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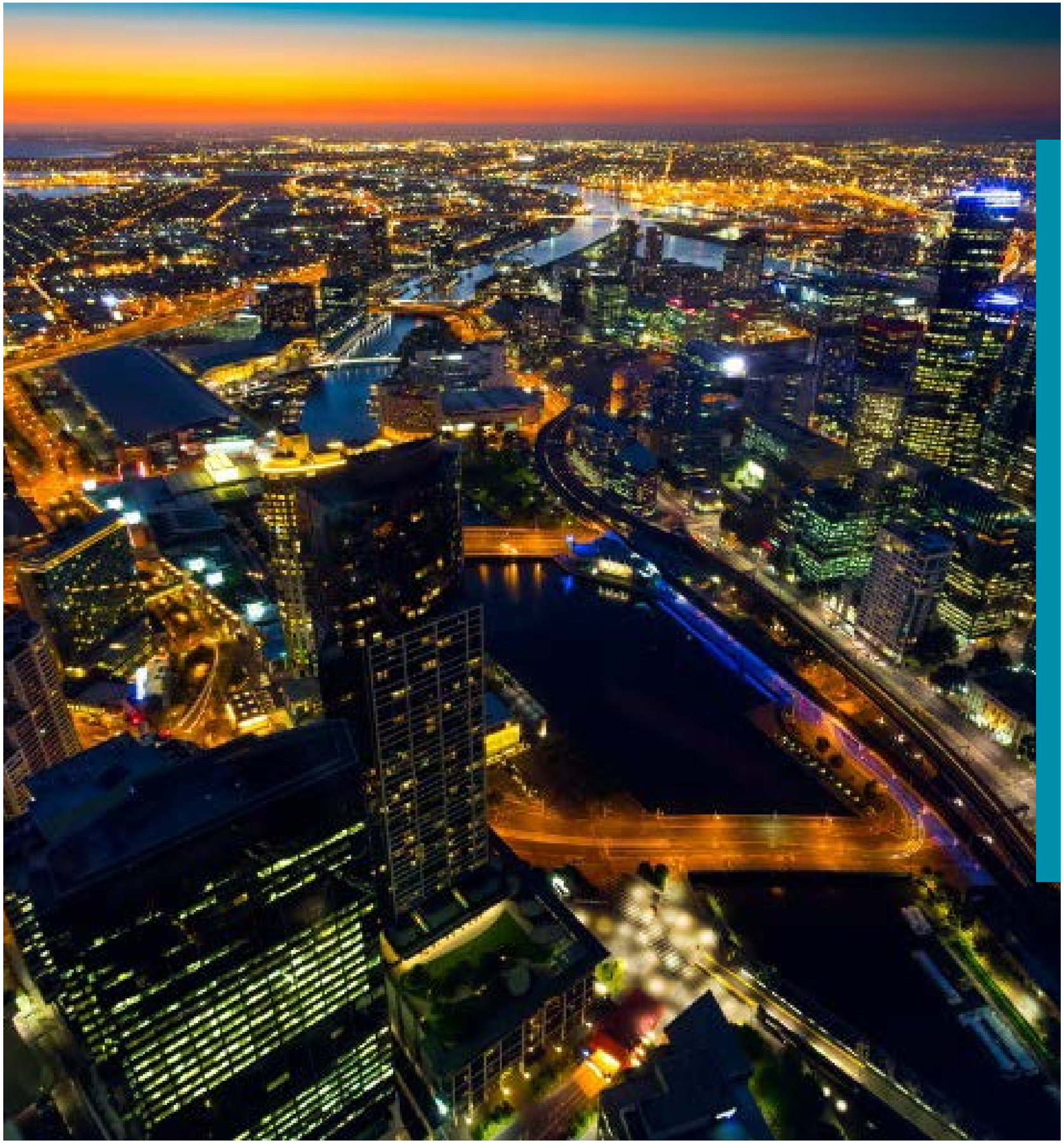
Doing business in Australia

An introductory guide

October 2020



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Australia's government, laws and regulatory bodies

Australia (also known as the Commonwealth of Australia) is a democratic, constitutional monarchy with a federal system of government.

Australia comprises six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and two territories (Australian Capital Territory and Northern Territory). It has a population of more than 25 million and is the fourteenth largest economy in the world.

There are three tiers of government in Australia; federal, state (and territory) and local. The Federal Government legislates on specific areas listed in the Australian Constitution, which are of relevance to the nation as a whole. These include trade and commerce, defence, foreign affairs, taxation, banking, communications and customs.

The state and territory governments legislate primarily on matters of service delivery regarding areas such as education, health, transport and housing.

Local governments have the smallest jurisdiction and are established by the state and territory governments in which they exist. Their primary function is to deliver community services such as waste disposal services, street lighting and parking, arts and cultural programs, roads etc.

A business established in Australia will be bound by federal laws, the laws of the particular states or territories in which it operates and the regulations of local government areas. Australia is a common law country, meaning that case law applies alongside statute law.

1.1 Key regulatory bodies

Australian Competition and Consumer Commission (ACCC)

The ACCC is an independent Australian Government statutory authority.

The ACCC seeks to promote competition, fair trading and to provide for consumer protection to benefit consumers, businesses and the community. It addresses anti-competitive and unfair market practices, company mergers and acquisitions, product safety and product liability, and third party access to national infrastructure services.

Australian Prudential Regulation Authority (APRA)

APRA is the prudential regulator of the Australian financial services industry. APRA supervises all bank and non-bank financial institutions (such as banks, insurers and superannuation funds) to ensure that prudential standards and practices are met to maintain a stable and competitive financial system.

Australian Securities and Investments Commission (ASIC)

ASIC is an independent Australian Government statutory authority, which regulates Australia's corporate markets and financial services sectors.

ASIC regulates Australian companies, financial services organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.

ASX Limited (ASX)

The ASX (also known as the Australian Securities Exchange) provides the platform for the major Australian market trading in equities, derivatives, futures and fixed interest securities.

The ASX functions as a market operator, clearing house and payments system facilitator. It also oversees compliance with its operating rules, promotes standards of corporate governance among Australia's listed companies, and helps to educate retail investors.

Australian Taxation Office (ATO)

The ATO is the statutory body responsible for administering the federal tax system. The current income tax system involves taxation of income and capital gains of individuals and businesses. It is governed by legislation, ATO administrative taxation rulings and court decisions.

The ATO also regulates Australia's superannuation system, collects excise on tobacco, petrol and alcohol, and administers the goods and services tax.

Reserve Bank of Australia (RBA)

The RBA is an independent statutory authority performing Australia's central banking functions. It has two broad areas of responsibility:

1. monetary policy (primarily directed at maintaining inflation rates), and
2. financial stability (to prevent excessive risks in the financial system and to limit the effects of financial disturbances when they occur).

IP Australia

IP Australia is a Federal Government agency, which receives and processes patent, trade mark, design, and plant breeder's rights applications, conducts hearings and decides on disputed matters relating to granting or refusing Australian intellectual property rights.

Foreign Investment Review Board (FIRB)

The main functions of FIRB are to:

- examine proposals by foreign interests for investment in Australia and, against the background of the government's foreign investment policy, to make recommendations to the government on those proposals,
- advise the government on foreign investment matters generally, and
- monitor and ensure compliance with foreign investment policy.

FIRB's functions are advisory only. The Treasurer is ultimately responsible for the government's foreign investment policy and for making decisions on proposals.

Foreign investment in Australia

2.1 Regulatory framework

The Australian Government welcomes foreign investment that is consistent with its national interest, and recognises the substantial contribution it makes to Australia's economic growth and prosperity.

Foreign investment in Australia is regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA), its related regulations, and Australia's Foreign Investment Policy (FIRB Policy). The Australian Federal Treasurer administers FATA and FIRB Policy, assisted by the Foreign Investment Review Board (FIRB).

The Treasurer has the authority to refuse proposals for certain foreign investments in Australia, impose conditions on those proposals and make a range of other orders, if the Treasurer considers the proposal to be contrary to the national interest.

Certain foreign investment proposals require notification to FIRB and the Treasurer's approval before being implemented. In practice, most applications do not raise national interest concerns and generally receive approval.

2.2 Foreign investors

The FATA and FIRB Policy apply to foreign investors who are considered 'foreign persons'. For these purposes, a 'foreign person' includes foreign individuals, corporations, trusts, governments and partnerships.

An individual is a foreign person if they are not ordinarily a resident in Australia (Foreign Individual). This includes expatriate Australian citizens.

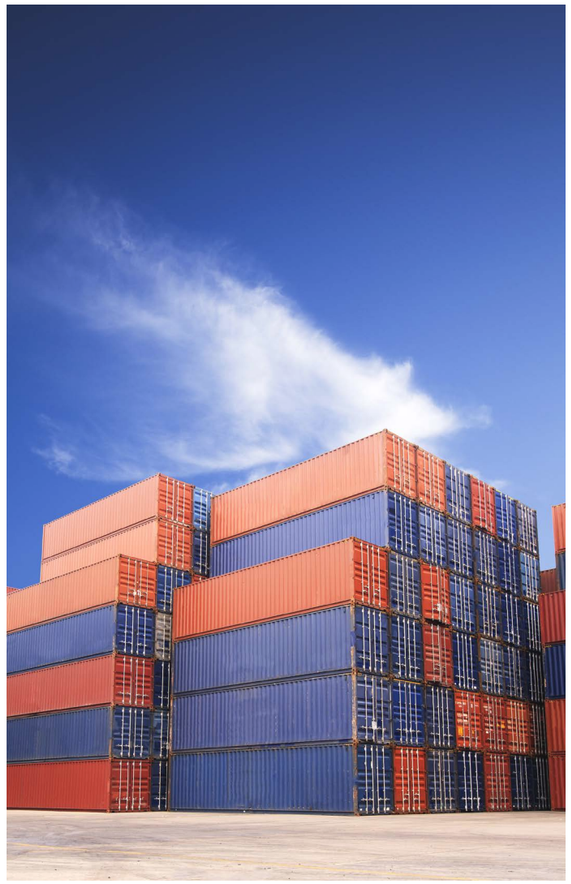
A corporation, trust or partnership is a foreign person if:

- at least 20% is held by a single Foreign Individual, foreign corporation or foreign government, or
- at least 40% is held by investors made up of Foreign Individuals, foreign corporations or foreign governments.

All 'foreign government investors' are also foreign persons *(see section 2.6 below)*.

2.3 Significant actions and notifiable actions

The Treasurer has the power to make a range of orders in relation to 'significant actions' and 'notifiable actions', and is primarily concerned with preventing transactions that negatively impact on the national interest (see section 2.7 below).



Foreign persons are not required to inform the Treasurer of proposed significant actions unless they are also notifiable actions, however they may choose to notify the Treasurer of a significant action to receive the benefit of the Treasurer's response prior to undertaking a significant action to prevent the Treasurer from making a subsequent disposal order.

Significant actions

Actions by a foreign person that may be a 'significant action' include:

- acquisition of Australian land,
- acquisition of a direct interest in Australian agribusiness,
- acquisition of an interest in Australian business assets resulting in a change of control in the business,
- entering into a 'significant agreement' with an Australian business resulting in a change of control in the business,
- actions relating to the acquisition of interests in or issue of securities in an entity, and
- certain other actions, such as alterations to constituent documents, that result in the company coming under the control of a foreign person (or a foreign person's associate).

These will only be significant actions where the investment exceeds the prescribed monetary threshold.

The regulations also prescribe certain other investments in Australian businesses as significant actions.

There are various exemptions that exclude certain actions from being significant actions.

Notifiable actions

A foreign person who proposes to take a notifiable action must give a notice to the Treasurer before taking the action.

'Notifiable actions' include acquisitions of direct interests in agribusiness, substantial interests (>20% by one foreign person or >40% aggregate interest held by two or more foreign persons) in Australian entities, and any interest in Australian land that exceed the prescribed monetary thresholds.

The regulations also prescribe certain other investments in Australian businesses as notifiable actions.

Exemptions and exclusions

Exemptions and exclusions apply to some foreign persons or investments removing the requirement to notify the Treasurer, including:

- acquisitions of Australian land by an expatriate Australian citizen;
- certain acquisitions by professional custodians;
- most investments acquired from Australian government or state-owned entities;
- compulsory acquisitions and buy-outs following take-over bids;
- certain acquisitions under rights issues; and
- certain acquisitions in relation to listed entities, such as under dividend reinvestment plans, bonus share plans, a distribution reinvestment plan or a switching facility.

Thresholds

Some investments are not considered 'significant actions' unless they exceed a monetary threshold.

Investors from certain countries enjoy higher thresholds in most instances and exemptions in others.

2.4 Foreign investment in business

Agribusiness

Foreign persons must apply for approval to acquire a direct interest in agribusiness where the value exceeds AUD58 million. This is a significant action and a notifiable action.

Other businesses and entities

As mentioned above, where the monetary threshold is met, the following will be significant actions:

- acquisition of an interest in Australian business assets resulting in a change of control in the business,
- entering into a 'significant agreement' with an Australian business resulting in a change of control in the business,
- actions relating to the acquisition of interests in or issue of securities in an entity, and
- certain other actions, such as alterations to constituent documents, that result in the company coming under the control of a foreign person (or a foreign person's associate).

The relevant monetary threshold for investment by a foreign person in these instances is, subject to certain exceptions:

- AUD1,154 million for US, New Zealand, Chilean, Chinese, Japanese and South Korean investors where the investment is not in a prescribed sensitive sector, or
- for all other investments, AUD266 million. An acquisition of a substantial interest in an Australian entity is also a notifiable action where the entity is an Australian unit trust or carries on an Australian business.

It is also a significant action and a notifiable action where, regardless of value:

- a foreign government investor acquires a direct interest in an Australian entity or business, or starts an Australian business, or
- a foreign person acquires an interest of 5% or more in an Australian media entity or business.

Exemption certificates – business

Exemption certificates may be applied for in certain circumstances, such as in relation to underwriting by certain foreign financial institutions.

2.5 Foreign investment in land

Who needs FIRB approval?

In most instances, foreign persons must obtain FIRB approval when acquiring an interest in Australian land.

Australian land includes:

- residential land,
- agricultural land,
- vacant commercial land,
- developed commercial land, and
- mining and production tenements.

Residential real estate

Generally and regardless of the value, foreign persons must obtain approval for an interest in Australian residential real estate unless an exemption applies.

Depending on whether the foreign person is a temporary resident in Australia or is a non-resident, there are different rules around who is allowed to acquire residential real estate and the nature of the residential real estate.

Foreign persons can apply to purchase established dwellings for the purposes of residential redevelopment, provided that the residential redevelopment increases Australia's housing stock. Approval may be granted with restrictions and conditions.

Agricultural land

A foreign person must obtain approval for an interest in agricultural land where the cumulative value of the agriculture land owned by the foreign person (and any associates) is more than AUD15 million, with the exception of investors from the US, New Zealand and Chile who enjoy a higher threshold of AUD1,154 million.

Vacant commercial land

Regardless of the value of the vacant commercial land, all foreign persons must obtain approval before acquiring an interest in vacant commercial land.

Developed commercial land

Foreign persons must obtain approval for an interest in developed commercial land if the interest exceeds

AUD266 million, unless the land is classified as sensitive developed commercial land in which case, the threshold is AUD58 million.

Mining and production tenements

Mining or production tenements are treated as Australian land for the purposes of the FATA and there is no applicable monetary threshold for most foreign investors, making any such investments significant actions and notifiable actions.

Investors from the US, New Zealand, Chile, China, Japan or South Korea are the exception, enjoying an AUD1,154 million monetary threshold before being subject to notification requirements.

Where an exploration and prospecting tenement provides a right to occupy land for a term of more than five years (including any likely extensions) it will be treated as 'Australian land'. Depending on the type of underlying land, it may be a significant action and a notifiable action to acquire an interest in a tenement which meets the above requirements.

For foreign government investors the following are significant actions and notifiable actions:

- any investment in a tenement (whether legal or equitable), even where it only increases an existing interest, and
- an investment that results in an interest of 10% or more in securities in a mining, production or exploration entity.

Australian land entities

An Australian land entity is an entity where the interests in Australian land held by that entity exceeds 50% of the total value of the total assets held by the entity. The acquisition of securities in such an entity may be a notifiable action and a significant action, unless an exception applies.

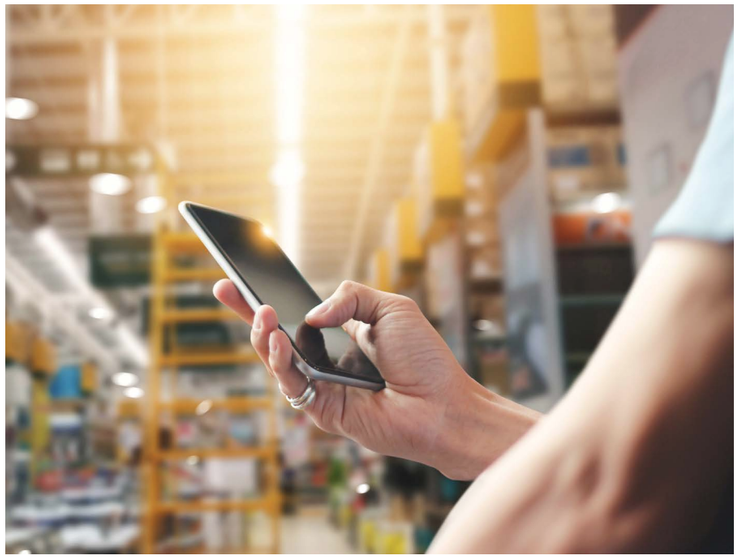
2.6 Foreign government investors

All foreign government investors must obtain approval, irrespective of the value of the investment or asset, before:

- making a direct investment in an Australian entity or business.
- establishing a new Australian business.
- obtaining an interest in Australian land.
- obtaining any interest in a prospecting, exploration, production or mining tenement.

2.7 National interest

The nature of the target entity or asset, the effect the proposal has on national security and a competitive market, the impact of the proposal on the economy and tax revenue, and the transparency and character of the investor are all considered when determining if a foreign investment proposal is contrary to Australia's national interest.



2.8 When to apply

You should apply for FIRB approval before you enter into an agreement to purchase, lease or license Australian land, an agreement to buy shares or units in an Australian land corporation or trust, or before you undertake any other notifiable action.

If you are unable to obtain approval before entering into any contract or agreement, you should ensure that the contract or agreement remains conditional on obtaining satisfactory FIRB approval.

2.9 Fees

Application fees apply for all foreign investment applications and are payable at the time of application. The size of the applicable fee will depend on the type of acquisition and in some instances the amount of consideration payable on the acquisition.

2.10 Tax conditions

FIRB is required to consult with the ATO to determine the potential tax impact of every proposed acquisition, which enables the ATO to scrutinise the proposed acquisition and financing structure in advance of the transaction. This heightens the urgency for foreign acquirers to address the various matters, which impact on the tax efficiencies of the investment which are summarised under *Taxation*. In many cases, FIRB will impose additional tax conditions as part of approving the transaction, for example advanced pricing agreements for transfer pricing purposes or additional reporting requirements.

2.11 Penalties

Failure to apply for FIRB approval may result in a divestment order, civil and criminal penalties and/or prohibition of the proposal.

2.12 Temporary changes (COVID-19)

The Federal Government has temporarily broadened its review power in response to the COVID-19 crisis. Under the changes, all proposed foreign investments will require approval, regardless of the value of the investment, the nature of the investment or the nature of the foreign investor.

Under the temporary measures, the monetary threshold components of 'significant' and 'notifiable' actions are lowered, but the scope of the categories and the requirements they impose are otherwise unchanged.

The timeframe for reviewing applications has been extended from 30 days to six months, to account for the increase in the number of reviewable transactions.

The measures came into effect on 29 March 2020 and will remain in place for the duration of the crisis.

2.13 2021 Reforms

The Federal Government has announced further reforms to Australia's foreign investment review framework. Among the announced changes are:

- a new definition of "National Security Businesses", which will include businesses involved in critical infrastructure, telecommunications critical military technology, defense services and intelligence;
- a new category of "notifiable national security actions" requiring foreign approval, being an action by a foreign investor to start or acquire a direct interest in a National Security Business, regardless of the value of the investment;
- increased powers for the Treasurer to review and impose conditions on any foreign investment, including the power to review investments that would otherwise fall outside the scope for review, and the power to impose or vary conditions or, as a last resort, order disposal on national security grounds; and
- a reduction in the requirements that must be satisfied to obtain FIRB approval for investments into non-sensitive businesses.

The reforms are expected to come into effect on 1 January 2021.

Contents

Establishing a business in Australia

3.1 Types of business entities

A business enterprise in Australia may be operated by an individual, a company, a trustee of a trust, a responsible entity of a managed investment scheme, a joint venture, a partnership, or a branch of a foreign company. A foreign investor may conduct business in Australia through any of these structures, or alternatively it may also register as a foreign company under the Corporations Act.

All Australian companies are regulated by the *Corporations Act 2001* (Cth), under which directors have substantial and wide-ranging obligations. The common law also imposes significant responsibilities on directors.

Although companies have limited liability, the directors may be personally liable for breaches of their duties. More information on directors' duties is set out in section 7.1.

Australian companies

A foreign investor who holds a visa to work in Australia can register an Australian company under the Corporations Act. The most common types of companies are proprietary (private) companies that are limited by shares, or public companies limited by shares or guarantee.

A company must have a registered office in Australia. If it is a proprietary company, it must also have at least one director (at least one of whom must ordinarily reside in Australia). If it is a public company, it must have at least three directors and at least one secretary (and at least two of the directors and one secretary must ordinarily reside in Australia).

There are no minimum capital requirements for an Australian company.

The 'limited liability' company is the most popular form of business structure adopted by foreign investors carrying on business in Australia.

A proprietary company (Pty Ltd):

- must have at least one but no more than 50 non-employee shareholders,
- must have at least one director residing in Australia,
- must have a registered office in Australia,
- must have a public officer for tax purposes,
- may have a company secretary, but does not need to; and
- has fewer fundraising options available, compared to a public company.

A public company (Limited):

- must have at least one shareholder, with no upper limit on the number of shareholders,
- must have at least three directors, two of whom must ordinarily reside in Australia,
- must have a registered office in Australia that is open each business day for a minimum prescribed time,
- must have a public officer for tax purposes,
- must have at least one secretary who ordinarily resides in Australia (if it has more than one secretary, only one needs to ordinarily reside in Australia),
- must appoint an auditor, and
- may raise capital by issuing a disclosure document to offer shares and other securities to the public.

Joint ventures

Two or more individuals or corporations may carry on business as a joint venture. A joint venture can be in the form of a unit trust, an incorporated joint venture or an unincorporated joint venture. Joint venturers may take the proceeds of the venture in output or product.

Partnerships

A partnership is an agreement between two and up to 20 people or companies who decide to carry on business together with a view to profit. In a partnership, each partner has joint and several unlimited liability in respect of the partnership.

Sole proprietors

A foreign investor may choose to carry on business in Australia as a sole proprietor trading under their own name, or under another business name.

Trusts

A trust is a relationship where one person (the 'trustee') holds the legal title to property on behalf of and for the benefit of others (the 'beneficiaries'). A trustee may be an individual or a company. Commonly unit trusts or discretionary trusts are used to carry on businesses. Although a trust is not a separate legal entity a company often acts as the trustee to limit the potential liability of the trustee.

Managed investment schemes

A managed investment scheme is a structure, which allows individuals or companies to pool funds for a common purpose to make a profit. A scheme must be registered with the Australian Securities Investment Commission (ASIC) if it has 20 or more members, if it is promoted by a person who is in the business of promoting managed investment schemes or if ASIC has otherwise determined that the scheme must be registered. Registered schemes must appoint a 'responsible entity', which must be a public company, and hold an Australian Financial Services Licence (AFSL). Schemes that are restricted to investment by wholesale clients only do not need to be registered with ASIC.

Australian branch

A foreign company directly carrying on business in Australia (other than through a subsidiary), must register as a foreign company with the Australian Securities and Investments Commission (ASIC) to:

- carry on business in Australia,
- establish or use a share transfer office or share registration office in Australia, or
- administer, manage or deal with property in Australia as an agent, legal personal representative or otherwise.

A branch office operated by a registered foreign company is not a separate legal entity. Liabilities will be those of the foreign company. Foreign companies are required to have a local agent, who may become personally liable to a penalty imposed on a foreign company.

3.2 Company and business names

Company names

A company name must indicate the company's legal status and the liability of its members (i.e. Pty Ltd or Limited). Upon registering with ASIC a company will be assigned an Australian Company Number (ACN) and a foreign company will be assigned an Australian Registered Body Number (ARBN). A company must clearly state its name along with its ACN or ARBN (Australian Business Number if the last 9 digits are the same as its ACN) on all public documents and negotiable instruments. For a company name to be registered, it must not be identical or similar to another name already registered with ASIC. There are also certain words that are not allowed to be included in a company's name (e.g. the word 'Trust').

An applicant can reserve a company name by having an application lodged with ASIC, even if the applicant is not yet ready to register the company.

Business names

A business name will need to be registered with ASIC when:

- a company wishes to trade or carry on business under a name which is different to its company name,
- an individual wants to carry on business under a name other than their own name, or
- a partnership wishes to carry on business under a name other than all the names of its partners.

For example, if your name is Daniel Lee, and the name of your business is 'Daniel Lee & Co', you will need to register the business name 'Daniel Lee & Co'.

Registration of a business name is necessary to carry on business under that name. However, this does not create a separate legal entity. To register a business name, the registrant of the business name must have an Australian Business Number (ABN).

Registration of a business, company or domain name does not of itself provide any intellectual property rights; only a trade mark gives that kind of protection.

Taxation

Australia has one of the most complex tax systems in the world, perhaps the most complex relative to the size of the economy, and requires careful consideration by inbound investors. Most foreign investors undertake Australian businesses through Australian incorporated entities, however we also consider some alternative entities below.

Australia operates on a 30 June tax year end, however foreign owned companies can typically apply for a substituted tax year end to coincide with the financial year of a foreign parent company.

4.1 Corporate tax

Corporate tax is a federal tax applicable at a rate of 30% on corporate taxable profits. A lower rate of 26% applies to certain smaller companies with an aggregated worldwide associate inclusive turnover of less than AUD 50 million.

Australian resident companies are taxed on their worldwide income, whereas non-resident companies are taxed only on their Australian sourced income.

A company will be an Australian tax resident where it is either incorporated in Australia, or, it has its central management and control and carries on a business in Australia.

Australian resident companies are entitled to a participation exemption whereby dividends received from active foreign subsidiaries are broadly treated as non-assessable. Capital gains derived from the sale of shares in active foreign subsidiaries are also broadly treated as non-assessable.

A limited foreign tax credit applies to assessable foreign dividends, but this covers only foreign withholding tax and not underlying corporate tax.

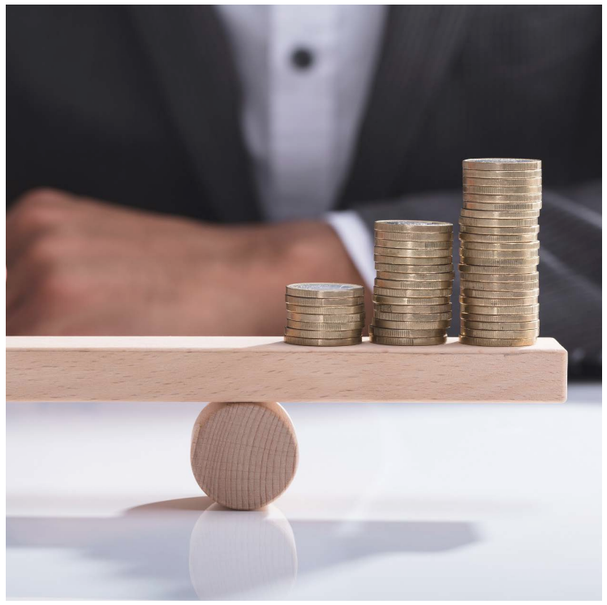
Australia has extensive controlled foreign corporation rules whereby Australian residents are assessable on certain classes of passive and related party income derived by Australian controlled foreign corporations.

Capital gains derived by companies are not subject to a separate tax regime and are instead treated as ordinary income.

Capital gains derived by non-residents on the sale of shares in Australian companies are generally not subject to Australian taxation unless the companies' assets comprise predominantly "taxable Australian property" such as real property and mining or exploration assets.

The tax consolidation regime allows multiple entities to be treated as a single entity for tax purposes such that the consolidated group is only required to lodge one income tax return and intragroup transactions are ignored for tax purposes.

Foreign investors may form a single entry consolidated group where all the wholly-owned Australian entities are ultimately owned by a single Australian parent company. Alternatively, a foreign ultimate parent company can form a multiple entry consolidated group where two or more top tier Australian companies are ultimately wholly-owned by the foreign parent. A multiple entry group affords greater flexibility to divest Australian assets without giving rise to Australian tax.



Australia operates a unique dividend imputation system whereby company shareholders obtain a franking credit for tax paid at the corporate level.

Dividends paid to non-resident shareholders are not subject to dividend withholding tax to the extent that the dividend is franked. Unfranked dividends paid to non-residents are subject to dividend withholding tax at a rate of 30%, or such lower rate as applies under a relevant Double Tax Agreement.

Conduit relief is available to exempt dividends paid to non-residents from dividend withholding tax to the extent those dividends are sourced on non-assessable foreign dividend and foreign capital gains derived by the Australian corporate. Accordingly, Australia can potentially be used as a regional holding company jurisdiction.

Australian corporates are subject to thin capitalisation restrictions, which apply to the level of interest deductible debt. A safe harbour of 1.5 to 1 debt/equity ratio is available, however debt includes domestic and third party debt. An alternative arms-length safe harbour may apply where the debt level exceeds the 1.5 to 1 ratio.

Interest paid to non-residents is generally subject to a 10% interest withholding tax. There are exemptions from interest withholding tax in respect of certain foreign syndicated loans or widely issued debentures, interest paid to financial institutions under select Double Tax Agreements, and interest paid to foreign pension funds and bodies entitled to sovereign immunity.

Royalties paid to non-residents are subject to a 30% withholding tax, subject to a lower rate under an applicable Double Tax Agreement.

Australia has a robust transfer pricing regime requiring international related party dealings to be set with reference to arms-length conditions. These transfer pricing rules were validated in a case involving Chevron's Australian funding which is of global landmark significance.

Australian corporates maybe entitled to tax concessions in respect of research and development expenditure.

4.2 Non-corporate entities

Foreign resident companies operating in Australia through an Australian branch are typically subject to corporate tax on their Australian sourced income. Australia does not have a branch profits tax.

Australia has introduced extensive anti-avoidance / diverted profit rules to capture income derived by multinationals outside an Australian permanent establishment.

General partnerships and joint ventures are typically treated as flow-through entities whereby each partner or joint venturer is accountable for their share of the partnership or joint venture taxable income or tax loss. Limited partnerships are generally taxed companies.

Trusts are widely used in Australia and are typically treated as flow-through entities except in certain cases where the trust is widely held and controls an active business.

Although trusts are widely treated as flow-through entities, the trustee is typically required to withhold 30% on account of tax payable by non-residents on distributions paid to them. This is a non-final tax, allowing non-residents to file a return and obtain a refund where they have incurred relevant offshore deductions.

Managed investments trusts which hold passive assets such as real property or infrastructure assets as well as other passive investments are only subject to a final 15% trustee withholding on distributions to non-residents. In conjunction with unitholder debt provided by non-residents within thin capitalisation limits, the effective tax rate of foreign investment into Australian property and infrastructure can be reduced below the headline rate of 15%.

4.3 Individual and employment taxes

Individuals' income is subject to a progressive marginal tax rate system, which includes a top rate of 47% (including Medicare levy) that applies from relatively low income levels by global comparison. However, individuals are able to structure considerable assets in private superannuation funds that attract a tax rate of only 0-15% of income derived by the fund. Such funds can receive refundable franking credits attaching to dividends received on investments in shares, resulting in an effective negative rate of tax for the fund.

Capital gains are subject to a 50% reduction in the assessable amount of the gain on assets that have been held for greater than 12 months. Individuals are also exempt from tax on gains from sale of their principal residence. These concessions are not available to non-residents.

Fringe Benefits Tax is payable by employers on the value of most benefits provided to their employees that are not taxed in the hands of the employees directly. Fringe Benefits Tax is calculated by reference to the top personal tax rate.

Each State and Territory has a Payroll Tax system under which the employer is liable to pay tax in the range of circa 5-6% on the employer's payroll (including benefits). The tax is only payable where the employer's payroll exceeds a minimum threshold. The Payroll Tax rates and thresholds vary depending on the particular State or Territory.

Employers must also make a superannuation contribution for the benefit of all their employees. The contribution rate is currently 9.5% for employee remuneration up to approximately AUD210,000.

4.4 Other taxes

Withholding where no Australian Business Number

An Australian Business Number (ABN) should be obtained as a preliminary step to commencing any enterprise in Australia. In the absence of an ABN, Australian businesses may be required to withhold 47% (as a non-final, refundable tax) from any payments made to the recipient.

Goods and services tax (GST)

GST applies at a flat rate of 10% on the supply of most goods and services. GST is a multi-stage tax payable by suppliers (similar to a value added tax), where each stage in the supply chain is potentially taxable, and registered entities being entitled to refunds of GST incurred on their business inputs.

GST is not applied to most export goods and services, and is widely applied to imports.

Some supplies are classified as GST free, including certain supplies relating to health, aged care, education and food, as well as sales of farmland and supplies of businesses as going concerns.

Other supplies may be exempt so that no GST liability arises, but the supplier may be denied credits on business inputs relating to that supply. Exempt supplies include certain financial supplies, residential rents and sales of established residential premises.

Stamp duty

Each State and Territory imposes its own stamp duties. Stamp duty is a tax on transactions and certain instruments, including conveyances of real property and business assets. The rates and duties payable vary among the States and Territories and depend on the nature of the transaction, however a rate of around 5-6% applies to most property and many business asset transfers.

In some cases land tax surcharges apply to residential property acquisitions by foreigners.

The duty is generally payable by the purchaser or transferee.

Land tax

Land tax is an annual tax levied on the owner of land in Australia, based on the unimproved capital value of the land. The land tax rates and thresholds vary depending on the particular State or Territory. In some cases, land tax surcharges are imposed on foreign owned land.


Contents

Acquisitions

5.1 Regulations

There are a number of regulations affecting the acquisition of an interest in a business by a foreign investor. These include:

- The *Corporations Act 2001* (Cth),
- The *Foreign Acquisitions and Takeovers Act 1975* (Cth),
- The *Competition and Consumer Act 2010* (Cth),
- The ASX Listing Rules (provided either the purchaser, seller or target is listed on the Australian Securities Exchange (ASX), and
- legislation specific to the industry in which the purchaser, seller or target operates.

5.2 Key thresholds

Under Australia's regulatory framework, there are a number of key thresholds that are relevant to a foreign entity seeking to acquire a stake in a company listed on the ASX or an unlisted company, which has more than 50 shareholders.

Under the Corporations Act, a person must not acquire a 'relevant interest' in issued voting shares in a company if, because of the transaction, that person's (or another person's) voting power in the company increases above 20%. This prohibition applies whether or not the acquirer intends to make a takeover bid, but is subject to certain exceptions. The two primary ways for a bidder to acquire an interest of 20% or more in a target listed on ASX are takeovers, schemes of arrangement and acquisitions approved by the shareholders of the target company.

Threshold	Relevance
5%	A person with a 5% interest must lodge a substantial holder notice and then lodge further notices where that interest changes by more than 1%.
>10%	A person with an interest of 10% or more can prevent a bidder from satisfying the tests to compulsorily acquire remaining shares.
>20%	A person cannot acquire an interest of more than 20% (known as the "takeovers threshold") without doing so under one of the limited exceptions (see discussion of takeovers and schemes of arrangement below).
>50%	Voting control is achieved for ordinary resolutions such as the appointment or removal of directors.
75%	A person can cause a special resolution to be passed (subject to any voting restrictions).
90%	A person may pursue compulsory acquisition of remaining shares.
100%	Complete control of target.

5.3 Takeovers

Control of a public company in Australia may be acquired by way of a takeover. The acquisition of interests in listed companies, listed management investment schemes and unlisted companies with greater than 50 shareholders are subject to the takeovers provisions set out in the Corporations Act.

A takeover bid in Australia may be an off-market bid or an on-market bid. An off-market bid is the more commonly used form of takeover bid.

Essentially, an off-market bid involves the issue of a takeover offer (in the form of a bidder's statement) to each of the shareholders of the target company. To accept the takeover offer, target shareholders will send their acceptances directly to the bidder.

An on-market bid is made through the ASX and, consequently, is only applicable to the securities of a listed company. An announcement of the takeover offer is made through a broker to the securities exchange (followed by a bidder's statement being issued to target shareholders). Target shareholders accept the takeover offer by selling their securities on-market.

For both an off-market and an on-market takeover bid, the target company prepares a target's statement for its shareholders containing details of the takeover offer and other essential information, including the recommendation of the target directors regarding the takeover bid.

While there are a number of differences between an on-market bid and an off-market bid, one of the most important differences is that the consideration for an on-market bid must be cash only (whereas for an off-market bid the consideration may include non-cash consideration e.g. shares). Further important distinctions are that, an off-market bid may be a partial bid and may be subject to conditions.

The Takeovers Panel is responsible for resolving any takeover disputes that arise. The Takeovers Panel is an independent peer-review body established under the Corporations Act, which has broad powers to make orders including to require the divestment of shares or to prevent a deal from completing.

5.4 Schemes of arrangement

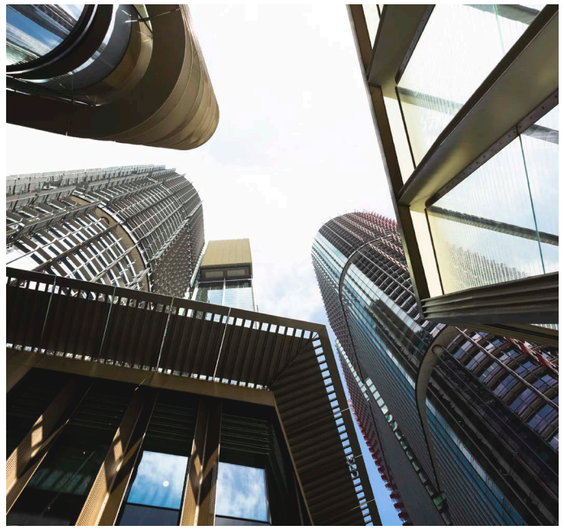
Schemes of arrangement are also used for corporate reconstructions, including mergers, and are an alternative to a takeover bid in Australia.

Schemes of arrangement are court-approved agreements between a company and its members (or creditors) that become binding by statute. Schemes of arrangement can be used to reconstruct the share capital, assets or liabilities of a company and are therefore used to effect control transactions by either transferring shares to a bidder or cancelling all shares issued to parties other than the bidder.

Schemes of arrangement are binding on all of the target's shareholders (or creditors) if approved by them in a meeting and subsequently approved by the court.

Schemes of arrangement differ from takeovers in that they require the cooperation of the target, which is required to convene a meeting of its shareholders (or creditors).

Certain takeovers and schemes of arrangement will require approval under the Foreign Acquisitions and Takeovers Act.



Competition and consumer laws

6.1 Competition laws

Australia has comprehensive competition laws similar to competition laws in North America and Europe. Australia's competition laws are contained in the *Competition and Consumer Act 2010* (CCA), which is administered and enforced by the Australian Competition and Consumer Commission (ACCC).

Key prohibitions

Australia's competition laws prohibit:

- Anti-competitive mergers: Any acquisition of shares or assets likely to substantially lessen competition in Australia (see 'Merger control' section below).
- Cartels: Competitors making or implementing any contract, arrangement or understanding to fix prices, restrict supply or acquisition, share markets or rig bids.
- Misuse of market power: An entity that has a substantial degree of power in a market engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in that market or any other market in which that entity of any related body corporate supplies or acquires goods or services.
- Resale price maintenance: Suppliers of goods or services seeking to ensure that resellers maintain minimum prices when advertising or selling the relevant goods or services.
- Specific anti-competitive vertical tying arrangements: Some forms of vertical tying arrangements that have the purpose or likely effect of substantially lessening competition in Australia, and
- Anti-competitive arrangements: Any contract, arrangement or understanding, whether between competitors or not, that has the purpose, effect or likely effect of substantially lessening competition in Australia. Concerted practices, being co-operative behaviour that replaces, or would likely replace, competitive uncertainty, is also prohibited.

Application of Australia's competition laws outside Australia

Australia's competition laws may apply to conduct outside Australia. For example, the key prohibitions outlined above apply to conduct outside Australia by Australian citizens, people ordinarily resident in Australia, companies incorporated in Australia and companies carrying on business in Australia.

Foreign companies can carry on business in Australia through the operations of Australian subsidiaries, depending on the relationship between the foreign company and the Australian subsidiary.

In addition, overseas suppliers of goods or services in Australia are subject to the prohibitions against resale price maintenance and specific anti-competitive vertical tying arrangements.

Merger control

As indicated above, Australia's competition laws prohibit any acquisition of shares or other assets, which is likely to substantially lessen competition in Australia.

There is no legal requirement to notify the ACCC of any merger in Australia. Where, however, there is a risk of a merger substantially lessening competition and so contravening the CCA, the usual practice is to seek merger clearance. This applies particularly when:

- the merger is likely to exceed the ACCC's notification threshold as specified in its guidelines; the merger otherwise risks substantially lessening competition – for example, by removing a vigorous competitor, or
- the merger is likely to otherwise attract ACCC scrutiny as a result of – for example, complaints to the ACCC or other regulators notifying the ACCC of the merger.

Where merger clearance is necessary, there are two merger clearance processes available in Australia:

- an informal (that is, not recognised by the CCA merger clearance process, under which the ACCC reviews mergers to determine whether they are, in the ACCC's view, likely to substantially lessen competition, and
- a formal merger clearance process, under which the ACCC reviews mergers to determine whether they are likely to substantially lessen competition or the likely public benefit from the proposed acquisition outweighs the likely public detriment including any lessening of competition.

Of these two processes, by far the most commonly used is the informal merger clearance process.

Immunity and leniency

The ACCC maintains an Immunity and Cooperation Policy ("Immunity Policy") for cartel conduct under which eligible applicants may obtain immunity.

To be eligible for immunity, applicants must, among other things, be a party to a cartel, admit their involvement in the cartel, be the first applicant for immunity regarding the cartel and must not have been the leader of the cartel. Applicants may request a 'marker' to preserve their position as first 'in the queue'.

A grant of immunity is conditional on all conditions of the grant being satisfied, including a requirement of full disclosure and cooperation. The Immunity Policy also applies to international cartels that affect Australia.

The ACCC also maintains a Cooperation Policy that provides for 'flexible' leniency in return for cooperation in all enforcement matters. Participants in a cartel who are not eligible for immunity under the Immunity Policy may be eligible for leniency under the Cooperation Policy.

Investigations

The ACCC has extensive powers to investigate suspected contraventions of the CCA. These include:

- the power to require a person to provide the ACCC with information, documents and oral evidence under oath, and
- the power to raid residential or business premises, where the occupier consents or where the ACCC has obtained a warrant.

In addition, in criminal investigations (such as the investigation of criminal cartel conduct), the Australian Federal Police may intercept telecommunications, access stored communications and use surveillance devices with the appropriate warrants.

The ACCC collaborates with competition regulators in other countries in the context of investigations into conduct connected to multiple countries.

Access to facilities of national significance (or 'essential facilities')

The CCA contains a process under which facilities of national significance may be 'declared'. Once 'declared' under the CCA, access to the declared facilities must be provided on terms agreed between the access provider and access seeker. In the absence of such an agreement, access terms may be determined by arbitration.

6.2 Consumer laws

Australia has comprehensive consumer laws, which include provisions governing unfair consumer contracts, consumer guarantees and product safety.

The laws are contained in the Australian Consumer Law (ACL), which is part of the CCA. The ACL is administered and enforced by the ACCC and state-based consumer regulators.

In addition to the standardised ACL, each state and territory has additional consumer protection and fair trading laws, which can differ between each jurisdiction.

Key prohibitions

A wide range of conduct is prohibited, including misleading or deceptive conduct, unconscionable conduct, specific types of misleading representations regarding the supply of goods or services, and certain types of marketing activities. In addition, unfair contract terms in standard form consumer contracts and standard form small business contracts are void.

Consumer guarantees

Every supply of goods or services to a consumer is subject to certain consumer guarantees. Both manufacturers and suppliers have potential liability under them.

Express warranties

Any express warranty against defects provided by a manufacturer or a supplier to a consumer must comply with prescribed requirements. As a result, warranties used by offshore manufacturers in other countries will require modification for use in Australia.

Product safety

Australia's consumer laws contain extensive provisions concerning the safety of goods, such as provisions for safety standards for particular goods, banning unsafe goods and publication of safety warning notices.

Laws and regulations governing corporations

7.1 Corporate governance

Principles of good corporate governance

Australian law imposes a high standard of corporate governance. For entities listed on the Australian Securities Exchange (ASX), there are numerous corporate governance requirements and guidelines. These include the Corporations Act, the ASX Listing Rules, the ASX Corporate Governance Council's Principles and Recommendations, various industry standards which may be adopted voluntarily, and guidance issued by regulatory authorities (such as APRA's prudential standards).

The ASX Corporate Governance Council's Principles and Recommendations set out the following eight principles as underlying good corporate governance:

- lay solid foundations for management and oversight.
- structure the board to be effective and add value.
- instill a culture of acting lawfully, ethically and responsibly.
- safeguard the integrity of corporate reports.
- make timely and balanced disclosure.
- respect the rights of security holders.
- recognise and manage risk.
- remunerate fairly and responsibly.

Duties of company directors and officers

Officers (which include directors) of Australian companies are subject to a range of duties imposed by the Corporations Act and at common law.

The duties of directors and other officers include:

- a duty to act with due care and diligence.
- a duty to act in good faith in the best interests of the company and for a proper purpose.
- a duty not to improperly misuse their position.
- a duty not to misuse information obtained during the course of their role.
- a duty to prevent insolvent trading (directors only).

Directors and officers are also subject to duties under other laws. For instance, the duty to carry out due diligence regarding compliance with occupational health and safety laws regarding having appropriate systems in place.

7.2 Disclosure obligations

Financial and other reporting

Certain Australian entities are required to lodge financial information with ASIC and, if listed, with the ASX. The level of reporting depends on the size of the entity; for larger and listed vehicles, an annual audited financial report and a half-yearly audit reviewed report are required.

There are rules regarding the delivery of these reports to security holders and providing them electronically. For smaller companies, there are certain financial disclosures that need to be made to ASIC.

Australia applies accounting standards, which are consistent with international accounting standards. The directors are responsible for the financial reports.

Continuous disclosure

All listed entities have an obligation to continuously disclose price sensitive information to the market. These disclosures must be made as soon as the entity becomes aware of the information.

There are a number of rules relating to whether information needs to be disclosed, including exceptions to the obligation to disclose (e.g. no need to disclose if the information is incomplete and remains confidential).

Some unlisted entities are also required to follow a similar disclosure regime with ASIC. There are a number of ways to comply with this regime.

Other key governance issues

Australia has insider trading policies that prohibit insider trading in listed and unlisted securities and financial products. The ASX requires that listed entities have policies in place. These policies often have trading windows for directors, executive management and staff.

To keep the market fully informed, directors of listed entities are required to disclose their holdings in the entities and any trades that they undertake within a short period after the trade is completed.

The Corporations Act and the ASX Listing Rules prescribe that certain persons who are in positions of influence or control over a company are 'related parties'. Transactions involving a public company and a 'related party' are regulated by the Corporations Act and ASX Listing Rules (if the company is listed on the ASX) and will generally require shareholder approval. In certain circumstances, if the transaction is on commercial arm's-length terms, security holder approval is not required.

Australia has strict rules regarding insolvent trading. Directors need to be cautious not to breach these laws if an entity is in financial distress. Directors may face personal liability if they allow their company to continue to trade if it cannot pay its debts as and when they fall due.

Equity fundraising

The *Corporations Act 2001* (Cth) regulates all issues of financial products in Australia. Financial products include shares, options, interests in managed investment schemes, debentures and other securities.

Importantly, the Corporations Act requires Australian and foreign issuers to provide prospective investors with a disclosure document (such as a prospectus or a product disclosure statement), before issuing financial products, unless an exception to this requirement applies. The purpose of a disclosure document is to assist investors to make an informed decision about their investment.

8.1 Exceptions

There are a number of exceptions to this disclosure requirement, including:

- offers to sophisticated, professional or experienced investors (as those terms are defined in the Corporations Act),
- offers with a minimum subscription of AUD500,000,
- certain rights issues/ entitlement issues made to existing shareholders of listed companies,
- offers to existing shareholders under a dividend reinvestment plan or bonus share plan,
- offers to employees under certain employee share plans,
- certain offers of listed foreign securities as part of the consideration for a takeover bid, and
- small scale offerings to investors known to the issuer where a maximum of 20 such offers are made in a 12 month period and a maximum of AUD2 million is raised.

8.2 Requirements

A disclosure document is not generally required for offers to sell existing financial products. However, in certain circumstances, entities offering existing financial products for sale in Australia may be required to prepare a disclosure document.

In addition to disclosure requirements, the Corporations Act imposes restrictions on unsolicited offers of financial products and advertisements regarding offers of financial products.

Entities listed on the Australian Securities Exchange (ASX) should also bear in mind that the ASX Listing Rules have specific provisions dealing with the issue of financial products by ASX-listed entities. For example, there are restrictions on the percentage of capital an ASX-listed entity can issue in a 12 month period (generally 15%).

Even if an issuer is not required to issue a disclosure document, the issuer still has obligations to ensure that any documents or other information provided to investors is not misleading or deceptive and does not contain any false statements.

The issuer will generally be required to lodge disclosure documents with ASIC (and also the ASX if the issuer is listed on the ASX) in connection with the offer before making any offers in Australia.

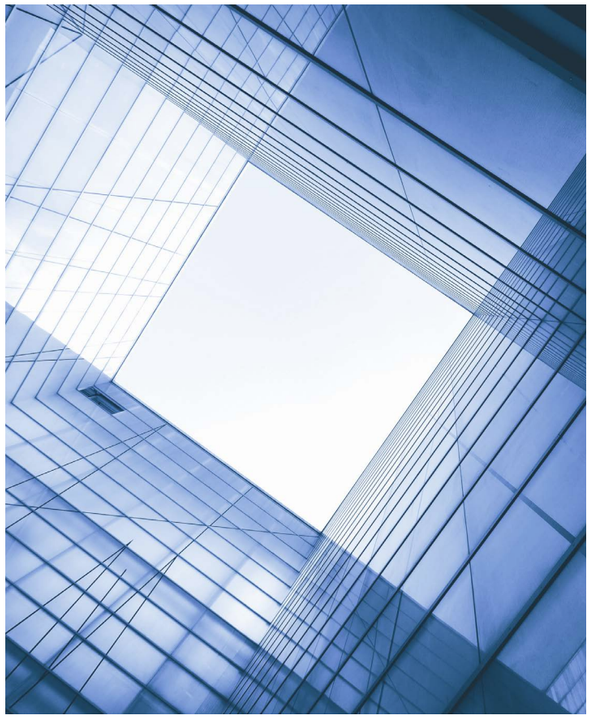
There are both civil and potentially criminal consequences for breaching the disclosure obligations under the Corporations Act.

8.3 Listing on ASX

A foreign company can list its securities on ASX in two ways:

- as an ASX Exempt Foreign Listing; or
- as a standard ASX listing.

A foreign entity that is listed on an acceptable overseas exchange may be admitted as an ASX Exempt Foreign Listing where the entity has net tangible assets of at least AUD2 billion at the time of admission or operating profit of at least AUD200 million for each of the previous 3 financial years, amongst other requirements.



An entity with an ASX Exempt Foreign Listing is not required to comply with the majority of the ASX Listing Rules, but must continue to comply with the rules of its home stock exchange and must provide ASX with a range of documents and reports on an ongoing basis.

A foreign entity may also seek admission by satisfying the same admission requirements as an Australian entity and will need to fully comply with the ASX Listing Rules.

To be eligible for either an ASX Exempt Foreign Listing or standard ASX listing, a foreign entity must, amongst other things, establish an Australian securities register, appoint a foreign agent for service and register as a foreign company under the Corporations Act.

Financial services law

9.1 Financial service providers

A person who carries on a financial services business in Australia is generally required to hold an Australian Financial Services Licence (AFSL). In certain limited circumstances, a person does not have to be licensed where it has been appointed as an authorised representative of an existing licensee or where an exemption is available.

A person will be carrying on a financial services business in Australia if they engage in conduct that is intended (or likely) to induce people in Australia to use their financial services. It makes no difference whether the person carrying on the business is located in Australia or anywhere else in the world.

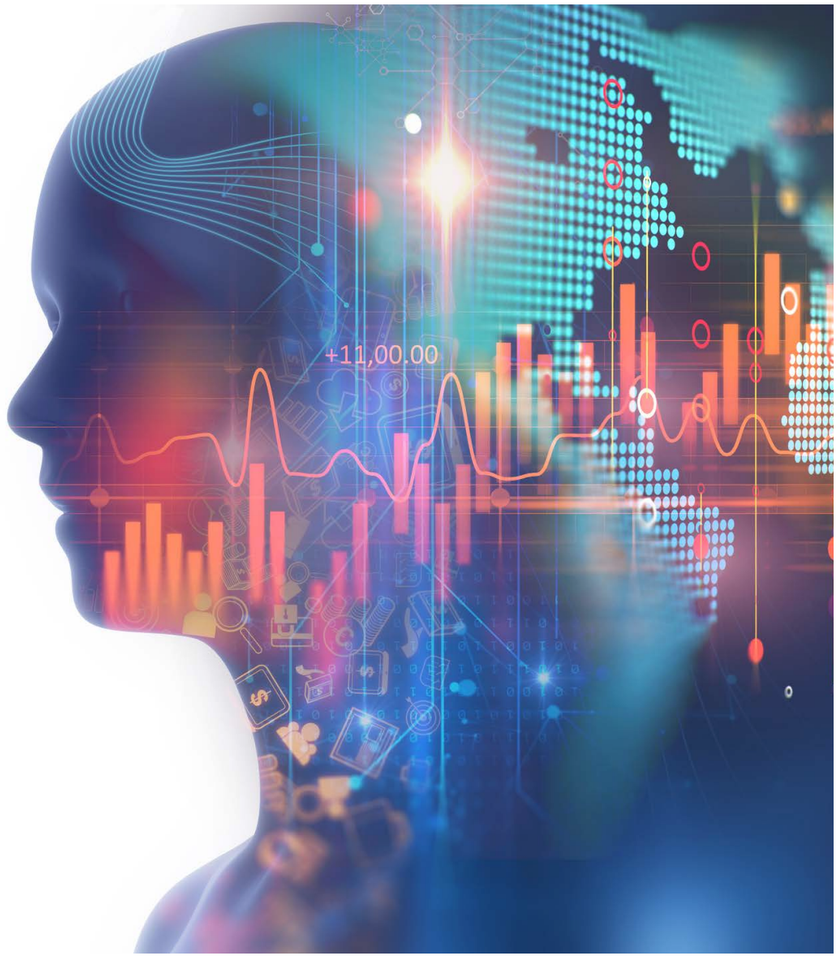
Generally, a person will be providing a financial service if they:

- provide financial product advice,
- deal in a financial product (e.g. apply for or acquire a financial product, issue or dispose of a financial product, or assist to do such things),
- operate a registered managed investment scheme,
- provide a custodial or depositary service, or
- make a market for a financial product.

Examples of how this may apply to a foreign entity include:

- a foreign company dealing securities, shares, stocks, deposits, debentures, bonds, managed investment scheme interests or insurance products to people in Australia.
- a foreign company providing foreign exchange payment services to people in Australia.
- a foreign company entering into a swap, forward transaction or other derivative contract regarding currency, commodities, metals, rates and indexes with people in Australia.

Foreign financial services providers who are regulated by regimes, which are sufficiently equivalent to Australia's regulatory framework (e.g. US Securities and Exchange Commission, UK Financial Conduct Authority, Hong Kong Securities and Futures Commission and the Monetary Authority of Singapore) may be eligible to apply for a foreign AFSL to provide specified financial services to wholesale clients in Australia. Holders of foreign AFSLs are exempt from certain provisions in Chapter 7 of the Corporations Act that would otherwise apply to holders of a standard AFSL.



One-off transactions are not likely to be caught by the requirement to hold an AFSL. However, if substantial, a single transaction could trigger a requirement to hold an AFSL. Higher standards apply to a financial services provider to retail clients, compared to wholesale clients (who are sophisticated and professional investors).

Who needs to hold an AFSL?

In some circumstances, a person may provide specified financial services on behalf of another person who holds an AFSL. AFSL holders may appoint authorised representatives to act under their licence, however the licensee will generally be responsible for the conduct of its authorised representatives.

ASIC issues AFSLs and is responsible for regulating persons who provide financial services in Australia. Licensees are required to comply with a number of general obligations, including having adequate financial, technological and human resources to provide the financial services and carry out any supervisory arrangements.

Licensees must appoint at least one responsible manager who has sufficient knowledge and skills to support the AFSL. The responsible manager will generally be directly responsible for significant day-to-day decisions regarding the provision of financial services. Obtaining a licence is not a simple exercise, can take many months depending on the complexity of the financial services and strength of the application, and licence holders will have obligations placed on them once the licence is issued.

Failure to comply with financial services laws

There are serious consequences for failing to comply with financial services laws. These can include enforceable undertakings, fines, jail, banning orders, the suspension or cancellation of the AFSL and/or, in certain circumstances, the right for clients to rescind agreements.

9.2 Consumer credit laws

Anyone who wishes to make loans or provide credit assistance (e.g. assist borrowers in applying for a loan) to individuals in Australia for personal, domestic or household purposes, or for investment in residential property, must hold an ASIC regulated Australian Credit Licence (ACL), or be as authorised representative of the holder of an ACL.

They must also comply with the rules set out in the National Consumer Credit Protection Act and the National Credit Code, including responsible lending requirements.

9.3 Anti-Money Laundering and Counter-Terrorism Financing Act (AML/CTF Act)

The AML/CTF Act and related rules impose certain obligations on 'reporting entities' that provide a designated service. Designated services relate to banking and financial services, bullion and the gambling industry, including opening bank accounts, providing loans and issuing financial products to clients. The obligations of reporting entities include:

- enrolling with the Australian Transaction Reports and Analysis Centre (AUSTRAC) and submitting annual compliance reports,
- preparing and implementing a "risk-based" AML/CTF program, which involves:
  - identifying, mitigating and managing the risks of money laundering or terrorism financing that the reporting may face, and
  - verifying the identity of clients before a 'designated service' is provided.
- conducting ongoing customer due diligence,
- providing AML / CTF risk awareness training to staff, and
- reporting to AUSTRAC any suspicious matters and cash transactions of more than AUD10,000.

The AML/CTF Act also regulates entering into transactions with residents of prescribed foreign countries.

Banking law

10.1 Australia's financial system

The Australian financial system consists of commercial banks, retail banks and investment banks.

The Australian Government has in place a 'four pillars' policy and will reject any merger between the four major banks. This is long-standing policy rather than formal regulation, but it reflects the broad political unpopularity of bank mergers.

Regulation

Australia's banking regulation is split mainly between the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC). APRA is responsible for the licensing and prudential supervision of Authorised Deposit-Taking Institutions (ADIs). These include banks, building societies, credit unions, friendly societies and participants in certain credit card schemes and certain purchaser payment facilities.

Foreign banks

Foreign banks may operate either through an authorised branch or an authorised locally-incorporated subsidiary. Subsidiaries can normally engage in the full range of banking business in Australia, but branches are normally subject to restrictions (including a prohibition on engaging in retail banking).

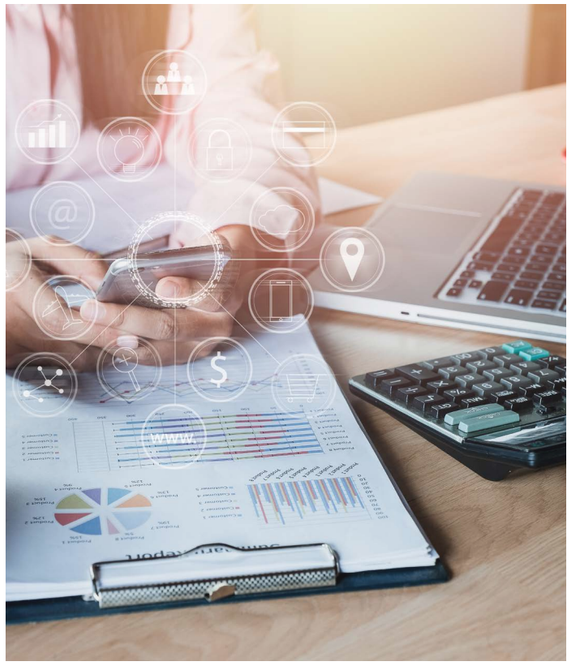
10.2 Borrowing from a bank in Australia

Secured or not?

Lending can be secured or unsecured. Unsecured lending is likely to be restricted to the highest of institutional credits and may result in pricing that is higher than a lender would offer for a secured loan.

Unsecured lending may be made available on the basis of a negative pledge from the borrower and possibly other members of the borrower group.

Secured lenders have priority for payment on the borrower's insolvency.



Types of security and finance documents

For the majority of commercial borrowing, Australian banks use letters of offer prepared on bank standard paper, mostly produced by the lender itself but sometimes by the lender's external lawyers. Loans will be regularly available on both floating and fixed rates (the floating rate is far more common). Facilities in Australia will often be documented as bill facilities or cash advances.

Pricing is on the basis of individual bank published lending rates or on screen rates. In Australia, the most common screen rate used is the Reuters BBSY rate. Sometimes the rate set by reference banks will apply.

When borrowing in Australia, security is likely to include one or more of the following:

- guarantees,
- real estate mortgages, and
- general security interests.

10.3 What is the ranking of security?

Australia has a system under which secured creditors (i.e. creditors who hold a security interest over assets as security for the payment of money or the performance of obligations) rank ahead of unsecured creditors. The ranking of security is quite complex and changes if a company is placed into liquidation (i.e. being wound up as insolvent).

How is security taken?

There are three principal ways security is taken:

- by operation of law (e.g. a warehouseman's or repairer's lien over goods).
- by a security interest which should be registered on the Personal Property Securities Register (PPSR). Importantly, anyone who parts with possession of property other than real estate may have their title to that property defeated if they do not register a security interest on the PPSR. For example, a lessor under a finance lease needs to register that interest on the PPSR.
- by mortgages over real estate. Real estate mortgages will generally extend to any improvements (fixtures) on the land and are not subject to the PPSR regime.

Financial assistance issues

An issue that arises in acquisition financing is financial assistance. The Corporations Act restricts a company from giving financial assistance to a person to acquire shares in the company or its holding company. Financial assistance includes giving a guarantee or security.

Recourse

Secured lending can be full recourse or limited recourse to the borrower. Limited recourse means that the lender will only be able to enforce its rights against the asset being provided as security. This mostly happens only for sophisticated borrowers, where the asset is of high quality and the facility is not highly geared.

Hedging

For property and project lending, Australian banks will often require that a significant part of the debt be subject to interest rate hedging (in the case of floating rate financing). This can be up to 50% or more of the facility.

Interest withholding tax

Interest payments out of Australia generally attract interest withholding tax. The rate of tax is 10% of the gross amount of the interest payment.

10.4 Personal property securities law

The Personal Property Securities Act (PPSA) applies to all security interests in both tangible and intangible personal property. The PPSA does not apply to real property.

The PPSA has clear rules for creating valid security interests, as well as comprehensive and coherent priority rules for competing security interests. It is based on existing personal property security law in New Zealand, Canada and the United States of America.

Under the PPSA, there is a national register, the Personal Property Securities Register (PPSR), where security interests in personal property are registered. This is used as a mechanism for people buying (or otherwise dealing with a person in possession of) personal property, to confirm whether another party has a security interest in that property.

Interests recorded on the PPSR include:

- a general security interest granted to a financier over all the assets of a company.
- a security interest over a particular asset.
- interests held by owners of assets where those assets are in the possession of third parties (e.g. leased equipment).

The PPSA applies to more than traditional security arrangements such as charges and mortgages over assets. It also affects personal property provided under:

- operating leases (other than short term leases such as car rentals).
- finance leases.
- hire purchase agreements.
- sale agreements under which possession of a good is given to the purchaser before payment.
- commercial consignments (or bailments).

Unless the owner of an asset involved in any of the above arrangements takes the necessary steps under the PPSA to perfect a security interest created as a result of those arrangements, it will not be able to rely on its legal interest to prove a first ranking claim to that personal property, on the insolvency of its counterpart.

How do you protect yourself under the PPSA?

You must perfect your security interest to protect your priority position in personal property, to avoid personal property being sold free of your security interest, and to maintain its enforceability.

The most common method of protection is by registration on the PPSR.

Employment and safety

11.1 Legislation

Fair Work Act

The *Fair Work Act 2009* (Cth) (FW Act) regulates employment conditions for national system employers (constitutional corporations) and national system employees (individuals employed by a national system employer) in Australia. Except in limited circumstances, the FW Act applies to most Australian employers and employees.

The National Employment Standards (NES) are a key feature of the FW Act and create the minimum terms and conditions of employment in relation to:

- Maximum hours of work – 38 hours per week (and reasonable additional hours).
- Requests for flexible working arrangements when an employee has completed 12 months continuous service and is a carer, has a child under school age or younger, is 55 or older, has a disability, is experiencing violence from a member of their family or is supporting a member of their immediate family or household who requires care or support because that person is experiencing violence from a member of that person's family.
- Parental leave and related entitlements – the FW Act only provides for unpaid parental leave; however, other legislation provides for paid parental leave if certain conditions are satisfied.
- Annual leave – 4 weeks per annum for full-time employees, pro rata for part-time employees.
- Personal/Carer's leave – 10 days per annum for full-time employees, pro rata for part-time employees.
- Compassionate leave – 2 days on each eligible occasion.
- Family and domestic violence leave – 5 days unpaid leave available for all employees.
- Community service leave, for example, jury service leave and voluntary emergency management activity.
- Long service leave typically granted in accordance with State-based legislation.
- Public holidays depending on the public holiday rules governing the State or Territory in which a person is working.
- Notice of termination – The FW Act provides a statutory minimum notice period based on an employee's period of service and their age at the date of dismissal.

The following table is extracted from s117 of the FW Act:

Employee's period of continuous service with the employer at the end of the day the notice is given	Period
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

Employees who are over 45 years of age and have more than 2 years' service are entitled to receive an additional week's notice.

- Redundancy pay

The FW Act also calculates redundancy entitlements based on period of service. The following table is extracted from s119 of the FW Act:

Employee's period of continuous service with the employer on termination	Redundancy pay period
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks
At least 9 years but less than 10 ears	16 weeks
At least 10 years	12 weeks

The redundancy entitlement reduces after 10 years' service because after this period of service, all employees receive long service leave entitlements, which can be paid out on termination:

- Fair Work Information Statement – all new employees must be provided with a copy of the Fair Work Information Statement, which is published by the Fair Work Ombudsman.

All national system employers must comply with the NES or risk a penalty of AUD63,000 for a body corporate or AUD12,600 for an individual involved in a contravention, for each breach.

Long service leave

Each jurisdiction in Australia has legislation governing long service leave. This provides a period of leave (which is in addition to annual leave) when an employee has completed a certain period of continuous service. The amount of leave and the continuous service required to access the leave (or be paid it out on termination) will vary between jurisdictions.

11.2 Industrial instruments

The FW Act provides for the creation of certain statutory instruments, which provide more generous terms than the NES. These are often referred to as industrial instruments and include modern awards and enterprise agreements.

Modern awards

Modern awards offer increased minimum wages (as compared against the national minimum wage) and enhanced terms and conditions (for example annual leave loading, redundancy, penalties, loadings and allowances). Modern awards are generally either industry or occupational based.

A list of all modern awards can be found at https://www.fwc.gov.au/awards-and-agreements/awards/modern-awards/modern-awards-list

A breach of a modern award may result in a penalty of AUD63,000 for a body corporate or AUD12,600 for an individual involved in a contravention, for each breach.

Enterprise agreements

Enterprise agreements are collective bargaining instruments. Industrial organisations (unions) are often involved in the bargaining.

Enterprise agreements replace the terms of any applicable modern award and must leave employees "better off overall". They must be voted on by employees and then approved by the Fair Work Commission, the independent employment tribunal (**FWC**). There are a number of pre-approval requirements which must also be satisfied.

11.3 Trade unions

Australian legislation protects the rights of employees to join trade unions and participate in certain forms of industrial activity.

Industrial action (strikes) can be taken by employees or employers and is not unlawful where it is permitted by the FW Act and the FWC.

Restrictions apply to paying employees' wages during periods of industrial action.

11.4 Employment contracts

Employment contracts cannot reduce the terms of the NES, a modern award or an enterprise agreement. They should be in writing to avoid disputes.

Contracts can be presented as a formal contract, a letter of offer, or a letter of offer with a standard terms sheet and variable schedules. They should include the following terms:

- Remuneration – Whether an hourly rate, annual rate and whether it is base plus superannuation or an inclusive package.
- Position – This can include only the position title, or may include a position description and KPIs.
- Type – Whether the employee will be engaged on a casual, part-time, full-time or other basis.
- Period of notice – Although the FW Act provides minimum notice periods, the failure to specify a period of notice in a written employment contract can result in an employee claiming an entitlement to "reasonable notice" which is often substantially longer than the statutory minimum notice period.
- Duties in relation to confidential information.
- Duties in relation to intellectual property.
- Post-employment restraints (for senior employees) – These are on their face unenforceable due to public policy reasons, but will, in certain cases, be enforced provided they go only so far as is reasonably necessary to protect the business interests of the employer. They must be tailored for each employee.
- Incentive schemes, bonuses and/or commission arrangements.
- Adherence to policies and procedures, but confirming these do not create contractual entitlements.

11.5 Policies and procedures

Employers in Australia should have policies and procedures in relation to employment and safety matters. At a minimum, they should have policies and procedures, which cover:

- Bullying, discrimination and harassment.
- IT use (including social media use).
- Occupational health and safety.

All employees should be inducted into these policies and procedures and they must be applied by the employer as appropriate. The policies and procedures should be revised and updated annually.

Policies and procedures should not include contractual or promissory language to avoid claims that those policies and procedures give rise to contractual entitlements for employees.

11.6 Taxes, superannuation and workers compensation insurance

PAYG taxes

Employers are required to withhold pay as you go (PAYG) tax contributions from the wages or salary paid to employees.

Payroll tax

Every jurisdiction in Australia has a different obligation in relation to the payment of payroll tax. This is calculated on the basis of wages paid to employees (and in some cases, fees paid to contractors) by a business.

Superannuation

Employers are required to make superannuation contributions, currently at a rate of 9.5% of an employee's ordinary time earnings (which can be different to the amount of remuneration actually paid to an employee) up to a maximum contribution base, which increases each year. Superannuation can also be payable on fees paid to contractors in certain circumstances.

Workers compensation insurance

Most employers will be required to hold workers compensation insurance in relation to their employees (and in some cases, their contractors). The amount of workers compensation premiums will vary between jurisdictions.

11.7 Employee protections

In addition to the statutory entitlements in the NES, modern awards and enterprise agreements, employees also have protections prior to, during and on termination of their employment.

Prior to employment

Candidates are entitled to protections under discrimination legislation (which varies between states) and the general protections provisions of the FW Act.

Broadly, these protect a potential employee from being refused employment or being offered less favourable terms because they have a workplace right (such as a benefit under a workplace law like the FW Act), or have the right to make a complaint or enquiry, or have a protected attribute (disability, age, parental status etc.).

General protections arise prior to, during and upon termination of employment. This is an unusual jurisdiction because it involves a reverse onus of proof. Once the applicant raises the allegation, it is up to the employer to prove that they did not take the adverse action complained about (refusing to hire someone, hiring them on less favourable terms, treating employees less favourably or dismissing an employee) because of the workplace right or protected attribute.

Compensation is uncapped in this jurisdiction and reinstatement can also be ordered. A successful applicant can also seek the payment of civil penalties of up to AUD63,000 for a body corporate or AUD12,600 for an individual per breach. In practice, if there has been a course of conduct which contravenes the general protections provisions, this can be penalised as a single breach.

During employment

Employees are protected from adverse treatment during employment under discrimination legislation and the general protections provisions of the FW Act. These protections includes discrimination in the terms and conditions of employment, the imposition of terms that a person cannot comply with because of a protected attribute, harassment because of certain protected attributes and sexual harassment.

Discrimination legislation also includes positive obligations to accommodate an employee's disability and, in a number of jurisdictions, accommodate an employee's parental status by making reasonable adjustments or accommodations.

There are also protections against workplace bullying, including the "stop bullying jurisdiction" in the FWC and criminal sanctions in some jurisdictions.

On termination

Employees have protections in relation to their dismissal.

Unfair dismissal

Unfair dismissal protects certain employees from a dismissal that is not for a valid reason and/or which is harsh, unjust or unreasonable. The employees who are protected are those who have completed a qualifying period (which varies based on the size of the employer) and earn under the high income threshold (currently AUD153,600) or are covered by an award or enterprise agreement.

Employees must commence an unfair dismissal within 21 days of their termination taking effect. The unfair dismissal claim is usually first dealt with by way of telephone conciliation and, if unsuccessful, it proceeds to a hearing before the FWC.

The primary remedy for unfair dismissal is reinstatement and/or compensation which is capped at 26 weeks' pay based on the applicable high income threshold, being AUD76,800.

General protections

The general protections provisions also protect employees from dismissal because they have or have exercised a workplace right, made a complaint or inquiry in relation to their employment, or have a protected attribute. It also protects employees from dismissal while temporarily absent from work due to illness or injury.

As explained above, this jurisdiction involves a reverse onus of proof. The employer must show the dismissal did not occur because of the workplace right or protected attribute.

Employees must commence a general protections claim relating to dismissal within 21 days of the dismissal taking effect. The general protections claim is usually first dealt with by way of telephone conciliation. If it is unsuccessful the applicant has to elect to proceed to the Federal Court or the Federal Circuit Court. Parties can also consent to the matter being arbitrated before the FWC instead of it proceeding to the Federal Court or Federal Circuit Court.

Compensation is uncapped in this jurisdiction and reinstatement can also be ordered. Civil penalties may also apply of up to AUD63,000 for a body corporate or AUD12,600 for an individual per breach.

Discrimination

It is also prohibited to dismiss a person because they have a protected attribute (including age, disability, parental status etc.).

It is lawful to dismiss a person who cannot fulfil the inherent requirements of the position. As this can be a complicated area, legal advice is recommended to ensure that proper procedure is followed prior to any dismissal for this reason.

11.8 Work health and safety

The majority of Australian jurisdictions have adopted the model *Work Health and Safety Act 2011* (WHS Act). Victoria and Western Australia retain their own state-based legislation. The WHS Act was largely modelled on the Victorian safety legislation, although there are key differences.

Work health and safety legislation imposes obligations on a person conducting a business or undertaking and on employees, workers, contractors and directors of businesses.

There are significant penalties for contraventions of any safety legislation, including imprisonment in the most serious cases.

Intellectual property

Intellectual property rights are protected by federal legislation and the common law.

Australia's intellectual property laws meet its international trade and treaty obligations. For example, Australia is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sets minimum standards for intellectual property protection and enforcement.

Australia is also a party to the Paris Convention for the Protection of Industrial Property, allowing applications for registered protection of intellectual property to be filed in Australia based on foreign filings and granted the earlier priority date when lodged within the requisite time period.

12.1 Trade marks

Australia has a registered trade mark system for marks that distinguish the goods or services of a trade mark owner from those of another person or entity.

Registered trade marks are governed by the *Trade Marks Act 1995*. Australia is a 'first to use' jurisdiction – we therefore recommend that those seeking to enter the Australian market conduct clearance searches, as well as pursue registration.

Initial registration of a trade mark lasts for 10 years, and registration can be renewed for successive periods of 10 years in perpetuity.

Australia is a signatory to the Madrid Protocol enabling trade mark applicants to seek protection in participating countries by using WIPO's central international registration process.

In Australia, the common law protects the use of unregistered marks used to distinguish the source or origin of goods or services by allowing an action for passing off. A passing off action is often coupled with an action under section 18 of the Australian Consumer Law. This section prevents traders from engaging in misleading or deceptive conduct in the course of trade and commerce.

12.2 Copyright

Copyright protection is provided under the *Copyright Act 1968* (Cth). In Australia, there is no system of registration for copyright works. Copyright subsists in an original work from the time the work is created.

Australia is a signatory to most international conventions that deal with copyright, including the Berne Convention.

For literary, dramatic, musical or artistic works, copyright generally subsists until 70 years after the end of the calendar year in which the author died. Copyright in films and sound recordings will, depending on when it was made, expire 70 years after the death of the author or 70 years after publication. For published editions of works, copyright subsists for 25 years after the calendar year in which the edition was first published, while copyright in broadcasts expires 50 years after first being broadcast.

Australia's copyright law has a complex interaction with designs law. It cannot be assumed that copyright law will protect designs of products sold, let for hire or exposed for sale or hire.

Moral rights are also protected, giving creators of certain works rights of attribution as owner and rights to prevent unfair treatment of the work. Moral rights are not assignable.

A copyright notice is not necessary in Australia, but is recommended.

Designs

Australia's designs registration system, governed by the *Designs Act 2003* (Cth), allows for the protection of the overall appearance of a product resulting from its visual features, where the design is new and distinctive. Registration can last a maximum of 10 years.

12.3 Patents

Patents are regulated under the *Patents Act 1990* (Cth) and are administered by the Patents Office of IP Australia. Australia is a member of the Patent Cooperation Treaty (PCT), participating in the international system for patent protection between member countries.

Standard patents in Australia are protected for a term of up to 20 years (with extensions available for pharmaceutical patents in certain circumstances).

An innovation patent (which has a lower patentability threshold) can be protected for up to eight years from the date of the patent. The Australian Government has begun the process of phasing out the innovation patent. The last day you can file a new innovation patent is 25 August 2021. Existing innovation patents will continue in force until their expiry.

12.4 Domain names

Australia has been assigned the country code Top Level Domain (ccTLD)'.au'. The domain name licence period for domain names in the .com.au, .org.au, .net.au and .edu.au spaces is between 1-5 years, depending on the fees paid.

To register a '.com.au' domain name, the applicant must be an Australian company, trading under a registered business name, be an Australian partnership or sole trader, a licensed foreign company, an incorporated association, commercial statutory body, or owner (or applicant) of an Australian trade mark. In addition, the domain name must have a sufficient connection to the applicant's business.

Domain names are granted to registrants who meet the criteria on a first come, first served basis. Where someone has registered a .au domain name without a legitimate business interest, it may be possible to challenge that registration under the .au Dispute Resolution Policy, and seek to have the domain name cancelled or transferred.

Depending on the facts, that conduct may also amount to trade mark infringement and passing off to trade mark infringement and / or passing off.

Contents

Property

13.1 Stamp duty

In Australia, each state and territory charges its own form of stamp duty (or transfer duty) on certain transactions, including:

- the transfer of real estate,
- the transfer of shares, and
- the acquisition of an interest in a 'landholder' (see below).

Stamp duty is charged at either a flat rate or an ad valorem rate (based on the value of the transaction), depending on the value of the property and the type of transaction.

Transfer of real estate

The duty payable on the acquisition of real estate in each state and territory is charged on a sliding scale based on the greater of the value of the property, or the consideration paid plus GST.

The acquisition of an interest in a 'landholder'

The indirect acquisition of real estate through the purchase of shares in a company or units in a unit trust scheme may attract duty at the general rate, as if it were the acquisition of the real estate held by such an entity.

Who is liable?

The party liable to pay stamp duty is generally the buyer, however in Queensland and South Australia each of the parties is liable.

Exemptions and concessions

Certain transactions may be exempt from stamp duty or entitled to a concession. These include:

- acquisitions by charitable institutions, religious bodies and educational organisations,
- transfers between members of the same corporate group,
- transfers of property between spouses or partners, and
- the acquisition of your first home.

13.2 Goods and Services Tax (GST)

The acquisition of Australian real estate will usually be subject to GST. GST is similar to the value added tax operating in most OECD countries. It is calculated at a rate of 10% on the value of a wide range of goods, services, rights and other things sold or consumed in Australia.

Registering for GST

You must register for GST if you carry on an 'enterprise', and your current or projected annual turnover is AUD75,000 or more.

The concept of 'enterprise' for GST purposes is very broad and (among other things) activities in the form of a business, activities in the form of an adventure or concern in the nature of trade or activities in the form of a lease, licence or other grant of an interest in land if made on a regular or continuous basis.

An entity may wish to register for GST even if it does not meet the turnover threshold. The benefits of voluntary registration may include the ability to claim GST 'input tax credits' (which can only be claimed by GST registered entities in respect of creditable acquisitions) by claiming a credit or refund for GST embedded in the price of purchases the entity uses in its enterprise. These 'input tax credits' for creditable acquisitions may be offset against the amount of GST it is liable to pay in respect of taxable supplies it makes to other entities.

Who is liable?

The liability to pay GST rests with the supplier of the goods or services. For most transactions involving Australian real estate, this would be the seller, builder, contractor or lessor. If the supplier is registered, the sale, construction and leasing of real property and buildings, whether new or used, will normally be subject to GST unless a specific exemption of concession applies.

Generally, the seller will seek to recover any GST for which it is liable from the purchaser, by including the GST in the price under the contract for sale. If the purchaser is carrying on an enterprise and is registered (or required to be registered) for GST, it will usually be able to claim a 'GST credit' by claiming back any GST it pays to the seller.

Exemptions and concessions

Various exemptions and concessions may apply to sales of Australian real estate. For example, land sold as part of the supply of a going concern or as farm land may qualify for exemption as GST-free supplies. Due to the broad definition of an 'enterprise' under the GST law, land that is sold subject to existing tenancies may qualify for the going concern exemption. Established residential premises are generally exempt (input taxed) but GST is normally applicable to sales of 'new residential premises'.

GST is normally calculated on the full value of the Australian real property sold by sellers who are registered for GST purposes and input tax credits can normally be claimed for real property purchased by a registered entity from a registered seller.

However, a special method of calculating GST known as the 'margin scheme' is available if the parties agree in writing to apply the margin scheme and certain conditions are satisfied. Under the margin scheme, GST is calculated on the seller's notional 'margin' on the sale rather than the full selling price. This seeks to ensure that GST is only payable on the uplift in value since the GST commenced on 1 July 2000 or when the real property became subject to the GST regime (e.g. if an unregistered owner chooses to register for GST or sells the property to a registered entity). If real property is purchased as a taxable supply on which GST was calculated on the full value of the supply, the property cannot usually be resold under the margin scheme.

A purchaser under the margin scheme cannot claim input tax credits on the supply even if the purchaser is registered for GST. For this reason, the margin scheme is generally confined to sales of real property that is or will be developed for sale as 'new residential premises'.

13.3 Land tax

Land tax is an annual tax levied by each state and the Australian Capital Territory (but not the Northern Territory) on the owners of land within that state or territory.

Land tax is assessed on an annual basis on the combined, unimproved value of all the taxable land you own. In general, your principal place of residence (your home) or land used for primary production (a farm) is exempt from land tax.

Land tax – Absentee surcharge

If you are a foreign person who owns land in Australia, you may be required to pay a land tax absentee surcharge in addition to any land tax you may already pay. Six of the eight states and territories in Australia have a higher rate of land tax for absentee owners or foreign purchasers with property interests in Australia.

The surcharge can range between 0.75% to 4% of the total taxable value of the land, depending on:

- the state or territory in which the land is located;
- the type of property or land subject to the surcharge (e.g. residential land); and
- the type of absentee owner (e.g. individuals, companies or trustees).

13.4 Foreign resident capital gains withholding

Foreign resident capital gains withholding applies to sellers of certain taxable Australian property including:

- taxable Australian real property with a market value of AUD750,000 or more;
- an indirect Australian real property interest; and
- an option or right to acquire such property or interest.

At settlement of these transactions, a 12.5% non-final withholding is applied. If the seller of these assets is a foreign resident, the purchaser must pay 12.5% of the purchase price to the Australian Taxation Office (ATO) as a foreign resident capital gains withholding payment.

The foreign resident seller can then claim a credit for the foreign resident capital gains withholding payment by filing a tax return through the ATO for the relevant year.

13.5 Municipal rates

Municipal rates are taxes set, collected, and used by local governments to provide a range of services in your municipal area.

Municipal rates are different from water and electricity rates, which generally depend on your water and electricity consumption. You will generally receive a monthly account that sets out how much you owe.

13.6 Due diligence on property

Before purchasing an asset such as a property, a purchaser should always conduct due diligence on the asset.

Property due diligence will generally include the following:

- examining the title to the property (including checking whether there are any third party rights which affect the title),
- reviewing registered and unregistered leases and licences,
- considering whether or not FIRB approval is required,
- reviewing planning certificates and regulations, and
- investigating whether any statutory bodies have an interest in the property.

Environment and planning

14.1 Regulation of environmental impact

Projects that impact on the environment in Australia are subject to a range of requirements, generally aimed at reducing, limiting or controlling the potential environmental impacts.

These controls can be broadly described as:

- control of land use and development impacts through approvals systems,
- pollution, waste and contamination laws through approvals and licensing, and
- environmental protection laws.

14.2 Development approvals

Generally speaking, most types of projects which involve the use of land or are undertaken on land or water in some way, will require some development or project approvals. These approvals may be required from federal, state or local government.

A Minister, government department or the local government council can be the decision-maker depending on the planning and development controls and whether the development is of state significance (in some jurisdictions).

Projects that typically require development or project approvals include mining, building and construction, agricultural or manufacturing enterprises, energy generation, infrastructure and waste or pollution generating projects. The development or project approvals process is different in each state and territory, but in most cases includes an assessment of the environmental impact of the project.

Depending on the scale, location and complexity of a project, the environmental impact assessment of a project can range from a simple town planning report for small projects, through to a comprehensive report addressing all impacts of the project including impacts on:

- biodiversity, native vegetation, threatened or endangered species,
- ground water, hydrological systems, wetlands, stormwater run-off, water conservation,
- soil, soil salinity, soil stability, and
- items of environmental (natural or man-made) heritage significance.

In addition, reports may be required to support the project approval from relevant experts on impacts arising from specific aspects of the project such as:

- odour, dust or other air or water pollution,
- urban design and town planning considerations (such as bulk and scale of buildings, light or view loss), and local amenity impacts of the project, and
- ecological (including native vegetation and fauna) or heritage impacts.

14.3 Native vegetation removal

The removal of vegetation (particularly native vegetation) is governed by federal, state and local laws. Permits and approvals are required for the removal of vegetation, and some approvals will require that an offset is provided either elsewhere on the site or at another location to compensate for the removal of the vegetation.

In some locations, offsets may be costly and/or challenging to obtain. In some circumstances, it may be possible to contract with a third party for the provision of the native vegetation offset.

14.4 Matters of national environmental significance

In addition to the various state requirements regarding biodiversity, the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) provides a federal framework for protecting and managing matters of national environmental significance (such as listed threatened species, internationally protected wetlands, Commonwealth marine areas, the Great Barrier Reef and world heritage areas).

Where a proposal has the potential to have a significant impact on a matter of national environmental significance, the following process will apply:

- Referral – The proposal must be referred to the Minister for the Environment to determine whether the project requires approval under the EPBC Act, and
- Assessment – The proposal will undergo assessment by the Minister for the Environment (either on the papers or by way of full public environmental inquiry and hearing) including through consultation with relevant State minister or through accredited assessment by the State, after which a decision will be made whether to approve the proposal (potentially subject to conditions).

14.4 Pollution

Most states have laws, which regulate or licence the generation of pollution by setting specific limits for emissions and specifying these through a licensing system. Approvals or licences to pollute are usually obtained through a state environmental protection authority.

Polluting activities are generally the subject of criminal sanctions. In each state and territory this includes:

- pollution offences (for pollution of land, air or water without an approval to do so),
- pollution clean-up requirements (which may be based on a 'polluter pays' principle, but in some cases, where the polluter is not identifiable, can impact on non-polluter land owners), and
- differing regimes for personal liability of directors (for pollution offences caused by a company).

In some jursidictions, the penalties for breaching pollution laws can be over AUD5 million and/or imprisonment for serious offences.

14.5 Contamination

Land that is contaminated with chemical or waste contamination (such as petrochemicals or manufacturing process by-products) is usually required to be comprehensively investigated, monitored and remediated if it is being developed for a more sensitive use or if the contamination is having an off-site impact.

Different requirements apply in each state and territory regarding:

- the duties of owners or occupiers to notify authorities or purchasers of contamination existing on land,
- positive obligations of owners, occupiers or notional owners (such as mortgagees) to investigate and actively manage contamination, and
- liabilities of owners, occupiers or notional owners for costs of remediation and/or impacts on other land.

While all jurisdictions in Australia have a focus on requiring the polluter to pay for any remediation, it is not always clear who caused the pollution and in some cases, the company which caused the pollution no longer exists. In these cases, there are broad options for the relevant environmental protection agency to require others (such as the current owner or occupier) to undertake site remediation.

14.6 Waste and chemicals

Specific laws apply in each state and territory to control the transportation of hazardous waste, and the handling or transportation of waste.

The manufacture or importation of industrial chemicals is regulated by the Commonwealth Government's scheme under which assessment certificates are required.

14.7 Due diligence

All projects which have the potential to impact on the environment should be the subject of thorough due diligence to ensure the correct approvals and licences are in place, or are being sought.

Additionally, where former industrial land is to be purchased and/or developed, thorough due diligence is required to ensure that the purchaser/developer is informed about the potential for clean-up liability.

14.8 Appeals

Project approvals in Australia are usually advertised and third parties can make submissions and object (unless the project is of State significance and has been subject to a special Ministerial process, which can exclude third parties). If an approval is refused or the conditions are onerous, there is a system of appeals to a local tribunal or court in all jurisdictions. Third parties can also generally lodge an appeal against the issuing of a permit. This can add to the time-frame of projects and therefore needs to be factored into development timelines.

Clean energy and carbon compliance

15.1 Emissions Reduction Fund

The Emissions Reduction Fund (ERF) is a voluntary scheme intended to assist Australia's goal to meet its emissions reduction target of 5% below 2000 levels by 2020 and 26-28 % below 2005 emissions by 2030, being the commitment made by Australia at the UN Climate Change conference in Paris 2015.

Land owners, businesses, community organisations and state and local governments can register an emissions abatement project and then bid for government contracts at a reverse auction. These carbon abatement contracts then entitle the successful bidder to earn a carbon credit unit purchased by the Clean Energy Regulator at the contracted price and funded by the ERF for each tonne of carbon dioxide equivalent that is stored or avoided by a project.

To ensure that abatements purchased via the ERF are not offset by rising emissions in other sectors of the economy, the NGER scheme (discussed below) is used as a 'safeguard mechanism' to regulate the nation's largest emitters (facilities with direct carbon dioxide equivalence emissions of more than 100,000 tonnes per year). Facilities are required to keep net emissions at or below baseline emissions levels. Baselines for existing facilities were fixed using data already reported under the NGER Scheme.

15.2 National Greenhouse and Energy Reporting (NGER) scheme.

The NGER scheme requires corporations (and other businesses responsible for emissions) that meet an NGER threshold to register and report on greenhouse gas emissions, energy use and energy production each year. The NGER scheme is administered by the Clean Energy Regulator in accordance with the *National Greenhouse and Energy Reporting Act 2007*. There are civil and criminal penalties for non-compliance.

15.3 Renewable Energy Target (RET) scheme

Australia has a target for large-scale generation of 33,000 GWh (being approximately 23.5% of its energy) to be generated from renewable sources by 2020. The RET scheme works to achieve this target by allowing entities (both large scale power stations and owners of small scale systems) to generate Renewable Energy Certificates (RECs) for every megawatt hour of electricity generated. Wholesale purchasers of electricity (usually electricity retailers) are required to purchase these RECs, and surrender a certain number to the Clean Energy Regulator each year, as mandated by legislation.

The RET scheme was based on a target of 41,000 GWh of renewable energy by 2020. Due to changing demand forecasts and increasing costs, the Australian Government reviewed the scheme and, following a lengthy period of negotiation, in June 2015, the Senate passed amendments implementing a reduction in the large-scale target to 33,000 GWh by 2020.

15.4 Recent developments

Recognition of the risks associated with climate change is increasing in companies doing business in Australia. It is now generally accepted that directors are required to consider the risks associated with climate change in their annual reports in order to discharge their duties under the *Corporations Act 2001* (Cth). Additionally, there has been an increase in litigation related to climate change, including proceedings brought against a bank and a superannuation fund for failing to disclose climate change risks in financial reports.

Furthermore, in seeking approvals for new fossil fuel projects, climate considerations will be relevant for the decision-maker. For example a coal mine in NSW was refused in 2019 partly due to the impact that the greenhouse gasses generated from the mine would have on climate change (as well other amenity issues).

Energy and natural resources

Australia currently has one of the largest mineral sectors by value of production in the world, as well as a burgeoning gas and alternative energy industry.

16.1 Legislative framework

Broadly speaking, the industry is regulated by an extensive legislative framework consisting of federal, state and territory legislation and regulations.

To enter into the mining or energy sectors, prospective participants need to consider legislative requirements governing exploration, development, operation, acquisition and sale of energy and resources assets, the environment, native title, corporate governance and taxation obligations.

16.2 Mining sector

State based law

Each state and territory has its own mining legislation that regulates the ownership of minerals and the operation of mining activities within the state or territory including laws dealing with mine operation, mine inspection, occupational health and safety, environment and planning.

Mining rights

Mining rights are granted to prospective miners by the government of the state or territory in which mining takes place.

Mining rights are obtained by applying to the relevant state or territory on a first-come, first-served basis, or in some instances, by a tender-based process. Mining rights may also be acquired by entering into a contractual arrangement with the holder of the mining right. Rights to access the land surface are regulated both by legislation and by private contracts with landowners.

Mining right holders will generally have obligations, which they must comply with as a condition of their mining right. Those obligations generally include payment of rent and royalties, compliance with employment law requirements, mine rehabilitation and reporting requirements, minimum expenditure commitments and other environmental reporting requirements.

Holders of an exploration licence (or retention licence in some instances) will have a priority right to acquire a mining licence.

Industry specific codes

The industry specific code for mining in Australia involves the use of the 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves' (known as the JORC Code) for public reporting (e.g. annual reports and analyst reports).

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

Tax obligations – Petroleum

The Petroleum Resource Rent tax (PRRT) applies to offshore oil and gas projects (except the Joint Petroleum Development Area in the Timor Sea). Before 1 July 2012, the PRRT only taxed certain offshore projects, but it now extends to both onshore and offshore projects (except the Joint Petroleum Development Area in the Timor Sea).

The PRRT is levied at the rate of 40% on project profits based on the extracted or upstream value of the resource less extraction costs.

Petroleum produced in the Joint Petroleum Development Area in the Timor Sea is subject to Production Sharing Contracts with the Australian and East Timorese Governments.

A crude oil excise also applies to certain crude oil and condensate production from onshore, coastal and certain offshore areas. The rate varies depending on the date of discovery and production.

State based royalties may also apply to the extraction of petroleum resources based on the net well-head value of production. Some states and territories have introduced a Resource Rent Royalty (RRR) to replace both the well-head royalty and excise regimes. The RRR is a profits based tax similar to the PRRT. The Federal Government's crude oil excise is waived in states and territories that have introduced an RRR and where revenue sharing agreements are entered into with the Australian Government.

Tax obligations – Minerals

Each state levies royalties on minerals extracted from within the state (at differing rates and on various minerals).

16.3 Oil and gas

With the exception of New South Wales, Tasmania and Western Australia, state based gas utility providers have been privatised. Large quantities of liquid gas are currently sourced from Commonwealth waters off the coast of Western Australia and Victoria, with coal seam gas production increasing in Queensland.

Both federal and state legislation cover licences to permit oil and gas exploration and production, and the use and construction of pipelines. The jurisdiction issue is determined by whether the operations are conducted on-shore (state and territory level) or off-shore (federal level).

Off-shore activities take place outside the three nautical mile limit of Australia's maritime jurisdiction. All drilling activities taking place off-shore are subject to the *Offshore Petroleum and Greenhouse Gas Storage Act.*

Oil

The most common forms of oil produced in Australia include crude, condensate and liquid petroleum gas, with production taking place primarily in Western Australia, South Australia, Queensland, the Northern Territory, and in the Timor Sea. Federal, state and territory legislation regulates exploration, production and pipeline activities through a permit based system. The exploration permits and tenements are legal rights to carry out works to explore for petroleum, subject to terms and conditions.

Production permits are required to recover discovered petroleum reserves, while pipeline permits are required for the carrying on of operations to construct and manage pipelines. Other permits may also be required for large scale infrastructure projects.

Gas

Much like the oil industry, legislation at the federal, state and territory level governs the rights to explore, produce and use gas infrastructure, depending on the location of the resource.

There is a national regime concerning the access to natural gas transmission and distribution infrastructure, known as the 'National Gas Law' (NGL). The NGL outlines the relevant gas market operator, the market rules, the trading system and the rules concerning access arrangements for pipelines.

All states, except Western Australia, have adopted the NGL, with the Western Australian rules largely replicating the NGL.

Victoria has imposed a permanent ban on onshore unconventional gas exploration methods, including coal seam gas and fracking (offshore gas exploration is not subject to the ban).

Western Australia has banned fracking in most of the State.

The Tasmanian government has also banned fracking until 2025, pending an ongoing review.

Minerals exploration development incentive (flow-through deductions)

The Government has established a Junior Minerals Exploration Incentive (JMEI) to provide a tax incentive for junior exploration companies to encourage investment and risk taking.

The JMEI enables eligible companies to create and issue tax credits by giving up a portion of their tax losses from greenfield mineral exploration expenditure, which can then be distributed to eligible shareholders. Tax credits can only be generated for new shares issued in that income year.

Australian resident shareholders that are issued with a tax credit will need to electronically lodge their participation form with the Australian Taxation Office by the due date, which will allocate each eligible entity an exploration credit allocation on a first come, first served basis until the annual exploration credit cap for each income year is exhausted.

The JMEI applied from the 2017-18 income year with exploration credits capped at a total of AUD100 million over a four year period:

- AUD15 million in the 2017-18 income year.
- AUD25 million in the 2018-19 income year.
- AUD30 million in the 2019-20 income year.
- AUD30 million in the 2020-21 income year.

If any part of the annual exploration credit cap is unallocated for an income year, the amount that is unallocated will be carried over to the following income year.

16.4 Environmental legislation

Each state and territory has a detailed legislative and regulatory regime relating to environmental conservation, assessment, planning and land use, as administered by the relevant state and territory environmental protection agency, the resources department and local government.

Most exploration and production licences will only be granted after the relevant state or territory department assesses the environmental impacts of any proposed or potential mining or drilling activity.

Federal laws will also apply to mining and drilling activities that will impact on Commonwealth lands or national matters.

Many Australian mining and oil and gas companies also adhere to international standards such as ISO 14001 for Environmental Management Systems.

The Commonwealth Department of Resources, Energy and Tourism has also published a set of guidelines on Best Practice on Environmental Management in Mining.

Climate change is becoming an important consideration for Courts when assessing whether to issue approvals for mining activities, with a coal mine in NSW recently refused on the basis of the impact of the mine on climate change (as well as other amenity issues).

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Corrupt practices legislation

It is an offence under the Australian *Criminal Code Act 1995* (Act) to bribe or give a 'corrupting benefit' to a Commonwealth public official. The Act also prohibits Australian citizens, residents or corporations anywhere in the world from bribing a public official in a foreign country.

Each state and territory also has legislation criminalising bribery of a state public official. Australia's anti-bribery laws operate in a similar manner to the *United States Foreign Corrupt Practices Act 1977* and the *United Kingdom Anti-Bribery Law 2010.*

The foreign bribery law gives effect to Australia's obligations under the United Nations Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

17.1 Penalties

Corporations found guilty of bribing either a Commonwealth or foreign public official are liable to substantial pecuniary penalties. If the value of the benefits directly or indirectly obtained from the bribery can be determined, a company may be subject to a maximum penalty of the greater of AUD22 million or three times the value of that benefit.

If a court cannot ascertain the value of the benefits obtained, the maximum penalty applicable is the greater of AUD22 million or 10% of the annual turnover of the corporation during the previous 12 months. Individual penalties also exist to a maximum of 10 years imprisonment and/or fine of AUD2.2 million.

Companies may also be at risk of prosecution for money laundering offences under the Criminal Code Act, where foreign bribery involves the commission of money laundering offences.

17.2 Compliance

Corporations should take care to implement anti-corruption compliance programs, particularly as they may be liable for the actions of their employees and agents under Australian law.

An effective program would typically include formal company policies and guidelines, education programs to build awareness at all levels of the organisation, and monitoring and enforcement processes.

Corporations should also ensure that any facilitation payments made are only for non-discretionary actions by an official, and are accurately documented in the corporation's records as facilitation payments.

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International trade and investment agreements

18.1 Free trade agreements (FTAs)

The Australian Government is committed to pursuing opportunities to increase trade and investment opportunities. One important way the government does this is by negotiating FTAs with important trading partners.

The Government's strategy is to promote trade liberalisation at multilateral, regional and bilateral levels. Australia is currently party to 14 FTAs with 20 countries, with a number of other FTAs still under negotiation. Currently, Australia is a party to FTAs with China, Japan, the Republic of Korea, New Zealand, Singapore, Thailand, the United States of America, Chile, ASEAN (with New Zealand), Malaysia, Hong Kong, Peru and Indonesia. Australia has also signed the Pacific Agreement on Closer Economic Regulations (PACER) Plus with eight Pacific Island countries.

An FTA is a contractual agreement between two or more parties under which they give each other preferential market access. Australia's FTAs apply to most trade in goods between the two parties and also cover trade in services, as well as other non-tariff issues (such as the recognition of standards, protection of intellectual property rights and regulation of foreign investment).

While each of the FTAs signed and implemented by Australia differ in their specific content and obligations, the overall goals are often concurrent. The FTAs target decreasing barriers to international trade and increasing market access in goods and services as well as investments, intellectual property, government procurement and increased competition.

18.2 Comprehensive and Progressive Trans Pacific Partnership (TPP)

Australia is also a party to the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), which is a regional free trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, and Vietnam, with the potential to expand membership in the future if such countries meet the CPTPP's high standards. The CPTPP is currently in force for Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam and will come into force for Brunei Darussalam, Chile, Malaysia and Peru 60 days after their respective ratification process is complete. At the time of signing, the CPTPP member countries account for approximately 13.3% of the world's GDP and 14.4% of world trade.

Goals of the CPTPP include reducing tariffs and international regulatory risks and other market access measures for member countries.

18.3 Bilateral Investment Treaties (BIT)

A Bilateral Investment Treaty (BIT) is a treaty between two states. Under a BIT, each state assumes certain obligations regarding investments made by an investor from the other state in its territory.

Contracting states

Australia is a party to 15 BITs currently in force with the following states: Argentina, China, Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay.

Features of BITs

Generally, Australia's BITs impose obligations on each respective state to:

- protect the other state's investors from unfair and inequitable treatment and expropriation,
- recognise the other as a most-favoured-nation trading partner, and
- guarantee the protection and security of investments.

18.4 Other treaties

Energy Charter Treaty

Australia is a signatory to, but has yet to ratify, the Energy Charter Treaty. Currently, 54 European and Asian countries have signed or acceded to the Energy Charter Treaty as has the European Union and Eurotom.

The main aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues. It is focused on encouraging investment and trade, ensuring reliable transit, and promoting efficient energy use.

Australia New Zealand Closer Economic Relations Agreement (ANZCER)

All tariffs and quarantine import restrictions on trade in goods are prohibited under the Australia New Zealand Closer Economic Relations Agreement (ANZCER). Currently, 99% of goods entering Australia from New Zealand are tariff-free.

Australian and New Zealand suppliers of goods and services are given equal treatment in competition for government contracts and business. The ANZCER endorses the freedom of travel between the two countries. It also provides reciprocal agreements on social security and health treatment.

Other agreements between Australia and New Zealand include the Trade in Services Protocol, the Trans-Tasman Mutual Recognition Arrangement and the MOU on Business Law Coordination.

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