大成 DENTONS

Doing business in Australia

Fintech edition

About Dentons

Dentons is the world's largest law firm, connecting talent to the world's challenges and opportunities in more than 80 countries.

Dentons' legal and business solutions benefit from deep roots in our communities, our award-winning advancements in client service, and from Dentons' commitment to innovation. We challenge the status quo to advance client and community interests, through our polycentric and purpose-driven approach, our commitment to inclusion and diversity, and world-class talent. See www.dentons.com

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Introduction

About this guide

Welcome to the 2021 edition of Dentons' guide to Doing business in Australia. This publication provides guidance to companies considering investing in or operating in Australia.

The Australian fintech market is rapidly expanding, with Fintech Australia estimating the industry has grown from $250 million to approximately $4 billion in the last five years. Australia is now ranked 6th in the world and second in the Asia Pacific region in the global fintech rankings.

Australian cities are also gaining ground. Sydney comes in at 11th place in the city rankings. Melbourne is placed 25th. Brisbane broke into the Top 100 for the first time at 98th place.

With over 800 fintech's currently operating in Australia it is a vibrant market. Australia is situated on the doorstep to Asia, which is increasingly home to the world's economic centre of gravity. This makes Australia a great location for companies wanting to establish their Asian regional headquarters. Australian fintech companies are also keen to explore opportunities to grow into international markets, including through forming partnerships with overseas fintechs.

The broader Australian landscape is also favourable. Australia is ranked 14th by the World Bank for ease of doing business in 2020, and its flexible and resilient economy, strong institutions and open markets set the scene for foreign investment growth across a number of industry sectors. Known for its technological readiness, Australia is also fast becoming a centre of innovation and a gateway to the Asia-Pacific region.

The strong foundations for foreign investment into Australia are supported by an efficient regulatory and legislative framework. We draw from the insights and experience of our skilled practitioners to provide an outline of key legal and tax considerations relevant for fintech's seeking to do business in Australia, including on foreign investment, regulatory developments, data privacy and more.

We hope that we can add value to your business in Australia to maximise the opportunities that exist and would be delighted to discuss opportunities with you further.

Key contacts

Rachel Walker
Managing Associate
D +61 2 9931 4951
rachel.walker@dentons.com

Elise Ivory
Partner, Banking and Finance
D +61 2 9931 4810
elise.ivory@dentons.com

David Carter
Partner, Banking & Finance
D +61 2 9035 7438
david.carter@dentons.com

Section 1

1. Australia's government, laws and regulatory bodies

1.1. Australia's government and laws

Australia is a democratic, constitutional monarchy with a federal system of government.

Australia comprises six states (New South Wales, Queensland, Victoria, South Australia, Western Australia and Tasmania) and two mainland territories (Northern Territory and Australian Capital Territory). It has a population of more than 25 million and is the 13th 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 is bound by federal laws, the laws of the particular states or territories in which it operates and the regulations of local government where it has a presence.

Australia is a common law country, meaning that case law applies alongside statute law.

1.2. 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 that have an anti-competitive effect, 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 organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit.

Australian Transaction Reports and Analysis Centre (AUSTRAC)

AUSTRAC is the Australian Government agency responsible for detecting, deterring and disrupting criminal abuse of the financial system to protect the community from serious and organised crime.

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.

Foreign Investment Review Board (FIRB)

The main functions of FIRB are to:

- Examine proposals by certain foreign persons wishing to make investments in Australia
- Advise the Government on the foreign investment proposals received
- Monitor and ensure compliance with foreign investment laws and regulations

The Treasurer is ultimately responsible for the Government's foreign investment policy and for making decisions on proposals.

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.

Office of the Australian Information Commissioner (OAIC)

The Office of the Australian Information Commissioner is an agency within the Federal Government's Attorney-General's portfolio although it is an independent agency which reports directly to the Parliament of Australia. It regulates federal privacy law and other freedom of information laws.

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:

- Monetary policy (primarily directed at maintaining inflation rates)
- Financial stability (to prevent excessive risks in the financial system and to limit the effects of financial disturbances when they occur)

The RBA plays an active role in maintaining the efficiency of the payments system and is responsible for issuing Australian currency. It also manages Australia's gold and foreign exchange reserves.

Takeovers Panel

The Takeovers Panel is a peer review body that regulates corporate control transactions (greater than 20%) of Australian companies. The Takeovers Panel was established under the Australian Securities and Investments Commission Act and derives its enforcement powers directly from the Corporations Act.

Section 2

2. Foreign investment in Australia

2.1. Regulatory framework

Foreign investment in Australia is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth)

(FATA), its related regulations. The Australian Federal Treasurer administers FATA, 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 proposals and make a range of other orders, if the Treasurer considers the proposal to be contrary to the Australian national interest.

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

Certain foreign investment proposals require notification to FIRB and the Treasurer's approval before being implemented. In recent years, new laws have been enacted to cover the review of proposed investments in relation to critical infrastructure and the services that support it, and to ensure such investments are not against Australia's national security interests.

2.2. Foreign investors

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

An individual is a foreign person if they are not ordinarily resident in Australia (including expatriate Australian citizens)

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

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

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

2.3. Significant actionsand notifiable actions

The Treasurer can make a range of orders in relation to 'significant actions' and 'notifiable actions'.

The Treasurer's key concern will be 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 protect against any subsequent "call-in" review by the Treasurer.

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.
- 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

Actions by a foreign person that are notifiable actions include:

- the acquisition of a direct interests in

an agribusiness;

- the acquisition of a substantial interests (>20% by one foreign person or >40% aggregate interest held by two or more foreign persons) in Australian entities or businesses; and
- the acquisition of any interest in Australian land that exceed the prescribed monetary thresholds.

The regulations also prescribe acquiring an interest in sensitive industries or a direct interest (>10%) national security businesses as notifiable actions.

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

A direct comparison of Foreign Direct Investment (FDI) rules between Australia and 9 other jurisdictions can be viewed via the Dentons FDI Global Tracker. The tracker specifies when the FDI rules are applicable, when a notification is mandatory and when it is voluntary; it sets out relevant review periods, sanctions and other implications for the Merger & Acquisition.

Thresholds

Most investments are not considered 'significant actions' unless they exceed set monetary thresholds, which are indexed annually.

Investors from countries that have entered into free trade agreements with Australia (including the US, New Zealand, Japan, China and Chile) or who are parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership enjoy higher monetary thresholds in most instances.

2.4. Foreign investment in entities and businesses

Businesses and entities

If 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.
- 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:

- AU$1.216 billion for US, New Zealand, and Chilean investors where the investment is not in a prescribed sensitive sector, or
- for all other foreign persons, AU$281 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.

National Security Business

A foreign person acquiring a direct interest (>10%) in a 'national security business' will need to notify and obtain FIRB approval prior to the making the acquisition, regardless of the value of the investment. A business is a national security business if it is:

- A responsible entity for a critical infrastructure asset.
- An entity that is a direct interest holder (>10%) in relation to a critical infrastructure asset.

Under the national security business guidelines foreign persons who obtain a direct interest in a service provider and supplier to a critical infrastructure asset are encouraged to obtain FIRB approval. The Treasurer has 10 years to review (Call-in) a transaction and review if it actually offended national security interests.

Exemption certificates

Exemption certificates may be applied for in certain circumstances, such as when a foreign person is planning to undertake a series of related and similar investments. This provides the convenience of not needing to obtain FIRB approval for each of the contemplated investments.

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.

What is Australian land?

Australian land includes:

- Residential land
- Agricultural land
- Vacant commercial land
- Developed commercial land
- Mining and production tenements

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 AU$1.216 billion.

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 AU$281 million, unless the land is classified as sensitive developed commercial land in which case, the threshold is AU$61 million. Investors from the US, China, New Zealand, Japan and Chile enjoy a higher monetary threshold of AU$1.216 billion.

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. 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.

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

A wide range of factors are considered when determining if a foreign investment proposal is contrary to Australia's national interest. These factors are in addition to the national security business tests and include 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.

2.8. When to apply

A foreign investor may apply for FIRB approval before they 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 otherwise they must ensure that completion of the transaction is conditional on receipt of FIRB approval.

2.9. Fees

Application fees apply for all foreign investment applications and are payable at the time of application.

2.10. Penalties

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

Section 3

3. 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.

Most entities are primarily regulated by the Corporations Act, as well as ancillary regulations and tax legislation.

Australian companies

A foreign investor can establish an Australian incorporated company under the Corporations Act. Companies may be either proprietary (private) companies that are limited by shares (Pty Ltd), or public companies limited by shares or guarantee.

There are no minimum capital requirements for an Australian 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.
- Must have a public officer for tax purposes.
- Must have at least one secretary (one of whom must ordinarily reside in Australia).
- Must appoint an auditor.
- Audited financial statements must be prepared.
- May raise capital by issuing a disclosure document to offer shares and other securities to the public.

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.
- Has fewer fundraising options available, compared to a public company.

Joint ventures

Two or more individuals or corporations may carry on business as a joint venture. Joint venturers may take the proceeds of the venture in output or product. They may be incorporated or contractual.

Partnerships

A partnership is an agreement between two or more people or companies who decide to carry on business together with a view to profit.

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.

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. If a scheme has 20 or more members or if it is promoted by a person who is in the business of promoting managed investment schemes, it must be registered with ASIC. Registered schemes must appoint a 'responsible entity', which must be a public company, and hold an Australian Financial Services Licence (AFSL).

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
- 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.

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). 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 (eg, 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.

We can conduct a name availability search through ASIC to see if the company name you would like to register is available.

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. This does not, however, 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.

Before registering a business name, a search should be undertaken through IP Australia to see if there are any registered trade marks that are similar to the proposed business name. Registering a business or company name does not mean the same name will be available as either a domain name or a trade mark.

Section 4

4. Banking and financial services

4.1. 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).

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

The AML/CTF Act imposes certain obligations on 'reporting entities', such as businesses operating in the financial services sector, accountants, lawyers and company directors. The obligations include implementing an AML/CTF Act compliance program, which involves verifying the identity of clients before a 'designated service' is provided.

Ongoing customer due diligence is also required to protect against money laundering or the financing of terrorism.

The AML/CTF Act also requires a reporting entity to advise the Australian Transaction Reports and Analysis Centre (AUSTRAC) of suspicious matters and cash transactions of more than AU$10,000.

It also regulates entering into transactions with residents of prescribed foreign countries.

4.2. 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 bank 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
- General security interests

4.3. What is the ranking of security?

Australia has a system under which secured creditors (ie, 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 (ie, being wound up as insolvent).

How is security taken?

There are three principal ways security is taken:

- By operation of law (eg, 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 landlord 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 recourse or non-recourse to the borrower. This means that in some cases, 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.

4.4. Personal property securities law

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

The PPSA sets out the requirements for creating valid security interests, as well as comprehensive priority rules for competing security interests.

Under the PPSA there is a national register, the Personal Property Securities Register (PPSR), where security interests in personal property are registered. Persons acquiring (or otherwise dealing with a person in possession of) personal property can review the PPSR 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 goods is given to the purchaser before payment, and commercial consignments (or bailments)

Unless the owner of an asset takes the necessary steps under the PPSA to perfect the security interest created by these arrangements, it will not have a first ranking claim to that personal property, on the insolvency of its counterpart.

4.5. How do you protect yourself under the PPSA?

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

Laws for financial services 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 company does not have to be licensed where an authorised representative is appointed 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 (ie, issue or trade in financial products)
- Operate a registered managed investment scheme.

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

- A foreign company issuing securities, shares, stocks, deposits, debentures, bonds.
- Managed investment scheme interests or insurance products to people in Australia.
- A foreign company holding securities, shares, stocks, debentures, bonds or managed investment scheme products in a custodial arrangement or on trust for 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.

Exemptions that may apply include relief for foreign financial services providers who are regulated by regimes which are comparable to Australia's regulatory framework (eg, US Securities and Exchange Commission, UK Financial Services Authority, Hong Kong Securities and Futures Commission and the Monetary Authority of Singapore).

One-off transactions are not likely to be caught by the 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?
Only the person providing the financial service needs an AFSL.

Licensees may appoint authorised representatives to act under their licence, however the licensee will generally be responsible for all acts of its authorised representatives.

ASIC issues AFSLs and has significant criteria to meet, including financial, staffing and other resourcing. Obtaining a licence is not a simple exercise 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 fines, jail, banning orders and/or, in certain circumstances, the right for clients to rescind agreements.

4.6. Consumer credit laws

- Generally speaking, anyone who wishes to make loans or provide credit assistance (i.e., act as a broker or arrange loans for borrowers) individuals or strata corporations for personal, domestic or household purposes, or for investment in residential property, must hold an ASIC regulated Australian Credit Licence (ACL), or be a Credit Representative of the holder of an ACL. There are some exceptions to this general statement (i.e., the provision of short term credit).

They must also comply with the rules set out in the National Consumer Credit Protection Act and the National Credit Code.

4.7. Anti-Money Laundering and Counter-Terrorism Financing Act

Through strong regulation, and enhanced intelligence capabilities, AUSTRAC collects and analyses financial reports and information to generate financial intelligence. This vital information about potential criminals and criminal activity contributes to Australia's national security and law enforcement investigations.

The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act) and the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (AML/CTF Rules) Australian government legislation that regulates AUSTRAC's functions.

4.8. Who needs to comply with the AML/CTF Regime?

AUSTRAC is the Australian Government agency responsible for detecting, deterring and disrupting criminal abuse of the financial system to protect the community from serious and organised crime.

Section 5

5. Laws and regulations governing corporations

5.1. Corporate governance

Principles of good corporate governance

Australian law imposes a high standard of corporate governance on entities established in Australia, the directors who oversee their operation and on business conduct. These include the Corporations Act, various industry standards (which may be adopted voluntarily) and guidance issued by regulatory authorities (such as APRA's prudential standards).

For entities listed on the ASX, there are additional corporate governance requirements and guidelines, including the ASX Listing Rules and the Corporate Governance Council's Principles and Recommendations. The Corporate Governance Council's Principles and Recommendations set out eight principles as underlying good corporate governance:

- Lay solid foundations for management and oversight
- Structure the board to be effective and add value
- Promote lawful, ethical and responsible decision making
- Safeguard integrity in financial reporting
- Make timely and balanced disclosure
- Respect the rights of shareholders
- 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, diligence and skill;
- a duty to act in good faith in the best interests of the company, for a proper purpose, and not recklessly or dishonestly; a duty not to improperly use their position or information obtained during the course of their role;
- a duty to prevent insolvent trading (directors only);
- not to give a financial benefit to a related party without shareholder approval (public companies only); and
- fiduciary duties under the general law including to act with a reasonable degree of care and diligence, in good faith and for a proper purpose, not to personally profit without disclosure and/or shareholder consent, and not to have an undisclosed or unapproved conflict of interest.

Directors and officers are also subject to duties under other laws. These include:

- to exercise due diligence to ensure compliance with occupational health and safety laws including having up-to-date knowledge of work health and safety matters, appropriate systems and resources and processes for risk minimisation; , and
- to ensure that the entity conducts a proper review of its finances and reports these to the regulators.

5.2. Disclosure obligations

Financial and other reporting

All companies must keep accurate financial records. 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 audited report are required. There are rules surrounding the delivery of these reports to security holders and providing them electronically.

Small proprietary companies generally do not need to disclose financial reports to ASIC, whereas large proprietary companies do. In 2019, the Federal Government increased the threshold for large proprietary companies. If two of the following are satisfied, the private company is large:

- Consolidated revenue is ≥AU$50 million
- Consolidated gross controlled assets are ≥AU$25 million
- More than 100 employees

For some smaller companies, there are financial disclosures that need to be made to ASIC, for example where it is a foreign owned entity.

Australia applies accounting standards which are consistent with international accounting standards. Directors are responsible for the financial reports.

ASX continuous disclosure

All ASX listed entities have an obligation to continuously disclose price sensitive information to the market. These announcements are made as soon as the entity becomes aware of the information that is, or a reasonable person would deem likely to be, price sensitive.

Other governance issues

Australia has policies that prohibit insider trading in listed and unlisted securities and financial products. The ASX requires that entities have securities trading policies in place. These 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 of the trade being done.

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.

Section 6

6. Equity fundraising

The Corporations Act 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, in some circumstances, provide prospective investors with a disclosure document (such as a prospectus, offer information statement (to raise up to AU$10 million) or a product disclosure statement), before issuing financial products. This is to assist them to make an informed decision about their investment. These documents also need to be lodged with ASIC.

In 2017, Australia also introduced a crowd funding regime permitting smaller companies, meeting certain conditions and with the assistance of a licensed intermediary/platform, to raise up to AU$5 million in any 12 month period and where a reduced level of disclosure applies.

Exceptions

There are a number of exceptions to the disclosure document requirement, including in relation to offers to:

- Sophisticated investors who have a gross income of at least AU$250,000 for the last two years, gross assets of at least AU$2.5 million or are paying at least A$500,000 for the financial products.
- Professional investors who control at least AU$10 million or hold an Australian Financial Services Licence authorising them to advise on financial products.
- Investors known to the issuer where a maximum of 20 such offers are accepted in any 12 month period and a maximum of AU$2 million is raised. When counting the number of offers accepted, and amounts raised, offers accepted by and amounts raised from the investors referred to in the dot points above can be excluded.
- Certain offers by ASX listed companies where the conditions entitling an issue without full prospectus type disclosure are met.

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, particularly where a sell down of those financial products is occurring within 12 months after the issue of those financial products.

The law regulating disclosure documents is complex and the preparation of these documents is time consuming and usually involves substantial due diligence to be undertaken in accordance with accepted market methodology.

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 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- broadly speaking a listed company can issue up to 15% of its capital in any 12 month period without shareholder approval, and in some cases a further 10% during any 12 month period where the company's shareholders have granted pre-approval to that process.

Section 7

7. Mergers and acquisitions

7.1. 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
- The Foreign Acquisitions and Takeovers Act
- The Competition and Consumer Act
- The ASX Listing Rules (provided either the purchaser, seller or target is listed on the ASX)
- Legislation specific to the industry in which the purchaser, seller or target operates

7.2. 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.

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 voting power in the company increases above 20%. This prohibition applies whether or not the acquirer intends to make a takeover bid, and is subject to certain exceptions (such as the target's shareholders approving the acquisition by a resolution passed at a general meeting).

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, the target shareholder will send their acceptance 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, the target company prepares a target's statement for its shareholders containing details of the takeover offer and other essential information. The target's statement must be sent to all shareholders.

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 other shares). Further important distinctions are that unlike for an on-market bid, an off-market bid may be a partial bid and may be subject to conditions.

Schemes of arrangement are also used for corporate reconstructions, including mergers, and are an alternative to a takeover bid in Australia. A scheme of arrangement is a shareholder and court-approved process whereby a target company proposes a scheme to is shareholders. A shareholder resolution must be passed by (each class of) target shareholders by both 75% of the votes cast on the resolution and >50% of the target shareholders.

Certain takeovers and schemes of arrangement will require approval under the Foreign Acquisitions and Takeovers Act. Please refer to Section 2 for further information.

Section 8

8. Competition and consumer laws

8.1. Competition laws

Australia has comprehensive competition laws similar to competition laws in North America and Europe.

Australia's primary competition laws are contained in the Australian Competition and Consumer Act (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, share markets or rig bids.
- Market power: Corporations that have substantial market power must not engage in conduct that has the purpose or which has the effect or likely effect of substantially lessening competition in a relevant market. Legitimate conduct such as vigorous jockeying for sales is not prohibited even if it damages a competitor, however some conduct such as raising barriers to entry to competitors in order to exclude them, or otherwise deterring competitive conduct may amount to a breach of this prohibition.
- Resale price maintenance: Suppliers of goods or services seeking to ensure that resellers maintain specified minimum prices when advertising or selling the relevant goods or services.
- Specific anti-competitive vertical arrangements: Some forms of vertical arrangements which have the purpose or likely effect of substantially lessening competition in Australia such as third line forcing (supplying goods or services on the condition that other goods or services are acquired from an unrelated third party) and exclusive dealing (including imposition of product, customer and territorial restrictions).
- Anti-competitive arrangements: Any contract, arrangement or understanding, whether between competitors or not, which has the purpose or likely effect of substantially lessening competition in Australia.

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 a form of merger clearance. This applies particularly when:

- the merger is likely to exceed the ACCC's notification threshold (the ACCC has published Informal Merger Review Process Guidelines and encourages notification where the merger parties' products are substitutable or complementary and the merged entity will have 20 percent or more of the relevant market);
- the merger otherwise risks substantially lessening competition by, for example, 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.

Various forms of transactions are caught by the merger regulations, where the transaction involves an acquisition of shares or assets. This might include forms of joint ventures or other collaborations.

Where merger clearance is necessary, there are three 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 likely to substantially lessen competition and therefore whether it will challenge that merger. The ACCC encourages parties to have discussions with it in relation to any significant merger, and may sometimes itself initiate such a process. Written submissions are commonly provided to the ACCC, providing details of, and analysing the proposed merger.
- A formal merger clearance process (authorisation), under which the ACCC reviews mergers to determine whether they are likely to substantially lessen competition. Authorisation is a time consuming process and is not a commonly used process. If an authorisation is not granted the parties may seek a merits review of that decision from the Australian Competition Tribunal, a Commonwealth body chaired by a Federal Court of Australia judge and on which other appointed members sit. The Tribunal may only consider the material before the ACCC and the parties must undertake not to complete the merger until the review process is complete. A further right of review (but not on the merits) may be available from the Federal Court of Australia.
- The parties may seek a declaration from the Federal Court that a particular acquisition does not breach the prohibitions in the CCA. The onus of proving that it does not breach the CCA lies upon the party commencing proceedings. The ACCC may also commence proceedings seeking injunctions to prevent a merger proceeding.

Immunity and leniency

The ACCC maintains an 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 applies to international cartels which affect Australia.

The ACCC also maintains a Cooperation Policy which 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.
- 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.

8.2. 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.

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, certain types of marketing activities, and unfair contract terms in standard form consumer contracts.

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.

Section 9

9. Data protection and privacy laws

9.1. Privacy

Legislation and regulation

Australia has both federal and state and territory legislation governing the use of personal information.

At the federal level, the Australian Privacy Act 1988 (Cth) (Privacy Act), applies to acts and practices, whether occurring in Australia or overseas, by any organisation with an Australian "link". Businesses that target and sell to persons in Australia and collect their personal information are likely to be considered to have an Australian link.

For some State and Territory levels, there is additional specific legislation regulating processing of health information by private sector organisations. Also, generally, more stringent and broader requirements apply for government agencies and companies that provide services to them.

Key definitions

"Personal information" is defined in the Privacy Act as "information or an opinion about an identified individual, or an individual who is reasonably identifiable".

"Sensitive information" is a special category of personal information which includes information or an opinion about an individual's racial or ethnic origin, political opinions, membership of a political association, religious beliefs or affiliations, philosophical beliefs, membership of a professional or trade association, membership of a trade union, sexual orientation or practices, criminal record or health, genetic and biometric information.

The Office of the Information Commissioner (OAIC) is the national regulatory body responsible ensuring compliance with the Privacy Act.

Australian Privacy Principles

The Privacy Act establishes thirteen Australian Privacy Principles (set out in Schedule 1 of the Privacy Act) (APPs) which must be followed by entities who are collecting, using, disclosing, handling, dealing with or processing personal information.

The Australian Privacy Principles address the open and transparent management of personal information, its collection, use and disclosure, the responsibility to maintain the integrity and security of personal information and the right of individuals to request access to or correction of their personal information.

In accordance with the Australian Privacy Principles, when doing business in Australia, it is necessary to have a clearly expressed and update to date privacy policy freely available to the individuals whose information you collect or process. Any collection of personal information must be reasonably necessary for an entity's functions or activities.

Entities must not use or disclose any personal information that they hold for any purpose other than for the purpose it was collected unless the individual has consented to the other uses or disclosures or the other purpose is related to the original purpose (or directly related in the case of sensitive information). In each case, the individual must reasonably expect the entity to use or disclose for that other purpose.

Sensitive information is subject to stricter restrictions on processing and must not be collected without the consent of the individual.

Entities must take reasonable steps to maintain the security of personal information which they hold. Additionally, where an entity discloses personal information to a processor it will remain responsible for any infringement of the Australian Privacy Principles by the processor and for ensuring the protection and security of personal information including if it is transferred outside Australia.

There are additional rules for entities that process the tax file numbers of individuals and credit information.

Cross border transfers

Although there are some exceptions, when transferring personal information from Australia to another country, entities are required to take reasonable steps to ensure that the overseas recipient complies with the APPs and the entity may be liable for any breaches of the Privacy Act by that overseas recipient in certain circumstances.

Employee records exemption

A private sector employer's handling of employee records in relation to current and former employment relationships is exempt from the Australian Privacy Principles in certain circumstances. The exemption may apply if the organisation's act or practice is directly an employment relationship between the employer and the individual or an employee record held by the organisation relating to the individual. Despite this exemption employers are still required to inform employees of the processing of their personal information prior to collecting such information.

Small business exemption

In some circumstances small businesses with turnover of less than AU$3 million are exempt from the Australian Privacy Principles. However, this exemption is not available to all small businesses for example a business that provides health services, trades in personal information, is a contractor that provides services under a Commonwealth contract or is a credit reporting body is required to comply with the Australian Privacy Principles.

Data breach notification

Under the Privacy Act, a breach or potential breach must be assessed to determine if it is an "eligible data breach" - where the breach is likely to result in serious harm to any of the individuals to whom the information relates.

Where an eligible data breach has occurred, the entity must submit a statement to OAIC notifying them of the eligible data breach as soon as practicable after it becomes aware of the breach. The entity must also notify the affected individuals as soon as practicable after preparing the statement for OAIC, subject to limited exceptions.

Penalties

OAIC can impose penalties of up to AU$2.1 million for serious or repeated breaches of the Privacy Act. If a business's privacy policy is not accurate or is misleading (either expressly or by silence), it could also face action by the Australian Consumer and Competition Authority (ACCC) (the consumer protection regulator in Australia) for making false or misleading representations which could be in excess of AU$10 million.

9.2. Direct marketing

Businesses undertaking direct marketing activities including targeted advertising, email or other messaging platform campaigns and telemarketing are regulated under the Privacy Act, Spam Act 2003 (Cth) (Spam Act) and Do Not Call Register Act 2003 (Cth) (Do Not Call Register Act).

The Australian Communications and Media Authority (ACMA) is the regulator responsible for compliance and enforcement of anti-spam and telemarketing laws.

Anti-Spam Law

The Spam Act 2003 (Cth) regulates commercial electronic messages and prohibits businesses from sending commercial electronic messages which offer, advertise or promote goods and services without the consent of the recipient. Consent may be express or inferred. The sender of a commercial message must also comply with certain requirements such as providing recipients with the opportunity to opt out from receiving further messages.

Telemarketing

Voice calls (including using recorded or synthetic voice) are governed the Do Not Call Register Act 2003 (Cth) and the Telecommunications (Telemarketing and Research Calls) Industry Standard 2017 (Cth) (Telemarketing Standard). Voice calls are not permitted to phone numbers listed on the Do Not Call Register unless the persons have consented to receiving such calls. Consent may be express or inferred. The Telecommunications (Telemarketing and Research Calls) Industry Standard 2017 (Cth) sets out the requirements that persons conducing telemarketing must comply with including identifying themselves and only calling within certain permitted timeframes.

Use of personal information for the purpose of direct marketing

Additionally, under the Privacy Act, a business must obtain the express or implied consent of an individual to use their personal information for the purpose of direct marketing. Consent may be express or implied.

Penalties

The maximum penalty for making unsolicited commercial electronic messages in breach of the Spam Act is AU$2.1 million for each day on which an infringement occurred.

The maximum penalty for making unsolicited telemarketing calls in breach of the Do Not Call Register Act is AU$2.1 million for each day on which an infringement occurred. And contraventions of the Telemarketing Standard may be up to AU$250,000 for each infringement.

Where direct marketing activities also infringe an individual's privacy a business may also be liable for penalties for breach of the Privacy Act as described in the previous section.

9.3. Consumer Data Right

Australia has a Consumer Data Right since the enactment of the federal legalisation called the Laws Amendment (Consumer Data Right) Act 2019 (Cth). The Consumer Data Right is a right of consumers to data portability - and the right is to be rolled out across the entire Australian economy on a sector by sector basis. The banking sector is the first sector to be required to provide implement the Consumer Data

Right in 2020. The energy and telecommunications sectors will follow.

The Consumer Data Right seeks to enhance competition and give customers more control and choice over data held about them in the regulated sectors by enacting stricter privacy requirements for the collection and disclosure of personal information as well implementing a new right for consumers and certain small businesses to data portability. The geographic scope of the law is broad as it will apply to data generated or collected both in Australia and outside Australia in the designated sectors.

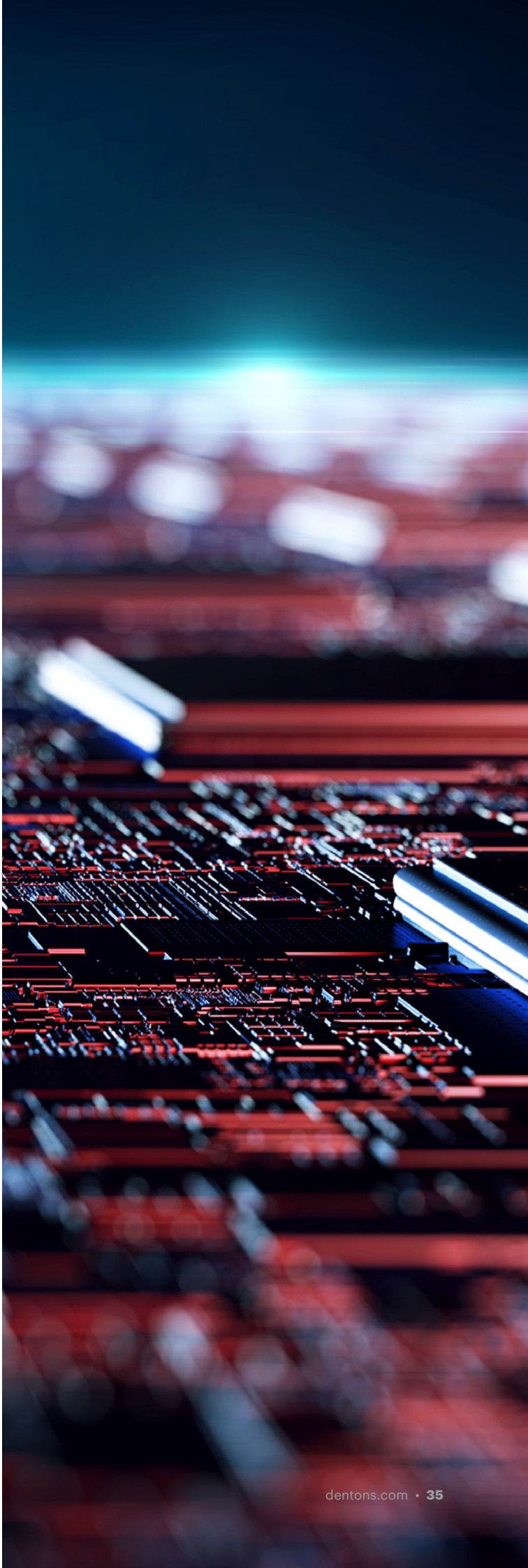
Technical standards for the consumer data right and for how data is to be shared are being developed by a newly appointed data standards body, Data 61. The ACCC and OAIC will be lead regulators.

9.4. Government interceptions laws

The Telecommunications (Interception and Access) Act 1979 (Cth) permits Australian law enforcement and security agencies to intercept communications, access stored communications and authorise the disclosure of data by telecommunications providers for national security or law enforcement purposes.

The Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Cth) (Assistance and Access Act) establishes a regime whereby various Australian law enforcement agencies can request or compel designated communications providers to provide certain types of access or assistance to the agency. A designated communications provider is defined broadly such that it includes telecommunications network and internet service providers but also any person that supplies goods or services to those providers, as well as any business operating a website, messaging application or service delivered using the internet in Australia. The Assistance and Access Act has extra territorial reach, and applies to anyone providing a website or information technology equipment or services in Australia.

There are severe consequences for not complying with the Assistance and Access Act or for breaching its provisions aimed to keep secret the requests made to businesses for cooperation with Australian law enforcement and security agencies to intercept communications, access stored communications or disclose data.



Section 10

10. Employment

The laws relating to the employment relationship involve an intersection of various statutes and common law. The vast majority of employment relationships will be regulated by federal legislation and in particular the Fair Work Act which provides for minimum terms and conditions of employment for all private sector employees. There are some unique aspects of the laws related to employment relationships in Australia, in particular the existence of instruments which regulate employment across an industry which have statutory force.

10.1. Fair Work Act

The Fair Work Act 2009 (FW Act) is the principal legislation that governs most Australian workplaces. This includes foreign corporations conducting business in Australia, and their employees in Australia.

The FW Act sets out the rights and obligations of employers and employees including minimum terms and conditions of employment (the NES discussed below), modern awards and rights on termination. In addition, all employment relationships will be subject to a common law contract of employment.

Additional obligations will apply in various states and territories around Australia. This includes an entitlement to long service leave (generally two or three months' paid leave after 10 years of service) and workers compensation for work-related injuries.

National Employment Standards

The National Employment Standards are 10 minimum essential employment conditions regarding:

- Maximum weekly hours of work
- Unpaid parental leave (although Australia has a statutory, government funded system of paid parental leave for eligible parents)
- Four or five weeks of paid annual leave for permanent employees
- Ten days of paid personal/carer's leave for permanent employees
- Community service leave
- Public holidays
- Notice of termination and redundancy pay
- Long service leave
- Flexible working arrangements
- The Fair Work Information Statement

Modern awards

Modern awards are an instrument which set out minimum terms and conditions that must be met in relation to particular classes of employees. These will generally apply either to an industry of employers, or to employees in a particular occupation. Modern awards provide for minimum terms and conditions of employment, in particular minimum wages, and are underpinned by the FW Act. Not all employees in Australia are covered by modern awards.

Enterprise agreements

Enterprise agreements are collectively negotiated agreements which set out terms and conditions that are appropriate for a particular enterprise and which provide better and additional terms than modern awards. The law requires compliance with certain prescribed good faith bargaining requirements when negotiating these agreements (such as the requirement to recognise and bargain with all other bargaining representatives). Generally enterprise agreements will be negotiated by an employer with the relevant union.

10.2. Employment tribunals

The Fair Work Commission is the principal national workplace relations tribunal which assists in the resolution of workplace issues. It has the power to make and vary awards, set minimum rates of pay, approve enterprise agreements, determine unfair dismissal claims and make orders regarding good faith bargaining and industrial action.

There are a number of other courts and tribunals that deal with employment related matters, including work, health and safety and discrimination matters.

10.3. Trade unions and industrial action

Federal, state and territory laws protect the rights of employees to join a trade union and participate in trade union activities.

The taking of industrial action in Australia is generally prohibited unless it is authorised by the Fair Work Commission in connection with the negotiation of an enterprise agreement.

10.4. Common law

Every employment relationship will be regulated by an employment contract (whether written or unwritten).

Where an employment relationship is not formalised by a written contract, there are a number of terms implied into an employment contract under the common law. An employment contract cannot be less beneficial to an employee than the terms of an applicable modern award or enterprise agreement, or the National Employment Standards.

10.5. Workers' compensation

State and territory laws require that all employers take out and maintain workers' compensation insurance (a statutory insurance scheme that provides coverage for employees who are suffering from a work-related illness or injury). These laws also impose obligations on employers concerning the rehabilitation of injured or ill workers.

10.6. Work, health and safety

Obligations are also imposed on employers regarding taking steps to ensure the health, safety and welfare of their employees and other people at their place of work.

Significant penalties can be imposed on employers and others, including officers, for breaches of these laws.

10.7. Discrimination and equal employment opportunity

Federal, state and territory laws make it unlawful to discriminate against people, or treat them less favourably, on certain prescribed grounds. Specifically the rights of employees not to be subjected to discrimination, vilification, harassment, bullying or victimisation are protected.

10.8. Visas and migration / Skilled foreign workers

The Australian Government regulates the entry of non-Australian citizens and permanent residents to Australia.

Skilled and business migration

The Government is focused on increasing the number of skilled and business migrants who have the ability to advance the Australian economy. Skilled migration is aimed at overcoming skill shortages.

Skilled and business migrants are also seen as integral to Australia's economy through the development of new businesses, contributions to technological development and improving Australia's international trade and business markets.

Eligibility for any visa is determined by strict validity and eligibility criteria, all of which must be met for the visa to be granted. This includes meeting health and character criteria.

Skilled Work Visas

Australian and international businesses seeking to recruit overseas employees to work in Australia can sponsor the employee to enter Australia either as a temporary or a permanent resident. See the Employment section for further details.

There are a range of temporary working and skilled visas available which are designed to meet the short to medium-term needs of Australian and overseas businesses for skilled labour, if a business is not able to find a suitably skilled Australian to fill a position. Some visas require business sponsorship and may also provide a pathway to permanent residency.

Two types of visas that a business might consider for shorter to longer term needs are set out below.

Temporary Skill Shortage visa (SC 482)

The Temporary Skill Shortage Visa (TSS) is a temporary visa which allows an employer to sponsor a suitably skilled worker to fill a position that it cannot find a suitably skilled Australian to fill.

To sponsor an employee, the business must be approved as a Standard Business Sponsor (SBS) or have entered into a Labour Agreement with the Australian Government. The occupation in which the employee is to be nominated must be specified in either the Short Term Skilled Occupation List, the Medium and Long-term Strategic Skills List, or the Labour Agreement.

The TSS visa has three streams; namely the Short-Term Stream, the Medium-Term Stream and the Labour Agreement Stream. Which stream is applicable will depend on the specific circumstances of the SBS and the occupation to be filled.

A SBS is required to undertake local labour market testing before nominating an employee, unless it is exempt from doing so because it would conflict with Australia's International Trade Obligations (ITO) in relation to the nominated position. SBSs must also pay the Skilling Australians Fund levy, an Australian Government initiative designed to support the vocational education and training system in Australia.

While the visa streams have some common criteria, there are differences, particularly in the length of the visa. The Short-Term stream allows an applicant to stay for up to two years, or up to four years if an ITO applies. The Medium-Term and Labour Agreement streams allow an applicant to stay for up to four years. Minimum salary requirements apply, which must be at least the prevailing Temporary Skilled Migration Income Threshold. Employees must meet various qualification and experience requirements in addition to language, health and character requirements.

Temporary Work (Short Stay Specialist) Visa – Subclass 400

This visa is available for workers in highly specialised jobs to provide short-term assistance. This involves highly specialised skills, knowledge or experience that can assist an Australian business and cannot reasonably be found in the Australian labour market.

The type of work is usually occupations such as managers, professionals, technicians and trades. It may include specific (proprietary) skills, or knowledge of goods or services developed by an overseas company which goods or services are being introduced to (or are already in use in) Australia, as this specific knowledge would not be available in the Australian workforce, or would be of limited availability.

The length of this visa is up to six months, with a strong business case required for periods longer than three months. For this visa, the worker's engagement must not be ongoing. This means that the work is likely to be completed within a continuous period of 6 months or less and that no arrangements are made to stay after the end of that period.

Business Visas

There are various business visas available which also provide a pathway for highly skilled business people to establish and develop businesses and investments in Australia.

Business Innovation and Investment (Provisional) Visa

The Business Innovation and Investment (Provisional) Visa includes five streams:

- Significant Investor stream
- Premium Investor stream
- Business Innovation stream
- Investor stream
- Entrepreneur stream

Each stream allows for alternative paths to residency if certain requirements are met. All streams have different investment requirements that must be met in order to be eligible to be granted the visa. Each stream also requires nomination by either an Australian State or Territory government agency, or Austrade, before an applicant is invited to apply for this visa.

Significant Investor stream

Significant Investor stream visa (SISV) applicants are required to invest in a complying significant investment of at least AU$5 million and have a genuine intention to hold that investment for at least four years, in the following proportions:

- at least AU$500,000 in eligible Australian venture capital and growth private equity funds investing in start-up and small private companies,
- at least AU$1.5 million in approved managed funds that invest in emerging companies listed on the ASX, and
- a 'balancing investment' of at least AU$3 million in managed funds.

SISV holders can apply for permanent residency after four years, which will change to three years on July 1, 2021, provided they spent at least 40 days per year in Australia over that time and have maintained the

AU$5 million complying significant investment for the whole period during which the temporary visa was held. Additional criteria applies if an extension of the temporary visa was granted.

Premium Investor stream

The Premium Investor stream visa (PISV) program has been designed to attract a small number of highly talented and entrepreneurial individuals who can translate those skills and talents into areas which deliver a long-term economic benefit to Australia.

The PISV is only available at the invitation of the Australian Government, with potential recipients to be nominated by Austrade.

PISV applicants are required to invest at least AU$15 million into complying investments in Australia. PISV holders will be eligible to apply for permanent residency after 12 months of holding a PISV and maintaining their complying premium investment.

Changes to the Premium Investor stream visa are currently being discussed and may come into effect as early as July 1, 2021.

Business Innovation stream

The Business Innovation stream visa (BISV) is designed to attract people with business skills who want to establish, develop and manage a new or existing business in Australia.

The BISV is only available at the invitation of the Australian Government, with potential recipients to be nominated by a State or Territory government agency.

Before being invited to apply for the visa, BISV applicants will first need to submit an Expression of Interest through SkillSelect.

BISV holders must have fulfilled the provisional visa requirements and have been in Australia and held the BISV for at least one year in the two years immediately before applying for permanent residency. In addition, they must show ongoing business involvement, meet certain financial requirements and have a history of employing Australian workers.

Investor stream

The Investor stream visa (ISV) is designed to attract people who want to make a designated investment of at least AU$1.5million.

The ISV is only available at the invitation of the Australian Government, with potential recipients to be nominated by a State or Territory government agency. The designated investment must be made in the State or Territory in which the nominating government agency is located.

ISV applicants will be required to submit an Expression of Interest through SkillSelect.

ISV holders must have fulfilled the provisional visa requirements and have been in Australia and held the ISV for at least two of the four years immediately before applying for permanent residency. In addition, ISV holders must have held the designated investment for at least four years.

Entrepreneur Stream

The Entrepreneur Stream Visa (ESV) is designed for people who have received funding of at least AU$200,000 from an approved entity and who will undertake a complying entrepreneur activity that relates to an innovative idea leading to the commercialisation of a product or service in Australia or the development of an enterprise or business in Australia.

Applicants must be nominated by a State or Territory government agency.

ESV applicants will be required to submit an Expression of Interest through SkillSelect.

ESV holders must have held the ESV for a continuous period of at least four years and resided in Australia for at least two years of the four years before applying for permanent residency.

In addition; ESV holders must show a successful record of entrepreneurial activities in Australia, while holding the provisional visa.

Section 11

11. Intellectual property

In Australia, intellectual property rights are protected by federal legislation and the common law.

11.1. Trade marks

Australia has a registered trade marks system for names, logos, devices, colours, sounds, shapes and smells that distinguish the goods or services of the owner from those of other businesses.

Registered trade marks are governed by the Trade Marks Act. Registration of a trade mark is strongly recommended for those seeking to enter the Australian market.

A registered trade mark provides its owner with the exclusive rights to use, license and assign it. However, the owner must actively use the trade mark in the course of trade. If not, the trade mark might be removed on the grounds of non-use.

It takes about six to 12 months for a trade mark to be registered and initial registration of a trade mark lasts for 10 years. The registration can be renewed for successive periods of ten years in perpetuity.

Only registered trade marks can carry the ® symbol. Once a trade mark is registered, placing the ® symbol immediately next to it puts other businesses on notice of that mark.

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 provisions of the Australian Consumer Law which prohibit persons (including businesses) from engaging in misleading or deceptive conduct (or conduct that is likely to mislead or deceive) in the course of trade.

Unregistered marks can be denoted as such by use of a ™ symbol.

Australia is a signatory to an international treaty known as the Madrid Protocol for International Trade Marks (Madrid Protocol). The Madrid Protocol enables trade mark applicants to seek protection in all or any of the countries that are signatories to the Madrid Protocol by filing a single application in Australia.

An international application under the Madrid Protocol must be based on an Australian application.

There are strict regulations covering commercial agreements under which a licensee is granted a right to operate a business associated with a trade mark owned by a licensor where monies are paid and it is important to obtain advice on whether the particular commercial arrangement is within the scope of the laws before the agreement is signed.

11.2. Copyright

In Australia, there is no system of registration for copyright works. Copyright instead subsists in an original work from the time the work is created.

For literary, dramatic, musical or artistic works, sound recordings, films, television and sound broadcasts, copyright subsists for the life of the author plus 70 years. For published editions of works, copyright subsists for 25 years after first publication.

Australia's Copyright Act provides the owner of the work with a number of exclusive rights. Those rights may be licensed or assigned.

The Copyright Act confers moral rights on authors, giving creators of certain works rights of attribution and to prevent unfair treatment of those works. Moral rights are not assignable but may be waived.

A copyright notice is not necessary in Australia, but it is recommended as it puts the public on notice that copyright in the work is claimed.

Australia is a signatory to various international conventions that deal with copyright. In particular, under the Berne Convention, works created in countries which are also signatories to the Convention will be treated as if they were created in Australia for the purposes of Australian copyright protection.

11.3. Patents

New, useful and inventive products, substances, methods and processes may be patentable in Australia.

Australia is a signatory to the Patent Cooperation Treaty (PCT), which allows an applicant to file a single international application.

Once registered, an Australian patent allows the owner to prevent any unauthorised persons or businesses from exploiting a product, substance, method or process that embodies the patented invention.

Patents are regulated under the Patents Act and (in the case of standard patents) must be examined prior to grant and before they can be enforced.

Standard patents in Australia are protected for a term of up to 20 years (with extensions of up to 5 years for pharmaceutical patents). An innovation patent can be protected for up to eight years from the date of the patent. From 26 August 2021 new innovation patent applications may not be filed as the government is phasing them out.

11.4. Designs

Design rights are able to be registered in Australia to protect the overall visual appearance of new and distinctive products. The overall visual appearance can be a combination of visual features including shape, colour, configuration, pattern and ornamentation. The primary legislation which governs the Australian design rights system is the Designs Act 2003.

Australia is a signatory to the International Convention for the Protection of Industrial Property (the Paris Convention). Australia is not a contracting party and cannot accept applications under the Hague System for the International Registration of Industrial Designs.

11.5. Domain names

.au Domain Administration (auDA) is the administrator for the .au country code top level domain (ccTLD). Such domain names can be registered for renewable two year periods.

To register a '.com.au' domain name, the applicant must have either be a registered Australian business or foreign company registered in Australia, or be an Australian partnership, statutory body, association, or be a company with a registered Australian business name, or a registered or pending Australian trade mark application from which the domain name can be derived. Other categories of eligibility are that the registrant can be trading under a registered business name in any Australian State or Territory or a foreign company licensed to trade in Australia.

Domain names are granted to eligible registrants who meet the criteria on a first come, first served basis. It is not possible to pre-register or otherwise reserve a domain name. Where someone has registered a domain name without a legitimate business interest, it may be possible to have the domain name transferred to a party with a legitimate interest in the domain name by filing an application under the .au Dispute Resolution Protocol (for .au domain names), or the Uniform Dispute Resolution Protocol (for most other domain names)..

Section 12

12. Property

- Foreign investment in residential and commercial property is tightly regulated in Australia. See Section 2 for details of the foreign investment regime.

12.1. 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.
- Investigating whether any statutory bodies have an interest in the property.
- Careful consideration of ownership structures is also important for property investment.

12.2. 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
- 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
- The acquisition of your first home

12.3. 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 AU$75,000 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 July 1, 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.

12.4. Land tax

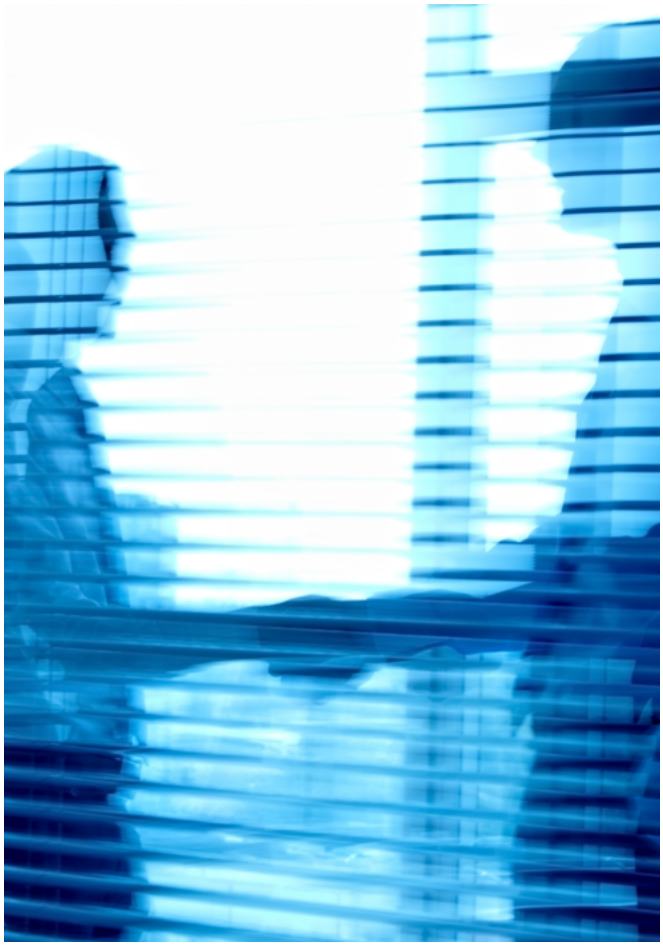
Land tax is an annual tax levied by each state and the Australian Capital Territory (but not the Northern Territory) on the owners of land within that state or territory.

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.

12.5. 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.



Section 13

13. Insolvency and restructuring financial services

13.1. Director's duties – Insolvent Trading

Australia has strict laws to prevent insolvent trading. Company directors must not breach these laws.

Directors (including non-executive directors) have a duty to ensure that a company does not incur a debt if the company is insolvent, or becomes insolvent by incurring the debt.

Failing to prevent insolvent trading may result in the director being personally liable for debts incurred if, at the time the debt is incurred by the company, the director had reasonable grounds for suspecting the company is insolvent, or would become insolvent because of the debt.

13.2. Safe harbour

A company in financial difficulty may utilise the 'safe harbour regime'.

The safe harbour regime can give a company certain breathing space to pursue a turnaround or financial restructuring plan. Importantly, the safe harbour regime may also provide directors with protection from personal liability for insolvent trading for debts incurred while a safe harbour plan is being pursued.

The safe harbour protections encourage and support directors who make early, genuine and potentially ongoing attempts to restructure their companies in an effort to avoid formal insolvency; and the associated detrimental impacts on all stakeholders including employees and creditors.

In short, and subject to meeting certain criteria, if directors take appropriate steps such as obtaining expert advice and preparing a turnaround plan that is reasonably likely to lead to a better outcome for the company (and its creditors), than an insolvency appointment, they can protect themselves against liability for insolvent trading.

During such a period, in order to meet their duties to the company, the directors must also have regard to the interests of the company's creditors.

13.3. Restructuring

Australian law provides processes designed to facilitate the financial restructuring of a company. The most common processes include:

- Schemes of arrangement
- Voluntary Administration

Schemes of arrangement

A scheme of arrangement is a process by which a company can undertake a financial restructuring via a court sanctioned compromise or arrangement with its creditors.

To implement a scheme, creditors are usually divided in to classes (based upon creditors having similar rights and common interests), and asked to vote on the proposed scheme. If a majority of creditors in each class vote in favour of the scheme, and the court subsequently sanctions the scheme, the compromise or arrangement between the company and its creditors takes effect.

Schemes of Arrangement are often used to restructure large companies, or groups of companies.

Voluntary administration

Voluntary Administration is a statutory 'out of court' process that can be used to restructure a company, and to preserve the underlying business.

Administration can be initiated a number of ways, the most common of which, is for the directors to pass a resolution to the effect that the company is, or is about to become, insolvent. Alternatively, a secured creditor who holds security over all, or substantially all, of the assets of the company may appoint an Administrator.

Once appointed, the Administrator (an independent insolvency professional) takes over control of the company from the directors, and must conduct the administration in a way that:

- maximises the chances of the company continuing under a deed of company arrangement (also known as a DOCA); or
- provides a better return to creditors (and possibly shareholders) than if there was an immediate liquidation.

Importantly, administration provides companies that are in severe financial difficulty, or insolvent, with a chance to restructure their financial affairs, or to sell their business as a going concern, and to provide a return to creditors, usually via a Deed of Company Arrangement (DOCA). In order to facilitate this, a key feature of the administration process are statutory moratoriums that protect the company from action by creditors, and the termination of contracts by key suppliers because of the administration.

The outcome (and conclusion) of an administration is determined by its creditors at a meeting convened for that purpose. At that meeting, creditors will have the option of voting for one of two alternatives as follows:

- If one is proposed, a DOCA
- If no DOCA is proposed, and the company is insolvent, liquidation

The administration process is the most widely used method for the restructuring of distressed companies in Australia. It can be utilised for small, medium and large companies alike.

Section 14

14. Litigation and arbitration

14.1. Australia's judicial system

The Australian judicial system comprises both state and federal (Commonwealth) courts, complemented by various tribunals and forums for arbitration. The High Court of Australia is the apex court of Australia, and hears matters of constitutional interpretation, as well as final appeals in both civil and criminal matters from state and federal courts. At a federal level, commercial matters are heard in the Federal Court of Australia, or in the Federal Circuit Court for less complex disputes.

The states and territories each have their own court systems that operate independently of the federal courts. These are arranged in a hierarchical structure; the Supreme Court being the superior court in all jurisdictions. State and territory courts have inherent jurisdiction to hear matters dealing with state or territory legislation, and each Supreme Court has been conferred federal jurisdiction in all matters except some specialist areas such as family or competition law. The forum in which a party chooses to commence proceedings will depend on a number of factors, in particular the jurisdiction of a court to hear the dispute, and the quantum of the claim.

Independence

Australia is a politically stable country with a strictly independent judicial system. The Australian Constitution provides for a separation of powers between the judiciary and the other arms of government, ensuring judicial officers are able to decide cases without interference from parliament or the executive government. Judicial officers are also constitutionally guaranteed tenure and remuneration to further ensure that they carry out their duties impartially.

Stability and predictability

Australian courts apply both statute and the common law of Australia, and in doing so, are bound by the rules of precedent. This provides for some degree of predictability in the outcome of disputes, as judicial officers cannot deviate from earlier established principles of superior courts.

Alternative dispute resolution

Civil procedure in Australia places a strong emphasis on the early resolution of disputes by encouraging parties to pursue alternative dispute resolution methods such as mediation or arbitration. Most jurisdictions will require parties to demonstrate that they have made genuine attempts to settle a matter prior to commencing judicial proceedings, and it is in the court's discretion to award costs on an increased basis where an unsuccessful party has unreasonably declined earlier offers to settle.

Enforcement of Foreign Judgments

Under the Foreign Judgments Act 1991 (Cth), some foreign judgments are recognised and can be enforced by Australian courts if an application to do so is brought within six years after the judgment. The subordinate regulations to the Foreign Judgments Act 1991 (Cth) list specific foreign courts from which judgments can be recognised, which notably does not include the United States of America. Where neither the Foreign Judgments Act 1991 (Cth) nor any international agreement applies, enforcement of foreign judgments must be done by reference to common law principles.

14.2. Arbitration

Arbitration is an effective method for resolving commercial disputes without recourse to court proceedings. It is a process through which parties mutually agree to present arguments and evidence before an independent arbitrator, who then makes a binding and enforceable determination. Arbitration can be confidential, and is seen as a flexible and efficient method of alternative dispute resolution.

Australia is signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and a popular forum for the arbitration of commercial disputes, especially given its proximity to the Asia Pacific region. International arbitration is governed at a federal level by the International Arbitration Act 1974 (Cth), while domestic commercial arbitration is governed by uniform state-based legislation. These statutory regimes are consistent with global best practices to facilitate the fair and final resolution of commercial disputes, without unnecessary delay or expense.

Arbitration in Australia is supported by independent institutions such as the Australian Centre for International Commercial Arbitration, the Australian Disputes Centre, and the Melbourne Commercial Arbitration and Mediation Centre. This network provides parties to a dispute with world-class hearing facilities, arbitrators and other resources, including arbitration rules and standard form arbitration clauses.

14.3. Class actions

Class action proceedings in Australia, formally referred to as 'representative proceedings', are cases in which named representatives bring proceedings on behalf of a larger group or 'class' of persons. This class of persons must comprise seven or more people, all with a claim against the same person, arising from similar circumstances, and based on at least one common issue of law or fact.

Class actions can be brought in the Federal Court of Australia and in most State Supreme Courts. They proceed on an 'opt-out' model, meaning all potential claimants are named as members when the claim is filed, and will have to opt-out if they do not wish to be bound by the outcome of the claim.

Class action proceedings can be costly, and are commonly funded by third party litigation funders. Funders generally operate on the basis that they will only require claimants to repay the funds where an action is wholly successful.

14.4. Regulatory investigations

Regulatory investigations into those carrying on business in Australia can lead to enforcement remedies being pursued through the courts, including by way of class action. Examples of enforcement regimes include the following.

Australian Securities & Investments Commission (ASIC)

ASIC has the power to conduct investigations into unlawful conduct by corporations, managed investment schemes, participants in the financial services industry and any other persons engaged in credit activities. Where an investigation uncovers unlawful conduct, it is within ASIC's discretion to commence civil proceedings, or to act as an intervener or amicus curiae (friend of the court) in private litigation where in the public interest to do so. ASIC may look to recover damages and property for persons who have suffered loss as a result of unlawful behaviour, as well as seeking pecuniary damages to punish and deter misconduct.

Australian Competition and Consumer Commission (ACCC)

As mentioned in Chapter 7, the ACCC has extensive powers to investigate suspected contraventions of the Competition and Consumer Act. It is also within their power to commence civil proceedings for alleged contraventions in the Federal Court, or to intervene in private proceedings that relate to the Act.

ACCC's discretion to do so is informed by their overriding purpose to promote competition and improve consumer welfare in Australia. Depending on the circumstances of the contravention, the ACCC may apply for orders for divestiture, to have transactions declared void, to impose civil pecuniary penalties, or to ban individuals from being involved in management.

Australian Prudential Regulation Authority (APRA)

As mentioned in Chapter 14, the Australian Prudential Regulation Authority regulates the financial services industry. APRA has an array of formal enforcement powers that can include commencing legal proceedings against non-compliant entities, directing an entity to take or cease particular actions, or the imposition of licence conditions for a particular entity.

APRA can apply to the Federal Court to disqualify an individual from holding a senior role in the industry.

Australian Transaction Reports and Analysis Centre (AUSTRAC)

AUSTRAC is a government agency that monitors financial transactions to identify money laundering, organised crime, tax evasion, welfare fraud and terrorism financing. AUSTRAC enforces breaches of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), which can include applying to the Federal Court for a civil penalty order against a non-complying entity.

Section 15

15. Taxation

15.1. Australia's tax system

Overview

The law relating to taxation in Australia is detailed and can be complex.

Careful consideration should be given to the nature of the business to be conducted in Australia and any taxation implications resulting from the nature of the business. The following information should not be used in substitution for detailed legal advice.

Australian tax laws are amended frequently. The Australian tax year ends on June 30 each year, however it is possible to apply for a substituted year end to coincide with the financial year of a foreign parent company.

Direct taxes

The principal direct tax is income tax, which is levied by the Federal Government. It is assessed on individuals, companies and trusts.

Partnerships are subject to pass through tax treatment. Participants in joint ventures who take a share in the product of the venture are generally taxed as separate taxpayers.

Australian residents are subject to tax in Australia on income derived from all (worldwide) sources, but tax offset will typically be available where foreign tax is paid by an Australian resident taxpayer for income derived from a foreign source. Non-residents are normally taxed in Australia on income derived from Australian sources only.

The general income tax rate for companies is currently 30%, although a reduced rate is available for small businesses. The current personal tax rates for individuals are based on a sliding scale from 0% to 45% for the component of the individual's assessable income over the relevant threshold for each rate.

Most businesses are required to pay quarterly 'pay as you go' (PAYG) instalments throughout the year based on their estimated tax liability, although it is necessary to lodge an annual tax return to determine their actual income tax liability.

Income tax is calculated by deducting allowable deductions from assessable income. Allowable deductions include certain deductions for expenses incurred in carrying on business and capital allowances for depreciating assets. Deductions may also be allowed for losses for previous years.

Tax is also payable on capital gains derived from the disposal of most capital assets acquired after September 19, 1985. The net capital gains of the taxpayer (reduced by capital losses) are included in the taxpayer's total assessable income in the same way as other items of assessable income. A net capital loss may be carried forward and offset against future capital gains.

Dividends paid by Australian resident companies may be franked (wholly or partly) with imputation credits that reflect the tax paid by the company on the profits distributed to members.

There are special rules that ensure uniformity of franking on distributions during a franking period. Non-resident shareholders are not eligible for credits or rebates on franked distributions. Dividends paid to non-resident shareholders may be subject to withholding tax if the distributions are not franked.

Indirect taxes

The principal indirect tax assessed and imposed by the Federal Government is the 10% Goods and Services Tax (GST). There are also excise duties imposed on certain commodities and customs duties on imported goods.

State taxes

State taxes comprise mainly of payroll tax (levied on the gross payroll of a business), land tax (levied on the unimproved value of land) and stamp duties (levied on certain transactions and documents).

Local taxes

Local taxes usually comprise of rates, which are generally levied by reference to the value of land.

15.2. Common tax issues for foreign investors

Australian Business Numbers

If you carry on an enterprise in Australia, you will need to apply for an Australian Business Number (ABN). If you don't have an ABN and you are required to, then Australian businesses may need to withhold 49% of any amounts payable to you, subject to certain conditions and exemptions.

Fringe benefits tax

Fringe benefits tax is a tax payable by employers on the value of certain benefits that have been provided to their employees or to associates of their employees. It typically applies to 'in kind' benefits and is payable at the top personal tax rate based on the taxable value of the benefit.

Superannuation contributions

Superannuation contributions are tax deductible to the employer making the contributions, if they are made to a fund which complies with federal legislation and do not exceed a maximum threshold. Income derived by a complying fund, including the contributions it receives, is taxable at the rate of 15%.

Medicare levy

A health care levy (known as the Medicare levy) is payable by individuals at rates of up to 2% of the individual's assessable income. The government announced in its 2017/18 Federal Budget that from July 1, 2019, the Medicare levy will increase from 2% to 2.7%. Legislation is currently being developed for this measure.

High income taxpayers ($90,000 for individuals or $180,000 for families) without private patient hospital insurance are liable to pay up to an extra 1.5% surcharge in addition to the general levy.

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-staged tax payable by suppliers (similar to a value added tax), where each stage in a supply chain is potentially taxable, but with registered entities being entitled to refunds of GST incurred on their business inputs (referred to as 'input tax credits').

Importantly, GST is not applied to most exports of goods and services.

Businesses must register for GST if they make taxable supplies of more than A$75,000 per year, regardless of whether the business in Australia is conducted through an Australian company or an Australian branch.

The liability to pay GST is generally imposed on the supplier. Most registered entities are required to account for GST either monthly or quarterly.

Some supplies are classified as GST-free. These include certain supplies relating to health, aged care, education and food, as well as sales of farm land and supplies of businesses as going concerns.

Other supplies may be exempt so that no GST liability arises, but the supplier may be denied input tax credits on business inputs relating to that supply. Exempt supplies may include certain financial supplies (e.g., loan, currency and derivative transactions and share transfers), residential rents and sales of established residential premises.

Payroll tax

Each state and territory has payroll tax legislation under which an employer is liable to pay tax on the employer's payroll. 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.

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.

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 (which excludes the value of the building or capital improvements).

Superannuation guarantee levy

All employers must make superannuation contributions for the benefit of all their employees. The minimum contribution is currently 9.5% and will remain at this rate until July 1, 2021 when the levy will increase to 10%, with incremental increases of 0.5% over the following 4 years to 12% from July 1, 2025.

Death, inheritance and gift taxes

There are no specific death, inheritance or gift taxes in Australia, although each of these events can have significant tax implications.

Capital gains tax (CGT)

CGT applies to a wide range of events (such as an asset disposal) affecting most forms of property or enforceable rights.

The CGT liability is determined by subtracting the cost base of the asset from the capital proceeds for the event. Gains are generally assessed on realisation or another specified event (such as ceasing to be an Australian resident), not on an accruals basis.

The ordinary income tax rates apply to capital gains, however individuals are generally eligible for a 50% discount on CGT if they have held the asset for at least 12 months.

There are a range of concessions and deferral mechanisms for businesses and individuals.

Non-residents are generally taxed only on capital gains derived from 'taxable Australian property' such as land, indirect interests in land along with mining or prospecting rights.

Withholding tax

The general rule that non-residents are liable for Australian tax on all Australian source income is modified in relation to dividends, interest and royalties.

Payers are required to withhold tax from interest, dividends and royalties paid to non-residents. Trustees, agents or others who receive interest, dividends or royalties on behalf of a non-resident where withholding tax has not been withheld by the payer, are also required to withhold tax.

The tax rates of withholding tax vary, depending on whether a 'Double Tax Treaty' applies, among other things. The dividend, interest or royalty does not need to be actually paid to the non-resident to be subject to withholding tax. The liability can also arise where the income is re-invested, accumulated, capitalised or otherwise dealt with on behalf of the non-resident.

Certain other payments to non-residents by a resident business are subject to foreign resident withholding tax rules. For example, foreign resident capital gains withholding (FRCGW) applies when a foreign vendor disposes of 'taxable Australian property' (such as land, mining tenements or shares in a land-rich company)

at the rate of 12.5%. The FRCGW is a non-final withholding and, upon filing a tax return with the ATO, the foreign vendor may be entitled to a credit to be offset against the vendor's CGT liability on the transaction.

Thin capitalisation

Australia's thin capitalisation rules are designed to prevent entities with cross border operations from funding their operations with excessive levels of debt to procure a more favourable Australian tax result.

Tax deductions on interest payments are limited by reference to a statutory debt/equity ratio (i.e., a gearing ratio of 1.5:1 for general entities and 15:1 for financial entities) assessed on the total debt of the Australian operations.

The thin capitalisation rules do not apply in relation to a business entity where they are an Australian resident entity that is not an inward or outward investing entity, or a foreign entity that has no investments or permanent establishment in Australia. Exemptions also apply for certain categories of entities and where the level of debt deductions fall below a de minimis threshold.

Transfer pricing rules

Transfer pricing rules seek to counter international profit-shifting techniques by ensuring that related parties to international transactions determine their pricing based on arm's length methodologies.

These rules allow the Tax Commissioner to reallocate income or adjust deductions to reflect an arm's length arrangement. The rules extend to branches or divisions of the same enterprise, where non-arm's length transactions are made between an Australian permanent establishment and an overseas permanent establishment of the same enterprise.

Other international tax avoidance measures

To complement the transfer pricing and thin capitalisation rules, Australia has a series of overlapping international tax avoidance measures, which include the controlled foreign company (CFC) rules and general anti-avoidance rules (GAAR).

The CFC rules may require Australian business entities to include in their assessable income, amounts representing income or gains from foreign companies in which the Australian entity has a controlling interest (even if the income or gain is retained by the controlled foreign company (CFC) and has not been distributed). The CFC's attributable income for the purposes of the CFC rules varies depending on whether the CFC is a resident of a listed or an unlisted country and, if the CFC resides in an unlisted country, whether the nature of the CFC's activities give rise to an exemption for active business income. The seven listed countries are Canada, France, Germany, Japan, New Zealand, the United Kingdom and the United States.

A range of additional measures apply to entities that are characterised as Significant Global Entities (SGEs). Broadly, an SGE is an entity (or member of a group of entities) with annual global income of AU$1 billion or more. In addition to other international tax rules, SGEs may be subject to a Diverted Profits Tax (DPT), Multinational Anti-Avoidance Law (MAAL) and Country (CbC) reporting obligations.

Research and development

A research and development (R&D) tax incentive provides R&D tax offsets to encourage companies to engage in research and development in Australia. The incentive provides up to 43.5% refundable tax offset for eligible companies with an aggregate turnover of less than AU$20 million per annum and a 38.5% non-refundable tax offset for all other eligible entities.

If an entity's notional R&D deduction for an income year exceeds a threshold of AU$100 million, the rate of the R&D tax offset is reduced to the company tax rate for the portion that exceeds the threshold. This reduction applies for income years starting before July 1, 2024.

Tax consolidation regime

The consolidation regime allows qualifying groups of entities to be treated as a single entity for income tax purposes.

Once part of a consolidated group, intra-group transactions will be ignored for tax purposes. The consolidated group will generally be required to lodge only one income tax return and one franking account.

Section 16

16. Corrupt practices legislation

It is an offence under the Australian Criminal Code 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.

Australia's anti-bribery laws operate in a similar manner to the United States Foreign Corrupt Practices Act of 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.

16.1. 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 AU$17 million or three times the value of that benefit.

If a court cannot ascertain the value of the benefits obtained, the applicable penalty is 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 a fine of AU$1.7 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.

16.2. 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.

Section 17

17. International trade and investment agreements

17.1. 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 currently has FTAs with Singapore, Thailand, the United States of America, Chile, Korea, Japan and China.

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 increased market access in goods and services as well as investments, intellectual property, government procurement and increased competition.

17.2. Comprehensive and Progressive Trans Pacific Partnership (CPTPP)

Australia is also a party to the Comprehensive and Progressive Trans- Pacific Partnership signed on March 8, 2018 which is a regional FTA between Australia, Canada, Chile, Japan, Mexico, Peru, New Zealand, Singapore, South Korea and Vietnam, with the potential to expand membership in the future.

Goals of the CPTPP include reducing tariffs and market access measures for member countries.

The CPTPP contains many important chapters that provide for the governance of markets. These include chapters on intellectual property, State-Owned Enterprises, e-commerce, telecommunications, labour, the environment, competition law and many more. The CPTPP also contains important provisions on the protection of investments by parties in member states and has Investor-State Arbitration provisions that allow the direct enforcement of those obligations under international arbitration (parties need not wait for diplomatic action at state level).

17.3. Bilateral investment treaties

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. A BIT is directly enforceable by an investor through international arbitration.

Contracting states

Australia is a party to 21 BITs currently in force with the following states: Argentina, China, Czech Republic, Egypt, Hong Kong, Hungary, India, Indonesia, Lao People's Democratic Republic, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay and Vietnam.

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.
- Guarantee the protection and security of investments.

17.4. Other treaties

Australia New Zealand Closer Economic Relations Agreement

Most tariffs and quantitative 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.

Since 1991, both Australian and New Zealand suppliers of goods and services have had equal treatment in competition for government 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, the MOU on Business Law Coordination, and the Australia-New Zealand Convention.

Our contributors

Rachel Walker
Managing Associate
D +61 2 9931 4951
rachel.walker@dentons.com

Elise Ivory
Partner, Banking and Finance
D +61 2 9931 4810
elise.ivory@dentons.com

David Carter
Partner, Banking & Finance
D +61 2 9035 7438
david.carter@dentons.com

John Mollard
Partner, Corporate
D +61 3 9194 8354
john.mollard@dentons.com

John Dalzell
Partner, Dispute Resolution
and Litigation
D +61 2 9931 4755
john.dalzell@dentons.com

John Stragalinos
Partner, Recovery
& Restructuring
D +61 3 9194 8341
john.stragalinos@dentons.com

Robyn Chatwood
Partner, Intellectual Property
and Technology
D +61 3 9194 8330
robyn.chatwood@dentons.com

John Grimble
Partner, Real Estate
D +61 2 9931 4709
john.grimble@dentons.com

Vanessa Gore
Partner, Litigation and Dispute
Resolution
D +61 8 8233 0641
vanessa.gore@dentons.com

Anthony Walsh
Partner, Banking & Finance
D +61 2 9931 4808
anthony.walsh@dentons.com

David McIntosh
Partner, Recovery & Restructuring
D +61 2 9035 7439
david.mcintosh@dentons.com

Ruth Nocka
Partner, Employment
D +61 2 9931 4744
ruth.nocka@dentons.com

Cameron Steele
Partner, Tax
D +61 2 9931 4738
cameron.steele@dentons.com

Hamish Walton
Partner, Corporate
D +61 3 9620 2223
hamish.walton@dentons.com

Jodie Wauchope
Partner, Planning,
Environment & Government
D +61 2 9931 4778
jodie.wauchope@dentons.com

Ben Allen
Partner, Litigation
and Dispute Resolution
D +61 2 9035 7257
ben.allen@dentons.com

Donald Robertson
Partner, Competition
and Economic Regulation
D +61 2 9931 4999
donald.robertson@dentons.com

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