Chapter 1
Overview of Australia

Australia is an extraordinary place for new business and foreign investment with a resilient economy, urbanized infrastructure, a skilled and multilingual workforce and a stable political environment. This guide outlines the laws and business practices in Australia, covering topics such as business acquisitions, foreign investment regulations, fundraising, consumer protection and product liability, banking regulation, and taxation.

Australia was ranked 14 in the World Economic Forum’s Global Competitiveness Report 2018, due to its transparent public and private institutions, well-developed infrastructure, good macroeconomic environment, and strong health and primary education. This is supported by a strong and efficient financial system with a sound banking sector.

The country, the people and the economy

Australia is an island continent in the Asia-Pacific region with an area of about 7.6 million km\(^2\). Australia has a temperate climate in most of the inhabited areas and a tropical climate in the north. The official language is English.

Australia is a vibrant multicultural society with a population of approximately 25.2 million people. With an annual population growth rate of 1.6%, the domestic market is consistently expanding, making Australia an appealing destination for corporations looking to expand their services abroad.

The key sectors of the Australian economy are services (79.2%), construction (8.8%), manufacturing (7.4%), agriculture (2.7%) and mining (1.9%).

Given its strong economic outlook and significant trust in its political, legal and economic institutions, Australia is an extremely attractive destination for foreign direct investment (FDI). Australia consistently ranks within the top 10 FDI destinations in the world. Australia’s largest sources of cumulative FDI are currently the US, Japan and the UK.

With an economy strongly linked to Asia - and in particular, China - there is also great optimism...
in Australia’s future economic development. In fact, Australia’s economy has had uninterrupted
growth in total GDP for 27 years, the longest in the developed world.

Australia has very strong export markets. Natural resources make up 49.1% of Australia’s
A$215 billion in exports in 2018, followed by services (21.2%), manufacturing (11.5%) and rural
(10.8%). Australia’s top five export commodities in 2018 were iron ore, coal, education, gold
and natural gas. Australia’s top five trading partners are currently China, Japan, South Korea,
the US and India.

Since 70% of the population resides in the major cities, particularly along the east coast in
Brisbane, Sydney and Melbourne, most business activities occur in these areas.

**Government**

The Commonwealth of Australia consists of six states (New South Wales, Queensland, South
Australia, Tasmania, Victoria and Western Australia), two major mainland territories (Australian
Capital Territory and Northern Territory) and other minor territories. The capital city of Australia
is Canberra.

There are three main levels of government in Australia:

- the Australian Government (also referred to as the Commonwealth or the “federal
government”)—primarily responsible for matters such as defence, foreign trade and
international relations, income taxes, social welfare, immigration, telecommunications and
broadcasting, commerce and currency;

- state governments—responsible for services such as education, health, housing, law
enforcement, natural resources, roads and transport, and tourism; and

- local councils—responsible for services such as local roads, town planning, and waste
removal and sanitation.

The structure of government in Australia is known as the “Westminster” system, similar to that
of England. The three arms of government (at both federal and state levels) are:

- the legislature—makes the law;

- the executive—administers and polices the law; and

- the judiciary—interprets and applies the law, and rules on disputes.
Legal system

Australia has a “common law” system which is based on the English legal system. Australia’s legal system has both federal and state laws. Australia also has a written Constitution which defines the structure of government and the powers of the Commonwealth and the states and territories.

Australian law is derived from three main sources:

- legislation or statutes (that is, Acts of parliament);
- subordinate rules or regulations (enforced pursuant to powers granted under Acts of parliament); and
- case law (developed by the courts in the course of resolving disputes).

Legislation prevails over case law; however, much case law involves the interpretation of legislation. Case law is the source of rights and duties which are not dealt with in the Acts and regulations. For a description of the court system and dispute resolution process, see Chapter 23 of this publication, Dispute Resolution.

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Chapter 2

Corporate Regulators

In Australia, the registration, control and management of companies is regulated by various federal authorities.

**Australian Securities and Investments Commission (ASIC)**

The Australian Securities and Investments Commission (ASIC) is responsible for the general administration of the *Corporations Act 2001 (Cth)* (*Corporations Act*). The Corporations Act is the primary law regulating the registration, control and management of companies. This covers Australian companies and foreign companies that are registered in Australia.

ASIC is also responsible for regulating financial markets and providers of financial services and financial products (including granting relevant licences and monitoring compliance with licence conditions) and responsible for supervision of trading on Australia’s domestic licensed financial markets, including the Australian Securities Exchange. ASIC monitors compliance with the market integrity rules and is able to issue infringement notices and accept enforceable undertakings through the Markets Disciplinary Panel.

More information about ASIC can be found at www.asic.gov.au.

**Australian Securities Exchange (ASX)**

The Australian Securities Exchange (ASX) is one of the world’s top 10 listed exchange groups (measured by its market capitalisation).

The activities of the ASX span primary and secondary market services, central counterparty risk transfer, and securities settlement for both the equities and fixed income markets. It functions as a market operator, clearing house and payments system facilitator. It monitors and enforces compliance with its operating rules, promotes standards of corporate governance among Australia’s listed companies and helps to educate retail investors.

The ASX administers the ASX Listing Rules which set out, among other things, requirements for
admission to list on the ASX and removal from the official list, continuous disclosure of information to the public, the rights that may be attached to the securities of a listed company, security holder approval for certain transactions and reorganisations of an entity’s capital. The ASX is also responsible for administering the ASX Settlement Operating Rules which are the rules governing the settlement process for the ASX’s markets, and offers clearing services by way of ASX Clearing Corporation Limited.

In enforcing the ASX Listing Rules, the ASX can suspend a listed entity and/or delist a listed entity from the official list. The ASX may also request corrective action to be taken, or refer a breach to ASIC for it to consider imposing a sanction. With respect to the ASX market participants, the ASX conducts investigations and imposes sanctions for any breaches of the ASX Operating Rules. The ASX is obliged by the Corporations Act to refer certain matters to ASIC for further investigation. The ASX does not have power to enforce the provisions of the Corporations Act. However, it works closely with ASIC in relation to ASIC’s supervision of Australian listed entities under that Act.

ASX Trade24 provides a facility for trading of futures and options on the interest rate, equity, currency contracts and commodity markets. The ASX Trade24 operating rules regulate the behaviour of ASX Trade24 participants in their relationships with the ASX, their clients and other participants.

The Australian Government has licensed Chi-X Australia, a part of Chi-X Global, to operate in Australia and compete with the ASX in trading listed shares and providing financial services to retail and wholesale clients.

More information about the ASX can be found at www.asx.com.au, and about Chi-X at www.chi-x.com/australia.

Takeovers Panel

The Takeovers Panel is the primary dispute resolution body determining disputes concerning takeovers and other corporate control transactions. It is a peer review body. It consists of part-time members drawn predominantly from takeovers practitioners (for example, bankers, lawyers and accountants) and Australia’s business community. The objectives of the Takeovers Panel are to reduce tactical litigation in takeovers, reduce the costs of takeovers and support the purposes of the takeovers legislation. The Takeovers Panel is the main forum for resolving disputes about takeovers until the takeover bid period has ended.

The Takeovers Panel has wide powers to make orders to remedy or prevent unacceptable circumstances in relation to takeover bids.
There are currently two Herbert Smith Freehills lawyers on the Takeovers Panel: Sydney-based partners Rebecca Maslen-Stannage and Philippa Stone.

Further details on the Takeovers Panel can be found at www.takeovers.gov.au.

**Australian Competition and Consumer Commission (ACCC)**

The Australian Competition and Consumer Commission (ACCC) is a statutory authority responsible for ensuring that companies comply with the federal competition, fair trading and consumer protection laws. This includes enforcing the anti-competitive practices, mergers and acquisitions, industry codes, product safety and price monitoring sections of the *Competition and Consumer Act 2010* (Cth) (CCA).

The ACCC is able to take legal action when it believes provisions of the CCA have been breached by a company. It has investigative powers to compel an individual or corporation to provide information about a suspected breach. The ACCC is able to issue various kinds of notices (such as infringement, substantiation and public warning notices in relation to consumer protection breaches), impose pecuniary penalties and enforce undertakings given to it.

More information about the ACCC can be found in Chapter 12 of this publication, 'Competition principles', and at www.accc.gov.au.

**Foreign Investment Review Board (FIRB)**

The Foreign Investment Review Board (FIRB) is an advisory body that provides foreign investment policy advice to the Australian Government. The FIRB examines proposals by foreign interests who wish to undertake direct investment in Australia and makes recommendations to the federal Treasurer on whether those proposals are suitable for approval under the government’s foreign investment policy. The Treasurer is ultimately responsible for making decisions on these proposals. The FIRB also provides information and guidelines, both in Australia and overseas, about the government’s foreign investment policy and monitors compliance with such policy.

The FIRB is discussed in more detail in Chapter 10 of this publication, ‘Foreign Investment Regulation’.

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

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Chapter 3
Business Structures

Foreigners may carry on business in Australia as an individual, a partnership, a company, a joint venture, a trust or an Australian branch office of a foreign company. The structure that is most suitable will largely depend on the nature of your business and its objectives. Each of the different business structures are described below.

Individual

This is the simplest form of business structure and is most common for small business ventures. If the business is not being conducted under the name of the individual (that is, first name and surname, or initials and surname), then the individual must register the relevant business name with the appropriate state or territory authority (a list can be found on the Australian Government’s website, www.business.gov.au). An individual is not subject to the same regulation as a company. However, an individual is exposed to unlimited personal liability and may not be eligible for taxation or financial structuring benefits.

Partnership

A business may be carried on as a partnership. A partnership is an arrangement between two or more people or companies to carry on a business in common with a view to profit. Unless the partnership is a professional partnership, it must not exceed 20 partners. A partnership may be created by an agreement between the partners and will be governed by contract law, state or territory legislation and the common law.

A partnership is not a separate legal entity distinct from the partners themselves. Each partner is collectively and separately liable for the debts and obligations of the partnership. If one partner is required to pay the debt of the whole partnership, that partner can recover from the other partners their shares of the debt. Partners also share the profits of the partnership.

In some states, limited liability partnerships can be created. These usually comprise one (or more) general partner(s) who has unlimited liability and one (or more) limited partner(s) whose liability is limited to the capital they have agreed to contribute to the partnership, provided the
limited partner does not participate in the management of the business. In Australia, corporate limited partnerships are generally taxed as companies.

**Company**

A company may be used to conduct business in Australia. The registration, management and control of companies is governed by the *Corporations Act 2001* (Cth) (*Corporations Act*), which is administered by the Australian Securities and Investments Commission (ASIC). For more information about ASIC, see Chapter 2 of this publication, 'Corporate regulators'.

**Types of companies**

The Corporations Act recognises the following classes of companies:

- **A company limited by shares** - the personal liability of each shareholder is limited to the amount (if any) unpaid on the shares held by the shareholder. This is by far the most common form of corporate business entity in Australia. These companies are denoted by 'Pty Limited' or 'Pty Ltd' in their name.

- **A company limited by guarantee** - no shares are issued by the company, but members are responsible for the company’s liabilities up to a nominated amount in the event that the company is wound up without sufficient funds to pay its liabilities in full. As the amount of the guarantee cannot be varied, this type of company is usually unsuitable for trading ventures, where it is likely that the company’s capital needs will increase while a going concern. This structure is often used by charities. These companies are usually denoted by 'Limited' or 'Ltd' in their name.

- **An unlimited liability company** - shares are issued by the company and shareholders have unlimited joint and several liability for the company’s obligations. This structure of company is used primarily by professional associations where members are required to be liable without limitation. There is no requirement that the word 'Unlimited' be used in the company’s name.

- **A no liability company** - this structure is available only to the mining industry (being prospecting, obtaining, sale or disposal of ores, metals or minerals, or a necessary or incidental business activity, either in Australia or globally, but excluding certain quarrying operations). Shareholders are not contractually bound to pay calls on the unpaid amount of their shares or contribute to debts and liabilities of the company; nor may they be sued for them. While any amount unpaid for shares is not an enforceable debt, where a call is unpaid at the end of 14 days after it became payable the shares are automatically forfeited. The words 'No Liability' or 'NL' must be used in the company’s name.
Proprietary and public companies

Companies may be registered in Australia as either a proprietary (private) or a public company. A proprietary company is generally simpler and less expensive to administer than a public company because it is subject to fewer of the administrative requirements imposed by the Corporations Act. Only companies limited by shares or unlimited liability companies may be proprietary companies.

A proprietary company cannot have more than 50 non-employee shareholders and must have at least one member at all times. It must have at least one Australian resident director and it may also, but is not required to, have an Australian resident company secretary. A proprietary company must not invite the public to subscribe for its shares or debentures, or to deposit money with the company. It must include the term 'Proprietary Limited' or 'Pty Ltd' in the company name if it is a limited liability company (or 'Proprietary' or 'Pty' only if it is an unlimited liability company). A proprietary company will generally only be required to appoint an auditor if it is a large proprietary company.

A public company must have at least three directors (two of whom must be Australian residents) and at least one Australian resident company secretary. A public company must include the term 'Limited' or 'Ltd' in the company name (unless it is an unlimited liability company or a company limited by guarantee provided it meets certain requirements—for example, the company pursues charitable purposes only and does not make distributions to its members or pay fees to its directors). A public company may raise funds from the public and be listed on the Australian Securities Exchange (ASX), or may be unlisted. A public company must have an auditor.

Establishing a company

![Diagram of the steps to establish a company]

- **Step 1**: Operation of company
- **Step 2**: Registration of company
- **Step 3**: Number Identifier of name of business
- **Step 4**: Registered Office of Business Number (ABN)
- **Step 5**: Display of name and company number
Step 1

- **Operation of company**: before registering a company, its owners must decide how the company will be internally managed. The internal management of a company is governed by the 'replaceable rules' set out in the Corporations Act unless the company adopts a constitution which replaces or modifies those rules.

Step 2

- **Registration of company**: a company is established by being registered with ASIC under the Corporations Act. A person may register a company directly with ASIC or acquire a 'shelf company' (that is, an existing already registered company that can be bought 'off the shelf') from a business service provider.

- **Registration of names**: there are two names relevant here - the company name and business name. The investor should reserve and register the company name when registering the company with ASIC. This name will identify the company as a legal entity and must include all relevant legal terminologies (such as 'Proprietary' or 'Limited'). Once the company has been registered, an investor who then wishes to undertake business activities under a different name may register a separate business name with ASIC.

Step 3

- **Company number**: on registration, ASIC issues the new company with a unique Australian Company Number (ACN) which the company must set out with its name (or which the company may elect to use as its name).

- **Business number**: companies may be required to apply to register for an Australian Business Number (ABN) with the Australian Taxation Office. The ABN is a business identifier for various business dealings with the Australian Government, including remitting Goods and Services Tax (GST) on taxable supplies and seeking input tax credits for GST paid in the course of the company’s business. If the last nine digits of the ABN are the same as the company’s ACN or ARBN, the company may use its ABN instead.

Step 4

- **Registered office**: once established, a company must maintain a registered office within Australia. For a public company, the registered office must remain open to the public for at
least three hours each business day and must display the company name along with the words 'Registered Office'. An important aspect of a registered office is that it is the place where official documents are served on the company.

Step 5

• Display of name and company number: the company’s name, ACN, ARBN or ABN (as applicable) must be displayed on the company’s seal (if the company has one), public documents, negotiable instruments and at places where the company carries on business that are open to the public.

Registering as a foreign company

If a company which is established outside Australia starts carrying on business in Australia or engages in certain other activities in Australia, it must register as a foreign company. A registered foreign company must have a registered office in Australia and a local agent. Registration requires proof of incorporation of the company in the foreign country, particulars of the company directors (including home addresses), a certified copy of the constitution of the company, details and documents in relation to charges on the company’s property and the address of the company’s registered office in its place of incorporation. All foreign companies must have a local agent who is responsible for any obligations the company must meet. Herbert Smith Freehills can assist foreign companies in locating third-party service providers that can provide a registered office in Australia and/or act as the local agent for a branch office of a foreign company.

Once the company and company name are registered, a separate business name may be registered with ASIC. A company number, known as an Australian Registered Business Number (ARBN) will be issued. The company name and number must be displayed at all times.

A registered foreign company must lodge a copy of its balance sheet, cash flow statement and profit and loss account for its last financial year, at least once every calendar year and at intervals of not more than 15 months. If the company is not required by the law of the place of its incorporation to prepare these financial statements, they must be prepared and lodged in such form and contain such particulars as those required for a public company under the Corporations Act. ASIC may require these statements to be audited.

Exemption from annual financial reporting requirements may be available if the registered foreign company is not 'large' or part of a 'large' group (defined by revenue, assets and number of employees), or the company is not 'large' and is covered in consolidated financial statements
of a controlling company which are lodged with ASIC. If the exemption applies, the registered
foreign company must instead file an annual return with information including share capital,
paid up capital, details of directors and local agents and a declaration of exemption from the
financial reporting requirement.

**Continuing requirements**

Companies must maintain a number of registers, including registers of shareholders, option
holders and directors, on the company’s property (company property means either the
company’s registered office, the company’s principal place of business or a place in Australia
where the work of maintaining the register is done). Listed companies must also comply with
the continuous disclosure requirements of the ASX.

All companies must keep financial records of their activities. Each financial year, public
companies, large proprietary companies and some small proprietary companies must also
prepare:

- a financial report;
- a directors’ report; and
- an auditor’s report.

These reports are collectively known as an ‘annual report’. Annual reports must be sent to all of
the shareholders of the company. The required contents of an annual report are set out in the
Corporations Act. The requirements for listed companies are more stringent than for other types
of companies. Some companies are also required to prepare half-yearly reports. The contents of
a half-yearly report are substantially similar to those of an annual report, except that they
relate to a half of the financial year. Additional reporting requirements set out in the ASX Listing
Rules for entities carrying on mining and exploration activities may also be applicable and may
require the preparation of quarterly reports.

The accounting requirements for a proprietary company depend on whether it is classified as
'small' or 'large' in a given year. A company is 'small' only if it satisfies at least two of the
following tests; otherwise it is registered as large:

- the consolidated revenue for the financial year of the company and the entities it controls
  is less than A$25 million for the year;
- the value of the consolidated gross assets of the company and the entities it controls is less
than A$12.5 million at the end of the financial year, and

- the company and the entities it controls have fewer than 50 employees at the end of the financial year.

Small proprietary companies are required to keep financial records that explain their transactions and financial position and that would enable true and fair financial statements to be prepared and audited. However, subject to certain shareholder or ASIC directions, they do not have to prepare annual financial reports or directors’ reports.

Large proprietary and public companies must prepare annual financial reports and a directors’ report, have the financial report audited, and send both reports to all of the shareholders. A company’s financial report must comply with the accounting standards set by the Australian Accounting Standards Board (AASB), be lodged with ASIC and give a true and fair view of:

- the position and performance of the company; and

- if consolidated financial statements are required, the financial position and performance of the consolidated entity.

Subsidiaries of foreign companies which are small are required to have their accounts audited unless they meet detailed exemption criteria, including certain net asset requirements and after tax profit.

Auditing and the appointment of auditors is strictly regulated by the Corporations Act. Auditors are subject to significant duties of independence, diligence and skill.

ASIC must be notified of changes to the company within prescribed times, including changes to the company’s shareholders, issued capital, ultimate holding company, location of a register, directors, company secretary, registered office, principal place of business and any registrable charges or mortgages given by the company. A proprietary company does not have to give notice of a change to its constitution unless it changes the status of the company from a proprietary to a public company. A public company must always notify ASIC of changes to its constitution.
Joint venture

A business may be carried on by individuals or companies as a joint venture. A joint venture typically involves two or more parties that come together to undertake a specific project. There are predominantly two forms a joint venture may take: an incorporated joint venture or an unincorporated joint venture. Each form entails distinct considerations, particularly in terms of the flexibility of the arrangement, taxation requirements and party liability.

Incorporated Joint Venture

An incorporated joint venture arises when the parties use a corporate entity to undertake the joint venture activity. Generally, a special purpose joint venture company is created, with each party being a shareholder in the company. Because of this, the terms of an incorporated joint venture are set out in a Shareholders’ Agreement. The parties must also comply with the rules contained in the Corporations Act.

Directors of an incorporated joint venture company owe the same duties as the directors of any other corporate entity. These duties include the duty to act in good faith in the best interest of the joint venture company.

For the purposes of tax, a joint venture company is unable to offset profits and losses against income and losses outside of the incorporated joint venture. Instead, tax losses are retained in the company until future years when assessable income is derived by the company. For more information about tax, see Chapter 11 of this publication 'Taxation, stamp duty and customs duty'.

Unincorporated Joint Venture

Under an unincorporated joint venture (UJV), the parties agree to a contract usually called the 'Joint Venture Agreement' which sets out the rights and obligations of each party. In a UJV each party owns a percentage interest in each asset of the joint venture, is responsible for its share of expenses and receives its share of the product generated from the venture. The parties will usually appoint a manager to operate the UJV and a marketing and sales agent to sell the product on behalf of each joint venturer.

As there is only a contractual relationship between the parties, each party is treated independently for tax purposes. Parties are therefore able to adopt their own preferred tax structure. Each party is also able to finance its share of the UJV separately, although for project financing all parties to the UJV often act together.

The joint venturer’s liability under a UJV is several (separate) as between the parties but often there is joint liability to third parties.
UJVs are generally the preferred legal structure for natural resources projects in Australia.

**Trust**

A trust structure can be used to carry on business in Australia. The trustee owns and manages the property and business of the trust wholly for the benefit of the beneficiaries (which may be individuals, trusts or companies). The beneficiaries usually have no specific interest in any particular asset of the business and no right to directly control the use or disposal of any particular asset; this is managed by the trustee. However, the beneficiaries are entitled to share in the proceeds of the trust property as a whole in equal shares (in a unit trust) or such proportions of the trust property as determined by the trustee (in a discretionary trust).

Generally, the trust itself will not be taxed on the income earned by the trust that is distributed to the beneficiaries. The beneficiaries will be assessed on their share of the trust income if they are “presently entitled” to a share of the income (that is they could be assessed even if they have not actually received income). If beneficiaries are not presently entitled to the income, the trust will be liable for the tax on the income. A trust cannot distribute a “loss” to the beneficiaries. That loss is retained in the trust and may be offset against the trust’s future income.

**Comparison**
### Key contacts

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<th>Individual</th>
<th>Partnership (General)</th>
<th>Company (Limited by Shares)</th>
<th>Trust</th>
<th>Incorporated Joint Venture</th>
<th>Unincorporated Joint Venture</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Simple to set up and operate</td>
<td>• Relatively easy and inexpensive to form and operate</td>
<td>• Limited liability: the personal liability of each shareholder is limited to the amount (if any) unpaid on the shares held by the shareholder</td>
<td>• Beneficiaries of a trust generally are not liable for the trust debts</td>
<td>• The parties’ liability is limited to its investment in the shares held in the joint venture company</td>
<td>• Each party is treated independently for tax purposes</td>
</tr>
<tr>
<td>• The individual has full control of all assets, profits and business decisions</td>
<td>• Contribution of different assets, skills and resources</td>
<td>• Generally easier to raise finance (debt and equity)</td>
<td>• Limited liability is possible if the trustee is a limited liability company</td>
<td>• Flexibility in distribution of income (discretionary trusts): trustee can distribute income at their discretion</td>
<td>• Flexibility in management / governance arrangements</td>
</tr>
<tr>
<td>• Subject to fewer regulatory requirements</td>
<td>• Written partnership agreement can clarify the mutual obligations of the partners</td>
<td>• Perpetual succession: company continues to exist despite any changes in membership or any transfer of stock</td>
<td>• Taxation and financial structuring benefits</td>
<td>• Ongoing requirements (accounting and reporting) and its associated costs</td>
<td>• Each party is treated independently for tax purposes</td>
</tr>
<tr>
<td>• Generally a low-cost structure</td>
<td>• Partners have rights of management</td>
<td>• Suitable for businesses that are continually expanding</td>
<td>• Structure is complex and can be expensive to form and operate</td>
<td>• The requirements under the Corporations Act 2001 can be quite complex</td>
<td>• No opportunity for tax consolidation</td>
</tr>
<tr>
<td>• Speed and flexibility of change</td>
<td>• Tax losses of the partnership can be used to offset the partners’ personal tax liabilities.</td>
<td></td>
<td>• Strict obligations on the trustee</td>
<td>• Loss of control: directors, rather than shareholders make management decisions</td>
<td>• Director’s duties to the joint venture company.</td>
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<td></td>
<td></td>
<td></td>
<td>• Extensive regulatory requirements that trusts must comply with</td>
<td></td>
<td>• There is often joint liability to third parties</td>
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Chapter 4

Corporate Governance

In Australia, the regulators expect company directors to conform to high standards of conduct in the performance of their duties to the company. Directors are generally required to apply their particular skills and experience relevant to the matter being considered and to always act in the best interests of the company, prioritising those interests over any external interests. If a director breaches their duties, they individually, as well as the company, could be subject to sanctions, including financial penalties and imprisonment.

The law recognises that directors can delegate their powers and responsibilities to the company’s executive officers to manage on their behalf. However, some responsibilities cannot be delegated, including responsibility for the accounts.

Shareholders do not have a right to be involved directly with the affairs of the company or to interfere with management. However, they do have the right to elect or remove the directors, and in the case of public companies this right cannot be restrained.

Directors duties

Overview

In Australia, high standards of business conduct are required of company directors and officers in the performance of their duties to the company. Directors are generally required to apply their particular skills and experience relevant to the matter being considered. If a director breaches their duties, they individually, as well as the company, could be subject to sanctions, including financial penalties and imprisonment. The range of duties directors owe to their company under both statutory and common law are described below.

Common law duties

Under the common law, directors have duties to:

- act in good faith and exercise their discretion in what they consider to be the best
interests of the company as a whole and not for a collateral purpose;

- **not to act for an improper purpose**, that is not to exercise their powers to obtain some private advantage or for any purpose for which the power was not granted;

- **maintain, as a board, any discretions** they have and not to limit themselves in the future from acting in the best interests of the company;

- **avoid conflicts of interest**, that is not enter into engagements in which a director has a personal interest conflicting, or possibly conflicting, with the interests of the company; and

- **act with care and diligence**, meaning that directors apply their minds to considering the overall position of the company. Directors cannot hide behind ignorance of the company’s affairs (where this results from a failure to make necessary enquiries) but must test information put before them and consider what other information they might require in their decision-making.

### Statutory law duties

The statutory duties of directors are contained in Part 2D.1 of the *Corporations Act 2001* (Cth) (*Corporations Act*). These statutory duties apply in addition to the common law directors’ duties set out above, although the two sets of duties are broadly consistent. The Corporations Act may impose other, more specific obligations, in the context of a particular sector (for example, the duty imposed on a holder of an Australian Financial Services Licence to have an appropriate conflicts management policy).

Under the Corporations Act, directors are required to:

- **act with a degree of care and diligence** which a reasonable person would exercise if he or she were a director in the company’s circumstances and had the same responsibilities of that director;

- **act in good faith in the best interests of the company** and for a proper purpose; and

- **not improperly use information or their position** to gain an advantage for themselves or someone else or to cause detriment to the company.
Other duties

Under the Corporations Act, there is a positive duty on directors to prevent the company from trading while insolvent. A director breaches this obligation if he or she fails to prevent the company from incurring a debt at a time when:

- the company is insolvent or becomes insolvent by incurring that debt (or by incurring debts including that debt);
- there are reasonable grounds for suspecting the company is (or would become) insolvent; and
- the director was subjectively aware of those grounds, or a reasonable person in a like position in a company in the company’s circumstance would be so aware.

There are certain defences a director may rely on, including that the director:

- believed on reasonable grounds that the company was solvent;
- relied on information from a competent and reliable person whom the director believed on reasonable grounds to be responsible for providing such information;
- the director did not take part in the management of the company at the time because of illness or some other good reason; or
- the director took all reasonable steps to prevent the company from incurring the debt.

In 2017, the Corporations Act was amended to provide directors with a defence to civil action for insolvent trading. Directors will be afforded an exception from liability for insolvent trading where the debt that the liquidator alleges had been incurred whilst the company was insolvent was incurred in connection with a course of action that is reasonably likely to provide a better outcome for the company than the immediate liquidation or administration.

Directors also have duties which are found in other pieces of legislation and which may impose personal liability on directors for non-compliance. The primary areas where these duties arise can be found in financial services legislation, environmental legislation, workplace health and safety laws and trade practices regulations. These and other statutory duties may be owed to the company’s shareholders, its employees and relevant third parties.
Legal protections available to directors

There are several legal protections or defences available to directors, as set out below.

**Business judgment rule**

Directors will meet the requirement to exercise due care and diligence both under the Corporations Act and the common law if, when making a ‘business judgment’ (that is, any decision to take or not take action in respect of matters relevant to the business operations of the company), they:

- act in good faith and for a proper purpose;
- do not have a material personal interest in the matter;
- inform themselves to the extent they reasonably believe to be appropriate; and
- rationally believe that the judgment is in the best interests of the company (which will be deemed to be the case unless no reasonable person in the position of the director would hold that belief).

The business judgment rule provides directors with a safe harbour from personal liability in relation to honest, informed and rational business judgments.

Directors will not be able to take advantage of the business judgment rule where they are discharging their general oversight and monitoring duties, as these duties do not involve any decision to take or not take an action. Similarly, failure to consider a matter does not constitute a business judgment.

**Reliance on information and advice**

In practice, directors will not always be in a position to independently verify and assess every piece of information upon which they must base their decisions.

Accordingly, the law recognises that directors are entitled to rely on information or professional or expert advice from an employee, professional adviser or expert, another director or officer, or a board committee, provided the reliance was made in good faith, and after the director has made an independent assessment of the information or advice having regard to the director’s knowledge of the company and the complexity of the structure and operations of the company. In certain cases, directors’ duties will positively require directors to obtain this type of expert
advice.

The key qualifications on the capacity of directors to rely on information and advice of others are where:

- the director has knowledge of deficiencies or inaccuracies in the information which has been provided to him or her;

- in all the circumstances there are sufficient ‘warning signals’ regarding the reliability of the information such that a reasonable person in the director’s position would take steps to verify or otherwise test the information; or

- the information is proved to be unreliable.

Further, directors cannot substitute the advice of management for their own attention and examination of an important matter that falls specifically within the scope of each director’s individual responsibilities (including responsibilities that legislation places on directors personally, such as the approval of the financial reports).

This principle applies to all directors, including the managing director. In practice, however, the managing director is likely to be in a better position than non-executive directors to assess the reliability of information flowing from employees of the company to the board and this factor would be taken into account in determining whether a managing director has acted reasonably in the circumstances.

Indemnity and insurance

A company can indemnify directors (for example, under its constitution or by entering into an indemnity deed with directors). The Corporations Act, however, prohibits a company from indemnifying a director against:

- liabilities owed to the company or related bodies corporate;

- liabilities for pecuniary penalties or compensation orders under the Corporations Act for certain breaches of duties; and

- liabilities owed to a third party and not arising out of conduct in good faith.

A company can also take out and maintain insurance for its directors. A company or a related
body corporate must not, however, pay, or agree to pay, a premium for a contract insuring a person who is, or has been, an officer of the company against a liability (other than one for legal costs) arising out of conduct involving a wilful breach of duty in relation to the company or arising out of improper use of position or information.

**Potential consequences of breaching directors’ duties**

If directors breach any of the duties mentioned above or fail to meet any of their obligations they may have proceedings brought against them by:

- the company;
- shareholders under the statutory derivative action provisions (provided the court in its discretion grants leave to the applicant);
- creditors, insolvency administrators and trustees in bankruptcy in the context of insolvent trading;
- third parties in the context of misleading and deceptive conduct or anti-competitive behaviour; and/or
- regulatory authorities such as the Australian Securities and Investments Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC).

As a general rule, enforcement action by ASIC will only be taken where there has been a failure of honesty, due care, diligence or proper purpose. Nonetheless, directors should equally remember ASIC’s high expectations of directors generally.

In addition, any breach or alleged breach of directors’ duties could have a significant impact on a director’s personal reputation and the reputation of the company.

**Nominee directors**

**Duties owed by nominee directors**

As a matter of Australian law, a nominee director is appointed in his or her personal capacity (rather than a representative capacity) and is subject to the usual array of directors’ duties applicable to any director of a company.
All directors, including nominee directors, have a duty to exercise their powers and discharge their duties in good faith in the best interests of the company, which means that they must act in the best interests of shareholders as a general or collective body. The law remains unclear as to the extent to which a nominee director can take into account the interests of their appointing shareholder. However, the generally accepted guiding principles are as follows:

- **alignment of interests of the appointer and the company** – nominee directors may act in the interests of their appointer if they have a bona fide belief that they are also acting in the best interests of the company;

- **interests of the company** – irrespective of what the constitution says, the fact that a director has been nominated to the office of director of a company by a particular shareholder does not permit the director to act in disregard of the interests of the company as a whole; and

- **direct conflict** – when the interests of the appointer and the company conflict, absent special circumstances, the nominee director must act in the best interests of the company (in preference to the best interests of the appointing shareholder).

**Ability of nominee directors to pass information to their appointer**

Australian law prohibits directors, including nominee directors, from using information that they have obtained in their capacity as a director to gain an advantage for themselves or someone else (including their appointing shareholder) or to cause detriment to the company. The obligation attaches to information obtained because a person is or was a director and continues after the director is no longer in office.

A director also owes a duty of confidentiality to the company. Ultimately, this duty of confidentiality overrides any obligation that a nominee director might otherwise owe to the major shareholder who appointed them to the board.

A nominee director must not disclose confidential information that they have obtained in their capacity as a nominee director to their appointer, unless there is a provision in the company’s constitution or in an agreement between the company and the appointing shareholder to the contrary, board consent or other special circumstances. However, there are a variety of ways to handle these obligations including formal protocols, and provisions in shareholder agreements.
Delegation

Power to delegate

A non-executive director is not expected to be involved in the day-to-day management of the company. The law recognises that all directors can delegate some of their powers and responsibilities to the company’s executive officers to manage on their behalf, with the exception of some non-delegable responsibilities (see ‘Non-delegable responsibilities’ section below). The Corporations Act also permits directors to delegate any of their powers to a committee of the board, another director, an employee of the company or any other person (unless the company’s constitution provides otherwise).

Non-delegable responsibilities

Australian common law, legislation and regulatory standards have also had the effect of mandating that certain responsibilities of directors cannot be delegated and must be fulfilled by directors themselves.

In order to discharge their duties all directors must:

- become familiar with the fundamentals of the business or businesses of the company;
- keep informed about the company’s activities;
- monitor, generally, the company’s affairs and policies by way of regular attendance at board meetings;
- maintain familiarity with the financial status of the company, including review of the company’s financial statements and board papers and to make further inquiries where appropriate; and
- have a reasonably informed opinion of the company’s financial capacity.

Where a particular responsibility is expressly imposed as a ‘director responsibility’ under the Corporations Act, it must remain in the board’s domain and delegations cannot remove liability. While steps that will assist in meeting the responsibility can be delegated to management, the ultimate responsibility and oversight cannot be shifted from the board. For example, the Corporations Act imposes a responsibility on the directors to approve and adopt the company’s financial statements.
Higher standard for executive directors

Both non-executive and executive directors have legal duties, responsibilities and potential liabilities. In practice, executive directors are held to a higher standard by virtue of their executive role, even though the wording of the directors' duties are the same. A court will apply an objective standard when considering the conduct of executive officers and executive directors and will consider the role and expected expertise of persons in the same recognised calling or office. It is important that executive directors consider issues raised in board and committee meetings through the ‘director lens’, as well as the ‘management lens’ (which may be slightly different).

Shareholder rights

Shareholders do not have the right to manage the affairs of the company. The Constitution typically vests all powers of management in the board and authorises the board to delegate those powers to one or more executives. While the board retains ultimate responsibility for the strategy and performance of the company, the day-to-day operation of the company is typically conducted by, or under the supervision of, the chief executive officer as directed by the board.

Of course, the primary right of shareholders is to elect or remove the directors. A shareholder or shareholders holding more than 5% of the voting shares can requisition that a shareholders meeting be held or, at their own cost, can convene a shareholders meeting to consider any resolution validly within the power of shareholders (for example, to remove a director, amend the Constitution or resolve to wind the company up). 100 shareholders together or any one or more shareholders holding more than 5% of the voting shares can also requisition that a resolution be put to the next general meeting convened by the board (more than 2 months after the requisition). General meetings of the company provide an opportunity for shareholders to engage with management and the board. Further information about general meetings is set out below.

Shareholders do not have a right to demand access to information under the Corporations Act. Shareholders may apply to the court for an order to inspect the books of the company. Shareholders have limited rights at common law to inspect the books of a company unless that inspection is necessary with reference to some specific dispute or question and it is only then granted to such an extent as may be necessary for that dispute or question.

Major shareholders by virtue of the size of their shareholding are often able to engage further with management and the board. By way of example, major shareholders often seek to appoint directors to the board of a company to effectively act as their spokesperson and to represent and protect their interests in the company.
General meetings

A public company must hold an annual general meeting (AGM) at least once every calendar year within 5 months after the end of its financial year. Proprietary companies must hold such meetings if they are required by their constitution. Meetings involving shareholders are subject to rules (generally set out in the company’s constitution) on the giving of notice and the time and place where the meeting can be held.

A shareholders’ meeting may be called:

- at any director’s own initiative; or
- at the request of shareholders holding at least 5% of the voting shares.

The court may also call a meeting if it is impractical to call one in any other way.

There are two types of resolutions that can be passed at a shareholders’ meeting. Ordinary resolutions require a simple majority to succeed. However, a special resolution must be passed by at least 75% of the votes cast by shareholders entitled to vote on the resolution. The Corporations Act requires that certain decisions are only made by special resolution. Where this is the case, there are additional notice requirements. The company’s constitution may also set out certain requirements relating to the meeting of shareholders or the voting requirements in respect of certain resolutions.

Additional guidance for ASX listed companies

The Australian Securities Exchange (ASX) Corporate Governance Council Principles and Recommendations (ASX Principles) set out recommended corporate governance practices for ASX listed entities that are likely to achieve good governance outcomes and meet the reasonable expectations of most investors in most situations.

The ASX Principles are in general not formally binding but any departure from them must be disclosed and explained by the Company in its annual reporting. The ASX Principles regulate (amongst other matters):

- Board composition and director independence; and
- Board Committees, Charters and Corporate Codes of Conduct.
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DOING BUSINESS IN AUSTRALIA

ACQUISITIONS AND DISPOSALS OF BUSINESS
Chapter 5

Acquisitions and Disposals of Business

There are a number of ways in which a foreign investor can seek to acquire an Australian business with the best approach turning on a number of factors including:

- whether the foreign investor wishes to acquire just the business assets of the company or the company itself;
- the type of company that is being acquired—that is, whether it is a public or a private company;
- the regulatory approvals that may be required; and
- the tax and accounting treatment of the acquisition (see Chapter 11 of this publication, ‘Taxation, stamp duty and customs duty’).

Share acquisitions

Private treaty

For Australian companies with less than 50 shareholders, it is possible to effect an acquisition by way of private agreement or treaty between the selling shareholders and the purchaser. This is usually in a share sale agreement which records the shares in the target being sold, the price to be paid and the conditions of sale. The document will also typically describe the basis of setting the purchase price, warranties and indemnities in favour of the purchaser, pre-completion conditions and restrictive covenants.

Takeovers

In general terms, a takeover involves the acquisition by one company, the bidder, of a sufficient number of shares in another company, the target, for the bidder to obtain control of the operations, assets and finances of the target.
The rules relating to takeovers in the *Corporations Act 2001* (Cth) (*Corporations Act*) apply to acquisitions of Australian incorporated companies which are listed on the Australian Securities Exchange (*ASX*) or have more than 50 shareholders.

The general rule is that a person must not acquire a relevant interest in issued voting shares in a company (by being the holder of such shares or having the power to control the voting or disposal of such shares) if that acquisition results in any person’s voting power in that company increasing:

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

unless the acquisition occurs in certain specified circumstances (including where a takeover bid is made).

Takeover bids can be either off-market or on-market, although off-market bids are by far the most common form. An off-market bid takes the form of an offer contained in a bidder’s statement sent to shareholders. On-market bids are effected by a broker through the *ASX*.

The *Corporations Act* imposes strict timing and procedural requirements for takeover bids and there are restrictions on dealing in the target’s shares during the bid period (for example, the bidder must not dispose of securities). The restrictions also apply to transactions before a bid is announced (for example, the consideration offered under a takeover must equal or exceed the maximum consideration that the bidder or its associate agreed to pay for target shares during the four months prior to the bid).

To undertake a takeover bid, the bidder must prepare a disclosure statement called a ‘bidder’s statement’, which informs the target’s directors and shareholders of the terms of the bid and relevant background information. Ideally, a bidder should be prepared to lodge the bidder’s statement very shortly after the bid is announced.

The target must formally respond to a takeover bid by preparing a ‘target’s statement’, which includes the recommendation of the target’s directors and other information relevant to whether shareholders should accept the bid.

External factors, such as share movements on the stock exchange during the bid process and public perceptions as to the advantages and disadvantages of the bid, may affect the outcome of the bid.
The Corporations Act contains procedures to allow a bidder to compulsorily acquire the remaining securities during or at the end of the offer period provided that certain thresholds (generally 90%) have been met.

The timetable for a takeover will be driven by various factors, including the respective strategies of the target and bidder and whether any regulatory approvals are required (e.g. the Foreign Investment Review Board or the Australian Competition and Consumer Commission). In FY2018, the median timeline for a takeover from announcement to compulsory acquisition date was 105 days.

Disputes relating to takeover bids that occur during the bid period are handled by the Takeovers Panel. For more details about the Takeovers Panel, see Chapter 2 of this publication, ‘Corporate regulators’.

Further information on takeovers can be found in The Herbert Smith Freehills Guide to Takeovers in Australia.

**Schemes of arrangement**

A scheme of arrangement is a statutory contract between the target company and its shareholders (and in some cases, option holders and creditors) to reconstruct the company’s share capital, assets or liabilities.

A scheme can be used to acquire a target company either by transferring all shares in the target to the bidder or cancelling all shares in the target except those held by the bidder.

Once the scheme is approved by the target’s shareholders in a general meeting and approved by the court, it is binding on all target shareholders. Schemes are highly regulated by the Corporations Act. To undertake a scheme, the target must prepare and send to its shareholders a ‘scheme booklet’, containing all information material to the shareholders’ decision whether or not to approve the scheme. The level of disclosure is broadly equivalent to disclosures made in a bidder’s and a target’s statement for a takeover bid.

In addition to strategy and necessary regulatory approvals, the scheme timetable may be impacted by the availability of court hearing dates. In FY2018, the median timeline for a scheme from announcement to implementation date was 116 days.

A scheme cannot be effected without the target’s cooperation. The target is required to produce the scheme booklet and convene the necessary meetings. For this reason, schemes are only used for friendly transactions.
Schemes have been used with increasing frequency in recent years. Reasons for this include:

- the two approval thresholds for a scheme—a majority of shareholders holding at least 75% of the votes voting in favour at a shareholders meeting—often mean it is easier to acquire 100% of a company under a scheme than under the 90% compulsory acquisition threshold applying to takeovers;

- there is greater certainty in the outcome of a scheme of arrangement given that the offer is either accepted or rejected in its entirety and the timetable is generally more certain; and

- there may be greater flexibility in a scheme of arrangement, such that different forms of consideration and treatment of shareholders are permitted.

Further information on schemes of arrangement can be found in *The Herbert Smith Freehills Guide to Schemes of Arrangement in Australia*.

**Business asset acquisitions**

As an alternative to buying the shares in a company, a foreign investor may acquire only the business assets of a company. Such an acquisition will usually be documented in a business sale agreement which will record what assets are being sold, the price to be paid and the conditions of sale. Similar to a share sale agreement, the business sale agreement will also typically describe the basis of setting the purchase price, warranties and indemnities in favour of the purchaser, pre-completion conditions and restrictive covenants.

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**Key contacts**
DOING BUSINESS IN AUSTRALIA

REGULATION OF FINANCIAL SERVICES
Chapter 6

Regulation of Financial Services

Application of Australian law to the provision of financial services is a highly technical subject and any particular proposal needs to be considered on its merits.

Banking business

An entity that carries on 'banking business' in Australia must be an authorised deposit-taking institution (ADI) supervised by the Australian Prudential Regulation Authority (APRA). For the purposes of the Banking Act 1966 (Cth) (as amended), an entity carries on banking business if it:

- takes deposits; and
- makes loans and advances.

An entity regulated as an ADI is subject to comprehensive supervision by APRA on a range of matters including prudential conduct, capital adequacy, governance and outsourcing. The effect of these policies is to place material boundaries on the conduct of ADIs.

Some particular aspects of banking business are also subject to regulation by the Reserve Bank of Australia (RBA), the Australian Securities and Investments Commission (ASIC) and the Australian Transaction Reports and Analysis Centre (AUSTRAC).

A foreign bank wishing to establish in Australia could seek to become an ADI by creating a new subsidiary that is subject to the supervision of APRA. Alternatively, a foreign bank could apply for registration as a foreign ADI. If this type of approval is granted, the foreign ADI is supervised by the relevant regulator in its own jurisdiction. Typically, however, there will be constraints on its operations which are imposed by APRA. These are likely to include:

- a minimum initial deposit amount (of, say, $500,000) which may be accepted by the foreign ADI from an Australian resident;
• disclosure to customers (and any other third parties) of the fact that the foreign ADI is subject to prudential supervision in another place and not by APRA; and

• a requirement to maintain liquid capital within the Australian branch of the foreign ADI sufficient to meet liabilities which are or may become payable within the next 30 days.

Another approach open to a foreign bank is to establish a representative office in Australia. This may enable it to maintain a presence so that it can receive enquiries about services which it provides offshore. A representative office does not carry on business in Australia.

Use of the term 'bank' requires approval from APRA and is usually conditional.

Banks have authority to deal in foreign currencies, except in certain transactions involving foreign governments and agencies.

**Payment systems**

As a primary concern, regulation of payment systems in Australia is directed at parties which hold value on behalf of customers. Under the *Payment Systems (Regulation) Act 1998* (Cth), an entity that participates in a ‘designated payment system’ and which holds value for a customer must be an ADI or a purchased payment facility provider approved by APRA. For these purposes designated payment systems include, for example, VISA, MasterCard and American Express, as well as Australian domestic clearing and settlement services such as EFTPOS.

There are some exceptions to this requirement, including storing value which can be used to pay no more than 50 persons, or storing value that does not exceed A$10 million. This provides some relief for smaller businesses during a start-up phase.

In practice, some providers of payment systems enter into an alliance arrangement with an ADI so that under the alliance structure, value is stored with the ADI for the benefit of the provider's customers.

Australia also has an e-Payments Code, a voluntary code of practice which regulates electronic payments (including ATM, EFTPOS, debit and credit card transactions, online payments, internet and mobile banking and BPAY). Banks, credit unions, building societies and other providers of electronic payment facilities to consumers may elect to subscribe to this Code. Subscribers must warrant that they will comply with the Code in the terms and conditions they give consumers, and consumers can complain about a breach of the Code to the subscriber.

In general, the Code:
- requires subscribers to give consumers clear and unambiguous terms and conditions, information about changes to terms and conditions (such as fee increases), receipts and statements;

- sets out the rules for determining who pays for unauthorised transactions; and

- establishes a regime for recovering mistaken internet payments.

Although not a strict legal requirement, ASIC expects that an Australian Financial Services Licence (AFSL) holder will comply with the e-Payments code as a matter of good licensing practice, if that code is relevant to any of those products.

**Other financial services regulations**

**Chapter 7 regulation and the Australian Financial Services Licence Regime**

Some products and services of financial services providers (including banks and other financial institutions) are subject to regulation under the financial services provisions of Chapter 7 of the Corporations Act. Chapter 7 applies to a financial services provider that targets customers located in Australia, even if that financial services provider has no place of business in Australia.

Chapter 7 of the Corporations Act regulates the financial services industry in several ways:

- Conduct in relation to a broad range of financial products is regulated, including securities (such as shares and debentures; see Chapter 8 of this publication ‘Fundraising’), derivatives, foreign exchange contracts, general and life insurance products, interests in managed investment schemes, deposit accounts, superannuation interests and non-cash payment facilities such as smart cards, cheques, travellers cheques and certain electronic payment facilities and margin lending facilities. Other forms of credit products are specifically excluded from the financial services regime.

- Providers of financial services are subject to a single licensing regime. This includes banks involved in issuing, dealing or giving advice in relation to financial products.

- Providers of financial services face consumer protection and disclosure obligations in relation to certain activities connected with financial services and products.

Generally speaking, persons issuing regulated financial products to retail clients face more extensive initial and ongoing disclosure obligations than those dealing just with wholesale
clients. Entities should also consider consumers protection provisions under the Australian Securities and Investments Commission Act 2001 (Cth) and the Australian Consumer Law (see Chapter 15 of this publication, 'Consumer protection and product liability') as well as data privacy laws (see Chapter 22 of this publication, 'Privacy').

There are some exceptions to the licensing regime where financial products are exempted under regulations or Class Orders.

**Financial Sector (Collection Of Data) Act**

Under the *Financial Sector (Collection of Data) Act 2001* (Cth), an entity which carries on business in Australia and has assets from the provision of finance must register with APRA if the sum of its assets from the provision of finance in Australia exceeds $50million.

A registered entity has an obligation to report monthly to APRA. Reporting obligations include relevant assets of related companies (whether or not themselves registered) which would not otherwise be reported. In practice, APRA usually requires only quarterly reporting until the assets of a registered entity from the provision of finance exceed $250 million.

The purpose of the Act is to enable APRA to collect data about the level of indebtedness in Australia. This informs monetary policy set by the Reserve Bank of Australia and enables the Australian Bureau of Statistics to publish accurate information about Australia’s indebtedness, for the purposes of ensuring transparency within the market for the benefit of investors.

Since early 2018, under the *Banking Act 1966* (Cth), APRA has possessed power to impose prudential standards on entities that are registered financial corporations under the *Financial Sector (Collection of Data) Act 2001* (Cth). To date APRA has not exercised this power, and its Chairman has said that for the time being it does not intend to so.

**Anti-Money Laundering and Counter-Terrorism Financing Act 2006**

An entity providing credit or financial services will almost certainly be providing a 'designated service' for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (*AML/CTF Act*). The AML/CTF Act was introduced to meet Australia’s international treaty obligations established by the Financial Action Task Force (*FATF*). Its broader objectives include detecting, deterring and disrupting money-laundering and terrorism financing (*ML/TF*) activity and other serious financial crimes.

If an entity provides designated services for the purposes of the AML/CTF Act it will be considered a 'reporting entity' and become subject to regulation by AUSTRAC. There are numerous consequences to this, including that the reporting entity must:
• enrol or register with AUSTRAC;

• carry out an assessment of the ML/TF risks in its business having regard to matters such as customer profile, jurisdictions affected by the financial service, and specific product/channel risk;

• establish, maintain and adhere to an effective AML/CTF program which is approved and overseen at Board level and is designed to identify, mitigate and manage those ML/TF risks by reference to a range of prescribed matters; and

• adhere to various obligations including in relation to:
  
  ◦ initial customer identification and verification;
  
  ◦ monitoring transactions to detect unusual activity that may be suggestive of ML/TF activity or other financial crime;
  
  ◦ reporting certain matters to AUSTRAC (including certain suspicious activity, threshold cash and e-currency transactions, international transfers, and annual compliance reports); and
  
  ◦ additional due diligence regarding customers, employees and some third parties.

AUSTRAC is an active regulator which enforces the legislation. The legislation presently prescribes a civil penalty of $21 million for each breach of the Act.

**The Financial Transaction Reports Act**

The *Financial Transaction Reports Act 1988* (Cth) operates alongside the AML/CTF Act and imposes a number of obligations on cash dealers, including an obligation to report suspect transactions, cash transactions of A$10,000 or more or the foreign currency equivalent, and international funds transfer instructions to AUSTRAC. For these purposes a cash dealer is widely defined, and is not limited to parties which are in fact dealing with currency. For example, any AFSL holder is a cash dealer. It also requires the verification of the identity of persons who are signatories to accounts, and prohibits accounts being opened or operated in a false name.

**Consumer credit regulation**

Generally speaking, an Australian credit licence will be required for a business that provides
credit to individuals who are ordinarily resident in Australia where the credit is provided for:

1. personal domestic or household purposes; or

2. investment in or improvement of residential real estate.

This type of credit is subject to the National Credit Code (contained in the National Consumer Credit Protection Act 2009 (Cth)) (NCC), and the credit provider:

1. must carry out responsible lending obligations; and

2. is subject to a range of policy expectations of the regulator, the Australian Securities and Investments Commission (ASIC).

Under the NCC there are requirements of a highly prescriptive character relating to the form and content of loan and security documentation, as well as statutory disclosures and notices which must be made. The NCC specifies mechanisms for enforcement of loans, prescribes a process for dealing with hardship variations of contract requested by a debtor, provides relief against terms of an arrangement which may be characterised as "unjust", and also provides for disputes to be dealt with by an approved external dispute resolution scheme which has jurisdiction to make decisions that are binding on the credit provider. Presently the approved external dispute resolutions schemes are the Financial Ombudsman Service and the Credit and Insurance Ombudsman but policymakers are proposing the merger of these schemes.

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Chapter 7
Debt Financing in Australia

Australia has a sophisticated market for debt financing, which offers financing products in connection with a broad range of businesses, assets and transactions, including general corporate financing, acquisition financing, project financing, leveraged financing, real estate financing, securitisation and structured financing and debt capital markets.

The debt finance market in Australia is generally open to international participants, whether as borrowers or lenders. The well-developed legal system in Australia provides borrowers and lenders with a high degree of certainty in relation to the legal treatment of various aspects of debt financing arrangements. This gives local and international debt market participants confidence to be able to enter into debt financing arrangements that will be legally enforceable against the parties to them.

Lending by foreign entities or to foreign entities

Under Australian law, there are generally no restrictions or limitations on foreign lenders making loans to Australian companies or Australian companies making loans to foreign entities. However, we note the points set out in:

- Chapter 11 of this publication, ‘Taxation, Stamp Duty and Custom Duty’, in relation to interest payable from Australian companies to foreign entities; and

- Chapter 10 of this publication, ‘Foreign Investment Regulation’, in relation to the authorisations and licensing and registration requirements in relation to foreign banks and financial institutions.

 Guarantees

Unless an Australian company is restricted from doing so in its constitution, it can give a guarantee for the debt of a borrower, whether the borrower is incorporated in Australia or in a different country.
However, there are certain laws in Australia that may affect the enforceability of a guarantee. A guarantee provided by an Australian company may be unenforceable if:

- the company does not have the power, under its constituent document, to provide the guarantee in the relevant circumstances; or

- the directors do not exercise their duty to act in good faith for the benefit of the company and for a proper purpose in giving the guarantee.

In determining whether there is sufficient benefit, all relevant facts and circumstances of the transaction need to be considered by the directors, including the benefits and detriments to the guarantor in giving the guarantee, and the respective benefits to the other parties involved in the transaction. The issue is particularly relevant where a company provides a guarantee in relation to the obligations of another member of its corporate family. In determining whether there is sufficient benefit, the directors need to give primary consideration to the benefits and detriments to the guarantor in giving the guarantee, in addition to the benefits to the other members of the corporate family.

Whether a guarantee entered into in breach of directors’ duties can be avoided against a party relying on the guarantee depends on certain factors, including whether the party knew of or suspected the breach. Under Australian law, a person is entitled to assume that the directors have properly performed their duties to the company unless that person knows or suspects that they have not done so.

In addition, in an insolvency of an Australian company, certain transactions may be set aside by a court, on the application of a liquidator of the company. A liquidator has the power to make such an application in respect of transactions entered into in the 6 month period prior to the application to wind the company up (or the commencement of the administration of the company (where applicable)) that constitute ‘unfair preferences’ or ‘uncommercial transactions’ and the company was insolvent at the time or became insolvent because of the transaction (or an act or omission made for the purpose of giving effect to the transaction).

**Taking security**

**Security over land**

Security over land is typically taken by way of a registered mortgage over the specific piece of land. Land may also be charged under a general security agreement (e.g. over all property which the grantor owns from time to time). A failure to register a security interest in land will
not generally affect the validity of the security in an insolvency of the grantor. However, if that security interest is not properly registered in accordance with the applicable statutory requirements in relation to the registration of security interests in land in the relevant state or territory, it will generally not have the benefit of priority over subsequent registered security interests in the land.

In most Australian states, land dealings are now registered on an online property exchange network known as PEXA, eliminating paper-based registrations and certificates of title. This process was in transition at the time of writing.

**Security over property other than land**

The grant, validity and priority of security over most classes of property other than land are subject to the *Personal Property Securities Act 2009* (Cth) (*PPSA*) and its related legislation. The PPSA applies to ‘personal property’, which is defined broadly to include any kind of property other than land (subject to certain exceptions). Personal property therefore includes, among other things, tangible and intangible property, financial property, intermediated securities and intellectual property.

Where a lender is taking security over all of the assets of a grantor, a general security deed will generally be entered into between the parties pursuant to which the grantor will grant security in all its present and after-acquired property. If the grantor is granting security only over only a specific asset or goods (e.g. the shares in a company), a specific security deed will be entered into.

**Registration of security interests in personal property**

Security granted over most classes of property other than land is required to be perfected under the PPSA in order to protect its validity and priority as against third parties and its validity in an insolvency of the grantor. Except for certain types of property in relation to which security may be perfected through prescribed methods of possession or control, perfection must generally be by registration on the Personal Property Securities Register (*PPSR*). There is no prescribed time period for the registration, however (subject to certain exceptions):

- priority will generally be determined by reference to the order in which security interests have been perfected, so a delay in registration can adversely affect the secured party’s priority; and

- if a security interest is not registered within 20 business days after the security agreement which provides for it is entered into, it will generally be void in an insolvency of the grantor
It should be noted that registration on the PPSR provides no assurances of priority – there may be prior security interests perfected through some means other than registration (e.g. by possession or control or under temporary perfection rules). It is also possible that later security interests may also obtain priority by being perfected by control or because they benefit from special priority rules relating to particular kinds of security interests such as purchase money security interests.

Security granted over other certain other specific classes of assets, such as minerals and resource interests, requires the consent of, and/or registration with, certain other government bodies.

**Enforcing security interests**

A secured party’s ability to enforce a security interest will generally be governed by the security agreement pursuant to which that security was created. Therefore, when a security interest is documented, the parties should negotiate the time when the security become enforceable (e.g. on the occurrence of an event of default) and any procedural requirements applicable to the enforcement of the security interest (e.g. notice of enforcement).

If a secured party is a foreign government or a related entity of a foreign government, the enforcement of security will constitute a ‘direct investment’ to which the requirements under the Australian Foreign Investment Policy may apply (see section 10.2 in Chapter 10 of this publication, ‘Foreign Government Investors’).

Under the PPSA, in enforcing a security interest, the secured party must act honestly and in a commercially reasonable manner.

If an administrator is appointed to a grantor, a statutory moratorium period will apply to a secured party taking enforcement action against the grantor’s security, subject to certain exceptions. The key exception is where a secured party has security over the whole, or substantially the whole, of the grantor’s property. In those circumstances, the secured party may enforce its security during the ‘decision period’, which is the period expiring on the 13th business day after:

- the day that notice of the appointment of the administrator is given to the secured party; or
- otherwise, the day that the administration begins.
A secured party will generally take steps to enforce its security by appointing a receiver or a receiver and manager in respect of the assets the subject of the security. The receiver or receiver and manager would then take steps to realise the assets in order to repay the debt owing to the secured party (e.g. by collecting receivables, seizing and disposing of assets or exercising contractual rights of the grantor under its contractual arrangements with counterparties).

**Stamp duty**

Under current law, no stamp duty applies to security granted in respect of assets located in any Australian state or territory. However, if any of the loan or security documents contain a declaration of trust, stamp duty may be imposed on that declaration of trust. The duty is generally a fixed amount (currently no more than A$500) provided that the property over which the trust is declared is only of nominal value or is not dutiable property. If a trust is declared over valuable dutiable property, *ad valorem* rates of duty will apply.

**Unfair preferences and uncommercial transactions**

The comments in section 7.2 above in relation to unfair preferences and uncommercial transactions would also apply to an Australian company granting security.

**Restriction on financial assistance**

Part 2J.3 of the Corporations Act precludes a company from providing financial assistance to a person who acquires shares in the company or any of its holding companies except in limited circumstances.

Financial assistance is not defined but is interpreted broadly and will include the giving of a guarantee or granting of security by a company to support debt used to acquire shares in that company or its direct or indirect holding company. A company may financially assist a person to acquire share in the company or any direct or indirect holding company only if:

- the assistance does not materially prejudice the interests of the company, its shareholders or the company’s ability to pay its creditors;

- the company obtains shareholder approval in accordance with the prescribed whitewash procedure; or

- the assistance is exempted under section 260C of the Corporations Act.
Lenders are often only prepared to rely on the whitewash procedure. The whitewash procedure includes a 14 day waiting period following lodgement of a notice with the Australian Securities and Investments Commission (ASIC) and a requirement that approval also be obtained from the shareholders of any Australian listed holding company or the ultimate Australian-incorporated holding company of the company giving the assistance. Assuming that shareholders’ consent to a short notice period can be obtained (which is usually the case where the relevant companies are not listed), the process takes a minimum of 15 days from the date of lodgement of the first notice with ASIC.

Most commonly in acquisition financing, that procedure takes place following the acquisition, and it is a condition subsequent that it is completed and the target companies accede to the financing as guarantors or security providers within a specified time period.

Contravention of the prohibition does not affect the validity of the financial assistance or any related contract or transaction and the company is not guilty of an offence. However, persons (which could include a lender) involved in a breach of the prohibition may be liable for fines of up to A$200,000 and/or (for individuals whose involvement is dishonest) imprisonment for up to five years. Civil penalties may also be imposed requiring persons involved in a breach to compensate the company concerned for any loss it suffers as a result of the breach.

**Subordination**

Under Australian law it is possible to subordinate debts such that one lender (the junior lender) may agree that a second lender (the senior lender) be preferred over the junior lender for repayment of a debt, provided that the subordination does not disadvantage any other creditor of the debtor that is not a party to the subordination arrangements.

In the Australian market, there are two principal contractual methods used to document such an arrangement, which will usually be documented in a tripartite agreement between the senior lender, the junior lender and the debtor:

- **contingent debt method:** whereby the lender’s right to have its debt repaid is contingent upon the senior lender’s debt having first been repaid (to a specified extent); or

- **turnover agreement / subordination trust method(s):** whereby the junior lender agrees to pay the senior lender and/or to hold on trust for the senior lender, any amounts paid by the debtor to the junior lender, until the senior lender has been repaid (to a specified extent). Senior lenders generally prefer for the junior lenders to agree to hold such amounts on trust for the senior lender (rather than to merely pay the senior lender) to protect these funds against the insolvency of the junior lender.
The second method may give rise to a security interest over the junior creditor’s claim in favour of the senior lender for the purpose of the PPSA and require registration on the PPSR.

Subordination may also be achieved by way of structural subordination, whereby a lender to a parent company in a group of companies is structurally subordinated to lenders to that parent company’s subsidiaries, who have direct claims against the assets of the subsidiaries.

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DOING BUSINESS IN AUSTRALIA

FUNDRAISING
Chapter 8

Fundraising

One of the ways in which an Australian business or a foreign business can raise funds within Australia is by issuing securities (for example, shares or debentures) or financial products (for example, interests in a unit trust or collective investment scheme or other managed investment scheme product).

Fundraising activity within Australia is regulated by the Corporations Act 2001 (Cth) (Corporations Act) which contains two separate fundraising regimes which prescribe disclosure and process:

- Chapter 6D of the Corporations Act applies to securities; and
- Part 7.9 of Chapter 7 of the Corporations Act applies to financial products other than securities.

Overview

Public companies can raise funds from the general public in Australia by issuing securities by making the appropriate disclosure or under an exemption from disclosure.

Proprietary companies are limited to raising funds from their shareholders and employees, and from the general public only if the fundraising is exempt from the requirement for a disclosure document or through equity-based crowd-sourced funding.

For a description of public and proprietary companies, see Chapter 3 of this publication, ‘Business structures’.

Since September 2017, Australia has had an equity-based crowd-sourced funding (CSF) regime which aims to facilitate access to capital for small to medium sized unlisted Australian public companies (and since October 2018, Australian proprietary companies) by reducing the regulatory and disclosure requirements for making public offers of shares, while seeking to
ensuring adequate protections for retail investors. The CSF regime allows Australian eligible companies, those with less than A$25 million of consolidated gross assets and less than $A25 million of annual revenue, to raise up to A$5 million in a 12 month period. The CSF regime limits to A$10,000 the amount that an individual investor may invest in a single company.

Managed investment schemes (for example, unit trusts and some other collective investment schemes) can raise funds from the general public in Australia by issuing units or other interests by making the appropriate disclosure or under an exemption from disclosure. The trustee of any such scheme is required to hold an Australian Financial Services Licence issued under the Corporations Act authorising it to be a ‘responsible entity’ of such scheme.

Where interests in managed investment schemes are offered to the public in Australia, the process of establishing the investment structure, the ongoing administration and management of the structure, and the offer of financial products are all regulated by the Corporations Act, in particular the requirements of the Australian Financial Services Licence regime and the obligations of such a licensee. Tax considerations are an important element in determining whether, and how, to establish such structures. The establishment of such structures and the offering of such financial products require experienced professional legal (and other) support and advice.

Securities and financial products can be offered into Australia by foreign entities either in accordance with the applicable Australian disclosure requirements or under exemptions from disclosure, for example, to wholesale or professional investors. The marketing of offers of securities or financial products into Australia will also be governed by elements of the Australian Financial Services Licence regime. Foreign entities considering making an offer into Australia will require experienced professional legal (and other) support and advice.

Shares, debentures and interests in managed investment schemes can be quoted on the Australian Securities Exchange (ASX).

**Disclosure requirements**

Offers of securities to the general public in Australia must generally be made under a disclosure document, being a prospectus, offer information statement or profile statement lodged with the Australian Securities and Investments Commission (ASIC). The requirements for such documents are set out in Chapter 6D of the Corporations Act.

Offers of financial products, other than securities, to the general public in Australia must generally be made under a product disclosure statement (PDS), which may be required to be lodged with ASIC. The requirements for a PDS are set out in Part 7.9 of the Corporations Act.
Offers of new ASX listed shares and financial products to existing holders may be able to be made without a disclosure document or PDS provided that the offeror publicly confirms to the ASX its compliance with its continuous disclosure and financial reporting obligations and that there is no other material information necessary for investors to make an informed investment decision in relation to the offer.

The legal provisions and regulatory practice governing the form and content of disclosure documents and other aspects of the fundraising process are detailed and stringent, with specific liabilities (and in some cases, defences) for defective disclosure. These provisions require an offeror to provide information to prospective investors to enable those investors to make an informed decision about whether to invest. Such offers require experienced professional legal (and other) support and advice.

Offers of securities do not need to be made under a disclosure document if the offer is exempted from disclosure under the Corporations Act or ASIC provides relief from disclosure. The main offers of securities exempted from the requirement to provide a disclosure document include:

- personal offers accepted by less than 20 investors, which raise no more than A$2 million in aggregate in any rolling 12 month period;

- offers where the amount paid (or topped up) results in a total investment by a person of at least A$500,000 in the class of securities;

- offers to sophisticated investors (who have a certificate from a qualified accountant saying that the investor has net assets of at least A$2.5 million or gross income of at least A$250,000 per year for each of the last 2 financial years);

- offers to professional investors (such as superannuation funds, ASX listed entities, persons controlling gross assets of at least A$10 million or ASX listed entities or their related bodies corporate);

- offers to senior managers or certain affiliates of the offeror;

- offers to existing security holders through a dividend reinvestment plan or bonus security plan;

- offers of securities for no consideration; or

- offers made under an Australian takeover bid or scheme of arrangement.
There are some similar, but less extensive, exemptions in relation to the offer of some financial products.

**Listing on the Australian Securities Exchange (ASX)**

The primary role of the ASX is to provide and maintain a fair, efficient, well-informed and internationally competitive market to raise capital and for trading securities. These include the securities of domestic and foreign issuers, and the direct and indirect debt of public bodies.

To qualify for listing on the ASX, an entity must satisfy minimum standards of quality, size and operations and must attract sufficient investor interest. ASX applies either a minimum profits or assets test.

Before an entity can be listed on the ASX and its securities quoted, the entity must generally have lodged with ASIC and ASX a prospectus, PDS or, with ASX’s agreement, publicly released an information memorandum containing equivalent disclosure.

A company incorporated outside Australia may be listed on ASX subject to a number of conditions being satisfied including:

- being registered under the Corporations Act as a foreign company carrying on business in Australia;

- agreeing to comply with the Listing Rules of the ASX (although where the foreign entity is already listed on a foreign exchange and has sufficient scale, it may be exempt from compliance with many of the ASX’s rules if it can meet the ASX’s Foreign Exempt Listing conditions. There is a specific category of Foreign Exempt Listing for New Zealand Stock Exchange listed entities); and

- establishing and agreeing to maintain an Australian share register, a register of depository receipts, or appropriate facilities for the registration of transfers.

For information about the regulatory functions of ASIC and the ASX, see Chapter 2 of this publication, ‘Corporate regulators’.

For more information about undertaking an initial public offering of securities in Australia, see Herbert Smith Freehills’ Initial Public Offerings in Australia legal guide.

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DOING BUSINESS IN AUSTRALIA

RESTRUCTURING AND INSOLVENCY
Australia has a comprehensive legal regime relating to restructuring and insolvency. It is predominantly contained in the Corporations Act 2001 (Cth) (Corporations Act). The main restructuring and insolvency procedures in Australia are:

- administrations, including deeds of company arrangement (DOCA);
- schemes of arrangement;
- liquidations (also known as 'winding ups'); and
- receiverships.

Each of these are discussed below.

Australia's restructuring and insolvency procedures are generally considered 'creditor-friendly', focused on achieving the best return for creditors.

**Administration**

**Overview**

Administration is governed by Part 5.3A of the Corporations Act and is the most common form of corporate reorganisation. It involves the appointment of an external administrator and is designed to resolve a company's future direction. The administrator takes control of the company and its business with the objective of maximising the chances of the company or its business continuing in existence or, if that is not possible, to obtain a better return for the company's creditors and members. This may include reorganisation in the form of a DOCA.

**Appointment**

Administration commences on the day an administrator is appointed. The company can appoint
an administrator if its board resolves that the company is, or is likely to become, insolvent (i.e. if it is not able to pay its debts as and when they fall due). This is referred to as ‘voluntary administration’.

An administrator can also be appointed by a liquidator or provisional liquidator if he or she thinks that the company is, or is likely to become, insolvent, or a secured creditor who has an enforceable security interest in the whole, or substantially the whole, of a company’s property. However, secured creditors usually prefer to appoint a receiver.

**Supervision and control**

The administrator has control of the company’s business, property and affairs, and has broad powers to carry on, terminate or dispose of the business or property of the company (subject to certain exceptions).

Although the appointment of an administrator cannot be revoked, an administrator can be removed by the creditors or the court in certain circumstances.

**Stages and timing**

The two main stages of an administration are the first and second meetings of creditors. Two issues are determined at the first meeting: (i) whether the administrator should be replaced by another person; and (ii) whether a creditors’ committee should be appointed.

The company’s future direction is decided at the second meeting of creditors. The creditors will consider the administrator’s report and determine whether: (i) the company should execute a DOCA; (ii) the administration should end and control of the company be returned to the directors; or (iii) the company should be wound up.

**Moratorium**

A stay, referred to as a ‘moratorium’, applies throughout the duration of the administration which prevents, among other things, the winding-up of the company, secured parties enforcing security interests, lessors or third parties taking possession of leased or owned property, and court or enforcement proceedings against the company or its property.

There are exceptions to the moratorium including where creditors obtain the administrator’s consent, or leave of the court to enforce, or have taken steps to enforce the security before the administration’s commencement. A secured creditor with security over the whole, or substantially the whole, of the company’s property may also take enforcement action within the ‘decision period’ (13 business days from notice of the administrator’s appointment).
The stay does not commonly prevent counterparties from exercising contractual rights to terminate a contract, accelerate debt or make demands for payment, but this position is expected to change in 2018 when new legislation restricting the enforceability of ‘ipso facto’ clauses is anticipated to come into effect.

**Ipso facto stay**

Where a company enters administration there is a stay on contractual counterparties exercising contractual rights (including rights to terminate the contract) by reason of:

- the company having entered administration;
- the company’s financial position;
- a prescribed reason (none have yet been prescribed); or
- something that is in substance contrary to the above.

The *ipso facto* stay is not intended to restrict a counterparty from enforcing a right for any other reason, such as a breach involving non-payment or non-performance. The *ipso facto* stay does not apply to contracts entered into prior to 1 July 2018, and there are number of other exceptions, including for certain types of contracts and rights.

**Operation of the business**

The administrator has the power to operate the company's business. The company may continue to incur debts and obligations, and sell products and services in the ordinary course of business, with the administrator’s authorisation. The administrator is personally liable for debts and liabilities incurred in performing his or her functions and powers for: (i) services rendered; (ii) goods bought; (iii) property hired, used or occupied; and (iv) repayment of money borrowed (and related costs and interest). However, the administrator is entitled to be indemnified out of the company's property for debts and liabilities incurred in the performance of the administrator’s functions. This will generally take priority over unsecured creditors but not secured creditors.

**Business and asset sales**

The administrator has the power to dispose of the business and property of the company. The administrator must act reasonably in exercising that power. However, the administrator must not dispose of secured property, or property of which someone else is the owner or lessor,
unless: (i) the disposal is in the ordinary course of the company's business; (ii) the written consent of the secured party, owner or lessor has been obtained; or (iii) leave of the court has been granted. Proceeds of sale of secured property must be applied to any debts secured by the security interest over the assets sold. The purchaser will acquire the assets free of existing claims and security.

DOCA

Before the second meeting of creditors, any person may propose a reorganisation by way of a DOCA. The DOCA may recommend a variety of things to achieve a better return to creditors than would otherwise be available in a liquidation. The rights of secured creditors, owners and lessors will generally not be affected by a DOCA (subject to certain important exceptions).

The administrator will give its opinion as to whether a DOCA is in the creditors’ interests. The creditors will subsequently vote on whether the company should enter into the DOCA. If a majority of the creditors (by value and number) vote in favour of the resolution, the DOCA will be approved. It will subsequently be executed by the administrator. A DOCA will bind the company, its officers and members, the deed's administrators, and all creditors (subject to certain exceptions).

Schemes of arrangement

Schemes of arrangement in Australia may be creditors' schemes (i.e. schemes affecting the rights of creditors of a company) or members' schemes (i.e. schemes affecting the rights of members (shareholders) of a company). A creditors’ scheme is a court approved compromise or arrangement between a company and its creditors (or class thereof).

A scheme of arrangement is usually proposed by a company to its creditors. The process involves the following 3 main steps:

- an application is made to the court for an order to convene a meeting of creditors (or class thereof) to vote on the proposed compromise or arrangement. Notice must be given to ASIC, who must have a reasonable opportunity to consider the terms of the proposed compromise or arrangement and to make submissions to the court;

- the meeting of creditors is held at which creditors vote on the proposed compromise or arrangement; and

- if the creditors vote in favour of the proposed compromise or arrangement, the court then decides whether to approve the scheme.
To be approved, a majority in number and at least 75% by value of creditors present and voting must vote in favour of the scheme. The court may grant its approval of the scheme subject to any conditions it thinks fit. Once approved, the scheme takes effect in accordance with its terms.

Creditors’ schemes of arrangement are generally only used in respect of large financial restructurings as they are considered relatively lengthy and expensive processes.

There is an *ipso facto* stay that applies where a scheme of arrangement is proposed to avoid an insolvent liquidation of the company.

**Compulsory liquidation and voluntary liquidation**

Compulsory liquidations (where the court orders the winding up of the company) and voluntary liquidations (where the shareholders vote for the company to be liquidated) are governed by the Corporations Act and are commonly used in Australia. They involve the appointment of an external liquidator to the company. The objective of the liquidation is to collect the company's assets, realise them and distribute the proceeds of sale to creditors. The liquidator also has broad powers to investigate the company's affairs and challenge certain transactions entered into by the company.

**Initiation**

**Compulsory liquidation**

Compulsory liquidations are initiated by application to the court for an order that the company be wound up. The application may be made by a variety of persons including the company, its members and creditors. The court can make the order on a number of grounds. It is most commonly made on the basis the company is insolvent. The company is presumed to be insolvent if it fails to comply with a statutory demand.

**Voluntary liquidation**

Members of a company can resolve to wind up the company by way of a voluntary liquidation, at which point a liquidator is appointed. If a declaration of solvency is made by the directors, it will be a ‘members' voluntary liquidation, which is intended to be a solvent process. If no such declaration is made, or if a liquidator subsequently finds the company is in fact insolvent, it will be a creditors’ voluntary liquidation. Creditors of a company in administration may also appoint a liquidator at the second meeting of creditors, having resolved that the company be wound up. The administrator generally becomes the liquidator in that instance.
Supervision and control

The liquidator supervises and controls the liquidation. The court has little or no involvement, unless applications are made to, or the liquidator has been appointed by, the court. The court and the creditors may, in certain circumstances, remove and replace the liquidator.

Operation of the business

The business of the company is usually shut down before or upon commencement of the liquidation. However, the liquidator has the power to carry on the business of the company provided it is for the beneficial disposal or winding up of the business.

Business and asset sales

The liquidator will conduct a sale of the business and assets of the company with a view to benefiting the creditors. The liquidator is at liberty to choose the nature of the sale, and does not need creditor or court approval, but in doing so, the liquidator is required to exercise due care and diligence. Except in certain circumstances relating to the sale of secured property and payments statutorily preferred, sale proceeds form part of the assets of the company available for distribution to the company's creditors. If the liquidator sells secured property, the secured creditor will be entitled to be repaid from the proceeds of any sale in priority to other creditors. The liquidator does not have the power to sell assets free of security (unless in certain circumstances where the security has vested).

Receivership

Secured creditors may appoint external officeholders, known as 'receivers', to take possession of and sell the secured property to repay the debt secured by the security interest. A 'receiver and manager' has broad powers to manage the company’s business and will generally seek to sell it as a 'going concern'.

Receiverships are governed by Part 5.2 of the Corporations Act and the security agreement between the company and the secured party. The court also has the power to appoint receivers, but this rarely occurs in practice.

The court typically has little or no involvement in the receivership, although it has certain powers which it can exercise if necessary.

There is an *ipso facto* stay that applies where a receiver is appointed to the whole, or substantially the whole, of a company’s assets.
**Appointment**

The security agreement generally grants the secured party the right to appoint a receiver when the security becomes enforceable. This is generally following the occurrence of an 'event of default'. The appointment is made by way of deed, entered into between the secured party and the receiver, and the receiver usually requires an indemnity from the secured creditor.

**Operation of the business**

The receiver frequently operates the business of the company during the receivership if the receiver has been appointed over all the assets of the company.

**Business and asset sales**

The receiver has the power to sell the secured property over which they are appointed. The receiver must take reasonable care to sell the property at market value or, if the property does not have a market value, for the best price reasonably obtainable.

Proceeds of sale are applied according to the security agreement under which the receiver was appointed. The security agreement will normally provide for payment of the receiver's costs, expenses and remuneration first and then repayment of the debt secured by the security interest. Any surplus must be paid back to the company.

**Comparison with the U.S. Bankruptcy Code**

Whilst the insolvency laws in Australia and the U.S. have similar purposes, there are key differences between these regimes. Broadly speaking, Chapter 7 of the U.S. Bankruptcy Code (Chapter 7) is the equivalent to Australian liquidation. Certain features of administration and schemes of arrangement in Australia are analogous to Chapter 11 of the U.S. Bankruptcy Code (Chapter 11), however there are also significant distinctions.

Chapter 11 is intended to comprehensively deal with all creditors and other interest holders in a single process, which is intended to result in a plan of reorganisation. If approved, all secured debt will typically be treated under such plan and all unsecured debt and equity interests may be compromised. By contrast, a scheme of arrangement under Australian law would only deal with a specific class of debt.

Filing for relief under Chapter 7 or Chapter 11 provides a debtor with a broad moratorium, which stays an array of creditor actions. This moratorium has some similarities to the stay applicable during an administration in Australia. However, the stay under a liquidation in Australia is more limited than a Chapter 7 or Chapter 11 moratorium, and there is no stay
applicable to a scheme of arrangement under Australian law.

Under Chapter 11, a debtor and its management are permitted to continue operating the business and acting for the company (except in limited circumstances). Chapter 11 is a 'debtor in possession' regime. By contrast, the Australian regimes (except for a scheme of arrangement) all involve the appointment of an external administrator who takes control and management of the debtor company.

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FOREIGN INVESTMENT REGULATION

DOING BUSINESS IN AUSTRALIA
Chapter 10

Foreign Investment Regulation

The Australian government welcomes foreign investment that is consistent with Australia’s national interest and assesses proposals on a case-by-case basis. Assessments of foreign entities and persons acquiring assets in Australia are carried out under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and associated regulations.

Overview of the framework

The FATA gives the Australian Federal Treasurer (Treasurer) the power to prohibit a proposed acquisition by foreign persons of certain specified assets or securities in an Australian corporation (or a foreign corporation that holds relevant Australian assets or entities) which are contrary to the national interest (see description of national interests factors below). The Treasurer can also make divestment orders when such an investment has already been implemented without prior approval.

The Treasurer also has the power to approve proposals subject to conditions designed to ensure the proposal will not be contrary to the national interest, for example, by imposing conditions relating to payment of tax.

Outright rejections of foreign investment proposals into Australia have been very rare but it is relatively common for the Treasurer to impose conditions on approvals.

The Treasurer’s decision is made through consultation with the Foreign Investment Review Board (FIRB). The Australian Taxation Office (ATO) supports FIRB by administering foreign investment applications with respect to residential real estate.

In relation to sensitive infrastructure assets, the Critical Infrastructure Centre (CIC) is also relevant. The CIC monitors, and maintains a register of, ownership and operational arrangements in relation to critical infrastructure assets (in particular electricity, water, port and gas infrastructure). FIRB will engage closely with the CIC (particularly on national security issues) in relation to proposed foreign investment into critical infrastructure assets. In addition to ownership arrangements, the CIC will provide views on matters such as system stability, data
security, and operational arrangements.

When an application is required, it is a criminal offence to enter into an unconditional agreement for the acquisition or to proceed with the acquisition without prior approval from the Treasurer.

Australia’s foreign investment framework is complex and layered, with multiple thresholds and rules applying to different groups of investors and types of investments. There are also a myriad of exceptions which may be applicable in certain circumstances. Accordingly, careful consideration should be given to proposed investment on a case-by-case basis to determine if approval is required.

Approvals are valid for 12 months from the date of the decision. That is, the acquisition must be completed within 12 months.

**Who needs foreign investment approval?**

**All foreign persons**

Under the FATA, 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 individual not ordinarily resident in Australia, foreign corporation or foreign government (together with its associates) holds an equity interest of at least 20%;

- a corporation, trustee of a trust or general partner of a limited partnership in which two or more foreign persons (together with their associates) hold an aggregate equity interest of at least 40%; or

- a foreign government or foreign government investor (see further below).

At a basic level, the FATA requires that the Treasurer (acting through FIRB) be notified in advance of a proposed acquisition by a single foreign person (together with its associates) of 20% or more of the securities or votes (including potential votes or rights to securities pursuant to an option) of an Australian corporation (a 'substantial interest') with total assets or issued securities valued at more than A$266 million (a higher threshold of A$1,154 million applies to acquisitions by certain non-government investors from Chile, Japan, South Korea, the United States, China and New Zealand in non-sensitive sectors).
In addition, an investor seeking to make an investment which will result in a group of separate foreign persons (together with their respective associates) holding 40% or more of the securities or votes or rights to shares pursuant to an option) of an Australian corporation meeting the thresholds above may wish to notify the Treasurer in advance of the proposed acquisition as, while such an acquisition is not mandatorily notifiable, the Treasurer has the power to unwind the acquisition if determined to be against the national interests.

**Foreign government investors**

More stringent rules apply to investments by foreign government investors. The definition of a foreign government investor is very broad and can capture many commercial investors and private equity vehicles with upstream foreign government investors (even where such government investors are entirely passive).

At a high level, a foreign government investor includes foreign governments, their agencies (for example, state-owned enterprises and sovereign wealth funds) and entities in which:

- foreign governments, their agencies or associates (including other foreign government investors from the same country) hold an interest of 20% or more; or
- multiple foreign government investors collectively have an aggregate substantial interest of 40% or more.

In general, regardless of the monetary value of the investment, all direct investments (which is generally 10% but may be less depending on the circumstances) by a foreign government investor in an Australian entity requires approval. FIRB has a view that any chain of interests in corporate entities of 10% or more where a foreign government is at the top of the chain makes the bottom entity a foreign government investor.

Investors need to be aware that the interests of foreign government investors can be traced through ownership structures, such that an Australian subsidiary lower down in an ownership structure may be considered to be a foreign government investor for the purposes of FATA merely due to the presence of a foreign government investor higher up in the ownership structure. The current guidance indicates that FIRB will trace through substantial interests or direct interests (as applicable), regardless of whether the higher foreign government investor is in a position to effectively control that lower Australian subsidiary.

**Lower notification thresholds for certain assets**
The FATA also contains important provisions, which impose different thresholds and obligations, in respect of acquisitions of:

- Australian land (including mining and production tenements) and companies whose Australian land assets comprise more than 50% of the value of their total assets (noting that relevant thresholds differ for each type of land);

- agribusiness and companies whose agricultural land assets comprise more than 50% of the value of their total assets;

- businesses in sensitive sectors, which include media, telecommunications, transport, defence and military related industries, encryption and securities technologies and communication systems and the extraction of uranium and plutonium or the operation of nuclear facilities; and

- portfolio investments in the media sector of 5% or more (all foreign investors must obtain approval to make investments of at least 5% or more in an Australian media business, regardless of the value of the investment).

The National Interest Test

The Foreign Investment Policy outlines the following 'National Interest Considerations', which the Australian Government considers when assessing foreign investment proposals.

**National security**: the government considers the extent to which investments affect Australia’s ability to protect its strategic and security interests.

**Competition**: the government considers the impact of the proposed investment on diversity of ownership and competition within Australian industries and sectors. A particular consideration is whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service, either within Australia or in the relevant global industry. The Australian Competition and Consumer Commission (ACCC) examines competition issues in accordance with Australia’s competition policy regime. This examination is independent of Australia’s foreign investment regime.

**Other Australian Government policies (including tax)**: the government considers the impact of a foreign investment proposal on Australia’s tax revenues. Other policies such as environmental policy may be considered, and a proposed investment will be assessed according to its consistency with those policy objectives.
Impact on the economy and the community: the government considers the impact of the proposed investment on the general economy, including the impact of any plans to restructure an Australian enterprise following acquisition, the nature of the funding of the acquisition, and the level of Australian participation in the enterprise that will remain after the acquisition, as well as the interests of employees, creditors and other stakeholders.

Character of the investor: the government considers the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision, as well as the investor’s corporate governance practices. In the case of investors who are fund managers, including sovereign wealth funds, the government considers the fund’s wealth policy and how it proposes to exercise voting power in relation to Australian enterprises in which the fund proposes to take an interest. Proposals by foreign investors that operate on a transparent and commercial basis are less likely to raise national interest concerns than proposals from those that do not.

Additional factors: the government will pay specific attention as to whether Australia’s national interest is served in transactions involving the agricultural sector, residential land and foreign government investors.

It is important to recognise that the dominant assumption is that foreign investment is good for the economy so investments will not be contrary to the national interest, except in rare circumstances.

Other relevant legislation

Foreign persons should also be aware that separate legislation includes other requirements and/or imposes limits on foreign investment in the following instances:

- foreign ownership in the banking sector must be consistent with the Banking Act 1959 (Cth), the Financial Sector (Shareholdings) Act 1998 (Cth) and banking policy;
- aggregate foreign ownership in an Australian international airline (including Qantas) is limited to 49 per cent (see Air Navigation Act 1920 (Cth) and Qantas Sale Act 1992 (Cth));
- the Airports Act 1996 (Cth) limits foreign ownership of some airports to 49 per cent, with a 5 per cent airline ownership limit and cross-ownership limits between Sydney airport (together with Sydney West) and either Melbourne, Brisbane, or Perth airports;
- the Shipping Registration Act 1981 (Cth) requires a ship to be majority Australian-owned if it is to be registered in Australia, unless it is designated as chartered by an Australian operator; and
aggregate foreign ownership of Telstra is limited to 35 per cent and individual foreign investors are only allowed to own up to 5%.

Practical considerations

Foreign persons should lodge applications in advance of any notifiable transaction, or make contracts conditional on foreign investment approval. Such a transaction should not proceed until the Treasurer advises of the outcome of its review.

The government encourages potential investors to engage with FIRB prior to lodging applications on significant proposals to allow timely consideration of the proposal.

Exemption Certificates

Under the FATA, foreign persons are required to notify the Treasurer in relation to each individual investment (unless otherwise exempt). The government has introduced exemption certificates in relation to multiple acquisitions as a way of reducing the regulatory burden of the FATA.

The grant of such exemption certificates will be assessed on a case-by-case basis to ensure they are not contrary to the national interest. However, it is unlikely that an exemption certificate will be granted to first time investors to Australia.

The exemption certificate will generally specify the maximum value of interests that can be acquired and the period during which acquisitions can be made. Typically, exemption certificates granted will be subject to periodic reporting conditions (e.g. quarterly compliance reporting and report on acquisitions made under the exemption certificate) and will often only obviate the requirement to notify the Treasurer of certain proposed investments, leaving intact the Treasurer’s powers to make divestment orders post completion of the investment.

There are two types of exemption certificates (see below).

Exemption certificates for business acquisitions

A business exemption certificate allows for programs of acquisitions of interests in the assets of an Australian business and/or securities in an entity, including interests acquired through the business of underwriting.
The business exemption certificates are generally suited to large investment funds, particularly those with low risk foreign government investors. It also suits those types of investors who may not have exact target acquisitions in mind when they seek approval but intend to make a series of passive investments in sectors or industries that are typically not considered sensitive from a national interest perspective.

There is no standard cap on the duration of a business exemption certificate but applications will generally seek a certificate for a period of longer than 12 months.

**Exemption certificates for a program of acquisitions of interests in kinds of land**

Foreign persons making multiple acquisitions of interests in land can apply for an up-front approval for a program of land acquisitions without seeking separate approvals. The exemption certificate is intended for foreign persons with a high volume of acquisitions of interests in land (generally not individuals).

While these exemption certificates had previously only been granted for a default period of 12 months, certificates can now be granted for shorter or longer periods.

**Application process**

The FATA provides the Treasurer with 30 days to make a decision from the date of payment of the required fee. The Treasurer has a further 10 days to notify applicants of the decision. In addition, the Treasurer may also make an interim order (which is publicly available) extending the decision timeframe by up to 90 days.

In practice, applicants are sometimes asked to agree to extend the decision date while FIRB and the Treasurer consider the application (which an applicant may do to avoid a public interim order being made). The likelihood of this occurring depends on the sensitivity of the application, the government’s current policy focus and the number of applications being assessed.

Applications can be filed online and can be done by the applicant’s advisers.

**Fees**

Fees are payable to submit a FIRB application. The fees are indexed each financial year, from the averages of the Consumer Price Index.

The following table summarises fees applicable to corporate matters for the financial year...
There are a number of exemptions and rules that apply in calculating the final fee payable on an applicant’s FIRB application. One common fee exemption provides that in circumstances where multiple corporate actions attracting separate fees are covered under a single agreement, only one fee (being the highest applicable fee) is payable.

**Conditions**

The types of conditions that the Treasurer imposes on any approval will generally depend on the government agencies consulted as part of the application. The Treasurer will typically consult with the ATO and regularly consults with the ACCC and the Australian Security Intelligence Organisation.

The Treasurer is now in the practice of imposing the standard tax conditions on most FIRB approvals. These standard tax conditions cover the following areas: ongoing compliance with Australia’s tax laws, provision of information to the ATO, undertaking to pay outstanding tax debts and annual reporting on compliance with these FIRB tax conditions. The additional tax conditions are only imposed in circumstances where the ATO considered the foreign investment to have a significant or particular tax risk.

Depending on the sensitivity of the transaction, the Treasurer may also impose other conditions, including, conditions that provide for a minimum level of Australian independent corporate governance (e.g. minimum number of Australian independent directors, Australian independent chairman etc.) or conditions that ensure that operations are conducted out of Australia (e.g. board meetings to be held in Australia and head office to be located in Australia).

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DOING BUSINESS IN AUSTRALIA

TAXATION, STAMP DUTY AND CUSTOMS DUTY
In Australia, taxes are imposed by the Australian Government, state and territory governments, and local government bodies. Australia’s taxation laws are complex and various general and specific anti-avoidance rules may apply to structures or transactions. Various tax issues may arise from an investment in Australia depending on the circumstances of that investment. You should seek specific taxation advice before committing to any investment or transaction in Australia.

**Introduction**

The principal taxes in Australia are set out below.

**Australian Government:**

- income tax;
- capital gains tax (CGT);
- fringe benefits tax (FBT); and
- indirect taxes, such as the goods and services tax (GST), customs duties, petroleum resource rent taxes and various natural resource royalties.

**State and territory governments:**

- payroll tax;
- stamp duty; and
- land tax.
Local government bodies:

- rates imposed on property owners.

Income tax rates and withholding tax rates that apply to non-resident taxpayers are set out below.

<table>
<thead>
<tr>
<th>Tax</th>
<th>Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>INCOME TAX</strong> (also applies to capital gains)</td>
<td></td>
</tr>
<tr>
<td>Income tax – individuals</td>
<td>Marginal tax rates start from 32.5% and progressively increase to 45%. There is no tax free threshold.</td>
</tr>
<tr>
<td>Income tax – companies</td>
<td>27.5% for companies with annual turnover of less than A$10 million; or</td>
</tr>
<tr>
<td></td>
<td>30% otherwise.</td>
</tr>
<tr>
<td><strong>WITHHOLDING TAX</strong></td>
<td></td>
</tr>
<tr>
<td>Interest income</td>
<td>10%, unless an exemption applies.</td>
</tr>
<tr>
<td>Unfranked dividends</td>
<td>15% for residents of a country with which Australia has entered into a Double Tax Agreement (DTA country), unless an exemption applies; or 30% otherwise, unless an exemption applies.</td>
</tr>
<tr>
<td>Royalty income</td>
<td>10% (or in some cases 5%) for residents of a DTA country; or 30% otherwise.</td>
</tr>
<tr>
<td>Investment in an Australian managed fund</td>
<td>Rental income or capital gains referable to Australian real property: 15% for residents of a DTA or exchange of information country; or 30% otherwise.</td>
</tr>
<tr>
<td>Sale of interest in Australian property</td>
<td>12.5% non-final withholding tax on proceeds of sale.</td>
</tr>
</tbody>
</table>
Income tax

Income tax is imposed on ordinary income (salary and wages, business profits, rent, interest, dividends and royalties) and certain non-income amounts (for example, capital gains). Income tax is assessed under the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth) (together, in this Chapter 11, the Act). Income tax is levied on both the income and the capital gains of all individuals, companies and other entities.

Two key elements which give rise to a liability to Australian income tax are:

- residence of the taxpayer; and
- source of the income derived by the taxpayer.

Residents of Australia must pay tax on their income derived from all sources whether in or out of Australia (their worldwide income). Non-residents of Australia generally pay tax only on income derived from sources within Australia, subject to the application of any applicable double tax treaty.

**Residence**

**Individuals**

An individual is a resident of Australia for tax purposes if they reside in Australia within the ordinary meaning of that word. Some of the things that are taken into account when determining whether an individual is a resident are:

- the length of time the individual has remained in Australia;
- the family and business ties which the individual has in Australia; and
- the degree of permanence of the circumstances surrounding the stay.

A person who is domiciled in Australia is deemed to be a resident of Australia unless the person’s permanent place of abode is outside Australia.

Expatriates will be deemed to be residents if they are present in Australia for more than one half of the income year, unless they:
• have their usual place of abode outside Australia; and

• do not intend to take up residence in Australia.

Special rules exist to relieve some of the tax consequences that would otherwise arise for expatriates, who are only temporarily residents of Australia.

**Companies**

A company is a resident of Australia for tax purposes if:

• it is incorporated in Australia; or

• where it is not incorporated in Australia, it 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.

The place of a company’s central management and control will usually be where the company’s directors meet to do the business of the company, although regard must always be had to where the real control of the company’s operations is located.

The Australian Tax Office (ATO) has recently released a ruling and practical compliance guide expanding its view on when a company may be considered to be carrying on business in Australia for these purposes.

**Source of income**

The source of income depends on the particular facts and circumstances and the principles developed by the courts.

The source rules are modified by the withholding provisions of the Act.

The operation of the Act with respect to income derived by both residents and non-residents is subject to the provisions of any bilateral double tax treaty. Australia’s double tax treaties typically contain sourcing rules that usually override the general source rules in domestic law.
When is tax paid?

Taxable income is assessed on an annual basis at the end of each financial year: that is, the year of income ending on 30 June. The due date for payment depends on the type of entity. Taxpayers may apply to the ATO for permission to adopt a year of income which ends on another date. Permission is usually granted where the taxpayer is an Australian subsidiary or branch of an overseas parent company that has an accounting year that does not end on 30 June.

Who must pay tax?

**Individuals**

Resident individuals who receive above A$18,200 in a financial year must lodge an income tax return with the ATO and pay tax, unless otherwise exempted.

Non-residents who receive income from Australia must also lodge a return and pay income tax. The only income which is considered for this purpose is that received from sources within Australia. However, a tax return is not required and income tax is not payable to the extent the income is subject to a final withholding tax, such as dividend or interest withholding tax (see section on Non-residents below).

Resident individuals (and some trustees) must pay the Medicare levy as part of their income tax payment. The Medicare levy is currently 2% of the total taxable income for the financial year. In addition, a Medicare levy surcharge of up to 1.5% is generally payable by higher income earners who do not hold adequate private health insurance.

Income tax is imposed at progressive rates, with higher rates applying to higher levels of taxable income. Resident individuals are taxed at more favourable rates than non-residents. Special rates apply to persons under the age of 18 years depending upon the nature of their income.

**Marginal tax rates for resident individuals for the 2018-19 income year**

<table>
<thead>
<tr>
<th>TAX RATE (%)</th>
<th>INCOME LEVEL (A$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>0 – 18,200</td>
</tr>
<tr>
<td>19</td>
<td>18,201 – 37,000</td>
</tr>
</tbody>
</table>
### Marginal tax rates for non-resident individuals for the 2018-19 income year:

<table>
<thead>
<tr>
<th>TAX RATE (%)</th>
<th>INCOME LEVEL (A$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>32.5</td>
<td>0 – 90,000</td>
</tr>
<tr>
<td>37</td>
<td>90,001 – 180,000</td>
</tr>
<tr>
<td>45</td>
<td>180,001 and above</td>
</tr>
</tbody>
</table>

### Companies

The taxable income of most companies is taxed at a flat rate of 30%. Companies with annual turnover less than A$50 million are taxed at a flat rate of 27.5%. These rates apply to both resident and non-resident companies. The relevant double tax agreement may eliminate this tax for a non-resident company with no permanent establishment or real property in Australia.

The time of recognition of income and expense items for tax purposes varies depending upon the particular circumstances. Financial accounting rules and outcomes have limited use in the Australian tax system, except in those areas (such as the regime for taxing financial arrangements) where they are explicitly incorporated.

Each company must appoint a public officer who is responsible for lodging the company’s tax return. Directors of the company are responsible for ensuring that appropriate accounting records are kept and returns are lodged. Permanent establishments in Australia are required to keep separate accounting records if their Australian turnover exceeds A$2 million.

Companies generally pay quarterly instalments toward their eventual tax liability. This is calculated by applying the instalment rate (given by the Commissioner of Taxation based on the previous year) to the company’s turnover for the quarter. Instalments are generally payable on the 21st day after the end of the quarter. Certain small companies may elect to pay a single annual instalment.
Dividend imputation

The dividend imputation system allows Australian resident taxpayers a credit for company tax already paid by Australian resident companies on the profits out of which dividends are distributed. While dividends to Australian resident individuals are assessable, residents are generally allowed a credit for company tax paid which attaches to the dividend. Dividends to which tax credits are attached are called franked dividends. Dividends may be franked, partly franked or unfranked.

The franked part of dividends is not subject to dividend withholding tax for dividends paid to non-residents.

Losses

A company makes an income tax loss if its deductions exceed assessable income. Subject to special carried forward loss rules, a tax loss may be carried forward and claimed as a deduction against assessable income of future years, including capital gains. Capital losses may also be carried forward, but may only be used to offset capital gains. There is no provision in the Australian tax system for the carry back of any kind of loss.

In order to utilise an income or capital loss, a loss company must demonstrate that shares carrying more than 50% of the voting, dividend and capital distribution rights are beneficially owned by the same persons during the whole of both the loss year and the claim year (and any intervening years). Concessional tracing rules are available for widely held companies which make it easier to demonstrate the required continuity of ownership.

If the loss company cannot satisfy this test, it will only be permitted to deduct its losses if it can satisfy the ‘same business test’. The same business test requires a company to have carried on, throughout the whole of the claim year, the same business that it carried on immediately before the relevant change in ownership or control. The ATO has in the past taken a very strict approach to this test, and 'same' was interpreted as 'identical'. However, these rules have been recently amended to supplement the current same business test with a potentially more flexible 'similar business test'.

Where a significant interest in a company with an unrealised loss is sold, special rules can prevent multiple recognition of the loss – that is, both by the company and by shareholders selling interests in the loss company.

Consolidation of wholly-owned groups

Wholly-owned groups of Australian resident companies (and in some circumstances, trusts and
partnerships) are permitted to consolidate with the effect that they are treated as a single entity for income taxation purposes. As a result of being treated as a single entity, intra-group transactions (including asset transfers, interest and dividend payments) are generally ignored. The head company of the group lodges a single income tax return on behalf of the group. The profits and losses of all group members are automatically consolidated, as are other tax attributes such as franking accounts.

Resident subsidiaries of a foreign parent entity may be eligible to consolidate, even if they do not have a single head company resident in Australia. This is done by way of a multiple entry consolidated (MEC) group. A MEC group is generally treated in the same way as a consolidated group.

**Partnerships**

Under Australian taxation law, a partnership is not subject to tax, with the exception of limited partnerships. Rather, the individual partners are taxed on their share of the net income of the partnership, calculated after subtracting allowable deductions from assessable income.

If the partnership makes a loss rather than a profit, each partner is generally entitled to a share of the partnership loss.

Limited partnerships are generally taxed as companies, though there are exceptions for venture capital and some Australian controlled foreign partnerships.

The concept of a partnership extends to any relationship in which income is jointly received by taxpayers, even if the parties are not partners as that term is understood in commercial law. To overcome this result, taxpayers often form unincorporated joint ventures which lack the essential elements of ordinary partnerships and do not involve the joint receipt of income.

Even though a partnership is not itself taxed, it is required to lodge an income tax return detailing its income and expenditure and indicating its resulting net income or loss.

**Unincorporated joint ventures**

As outlined previously, some taxpayers may form a relationship which does not meet the criteria for a partnership. Unlike a partner in a partnership, a participant in a joint venture is entitled to account for its interest in the joint venture (both as to income and expenditure) on an item-by-item basis in its own tax return, and not merely as a share of net partnership income. Unincorporated joint ventures do not file a separate tax return. They are commonly used in the mining and construction industries.
**Trusts**

Under Australian commercial law, a trust is not a separate legal entity. Rather it is a relationship between a person (the trustee) who holds property, or in whose name property is registered, and the person (the beneficiary) on whose behalf the property is held.

If the trust property produces income, or is sold for a capital gain, the trustee will hold that income or gain not for its own benefit but for the benefit of the beneficiary. Trusts are used extensively in Australia in the managed funds industry and for private (closely held) businesses.

In general, income and gains to which a beneficiary is entitled are taxed in the hands of the beneficiary and are not taxed separately in the hands of the trustee. However, if there is income or there are gains of the trust to which no beneficiary is entitled, the trustee becomes liable to pay tax in respect of the income or gains in its representative capacity of trustee generally at 47%. This liability is separate from any liability to tax which the trustee may have in relation to its own income or capital gains.

The trustee of a trust is liable to tax in respect of any trust income to which a non-resident beneficiary becomes entitled under the trust.

A special regime operates for the non-resident beneficiaries of trusts that qualify as a Managed Investment Trust (see section 11.6).

Special rules apply to certain public trading trusts, whether publicly listed or otherwise widely held. Broadly, public trading trusts are taxed in a similar manner to companies, and the beneficiaries are treated as if shareholders. These rules discourage the use of trusts for conducting active business operations but do not prevent other collective investments being taxed on a transparent basis.

Trust losses are trapped in the trust (that is, losses are not available to be claimed directly by beneficiaries) and are subject to special rules which usually deny the loss if the control or ownership of the trust changes.

**Other types of trusts and companies**

There are special taxation rules for certain types of trusts (such as pension funds) and special types of companies (such as life insurance companies).

**Capital gains tax**

A taxpayer’s assessable income includes net capital gains that a taxpayer derives when
disposing of assets which the taxpayer acquired (or is deemed to have acquired) on or after 20 September 1985. The Act also includes other amounts in the net capital gain where the gain did not strictly arise as a result of the disposal of an asset. For example, the granting of a restrictive covenant under which one person agrees not to compete with another person may give rise to a capital gain if granted for monetary or other consideration.

Tax on capital gains is not administered as a separate tax. Instead, any net gain is included as assessable income for income tax purposes in the year of disposal.

If an asset is held for more than 12 months, only 50% of the net capital gain is taxable in the hands of individuals and two-thirds of the net capital gain is taxable in the case of superannuation funds. This discount does not apply to companies.

A taxpayer will incur a capital loss where the sale proceeds are less than the cost of the asset (reduced by any amounts which have been allowed as deductions). Capital losses may be applied to reduce capital gains derived by the taxpayer in the same year of income. If there are no or insufficient capital gains to absorb the capital loss, the remaining capital loss may be carried forward indefinitely (subject to certain restrictions in the case of companies) and offset against capital gains in future income years. A capital loss cannot be used to offset against other assessable income.

There is relief against double taxation where the same gain may be assessable under both the capital gain provisions and as income.

Any gain (or loss) made on the sale of an individual taxpayer’s principal place of residence is generally exempt from CGT.

Non-residents are only liable to Australian CGT where the asset is classified by the Act as 'taxable Australian property'. Taxable Australian property includes:

- Australian real property;

- an indirect interest in Australian real property owned via an interest of 10% or more in a ‘land rich’ entity (that is, where the value of the Australian real property constitutes more than one-half of the value of the entity);

- assets used in carrying on business through a permanent establishment in Australia; and

- options or rights to acquire such assets or interests.
In the 2017 Federal Budget, the Government announced changes to the indirect interest test. The proposed changes will make clear that a 10% investment, regardless of whether it is held by a single entity or a group of ‘associate’ entities, will be subject to Australian CGT. Although the Government has introduced the *Treasury Laws Amendment (Reducing Pressure on Housing Affordability Measures No. 2) Bill 2018* (Cth) to effect these changes, the bill has yet to be enacted.

A non-final 12.5% withholding tax applies to the sale of direct and indirect interests in Australian property.

**Tax incentives**

**Capital allowances**

The uniform capital allowances system allows deductions for the decline in value of depreciable assets. Generally the rate is based on effective life of the asset. However, certain long-life assets, such as aircraft and certain oil and gas assets, are given shorter lives for tax depreciation purposes.

Either straight-line or declining balance methods (based on 200% of the straight line rate) are available.

Intangible assets are subject to a more limited tax write-off than tangible assets.

**Tax concessions**

Tax concessions are available to encourage the development of certain industries or sectors of the economy. Some examples are:

- **Agriculture** — immediate deductions are allowed for expenses of fencing and water facilities.

- **Mining** — concessions are available primarily as capital expenditure deductions for the costs of exploration and prospecting; they are also available in relation to some capital expenditure in mining operations and costs of rehabilitating mine sites.

- **Research and development (R&D)** — expenditure on R&D is supported with:
  - 43.5% refundable tax offset to eligible entities with an aggregated turnover of less than A$20 million per annum; and
- a non-refundable 38.5% tax offset to all other eligible entities.

- **Intellectual property** — concessions are available to encourage the development of Australian patents, copyrights and designs, and for investment in Australian films.

- **Environmental protection** — concessions are available for certain kinds of expenditure on environmental protection.

- **Early stage innovation companies** — there are 2 types of incentives:
  - concessional treatment of grants of employee option and share plans for qualifying start-ups; and
  - a 20% tax offset and capital gains tax exemption or reduction for investments into qualifying Early Stage Innovation Companies.

### Tax treaties

Australia has entered into tax treaties with approximately 45 countries.

Australia’s tax treaties prior to 2001 allow more source taxing rights than the Organisation for Economic Co-operation and Development (**OECD**) Model Tax Convention on Income and Capital. However, recent treaties have moved closer to the OECD Model, notably for dividends and capital gains. The definition of permanent establishment (for substantial equipment and processing activities) and the taxation of royalties (now typically 5%) are still more extensive than the OECD Model.

Recent treaties contain articles dealing with:

- more extensive exchange of information between countries;
- assistance in collection of taxation; and
- procedural rules relating to the resolution of tax objections and disputes based on recent OECD developments.

The Government intends to ratify the multilateral treaty to be implemented under the Base Erosion and Profit Shifting (**BEPS**) regime which will modify Australia’s treaty network when it
Australia’s tax treaties are expressly subject to the general anti-avoidance rule in domestic law.

Australia has negotiated agreements for the exchange of tax-related information with more than 35 countries, including low-tax jurisdictions. Legislation giving effect to the US Foreign Account Tax Compliance Act and the Common Reporting Standard has also been enacted.

Australia is a signatory to the Multi-Lateral Instrument which modifies the operation of bilateral treaties. The dates on which the Multilateral Instrument has modified Australia’s bilateral tax treaties can be found here: https://treasury.gov.au/tax-treaties/income-tax-treaties.

**Non-residents**

**Transfer pricing**

Australia has transfer pricing rules which apply to international transactions. The rules impose arm’s length pricing requirements for international transactions. The ATO vigorously enforces its transfer pricing rules in relation to both residents and non-residents and has been emboldened by its victory in pricing intra-group debt against Chevron.

The transfer pricing rules apply where there is an international transaction and apply not only to related parties but also to unrelated parties that are not dealing at arm’s length. Prices may be adjusted to the arm’s length consideration where the consideration charged by the parties would lead to a reduction in Australian tax revenue.

Compensating adjustments can be made to other parties involved in the transaction.

Australian administrative practice generally follows the OECD Transfer Pricing Guidelines. The ATO has released several public rulings and compliance guides in relation to the operation of the transfer pricing rules. The ATO requires taxpayers to keep contemporaneous documentation in order to justify pricing methodologies.

Australia is a participant in Advance Pricing Arrangements whereby transfer pricing methodologies and practices are agreed with taxpayers and foreign tax administrations in advance.

**Withholding tax**

Interest, dividends and royalties paid to a non-resident by a resident of Australia are generally subject to withholding tax. Interest and royalties incurred by a resident in carrying on a
business at a permanent establishment outside Australia are, however, not subject to withholding tax. In addition, interest or royalties which are incurred by a non-resident in carrying on business in Australia through a permanent establishment and which are paid to another non-resident are generally subject to withholding tax.

Withholding tax is imposed on the non-resident payee of the interest, dividends or royalties, but is collected (withheld) by the payer at the time of payment to the non-resident. The payer is required to remit the tax to the ATO.

Withholding tax is a final tax levied on a gross basis (that is, without deduction for foreign expenses incurred to gain the income).

**Interest payments**

Interest payments (or payments in the nature of interest) to non-residents are generally subject to 10% withholding tax, although this may be varied by any applicable tax treaty. Australia’s tax treaties with the United States and the United Kingdom and other countries since 2001 can eliminate all Australian withholding tax on interest for loans from unrelated foreign financial institutions.

The liability to withholding tax depends on the type of security involved and the nature of the amount paid, as the term interest is widely defined. Exemptions may be available under domestic law in respect of interest paid on debentures issued by public offer by Australian resident companies or trusts or permanent establishments of non-resident companies or trusts in Australia. Foreign pension funds are generally exempt from dividend and interest withholding tax.

**Dividends**

The withholding tax rate of dividends depends on the nature of the dividend and whether it is paid to a resident of a country which has entered into a tax treaty with Australia. Generally, to the extent that a dividend is franked, no withholding tax is payable. Where the dividend is unfranked, 30% withholding tax is applicable unless the non-resident is from a country with which Australia has a tax treaty. In such cases, the withholding tax is (usually) limited to 15%, but depends on the specific provisions in the tax treaty. Australia’s tax treaties with the United States and United Kingdom and some other treaties entered into since 2001 eliminate all Australian withholding tax on dividends paid to certain corporate shareholders (generally listed companies and their subsidiaries) that have held more than 80% of the Australian company’s shares for at least 12 months.

Dividends paid by an Australian company from ‘foreign conduit income’ are not subject to
dividend withholding tax even if unfranked.

**Royalties**

Royalty payments to non-residents are subject to 30% withholding tax unless an exemption applies. The payer of the royalty is required to deduct the tax at the source. Under Australia’s tax treaties, the withholding tax on royalties is generally limited to 10% of the gross royalty, reduced to 5% for treaties since 2001. Natural resource payments and equipment royalties are excluded from royalty withholding tax under more recent treaties. However, rental payments to non-residents under cross border hire-purchase arrangements continue to be subject to withholding tax.

**Managed investment trust**

Where a non-resident derives interest, dividend or royalty income by investing through a managed investment trust (MIT) or an attribution MIT (AMIT), the same rates outlined above apply.

Other kinds of income (particularly rental income) derived through an Australian MIT or AMIT may qualify for a reduced final withholding tax of 15% (or 10% for certain new ‘5 star rated green’ buildings), provided the investor is resident in a country with which Australia has negotiated either a bilateral tax treaty or an exchange-of-information-only agreement. For recipients who are residents of other countries, the final withholding rate is 30%.

**Interest in Australian property**

A non-final 12.5% withholding tax applies to proceeds of sales by non-residents of direct and indirect interests in Australian property (see section 11.3 above).

**Limits on debt that can be used to finance Australian operations**

There is a limit on the amount of financing costs (such as interest) that are allowed as deductions which are attributable to the Australian operations of both Australian and foreign investors. Individuals and all types of entities are covered by the rules.

The rules limit interest deductions (for inward and outward investors) on the amount of debt used to finance Australian operations. Generally, entities are allowed a ‘safe harbour’ debt-to-equity ratio for all interest, not just related party interest, of 1.5:1; or gearing in Australia of up to 100% of the overall group’s worldwide gearing. Special rules apply for securitisation vehicles and financial institutions.
There is a limited exception if the taxpayer can show that the excessive amount of debt satisfies the arm’s length principle. Exemptions are also available to taxpayers with interest deductions of less than A$2 million and outward investors whose Australian assets make up 90% or more of their total assets.

**Base erosion and profit shifting**

Australia has implemented a number of measures directed to base erosion and profit shifting (BEPS). The 'Multinational Anti-Avoidance Law' (MAAL) has been enacted and extends Australia’s general anti-avoidance law to schemes for the avoidance of Australian permanent establishments. The MAAL applies to members of groups with worldwide income of more than A$1 billion (‘Significant Global Entities’). Significant Global Entities must also comply with ‘Country-by-Country’ reporting requirements.

New measures to increase tax transparency include:

- voluntary public disclosure of income and taxation information for taxpayers with an annual turnover of more than A$100 million; and

- the 'Automatic Exchange of Financial Account Information in Tax Matters (Common Reporting Standard)' which is intended to facilitate exchange of financial account information between 90 jurisdictions.

Draft legislation targeting hybrid mismatches was released in November 2017 for consultation.

**Diverted profits tax**

Australia has introduced a ‘Diverted Profits Tax’ (or DPT), which is similar to the second limb of the UK’s diverted profits tax. Amounts subject to the DPT will be taxed at a rate of 40%.

Broadly, the DPT will apply if:

- a Significant Global Entity with Australian turnover of more than A$25 million;

- the Australian entity has entered into an arrangement with a foreign related entity for the principal purpose of obtaining an Australian tax benefit (or an Australian and a foreign tax benefit);

- this arrangement results in an effective tax mismatch (i.e. the increase in the foreign entity’s tax liability is less than 80% of the reduction in the Australian entity’s tax liability); and
it is reasonable to conclude that this arrangement was designed to secure a reduced tax liability.

**Fringe benefits tax**

Where an employer provides certain benefits to employees other than salary or wages, share options or pension benefits, those benefits may be subject to fringe benefits tax (FBT).

Common employee benefits include the provision of motor vehicles for private use, low-interest loans, subsidised accommodation, entertainment, discounted goods and payment of private expenses.

The FBT year runs from 1 April to 31 March in the following year, and a FBT return must be lodged annually by the employer (who is liable for the tax). The FBT tax rate is 47%.

**Superannuation guarantee scheme**

The superannuation guarantee scheme requires all resident and non-resident employers to contribute a regular minimum amount to an approved pension plan for employees working in Australia, subject to limited exceptions. The aim of the scheme is to encourage employees to be self-sufficient upon reaching retirement age. The scheme is administered by the ATO on a self-assessment basis. Employer contributions to a superannuation fund are generally tax deductible.

The minimum level of superannuation support is 9.5% per annum of an employee's regular earnings (increasing by 0.5% from the 2021-22 income year until it reaches 12% in the 2025-26 income year). There is also a cap to the contribution that is required, although employers can contribute more than this amount. Required contributions must be paid quarterly.

Employers who fail to provide the minimum level of superannuation are subject to a superannuation charge. This non-deductible charge comprises the shortfall, an interest component and an administration charge.

**Goods and services tax**

Australia has a 10% value-added tax, known as the Goods and Services Tax (GST). It is an indirect, broad-based consumption tax. It is levied on the supply of goods, services and other things such as property and rights. However, the supply of certain goods and services is GST-
free (for example, exports) or input taxed (for example, financial services).

Offshore services or intangibles provided to Australian consumers are subject to GST, commonly referred to as the ‘Netflix tax’. Digital currency (such as bitcoin) is not subject to GST.

GST will also be applied to ‘low value’ goods imported into Australia from 1 July 2018.

As with income tax, associated entities can elect to form a GST group. Generally, transactions within the group are ignored for GST purposes and the representative member is responsible for the groups reporting obligations.

**Customs duty and excise**

**Customs duty**

Customs duty is levied on most goods imported into Australia for domestic consumption. The classification of goods for customs duty purposes is a difficult matter, so expert advice should be sought. Concessional rates of duty may be obtained where there is no local manufacture of the item being imported, but the conditions for this are stringent.

**Excise and royalties**

Excise is levied on the production and importation of liquor and tobacco and on certain forms of petroleum. Mineral royalties are also payable to state governments for onshore mining (as the ownership of most minerals is reserved to the state).

**State and territory stamp duty**

Stamp duty can be a crucial consideration in business planning and costing because it applies to a wide variety of transactions, and it is often calculated by reference to the purchase consideration (inclusive of GST) or value of the property involved. We recommend that expert advice be obtained early in the decision-making process.

Stamp duty is a tax imposed by each of the 8 State and Territory governments. It is payable on certain transactions that have a relevant ‘connection’ with a State or Territory, as determined by the individual law of that State or Territory. If a transaction is dutiable, the taxpayer will be liable to pay the stamp duty and file a lodgement with the relevant government authority, regardless of where the taxpayer resides. It is possible for stamp duty to be payable on a particular transaction in more than one State or Territory.
Transactions that might be subject to stamp duty include:

- direct acquisitions of assets such as land and buildings, plant and equipment, leases, goodwill, intellectual property, customer contracts, securities and debts, and motor vehicles;

- indirect acquisitions of assets by acquiring certain interests in trusts, companies and partnerships holding those assets; and

- insurance policies.

Stamp duty is generally calculated on the value (or purchase consideration if higher) of the transaction or underlying assets in question. The applicable rate will depend on the dutiable value, and will vary in each State and Territory. As at 1 May 2018, the rates for a dutiable transfer or acquisition are up to 5.95%. Higher duty rates apply to acquisitions of residential property in certain circumstances.

There is also additional duty (a surcharge) payable in a number of States, by foreign persons who acquire residential land, or certain indirect interests in residential land. The surcharge rate varies, and is up to 8%. In some cases, the surcharge is not imposed on property development meeting certain criteria and on various alternative asset classes (such as, potentially, retirement villages, hotels, and student accommodation).

**Payroll tax**

Payroll tax is imposed by the states and territories on employers at rates of up to 6.85% depending on the jurisdiction. It will apply to the extent that the wages, including fringe benefits, making up the payroll exceed thresholds from A$600,000 to A$1.1million depending on the jurisdiction.

**Land tax**

The states and the Australian Capital Territory (but not the Northern Territory) levy land tax on the unimproved capital value of land. Concessions are made for the taxpayer’s principal place of residence. This tax does not take the value of buildings and other improvements on land into account.

Victoria and New South Wales have also introduced a surcharge of up to 1.5% per annum for foreign owners of residential property.
The Australian Government has announced a proposal to introduce a ‘vacancy tax’ on foreign-owned property, which will apply when the property is not occupied or available for rent for 6 months in a year.

**Resource rent taxes and royalties**

A petroleum resource rent tax is levied on certain offshore petroleum production at 40% of the net cash flow on a project-by-project basis. It also applies to onshore oil and gas projects.

Various natural resource royalties are applied by state governments.

**Death, wealth and gift taxes**

There is no death duty in Australia. There is also no gift duty, though a gift of property may, in certain circumstances, be chargeable with stamp duty or trigger CGT.

**Property tax**

A local property tax (called rates) is levied by municipalities.

Last updated: 01/03/2019

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**Key contacts**
DOING BUSINESS IN AUSTRALIA

COMPETITION PRINCIPLES
Chapter 12

Competition Principles

The Competition and Consumer Act 2010 (Cth) (CCA) regulates competition in Australia. It prohibits a range of anti-competitive behaviour, governs merger activity and regulates companies’ dealings with customers under the Australian Consumer Law.

The CCA provides for authorisation and notification processes to permit behaviour otherwise prohibited by the legislation, such as mergers, resale price maintenance, misuse of market power, cartel conduct and exclusive dealing. Significant reforms to the Australian competition recently came into effect. The new laws include the introduction of a prohibition on concerted practices and a lessening of competition test for the prohibition on misuse of market power.

Contravention of the CCA carries significant penalties, with the Australian Competition and Consumer Commission (ACCC), the body responsible for enforcing the CCA, increasingly pursuing criminal prosecution of companies and individuals for cartel conduct. In May 2018, the ACCC successful brought proceedings before the Full Federal Court against Yazaki Corporation which was ordered to pay a penalty of $46 million for cartel conduct, the highest penalty ever handed down under the CCA. Furthermore, in 2018 the ACCC brought two criminal cartel proceedings which included individuals as co-defendants, the first time this has occurred in Australia. The ACCC’s enforcement priorities for 2018 included misleading and deceptive practices (particularly in relation to the misrepresentation of consumer guarantees), anti-competitive conduct, product safety, and unfair contract terms affecting small business and franchisee businesses, with a particular emphasis upon contravening behaviour in the financial services and energy sectors and in the online marketplace. The ACCC is also pushing for higher penalties to be awarded in relation to breaches of the CCA and is actively looking to increase criminal prosecution of cartel conduct. As of February 2019, there are three criminal cartel cases before the court.

Conduct prohibited under the CCA

Under Part IV of the CCA, certain conduct is prohibited outright (that is, irrespective of the effect on competition), while other conduct is prohibited only where it has the purpose, effect or likely effect of substantially lessening competition (SLC) in any market or it involves the misuse of
substantial market power.

<table>
<thead>
<tr>
<th>Outright prohibitions</th>
<th>Conduct prohibited where it has the purpose, effect or likely effect of SLC</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cartel conduct</strong> – any contract, arrangement or understanding between competitors (or potential competitors) which has: • the purpose or effect of fixing or influencing prices; or • the purpose of restricting production, capacity, or supply to customers; sharing or dividing up markets by allocating customers, suppliers or territories; or bid rigging.</td>
<td><strong>Misuse of market power</strong> – where a company has substantial market power, engaging in conduct that has the purpose, or has or is likely to have the effect of substantially lessening competition in: • that market; • any other market in which that company supplies goods or services; or • any other market in which that company acquires goods or services.</td>
</tr>
<tr>
<td><strong>Resale price maintenance</strong> – specifying a minimum price below which customers are not to resupply or advertise goods or services for resupply.</td>
<td><strong>Concerted practices</strong> – the co-operation between two or more person which reduces the uncertainty of competition.</td>
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<td></td>
<td><strong>Exclusive dealing</strong> – imposing restrictions on a customer’s or supplier’s freedom to choose with whom, where or on what terms it may conduct business.</td>
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<td></td>
<td><strong>Mergers and acquisitions</strong> – the acquisition of shares or assets.</td>
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</table>

**Authorised conduct and merger clearances**

The CCA permits conduct that may otherwise contravene the CCA to be exempted by the ACCC. A company may apply to the ACCC for authorisation of anti-competitive conduct (including cartel conduct and misuse of market power) on public benefit grounds; or it may lodge a notification with the ACCC for exclusive dealing, resale price maintenance or collective bargaining arrangements.

In respect of a merger or acquisition which raises competition law issues, companies may also seek to have the merger cleared or authorised by the ACCC. Clearance will require the parties to persuade the ACCC that the proposed merger or acquisition is not likely to substantially lessen competition. Authorisation can be granted where the merger or acquisition will result in public benefits which outweigh any detriments (including competitive harm). There is no mandatory requirement to notify the ACCC prior to completing a transaction; however, the
ACCC Merger Guidelines encourage the parties to notify the ACCC where the products of the merger parties are either substitutes or complements and the merged firm will have a post-merger market share of greater than 20% in the relevant market/s.

**Penalties**

Pecuniary penalties apply to contraventions of all Part IV provisions. The maximum penalty per contravention is displayed below:

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<thead>
<tr>
<th>Civil Penalties</th>
<th>Companies</th>
<th>Individuals</th>
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<tr>
<td>The greatest of:</td>
<td>A$10 million;</td>
<td>A$500,000</td>
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<td>• three times the value of the benefit obtained</td>
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<td>benefit, 10% of the annual turnover of the</td>
<td>benefit, 10% of the annual turnover of the</td>
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<tr>
<td>corporate group in Australia in the preceding 12</td>
<td>corporate group in Australia in the preceding 12</td>
<td></td>
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<td>months.</td>
<td>months.</td>
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</tbody>
</table>

**Criminal penalties (for cartel conduct)**

| | Equivalent to civil penalties | Up to 10 years imprisonment and/or fines of up to $A420,000 |

A company must not indemnify its officers against a liability to pay a pecuniary penalty or for the legal costs of defending proceedings in which the officer is found to have such a liability.

In addition, on the application of the ACCC (or in respect of criminal cartels, the Commonwealth Director of Public Prosecution), a court may disqualify a person who has been found to have engaged in anti-competitive conduct from managing companies for a period the court considers appropriate. Other non-pecuniary penalties include community services orders and adverse publicity orders.

**Other provisions of the CCA**

The CCA also has specific parts dealing with:

- access to telecommunications services (access to telecommunications facilities is dealt with in Schedule 1 of the *Telecommunications Act 1997* (Cth));
access to essential infrastructure services which cannot be economically reproduced by a third party - for example, gas and electricity transmission and distribution services, railway lines, airports, ports and other services with natural monopoly characteristics;

- anti-competitive conduct in telecommunications markets;

- the regulation of international liner cargo shipping;

- prices surveillance; and

- unfair dealings in business, consumer protection and product safety (now contained in the Australian Consumer Law, in Schedule 2 of the CCA). For more information on the Australian Consumer Law see Chapter 15 of this publication, 'Consumer protection and product liability'.

**Australian Competition and Consumer Commission**

The ACCC is the body charged with administering the CCA. It also has a number of other competition-related functions under a wide range of other industry legislation. The ACCC is a powerful regulator, with broad discretions and a high profile.

Broadly, the ACCC’s role includes:

- the enforcement of the anti-competitive conduct, consumer protection and unfair dealing provisions of the CCA. The ACCC has extensive investigation powers, including powers to compel companies to provide information and documents and to examine individuals under oath. However, the ACCC cannot make findings of illegality and impose penalties for a breach of the CCA itself – it must apply to the Australian Federal Court. The exception to this is in relation to certain consumer protection provisions where the ACCC has the power to issue infringement and substantiation notices, banning orders and public warnings. The ACCC’s role in enforcement of the CCA is supplemented by the ability of private parties to take private actions under the CCA (other than seeking an injunction in relation to an anti-competitive merger);

- the assessment of mergers and acquisitions which might have the likely effect of substantially lessening competition. Although there is no compulsory pre-merger notification requirement, the ACCC will often investigate mergers and acquisitions that come to its attention, even where the merger parties may not have sought ACCC clearance. Parties can apply for the ACCC to assess mergers and acquisitions through its informal clearance process or the formal process which includes the option of seeking authorisation
on public benefit grounds and which can be appealed to the Tribunal;

- a range of regulatory functions under the general and telecommunications-specific access regimes, which relate to the terms and conditions upon which businesses competing in upstream and downstream markets will be granted access to services provided by essential infrastructure facilities (for example, telecommunications, electricity and gas transmission and distribution services, and railway lines); and

- prices surveillance including price notification, price monitoring and pricing inquiries.

A range of state regulatory bodies are responsible for administering state-based access regimes, and other industry-specific regulation.

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Chapter 13

Employment and Industrial Law

Employees in Australia have their rights and obligations relating to their employment governed by a range of laws, covering areas such as minimum terms and conditions, work health and safety, discrimination and superannuation. The primary source of regulation derives from the Fair Work Act 2009 (Cth) (FW Act). It is therefore vital for any person looking to do business and employ people in Australia to have a solid understanding of Australia’s employment framework in order to minimise any risk to the ultimate success of their business.

Hierarchy of employment

The FW Act establishes a hierarchy of terms and conditions that apply to a person’s employment.

National Employment Standards (NES)

The NES provide the base 10 minimum mandatory conditions of employment for all employees covered by the FW Act. Some key conditions include:

- maximum ordinary hours of work (namely, 38 hours per week plus ‘reasonable’ additional hours);
- paid annual leave of 20 days per year for full time employees (with additional leave for shift workers);
- paid personal leave (sick or carer’s leave) of 10 days per year, unpaid carer’s leave of two days per year and unpaid family and domestic violence leave;
- unpaid parental leave of up to 12 months, with a right to apply for an additional 12 months;
- the right to refuse to work on a public holiday on reasonable grounds; and
- depending on length of service, up to 5 weeks’ notice of termination and up to 16 weeks’ redundancy pay.
Modern awards

Modern awards are industry and occupation based instruments that establish a minimum safety net of terms and conditions that supplement the NES. Modern awards deal with:

- pay conditions (including minimum wages, superannuation, penalty rates and overtime);
- types of work (for example, full-time, part-time or casual);
- consultation, representation and dispute settling;
- hours, rostering and rest breaks; and
- leave and leave loadings.

Enterprise agreements

Enterprise agreements are collective agreements made between employers and their employees under the FW Act, with employees often represented by unions as ‘bargaining representatives’. In negotiating an enterprise agreement (known as ‘bargaining’), all parties must act in good faith to reach an agreement. An enterprise agreement must pass the ‘better off overall test’ such that, on balance, employees covered by the enterprise agreement are better off overall than they would be under the applicable modern award. Once approved by the Fair Work Commission (FWC), the enterprise agreement applies to covered employees until its nominal expiry date, after which the agreement continues to apply but bargaining for a new agreement may commence and protected industrial action may be taken (subject to procedural requirements being met).

Enterprise agreements cannot exclude or undercut the minimum conditions of employment set out in the NES. A contract of employment for specific employees can operate alongside enterprise agreements, but can only supplement (not undercut) the terms and conditions of an enterprise agreement.

Employment law in Australia

Establishing a new business

Organisations seeking to set up a new business in Australia that are likely to engage employees who would be covered by a modern award may enter into a ‘Greenfields’ enterprise agreement with a relevant union representing the employees who would be covered by the agreement.
Greenfields agreements are often attractive to employers as they provide certainty for the commencement of a new business – they lock in prospective employees’ terms and conditions of employment before their employment commences. This enables a new business to proceed without a (potentially) costly and lengthy bargaining process, or facing protected industrial action.

**Acquiring an existing business**

Alternatively, a company may purchase a pre-existing business in Australia and seek to transfer employees to a new entity. This scenario may trigger the 'transfer of business' provisions of the FW Act if the following criteria are met:

- an employee’s employment with the old employer is terminated;
- the employee is re-employed with a new employer within three months to do substantially similar work; and
- there is a relevant connection between the two employers (such as a transfer of assets, or an outsourcing or insourcing of work).

The key consequence of a transfer of business is that an enterprise agreement that applied to the employees of the old employer is transferred to the new employer, unless the new employer obtains an order from the FWC that this not occur.

**Industrial action**

Employees are able to take lawful industrial action in the context of bargaining to support claims for an enterprise agreement (protected action). In order for the industrial action to be lawful, it must be demonstrated that:

- the nominal expiry date of any existing enterprise agreement has passed;
- the employees are genuinely trying to reach an agreement with the employer;
- the FWC has authorised a protected action ballot (a secret vote) to occur, with the majority of employees eligible to vote in the ballot voting in favour of undertaking the industrial action; and
- the employer has been given the required written notice of the proposed action.
In almost all cases, it remains unlawful for an employer to pay employees who take lawful or unlawful industrial action.

If employees take unlawful industrial action, the employer can seek an order from the FWC that the industrial action stop, not occur or not be organised, and must deduct a minimum of four hours’ pay for each day unlawful industrial action is taken. Orders can also be sought from the courts.

**Termination of employment**

Several claims are available to employees who are dismissed from their employment. This includes breach of contract, unfair dismissal, general protections, or discrimination under equal opportunity legislation. Potential remedies include reinstatement or compensation.

**Unfair dismissal**

Under the FW Act, employees who have been dismissed from their employment and:

- have worked for the employer for at least six months (in the case of employers with 15 or more employees) or 12 months (for employers with fewer than 15 employees);

- have not been dismissed as a result of a genuine redundancy; and

- are covered by a modern award, an applicable enterprise agreement or earn under a salary cap (currently A$145,400 per annum), can apply to the FWC on the basis that their dismissal was ‘harsh, unjust or unreasonable’.

**General protections and workplace rights**

Under the FW Act, employees cannot be dismissed or subjected to detrimental conduct (such as a demotion) because they have certain rights, entitlements or attributes. For example, an employer cannot terminate an employee because that employee has made a complaint or inquiry in relation to their employment.

**Discrimination**

Employers must not discriminate against employees for a prohibited reason. This broadly includes sex, marital status, sexual orientation, race, political opinion, national origin, disability, pregnancy, family responsibilities, age and religion. Such discrimination may be direct, such as
where a person treats another person less favourably, or indirect, such as where a person imposes an unreasonable condition, requirement or practice across a group of persons which has the effect of disadvantaging certain persons within the group.

In most cases, it can be a defence to a discrimination claim that the discrimination related to a characteristic that prevented the employee from fulfilling the ‘inherent requirements’ of their position or employment.

**Bullying**

The FW Act also contains anti-bullying laws which allow a worker who has been bullied at work to apply to the FWC for an order that the bullying stop where there is a risk that the worker will continue to be bullied at work. A person is ‘bullied at work’ if an individual repeatedly behaves unreasonably towards the worker, and that behaviour creates a risk to the worker’s health and safety. However, it excludes reasonable management actions carried out in a reasonable manner. Whilst the FWC cannot impose a financial penalty, it is otherwise empowered to make any order that it deems fit and contravention of a stop bullying order can be subject to financial penalty (via the courts).

**Work health and safety**

Work health and safety (WHS) laws vary between the separate states and territories of Australia. The Australian Government sought to harmonise WHS laws by developing the *Work Health and Safety Act 2011* (Cth) (*WHS Act*), however not all states and territories have adopted this approach.

Regardless of which WHS law applies, the fundamental tenets of Australian WHS law are that employers have an obligation to maintain a safe workplace and ensure the health, safety and welfare of their workers and other persons affected by the way they conduct their business.

WHS is a highly regulated regime, with state and federal regulatory bodies empowered to investigate, enforce and prosecute breaches of WHS laws. Substantial penalties apply for failure to comply with the relevant legislation and both companies and individuals involved in breaches can be exposed to criminal prosecution and imprisonment.

**Workers compensation**

Similarly, laws governing workers compensation arising out of work-related accidents continue to be regulated by states and territories. However, a federal workers compensation scheme
does exist whereby some employers can 'opt in' to the one system and avoid the duplication and costs of complying with the different state laws governing workers compensation. This is a benefit for businesses because it reduces set-up costs.

**Superannuation**

Australian superannuation laws require employers to contribute a minimum of 9.5% of an employee’s ‘ordinary time earnings’ to their superannuation fund, though this is expected to incrementally increase to 12% by 2025. Choice-of-fund legislation has given employees the right to elect which superannuation fund they would like employers to contribute to. Employees who do not elect a fund will automatically default to the employer’s fund.

**Long service leave**

Employees are entitled to long service leave entitlements under state and territory laws. Most schemes provide for an entitlement of 3 months’ long service leave after 15 years’ service, with some allowing this entitlement to be accessed or paid out on termination of employment after a shorter period of time. There is potential that the Australian Government will ultimately legislate federally to introduce a single national long service leave standard and eliminate state inconsistencies.

Last updated: 01/03/2019

**Key contacts**
Chapter 14

Immigration

Immigration concerns the entry of non-citizens into Australia for all purposes, whether for tourism, business, employment or any other purpose. Immigration is regulated by laws made by the Australian Parliament, under the authority of the Australian Constitution. Australian immigration law is largely contained in the Migration Act 1958 (Cth) (Migration Act) and the Migration Regulations 1994 (Migration Regulations) and encompasses the entry of non-citizens as well as their presence in, and removal from, Australia. The Migration Act and the Migration Regulations are administered by the Department of Home Affairs (the Department).

Under the Migration Act, visas operate to permit non-citizens to travel to, enter and remain in Australia for a specified or indefinite period. The visa system provides a number of options for individuals who wish to visit Australia to undertake business activities or to take up either temporary or permanent residence for business or employment purposes. Entry to Australia for temporary residence for employment usually requires sponsorship by an Australian or overseas company. However, there are options for highly skilled individuals or successful business people to take up permanent residence in Australia in their own right. New Zealand citizens with valid New Zealand passports and who do not have serious character or health concerns are entitled to Special Category Visas which allow them to freely work and live in Australia.

Australia’s visa system

All non-citizens wishing to enter Australia for a visit or to reside here are required to hold a visa permitting them to enter and remain in Australia. Non-citizens who do not hold a valid visa are liable to be removed from Australia, which may involve being taken into detention prior to removal. Most visas must be applied for and obtained before travel to Australia.

Visa application process

Non-citizens must generally make an application for a visa appropriate to the purpose and duration of their planned stay in Australia. Most applications must be in writing, using the approved application form. Applications for an increasing number of visa classes may be made electronically via the Department’s website, www.homeaffairs.gov.au.
The criteria to lodge a valid application are set out in the Migration Regulations and include the payment of the appropriate lodgement fee and using the correct application form.

**Types of visas**

Visas which permit non-citizens to enter or stay in Australia indefinitely are known as permanent residence visas. Temporary residence visas permit non-citizens to enter or stay in Australia for a specified period, until a specified event has happened or while the non-citizen has a specified status. Temporary residence visas are also subject to specific conditions which if breached, can lead to visa cancellation and in some cases, removal from Australia. Significant civil and criminal penalties also apply to employers who allow a non-citizen to work in breach of a work-related condition or without a visa. All permanent and temporary visas are classified into particular classes which are further categorised into subclasses. Some of the visa subclasses relevant to conducting business, working or studying in Australia are discussed below. There is a brief overview of visas for family-related permanent residence as well.

**Business visitors**

Non-citizens wishing to visit Australia for not more than three months to undertake business activities may apply for a business visitor visa, a business Electronic Travel Authority (ETA) or an eVisitor visa, depending on the country of the passport that the non-citizen holds. Passport holders of the United States, Canada, Japan and other defined countries are able to apply online through the Department’s website for a business ETA; citizens of countries in the European Union are able to apply online for an eVisitor visa; and citizens of other countries not included in the ETA or eVisitor arrangements must apply at the nearest Australian overseas post for a business visitor visa (though some citizens of these other countries are eligible to apply online).

Holders of any of these business visas are only permitted to participate in defined ‘business visitor activity’ and must not engage in activities that will have adverse consequences for employment or training opportunities for Australian citizens or permanent residents. This means holders of these visas can travel to Australia to participate in meetings and negotiations (including negotiating, entering into or reviewing business contracts) familiarise themselves with the Australian operations of an overseas business or participate in a conference, trade fair or seminar (provided the person is not being paid by an organiser for participation), but are not able to undertake work for or supply services to an organisation or person based in Australia. Care must be taken by holders of these business visas to remain within the limited range of activities that can be undertaken while in Australia.
Temporary residence visas for business and employment

Individuals may enter Australia for stays of up to four years as holders of a temporary residence visa for employment. These individuals may be accompanied by members of their family. The applicant and family members over 11 years of age may be required to undertake a chest x-ray examination and the applicant or family members who are either involved in activities such as education or health care or who are of school age must have a medical examination. The applicant and family members aged 16 and over will also be required to obtain police clearances from countries where they have lived for 12 months or longer in the past 10 years. Holders of these visas are able to make multiple entries to Australia during the validity of their visa.

Temporary residence visas for business

It is not possible for an individual business person to enter Australia as the holder of a temporary residence visa to establish a new business or participate in an existing Australian business. The only exception is where the individual is employed by an overseas company to establish a new business in Australia or is employed by a company operating in Australia in an occupation appropriate to the experience of the individual and the requirements of the business.

The requirements for this visa are outlined immediately below.

Temporary residence visas for employment

The temporary residence visas available for individuals to take up employment in Australia consist of one category of visa catering for a defined list of skilled occupations, comprised of select professional, management, associate-professional and trade occupations; this category is known as the Temporary Skill Shortage visa. There are also specialist visas available for defined activities: for example, research, occupational training, religious work, live performances or other productions, sporting events and other Government endorsed events.

Temporary Skill Shortage visa

The Temporary Skill Shortage (TSS) visa came into effect on 18 March 2018 and replaced the Temporary Work (subclass 457) visa as the most commonly used visa to employ overseas workers in Australian businesses on a temporary basis. Applicants can be any of the following:

- personnel, including intra-company transfers and overseas recruits, for Australian-based companies;
• personnel (executives and specialists) from offshore companies seeking to establish a branch of the company in Australia, participate in a joint venture, or undertake employment pursuant to a contract between an offshore company and an Australian company;

• personnel covered by a labour agreement or a work agreement; or

• service sellers.

**TSS Visa application process**

To obtain a TSS visa under the current requirements, the applicant’s employer or an associated entity of the employer first must complete an application to be an approved sponsor (sponsorship application). The sponsorship can be sought by a company already established and operating in Australia or an overseas company with no operations in Australia that is seeking to establish operations or is required to send personnel to Australia to fulfil contractual obligations. The company is also required to file a nomination application, identifying an individual for one of the occupations specified by the Minister for Immigration, Citizenship and Multicultural Affairs (the Minister). This nomination application covers aspects such as the nominated role, Labour Market Testing, the terms and conditions of employment as well as the proposed length of stay. Once the sponsorship and nomination applications are approved, the applicant's visa application is then considered.

All three applications can be lodged electronically with the Department and may be filed simultaneously. The visa applicant may be in or outside Australia at the time of the decision.

**Sponsorship application**

The sponsorship framework for the employment of foreign workers has been in effect since September 2009. There are a number of obligations imposed on the sponsoring company, greater sharing of information and the disclosure of information between other Departments, as well as heightened enforcement mechanisms. The latter includes financial penalty provisions (discussed below), increased monitoring and investigation powers for officials of the Department and information sharing between the Department and other Government agencies such as the Fair Work Ombudsman and the Australian Tax Office.

An Australian business seeking approval as a business sponsor must have the financial capacity to meet its obligations as the sponsor of foreign employees. The business must also demonstrate that it has a strong record of employing local labour, non-discriminatory work practices and there must be nothing adverse known about the business or a person associated
with the business.

The approved sponsorship is valid for a period of five years and it can be renewed providing the sponsoring company meets the relevant criteria.

Accredited sponsorship status is available for sponsors that have proven record with the Department and can satisfy certain additional criteria. This accreditation provides longer status as a sponsor, typically six years, access to expedited processing times for individual nominations and visa applications for temporary workers as well as ‘preapproval’ of certain factors including occupation, annual market rates and employment conditions.

**Nomination application**

As part of nomination application, the company must demonstrate and/or certify to the Department that:

- the visa applicant will be employed in a specified occupation from one of three prescribed occupation lists:
  - The Short Term Skilled Occupation List (**STSOL**) comprised of occupations which are in current short term shortage. Unless an international trade agreement provides otherwise, visas granted for such occupations are valid for a maximum period of two years, with the possibility of renewal in Australia for a further two years. A third application for an STSOL occupation may only be lodged from outside Australia and will be subject to strict genuine temporary entry requirements.
  - Occupations on the STSOL are not eligible to be sponsored under the permanent Employer Nomination Scheme, unless the visa holder is eligible for transitional arrangements which apply to certain current or former 457 visa holders (discussed further below).
  - The Medium and Long Term Strategic Skills List (**MLTSSL**) comprised of occupations in high demand, with a high value to Australia's economic development, and with a relatively long lead time for development of occupational skills within Australia. Occupations on the MLTSSL are eligible for a four-year TSS visa, can be renewed and can also be sponsored under the permanent Employer Nomination Scheme.
  - The Regional Occupation List (**ROL**) restricting certain occupations to regional areas of Australia only. The regions are defined by postcode but generally include anywhere outside the metropolitan areas of Sydney, Wollongong, Newcastle, Melbourne, Brisbane, the Gold Coast and Perth.
• if the occupation is subject to a 'caveat' (which relates to attributes about the nature of the position, size of business etc.), that these additional requirements are met;

• unless an international trade obligation applies, the sponsor has undertaken labour market testing (LMT) to demonstrate there is no suitably qualified and experienced Australian who is readily available to fill the nominated position. In most cases, this will require the sponsor to have undertaken suitable advertising in the four months prior to lodging the nomination. Strict criteria apply to the format, content and medium of advertising. For certain ‘select occupations’ or ‘select positions’, the nominator may provide, in lieu of prescribed advertising, a submission or alternative evidence detailing that there is no suitability qualified and experienced Australian who is readily available to fill the nominated position must be made;

• in all cases, the sponsor must also provide details of any redundancies or retrenchments of Australians in the same occupation, in the business of the sponsor (or an associated entity) and in the last 4 months prior to nomination lodgement. There are additional requirements that need to be made to meet the LMT criterion in these situations;

• the duties of the nominated position include a significant majority of the duties of the nominated occupation listed in the Australian New Zealand Standard Classification of Occupations (ANZSCO);

• the visa applicant's experience and qualifications are commensurate with the qualifications and experience specified in ANZSCO for the nominated occupation;

• the salary and other terms and conditions of employment offered to the visa applicant are no less favourable than those offered to an Australian in the same occupation in the same location, known as the 'annual market salary rate' requirement;

• the visa applicant will be engaged as an employee under a written contract of employment and the sponsor certifies in writing that the employment contract with the TSS visa holder/applicant is compliant with the National Employment Standards;

• the nominated position is a genuine one and is a full-time position (unless it is reasonable for the Minister to disregard this requirement); and

• for applications lodged on or after 12 August 2018, the applicable ‘Training Contribution Charge’ has been paid in relation to the nomination. This is calculated based on the turnover of the sponsoring business and the proposed period of stay. It is currently set at A$1,800 per year where the turnover is more than $10 million and $1,200 per year where the turnover is less than $10 million. A refund of the Training Contribution is available only in limited circumstances.
The annual market salary rate requirement means that overseas workers should receive the same or not less than the ‘guaranteed earnings’ that an Australian citizen or permanent resident earns or would earn performing equivalent work on a full-time basis for a year at the same workplace at the same location.. The payments that can be included in ‘guaranteed earnings’ are specified. Broadly they include wage payments, certain allowances and the value of agreed non-monetary benefits but do not include amounts that cannot be determined in advance, reimbursements or compulsory contributions to superannuation (pension) funds. In most cases, the cash components of the remuneration to be paid to the foreign worker should be greater than the Temporary Skilled Migration Income Threshold (TSMIT) which is currently set at A$53,900. The annual market salary rate requirement does not need to be demonstrated where the guaranteed earnings of the applicant are A$250,000 or higher.

**Visa application**

The individual applicants for a TSS visa are required to:

- have at least 2 years’ relevant experience in the nominated role. For some occupations (predominantly Trades occupations from specified countries), a formal skills assessment must also be obtained;

- show they have the necessary qualifications and/or skills and English language level to perform the duties of the nominated role and meet any relevant caveats that are placed on that occupation;

- in the case of the Short-term stream, satisfy a ‘genuine temporary entrant’ requirement to demonstrate their intention to only remain temporarily in Australia;

- show the individual and accompanying family members meet the health and character criteria for the grant of the TSS visa; and

- provide documentary evidence of adequate health insurance arrangements for the individual and family members at the time of application, which must be maintained for the duration of their stay in Australia.

**Sponsorship obligations**

Companies that sponsor individuals for TSS visas to work in their Australian operations take on a number of obligations with respect to the sponsored employees and their accompanying family members. These obligations include the following:
• providing terms and conditions of employment, including remuneration, that are at least equivalent to those of an Australian employee in the same occupation in the same location;

• meeting travel costs for the employee and family members to return to their home country in certain circumstances;

• ensuring that the employee only works in their approved nominated occupation;

• ensuring all necessary taxation and superannuation payments are made on behalf of the individual employee; and

• notifying the Department within 28 days and keeping records of certain events, including when the sponsored employee leaves the company's employ for any reason; a change of the duties of the employee; the payment of return travel costs; change of circumstances relevant to the approval of the sponsorship or nomination applications; and the appointment of a new director of the company.

Companies that do not adhere to these obligations face a range of penalties, including financial penalties and administrative penalties such as cancellation of their sponsorship and/or a bar from sponsoring additional employees for a set period of time. From 13 December 2018, the Department has the power to publish details of sponsors who have been sanctioned for failing to meet their sponsorship obligations.

**Specific visas for certain occupations and activities**

Depending on the proposed period of stay and location of the individual, applications for temporary residence visas for specified occupations, such as religious workers, researchers, sports persons, entertainers and domestic workers, have similar sponsorship rules as set out above. For stays of less than 3 months or where the individual is outside of Australia, the visa applicant will require a letter of support from an appropriate organisation or person in Australia to accompany the visa application. Temporary residence visas are also available for individuals to take up occupational training and professional development programs in Australia providing these opportunities do not impact on training opportunities for Australian citizens or permanent residents.

The Temporary Work (Short Stay Specialist) Subclass 400 visa allows for short term travel to:

• undertake non-ongoing highly specialised work (generally up to 3 months although stays of up to 6 months may be granted where there is a strong business case); or
• undertake an activity or work where there are compelling circumstances affecting Australia’s interest. This may include, for example, assistance with a disaster or emergency.

Subclass 400 visas can only be applied for and be granted whilst the applicant is outside of Australia and there are specific and extensive policy on the 400 visa and its allowable usage. Client’s should apply and utilise the 400 visa with care and this should not be used as an automatic alternative to the TSS work visa due to the very specific nature of the requirements.

Australia’s student visa program caters to international students wishing to undertake full-time study. Holders of most student visas are able to work up to 40 hours per fortnight and fulltime during semester breaks. Holders of retirement investment visas are able to work up to 40 hours per fortnight.

**Working holiday visas**

Non-citizens from participating countries who are at least 18 but have not turned 31 (or 35 for Irish and Canadian citizens) are able to enter Australia, usually for periods of up to 12 months, to undertake a combination of work and holiday activities. These arrangements are the subject of bilateral agreements between Australia and a growing number of countries. For passport holders of countries such as the United Kingdom, Germany, Ireland, Sweden, Norway, Finland, Japan, Canada, France, Taiwan, Hong Kong and several more, the visa is known as a ‘working holiday visa’. For those from countries such as the United States, China, Thailand, Malaysia, Indonesia, Chile, Spain, Turkey and several more it is known as the ‘work and holiday visa’. Employment is usually restricted to no more than six months with any one employer. In some cases, visa holders are able to extend their stay for up to 12 months where they have undertaken particular work in prescribed regional areas for a period of at least 3 months.

**Permanent residence visas for business and employment**

A number of options are available for individuals wishing to take up permanent residence in Australia for business or employment purposes.

**Permanent residence for business**

There are two visa categories in which experienced business people, either as owners or investors, who are aged less than 55 years of age and are sponsored by a state or territory government, can apply to migrate to Australia in the business innovation and investment category. Older applicants may apply for a visa under this program if the nominating state or
territory government provides its support to waive the age requirement in circumstances where the proposed business or investment activities will be of exceptional economic benefit to the region.

In general terms, applicants in the Business Innovation and Investment Program (BMP) must have an overall successful business career or successful record of business investment activity, and meet requirements for either owning or operating a business in Australia, by making a designated investment into state or territory government bonds or making a ‘complying’ investment into managed funds. There is also a specific stream for entrepreneurs who have secured funding from an appropriate third party in Australia.

High-calibre business owners and entrepreneurs can apply directly for a permanent visa under the Business Talent (subclass 132) visa category which is comprised of two streams:

- **Venture Capital Entrepreneur stream:** for individuals who have sourced at least A$1million in venture capital funding from a member of the Australian Venture Capital Association Limited for the early-phase start-up of a business in Australia; the commercialization of a product in Australia; or the development or the expansion of a business in Australia. No age limit applies to this stream.

- **Significant Business History stream:** For high-calibre business owners with a business turnover of at least A$3million and business assets of at least A$400,000 and who have a genuine and realistic commitment to establish or participate in a business in Australia. An age limit of 55 applies to this stream.

**Provisional visa application**

With the exception of a limited number of high-calibre business owners and entrepreneurs who can meet the above criteria for the Business Talent (subclass 132) visa, the business innovation and investment category of permanent residence requires the business person or investor to fulfil two stages in order to be granted a permanent residence visa. At the first stage, the individual applies for a provisional visa which allows the applicant to enter and remain in Australia for a four-year period to establish or enter into a business in Australia or to make prescribed investments. Depending on the stream, some business migrants may renew their provisional visa for another two years if they require additional time to establish their business in Australia or meet the requisite residence test before applying for the second stage of permanent residence, providing that state or territory government agrees to further their support.

The visa criteria differ depending in which stream the applicant applies for a visa: business
innovation, investor, significant investor, premium investor or entrepreneur (noting the latter is different from the Business Talent permanent visa described earlier).

Individuals applying in the business innovation stream must demonstrate a genuine and realistic commitment to be involved as an owner of a new or existing business in Australia, have net business and personal assets of at least A$800,000 and a business turnover of at least A$500,000. Applicants in the investor stream must have at least three years’ experience of direct involvement in an eligible investment, make a designated investment of at least A$1.5 million into state or territory government bonds for four years and have net business and personal assets of at least A$2.25 million. In addition to meeting the basic eligibility criteria, business innovation and investment applicants must meet an innovation points test which is based on criteria including age, English language ability, qualifications, experience in business, net personal and business assets and business turnover and innovation. All family members must also be able to meet health and character criteria before the visa can be granted.

Individuals applying under the significant investor stream must make a ‘complying significant investment’ of at least A$5 million for a period of at least four years into Australian managed funds (which themselves have additional criterion placed on them) and which fund is comprised of the following:

- at least A$500,000 invested in venture capital funds registered under the Venture Capital Act 2002 (Cth);

- at least A$1.5 million invested in emerging companies i.e. companies with market capitalisation of less than A$500,000 incorporated in Australia or quoted on an Australia securities exchange; and

- the remaining A$3 million portion is to be invested in defined ‘balancing investments’.

No age limit applies to this stream.

Individuals applying under the Premium Investor stream must invest at least A$15 million into prescribed investments and/or philanthropic contributions (which must be approved by a State/Territory government) for a period of at least 12 months. No age limit applies to this stream.

Individuals applying under the Entrepreneur stream must have sourced at least A$200,000 from approved third party funding, have a ‘Competent’ level of English and undertake or propose to undertake ‘complying entrepreneurial activity’ in Australia.
Permanent visa application

At the second stage, the applicant who holds a provisional visa applies for permanent residence as a business owner or investor. For the business owner and entrepreneur category this application can be lodged after residing for a minimum period of two years in Australia as the holder of a provisional business innovation and investment visa. For the investor and significant investor categories, the permanent residence stage can only be applied for after the individual has held the appropriate investments for at least four years and can satisfy a prescribed residence requirement of at least two years (investor stream) or 160 days (significant investor stream) over the preceding four year period. For the premium investor category, the minimum investment period is reduced to 12 months and there is no residence requirement.

In order to be eligible for a permanent visa, in addition to meeting all of the obligations of the provisional visa, the individuals must show a satisfactory record of compliance with Australian laws and a genuine and realistic commitment to continue a business or investment in Australia. Applicants in the business innovation stream will also need to demonstrate a business turnover of at least A$300,000 in the 12 months immediately before the application is lodged and to meet two of the following criteria: business assets of at least A$200,000, net personal and business assets of at least A$600,000 and/or employment of at least two full-time employees who are Australians or New Zealanders and who are not members of the applicant’s family, throughout the 12 months immediately before making an application.

Applicants in the entrepreneur stream will also need to demonstrate an overall successful record of undertaking activities of an entrepreneurial nature in Australia in order to be eligible for permanent residency. Factors that are considered to assess the success of the applicant’s record include:

- the number of Australians that are employed in Australia in relation to the activities;
- the level and nature of ongoing funding of, or investment in, the activities; and
- the annual turnover of businesses related to the activities.

Permanent residence for employment based on nomination by an employer

Companies are able to nominate highly skilled individuals to migrate to Australia as permanent residents or to remain permanently in Australia under the Employer Nomination Scheme. The individual must have the necessary skills and experience to be employed in an occupation defined in a list of highly skilled occupations. These occupations include a number professional,
management, para-professional and trade-based occupations. An age limit of 45 applies unless the individual meets one of the prescribed aged exemptions.

The application process consists of two stages. First, the company must have the nomination of the position approved by the Department. As part of the nomination application, the company is required to demonstrate that it is of good corporate standing (no adverse information is known about the business), it is actively and lawfully operating in Australia and adheres to all workplace and immigration laws. For applications lodged on or after 12 August 2018, the applicable ‘Training Contribution Charge’ must accompany the nomination. This is calculated based on the turnover of the sponsoring business and is currently set at A$5,000 per nomination where the turnover is more than $10 million and A$3,000 per nomination where the turnover is less than $10 million. A refund of the Training Contribution is only available in limited circumstances.

The company must also satisfy the Department that there is a genuine need for the nominated position, which must be full-time and available for at least two years with nothing expressed in the employment agreement to exclude the possibility of renewal beyond two years. The employer will also need to meet the ‘annual market salary rate’ requirement as required for the approval of a TSS visa.

Pathways to Permanent Residence

There are three eligibility pathways to permanent residence under the Employer Nomination Scheme: one for select TSS or subclass 457 visa holders transitioning to permanent status (Temporary Residence Transition stream), another for those seeking permanent residence directly (Direct Entry stream), and a third for applicants who are sponsored by an employer that has an agreed labour agreement with the Department (Labour Agreement stream). Some common criteria apply, including an age limit or 45 and the requirement to have at least ‘competent’ English, with some limited exemptions.

TSS or subclass 457 visa holders applying for permanent residence under the Employer Nomination Scheme benefit from the streamlined Temporary Residence Transition (TRT) pathway if they have worked for their sponsoring employer for at least three years in the period of four years immediately before the nomination application is made and if the nominated role falls within the Medium and Long-Term Strategic Skills List (MLTSSL). The visa holder must have been employed full time and in Australia, as well as being paid the annual market rate. As a result of the prior employment and the continuing employer sponsorship, applicants under this stream do not require a formal assessment of their skills or qualifications. However, a significant change in role or in the legal structure or entity of the sponsoring employer may affect a person’s ability to satisfy the Temporary Residence Transition requirements.
**Transitional arrangements for certain current and former 457 visa holders**

Transitional arrangements apply to current and/or former 457 visa holders who held or had applied for a subclass 457 visa as at 18 April 2017. Under these transitional arrangements the applicant:

- needs to have been employed full-time in Australia in their nomination occupation for a period of at least 2 years in the 3-year period to the application being made (rather than 3 years in the last 4 years);

- can apply in their nominated occupation regardless of whether it is on the MLTSSL at the time the ENS application is lodged; and

- will not need to be 45 years old but will still need to be under 50 years old at the time of application (unless an age exemption applies).

These transitional arrangements are available until 18 March 2022.

Foreign nationals applying under the Employer Nomination Scheme under the Direct Entry (DE) stream are those applicants applying from overseas, or applicants who hold a temporary visa other than a primary TSS visa (for example, New Zealand citizens or family members holding New Zealand Family Relationship visas), or applicants who have not completed the required three years of employment with the sponsoring employer. The nominated position must appear on the MLTSSL and these applicants are subject to more stringent requirements requiring the nominated position to be under the employer’s direct control (as opposed to under the TRT stream where the applicant can be employed by an associated entity of the nominating employer). The applicant must also have at least three years’ work experience and undergo a formal skills assessment, although some exemptions apply.

Under current rules, specific exemptions for age, skill and English language requirements are available in some cases. For example, age concessions apply to for prescribed occupations, for New Zealand citizens or New Zealand Family Relationship visa holders who have worked for their nominating employer for at least two years or for TSS or subclass 457 visa holders who have worked for their nominating employer for at least three years and during that time earned above the Fair Work High Income Threshold which is indexed each year.

Under the Regional Occupation List, there are additional occupations available for nominations under the Regional Sponsored Migration Scheme relating to employment in regional areas of Australia. In these cases the nominations must be supported by the relevant Regional Certifying Body in the region.
Dependent family members may be included in the visa application, and all applicants are required to meet health and character criteria (including those who will not be migrating to Australia).

**Permanent residence for employment based on skills and experience**

Individuals, who are under 45 years of age, are able to apply to take up permanent residence based on their skills and experience in a highly skilled occupation under the General Skilled Migration (GSM) program. Applicants may apply independently or through nomination by a state/territory government or sponsorship by an eligible relative living in a designated area of Australia. The number of skilled occupations available for this purpose has been significantly reduced and now only includes occupations in fields such as health care, information technology, accounting, engineering and construction (both professional and trade), education and agriculture. There are six permanent visa categories that are available for skilled migration under GSM. One for individuals who are applying on basis of their skills and work experience (subclass 189 visa) and another for those who are nominated by a state or territory government (subclass 190 visa). Other subclasses cover applicants who fall under categories including nominated, regional, temporary and recognised graduate applicants. Each visa subclass has its own eligibility criteria, and the application process (known as 'SkillSelect') for this type of visa takes place over three stages, including submitting an online Expression of Interest, meeting the eligibility criteria and satisfying a points test, and then making a visa application, if invited, within a prescribed time. Generally in applying for these permanent residence visas, the individual must meet a points test based on factors such as age, English language ability, Australian and overseas employment experience and qualifications, credentialed community language, partner’s skills, studying and living in regional Australia and sponsorship by a state or territory government. Points can be awarded for credentialed community language if an applicant has been accredited at the para-professional level or above by the National Accreditation Authority for Translators and Interpreters (NAATI) as either a translator or interpreter. The main applicant and all family members, including those who are not migrating to Australia, must meet health and character requirements.

A new pathway for New Zealand citizens was introduced on 1 July 2017 into the subclass 189 visa category for certain New Zealand citizens who were present in Australia on or before 19 February 2016, have been usually resident in Australia for a continuous period of at least five years and during that time have earned above a specified amount.

There is also a visa for recent graduates of Australian tertiary education institutions in most areas of study or from engineering courses at designated overseas universities. These visas create a pathway for graduates to apply for permanent residence onshore either in the highly
skilled category, but only in an approved occupation, or as sponsored by an employer toward the end of their initial visa which can be granted for periods of between 18 months to four years depending on stream.

Once a permanent residence visa is granted, it is generally valid for five years and allows travel in and out of Australia over that period. After this initial period of permanent residence has elapsed, eligibility to continue to re-enter Australia after travel overseas is reassessed based on the length of time that the individual has been physically present in Australia during the initial five-year period. In cases where the individual has spent less than two years in Australia, the business, personal, employment and cultural ties that the person has to Australia and the benefit of these ties to Australia are assessed as part of the application process.

**Application process for certain visa categories under the Business Innovation and Investment BMP and GSM programs**

Since 1 July 2012, individuals who are interested in skilled migration to Australia under the Business Innovation and Investment (BMP) and GSM programs, they must make the application through the Skilled Migration Selection Model. The scheme is a two-stage initial application process where prospective applicants first submit an indication that they would like to be considered for a visa, through an online expression of interest (EOI) and subsequently the Department may invite the individual to make an application for a visa.

For the points-based skilled migration programs, applicants have their skills and attributes ranked according to the appropriate points test, and therefore, only those applicants who receive the highest score will be invited to apply for a visa. Each occupation has an 'occupation ceiling' which means that there is a limit on how many people are selected for skilled migration from particular occupation groups. There are further measures where certain occupations are listed on State and Territory lists as those in need or priority where an application may ultimately be sought to be made under State or Territory Nomination.

Prospective migrants are also able to nominate in the EOI their willingness to live and work in regional Australia as well as their interest in being considered for state/territory or employer-sponsored visa categories. All EOIs are recorded online through a database called SkillSelect. Employers and state or territory governments interested in sponsoring overseas workers are able to search through SkillSelect to locate workers with the requisite skills and attributes and nominate them for a permanent or a temporary visa. As SkillSelect records whether the individual is willing to live and work in regional Australia, it may assist employers and state and territory governments with filling vacancies in areas of Australia with acute skills shortages.
Family members and partners visas

There are a variety of permanent visas for family members and partners. Legally married spouses and de facto partners (including same sex partners) of Australian citizens, permanent residents and eligible New Zealand residents can apply onshore or offshore for a partner visa and be sponsored by their spouse or de facto for a visa. The individual applies first for a provisional visa and then after a certain period of time has passed may be considered for permanent residence so long as the applicant continues to meet the eligibility criteria (with some limited exceptions). Applicants in a married and de facto relationship must demonstrate that they are in a genuine and continuing relationship with their spouse or de facto partner and mutual commitment to a shared life to the exclusion of all others. There is a prospective spouse visa for fiancés of Australian citizens and permanent residents which may only be applied for outside Australia, and which allow the visa holder nine months to marry an Australian citizen, permanent resident or eligible New Zealand citizen who has sponsored the individual for the visa.

Permanent visas are available for children (natural, adopted, stepchildren, orphaned and more), as well as for parents and close relatives of Australian citizens and permanent residents. To qualify for permanent visas, children must be considered dependent upon their Australian citizen or permanent resident sponsor under the Regulations. There are both onshore and offshore options available. Parents can qualify for permanent visas if they are able to show that requisite numbers of their children usually reside in Australia. There is a category of permanent residence for parents where significantly higher lodgement fees are required to be paid. These applications have much shorter processing times than is the case for the other categories of parent visas. Only parents who are considered to be ‘aged parents’ are eligible to apply under onshore subclasses and are thus eligible for a bridging visa upon lodgement of a valid application allowing them to remain in Australia during lengthy visa processing.

Student visas

Non-citizens seeking to enter and remain in Australia for the purpose of full-time study must generally obtain a student visa. On 1 July 2016 all student visa subclasses in existence were repealed and replaced with two student visa subclasses – the Class TU Student (Temporary) Visa and the Student Guardian Visa.

In order to apply for a valid student visa, the applicant must have applied for and been accepted to study in a, full-time course of study which is provided by an institution that is registered under the Education Services for Overseas Students Act. A confirmation of enrolment from the institution is generally required in most cases. If the applicant is under 18 years of age, then the applicant must also show that appropriate welfare arrangements have been made for
the duration of their intended stay in Australia.

On 1 July 2016, a new ‘Simplified Student Visa Framework’ was introduced to replace the previous assessment level regime and the streamlined processing arrangements which was previously available for certain courses. Under the new framework, the level of evidentiary requirements in relation to English language skills and financial capacity are now assessed and managed by an online document checklist tool available on the Department’s website: http://www.border.gov.au/Trav/Visa-1/500-. Any applicant wishing to study in Australia must also satisfy the Department that they are both a genuine student and have a genuine intention to stay in Australia temporarily. In all cases, the Migration Regulations require all family unit members to be declared in the student’s application regardless of whether they intend to accompany the student to Australia.

The student guardian visa may be applied for by a family member in order to provide appropriate care and welfare arrangements for the Student visa holder if they under 18 years of age during their studies, or for student visa holders over 18 in exceptional circumstances. Student Guardian visa applicants are required to meet prescribed financial requirements and provide evidence of their financial capacity.

There are other temporary visas outside of the student visa program that permit short-term study in Australia of generally up to 3 months, and may be used such as where the course is not a registered course of study. These include visa issued under the Visitor's visa program and the Working Holiday or Work and Holiday program.

**Immigration review**

In most cases, a decision by a Department official to refuse an application for a visa or a sponsorship application may be reviewed, generally provided one of the parties with an interest in the application is present in Australia. Since 1 July 2015 the Migration Review Tribunal and Refugee Review Tribunal have merged with the Administrative Appeals Tribunal (AAT) which is now the sole review body for migration decisions. Applicants may apply online for review, and may make their application either under the Migration and Refugee Division or the General Division of the AAT depending on the decision to be reviewed. However, it is essential to apply within the required statutory timeframe or such an application will not be valid and cannot be reviewed.

The AAT reviews the merits of the Department’s decision and can also review visa cancellation decisions (known as migration decisions), most onshore protection refusal decisions (refugee decisions), character-related refusal decisions, and citizenship refusal decisions. The AAT has the power to set aside the decision of the Department official and substitute the Department’s
decision with its own. If the AAT determines that the Department’s decision was correct then the applicant will no longer have the right to remain in Australia unless they hold another visa. The person must return home or to a country where the person has the right of entry and stay as soon as possible.

Further avenues of review are available on legal issues (known as judicial review) associated with particular decisions to the Federal Magistrates Court, the Federal Court and the High Court.

The Migration Act empowers the Minister for Immigration, Citizenship and Multicultural Affairs to intervene in particular cases and grant a visa where the application has been refused by the Department and the refusal has then been considered by the AAT.

**Concluding comments**

The Australian Government welcomes applications from non-citizens who wish to live and work in Australia. While the process of applying is detailed, the criteria for the visa to be approved are set out in the Migration Regulations. Provided the requirements for the visa can be met by both the individual and the sponsor (if any), genuine applicants should have little difficulty in being granted the visa they seek where entry is sought for employment or business purposes. These visas are often processed more quickly by Department officials than for some of the family-related visa categories.

There are regional offices of the Department in each state and territory capital city and a number of Australian diplomatic missions overseas. The Department’s website is at www.border.gov.au and a number of visa applications can now be lodged online with approval being notified electronically. It is the intention that in the future, more visa categories will be eligible to lodge online.

The Australian Government continues to review and adjust its migration program and future amendments, some of which have already been detailed, are expected.

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CONSUMER PROTECTION AND PRODUCT LIABILITY
Australian law has a strong focus on consumer protection and there are numerous obligations that businesses must comply with when providing goods or services to consumers in Australia. These obligations are contained in the Australian Consumer Law (ACL). Found in Schedule 2 of the Competition and Consumer Act 2010 (Cth), the ACL is the principal legislation in Australia governing consumer protection and liability of manufacturers, suppliers and distributors of consumer products for losses or injuries caused by products. The ACL is a single national law covering consumer protection and fair trading laws in Australia. It deals with consumer issues such as misleading and deceptive conduct, unfair contract terms, statutory consumer guarantees, unsolicited sales practices, lay-by agreements, product safety and manufacturer liability (among other things).

The ACL can also provide some protections in certain business-to-business contexts.

**Conduct obligations**

The ACL contains numerous obligations that regulate how companies can engage with consumers (including over the internet). The predominant focus of the ACCC’s enforcement activities recently has been on the prohibition of ‘misleading and deceptive conduct’ in trade or commerce. Businesses need to take particular care to ensure that they do not make misleading representations to consumers in Australia about their products and services or what remedies might be available under the ACL in relation to product or services claims.

The ACL also prohibits ‘unconscionable conduct’ in connection with the supply of goods or services. When considering whether conduct may be classified as unconscionable, consideration is given to factors such as the relative bargaining strengths of the business and the customer and whether the business used undue influence, pressure or unfair tactics.

The ACL similarly contains provisions prohibiting unfair contract terms contained in standard form contracts between a company and an individual consumer. Unfair contract terms are terms that would cause significant imbalance in the parties’ rights and obligations under the contract, are not reasonably necessary to protect the legitimate interests of the advantaged
party, and would cause detriment (financial or otherwise) if relied on. A term found to be an unfair contract term is void. This unfair contract terms regime has been extended to certain business to business contracts where at least one of the parties is a small business and the upfront price payable under the contract is no more than A$300,000 or A$1 million if the contract is for more than 12 months.

Businesses must also have regard as to how they present prices. The ACL prohibits companies from stating the price for goods or services for consumers as a component of the total price, unless a single price is also prominently specified. The single price must include all quantifiable components including any taxes or charges imposed. There are some limited exemptions to this rule; for example, restaurants applying menu surcharges on specific days may be exempt from the component pricing requirements.

The ACL imposes consumer protection obligations on businesses undertaking unsolicited sales practices (including door-to-door selling and telephone sales) and entering into lay-by transactions with customers. There has been increased enforcement activity in this area in recent times.

The ACL also prohibits certain types of false representation, referral selling, undue harassment at a place of residence or business, supplying unsafe goods, sending unsolicited credit cards and requiring payment for the supply of unsolicited goods.

**Defective goods**

The ACL provides remedies for consumers where goods are not of acceptable quality or are defective and cause injury as discussed below.

**Consumer guarantees**

Consumer guarantees apply where there is a supply of goods or services to a consumer in trade or commerce. The consumer guarantees provisions contain a number of requirements, one of the most significant requiring goods to be fit for purpose. In recent years, the ACCC has been actively enforcing these provisions with regard to representations made by large retailers about express and extended warranties that may mislead consumers as to their rights under statutory consumer guarantees.

** Liability for injury or loss**

Suppliers, and not just manufacturers, are directly liable for damage or loss that the consumer suffers from goods which breach consumer guarantees. The ACL places mandatory reporting obligations upon companies who become aware that a consumer good they supply has caused
injury. The ACL also enables people who are injured or whose property is damaged as a result of goods being unsafe to seek compensation from the manufacturer without the need to show any negligence by the manufacturer, or a contractual relationship with the manufacturer.

Goods will be deemed to have a defect if their safety is not such as a person is generally entitled to expect. The ACL sets out a number of matters to be considered in determining whether goods are safe, including the way in which the goods are marketed, the packaging of the goods and the instructions or warnings that accompany the goods. The manufacturer of the goods has a number of statutory defences they may seek to rely on, including (among others) the absence of any defect when the goods were supplied or that the defect occurred because of compliance with a mandatory standard.

In addition to statutory protection for consumers, consumers in Australia may also rely on the common law and seek damages under principles of tort (negligence) or contract, following loss or damage from a defective product. Liability under the common law tort of negligence is fault-based, with the result that the plaintiff must show some wrongdoing on the part of the defendant (manufacturer or supplier). The plaintiff must establish that the manufacturer or supplier owed a duty of care to the plaintiff, that they breached that duty (by failing to perform according to the requisite standard of care) and that breach caused loss or injury to the plaintiff.

There may also be contractual remedies for consumers who are able to establish a contractual relationship with the supplier and breach of that contract.

**Enforcement: penalties and powers**

The ACL confers enforcement powers upon the ACCC in connection with the consumer protection provisions. The ACCC can issue substantiation notices, requiring a business to produce information or documents, and they can issue infringement notices imposing a financial penalty.

Where court proceedings are commenced, civil penalties for breach of the ACL by companies can be up to the greater of:

- A$10 million;
- three times the value of the benefit received; or
- where the benefit cannot be calculated, 10% of annual turnover in the preceding 12 months.
For individuals, the penalty can be up to A$500,000, for each contravention.

Civil penalties will be materially higher than the fines associated with an infringement notice. For example, in a Federal Court case in 2018 a company was ordered to pay a A$10m penalty for engaging in unconscionable conduct in relation to dealings with customers in relation to their legal rights, including potential rights under statutory consumer guarantees, in relation to product complaints.

The ACCC can also require businesses to publish corrective advertising, implement compliance programs and disqualify individuals from management positions.

**International product liability**


The Convention applies where the seller and purchaser have places of business in countries that are parties to the Convention, or where the rules of private international law lead to the application of the law of a country that is a party to the Convention.

The Convention does not apply to the sale of some products including products bought for personal, family or household use and financial products such as stocks, shares, investment securities or money.

The Convention provides that the seller must deliver products which are of the quantity, quality and description required by the contract, and which are contained or packaged in the manner required by the contract. Unless the parties have agreed otherwise, products supplied under the contract must be fit for their intended purpose (that is the usual purpose for such a product or the purpose expressly or impliedly made known to the seller at the time of the contract), have the qualities conforming to the sample or model used to sell the product, and be packaged in a manner adequate to preserve and protect the products.

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DOING BUSINESS IN AUSTRALIA

PROPERTY LAW
Chapter 16

Property Law

Australia has a large body of law regulating real estate. This chapter contains a brief overview of:

- the different types of land ownership in Australia;
- other interests in land (which do not amount to full ownership) and rights in respect of land which are recognised by Australian law;
- the requirements which must be met under Australian law before real estate located in Australia can be sold or leased or otherwise dealt with; and
- the more significant responsibilities and liabilities imposed on people who own land in Australia.

You should seek specific legal advice in relation to each of these issues before you acquire or develop any real estate in Australia.

Land ownership

Australian law recognises the following two basic different types of land ownership:

- freehold title; and
- Crown land.

Each of the states and territories has its own legislation that deals with the ownership of land.

Freehold title

Freehold title gives the landowner complete and unrestricted ownership of that land (but
subject to certain rights which are often reserved to the relevant state or territory, such as the right to minerals) and the right to do anything it wishes on that land, subject to complying with applicable laws, such as planning and environmental laws. The majority of ownership of freehold title, and interests in freehold title, in Australia is governed by a system of registration known as Torrens title.

**Torrens title**

Torrens title is an effective, relatively simple and secure system that protects the rights of those having a registered interest in land. Most types of interests in land can be registered on the relevant state or territory register which is then used as the key means for the public to find out what interests exist in relation to a parcel of land (and the terms of any such interests, such as the terms of a registered lease). However, some freehold land in Australia has not yet been converted to Torrens title and is still governed by what is called ‘old system’ title. This type of land is relatively rare and mostly located in New South Wales. Old system title is not as simple to deal with as Torrens title but it still provides the owner with secure title.

The title to freehold land can be subdivided in various ways. Two examples are strata title and community title. Both strata title and community title are regulated by statute.

**Strata title and community title**

Strata title is most commonly used for multi-level buildings, for example, residential apartments. Strata title enables a person to own part of a building (commonly referred to as a lot or unit) and to use the common areas of the building (such as foyers, pools and lifts) in common with the other lot or unit owners of the building.

Community title is most commonly used for land subdivisions, such as housing estates. It can also be used in relation to apartment buildings. Community title enables a person to own an area of land forming part of an estate and to use the common areas of the estate (such as private roads and parks) in common with other persons who own the other land in the estate.

The legislation governing strata title and community title subdivisions establishes a body corporate which oversees the common areas and shared facilities and which has the power to make rules which regulate the way people can use property and shared facilities within the building or estate. The owners of land in a strata title or community title subdivision collectively control the body corporate.

**Crown land**

The Australian Government and the state and territory governments own certain land in
Australia. Not all government-owned land has been converted to freehold title and what remains is known as Crown land. Crown land is regulated by statute and certain specific requirements must be met before Crown land can be dealt with, for example, by being leased or sold.

**Interests in and rights in respect of land**

Australian law recognises a number of different types of interests in and rights to land which do not amount to full ownership of the land including:

- leases;
- mortgages;
- easements and restrictive covenants;
- native title; and
- licences.

**Leases**

A landowner can lease the land or part of it to another person on terms to be agreed by the parties. A lease gives the person to whom it is granted an interest in the land and a right to exclusively occupy the area leased subject to the terms of the lease. Certain types of lease of Torrens title land are required to be registered under the Torrens title system in some, but not all, states and territories, in order to protect the interest in the lease against the claims of third parties (for example, a mortgagee who wishes to sell the land as vacant land). In Victoria, leases are generally not able to be registered.

**Mortgages**

When a landowner borrows money the lender may require that the landowner grant to the lender security over land. This security is known as a mortgage and it generally entitles the lender to sell the land if the borrower does not repay the money borrowed as agreed between the parties. Mortgages of Torrens title land are registered under the Torrens title system.

The owner of a leasehold interest in land can also use its leasehold interest as security for borrowed money, subject to the terms of the lease. If the borrower does not repay the money borrowed as agreed between the parties, the mortgage of a leasehold interest gives the lender
the right to sell the leasehold interest in the land. Mortgages of leases of Torrens title land are registered under the Torrens title system.

**Easements and restrictive covenants**

A landowner can grant rights over its land, in favour of the owner from time to time of other land, for example, a right to travel over the land or to lay pipes through the land. These rights are referred to as easements.

A landowner can also restrict the use of its land, in favour of the owner for the time being of other land, for example, agreeing to not use their land for noxious or offensive purposes. These restrictions are referred to as restrictive covenants.

Both easements and restrictive covenants:

- benefit or restrict the land rather than the landowner who granted the easement or restrictive covenant or the landowner who obtained the benefit of it; and

- where they affect Torrens title land, are registered under the Torrens title system in some, but not all, states and territories.

In general, where easements and restrictive covenants are not registered under the Torrens title system, they will not be binding on future owners unless the future owners have agreed by contract to be bound by them.

Some government bodies and authorities can also obtain easements or place restrictive covenants over land, for example, to lay electricity cables. These easements and restrictions are referred to as easements in gross. Easements in gross do not attach to or benefit land owned by the government body or authority but instead are granted directly to the government body or authority. Like easements and restrictive covenants granted between landowners, easements in gross are registered under the Torrens title system where they affect Torrens title land.

**Native title**

Native title is the term for the interests in land held by Aboriginal or Torres Strait Islanders (Australia’s Indigenous people) under their customary law as recognised by the law of Australia.

Native title is different from a freehold or leasehold interest in that:
the rights derive from traditional laws and customs acknowledged and observed by Indigenous Australians; they do not derive from statute; and

native title rights and interests must relate to either or both of land or waters. They may be communal, group or individual, but are not transferable. Refer to section 19.4 in Chapter 19 of this publication, 'Natural Resources', for further information on native title and Indigenous cultural heritage law.

Licences

A landowner (and, subject to the terms of the particular lease, a person who leases land) can grant a licence to occupy that land to other persons. A licence gives the person to whom it is granted a non-exclusive right to occupy the land subject to the terms of the licence. Licences do not give the licence holder an interest in the land and cannot be registered under the Torrens title system. A licence is a personal contract between the landowner (or the lessee) and the person to whom the licence is granted.

Dealing with land in Australia

There are certain legal requirements which must be met before land located in Australia can be dealt with (for example, purchased or leased). The more significant of these requirements are as follows:

agreements which deal with land (that is, sell, lease or mortgage land) in Australia must be made in writing in order to be effective;

documents which need to be lodged with the Torrens title system registry offices to transfer any type of interest in land to a purchaser must be in the prescribed form and executed in accordance with the registry requirements for the relevant state. Registry offices in Australia are moving to electronic lodgement of documents and vary between the states. It is also ordinarily a requirement that a lawyer verify the identity of signatories who sign prescribed forms. Again the practice varies between the states;

in some states and territories certain documents dealing with land are required to be stamped by a government office in order to be effective. The government office charges a fee or transfer tax, usually calculated by reference to the money paid under the dealing, before it will stamp the document. This is referred to as stamp duty. Foreign companies or persons may be subject to higher rates of stamp duty on acquisition of real estate as compared to an Australian resident. Similarly, a foreign company or person may be charged a higher rate for land tax in relation to real estate it has acquired. See Chapter 10
of this publication 'Foreign investment regulation';

- foreign companies or persons will generally require approval from the Foreign Investment Review Board (FIRB) before they are able to buy real estate in Australia. Different rules apply to different types of real estate and certain categories of foreign persons. In some circumstances, FIRB approval may also be required to lease real estate in Australia. See Chapter 10 of this publication 'Foreign Investment Regulation', for more information on FIRB approval;

- in some states, there may be a separate foreign ownership of land register (distinct from the FIRB approval requirements); and

- in relation to the acquisition of certain types of real estate in some states, purchasers must enquire about the vendor’s residency status and vendor’s GST compliance. Depending on the information provided by the vendor, the purchaser may be required by law to withhold a prescribed amount from the purchase price and remit this amount to the Australian Taxation Office. Failure to comply with this obligation to retain and remit funds, will make the purchaser personally responsible for these amounts. See Chapter 10 of this publication, ‘Foreign Investment Regulation’ and Chapter 11 of this publication, ‘Taxation, stamp duty and customs duty’.

**Responsibilities and liabilities of landowners**

Australian law imposes certain general responsibilities and liabilities on land owners. A brief overview of some of these responsibilities and liabilities is set out here. Other responsibilities and liabilities may apply where entering into certain transactions, such as:

- a standard form lease offered to a party on a 'take it or leave it' basis – see section 15.1, ‘Conduct obligations’, in Chapter 15 of this publication 'Consumer protection and product liability', for a discussion of the Australian Consumer Law; and

- the obligation to disclose certain information about land that is being sold or leased, for example:
  - disclosure material which is compulsory under the property legislation for most states;
  - contamination;
  - specific disclosure obligations and requirements for strata title, community title and residential land; and
building and energy efficiency certificates, NABERS and Green Star ratings.

You should obtain legal advice as to the specific responsibilities and liabilities which attach to any land you are considering purchasing.

Rates and taxes

Australian law permits local government authorities to charge levies on land to cover the cost of providing services such as garbage removal, water and sewage removal services to the land. These levies are referred to as rates and are assessed yearly but may be payable in quarterly instalments.

Each state and territory in Australia imposes an annual tax on owning land within the state or territory. This tax is known as land tax.

Some properties, usually properties which are the owner’s principal place of residence, are exempt from the requirement to pay land tax.

An owner domiciled outside Australia is not usually entitled to this exemption.

For strata title or community title subdivisions of land, the body corporate also charges levies to meet the costs of administration, repair, maintenance and insurance of common areas and shared facilities.

Public liability

Australian law imposes liability on a landowner or a person who leases land if people who enter onto that land are killed or injured or have their property damaged in certain ways for which the law regards the landowner or person who leases the land as being responsible. Public liability insurance is available to cover this risk.

Compliance

Each state and territory in Australia has detailed laws governing:

- the use of land;
- the development of land and the erection of improvements on land; and
- the emission of pollutants.
These laws often place responsibility for complying with such laws on the landowner as well as on the person occupying the land or carrying out development of land. See Chapter 17 of this publication 'Environmental and planning regulation', for more information on these laws.

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DOING BUSINESS IN AUSTRALIA
ENVIRONMENTAL AND PLANNING REGULATION
Chapter 17

Environmental and Planning Regulation

The Australian Government and the governments of each Australian state and territory have enacted detailed laws regulating:

- the use of land;
- the development of land and the erection of improvements on land; and
- the emission of pollutants from or to land.

As a result, most corporate acquisitions and nearly all real estate transactions in Australia will involve planning, land use and pollution control issues.

This chapter contains a brief overview of the main federal environmental legislation and a discussion of the types of legislation which have now been enacted by each state and territory in Australia.

If you intend to acquire real estate, develop land or acquire or set up a business in Australia you should obtain legal advice in relation to the specific planning, land use and pollution legislation which will regulate your proposed transaction or project.

Federal legislation

The primary federal legislation governing planning and environmental matters is the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). The EPBC Act prohibits the carrying out of 'actions' which will have a significant impact on:

- the environment of land or seas owned by the Commonwealth; or
- certain specific matters of national environmental significance (such as items of national heritage, listed threatened species and communities, and nuclear actions),
unless the approval of the Minister for the Environment has been obtained or one of the other exceptions contained in the EPBC Act applies. Any requirement to obtain approval under the EPBC Act is separate from and in addition to any requirement to obtain approval under state or territory legislation, although sometimes the same documentation may be used for both applications.

State and territory legislation

Separate land use planning and environmental legislation has been enacted by each Australian state and territory. While the legislation which has been enacted differs (sometimes widely) between the different jurisdictions, it is possible to identify some common themes in relation to:

- land use planning pollution control;
- land contamination; and
- greenhouse gas and renewable energy issues.

A brief overview of each of these issues is set out below.

Land use planning

In general, the land use planning legislation in each jurisdiction utilises environmental planning instruments to control the use and development of land. Environmental planning instruments classify land into different zones and specify the types of development which may be:

- permitted without any requirement to obtain approval;
- prohibited; or
- permitted only after approval has been obtained.

In general, approval is required to change the use of land or a building (for example, from a house to a commercial office) or to erect any substantive structure, such as a building, on land. Failing to obtain approval where it is required is a criminal offence and may also entitle an authority to issue an order requiring you to stop using the land for an unapproved purpose or to demolish any structures built without approval.

If approval is required to change the use of land or erect a structure, then:
an environmental impact assessment (which involves making an assessment of the potential environmental impacts of carrying out a particular project or development) may be required to be carried out; and

certain members of the public may have to be notified and given a right to make submissions before any approval may be granted.

As land use approvals are usually granted by the local municipal councils or, in the case of some high impact types of development, the state or territory government, the approval process may be influenced by political considerations. Given this and the multi-layered levels of environmental planning instruments which often apply, you should obtain specific advice as to the land use planning approvals which will be required before you can carry out your project.

Pollution control

Each state and territory has enacted laws which aim to control pollution and regulate waste.

Most jurisdictions:

- require licences to be obtained before activities which are regarded as likely to cause pollution (such as mining or certain types of industry) may be carried out, and
- make it an offence to pollute land, air or water or to emit noise pollution unless this is authorised by a licence.

The regulators in each state and territory are able to take a range of actions to enforce the pollution control legislation. The enforcement measures available to regulators range from the issuing of orders and civil penalties to criminal prosecutions which may result in heavy fines or even imprisonment.

As the laws regulating pollution vary between jurisdictions and have heavy penalties for breaches, it is necessary to obtain specific advice as to the licences required and the legislative requirements which must be met before carrying out any project which may result in pollution.

Land contamination

The states and territories in Australia all have legislation regulating land contamination. Land is usually regarded as being contaminated if it contains a substance at a concentration above that which is naturally occurring (for example, lead) and at a level which poses a risk of harm to
human health or any aspect of the environment. In general, liability for contamination is directed first at the person who caused the contamination but if that person cannot be located or is unable to pay for the clean-up of the contamination, the owner of the land (or even the relevant local government) may be liable.

The acquisition, disposal and remediation of land which is or may be contaminated involves particular risk management issues and specific legal advice should be obtained to manage the risks.

**Greenhouse and renewable energy**

Laws relating to climate change are already in existence and are continuing to evolve in Australia.

In mid-2012 the *Clean Energy Act 2011* (Cth) and a suite of 18 related Acts came into effect in order to create a comprehensive Carbon Pricing Mechanism. These Acts were repealed in mid-2014 and were replaced by the Direct Action Plan, which is discussed further in Chapter 18 of this publication, 'Energy & Renewables'.

Another existing program is the Carbon Farming Initiative (CFI), introduced under the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth). The CFI supersedes several pre-existing policy measures which had been implemented at both state and federal levels to encourage voluntary greenhouse gas abatements and investments in renewable energy technologies. The CFI enables parties to generate government-backed tradeable 'credits' from Australian land-based actions which reduce or store carbon pollution. These credits can be sold domestically (to parties wishing to offset their carbon emissions voluntarily) or internationally (for voluntary offsetting purposes, or for compliance purposes, under binding schemes such as the EU emissions trading scheme). The CFI is now incorporated into the Emissions Reduction Fund scheme, which forms part of the Direct Action Plan.

The principal reporting program is the National Greenhouse and Energy Reporting Scheme (NGERS), implemented under the *National Greenhouse and Energy Reporting Act 2007* (Cth). The NGERS requires a broad range of corporations to submit annual reports concerning their operations’ emissions of greenhouse gases and their production and consumption of energy. The NGERS is discussed further in Chapter 18 of this publication, 'Energy & Renewables'.

The Australian Government has also implemented the Renewable Energy Target (RET) which requires electricity suppliers in Australia to source a certain amount of their electricity from renewable sources. The RET is discussed further in Chapter 18 of this publication, 'Energy & Renewables'.
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The electricity, gas and renewables sectors are currently undergoing significant changes as the industry transitions from a primarily coal-based generation mix to greater levels of ‘flexible’ renewable generation. High electricity and gas prices, network system security issues and emerging new technologies are major drivers in the transformation of the energy market. Amidst the boom in the development of wind and solar projects in recent years, the emergence of flexible storage technologies (i.e., batteries, and pumped hydro) is driving the shift away from coal and gas while assisting renewables to respond to the highly political issues of security, reliability and affordability of generation.

Australia continues to struggle to implement a policy mechanism to balance reducing carbon emissions, maintaining energy security and enabling energy affordability. As a result, the regulatory frameworks around the energy sector are currently unsettled and are likely to evolve.

**Power and renewables**

**Electricity markets**

Australia has a number of separate electricity systems. The largest of these in the National Electricity Market (NEM) which encompasses Queensland, New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory followed by the Wholesale Electricity Market (WEM) which operates throughout the South West Interconnected System in Western Australia. Smaller systems include the North Western Interconnected System in the remote Pilbara region of Western Australia and the Northern Territory Electricity Market which operates in the Northern Territory of Australia.

**National Electricity Market**

The NEM is the largest electricity system in Australia comprising 40,000km of transmission lines, 9 million customers, and 50,000MW of generating capacity with A$11.4 billion worth of electricity traded each year. The NEM was established under the National Electricity Law (first
passed in South Australia and then uniformly adopted in each jurisdiction) in 1998 and is primarily governed by the National Electricity Rules.

The NEM is operated and regulated by the following independent bodies:

- **Australian Energy Market Operator (AEMO)** – market operator, market registrations;
- **Australian Energy Market Commission (AEMC)** – responsible for rule changes; and
- **Australian Energy Regulator (AER)** – enforcement, retail and network licensing / exemptions, network revenue determinations.

While many legal and regulatory aspects of the sector are governed by the National Electricity Law and the National Electricity Rules, certain key aspects can differ from State to State. These include planning and environmental approvals, transmission and distribution network licensing, retailer licensing (Victoria only) and generation licensing (other than NSW).

Participants in the NEM can be divided into three broad groups: generators, network service providers (i.e. transmission and distribution network operators) and market customers (i.e. electricity retailers). Most of the generators, network services providers and retailers in the NEM are now privately owned however some level of Government ownership remains in each category. Large energy retailers in the NEM typically also own significant generation capacity, known as ‘gentailers’, however network services providers typically only hold transmission or distribution assets and do not participate in electricity generation or sale.

The retail price for electricity sold to consumers connected to the NEM is now largely ‘unregulated’ however electricity transportation costs (i.e. the charges that must be paid to network services providers) continue to be regulated by the AER in accordance with the National Electricity Rules.

The NEM itself is a gross power pool, in which the wholesale electricity price is determined for each region of the NEM (Queensland, New South Wales, Australian Capital Territory, Victoria, Tasmania and South Australia) every trading interval (currently 30 minutes, but a move to 5 minute trading intervals will take effect from 2021), 24 hours a day. To set this price AEMO runs a reverse auction in the lead up to each trading interval. Generators make offers (bids) to generate certain quantities during the trading interval at various prices. The introduction of 5 minute trading intervals will create opportunities for increased ‘flexible’ generation to dispatch into the NEM.

AEMO dispatches generation in the trading interval starting with the cheapest offer and moving
through the bids until sufficient supply has been dispatched to meet demand. The wholesale price for that trading interval will be the highest price that was bid by any generator that AEMO actually dispatched. The same wholesale price is received by all generators that were dispatched during the trading interval regardless of whether they bid a cheaper price. Currently the NEM wholesale price may range from -A$1,000/MWh to A$14,500/MWh in any trading interval. Consistent high market prices in recent years have resulted in increased pressure on governments to reform the NEM.

AEMO operates as a clearing house for settlement purposes by receiving from market customers (i.e. retailers) the wholesale price for all electricity consumed by their customers during the relevant trading interval and paying the wholesale price to all generators who generated electricity during the relevant trading interval.

Retailers generally charge their customers a fixed price for the electricity they consume. Retailers typically manage their exposure to the fluctuating wholesale electricity price by entering into hedges or other derivative contracts with other market participants or by purchasing electricity futures contracts.

**WEM**

The South West Interconnected System (**SWIS**) over which the WEM operates incorporates over 7,800 km of transmission lines, supplies about 18 terawatt hours of electricity each year has more than one million customers and 5,798MW of registered generation capacity, including 513 MW of non-scheduled generation. Unlike the NEM the WEM is a net market (i.e. bilateral contracts between participants still play a large role) which trades both capacity and electricity. AEMO has recently taken on the role of system operator in the WEM.

**Renewables**

When the NEM was established, the generation of electricity in the NEM was largely provided by coal and gas-fired generation. However, in the last decade this generation mix has been changing. One of the significant changes has been the halting of further development of coal-fired generation and the closure of some aging coal-fired plant. At the same time, a number of gas-fired generators have been 'mothballed' as the result of significant increases in wholesale gas prices following the development of major LNG facilities in Queensland.

At the same time there has been a growing penetration of renewable energy in the NEM, predominantly from onshore wind and utility-scale solar PV plant. This growth has been supported by a number of State and Federal regulatory arrangements. More recently, storage technologies are being deployed to meet network system security and stability requirements as well as provide flexible generation.
In response to high electricity prices, corporates, governments and universities have begun contracting directly with renewable energy generators to manage electricity costs, and purchase green products, known as corporate power purchase agreements (PPAs). Corporate PPAs are re-shaping electricity procurement for many organisations and can assist to support financing of renewable energy developments across the NEM.

**Climate change commitment**

Australia is a signatory to the Paris Agreement under the United Nations Framework Convention on Climate Change. The Paris Agreement includes a commitment to limit the increase in global average temperature to below 2 degrees Celsius (above pre-industrial levels) and to pursue efforts to limit the increase in global average temperature to 1.5 degrees Celsius (above pre-industrial levels).

Australia has committed to reduce carbon emissions to 26-28% below 2005 levels by 2030, which builds on Australia’s 2020 Kyoto Protocol target of reducing emissions by 5% below 2000 levels.

**Climate change policy**

Various initiatives have been introduced by the Federal and State governments that aim to reduce Australia’s carbon emissions and promote greater renewable energy generation. The two key Federal Government policy initiatives are:

- the Renewable Energy Target (RET); and
- the Emissions Reduction Fund (Direct Action).

State governments have demonstrated increasing policy ambition to address rising electricity costs, secure energy supply and reduce emissions, while attracting investment. For example, Victoria legislated a separate, State-based, renewable energy target (VRET) and supported more than 900MW worth of renewable energy projects in the first round of the reverse auction.

**RET Scheme**

The key driver for investment in renewable generation in Australia has been the RET scheme which commenced in 2000 and is currently scheduled to operate until 2030.

Under the RET, renewable power generators may create Renewable Energy Certificates (RECs) with a REC being equivalent to around 1 MWh of electricity production from the renewable
source. Electricity Retailers must purchase these RECs in a quantity that is equivalent to approximately 23.5% of the quantity of electricity they sell to consumers. Retailers are required to surrender RECs to the Clean Energy Regulator in respect of their electricity sales on a calendar year by calendar year basis. Failure to surrender sufficient RECs incurs a shortfall charge.

The RET Scheme is divided into the Large-scale Renewable Energy Target (LRET) and the Small-scale Renewable Energy Scheme (SRES). The two schemes create different categories of RECs with each category having a separate surrender target and pricing:

- under the LRET Large-scale Generation Certificates (LGCs) are created progressively based on metered output from renewable installations with a capacity of at least 100kW such as utility scale wind or solar projects; and

- under the SRES Small-scale Technology Certificates (STCs) are created from smaller renewable installations – typically residential or commercial rooftop installations. Unlike LGCs the STCs for a smaller project can be created ‘up-front’ upon installation based on anticipated generation and are often sold by the customer to the installer in exchange for a discount on the cost of the system.

The surrender target for LGCs will peak in 2020 at a level equivalent to 33,000 GWh of renewable energy output. From 2020 until the end of 2030 the target will remain at that level. The market value of LGCs is expected to drop sharply in the years following 2020 and the RET scheme is scheduled to expire at the end of 2030.

**Emissions Reduction Fund and Safeguard Mechanism**


Individuals and businesses taking part in the scheme earn Australian carbon credit units for each tonne of carbon dioxide equivalent stored or avoided by the project. The Australian carbon credit units can be sold to generate income either to the Government through a carbon abatement contract or on the secondary market.

As at December 2018, A$2.3 billion had been spent to abate 193 mtC02-e.

In 2015, as part of the Direct Action Plan, a Safeguard Mechanism was established to ensure the
emissions reductions purchased by the Government are not offset by significant increases in emissions above business-as-usual levels elsewhere in the economy. The legislative framework of the safeguard mechanism is set out in the *National Greenhouse and Energy Reporting Act 2007* (Cth) (*NGER Act*) through the amendments to the *Carbon Farming Initiative Amendment Act 2014* (Cth).

The Safeguard Mechanism applies to around 140 large businesses that have facilities with direct emissions of more than 100,000 tC02-e per year, which covers around half of Australia’s emissions.

**Greenhouse and energy reporting**

The *NGER Act* was passed in September 2007. The *NGER Act* provides for mandatory reporting of significant energy consumption and production, and greenhouse gas emissions which exceed certain threshold amounts. Penalties for non-compliance with the *NGER Act* include fines of up to A$260,000 and personal liability for CEOs. Responsibility for reporting is assigned to the company at the top of a corporation hierarchy (the ‘controlling corporation’). The *NGER Act* only applies to energy consumed or produced in, or greenhouse gases emitted from, Australian territory. Since 1 April 2012, the scheme is administered by the Clean Energy Regulator.

**VRET**

The VRET is a Victorian Government initiative to promote investment in the renewable energy sector within Victoria. Under the VRET, Victoria is committed to renewable energy generation targets of 25% by 2020 and 40% by 2025. The targets have been supported by a reverse auction scheme whereby project developers competed to be the lowest cost provider of renewable energy resulting in the award of a number of ‘support agreements’ to large-scale renewable generators in 2018.

**Energy policy review**

**Finkel Review**

In 2017 the Council of Australian Governments (*CoAG*) commissioned an independent review into the future security of the NEM. The review was led by Australia’s Chief Scientist, Dr. Alan Finkel AO, and was designed to provide a national reform blueprint for ensuring the security, reliability, affordability and sustainability (lower emissions) of the NEM. The report has since come to be known as the ‘Finkel Review’ (*the Review*).

The outcomes of the Review are underpinned by three pillars - orderly transition, better system planning and stronger governance, and comprise the following key recommendations:
• requiring all large generators to provide three years’ notice of closure;

• a system-wide grid plan detailing network investment decisions;

• regional security and reliability assessments;

• system planning to assist with the transition to an innovative, low emissions electricity system;

• a new Energy Security Board to assist in implementing the findings of the Review and provide system-wide oversight;

• strengthened energy market bodies; and

• possible structural changes to the form of the NEM, including consideration of an ex ante market.

CoAG endorsed 49 of the Review’s 50 recommendations. A Clean Energy Target mechanism (which would essentially have replaced the RET) was not endorsed and at the time of writing there remains a level of uncertainty around the future of climate and energy policy at the national level.

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Key contacts
DOING BUSINESS IN AUSTRALIA

NATURAL RESOURCES
Australia is self-sufficient in most minerals of economic importance and has an extensive resources sector. The mining industry contributes about 8.2% to Australia’s gross domestic product and just under half of the value of total goods exported.

Gold, silver, nickel, coal, lead, industrial diamonds, manganese, tantalum, copper, zinc, iron ore and ferrous compounds have been produced in commercial quantities for a long time, as has uranium since the 1950s; oil and gas since the early 1960s; and bauxite, alumina and aluminium since the 1970s. There is also considerable exploitation of mineral sands.

The diverse nature of Australia’s resources means there is a wide range of commercial opportunities for ventures including exploiting minerals directly; establishing mineral processing industries; and providing technical expertise, services and equipment to the industry.

Australia and its continental shelf have substantial petroleum reserves. Australia’s main oil-and condensate-producing areas are the North West Shelf of Western Australia and the Bass Strait, off the coast of Victoria. Significant new condensate production is occurring in West and Northern Australia and is primarily directed for the export market. Abundant natural gas resources have been identified in the North West Shelf of Western Australia, central Northern Territory and south west Queensland. Australia’s natural gas resources meet Australia’s domestic gas needs and support substantial gas-based processing industries. Liquefied natural gas (LNG) production will substantially increase over 2019 with the ramping up of the Wheatstone, Ichthys and Prelude LNG projects. Australia has edged past Qatar to be the world’s largest LNG exporter. Australia is expected to be the largest LNG exporter for 2019 and into 2020.

Coal bed methane has more recently been developed on the east coast, particularly in Queensland (there are currently legislative restrictions in place in Victoria, New South Wales, Tasmania and the Northern Territory). Several LNG plants operating at Gladstone in Queensland use coal bed methane as a feedstock.

The Australian Government’s policy on uranium has been to develop the export potential of Australia’s industry by allowing the mining and export of uranium under strict international
agreements designed to prevent nuclear proliferation. Presently, there are only three uranium mines operating in Australia (Ranger in the Northern Territory and Olympic Dam and Beverley in South Australia). The Western Australian Government has reintroduced a ban on new uranium mining projects that was effected on 20 June 2017, although the Kintyre, Yeelirie, Mulga Rock and Wiluna projects which had approval prior to the ban were able to proceed. Queensland maintains a ban.

**General overview: mining and petroleum legislation**

Most of Australia’s mining activity is conducted onshore. There is significant offshore petroleum exploration and production. A number of statutes (federal, state and territory) govern mining and petroleum operations. In general, any company wishing to conduct exploration or development must satisfy the government concerned that it has the financial and technological resources to support the activities proposed.

State and territory governments administer the acts and regulations bearing on the mining and petroleum industries within their jurisdiction. This includes:

- the issue of exploration and production titles and the approval and registration of dealings affecting those titles;
- the approval of mineral and petroleum exploration and development projects (usually in two stages);
- the supervision of operations to ensure the observance of good mining and oilfield practices, compliance with health and safety requirements and the protection of the environment; and
- the levying of rents, royalties and other charges.

A mining title, which could be an exploration licence, a mining lease or a title for ancillary purposes (such as for processing facilities, accommodation or power transmission lines), must be obtained under the relevant legislation before any exploration or mining operations may be undertaken in respect of minerals which are the property of the Crown. It is important to inspect the relevant mining register as well as any available title documents to assess the terms and conditions attaching to the mining title and any registered dealings.

Most mining and petroleum statutes contain a requirement that the holder of a title obtain government approval in respect of certain dealings affecting mining or petroleum titles.
In general, an assignment or sale involving a transfer of all (or part) of a mining or petroleum title will require government approval and registration.

Almost all natural resources in Australia are owned by or reserved to the Crown. It is, however, possible to have privately owned minerals. It is important to check the original property grant to determine whether all minerals have been reserved to the Crown. In any event, the right to explore for or mine minerals (whether privately owned or otherwise) is dependent upon the grant of the relevant government approvals.

**Mining titles**

Each state and the Northern Territory has a mining statute for mining in general. Other legislation regulates coal mining.

The state and territory mining statutes are similar in structure and approach, but there are many variations in the legislative treatment of mining titles. There are also differences in the practice and procedures of the federal and state government mining departments in the administration of the legislation and regulations.

Two principal forms of title exist under mining statutes:

- the exploration title (usually called an exploration licence), required to conduct exploration activities, including drilling and testing; and

- the production title (usually called a mining lease), required to conduct commercial mineral extraction activities.

An exploration permit or mining lease will be subject to prescribed terms and conditions. These will include obligations to lodge periodical reports and pay rent. Conditions imposed on a mining title may also regulate how and when certain exploration or mining activities can be undertaken.

For example, in Western Australia, in respect of an exploration licence applied for:

- before 10 February 2006, relinquishment of 50% of the exploration licence is required at the expiration of both the third and fourth year of the exploration licence term; and

- after 10 February 2006, 40% of the ground must be surrendered at the end of the sixth year of the exploration licence. The purpose of these compulsory surrender provisions is to prevent large areas of land from being tied up by one explorer and to provide equitable
access to land by other explorers.

Mining royalty arrangements differ among the states and territories and also vary depending on the nature of minerals mined.

**Environmental and planning approvals**

Separate land use planning and environmental legislation has been enacted by each Australian state and territory. In general, some form of environmental or land use approval is required when a company proposes to undertake exploration activities.

In the case of approvals for potentially high-impact activities such as mining, the decision to grant a primary approval is usually made by the relevant state or territory government. This means that the approval process is likely to be influenced by political considerations.

While the approval process varies according to the jurisdiction, the following are some common features:

- an approval cannot be granted in relation to exploration/mining activities without the approving authority considering any and all possible impacts on the environment by reason of that activity;

- preparation of an environmental management plan or environmental impact assessment will be required where the activity is likely to have a significant impact on the environment;

- certain, or all, members of the public may have to be notified and given a right to make submissions/object before any approval is granted; and

- the approving authority may refuse to approve the proposed mining activity or may grant approval with any conditions considered appropriate. In the context of a proposed mining project, the conditions will be broad in scope, number and detail. The project cannot commence or proceed except with, and in accordance with, the approvals granted.

In the context of a proposed mining project, key environmental considerations will include the impacts on:

- groundwater sources and flows;

- climate change;
• flora and fauna;

• Aboriginal and non-Aboriginal heritage; and

• human communities.

These factors will need to be considered in detail in any impact assessment or environmental approval.

In addition to the state and territory legislation, the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) require a company to obtain approval for any activity that is likely to have a significant impact on one or more of the following matters of national environmental significance:

• a declared world heritage property;

• a National Heritage place;

• a wetland of international importance (declared under the Ramsar Convention);

• a listed threatened species;

• a listed threatened ecological community;

• a listed migratory species protected under international agreements;

• a Commonwealth marine area;

• the Great Barrier Reef Marine Park;

• nuclear actions (including uranium mines); and

• in the case of coal mining or coal seam gas activity, a water resource.

Accordingly, before any exploration work or mining activity is carried out in relation to a proposed mining project, an assessment must be made of whether the activity is likely to have a significant impact on any one or more of the matters listed above.

In addition to the above preliminary assessment procedures, a number of other licences/approvals may be required for specific activities in relation to both exploration and
mining. Such licences/approvals include:

- approvals for road closures;
- approvals in relation to the use of explosives and radioactive substances;
- approvals to extract water from a particular water source; and
- approvals to use water at a particular site.

This is not an exhaustive summary of the different approvals/licences that might be required in relation to a proposed mining project in Australia. Where approval is required, the relevant legislation makes it an offence to proceed until the approval is first obtained. This is a complex area of law involving multiple jurisdictions, authorities and pieces of legislation. We recommend that legal advice is sought (and environmental consultants retained) well in advance of commencing a proposed project.

**Surface rights**

There is obviously tension between an owner or occupier of land (often a farmer) and a mining title holder who needs to access and/or disturb that land. The law here can be quite complex.

Consent is required for the grant of a mining title over certain types of occupied land. In other cases, consent is required for entry onto occupied land after the title has been granted.

Under state mining legislation, it is necessary to compensate a landholder where that landholder’s surface rights are affected by mining operations. Compensation to be paid to the owner or occupier may include compensation for deprivation of possession of the surface of the land, damage to the surface of the land and loss of or damage to any improvements (among other things).

**Other titles: petroleum and gas (including coal seam gas)**

**Petroleum**

In all states and territories (other than the Australian Capital Territory) separate legislation covers onshore, as distinct from offshore, petroleum exploration and production. In terms of offshore exploration and production, there is a state offshore regime (which extends three natural miles seawards from the baseline of the territorial sea) and a federal offshore regime (which extends to waters which are more than three nautical miles seawards of the baseline of
the territorial sea). State legislation also exists to regulate the construction and operation of petroleum pipelines. In respect of gas pipelines, national access principles have been developed to allow third parties to negotiate access to some of the larger gas pipelines in Australia.

As with minerals, different types of petroleum titles are issued under the petroleum statutes. These include exploration permits which authorise exploration for petroleum, as well as production licences which allow a holder to recover petroleum following a commercial discovery and to conduct necessary production operations and works. A petroleum pipeline licence is required to construct and operate a petroleum pipeline.

Coal seam gas

Coal seam gas (CSG), also called coal seam or coal/bed methane, is a naturally formed gas consisting of methane. The methane is typically attached to the coal surface (fractures and cleats) or micropores and held in place by reservoir and water pressure. CSG is released when pressure on the coal seam is reduced, usually after water is removed from the seam.

CSG has long been extracted in connection with coal mining for safety reasons, but has gained recent attention in Australia as a viable energy source in its own right.

For example, in Queensland, CSG (being a hydrocarbon) can be exploited through a coal mining lease (with appropriate conditions) or through the relevant petroleum legislation. Once again this is a complex area. Because gas can be exploited differently according to the nature of the title, there is considerable scope for overlap.

However, it should be noted that the following restrictions in relation to CSG apply in Australian states and territories:

- Victoria has a permanent ban on onshore unconventional gas exploration methods, including CSG and hydraulic fracturing (also known as ‘fracking’), as well as a moratorium on conventional onshore gas exploration to 30 June 2020; and

- Tasmania has a moratorium on hydraulic fracking in the state until 2025.

The Northern Territory previously had a moratorium on fracking, which was lifted on 17 April 2018 following a scientific inquiry.

Overlapping titles

There is the possibility of overlap between coal, petroleum, CSG and oil shale titles. It may be
necessary for title-holders to enter into appropriate coordination agreements. This is a very complex area and miners are advised to seek advice on proposed resource projects.

Legislation regulating the capture and storage of carbon dioxide underground also adds to the overlap complexity.

**Geothermal power**

Geothermal power is energy generated from heat stored in the earth, or the collection of absorbed heat derived from underground. In Australia, geothermal energy is not used as a power source but there are known locations where geothermal energy is detectable. Two types of geothermal projects are currently being developed in Australia – enhanced geothermal systems and hot sedimentary aquifers. Most of the projects are still at proof-of-concept or early demonstration stage.

A number of states have legislation in place regulating exploration for geothermal energy. Some states also have legislation in place regulating the exploitation of geothermal energy by way of production licences.

**Native title and Aboriginal cultural heritage**

**General**

In 1992 the High Court held that the common law of Australia recognises and protects 'native' title. Native title over land or waters is not a 'title' in a conventional sense. Native title is a 'bundle of rights' derived from traditional laws and customs acknowledged and observed by Aboriginal people. For example, native title rights can include the right to control use of or access to land and the right to hunt, fish and gather. Native title rights and interests may be communal, group or individual, but are not transferable (such as by way of sale and purchase).

**Native Title Acts**

Native title legislation exists at both the federal and state levels. The *Native Title Act 1993 (Cth)* (**NTA**) came into effect on 1 January 1994. The purpose of the NTA is to recognise and protect native title. The NTA covers five main areas:

1. land access procedures where the grant of an interest in land or waters may affect native title ('future act' procedures);

2. extinguishment of native title;
3. native title claims;

4. confirmation of the validity of certain statutes, land titles and public works; and

5. compensation for extinguishment of native title.

**Land access—future acts**

Non-legislative acts done after the commencement of the NTA on 1 January 1994 which affect native title (such as grants of freehold titles, mining and petroleum titles and other Crown tenures) must comply with the future act provisions of the NTA. These provisions provide certain procedural rights to native title holders and registered native title claimants.

Depending upon the nature of the interest to be granted, the procedural rights accorded to native title holders and registered claimants will range from a right to receive notice or an opportunity to comment, through to a right to negotiate with the prospective grantee.

Titles which are granted in compliance with the future act provisions are valid. They will affect native title in the manner set out in the NTA. Mining interests do not usually extinguish native title; rather, they usually prevail over native title rights for the duration of the grant.

Titles which are not granted in compliance with the future act provisions of the NTA may be invalid.

Importantly, if it can be demonstrated that native title has already been extinguished in relation to the land, the NTA can have no operation.

**Extinguishment**

Native title may be extinguished over land or waters in a number of ways including by legislation, or by the grant of interests in land which are inconsistent with the continued existence of native title. There may be no native title if an Aboriginal group loses its connection with its traditional lands.

The NTA clarifies the types of acts that have resulted in the extinguishment of native title. Each of the states and territories have enacted legislation which provide that comparable acts taken by the state and territory governments also extinguished native title, although there are minor differences between them.

Native title may have been extinguished in whole or in part. For example, the grant of a
freehold title is completely inconsistent with native title so that the grant of such title prior to 1994 (with some exceptions) will have wholly extinguished native title. In contrast, the grant of a pastoral lease may only be partially inconsistent with native title so the grant of such a lease may have extinguished some native title rights over the relevant land (such as any right to control access or use), but may not have extinguished other rights such as a right to pass over, or a right to collect bush medicine on the land.

**Native title claims**

Under the NTA, Aboriginal people may lodge an application for a determination that native title exists. This involves a hearing by the Federal Court as to whether a particular group of Aboriginal persons can establish that native title continues to exist in relation to particular land and waters, and has not been extinguished.

The National Native Title Tribunal (**NNTT**) and/or the Federal Court may offer assistance in mediating an outcome, and many determinations are made by consent of the parties.

If a lodged native title claim passes a statutory test it will be registered by the NNTT and those claimants will be entitled to receive the benefits of certain procedural rights under the future act provisions of the NTA.

**Validity**

The NTA and complementary state and territory statutes ensure that any interest in land or waters granted before the commencement of the NTA in 1994 are valid in native title terms and the rights under those titles are fully exercisable.

**Aboriginal land**

Some states and territories have legislation which creates certain types of Aboriginal land. There are usually additional procedural requirements in relation to accessing this land.

**Aboriginal cultural heritage**

The Australian Government and states and territories each have legislation which protects Aboriginal cultural heritage.

While the regimes differ in detail, it is generally an offence to disturb Aboriginal cultural heritage without obtaining a consent. It may also be necessary to prepare a plan for the management of cultural heritage during construction or operation of a project.
Joint ventures

Joint venture arrangements provide a convenient structure for bringing together capital and talent for mining and petroleum enterprises. For more information regarding joint ventures, see Chapter 3 of this publication, 'Business Structures'.

Foreign investment

The Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) regulates acquisitions by foreign persons of Australian assets or shares in Australian companies. This is set out in more detail in Chapter 10 of this publication, 'Foreign Investment Regulation'.

Government assistance and taxation

Taxation

In Australia, taxes are imposed by the Australian Government, state and territory governments, and local government bodies (see Chapter 11 of this publication, ‘Taxation, stamp duty and customs duty’). Expert advice is required in planning an investment in Australian natural resources and in ensuring ongoing compliance with taxation obligations. To give just one example, the Australian Tax Office is vigilant on transfer pricing, including when a mineral or petroleum is sold to other parts of a corporate group in foreign jurisdictions.

The Petroleum Resource Rent Tax (PRRT) is a federal profits-based tax that applies to offshore and onshore Australian oil and gas projects (as a separate regime in addition to the federal income tax). In November 2018, the Australian Government announced a number of proposed changes to PRRT to apply from 1 July 2019, including that onshore projects would no longer be subject to PRRT. An amendment bill to this effect was introduced in February but has not been passed as at the date of this publication.

Transfer (stamp) duty is a state-based tax affecting a broad range of transactions. Each state and territory in Australia has its own stamp duties legislation, resulting in a complex set of duties laws. As transfer duty can have a significant impact on natural resources transactions and companies, it is important that investors be aware of and consider the potential duties implications of a proposed transaction.

Various natural resource royalties are applied by state and territory governments on mineral, petroleum and gas production within the applicable jurisdiction. Excise is also levied by the Australian Government on certain forms of petroleum.
Government assistance

On the reverse side, Australian Government assistance to the natural resources industries substantially takes the form of income taxation concessions.

Special tax deductions exist for capital expenditure on exploration and production of petroleum and natural gas. These include the amount spent on successful cash bids and the costs of exploratory surveys, drilling and well-head plans, natural gas liquefaction plant, access roads, and housing and welfare.

A company which is mining or prospecting for minerals may also be allowed deductions for capital expenditure on exploration and prospecting, site preparation, buildings, access roads, certain treatment plants, other improvements and plants necessary for those operations, housing and welfare and site rehabilitation.

Cash bids relating to general mining and exploration titles are also deductible. Various tax deductions are also available for the use of transport facilities.

The timing for the deductions depends on the nature of the expenditure. For instance, exploration related expenditure can sometimes be deductible immediately in full, whereas other capital expenditure is generally deductible (amortised) over the life of the applicable individual asset, project, or mining/petroleum right (title) to which that expenditure relates.

Government and industry bodies

Government bodies

The other significant role played by the Australian Government in the resources industry is through the Commonwealth Scientific and Industrial Research Organisation (CSIRO), which aims to increase the international competitiveness, export earnings and value of services provided by the minerals, energy and construction industries.

The CSIRO is a supportive institution that plays a coordinating and advisory role within the industry, rather than performing a regulatory function.

In addition, state governments offer various forms of assistance to the industry including free technical services, field examinations of mining prospects, advice on exploration and development, selection of sites for water supplies and a range of other services.

The Australian Government released Australia’s National Resources Statement in February 2019 setting out the Government’s policy and long-term reform agenda for the Australian resources
sector. The statement contains an action plan to achieve the following five priorities to:

- deliver the most globally attractive and competitive investment destination for resources projects;
- develop new industries and resources regions;
- invest in new technologies and approaches, especially to deliver better environmental outcomes;
- create well paid and secure jobs; and
- support communities to ensure they receive benefits from the development of Australian resources.

Queensland is the only Australian state to have a Coordinator-General with its own legislation and the power to expedite projects considered to be of 'state significance'. These projects commonly include coal mine developments and expansions. The Coordinator-General’s office also manages a Coal Infrastructure Taskforce to ensure Queensland’s coal infrastructure can support production.

Industry bodies

The object of industry bodies is to promote mining and petroleum interests and act as advocates for those interests. Most states have a Minerals Council or Chamber of Minerals and Energy, and at the federal level there is the Minerals Council of Australia. The Association of Mining and Exploration Companies also plays a role in this regard.

In the petroleum industry, the Australian Petroleum Production and Exploration Association Limited (APPEA) promotes upstream interests, and the Australian Institute of Petroleum promotes downstream interests. Both are national bodies with state branches.

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Key contacts
DOING BUSINESS IN AUSTRALIA

CONSTRUCTION AND INFRASTRUCTURE
Chapter 20
Construction and Infrastructure

Australia’s construction and infrastructure market continues to grow. With the mining industry experiencing a slight recession in very recent years, both the Federal Government and the various state governments have shifted their focus to infrastructure. This has become evident with the most recent Federal Budget increasing investment in transport, defence and renewable energy.

The Federal Government has:

- cumulatively over the past four years committed to investing over A$70 billion in transport through a combination of grant funding, loans and equity investments in transport infrastructure by 2020-21;
- committed to a twenty year defence industry plan which aims to secure the local defence manufacturing industry through initiatives including the A$50 billion Future Submarine program and the A$35 billion Future Frigate program;
- stated that it plans to invest over A$6 billion on climate spending from 2018/19 to 2021/22, including investing in newer technologies through the Australian Renewable Energy Agency and providing debt and equity to support clean energy projects through the Clean Energy Finance Corporation; and
- committed to establishing a 10 year allocation fund which will deliver A$75 billion in transport infrastructure funding and financing from 2017/18 to 2026/27.

State governments are also investing record amounts on infrastructure, with the New South Wales Government allocating A$87 billion over the next four years to its infrastructure program (with A$51.2 billion of this committed to public transport and roads projects) and the Victorian Government projecting it will spend A$13.4 billion on infrastructure in the 2018/19 year alone.

These government investment initiatives are strong indicators of a continually developing construction and infrastructure market.
Construction and Infrastructure in Australia is regulated by federal, state and territory legislation. Often case law also provides an overlay. The nature and source of the regulation in this area depends on the type of activity being regulated and the type of issues involved.

**Building law**

The Australian Government regulates matters including:

- the formation and management of corporations, pursuant to the *Corporations Act 2001* (Cth) (see Chapters 2 'Corporate regulators', 3 'Business structures', and 5 'Acquisitions and disposals of business', of this publication for more detail);

- compliance by industry participants with workplace relations laws, pursuant to the Australian Building and Construction Commission and the Building Code established by the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth);

- the publication of national building regulations and standards, including the National Construction Code (which is published by the Australian Building Codes Board and is given legal effect by relevant legislation in each state and territory);

- the health and safety of industry participants and their employees, pursuant to the *Work Health and Safety Act 2011* (Cth) (note that all states and territories except Western Australia and Victoria have adopted and implemented the federal legislation which came into effect on 1 January 2012);

- matters in relation to independent contractors pursuant to the *Independent Contractors Act 2006* (Cth); and

- fair trading and consumer protection, pursuant to the Australian Consumer Law (see Chapter 15 of this publication, 'Consumer protection and product liability', for more detail).

The state and territory governments are responsible for regulating various matters including:

- general construction law pursuant to a variety of building legislation and standards, licensing and accreditation requirements in each state and territory;

- proportionate liability of wrongdoers pursuant to various state and territory wrongs legislation;

- supervision of the residential building industry; and
the approval of development applications, building works and the final approval of construction works pursuant to various legislation in each state and territory.

Certain state and territory jurisdictions in Australia also have designated ‘major project’ style infrastructure legislation which is designed to streamline the early stages of key infrastructure projects to facilitate the obtaining of required land and planning and environmental approvals. For instance, in Victoria, if a project is declared a transport project to which the Major Transport Projects Facilitation Act 2009 (Vic) will apply, then major state approvals can be obtained pursuant to that Act’s streamlined processes, rather than a comprehensive impact statement or impact management plan being required.

Also, given the significant impact certain construction and infrastructure projects may have on the local environment and population in and around the project site, certain local government permits and approvals are generally required, and the conditions of these must be complied with. The conditions primarily relate to planning and environment laws (see Chapter 17 of this publication, 'Environmental and planning regulation'), but may also include functions delegated to the local government entity by the state.

Finally, most contractual relationships for construction work in Australia between developers, builders, contractors and subcontractors are governed by the relevant state and territory security of payment legislation (SOP legislation). SOP legislation aims to keep projects moving by using very prescriptive and fast payment regimes. It is often referred to as a ‘pay now, argue later’ type payment system. SOP legislation is strict and if not complied with can have legal and commercial implications on projects. One difficulty of the SOP legislation is that it varies in each state and territory within Australia. Currently, the construction industry is looking into the feasibility of adopting a national security of payment system but until the legislation is harmonised, parties to a construction contract should be wary of the often subtle but crucial differences in the SOP legislation across Australia.

**Nature of construction and infrastructure industry in Australia**

The Australian construction and infrastructure industry is characterised by:

- a mix of privately funded and publicly (federal and state) funded projects;

- a high percentage of public procurement of key infrastructure occurring through ‘public private partnership’ programs where private sector consortia bid for and then finance, deliver, operate and hand back infrastructure, while a number of projects are still delivered by ‘direct government procurement’;
- a concentration of a few very large construction companies, including CIMIC/CPB, Thiess, John Holland and Lendlease, together with a number of other large but slightly more specialised contractors, including Laing O'Rourke, McMahon, Downer, Clough, Multiplex, Transfield and Grocon; there are also a number of international builders and infrastructure providers with operations here, including Bechtel, PCL, Acciona, Bouygues, Siemens, Dragados, Ferrovial and Samsung;

- a heavily unionised workforce, both in construction and operations, requiring employers and principals to have clear and well-thought-out industrial relations strategies; and

- several dominant subject sectors, including:
  - mining and resources (including related mines, rail links, ports and other facilities such as LNG terminals)—for more detail see Chapter 19 of this publication, 'Natural Resources';
  - energy (including generation, transmission and distribution);
  - roads and transport;
  - social infrastructure (such as schools, hospitals and housing);
  - property development; and
  - entertainment,

each with their own considerations and market norms, industry drivers and key players.

Other characteristics of the Australian construction and infrastructure industry which may differ from what foreign infrastructure players are used to elsewhere are:

- a relatively high level of environmental and planning compliance obligations, including in relation to heritage and native title (see section 19.4 in Chapter 19 of this publication, 'Natural Resources', for more detail);

- a relatively stable government decision-making environment with low sovereign risk;

- certain foreign investment restrictions (see section 2.5 in Chapter 2 'Corporate Regulators' and section 19.6 in Chapter 19 'Natural Resources' of this publication for more detail);
more strict enforcement of contractual rights and obligations than in some jurisdictions; however, punitive damages are rarely awarded (and are relatively small if awarded); and

- the ability of the principal to appoint the contractor as 'principal contractor' to ensure a single, non-delegable point of responsibility for compliance with workplace, health and safety laws.

**Unsolicited proposals**

Unsolicited proposals are being increasingly utilised by the private sector and governments to drive innovation and accelerate the delivery of infrastructure projects. An unsolicited (or market-led) proposal is a proposal initiated by the private sector to build or finance an infrastructure project, without a formal request or tender from the government.

Governments generally welcome and encourage unsolicited proposals, where they create unique opportunities to provide important infrastructure to the community. However, given that unsolicited proposals operate outside the standard competitive processes, each state and territory has developed robust guidelines to ensure transparency and fairness. Pursuant to these guidelines, it is of primary importance that the proposal demonstrates unique advantages and will result in positive outcomes for the community.

Government guidelines impose additional criteria, including that the proposal:

- aligns with government policy;
- is feasible and capable of delivery; and
- represents value for money.

**Building contracts and remedies**

Construction and infrastructure projects in Australia invariably involve many parties—government, equity funders, debt funders, designers, builders, operators, subcontractors and users, among others. In the common law tradition, relations between all of these parties are almost always regulated by contract. Usually such contracts are reduced to writing. Provided certain formalities are satisfied, the parties’ agreement in such contracts is binding on them and their counterparties and is enforceable through the courts.
Building contracts in Australia vary in many ways; however, a key manner in which they differ is the level of risk and control which is passed to the contractor. The agreements vary, ranging from fixed time and cost, lump sum, design and construct, engineer, procure and construct turnkey contracts, through to cost-plus, contract management and contractual alliances. Moreover, principals may have one contract with a contractor who then subcontracts out the work (with the contractor bearing integration, coordination and interface risk), or the principal may retain integration, coordination and interface risk by contracting out various portions of work to a number of contractors.

Key issues which frequently occupy significant time and effort when negotiating building contracts in Australia (and which are more likely to lead to dispute) include:

- responsibility for site conditions;
- responsibility for planning consent;
- circumstances entitling variations;
- circumstances entitling time and cost relief;
- level of contract price, performance security and liquidated damages;
- completion requirements;
- the principal’s ability to complete works warranties, including a fitness for purpose warranty;
- indemnities and insurance;
- any liability exclusions and limitations; and
- consequences of and circumstances entitling termination.

Building and related contracts will frequently include the requirements of other project stakeholders (even though those stakeholders are not parties to the building contract), such as banks, government or offtakers (such as the party to whom a power station’s electricity is contracted to). These requirements must also be complied with by the parties.

The most common contractual remedies pursued by parties in Australia are:

- **Termination**—this enables a wronged party to regard the contract as at an end (for
example, where the principal has not provided the contractor access to the site within a maximum prescribed period). Termination may be used in conjunction with other remedies. In 2018 the Federal Government introduced an *ipso facto* regime through the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth), which restricts a party from exercising any contractual right (including to terminate a contract) solely on the basis that its counterparty has entered into certain types of restructuring or insolvency procedure (see discussion in Chapter 9 of this publication, ‘Restructuring and insolvency’ for more detail). This new regime applies to the majority of construction contracts entered into on or after 1 July 2018 (but note that there are a number of contract types excluded from this regime, including certain arrangements that involve a special purpose vehicle in a public-private partnership).

- **Damages**—the general principle behind contractual damages in Australia is to as closely as possible restore the wronged party to the position it would have been in pursuant to the contract had it not been wronged, provided that the wronged party has not also breached the relevant contract and that other formal requirements are satisfied.

- **Specific performance**—this also aims to restore the wronged party to the position it would have been in pursuant to the contract had it not been wronged by requiring the breaching party to perform its contractual obligation (for example, supply a transformer or complete construction of a building), and is typically used where damages are regarded as an inadequate remedy.

- **Injunctions**—this is used to restrain a party from carrying out a certain act where that act is or may be prohibited by contract.

Contractual remedies are further supplemented in Australia by:

- **equitable remedies**, which include specific performance and injunctions (although different to those under contract) and rescission, rectification, estoppel and constructive trusts;

- **tortious remedies**, such as damages, specific performance and injunctions (although again different to those under contract and at equity) for torts such as negligence and nuisance; and

- **statutory remedies**, such as those under the Australian Consumer Law for misleading and deceptive conduct or fines and penalties under other statutes.
Contractual counterparties are entitled to liquidate their losses by contract in Australia, provided that such liquidated losses are a genuine pre-estimate of the loss which will be suffered by a party if the given circumstance occurred, and that such losses are not penal in nature and therefore unenforceable. Delay and performance liquidated damages are typically provided for in construction contracts in Australia.

**Standard contracts**

Standardised contracts are often (although not always) used in construction and infrastructure contracting in Australia. The principal and contractor agree at the outset of negotiations which (if any) form of standardised contract will be used as a basis for negotiations, and then agree on departures from that standard form to tailor the contract to the specific risks of the project, parties and risk allocation sought for the project. Large contractors or large procurers of construction or engineering services may also have their own corporate 'preferred/standard' form contracts.

Standardised contracts are rarely used unamended.

Standardised construction contracts used in Australia include those published by two organisations:

- the International Federation of Consulting Engineers (FIDIC); its contracts include design-build and turnkey (orange book) and plant and design-build (gold book) contracts, typically used on projects involving a number of international parties; and


Standardised contracts are used by parties as a common and familiar starting point for contractual negotiations, and to enable the terms of subsequent agreement to be communicated in a common and familiar form to other stakeholders, such as banks and subcontractors. Sophisticated participants in the Australian contracting market (both on the principal side and the contractor side) have developed sets of 'standard' amendments which they seek to include in the various key 'standard' contracts to speed up efficient and reliable contracting outcomes.

These standardised contracts are the intellectual property of their publishers. Hence, when parties wish to use these standardised contracts they must pay the relevant royalty to the
publisher or ensure they have in place an adequate licensing arrangement for the relevant standard.

**Project dispute resolution**

Construction and infrastructure contracts in Australia frequently provide a prescribed method of dispute resolution. This generally involves one or several rounds of senior executive negotiation over required minimum time periods, followed by either binding arbitration, litigation or expert determination.

Binding arbitration remains a popular method of dispute resolution, particularly for projects with an international component or party. The seat of arbitration may be in Australia, but is frequently specified to be in an international arbitration centre, such as Singapore, Hong Kong or London. The decision, by some parties, to choose binding arbitration over court proceedings is often driven by the comparative ease with which arbitral awards can often be enforced overseas.

However, it is also common for participants in large Australian infrastructure projects to choose to have contract disputes ultimately decided by courts (whether Australian or otherwise) rather than arbitrators. This is because court dispute processes are often no longer or no more expensive (and are in some cases shorter and cheaper) than arbitration processes, with parties enjoying certainty of process and the ability of courts to make binding orders on related parties, such as to require disclosure of certain documents by non-parties.

It is also fairly common in Australia for parties to adopt binding expert determination in order to resolve certain types of disputes, often of a technical nature, in a relatively short timeframe.

Given the variety of dispute resolution options used on projects in Australia, it is important for parties to carefully consider the advantages and disadvantages of each form of dispute resolution, in relation to their particular contractual circumstances and priorities, at the time of contracting.

See Chapter 23 of this publication, 'Dispute Resolution', for more detail on dispute resolution.

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Chapter 21

Intellectual Property

The recent boom in data and digital technology developments, as well as innovations in various other industries, highlight the need for businesses to consider whether their inventions, creative exploits and brands should be protected by intellectual property (IP) rights. A robust portfolio of IP rights gives businesses a competitive advantage over others in their field. Australia is a strategic centre in the Asia-Pacific region where businesses should consider building an IP portfolio.

In Australia, IP rights are protected by federal legislation and common law. Registered IP rights (patents, trade marks, designs and plant breeder’s rights) and the legislation relating to them are administered by IP Australia, an Australian Government agency. IP Australia facilitates a world-leading IP system that is designed to encourage innovation and protect businesses that develop original IP. Australia is also a signatory to a number of international agreements that facilitate obtaining IP protection in a number of countries.

This chapter is designed to outline the various forms of IP protection that businesses may pursue in Australia.

Patents, trade marks, copyright and designs

Patents

An Australian patent gives the owner a legal right to prevent third parties from exploiting the patented invention in Australia. To obtain patent protection for an invention, a patent application must be filed in Australia. The Patents Act 1990 (Cth) provides for the filing, granting and enforcing of patent rights. Australia has two kinds of patents: standard patents and innovation patents.

Standard patents have a life of 20 years from the date of application and are generally used to protect high-level inventions. Innovation patents, which have a lower threshold for validity, have a life of up to 8 years and are used to protect lower-level innovations.
IP Australia regulates the grant of patents in Australia, including carrying out pre-grant examinations and adjudicating in pre-grant oppositions for standard patents. Innovation patents are granted after a formalities check only, and will only be examined and certified upon request. Enforcement of an innovation patent can only take place after certification.

**Trade marks**

Trade marks can be used by the owner as a marketing tool and enable brand protection, particularly if registered. The owner of a trade mark which is used or proposed to be used in Australia may apply to IP Australia to register the trade mark under the Trade Marks Act 1995 (Cth). Registration is available for trade marks in respect of goods and/or services. The application is made in one or more classes, and the owner of the trade mark must specify the goods and/or services to be covered. To qualify for registration, a trade mark must be capable of distinguishing the applicant’s goods and/or services from those of other persons. An Australian trade mark is registered for an initial 10-year period and is renewable for additional 10 year periods thereafter.

Although registration of a trade mark is not compulsory, an unregistered trade mark is difficult to protect unless a substantial reputation has been built up in the mark. Advantages in obtaining registration include the fact that registration provides the proprietor with a statutory right to take action against unauthorised users or infringers of the trade mark without the need to prove reputation.

Australia is a party to the Madrid Protocol relating to international registration of trade marks. Australian trade mark applicants can therefore file a single international application in a number of countries around the world based on their Australian application.

While not an IP right as such, businesses trading in Australia should consider registering domain names ending in ‘.au’ that relate to their trade marks and business names. Businesses should also ensure that key trade marks and business names are registered as business names in Australia. These registrations will ensure continued brand protection.

**Copyright and moral rights**

Australian copyright law encourages businesses to develop new material by offering protection to original, creative works. Under the Copyright Act 1968 (Cth), original artistic, literary, dramatic, musical and other works attract automatic copyright protection (provided certain qualifying criteria are satisfied). In Australia, there is no requirement (or ability) to register copyright with IP Australia. The range of materials protected by copyright is diverse and includes computer programs, graphs, videos, broadcasts, training manuals, price lists and product brochures.
The Copyright Act 1968 (Cth) also gives the authors of most copyright works certain 'moral rights' in relation to their work. Moral rights include the right to be identified as the creator of a work, to not have authorship falsely attributed and to prevent derogatory treatment of a work.

Registered designs

Industrial designs may be protected against copying under the Designs Act 2003 (Cth), which provides protection for the overall appearance of a product, including its shape, configuration, pattern and ornamentation, provided the design is new and distinctive (based on designs previously used in Australia or published in the world). Protection lasts 10 years, provided renewal fees are paid.

IP Australia will conduct a formalities check on a new design application prior to registration. Enforcement may occur only after the issue of a certificate of examination, upon request.

Other intellectual property rights

The Plant Breeder’s Rights Act 1994 (Cth) protects new plant varieties for up to 25 years for trees and vines, and 20 years for other plant types. It does not exclude the possibility of patent protection.

The Circuit Layouts Act 1989 (Cth) provides copyright-type protection for the original layout of an integrated circuits. Protection is automatic and lasts for 10 years from first commercial exploitation, if this occurs within 10 years from creation.

Confidentiality and trade secrets

Confidential information or trade secrets, such as a secret technology or process, may also be commercially valuable.

Secrecy as a form of protection may be chosen because, for example, the technology is not patentable or maintaining. Secrecy could potentially extend protection beyond the life of a patent.

Protection is via strategies for keeping the information secret, supplemented by contractual and equitable obligations of confidence.

Appeals from IP Australia

Some decisions of IP Australia in relation to the registration of IP rights, for example final
decisions in opposition proceedings, can be appealed to the Federal Court of Australia.

**Commercial dealings with IP rights**

Australian IP rights can be assigned and licensed. Exclusive, sole and non-exclusive licences are available. Specialist advice should be taken before entering into an IP licence, because not all of these licence types enable the licensee to take enforcement action if the IP rights are infringed by a third party.

IP rights are often disclosed in the context of a due diligence exercise in relation to an acquisition or in negotiations with potential commercial partners. Care must be taken before disclosing valuable IP to others. Without a non-disclosure or confidentiality agreement in place, the ability to obtain certain valid IP rights like patents and designs may be lost by disclosing unprotected inventions and designs to others. Ideally, applications to register IP rights should be made to IP Australia before they are disclosed to third parties.

The launch of products and services in Australia carries with it the risk of infringing the Australian IP rights of third parties. It is recommended to conduct ‘clearance’ or ‘freedom to operate’ searches at an early stage in launch plans, as pre-existing local Australian IP rights may stand in the way of using your preferred brand, design or exploiting your invention.

In order to deal commercially with Australian IP (and to enforce IP), it is important to know who owns the IP. IP can be owned by individual persons and by companies. Sometimes IP rights are owned outright, sometimes there are multiple co-owners. It is sometimes complex to work out who owns a particular IP right and requires consideration of issues such as whether the IP right was generated in the course of employment or whether a third party consultant was involved. A factual enquiry as to IP ownership can sometimes lead to unexpected outcomes.

Joint ventures, pursuant to which IP rights will be generated, require particularly careful drafting to account for the ownership of IP that is jointly created. Co-owners of IP can have different rights and limitations on their respective ability to use and exploit the IP, depending on the type of IP.

**Enforcement of IP rights in Australia**

IP rights are usually enforced by litigation in the Federal Court of Australia.

Subject to meeting certain threshold requirements, interlocutory (urgent) injunctions are available to restrain infringing conduct. Once you become aware of an actual or threatened infringement of your IP rights in Australia it is very important not to delay taking legal advice
because interlocutory injunctions are not available where there has been undue delay.

Remedies for infringement of IP rights are:

- damages or an account of the profits made by the infringer (you cannot get both);
- injunctions;
- declarations of infringement; and/or
- orders that infringing goods be delivered up for destruction.

In litigation proceedings written pleading documents set out the scope of the infringement claim and any defence to it. It is common for infringement proceedings to be defended with a written cross-claim seeking to invalidate the IP right. The infringement claim, defence and any cross-claim for invalidity are typically heard together at trial.

The proceeding is case-managed and heard by a single judge (with no jury).

The trial will usually involve the witnesses who have given an affidavit appearing to give oral evidence and be cross-examined. At the end of a trial, the judge will typically reserve judgment and deliver a written decision at a later date after careful consideration of the evidence and submissions presented at trial.

After judgment, the parties have a short period of time (usually less than one month) to decide whether to appeal the decision to the Full Federal Court.

After judgment, the parties have a short period of time (usually less than one month) to decide whether to appeal the decision to the Full Federal Court.

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Chapter 22

Privacy

In Australia, privacy legislation impacts how organisations handle personal information, conduct surveillance and engage in direct marketing. National privacy laws and state-based health privacy laws govern the collection, use, disclosure and transfer of personal and health information.

Most state and territory public sector agencies are regulated by state-based privacy laws, and these sometimes extend to private sector organisations engaged by those public sector agencies.

There are also a range of specific laws and codes regulating information, industries and activities including surveillance, telecommunications, direct marketing, websites, criminal records, financial services, government registers, cybercrime, identity theft, market and social research and company registers.

This chapter is designed to provide an introduction to some of the key regimes.

Privacy Act 1988 (Cth) (Privacy Act)

The Australian Privacy Principles (APPs) apply to private sector organisations with an annual turnover of more than A$3 million and their related companies, as well as some others including health service providers and organisations that trade in personal information. The APPs also apply to Federal government agencies.

The Act extends to the activities of foreign companies in Australia, and to the activities of foreign companies outside Australia, where those companies carry on business in Australia, and collect or hold personal information in Australia. The Office of the Australian Information Commissioner (OAIC) considers the collection of personal information from an individual located in Australia to be a collection ‘in Australia’, even if the company collecting the information is outside Australia at the time.
It is important to note that the approach of the Privacy Act differs from the European model in that the Privacy Act does not contemplate the roles of, and distinctions between, ‘data controllers’ and ‘data processors’.

The 13 APPs regulate the manner in which any regulated organisation can collect, store, use and disclose personal information. Special provision is made with respect to health and other sensitive information, which includes personal information about racial or ethnic origin, religious beliefs or affiliations, political or philosophical beliefs, membership of a political, professional or trade union or association, sexual preferences or practices, genetic and biometric information and criminal record.

Some exemptions apply, including for employee records, media and political parties.

**Data breach notification**

Entities regulated by the APPs are also subject to the ‘notifiable data breaches’ scheme. Entities must promptly notify the OAIC and affected individuals where there is loss of or unauthorised access to or disclosure of personal information, and the incident is likely to result in serious harm.

**Credit reporting**

Part IIA of the Privacy Act and the *Privacy (Credit Reporting) Code* apply to Australia’s consumer credit reporting system, under which credit providers contribute to and access the consumer credit histories of individuals held by credit reporting bodies such as Equifax, Illion (formerly Dun & Bradstreet) and Experian. The requirements primarily relate to consumer credit information, but this is sometimes used in connection with commercial credit arrangements, e.g. where sole traders or guarantors are involved.

**Tax file numbers**

The Privacy Act also deals with the protection of tax file numbers, primarily through the binding Privacy (Tax File Number) Rule issued by the Privacy Commissioner. This Rule also complements some related provisions in tax legislation.

**Spam**

The *Spam Act 2003 (Cth)* (*Spam Act*) regulates the sending of ‘commercial electronic messages’ by anyone (including individuals) in, into or from Australia. In most cases, commercial electronic messages must not be sent without consent, and must include valid contact information and an unsubscribe facility. The collection and use of some automatically
harvested lists of email addresses is also banned.

**Telemarketing and the Do Not Call Register**

The Do Not Call Register was established in 2006. The types of numbers which may be included on the Register include home phone, personal mobile and fax numbers. Businesses must ‘wash’ their marketing lists against the Register to avoid calling or faxing those numbers.

An associated mandatory industry standard regulates telemarketing and market research calls generally, including prohibited calling times, information to be provided during calls, call-termination requirements and the use of calling line identification.

**Health records**

Notwithstanding the fact that the Privacy Act regulates the manner in which all personal information (including health information) is handled, there are additional health records laws in three state/territory jurisdictions: New South Wales, Victoria, and the Australian Capital Territory.

These health privacy regimes have many similarities to the APPs, but go further in some areas including deceased individuals, information access procedures, retention periods and additional requirements for health service providers.

Australia’s e-health records system also includes specific privacy requirements.

A number of health-related privacy guidelines have also been published by regulators, including in relation to medical research and genetic information.

**Surveillance**

**Surveillance devices laws**

All states and territories have some form of surveillance devices legislation. These laws generally prohibit certain uses of surveillance devices and information obtained using surveillance devices, with some exceptions for law enforcement. Depending on the jurisdiction, these laws may regulate optical surveillance devices (e.g. cameras), listening devices (e.g. microphones), location-tracking devices (e.g. GPS) and data surveillance devices.

The Australian Law Reform Commission has recommended the introduction of national surveillance devices laws to replace the existing state and territory laws, including in relation to
workplace surveillance.

**Workplace surveillance**

Specific workplace privacy legislation exists in New South Wales and the Australian Capital Territory. Those laws regulate overt and covert camera, computer and tracking surveillance, including:

- requirements to provide employees with 14 days’ notice (unless otherwise agreed) of an intention to commence surveillance;

- provision for covert surveillance by order of a Magistrate where unlawful employee conduct is reasonably suspected; and

- prohibition of surveillance in change rooms, bathrooms and toilets (Victoria also has similar requirements to this).

**Telecommunications interception and listening devices**

With respect to telephone communications, the federal *Telecommunications (Interception and Access) Act 1979* (Cth) prohibits listening to or recording communications passing over a telecommunications system without the consent or knowledge of the parties to the communication.

Listening and surveillance devices legislation in each state generally prohibits the use of a listening device to listen to or record private conversations to which the user is not a party without the consent of all parties.

**Spent convictions**

All Australian jurisdictions except Victoria have ‘spent convictions’ laws which limit the use and disclosure of information about old minor criminal convictions.

**Tort of privacy**

Consistent with a general trend in common law countries, including the UK and New Zealand, there appears to be some movement in Australian courts towards recognising new rights to recover damages to for invasions of privacy generally, separate from statutory remedies for
inappropriate dealing with personal information.

The federal government is considering legislating in this area, having released a law reform report in 2014 proposing either a new right to sue for serious invasions of privacy, or a new tort of harassment coupled with an extension of breach of confidence to cover emotional distress. A NSW law reform report in 2016 has also recommended introducing a right to sue for serious invasions of privacy.

**Consumer protection**

The Australian Consumer Law prohibits certain misrepresentations and misleading and deceptive conduct in trade or commerce in Australia. This can be relevant to the content of privacy policies and statements, which sometimes over-commit companies by promising to meet privacy standards which exceed legal requirements and are difficult to maintain.

**Enforcement**

The OAIC investigates complaints from individuals about interferences with privacy that are contrary to the Privacy Act. The OAIC also has the power to initiate own motion investigations about potential breaches of privacy that do not relate to a particular complainant.

Following its investigation, the OAIC has the power to make a determination ordering compensation and reparatory action, among other things, which is enforceable in the Federal Court or Federal Magistrates Court.

Certain breaches of the Privacy Act, Spam Act or *Do Not Call Register Act 2006* (Cth) can result in fines of up to AU$2.1 million. Regulators can also agree enforceable undertakings with entities that breach these Acts.

In some jurisdictions, contravening privacy legislation can result in the imposition of fines or imprisonment. For example, a breach of the *Surveillance Devices Act 1999* (Vic) can result in imprisonment of up to two years or the imposition of substantial fines.

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**Key contacts**
Chapter 23

Dispute Resolution

Australia has a well-developed and sophisticated system for the resolution of commercial disputes, both within and outside a formal court setting. As explained elsewhere, our legal system is based on both federal and state laws and the courts are also organised in that way. The courts are independent of both the executive and legislative arms of government, and judges are appointed rather than elected.

The court system

The court system in Australia is divided into the federal court system and the state and territory court system, with each hearing different types of commercial disputes.

Federal courts generally deal with disputes arising under federal (Commonwealth) laws; typically disputes about tax matters, patents and trademarks, antitrust and consumer protection issues, corporations regulation and misconduct issues, takeovers and labour laws. Each state and territory of Australia has a Federal Court branch in which a dispute can be commenced, often depending on where the relevant parties to the dispute are based.

State and territory courts deal with non-federal matters for the most part, including the application of state and territory specific laws. Many contractual disputes and negligence claims are dealt with by those courts. There are different levels of state and territory courts depending on the size and nature of the dispute. Large commercial disputes will usually be dealt with in the Supreme Court, which is the highest court of each state or territory.

The Federal Court and each Supreme Court has an appellate division to which an appeal against a decision of a single judge of the Federal or Supreme Court, or a decision of an inferior federal, state or territory court may be made. In limited cases, a further and final appeal may then be made to the High Court of Australia.

Special fast-track services for commercial disputes exist in both the federal and state court systems. The parties to a dispute, and their lawyers, are expected and have a duty at law to cooperate with the court and to assist in facilitating the resolution of disputes as quickly,
inexpensively and efficiently as possible. The courts also encourage the parties to exhaust all avenues of settlement prior to trial and, in many instances, the court may order parties to participate in mandatory mediation.

The Federal Court and state and territory Supreme Courts have developed sophisticated methods to deal with complex disputes and are at the forefront internationally in using technology to streamline the conduct of cases. Large trials are often run electronically, with the judge, witnesses and lawyers all working from an electronic set of documents displayed on computer screens around the court room. Technology is also used in other ways to facilitate the efficient conduct of proceedings, for example, it may be possible for evidence from foreign witnesses to be taken by video link, without the need for personal attendance.

**The litigation process**

The various courts have rules and practices which govern the way disputes are resolved, but the following are common features:

- most civil cases are decided by a judge alone, without a jury;

- civil cases commence with a written pleading document setting out the claims made and the orders sought (which may include monetary damages, orders requiring something to be done or not done, and other orders to suit the circumstances);

- the other party then produces a response in writing which may also include counter-claims against the original party, or may bring in other parties who it is said caused or contributed to the loss alleged;

- usually each party will be required to provide documentary evidence to the other party in advance of the hearing before the judge. Usually this will include primary documents relevant to the issues in dispute (by way of a process called ‘discovery’), but will often also involve potential witnesses setting out in writing what evidence they can give. A party may also issue subpoenas to other persons who are not party to the proceedings, calling on them to produce documents which are relevant to the dispute;

- often the hearing before the judge will involve witnesses giving oral evidence in court, in which the witness must state on oath or by affirmation that they will tell the truth. The opposing lawyers can seek to challenge that evidence through cross-examination, which involves seeking to undermine the force of the evidence (for example, by showing the evidence is not consistent with a document the witness wrote at the time);

- after hearing evidence and legal argument from both sides, the judge then often takes
some time to give a judgment and make orders. Often in commercial disputes, the judge will order that the unsuccessful party pay the legal costs of the successful party, in addition to any other damages payable; and

- the parties then have a short period of time (usually less than one month) to decide whether to appeal the decision of the judge.

**Alternative methods of dispute resolution**

It is well recognised that full-scale court proceedings can involve considerable time and expense and strain relationships between the parties to the dispute. In many cases we recommend that a dispute resolution process outside the court system be considered.

Some contracts require the parties to arbitrate any disputes they have. Commercial parties, particularly in international transactions, may prefer to arbitrate disputes if possible because arbitral awards are more readily enforceable around the world than judgments of national courts. Also, unlike court proceedings, arbitration proceedings are generally private and afford parties a greater degree of confidentiality in respect of their dispute. The arbitration process often involves a semi-formal hearing, and the decision-maker is often appointed by the parties to the dispute.

Other alternative dispute resolution techniques which are often used include:

- mediation, which is a non-binding negotiation facilitated by a mediator. The mediator does not have authority (unlike an arbitrator in an arbitration) to bind the parties to a decision but can assist the parties in coming to a mutually satisfactory settlement; and

- expert determination, which produces a binding decision by an independent expert. The independent expert will usually have particular expertise or technical knowledge in the subject matter of the dispute. Expert determination is usually employed to resolve disputes concerning technical, factual matters rather than complex legal issues.

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DOING BUSINESS IN AUSTRALIA

FREE TRADE AGREEMENTS, ANTI-CORRUPTION, SANCTIONS, EXPORT CONTROLS, WHISTLEBLOWING LAWS, FOREIGN INFLUENCE AND MODERN SLAVERY
There are a range of internationally focused regulations that companies and individuals should take into account when doing business in, or trading with, Australia. This chapter looks at some of those key international considerations, including:

- the impact of anti-corruption and bribery laws (including false accounting offences);
- the effects of the free trade agreements that Australia has entered with other countries or groups of countries;
- the restrictions on dealings flowing from import/export controls and sanctions regimes; and
- the effect of laws aimed at providing transparency of foreign influence in Australia.

**Anti-corruption**

There are four primary categories of anti-corruption laws which companies and individuals should be aware of when conducting business in Australia:

- prohibitions on bribing Australian officials;
- prohibitions on Australian companies, or persons in Australia, bribing foreign public officials;
- prohibitions on false dealings with accounting documents; and
- prohibitions on 'private' bribery.
Prohibition on bribing Australian officials

Australia’s Criminal Code prohibits a person or company from dishonestly providing, offering or promising a benefit to another person (or causing this to occur), with the intention of influencing a federal public official in the exercise of the official’s duties as a public official.

Key points to note in respect of these provisions are:

- the definition of bribe or corrupting benefit is broad – it extends to any benefit or advantage, including hospitality, gifts, travel and preferential treatment;

- an 'offer' or 'promise' to provide a benefit is sufficient – no benefit needs to actually be provided; nor does the bribe need to actually influence the public official – an intention to influence is sufficient;

- the bribe or corrupting benefit can be offered, promised or provided through an intermediary, rather than directly;

- there is no ‘facilitation payment' defence; and

- relevant public officials include parliamentarians, judicial officers, members of the public service, members of the defence force, members of the Federal Police, officers of federal authorities, and officers and employees of contracted service providers for federal contracts.

The consequences for breaching these provisions are severe, including:

- significant penalties:
  - for companies: up to the greatest of a A$21 million fine, three times the value of the benefit directly or indirectly obtained, or (if the court cannot determine the value of the benefit) 10% of the annual turnover of the company during the 12 months prior to the offence; and
  - for individuals: up to 10 years imprisonment and/or a A$2.1 million fine;

- potentially, an action under Proceeds of Crime legislation, for example to pay a penalty equivalent to the value of the benefits derived from the commission of the offence; and

- reputational damage, as well as the cost and strain of being subject to a criminal
Companies can be found liable for bribery where, for example, a senior manager of the company engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence – although there is a due diligence defence in this scenario. A company can also be found liable where it failed to create and maintain a corporate culture that required compliance with the relevant provisions.

Similarly, legislation in Australian states and territories prohibits conduct which seeks to influence a state or territory official to misuse their position.

**Prohibition on bribing Foreign officials**

Australia's Criminal Code also prohibits a person or company from providing or offering a benefit that is not legitimately due to the receiving person with the intention of influencing a foreign public official in order to obtain or retain a business or a business advantage that is not legitimately due.

The offence applies to conduct that occurs wholly or partly in Australia (which may include calling or sending correspondence to or from Australia), and to conduct that occurred wholly outside Australia if it was committed by an Australian citizen or resident, or an Australian company.

The same key points noted above for the Australian public official offence also apply to the foreign bribery offence, except that:

- there is a 'facilitation payment' defence; and
- the definition of foreign public official includes employees, contractors or officials of a foreign government department or agency, members of a foreign military or police force, or members of the executive, judiciary or legislative.

The Australian Government is currently considering significant reforms to the foreign bribery offence. Key changes under consideration include creating a new offence of recklessly bribing a foreign public official and creating a new corporate offence for failing to prevent foreign bribery. Should these changes be implemented, they will likely increase the compliance risks for companies operating in Australia.

Penalties for the foreign bribery offence mirror the Australian public official offence, including
the potential for actions under Proceeds of Crime legislation (as set out above).

**False accounting offences**

The Australian Criminal Code also includes offences that criminalise intentional or reckless false dealings with accounting documents for the purposes of concealing the giving or receiving of benefits that are not legitimately due.

These offences were introduced to primarily target foreign bribery, but the broad drafting means they may be invoked beyond this context. Because of the lower threshold of proof required, it may be easier to establish a false accounting offence than to establish the bribery offences discussed above.

The false accounting offences apply to conduct occurring both within and outside Australia. However, if the conduct occurred wholly outside Australia by a person who is not an Australian citizen or resident, or an Australian company, then the Attorney-General's consent is required to prosecute.

These offences also attract significant penalties. Where an offence was intentional, the penalties mirror the penalties for the Australian public official offence and foreign bribery offence. Where an offence was reckless, the penalties are half the maximum penalties for the intentional offence.

**Prohibitions on private bribery**

Each Australian state and territory has offences which, broadly speaking, prohibit:

- agents from corruptly accepting or soliciting a benefit as an inducement or reward for an act or omission in relation to the principal’s business; and

- persons from corruptly giving or offering a benefit to an agent with the intention of influencing the principal’s business.

The penalties for bribery and corruption offences under state and territory legislation vary. Some states and territories also have false accounting type offences that have been relied upon in the context of private bribery charges.

**Herbert Smith Freehills' anti-corruption**
Herbert Smith Freehills has significant expertise advising clients on anti-corruption and bribery issues, including providing practical advice on how to mitigate such risks. We work with our clients in conducting internal investigations, and are representing clients in investigations and enforcement proceedings by both Australian and international regulators. We also understand the potential reputational and related risks. We work with our clients on managing public relations, shareholder communications, insurance issues, employment issues and the prospect of civil claims.

**Free trade agreements**

Free trade agreements (FTAs) are international treaties entered into between countries that seek to promote economic integration and facilitate greater trade and investment by reducing barriers to trade. FTAs can be entered into between two countries or between groups of countries covering multiple regions.

In recent years, Australia has strongly pursued FTAs. The Australian Government’s stated policy aim is to maximise the economic benefits flowing to Australia from FTAs. According to the government, those benefits include:

- freer trade flows and stronger ties with Australia’s trading partners;
- increased Australian productivity and higher GDP growth by allowing domestic businesses access to cheaper inputs, introducing new technologies, and fostering competition and innovation; and
- enhanced competitiveness of Australian exports in the partner market, and attractiveness of Australia as an investment destination.

Australia is party to 11 FTAs with either individual countries or groups of countries. Those are with New Zealand, Singapore, the Association of South East Asian Nations (ASEAN), the United States, Thailand, Chile, Malaysia, Korea, Japan and China, and most recently the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) between 11 Pacific nations.

The CPTPP came into force on 30 December 2018 and is a separate agreement that incorporates by reference the provisions of the Trans-Pacific Partnership (signed but not yet in force), notwithstanding a limited set of suspended provisions. The CPTPP was brokered after President Trump withdrew the United States from the TPP in early 2017 and the suspended provisions largely represent those provisions that the United States favoured but that other
Parties opposed. Significantly, the CPTPP maintains the original market access package of the TPP.

A number of FTAs are also under negotiation, including the Australia-Gulf Cooperation Council (GCC) FTA, Australia-India Comprehensive Economic Cooperation Agreement, Environmental Goods Negotiations, Pacific Alliance Free Trade Agreement, Regional Comprehensive Economic Partnership, Trade in Services Agreement and the Australia-European Union Free Trade Agreement.

Additionally, there are several FTAs that were recently signed in 2018 by Australia but are not yet in force, including the Indonesia-Australia Comprehensive Economic Partnership Agreement, the Peru-Australia Free Trade Agreement, the Australia-Hong Kong Free Trade Agreement and the Pacific Agreement on Closer Economic Relations (PACER) Plus which is between Australia, New Zealand and 8 Pacific Island nations.

As a member of the World Trade Organisation (WTO), Australia upholds legal trade disciplines in its FTAs to ensure they are supportive of the international trading system. Under WTO rules, FTAs must eliminate tariffs and other restrictions on 'substantially all the trade' in goods between its member countries and eliminate substantially all discrimination against service suppliers from member countries (helping to increase trade in services).

One area which has been the subject of much attention and controversy recently is the inclusion in FTAs of investor state dispute resolution mechanisms. Such mechanisms permit foreign investors to bring direct claims against governments where treaty protections are breached e.g. where investments are expropriated. The purpose of including such mechanisms is to increase investor confidence and consequently investment in the host country. However, critics claim that such protections place foreign investors in a more favourable position compared to domestic investors and can hamper legitimate government regulation.

Export regulation

General

There are fairly minimal limitations on exports from Australia. Most exported goods and services are not subject to Goods and Services Tax (GST) so long as they are exported within a prescribed time of an invoice being issued or payment being received.

Defence export controls

The Australian Government maintains export control policies for defence and strategic goods and technologies (including military items and ‘dual-use’ items that can be adapted for military
programs or weapons systems) to ensure they are exported in accordance with Australia's national interests and international obligations (including sanctions regimes). Export controls are implemented under a framework of relevant legislation, including the Defence Trade Controls Act 2012 (Cth) and the Customs Act 1901 (Cth).

Australia's export control systems are continually evolving to account for changes in Australia's strategic circumstances. Accordingly, foreign persons and entities doing business in Australia should regularly review Australia's defence export policies and procedures, and seek independent legal advice before commencing commercial activities that may involve the export of defence and strategic goods and technologies.

Import regulation

General

Importation is regulated by a number of statutes in Australia, including the Customs Act 1901 (Cth). There is no general requirement for importers to hold an import licence to import goods into Australia. However, depending on the nature of the goods and regardless of value, importers may be required to obtain permits to clear certain imported goods from customs control.

The importation of certain goods may be prohibited or restricted under the Customs (Prohibited Imports) Regulations 1956 (Cth). This includes the importation of firearms and weapons. For some of these goods, permits are required prior to importation.

Duties and taxes

In most cases, customs duties and Commonwealth taxes apply to the value of imported goods, including under the Customs Tariff Act 1995 (Cth). The rate of duty payable depends on the tariff classification of the goods.

However, goods may be imported duty-free via free trade agreements or on the basis of duty concession schemes. One such scheme is the Tariff Concession Scheme (TCS) which was established in 1992. Concessions under the TCS apply to imported goods covered by a Tariff Concession Order (TCO). Typically, TCOs are only granted where substitutable goods are not made in Australia.

Anti-dumping

Dumping occurs where exporters sell goods to Australia at prices below the ‘normal value’ of goods, which is usually the domestic price of goods in the country of export. Subsidisation is
when imported goods benefit from government assistance in the country of export.

While dumping and subsidisation are not prohibited under Australian law, Australia’s anti-dumping and countervailing (anti-subsidy) system, administered by the Anti-Dumping Commission, may result in the imposition of anti-dumping measures (including duties such as ad valorem duty, fixed duty, floor price or a combination of fixed and variable duties) or ‘countervailing’ duties that offset the amount of the relevant subsidy.

Members of Australian industry can apply to the Anti-Dumping Commission to investigate dumping or subsidy claims which have caused, or threaten to cause, material injury. The Minister decides whether special duties should be imposed based on the recommendation of the Anti-Dumping Commission.

**Sanction regimes**

Australian sanctions laws implement both United Nations Security Council (UNSC) sanctions and Australia’s autonomous sanctions.

Article 41 of the *United Nations Charter* allows the UNSC to impose sanctions against nations which pose a threat to international peace and security. As a United Nations member state, Australia is obliged to implement UNSC sanctions domestically. Sanctions are implemented by promulgating new regulations under the *Charter of the United Nations Act 1945* (Cth). The Department of Foreign Affairs and Trade (DFAT) has responsibility for implementing legislation giving effect to sanctions-related decisions of the UNSC, including with respect to the freezing of terrorist assets.

Australia also imposes sanctions on some dealings with certain countries and individuals to support its foreign policy objectives. Autonomous sanctions are implemented under the *Autonomous Sanctions Act 2011* (Cth) and the *Australian Autonomous Sanctions Regulations 2011* and other related regulations. DFAT also administers these sanctions. Australian autonomous sanctions regimes may supplement UNSC sanctions regimes, or be separate from them. Sanctions measures vary for each sanctions regime and may include general prohibitions on:

- making a ‘sanctioned supply’ of ‘export sanctioned goods’;
- making a ‘sanctioned import’ of ‘import sanctioned goods’;
- providing a ‘sanctioned service’;
- engaging in a ‘sanctioned commercial activity’;
• dealing with a ‘designated person or entity’;

• using or dealing with a ‘controlled asset’; or

• the entry into or transit through Australia of a ‘designated person’ or a ‘declared person’.

Sanctions regimes imposed by foreign jurisdictions, such as the European Union and the United States (US), may also impact the dealings of foreign persons and entities doing business in Australia. Such regimes may be enlivened when nationals of those jurisdictions, or entities wholly owned by nationals of those jurisdictions, are involved in dealings in Australia.

Both International and Australian sanction regimes are regularly subject to change and need to be consulted for variances. Recently, in May 2018, the US withdrew from the Joint Comprehensive Plan of Action (JCPOA); an agreement endorsed by UNSC Resolution 2231 which promised Iran phased sanctions relief in exchange for nuclear reform. The US has since taken steps to re-impose US sanctions lifted or waived in accordance with the JCPOA. Whereas, DFAT has indicated that there is no intended change to Australia’s UNSC and autonomous sanctions regime. Australian businesses should seek legal advice as to the effect of these sanctions regimes on their business activities.

Information about the implementation of autonomous and UNSC sanctions in Australia, as well as additions to the register of ‘designated persons or entities’, is available on DFAT’s website.

Foreign persons and entities doing business in Australia should familiarise themselves with the operation of Australia’s sanctions regimes and seek independent legal advice before commencing commercial activities which may be affected by sanctions regimes.

Whistleblowing Laws

Australia has recently updated its laws relating to private whistleblowing. The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018 (Whistleblower Bill) will:

• consolidate the existing laws on private whistleblowing into the Corporations Act 2001 (Cth);

• enhance the existing protections for whistleblowers; and

• introduce a requirement for public and large proprietary companies to have a whistleblower policy.
The new laws will commence on 1 July 2019. The existing laws will continue to apply until that date.

Both the existing and new laws contain protections for whistleblowers prohibiting victimising or disclosing confidential information about whistleblowers. There are significant penalties under the new laws for failing to comply with these protections. Both will be civil penalty provisions under the Corporations Act 2001 (Cth), and could therefore lead to civil penalties. Both will also be criminal offences, potentially resulting in fines or imprisonment. Whistleblowers will also able to seek compensation where they have been victimised.

From 1 July 2019, these protections will apply to ‘protected disclosures’ being whistleblower reports:

- which are made by an eligible whistleblower (including officers, employees, suppliers, and associates of the company, or a relative or dependent of any of those people);

- which are made to an eligible recipient (including ASIC, APRA or, in relation to a company, officers, senior managers, auditors, actuaries of the company, or a person authorised by the company to receive disclosures); and

- where the report relates to specified offences or the whistleblower has reasonable grounds to suspect that the information concerns misconduct or an improper state of affairs or circumstances in relation to the company (excepting certain personal work-related grievances).

Companies need to have processes and procedures in place to ensure that protected disclosures are identified, escalated, assessed, investigated, actioned and reported on consistently with the confidentiality and non-victimisation protections.

From 1 January 2020, public and large proprietary companies will also be required to have a whistleblower policy that sets out certain matters, such as to whom protected disclosures may be made. It will be a criminal offence to fail to comply with this requirement. Similarly, the 4th edition of the Corporate Governance Principles and Recommendations recommends that listed companies have a whistleblower policy and suggests it covers certain (different) subject matters. This edition will take effect for a listed entity’s first full financial year commencing on or after 1 January 2020.

**Foreign Influence Transparency Scheme**

Australia has recently implemented a suite of measures aimed at countering the threat of
espionage, foreign interference and covert influence in Australia. One of those measures is the Foreign Influence Transparency Scheme Act 2018 (Cth) (Scheme), which commenced on 10 December 2018.

The Scheme is aimed at increasing visibility of the extent of foreign influence over Australia’s political and government processes. The Scheme imposes registration and other obligations on persons who undertake or agree to undertake certain, mostly political, activities on behalf of foreign principals.

The activities covered by the scheme include parliamentary and general political lobbying in Australia, communications and disbursement activities, and activities by former Australian Cabinet Ministers and certain other high-level officials. Whether an activity is registrable will depend on what type of foreign principal is involved, what activity is undertaken and, in some cases, whether the purpose of that activity is political or government influence.

There are a number of exemptions available, including for diplomatic activities, industry representative bodies, registered charities and trade unions. Limited exemptions apply for commercial or business pursuits.

Notably:

- the definition of foreign principal is broad, covering not only foreign governments and foreign political organisations, but also entities related to foreign governments or foreign political organisations in certain prescribed ways;

- if required to register, a person must provide certain information to the Australian Government, which may be published on a public, transparency register; and

- registrants are subject to a number of ongoing reporting, disclosure and record keeping requirements. There are also heightened reporting requirements during Australian voting periods.

The Scheme creates criminal offences for failing to register under the Scheme, failing to fulfil obligations under the Scheme, providing false or misleading information to the Department and destroying records with the intent of avoiding or defeating the object of the Scheme.

Before undertaking any of the activities covered by the Scheme, businesses, especially those with any element of foreign-government ownership, should familiarise themselves with the Scheme and seek independent legal advice as to its application and requirements.
**Modern slavery**

Australian entities and entities carrying on business in Australia with a consolidated revenue of $100 million or more will now be required to report on the actions taken by the reporting entity to address modern slavery risks within their operations and supply chains. The purpose of the regime is to reduce the likelihood of modern slavery practices taking place in the provision of goods or services in the Australian market.

‘Modern slavery’ means conduct which would constitute:

- certain slavery-related offences under Australia’s existing criminal law, including slavery, servitude, forced labour and forced marriage; or
- child labour or trafficking in persons as defined by particular international conventions.

Under the *Modern Slavery Act 2018* (Cth) reporting entities will have to publish a modern slavery statement annually. The first statement must be published within 6 months of the completion of the entity's 2019/2020 financial year.

The modern slavery statement must describe:

- the structure, operations and supply chains of the reporting entity;
- the risks of modern slavery practices in the operations and supply chains of the reporting entity;
- the actions taken by the reporting entity, to assess and address those risks, including due diligence and remediation processes; and
- how the reporting entity assesses the effectiveness of such actions.

At the time of publishing, there is no penalty for failing to make a modern slavery statement. However, a reporting entity can be asked by the Minister to explain why it did not comply with its reporting requirements and/or be required to take remedial steps. If the reporting entity does not provide an explanation or it fails to take remedial steps, the Minister may publish the identity of the entity and details concerning the entity’s failure to comply with its reporting obligations.

NSW has also introduced modern slavery legislation, with reporting obligations. It is intended
that companies reporting under the Commonwealth regime would satisfy the requirements of the NSW law (although the interaction between the laws is still to be formalised). Entities should consider whether they have obligations under either the Commonwealth and/or NSW law.

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CONTRIBUTORS AND RESOURCES
Chapter 25
Contributors and Resources

Websites

Below is a list of useful websites relating to the conduct of business in Australia:

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<td>New South Wales Department of Planning</td>
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OVERVIEW OF HERBERT SMITH FREEHILLS

DOING BUSINESS IN AUSTRALIA
Chapter 26

Overview of Herbert Smith Freehills

Herbert Smith Freehills is one of the world’s leading professional services businesses, bringing together the best people across our 27 offices, to meet all your legal services needs globally. We can help you realise opportunities while managing risk.

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