air transportation and safety. The *Air Navigation Act 1920* (Cth) gives effect to the Chicago Convention, which Australia ratified in 1947. The Civil Aviation Safety Authority, which was established pursuant to the C*ivil Aviation Act 1988* (Cth), performs the role of Australia's aviation safety regulator, which performs its function in a manner that is consistent with Australia's obligations pursuant to the Chicago Convention. Airservices Australia is the civil air navigation services provider and was established pursuant to the *Air Services Act 1995* (Cth). Aviation accidents and incidents are investigated by the Air Transport Safety Bureau, which was established pursuant to the *Transport Safety Investigation Act 2003* (Cth).

Land

Australia has a comprehensive network of highways and other roads linking all capital cities and regional centres. Haulage contractors strongly compete for business with the national and state railway systems and are capable of reaching many urban and industrial centres not served by the rail network. The road network in Australia continues to be upgraded with ongoing improvements to major highways such as the pacific highway and provides vital infrastructure for the movement of people and is a vital facilitator of trade and commerce in a country that manages vast distance with a relatively small population. Australia's rail network comprises approximately 40,000 kilometres of track of three major gauges. The Inland Rail project is currently in progress and will deliver a 1600

[26] Federal Aviation Administration, *IASA Program Results*

kilometres dedicated freight rail link between Melbourne and Brisbane. The project, comprising of twelve individual projects, is due to be complete in 2027.

The freight rail operations of the commonwealth, New South Wales, Victoria, Queensland, and Western Australia have now been privatised. However, rail infrastructure assets such as track, sleepers, ballast, and formation are in a combination of public and private ownership. Some jurisdictions have also leased the corridor and track to private operators in addition to selling rail assets (such as rolling stock and locomotives). Bulk commodities are well supported by rail infrastructure and operators, particularly in Queensland for coal and in Western Australia for iron ore.

Australia has not adopted any of the international conventions on liability for the carriage of goods by road or rail. However, both the road and rail transport industries have had to adjust to an avalanche of major state-based regulatory changes over the last decade. Much of this legislation is based on the concept of "chain of responsibility"—the notion that all parties in the road transport supply chain (including consignors, packers, loaders, operators, drivers, owners, and consignees) have obligations to improve safety and prevent a breach of the transport laws from occurring. The concept does not lead to equal responsibility between those parties, but rather to responsibility proportionate to each party's level of involvement in the transport supply chain. Notable regulatory changes include legislation that imposes liability for serious road traffic infringements; mass, dimension, and load infringements; and driver fatigue.

The introduction of this concept of chain of responsibility into road and rail legislation has meant that consignors (which by definition under the legislation can include air and sea carriers needing to subcontract for inland transport) need to familiarise themselves with the chain of responsibility laws as a matter of risk management.

Telecommunications

The Australian telecommunications sector has experienced a rapid growth over the last few years. This has been driven by the expansion of online services, deregulation, and impact of the internet and technology advancements. The move by corporate and government towards diversification and reliable cloud infrastructure has seen an increased focus on telecommunications services and managed outsourced telecommunications arrangements.

The telecommunications and radio communications regulator in Australia is the Australian Communications and Media Authority (ACMA). In the last year, there has been an increased focus by the ACMA on its efforts to address spam and scam in the telecommunications sector. This has led to increased investigations and scrutiny by the ACMA on carriers and carriage service providers in the industry that provide messaging and call services to ensure compliance with various industry codes such as the Reducing Scam Calls and Scam Short Messages[27] industry code as well as the Integrated Public Number Database[28] industry code. As a result of this increased regulatory oversight, there has been a significant increase in the number of penalties and directions to comply that the ACMA has issued to carriers and carriage service providers.

In addition to the ACMA, the ACCC has a regulatory role in relation to enforcing competition and consumer law in the telecommunications industry. Given the size and nature of this industry in

[27] The Reducing Scam Calls and Scam Short Messages industry code sets out processes for identifying, tracing, blocking and otherwise disrupting scam calls and scam short messages.

[28] The Integrated Public Number Database is a record of most Australian phone numbers and owner details. It has listed and unlisted phone numbers.

Australia, the ACCC has indicated that one of its priorities this year is to promote competition in essential services with a focus on telecommunications.

Telstra, Optus, and TPG (formerly Vodafone) are the three largest commercial telecommunications companies in Australia. The federal-government-owned NBN Co owns and operates the national broadband network (NBN). This is a multi-mode network that provides wholesale broadband services across a combination of fibre to the home, fibre to the node, fibre to the curb, cable-TV, fixed wireless, and satellite technologies.

Telstra (now a listed company, but previously a government-owned monopoly telecommunications carrier in Australia) has, by far, the largest fixed line and mobile telecommunications network in Australia. Its main fixed line and mobile competitor is Optus (wholly owned by Singtel), with TPG following closely behind with its acquisition of Vodafone.

With the expansion of the NBN (which includes fixed line and wireless services in regional areas) as a wholesale offering, many retail service providers re-sell NBN services at a commercial and enterprise level. There are strict competition rules enforced by the ACCC to protect NBN Co's monopoly provision of wholesale fixed-line broadband services. The federal government plans to privatise NBN Co in coming years.

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 OAIC, 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 provisions for the enforceability of certain electronic transactions. The Corporations Act and taxation legislation also recognise electronic records. State and commonwealth legislation also recognise electronic signatures to varying extents. 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.

See Privacy for privacy provisions which may be applicable to certain businesses.

Fintech

Australia aims to position itself as an attractive destination for fintech companies. With unprecedented engagement from all levels of government and Australia's financial regulators, Australia represents an attractive destination for fintech. Australia's legal and regulatory system operates predictably and provides a level of certainty to business and consumers.

The fintech industry is experiencing an extraordinary rise, buoyed in part by the growing surge in investments, collaboration between incumbents and market disruptors, and regulatory advancement across the globe. These developing trends have been occurring in the industry as companies capitalise on current and future value.

Australia has recently launched an open banking framework, as part of a broader consumer data right. It is intended to give consumers a right to direct the information held by financial institutions to

be shared with other accredited entities. Initially, customers of Australia's four largest banks (ANZ, Commonwealth Bank, NAB, and Westpac) may request and share information about their transaction accounts, credit and debit cards, home loans, personal loans, etc., with accredited data recipients.

See Regulation of Markets for regulatory guidance relating to the fintech industry.

Click on the link provided for the K&L Gates FinTech and Blockchain Law Watch blog: www.fintechlawblog.com.

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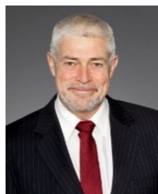

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Dispute Resolution

DISPUTE RESOLUTION

Australia’s Court System

Australia’s legal system includes Federal, State and Territory Courts and Tribunals, each exercising different jurisdictions.

The Federal Court exercises jurisdiction arising under Commonwealth legislation and hears matters involving bankruptcy, corporations, industrial relations, taxation, and trade practices laws.

State and Territory Courts have jurisdiction concerning issues arising under State and Territory laws, as well as the common law (such as contractual disputes and negligence claims).

Commencement of Proceedings

When commencing a legal proceeding, it is necessary to identify which court has jurisdiction to hear the matter and to understand the applicable limitation periods.

Choosing the right court will depend on the nature of the dispute, the amount involved and the court’s specific jurisdiction.

The limitation periods will vary based on the nature of the claim. For most contract and tort claims, the limitation period is typically six years from when the cause of action arose. Failure to commence proceedings within this timeframe can lead to the forfeiture of the right to litigate the dispute.

Common Features of the Litigation Process

In Australia, most courts actively manage cases by setting administrative hearings to provide for a timetable for the various stages of the litigation process.

Most civil cases are decided by a judge. Jury trials are rare in civil matters and are typically reserved for some defamation cases and personal injury proceedings.

The litigation process typically involves filing pleadings, in which parties set out their claims or defences. The party (or parties) commencing the proceeding files a pleading (such as a “Statement of Claim”) which sets out the party’s claim. The party (or parties) defending the claim then files a pleading (such as a “Defence”) which responds to the claim made against it, identifying applicable defences.

Parties to proceedings are typically required to produce relevant documents in their possession to the other parties to the litigation, in a process known as discovery.

Documents which are subject to legal professional privilege are not required to be produced. Documents will be privileged where they involve a communication between a lawyer and their clients produced for the purposes of litigation, or anticipated or pending litigation, or for the purpose of providing legal advice to the client.

Parties to proceedings typically present evidence to support their case, which depending on the case can include written witness statements, oral evidence, and expert evidence. Witnesses can be cross-examined on their evidence.

Remedies

Australian courts can award a variety of remedies, including monetary damages, specific performance orders, injunctions, and declaratory judgments. The nature of the remedy will depend on each case and the relief sought.

Costs

Australian courts generally order that the unsuccessful party pay the successful party's legal costs.

The usual order is for "costs on a standard basis" (also known as party-party costs). A general rule of thumb is that costs on a standard basis are approximately 60% of a party's actual legal costs.

The court also has discretion to award "costs on an indemnity basis" in particular circumstances, usually where a party has engaged in conduct which has resulted in delay or unnecessary costs. Indemnity costs may be around 80-95% of a party's actual legal costs.

Following a costs order, parties are encouraged to agree the amount of costs to be paid by the unsuccessful party to the successful party. However, if they cannot agree, the amount of costs will be determined by the court.

Appeals

Appeals can be heard in a State or Territory's Supreme Court, the Federal Court, and in some cases, in the High Court of Australia, the country's highest court.

A party seeking to appeal a decision to the High Court must seek permission to appeal, which the High Court only grants in a limited number of cases.

Alternative Methods of Dispute Resolution

Alternative methods of dispute resolution in Australia include arbitration, mediation, and expert determination.

Parties can agree to refer their dispute to arbitration, in which an arbitral tribunal consisting of one or more arbitrators is appointed by the parties to determine the dispute. For example, many commercial contracts include clauses which state that disputes are to be resolved by arbitration rather than in court.

A mediation involves an independent third party facilitating structured negotiations between the parties to reach agreement to resolve their dispute. Courts nearly always require parties to participate in a mediation prior to trial to reduce costs and avoid delays.

An expert determination can be used where disputes require specialised knowledge, with an expert in the relevant field making a binding decision.

Foreign Judgments

Australia recognises and enforces foreign judgments, although those judgments must be registered before they can be enforced.

The enforcement of foreign judgments in Australia is governed by the *Foreign Judgments Act 1991* (Cth) and the common law.

Under the *Foreign Judgments Act 1991* (Cth), a plaintiff who has obtained a judgment of a recognised court in an overseas country covered by the Act may apply to the Federal Court of Australia or the Supreme Court of a State or Territory within six years to have the judgment registered in the Court. After the judgment has been recognised, it can be enforced with the same effect as a judgment of that Court.

The *Foreign Judgments Act 1991* (Cth) does not cover judgments of any United States courts, and therefore United States judgments must be enforced in Australia pursuant to the common law.

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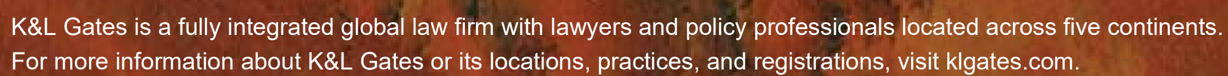

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