DENTONS

Doing Business in Australia

Grow | Protect | Operate | Finance

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About Dentons

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

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About this guide

Welcome to Dentons' guide to Doing Business in Australia. This publication provides guidance to companies considering investing in or operating in Australia.

Australia's 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 to doing 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.

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Section 1
Australia's government, laws and regulatory bodies

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 26 million and is the twelfth 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 financial markets, corporations and financial services providers. ASIC's role is to maintain, facilitate and improve the performance of the financial system and entities in it, promote confident and informed participation by investors and consumers in the financial system. ASIC regulates organisations and professionals who deal and advise in investments, superannuation, insurance, deposit taking and credit. ASIC is responsible for enforcing and administering various laws related to financial services and corporations, conducting investigations, and imposing penalties and sanctions when necessary.

Australian Transaction Reports and Analysis Centre (AUSTRAC)

AUSTRAC is the Australian Government agency responsible for preventing, detecting, deterring and disrupting criminal abuse of the financial system to protect the community from serious and organised crime. AUSTRAC enforces breaches of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and *Financial Transactions Reports Act 1988* (Cth), which can include applying to the Federal Court for a civil penalty order against a non-complying entity.

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. The ASX compliance function oversees compliance by listed entities and market participants with its listing and operating rules, promotes standards of corporate governance among Australia's listed companies, and helps to educate retail investors. The operations of the ASX are reinforced by the market supervision and regulatory role undertaken by ASIC across all trading venues and clearing and settlement facilities.

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 tax on tobacco, petroleum 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 applications for registration of patents, trademarks, designs, and plant breeder's rights and which conducts hearings and decides on disputed matters relating to granting or refusing Australian intellectual property rights. Various copyright collecting societies administer certain uses of copyright materials for their members and are authorised to collect fees for uses of the copyright materials, which they redistribute to copyright owners.

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 per cent) of Australian companies. The Takeovers Panel was established under the *Australian Securities and Investments Commission Act 2001* (Cth) and derives its enforcement powers directly from the *Corporations Act 2001* (Cth) (**Corporations Act**). The Takeovers Panel operates under ASIC and is composed of experts from various backgrounds, including legal, financial, and commercial sectors. The primary role of the Takeovers Panel is to provide a forum for resolving disputes in takeovers, aiming to provide timely and effective resolutions.

Section 2
Foreign investment in Australia

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**), and 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.

On 1 May 2024, the Treasurer announced reforms to streamline and strengthen Australia's foreign investment framework, in order to deliver a stronger, faster and more transparent approach to foreign investment. On the same day, the Treasurer released an updated Australia's Foreign Investment Policy, which aims to "focus foreign investment scrutiny on high-risk investments to protect our national interest, while streamlining low-risk investments to bring in the capital Australia needs quickly". A copy of the updated policy can be accessed **here**.

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).

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

- at least 20 per cent is held by a single foreign person, foreign corporation or foreign government, or
- at least 40 per cent 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).

2.3. Significant actions and 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).

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 per cent by one foreign person or >40 per cent aggregate interest held by two or more foreign persons) in Australian entities or businesses
- 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 per cent) 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.

Notifiable national security action

A 'notifiable national security action' includes any of the following actions by a foreign person:

- To start a national security business
- To acquire a direct interest in a national security business
- To acquire an interest in national security land
- To acquire an interest in an exploration tenement in respect of national security land

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

Thresholds

Monetary thresholds 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.

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 and acquisition.

2.4. Foreign investment in entities and businesses

Businesses and entities

The relevant monetary threshold for non-land investment is subject to certain exceptions:

- A$1.427 billion for US, New Zealand, and Chilean investors and investors from other free trade agreement countries where the investment is not in a prescribed sensitive sector, or
- for all other foreign persons, A$330 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 five per cent or more in an Australian media entity or business.

National Security Business

A foreign person acquiring a direct interest (>10 per cent) 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, among other things, it:

- Is a responsible entity for a critical infrastructure asset
- Is a direct interest holder (>10 per cent) in relation to a critical infrastructure asset
- Stores or has access to classified information
- Develops, manufactures or supplies critical goods or critical technology that are, or are intended to be, for a military use, or intelligence use

Critical infrastructure assets are defined in the Security of Critical Infrastructure Act 2018 (see further at section 2.11).

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.

Agribusiness

Foreign persons must apply for approval to acquire a direct interest (>10 per cent) in an agribusiness where the value exceeds A$71 million. This is a significant action and a notifiable action.

Investors from Chile, the US and New Zealand have a higher threshold of A$1.427 billion before being subject to notification and approval requirements.

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

Residential real estate

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

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

Foreign persons can apply to purchase established dwellings for the purposes of residential redevelopment, provided that FIRB approval is obtained. The approval may be granted with restrictions and conditions. The acquisition of second hand residential real estate for purposes other than development is generally prohibited except in limited circumstances.

Australian states impose significant surcharge purchase duty and surcharge land tax on residential land acquired and held by foreign persons and non-resident permanent residents.

Agricultural land

Generally, foreign persons 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 A$15 million. Foreign government investors require approval for all acquisitions of agricultural land, regardless of their cumulative holdings or the consideration of the proposed investment.

Critically, a foreign purchaser must be able to demonstrate that agricultural land at a value of greater than A$15m for most non-government investors has been openly and transparently marketed in Australia in accordance FIRB's published requirements so that local buyers have had an opportunity to acquire.

Vacant commercial land

Generally, and 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 A$310 million, unless the land is classified as sensitive developed commercial land in which case, the threshold is A$67 million. Investors from certain free trade agreement partners enjoy a higher monetary threshold of A$1.339 million, regardless of whether the land is sensitive. Foreign government investors require approval for all acquisitions of commercial land, regardless of whether the land is sensitive or vacant or its value.

Mining and production tenements

Under the foreign investment framework, a mining or production tenement is a type of Australian land for which acquisitions of interests generally require approval regardless of the value of the tenement. A higher monetary threshold applies for private investors from certain free trade agreement partners. However, the acquisition of an interest in a mining or production tenement that is national security land has a A$0 threshold for all foreign investors.

Exploration tenements are distinct from mining or production tenements and are treated differently under the framework. Acquisitions of interests in exploration tenements generally do not require foreign investment approval, except by foreign government investors or if the tenement is over national security land.

Foreign persons may need to notify the Treasurer and obtain approval before acquiring an interest in Australian land intended to be used for mining operations. This will generally depend on the type of land proposed to be acquired. Foreign persons must give notice of certain actions relating to Australian land (including mining or production tenements) and exploration tenements to the Registrar of the Register of Foreign Ownership of Australian Assets.

Australian land entities

Section 13 of the *Foreign Acquisitions and Takeovers Regulation 2015* prescribes the meaning of land entities as generally an entity where the interests in Australian land held by the entity exceeds 50 per cent of the value of the total assets of the entity.

Foreign persons may require approval where they acquire 10 per cent or more in a listed or unlisted Australian land entity, that is valued above the relevant monetary threshold. Where the foreign person is a foreign government investor, additional rules apply.

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.

2.11. Critical infrastructure

Australia has broad laws which regulate certain critical infrastructure assets in a wide range of sectors.

The Security of Critical Infrastructure Act 2018 (**SOCI Act**) outlines eleven critical infrastructure sectors and regulates responsible entities for, as well as entities who have a direct interest in, critical infrastructure assets.

The relevant critical infrastructure sectors and asset classes captured under the SOCI Act are:

- Communications
  - critical telecommunications assets
  - critical broadcasting assets
  - critical domain name systems
  - Data storage or processing
- Defence industry
  - critical defence industry assets
- Energy
  - critical electricity assets
  - critical gas assets
  - critical energy market operator assets
  - critical liquid fuel assets
- Financial services and markets
  - critical banking assets
  - critical superannuation assets
  - critical insurance assets
  - critical financial market infrastructure assets
- Food and grocery
  - critical food and grocery assets
- Health care and medical
  - critical hospitals

- Higher education and research
  - critical education assets
- Space technology
- Transport
  - critical ports
  - critical public transport assets
  - critical aviation assets
- Water and sewerage
  - critical water assets

Under the SOCI Act, the Critical Infrastructure Centre was established with the aim of safeguarding Australia's critical infrastructure from national security risks of sabotage, espionage, coercion or foreign involvement in Australia's critical infrastructure.

The Critical Infrastructure Centre complements the Foreign Investment Review Board (**FIRB**) through advising the FIRB on foreign investment proposals.

Determining whether a foreign person needs to notify FIRB in advance of its investment requires an assessment of the type of investor and investment, the nature of the underlying investment and the value of the proposed investment.

Australia's Treasurer can block foreign investment proposals which are contrary to Australia's national interest or national security, or the Australian Treasurer can condition approvals of acquisitions.

A foreign person proposing to acquire a direct interest over a certain threshold in a national security business or an entity that carries on a national security business, or proposing to start a national security business, is a notifiable national security action and FIRB approval must be granted before taking the action. A business is a national security business if it is publicly known, or could be known by making reasonable inquiries, that the business is, amongst other criteria, the responsible entity for, or holds a direct interest in a critical infrastructure asset under the SOCI Act.

Notification thresholds also apply to proposed acquisitions by foreign persons of businesses in other sensitive sectors, such as media, telecommunications, transport, defence/military related industries, encryption and securities technologies and communication systems, and extraction of uranium and plutonium or the operation of nuclear facilities.

Foreign persons should lodge applications with FIRB in advance of notifiable transactions.

If regulated by the SOCI Act, there may be obligations to assist the Australian Government and comply with their intervention and directions. Additionally, some entities may have additional enhanced security obligations. It is complex to assess applicability of the SOCI Act to entities and so a case-by-case analysis is needed. Some entities may be subject to multiple regulatory regimes and regulators.

*All monetary thresholds are indexed annually. The figures included in this Chapter were effective as of 1 January 2024.

Section 3
Establishing a business in Australia

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, subject to Australia's foreign investment review regime (discussed at Chapter 2). For example, a foreign government investor starting a new business in Australia requires notification to FIRB and the action cannot proceed until a notice of no objection is obtained. 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.

All directors of an Australian company must have a Director Identification Number (DIN). A DIN is a 15-digit unique identifier provided to each director of a company upon application with the Australian Business Registry Services.

A proprietary company (Pty Ltd):	A public company (Limited):
• Must have at least one but no more than 50 non-employee shareholders	• Must have at least one shareholder, with no upper limit on the number of shareholders
• Must have at least one director who ordinarily resides in Australia	• Must have at least three directors (two of whom must ordinarily reside in Australia)
• May, but does not need to have a company secretary	• Must have at least one secretary (one of whom must ordinarily reside in Australia)
• Must have a public officer for tax purposes	• Must have a public officer for tax purposes
• Must have a registered office in Australia	• Must have a registered office in Australia
	• Must appoint an auditor
	• Must prepare annual financial reports (in certain circumstances, audited)
	• May raise capital to offer shares and other securities to the public

Joint ventures

Two or more individuals or corporations may carry on business as a joint venture. Joint ventures may be incorporated or unincorporated. The rights of the parties involved in a joint venture are governed by a joint venture agreement, a unitholders' agreement (if the joint venture vehicle is a trust), or a shareholders' agreement (if the joint venture vehicle is a company). Joint venture arrangements are common in the context of mining companies, in particular junior miners.

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. The rights and obligations of the partners are generally set out in a written partnership agreement. Partnerships are not a separate legal entity; the partners are jointly and individually liable for the debts of the partnership. Business partnerships of more than 20 persons are prohibited, except for certain professional partnerships.

Sole proprietors

A foreign investor may choose to carry on business in Australia as a sole proprietor trading under its own name, or under another business name. A sole proprietor is personally liable for all debts incurred by it in carrying on its business.

Trusts

A trust is a relationship where one person (the 'trustee') holds the legal title to investments or carries on the business 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' to operate the scheme, 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 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

An Australian branch of a foreign company is not a separate legal entity. The foreign company will be liable for all debts and obligations of the Australian branch.

As a registered foreign company, the Australian branch of a foreign company must appoint have a local agent. The local agent of a registered foreign company is responsible for any obligations the company must meet and may be liable for any breaches or penalties. The requirement to have a DIN also applies to a director of a body corporate that is a registered 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 to be registered, its name must not be identical or similar to another name already registered with ASIC. There are also certain words that are not allowed to be included in a company's name (e.g. the words 'Ambulance', 'Interpol' and 'Trust').

An applicant can reserve a company name for two months (with extensions of further two month periods at the discretion of ASIC) by having an application lodged with ASIC, even if the applicant is not yet ready to register the company.

Dentons can conduct name availability searches through ASIC and intellectual property searches to check if the preferred company name to be registered is available or might infringe someone else's rights.

Registering a particular company or business name may not stop another person from registering a similar name. It also does not give the registrant the exclusive right to use the name or part of the name or stop another person who has that name as a trademark from using it. The obligation to register a company or business name is separate to protecting any intellectual property rights in a name or brand, such as registering a trademark.

Business names

A business name must be registered with ASIC when:

- A company wishes to trade or carry on business under a name which is different from its company name
- An individual wants to carry on business under a name other than their own name
- 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 under which you want to trade for your business is 'Daniel Lee & Co', you will need to register the business name 'Daniel Lee & Co' with ASIC.

Registration of a business name does not, however, create a separate legal entity. Each registrant of a business name must have an Australian Business Number (ABN) or be in the process of applying for one with the Australian Business Register.

Mere registration of a business or company name (or a domain name, as discussed below in "Intellectual Property") does not of itself provide any intellectual property rights in the name; only a trade mark of that business, company or domain name gives that kind of protection. Registering a business name does not mean the same name will be available as a domain name or a trademark.

Dentons can conduct a business name availability search through ASIC and conduct the intellectual property searches to see if the preferred business name to be registered is available or if it might infringe someone else's rights.

3.3. Expansion into Australia via distributors, agents, licensees or local operations

A common method to expand into Australia is to use distributors, agents, commercial partners or licensees.

Australia has strict laws that regulate certain types of distribution, commercial agency and other trademark licensing arrangements (including franchise structures).

If the commercial arrangements with the distributor, agent or licensee in substance meets the very broad criteria for being a "franchise agreement", then regardless of the name of the agreement, it will be regulated as such under the Franchising Code of Conduct (Code). Many forms of trademark licences, distribution agreements, services agreements, collaboration agreements, commercial agency agreements and other types of commercial arrangements fall within the definition of a franchise agreement and it is often a very technical assessment and so legal guidance should be sought before any agreement is made or local operations commence.

Severe penalties apply for non-compliance with the Code (including pre-contract obligations).

Section 4
Laws and regulations governing corporations

4. Laws and regulations governing corporations

4.1. 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.

The 8 Principles
• Lay solid foundations for management and oversight
• Structure the board to be effective and add value
• Instil a culture of acting lawfully, ethically and responsibly
• Safeguard the integrity of corporate reports
• Make timely and balanced disclosure
• Respect the rights of security holders
• Recognise and manage risk
• Remunerate fairly and responsibly

The ASX Corporate Governance Council has proposed a fifth edition of the Corporate Governance Principles and Recommendations (**Fifth edition**). The Fifth edition is expected to be published in early 2025 and ready for adoption in the financial year starting 1 July 2025. Key themes regarding the proposed changes in the Fifth edition include greater stakeholder engagement, disclosure of processes and targets related to corporate and financial reporting, and board diversity.

Listed entities are increasingly focused on governance of Environmental, Social and Governance (**ESG**) risks and are voluntarily reporting against international sustainability reporting frameworks, such as the Task Force on Climate-related Financial Disclosures recommendations. In early 2024, the Treasury released the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Bill 2024* (**Financial Climate Reporting Bill**). The Financial Climate Reporting Bill introduces a proposed new climate-related financial disclosure regime which includes mandatory climate-related risks and opportunities disclosure requirements. Reporting obligations under the proposed regime will be phased in three groups, over a four-year period based on revenue, assets, number of employees and whether the entity has existing reporting obligations. The first phase for eligible large entities is planned to begin from 1 January 2025. Further details are at section 5.1.

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)
- 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.
- To ensure that the entity conducts a proper review of its finances and reports these to the regulators.

4.2. 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 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. If two of the following are satisfied, the proprietary company is a large proprietary company:

- Consolidated revenue for the financial year is ≥A$50 million
- Value of the consolidated gross controlled assets at the end of the financial year is ≥A$25 million
- The company and any entities it controls have more than 100 employees

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

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. Once an ASX listed entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately disclose that information to the ASX.

However, in accordance with the ASX Listing Rules, the continuous disclosure obligations mentioned above do not apply if:

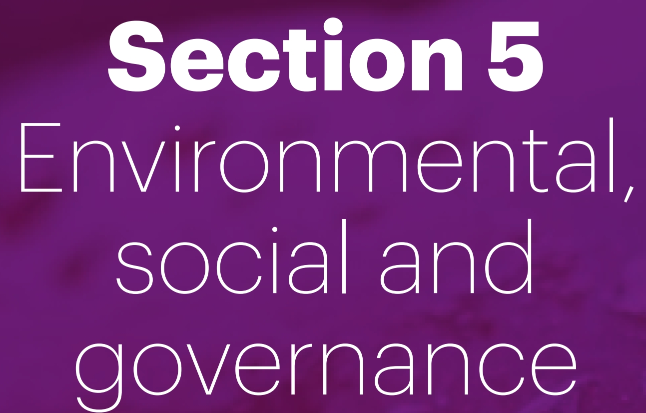
- One or more of the following situations applies
- It would be a breach of law to disclose the information
- The information concerns an incomplete proposal or negotiation
- The information comprises matters of supposition or is insufficiently definite to warrant disclosure
- The information is generated for the internal management purposes of the entity
- The information is a trade secret
- The information is confidential and the ASX has not formed the view that the information has ceased to be confidential
- A reasonable person would not expect the information to be disclosed

Other governance issues

Australia has strict laws and policies that prohibit insider trading in listed and unlisted securities and financial products. The ASX requires that a listed entity must have a securities trading policy in place which complies with the requirements set out in the ASX Listing Rules. The trading policy must include information on trading windows during which key management personnel (which would include and is not limited to all the directors of an entity and its senior executive) are generally prohibited from trading in its securities. Key management personnel is defined as persons who have the authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity. 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 for certain debts which are incurred if they are a director at the time when the company incurs the debt, the company is insolvent at that time, or becomes insolvent by incurring that debt, and at that time there are reasonable grounds for suspecting that the company is insolvent or would become insolvent.

The Corporations Act contains safe harbour provisions which provide directors with a form of defence to insolvent trading if at a particular time after a person starts to suspect a company may become or be insolvent, they start developing one or more courses of action that are reasonably likely to lead to a better outcome for the company, and the debt is incurred directly or indirectly in connection with that course of action and during a specified time period.



Section 5
Environmental, social and governance

5. Environmental, social and governance

In recent years, there has been increased social, economic, and political pressure for more accountability, regulatory scrutiny and disclosure requirements on companies operating in Australia who face a rapidly evolving reporting and regulatory landscape that differs across jurisdictions and industries. Businesses are increasingly embracing responsible commercial practices with a focus on environmental, social and governance (ESG) issues for a sustainable future. There is an expectation on directors to be equipped to understand and oversee ESG issues, report on and respond to relevant ESG related risks.

5.1. Environmental

Companies and their shareholders and customers are increasingly concerned about the financial and reputational risks posed by poor environmental and sustainability practices. Environmental considerations include greenwashing, depletion of natural resources, pollution, waste, land contamination, loss of biodiversity, energy use, sustainable resourcing, recycling, and business' contribution to climate change via greenhouse gas emissions.

Australia has legislated at the federal level to achieve net zero emissions by 2050 under the National Greenhouse and Energy Reporting Act which also established the National Greenhouse and Energy Reporting Scheme. Under the Scheme, companies in Australia who emit the most greenhouse-gas emissions (currently 251 companies) must reduce their emissions every year until net zero is achieved in 2050. Companies may offset their greenhouse gas emissions to meet their emissions reduction targets through purchasing carbon credits on a tradeable market. Eligible companies must register with the Scheme and report annually to the Clean Energy Regulator about their compliance with emissions reduction targets. They must also publish their greenhouse gas emissions in their annual reports.

Greenwashing describes the practice by a company to convey a false impression or present misleading information about how environmentally friendly, sustainable or ethical a company is, or that the company is making a greater positive environmental impact than it actually is. In Australia, greenwashing may amount to misleading and deceptive conduct which attracts civil liability and, in some cases, criminal liability. ASIC has announced that it will focus on prosecuting greenwashing and the enforcement of disclosure obligations relating to sustainability and governance by listed companies, managed funds, superannuation funds and green bonds.

There is a growing trend of listed companies in Australia voluntarily making sustainability and climate-related disclosures against international sustainability frameworks, and ASIC encourages listed companies to use the Task Force on Climate-related Financial Disclosures (**TCFD**) recommendations as the primary framework for voluntary climate-related disclosures.

In addition to imposing mandatory reporting requirements on the top greenhouse gas emitters, the federal government has proposed changes to company reporting requirements and directors' duties under the *Corporations Act 2001*. If passed into law, the proposed changes would mandate that all companies disclose climate-related risks to their operations, starting with large companies in a phased approach. Companies would be obliged to disclose information about climate-related financial risks and opportunities, any climate-related targets (if applicable) and the strategies and policies of the company in mitigating risks and meeting targets. Further, proposed mandatory reporting requirements under the Financial Climate Reporting Bill (to be disclosed in the entity's annual sustainability report) includes a climate statement on the entity's governance, strategy, risk management, metrics and targets, any notes to the climate statement, additional statements required by any prescribed legislative instrument concerning environmental sustainability matters and a directors' declaration (about the climate statement and any corresponding notes).

5.2. Social

Social factors can include modern slavery, human rights, labour standards across the supply chain, pay equity and adherence to workplace and industry health and safety standards. Companies usually have diversity and inclusion policies and should be mindful of public perception of their business engagement and impact on the community.

Mandatory reporting obligations required under the *Modern Slavery Act 2018* (Cth) has resulted in increased compliance obligations for organisations and a need for directors to be aware of statements made by the company.

5.3. Governance

Governance (discussed at Chapter 4 above) refers to themes surrounding corporate governance and behaviour, including ethics, corruption, transparency, response to sanctions, political contributions, anti-competitive practices, human rights abuses, and corporate sustainability.

Corporate governance practices of listed companies are guided by the fourth edition of the ASX Corporate Governance Council's Principles and Recommendations. As discussed in Chapter 4, the proposed Fifth edition is expected to be released in early 2025 and ready for adoption in the financial year starting 1 July 2025. Listed entities should be aware of additional disclosure obligations expected under the Fifth edition.

Section 6
Equity fundraising

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.

Australia has a crowd funding regime permitting eligible Australian registered proprietary and unlisted public companies with less than A$25 million in assets and annual turnover, meeting certain conditions and with the assistance of a licensed intermediary who is required to hold an AFSL with an authorisation to provide a crowd funding service, to raise up to A$5 million in any 12 month period and where a reduced level of disclosure applies. Retail investors have an investment cap of A$10,000 per company in any 12-month period.

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 A$250,000 for the last two financial years, net assets of at least A$2.5 million or are paying at least A$500,000 for the financial products.
- Professional investors, which includes a person who:
    - Holds an Australian Financial Services Licence authorising them to advise on financial products.
    - Controls at least A$10 million (including any amount held by an associate or under a trust that the person manages).
    - Is a listed entity, or a related body corporate of a listed entity.
- Investors where a maximum of 20 such offers are accepted in any 12-month period and a maximum of A$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.
- Employees under certain employee share plans. Employee share plans may fall within the scope of Division 1A of Part 7.12 which took effect on 1 October 2022 and replaced the ASIC class orders in relation to employee share schemes for listed and unlisted bodies.
- Certain offers by ASX listed companies where the conditions entitling an issue without full prospectus type disclosure are met.

Even where one of these exceptions applies, the issuer still has obligations with which it must comply, including that any documents or other information provided must not be misleading or deceptive or contain false statements.

The tests for determining whether an investor qualifies under an excluded offer as a sophisticated investor or a professional investor is currently under review by the Treasury. Potential changes to the tests include increasing the current test thresholds which would restrict access to riskier investments by investors.

Requirements

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 usually involves substantial due diligence to be undertaken in accordance with accepted market methodology. The ASX Listing Rules provide guidance on continuous disclosure obligations, including guidance in relation to the expectation of when to engage regulators and publish market announcements following a data breach.

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 per cent of its capital in any 12 month period without shareholder approval, and in some cases a further 10 per cent during any 12 month period where the company's shareholders have granted pre-approval to that process in an annual general meeting.

Notably, following recent high profile cyber breaches in Australia, ASX Guidance Note 8 has been updated to include cyber incident disclosure examples and continuous disclosure requirements.

Section 7
Mergers and acquisitions

7. Mergers and acquisitions

7.1. Regulations

- 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 and schemes of arrangement

Control of a public company in Australia may be acquired by way of a takeover or a scheme of arrangement.

Takeover bids

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 per cent. 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

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 and ASIC reviewed statutory process whereby a target company proposes a scheme to its shareholders. It involves the bidder and the target company entering into a formal 'scheme of implementation agreement' which sets out the terms of the schemes and commits parties to the transaction. The scheme implementation agreement typically obliges the target company to ensure that its directors recommend to its shareholders to vote in favour of the scheme unless the target company receives a superior proposal. Generally, the scheme is first publicly announced when the scheme implementation agreement is executed.

The process is therefore more generally target driven (as to being bidder driven in a takeover) and includes preparing a disclosure document known as a 'scheme booklet' to the target company's shareholders. The scheme booklet generally contains all the information available to the target company and the bidder and also contains a report from an independent expert as to the value of the target company's shares and the expert's opinion as to whether the scheme is in the 'best interest' of the shareholders.

A shareholder resolution must be passed at a meeting by at least 75 per cent of the votes cast on the resolution (by value) and more than 50 per cent of each class of the target's shareholders present and voting (by headcount).

Whilst the overall timeline to complete a scheme of arrangement is not prescribed by law, there are several time-related legal requirements and the process from the bidder approaching the target through to implementation may take up to or greater than four months (subject to the extent of due diligence on the target company).

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
Managed investment schemes

8. Managed investment schemes

8.1. Managed investment schemes

A managed investment scheme is an investment structure which allows individuals or companies to pool funds for a common purpose to make a profit. Generally, only investment structures which are 'collective' and 'managed' are managed investment schemes. They are governed by the Corporations Act and have three particular features:

- Investors contribute money or money's worth as consideration to acquire rights (interests) to benefits that are produced by the scheme.
- All contributions from investors are pooled or used for a common purpose to further produce benefits. Benefits may be financial or consist of rights or interests in property.
- The members of the scheme (investors) are not active in controlling the scheme's day-to-day operations.

Most managed investment schemes established in Australia are established in the form of a unit trust to provide for tax flow-through for investors . However, a managed investment scheme can also take other forms such as a bare trust, discretionary trust, syndicate or other contractual arrangement. There are certain things which are excluded from being a managed investment scheme, such as a franchise, a regulated superannuation fund, a body corporate and the issue of debentures and convertible notes by a body corporate. Accordingly, a share, debenture or convertible note in a company can never be an interest in a managed investment scheme and neither can a limited partnership interest in an early stage venture limited partnership or a venture capital limited partnership (as these entities are required to be incorporated partnerships under the *Venture Capital Act 2002* Cth which is a body corporate).

A managed investment scheme can be registered or unregistered. 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, except where interests in the scheme are only available only to wholesale investors, the scheme must be registered with ASIC.

As at 30 June 2023, there were 3,605 registered managed investment schemes in Australia.

Registered schemes are governed under Chapter 5C of the Corporations Act and have additional compliance, governance, product governance and disclosure responsibilities. Registered schemes are identified by an Australian Registered Scheme Number (ARSN). They must have a compliant constitution, appoint a 'responsible entity' (a regulated trustee), which must be a public company, hold an Australian Financial Services Licence (AFSL) with the appropriate authorisations to act as a responsible entity and operate the managed investment scheme. The responsible entity must meet a minimum net asset (i.e. capital) requirements and/or appoint a custodian to hold scheme assets. The responsible entity must also create and lodge a compliance plan with ASIC to ensure compliance with the scheme constitution and the Corporations Act and lodge audited accounts. If the board of the responsible entity does not have a majority of independent, external directors, then the responsible entity board must appoint a compliance committee with a majority of external members.

Any disclosure document issued by a responsible entity for a registered managed investment scheme must be notified to ASIC and the responsible entity must also create a target market determination identifying the target retail investors for the scheme. Periodic and annual reporting must be made to investors in accordance with the Corporations Act, in addition to meeting continuous disclosure reporting obligations. A registered managed investment scheme is an entity eligible to be listed on the Australian Securities Exchange.

An unregistered managed scheme is not subject to the same compliance, disclosure and governance regulatory requirements as a registered scheme (since an unregistered scheme is not regulated under Chapter 5C of the Corporations Act and need not meet the product governance obligations under the design and distribution obligations in the Corporations Act). However, a trustee of an unregistered scheme is generally required to be appropriately authorised under an AFSL, subject to any relevant exemptions. Further, a trustee of an unregistered scheme may be subject to certain compliance requirements as a

result of being licensed, such as the requirement to have a compliance management system (ASIC Regulatory Guide 132) and meet financial requirements if providing incidental custody (ASIC Regulatory Guide 166).

8.2. Corporate Collective Investment Vehicles

The CCIV regime was introduced in July 2022. The objective of the regime was to create a new type of Australian investment vehicle in the form of a company with fund characteristics, including sub-funds. It was created with the intention of being a form of collective investment vehicle in Australia which would be similar to other corporate funds vehicles in other jurisdictions such as Luxembourg (SICAV), the United Kingdom (ICVC) and Singapore (VCC). The CCIV is also a vehicle that may be 'passported' under the Asia Region Funds Passport to participating Asian economies.

The CCIV must be operated or directed by a corporate director which must be a public company. The corporate director must be appropriately licensed with an AFSL to operate a CCIV. A CCIV may operate as a retail CCIV or a wholesale CCIV. A retail CCIV with a single sub-fund or a single sub-fund of a CCIV is able to be listed on the Australian Securities Exchange.

One of the key features of a CCIV is that the assets and liabilities of a CCIV are allocated to distinct sub-funds of the CCIV. Each sub-fund of a CCIV is registered separately with ASIC, and the clear identification and segregation of the assets and liabilities ensures the business of each sub-fund is protected from the business of other sub-funds, including in an insolvency context.

There are other structural, regulatory, compliance and governance requirements applicable to CCIVs, some of which are similar and some of which are different to the managed investment scheme regime. For example, wholesale CCIVs are subject to greater regulation and regulator oversight than unregistered managed investment schemes because they must be registered with ASIC. In particular, the corporate director of a wholesale CCIV must be a public company (rather than a proprietary company) and a wholesale CCIV constitution must be lodged with ASIC (although it is not publicly available). Further, a responsible entity of a registered scheme must seek a variation of its AFSL to be able to act as a corporate director of a CCIV.

It appears to be due to these differences and the fact that there is there is no transitional regime for existing funds to convert to a CCIV including in relation to tax (rollover relief) and regulatory (to facilitate amendments to existing fund constitutions), that the take-up of CCIVs in Australia by responsible entities and Australian fund managers since commencement of the regime in July 2022 has been limited. It is expected that the CCIV regime may be more attractive to foreign fund managers establishing operations in Australia who will be more familiar with the corporate funds' vehicle with sub-funds structure and who will not be restricted by existing license and fund arrangements.

8.3. Regulatory developments

During 2023, the Australian Government conducted a review and consultation process (**MIS Review**) to review the efficacy of the regulations for managed investment schemes in Australia and the determinative tests for wholesale investors under the Corporations Act.

The MIS Review consisted of 24 groups of questions interrogating the following key regulatory aspects of the operation and governance of registered managed investment schemes in Australia, including:

1. 'Wholesale' investor thresholds: Whether the current wealth test thresholds that determine whether an investor is a 'retail' or 'wholesale' client remain appropriate.
2. Suitability of scheme investments: Whether certain managed investment schemes should be marketed and sold to 'retail' investors.
3. Scheme governance and the role of the responsible entity: Whether the governance, compliance and risk management frameworks for managed investment schemes under Chapter 5C of the Corporations Act are appropriate.
4. Right to replace the responsible entity: Whether 'investor rights' for people who invest in managed investment schemes are appropriate.
5. Right to withdraw from a scheme: Liquidity requirements for managed investment schemes.
6. Winding up insolvent schemes: Whether an insolvency regime is required for managed investment schemes.
7. Commonwealth and state regulation of real property investments: The interaction between Commonwealth and State laws when regulating real estate investments by managed investment schemes including issues relating to the failed SIT and Sterling Group.

It is expected that draft revised legislation addressing each of these issues will be issued later in 2024 for review and further consultation. Based on the submissions provided, it is expected (amongst other things) the wealth tests for determining wholesale investors will be increased and a new legislative regime for the insolvency of managed investment schemes may be introduced.

Section 9
Competition and consumer law

9. Competition and consumer law

9.1. Competition laws

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

Australia's competition laws are contained in the 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 a market 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. Both civil penalties and criminal penalties (including substantial fines and, for individuals, imprisonment) apply to both corporations and individuals involved in cartel conduct. There are limited exceptions for cartel conduct, most importantly, the joint venture exception (but this is tightly defined).
- **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:** Vertical arrangements which have the purpose or likely effect of substantially lessening competition in a market in Australia such as forcing (supplying goods or services on the condition that other goods or services are acquired from the supplier – or from an unrelated third party – third line forcing) and other forms of 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 a market in Australia.

A key concept in the application of most competition laws in Australia is that of a 'market'. A 'market' is a mixed legal and economic concept. It does not, necessarily mean a 'product market' in ordinary business terminology. In the CCA it is referred to as a 'relevant' market and takes into account both actual competitive products and services and likely substitutes for those products (including likely entry) should an entity seek to raise or maintain prices or otherwise exercise market power. It is a wholly-future-looking concept.

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 be held to be themselves 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 a market in Australia.

The current practice currently is to informally approach the ACCC 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 per cent 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 because 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 sought, there are three processes currently available in Australia:

- An 'informal' (that is, not mandated or 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.
- A formal merger clearance process (authorisation), under which the ACCC reviews mergers to determine whether they are likely to substantially lessen competition. Authorisation requires the party seeking authorisation to prove that 'public benefits' outweigh any anti-competitive detriment.
- 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.
- There is currently no legal requirement to notify the ACCC of any merger in Australia. A mandatory notification of mergers regime is planned to commence on 1 January 2026. The compulsory notification regime will operate on 'typical' business metrics. The details of the new regime are still to be announced but will shift power substantially to the ACCC, limiting the power of any review and the role of the courts.

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.

Access to facilities of national significance (or essential facilities)

The CCA contains a process under which facilities of national significance may be declared and subject to a regulatory regime. To be subject to an access regime requires showing that competition in a market is substantially increased. That other market is one other than the market in which a supplier of services itself operate in, that is, one upstream or downstream of that provider) is substantially increased. Once declared under the CCA, access to the declared facilities must be provided on terms agreed between the access provider and access seeker. In the absence of such an agreement, access terms may be determined by arbitration.

The general provisions of the CCA in relation to market power might independently provide a cause of action in respect of conduct of a corporation that holds market power.

9.2. 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. Penalties under the ACL are significant, and in November 2022 the maximum penalties for breaches of certain provisions increased five-fold.

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.

Australia has broad laws under the ACL which prohibit the inclusion of unfair contract terms (**UCT**s) in standard form contracts with consumers or small businesses. UCTs in such contracts are unenforceable and significant penalties apply.

The maximum financial penalties for businesses under the new unfair contract terms law are the greatest of:

- A$50 million;
- three times the value of the "reasonably attributable" benefit obtained from the conduct, if the court can determine this; or
- if a court cannot determine the benefit, 30 per cent of adjusted turnover during the breach period.

The maximum penalty for an individual is A$2.5 million.

These laws apply to standard form contracts made or renewed on or after 9 November 2023 or terms varied or added on or after that date.

The definition of small business, for the purpose of deciding if the laws apply to a standard form contract with a small business, is a business with fewer than 100 employees or with an annual turnover of less than A$10 million.

Consumer guarantees

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

Express warranties

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

Product safety

The ACL also contains extensive provisions concerning the safety of consumer goods and product-related services supplied in Australia. These provisions include requirements regarding the issue of product safety warning notices, product bans, and the imposition of mandatory safety standards for particular goods.

The Commonwealth Minister has the power to order a compulsory recall if they consider that the suppliers have not taken satisfactory recall action.

The ACL also imposes mandatory reporting requirements where a consumer product has caused, or may cause, death, serious injury, or illness to any person. This includes even where the cause was due to a "foreseeable misuse" of the product. Within two days of becoming aware of any such incident, a supplier is required to make a mandatory report to the Commonwealth Minister.

The ACCC commonly works with other domestic and international regulators and government agencies in relation to particular issues.

Section 10
Employment and immigration

10. Employment and immigration

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
- Requests to convert from casual to permanent employment
- 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, Casual Work Information Statement and Fixed Term Contract Information Statement

Modern awards

Modern awards are industrial instruments 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 and driving growth and innovation in sectors of national importance.

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 on employing workers in Australia.

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.

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

Skill Shortage Visas

The Temporary Skill Shortage Visa (SC 482) (**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 in a Labour Agreement, which will, in turn, determine the relevant stream for the TSS.

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.

The TSS visa allows an employee to stay between two to four years, depending on the stream. Minimum salary requirements apply, which must be at least the prevailing Temporary Skilled Migration Income Threshold (**TSMIT**), currently A$70,000, excluding superannuation, or the annual market salary rate, whichever is higher. Employees must meet various qualification and experience requirements in addition to language, health and character requirements.

As at the date of publication, the Government has foreshadowed replacing the TSS visa with a Skills in Demand visa, which will have three streams: Specialist Skills Pathway, Core Skills Pathway and Essential Skills Pathway.

The key features foreshadowed for each stream are:

Specialist Skills Pathway	Core Skills Pathway	Essential Skills Pathway
• Any occupation except trades workers, machinery operators and drivers, and labourers. • Earnings must be at least A$135,000, but must also be no less than Australian workers in the same occupation.	• The occupation will need to be either on a new Core Skills Occupation List, which will include occupations identified as being in shortage, or where there is an international trade agreement in relation to the occupation. • Earnings must be at least the TSMIT (to be retitled the Core Skills Threshold) or the relevant average market salary, whichever is higher.	• A more regulated pathway for lower paid workers with essential skills, similar to the current Labour Agreements stream of the TSS. • This pathway will be sector specific and capped.

It is expected that the Skills in Demand visa will be implemented towards the end of 2024.

Temporary Work (Short Stay Specialist) Visa – Subclass 400

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

Occupations usually include 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, where this specific knowledge would not be readily available in the Australian workforce.

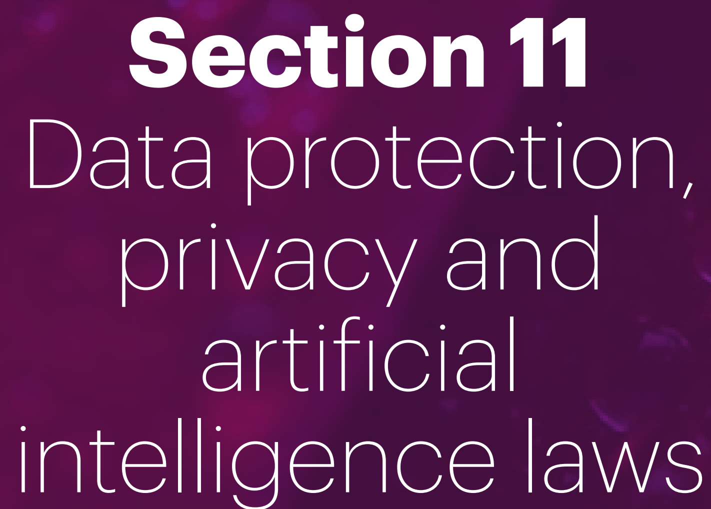
This visa is usually granted for three months, with a strong business case required for longer periods up to six months. The worker's engagement must not be ongoing. This means that the work is likely to be completed within a continuous period of six months or less and that no arrangements are made to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

National Innovation visaThe Government has foreshadowed introducing a new visa, to be called the National Innovation visa, to provide a pathway for highly skilled and high performing entrepreneurs, major investors and global researchers to establish and develop businesses and investments in Australia.

This visa is aimed to drive growth, innovative investments and entrepreneurship in sectors of national importance. It is expected that the new National Innovation visa will be introduced in late 2024, replacing the current Global Talent visa (subclass 858).

Business Innovation and Investment Visa

As part of its Migration Strategy, the government has ceased the Business Innovation and Investment visa program. The National Innovation visa is intended to provide a more targeted approach to meet what were previously the objectives of the Business Innovation and Investment visa program.



Section 11
Data protection, privacy and artificial intelligence laws

11. Data protection, privacy and artificial intelligence laws

11.1. 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. The Privacy Act is set to be significantly reformed in 2024-2025.

For some states and territories, 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.

The federal government have publicly stated that they intend to reform Australia's privacy and cyber security laws and the regime regulating artificial intelligence and announced their intention to implement new laws in the next year or so for mandatory ransomware payment reporting, reviewing data retention requirements in legislation and making further changes to the federal Privacy Act and the federal Security of Critical Infrastructure Act.

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, whether or not that information or opinion is true or not or is recorded in a material form or not.

"**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 or biometric templates.

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) (**APP**s) which must be followed by entities who are collecting, using, disclosing, handling, dealing with or processing personal information.

The Privacy Act does not currently differentiate between processors (being entities that ultimately control personal information) and processors (those that handle personal information on behalf of a controller). It is expected that the reforms to be enacted by the Australian Government in 2024 will introduce controller and processor concepts.

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. Entities covered by the Privacy Act must have a clearly expressed and update to date privacy policy freely available to the individuals whose information it collects or processes. 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.

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

Cross border transfers

Although there are some exceptions, when transferring personal information from Australia to a recipient in 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 related to an employment relationship between the employer and the individual or an employee record held by the organisation relating to the individual. This exemption is expected to be significantly amended by the federal government as part of their reform agenda for 2024-2025.

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.

This exemption is expected to be significantly amended by the federal government as part of their reform agenda for 2024-2025.

Data breach notification

Under the Privacy Act, if there has been unauthorised access to, or unauthorised disclosure of, personal information held by an organisation or personal information has been lost in circumstances where unauthorised access to, or unauthorised disclosure of, that personal information is likely to occur, and this would likely result in serious harm to the individual, then that organisation will have suffered an "**eligible data breach**".

Where an entity is aware of reasonable grounds to suspect that they may have suffered an eligible data breach, they must carry out a reasonable and expeditious assessment of those grounds to determine whether an eligible data breach has occurred, which must be completed within 30 days. This data breach notification regime is expected to be significantly amended by the federal government as part of their reform agenda for 2024-2025.

Subject to some exceptions, 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

The OAIC can impose penalties for a serious interference, or repeated interferences, with the privacy of an individual under the Privacy Act of up to the greater of:

a. A$50 million;

b. three times the value of the benefit derived from the interference/s with privacy, or

c. if the value of the benefit cannot be ascertained, then 30 per cent of the company's adjusted turnover.

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 and the penalties that may apply are similar to the penalties for a serious interference, or repeated interferences, with privacy.

11.2. 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. The sender of a commercial electronic 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). Voice calls are not permitted to phone numbers listed on the Do Not Call Register unless the persons have consented to receiving such calls. 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 may use an individual's personal information for the purpose of direct marketing if:

a. the business collected the personal information from the individual;

b. the individual would reasonably expect the business to use their personal information for direct marketing purposes; and

c. the business has provided a simple means to opt out of direct marketing messages and the individual has not so opted out.

Penalties

The maximum penalty for a company making unsolicited commercial electronic messages in breach of the Spam Act is A$2.75 million for each day the company contravenes the penalty regimes under the Spam Act.

The maximum penalty for a company making unsolicited telemarketing calls in breach of the Do Not Call Register Act is A$2.75 million for each day the company contravenes the penalty regimes under the Do Not Call Register Act, and the maximum penalty for contraventions of the Telemarketing Standard may be up to A$250,000 for each infringement.

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

11.3. 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 and the energy sector have been required to implement the Consumer Data Right. The non-bank lending and telecommunications sectors have been designated as the next sectors in which the Consumer Data Rights will be rolled out.

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 will be the lead regulator with support from Data 61 and the OAIC.

11.4. Industry specific data protection regulations

There are industry specific data protection laws and regulations that apply in Australia. Some examples of industries with specific regulatory obligations include:

- Critical infrastructure
- Banking and financial services
- Health services
- Telecommunications

11.5. Government interceptions laws and security of critical infrastructure

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 Act 1997* (Cth) (**Telecommunications 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 Telecommunications 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 Telecommunications 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.

See also section 2.11 regarding the regulation of the security of critical infrastructure assets. The SOCI Act also requires, amongst other obligations, entities regulated by it to cooperate with interventions by the Australian Government security agencies.

11.6. Artificial intelligence

Presently there is no specifical law regulating the use of artificial intelligence (**AI**) but instead there is a patchwork of laws regulating privacy, critical infrastructure, intellectual property, product liability, consumer protection, discrimination, workplace safety and negligence and data security.

In 2024, the federal Australian government announced an intention to implement specific laws aimed to ensure safe and responsible use of AI.

Section 12
Intellectual property

12. Intellectual property

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

12.1. Trade marks

Australia has a system for registering trade marks 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 regulated by the federal Trade Marks Act. Prior registration of a trade mark is strongly recommended for those seeking to enter the Australian market using that mark.

A registered trade mark provides its owner with the exclusive rights to use, license and assign it. The owner must actually use the trade mark in the course of trade or the trade mark risks being removed from the register on the grounds of non-use.

It takes about seven to 12 months for a trade mark to be registered from the date of application and initial registration of a trade mark lasts for 10 years. The registration can be renewed for successive periods of ten years in perpetuity assuming it continues to meet ongoing use requirements.

Only registered trade marks may use the ® symbol. By placing the ® symbol immediately next to the registered trade mark, other businesses are put on notice of that registered trade mark right.

In Australia, the common law protects the use of unregistered trade marks used to distinguish the source or origin of goods or services by allowing an action for passing off provided they meet the criteria for protection. Trade mark owners frequently take action against infringers for "passing off" - often accompanied by 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 underlying 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 these strict relationship laws before the agreement is signed (as noted above in "Expansion into Australia via distributors, agents, licensees or local operations").

12.2. 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 consent may be obtained from the author to infringe their moral rights.

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.

Various copyright collecting societies administer certain uses of copyright materials for their members and are authorised to collect fees for uses of the copyright materials, which they redistribute to copyright owners.

12.3. Patents and inventions

Inventions for new, useful and inventive products, substances, methods and processes may be registered for protection as a patent in Australia.

Australia is a signatory to the Patent Cooperation Treaty (PCT), which allows an applicant to file a single international application filing date listing Australia which then enters into the national phase to proceed towards examination for grant under Australian law.

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 federal Patents Act and must be examined by IP Australia prior to grant and before they can be enforced by the patent owner or, in some cases, by its licensee.

Patents in Australia are protected for a term of up to 20 years (with extensions of up to five years for pharmaceutical patents).

12.4. 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 federal Designs Act. A design right initially lasts for five years from the date of application for registration and the owner may choose to renew it so that it lasts for a further five years. It can only be renewed once.

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.

12.5. Domain names

The .au Domain Administration (auDA) is the administrator for the .au country code top level domain (ccTLD). Such domain names and other Australian domain names (such as the '.au' direct domain namespace e.g. domain.au) can be registered for renewable one to five year periods for eligible registrants.

To register a '.com.au', '.net.au' or '.au' domain name, the applicant must meet eligibility criteria.

Domain names are granted to eligible registrants who meet the criteria on a first come, first served basis. Where someone has registered a domain name without a legitimate business interest, the domain name may potentially be transferred to a party with a legitimate interest in the domain name following resolution of the matter under the .au Dispute Resolution Protocol (for .au domain names), or the Uniform Dispute Resolution Protocol (for most other domain names).

A domain name licence can be obtained for a licensing period of up to five years and may be renewed before the licence expiry date or the short grace period.

12.6. Plant breeder's rights

Regulated by the federal Plant Breeder's Rights Act, plant breeder's rights protect new plant varieties and their reproductive material. The owner of those rights is exclusively entitled to produce, reproduce, commercially exploit or market the new plant variety.

Only new or recently exploited varieties can be registered. If registered, the Act confers protection for up to 20 or 25 years (dependent on plant type) subject to compliance with renewal processes.

12.7. Circuit layout rights

The federal Circuit Layouts Act provides for protection of certain original layouts for integrated circuits which have the purpose of performing an electronic function integrally formed in or on a piece of material, where the criteria for protection are met. The criteria for protection include the requirement that the representation of the circuit layout must have been made by Australians or other eligible persons or first commercially exploited in Australia or in eligible foreign countries.

Protection of eligible layout rights are for between 10 and 20 years, depending on the circumstances.

12.8. Trade secrets and confidential information

Trade secrets and other confidential information are protected generally with confidentiality agreements. Australia does not have a specific legislative regime for the protection of trade secrets or confidential information (although there are various laws which protect against the disclosure of confidential information through imposing an obligation of confidence, such as workplace laws, the privacy laws and laws imposing duties on directors or officers of a company). The common law covers infringement of trade secrets and breaches of confidentiality obligations. To be protected under the common law, the information must meet certain minimum criteria.

Section 13 Property

13. Property

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

13.1. 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 and whether substantial inspection fees are payable (see 2.5)
- 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.

13.2. Transfer duty

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

- The transfer of real estate
- The transfer of shares
- The acquisition of an interest in a 'landholder' (see below)

Transfer 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. Most states and territories impose an additional surcharge for acquisitions of residential-related land by foreign persons.

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 unless an exception applies. In Queensland and South Australia each of the parties is liable. In some jurisdictions the landowning entities may also be jointly and severally 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

13.3. Goods and Services Tax (GST)

The acquisition of Australian real estate may usually be subject to a requirement that GST be paid by the seller. 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 A$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, the supplier 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 or concession applies.

Generally, the seller (as the supplier) will seek to recover any GST for which it is liable from the purchaser (as the recipient), by including the GST in the price under the contract for sale. If the purchaser (as the recipient) 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' only in relation to certain real estate transactions is available if the parties agree in writing to apply the margin scheme and certain conditions are satisfied. Under the margin scheme, GST is calculated on the seller's notional 'margin' on the sale rather than the full selling price. This seeks to ensure that GST is only payable on the uplift in value since the GST commenced on 1 July 2000 or when the real property became subject to the GST regime (e.g., if an unregistered owner chooses to register for GST or sells the property to a registered entity).

If real property is purchased as a taxable supply on which GST was calculated on the full value of the supply, the property cannot usually be resold under the margin scheme. A purchaser under the margin scheme cannot claim input tax credits on the supply even if the purchaser is registered for GST. For this reason, the margin scheme is generally confined to sales of real property that is or will be developed for sale as 'new residential premises'.

13.4. 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.

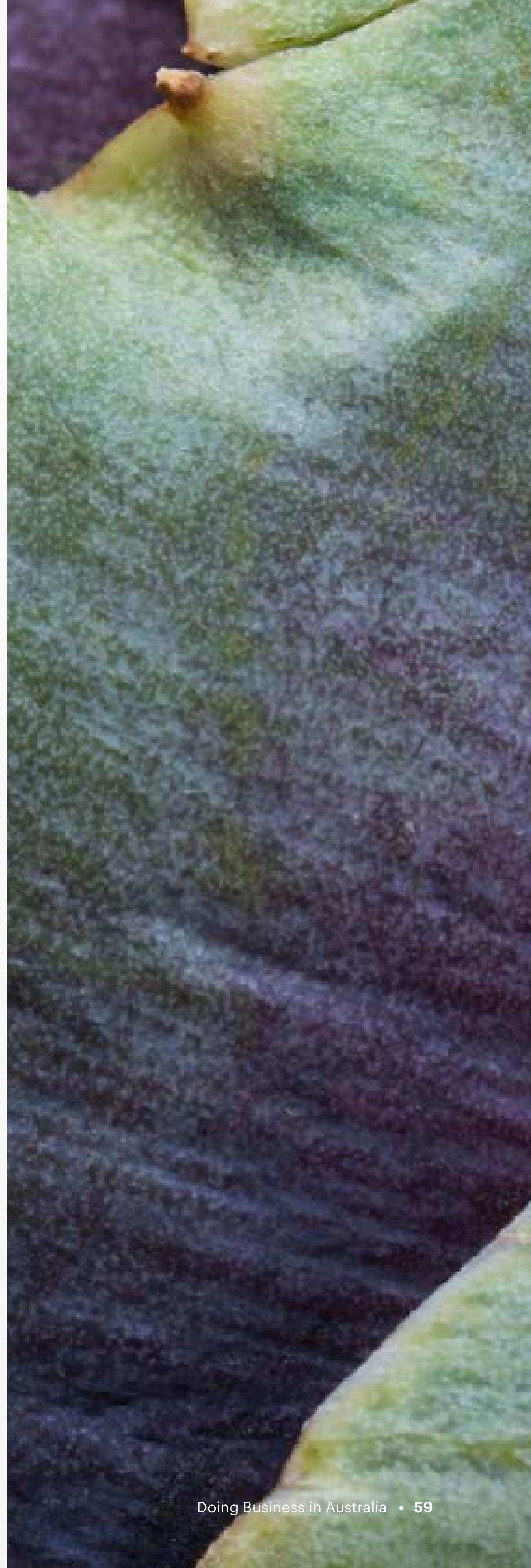
Land tax is assessed on an annual basis on the combined, unimproved value of all the taxable land you own. In general, your principal place of residence (your home) or land used for primary production (e.g. a farm) is exempt from land tax. Most states and territories impose an additional surcharge for residential-related land owned by foreign persons or absentee owners.

Surcharge land tax is also payable by foreign persons or certain non-resident permanent residents on residential land held by them. Exemptions exist for qualifying residential developers subject to conditions.

13.5. Municipal rates

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

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



Section 14
Environment

14. Environment

14.1. Regulation of environmental impact

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

These controls can be broadly described as:

- Control of land use and development impacts through approvals systems
- Pollution, waste and contamination laws through approvals and licensing
- Environmental protection laws

14.2. Development approvals

At a state level, most projects which involve development (this includes use) of land or water, including any building works or change of use, will require approval from the relevant consent authority, usually a local council but in some cases a state government. The development or project approvals process is different in each state and territory, but in most cases includes an assessment of the environmental impact of the project.

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

- Biodiversity, native vegetation, threatened or endangered species
- Ground water, hydrological systems, wetlands, stormwater run-off, water conservation
- Soil, including soil salinity and soil stability
- Items of environmental (natural or man-made) heritage significance

In addition, reports can be made on impacts arising from specific aspects of the project such as:

- Odour, dust or other air or water pollution, or noise or traffic generated by the project
- Heritage, urban design and town planning considerations (such as bulk and scale of buildings, light or view loss), and local amenity impacts of the project
- Noise or traffic generated by the project
- Site contamination

In addition, at a federal level, some projects will also require approval under federal environmental legislation if the project is likely to have a significant impact on a matter of national environmental significance. Matters of national environmental significance include federally listed threatened species and ecological communities, migratory species, Ramsar wetlands, World and National Heritage places, Commonwealth marine areas, uranium and nuclear facilities and the Great Barrier Reef Marine Park.

14.3. Pollution

Most states have laws which regulate or license the generation of pollution by setting specific limits for pollutant emissions. Approvals or licences to pollute are usually obtained through a state environmental protection authority.

Polluting activities without prior permission can be the subject of criminal sanctions. In each state and territory this includes:

- Pollution offences (for pollution of land, air or water without an approval to do so).
- Pollution clean-up requirements (which may be based on a 'polluter pays' principle, but in some cases, where the polluter is not identifiable, the landowners (this can sometimes include a mortgagee as a national owner or occupiers may be held responsible).
- Differing regimes for personal liability of directors (for pollution offences caused by a company).

In some states, the penalties for breaching pollution laws can be over A$5 million and/or imprisonment for serious offences.

14.4. Contamination

It is advisable to conduct an environmental site investigation before commencing a project or signing a lease in order to ensure that land is not contaminated, and to avoid any liability for contamination which may be found on land.

Land that is contaminated with chemicals or waste (such as petrochemicals or manufacturing process by- products) should be comprehensively investigated, monitored, and remediated.

Different requirements apply in each state and territory regarding:

- The duties of owners or occupiers to notify authorities or purchasers of contamination to land
- Positive obligations of owners, occupiers, or notional owners (such as mortgagees) to investigate contamination
- Liabilities of owners, occupiers, or notional owners for costs of remediation and/or impacts on land

14.5 Waste and chemicals

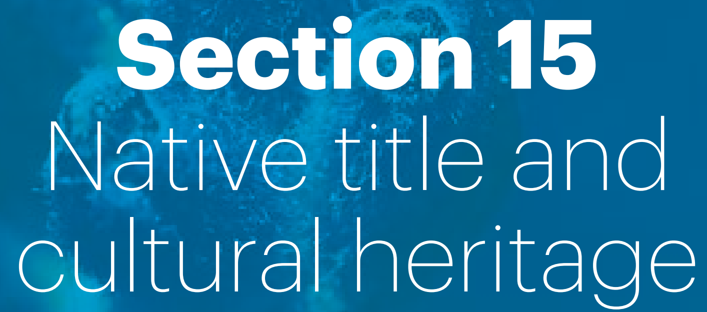
Each state and territory has its own laws to control the handling and transportation of waste, and the transportation of hazardous waste which is subject to stricter rules. At the federal level, hazardous waste cannot be exported or imported to Australia without a permit.

The federal government issues certificates and authorisations to regulate the manufacture or importation of industrial chemicals via the Australian Industrial Chemicals Introduction Scheme.

The National Waste Policy sets a national framework to achieve targets to regulate Australia's waste exports, reduce and recover waste, increase recycling and reduce the amount of organic waste and unnecessary plastic generated in Australia.

14.6. Due diligence

All projects which have the potential to impact on the environment should be the subject of thorough due diligence to ensure the correct approvals and licences, as set out above, are in place.



Section 15
Native title and cultural heritage

15. Native title and cultural heritage

15.1. Recognition of First Peoples' rights

Native title is the term given to the collection of rights held by certain Aboriginal peoples or Torres Strait Islanders (**First Nations Peoples**) to use their traditional lands and waters according to their traditional customs, laws, and beliefs.

In a series of decisions in the 1990s, the High Court of Australia determined that title to land held by the Crown, being the executive branch of the federal government, did not extinguish native title.

In *Mabo and Others v The State of Queensland (No. 2)* in 1992, the High Court of Australia rejected the doctrine of terra nullius (Latin for 'land belonging to no one') and the proposition that absolute beneficial ownership of all land vested in the Crown on the acquisition of sovereignty, in favour of common law recognition of native title.

Native title rights can co-exist with other property rights if it has not been extinguished by an incompatible occupation or use of the land. In *Wik Peoples v The State of Queensland* in 1996, the High Court held that statutory pastoral leases did not bestow a right of exclusive possession on the leaseholder. Since possession was not exclusive, those leaseholders rights could co-exist with native title (depending on the terms and nature of the particular pastoral lease).

15.2. Native Title Act

The *Native Title Act 1993* (Cth) (the **Act**) was enacted in the wake of the Mabo decision. It commenced operation on 1 January 1994. The Act and the complementary state native title legislation (together, the NTA):

- Regulate the recognition and protection of the rights and interests of First Nations Peoples in Australia's lands and waters.
- Confirm the native title validity of titles granted in particular time periods (for example, grants made before 1 January 1994).
- Set out the procedures to be followed regarding certain 'future acts'. A future act is defined in the Act and means a proposal to deal with land that affects native title rights and interests (for example issuing a mining licence).
- Confirm that a valid grant of certain interests in land and waters have the effect of extinguishing any native title rights and interests.
- Confirm that once any native title rights and interests are extinguished, they cannot be revived.
- Set out procedures under which First Nations Peoples can make a native title claim.
- Set out procedures for how native title holders may be afforded certain procedural rights, including the 'right to negotiate' and to claim compensation.
- Establish the National Native Title Tribunal (**NNTT**).

First Nations Peoples may lodge an application in the Federal Court for a determination of native title in a defined area, known as the Determination Area.

To successfully establish native title rights to land, an applicant who represents a group of First Nations Peoples (referred to as the "Claimant Group") must establish the following in order to meet the "registration test":

- Provide a sufficient description or list of the persons within the native title claim group, and certification from all members of that group.
- A reasonable identification of the area claimed using a technical description and a map.
- A description of the native title rights claimed.
- An ongoing connection to the area, and continuing holding of native title in accordance with traditional law and customs.
- Information about a traditional physical connection of one or more members of the group with the area. This includes historical physical connection i.e. occupation or use of the land, but does not require current physical connection.

The fact that a claim has been lodged does not necessarily mean that native title exists over the Determination Area. Similarly, the absence of a claim does not necessarily indicate that native title does not exist in that area. If successful, the native title claim is lodged on the National Native Title Register.

15.3. Impact of native title

Generally, a valid grant of freehold title to land and most leasehold interests will not be directly impacted by a native title claim because the NTA provides that certain acts of the government extinguish native title rights and interests by granting exclusive possession.

Mining tenements and some leasehold interests can be affected by native title claims because they are not considered to be grants of exclusive possession. The most commonly affected projects are mining projects or agricultural projects.

Native title can impact on land use and the operation of projects at multiple stages of the determination process including after the registration of a native title claim, and after the successful determination and registration of native title rights and interests.

The main ways in which native title rights and interests can impact on project operations include:

- Establishing procedures which must be followed before certain actions on or regarding land and waters can occur, known as the 'future acts' regime.
- Requiring proposed dealings with the land (such as the granting of tenure), and the future use of land to follow such procedures.
- Where mining tenements are proposed to be granted, a right for the native title party to participate in negotiations with the government and mining companies regarding the granting of the tenements.
- Creating a mechanism for Native title holders to enter into agreements with land holders and register those agreements, known as Indigenous Land Use Agreement (**ILUAs**) to govern the future use and maintenance of the land. ILUAs can include, for example, agreement on access rights, compensation and the preservation or maintenance of important cultural sites.

15.4. Indigenous cultural heritage

Indigenous cultural heritage is governed by both federal and state legislation, which protects culturally significant sites and objects (whether or not they are the subject of a native title claim).

Whilst processes vary between states, approval must be obtained from federal and/or state governments prior to disturbing a site of indigenous heritage significance. Consultation is also usually required with local indigenous representatives or land councils where development is proposed in culturally significant or heritage identified areas.

Special notification and consultation procedures apply where objects are found during earthworks or excavation. Usually works must stop if culturally significant objects are discovered to enable further investigation. Local indigenous representatives or land councils are also usually required to be notified of any such findings and are included in the further investigations.

Section 16
Banking and financial services

16. Banking and financial services

16.1. 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. ASIC is responsible for financial services licensing that applies both to banks and others offering credit and financial services, including those providers who are not banks.

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. 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 A$10,000.

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

16.2. 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

16.3. What is the ranking of security?

Australia has a system under which secured creditors (i.e., creditors who hold a security interest over assets as security for the payment of money or the performance of obligations) rank ahead of unsecured creditors.

The ranking of security is quite complex and changes if a company is placed into liquidation (i.e., being wound up as insolvent).

How is security taken?

There are three principal ways security is taken:

- By operation of law (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.

16.4. 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)

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.

16.5. 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 they have been appointed as an authorised representative of another AFSL holder, 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 (i.e., issue or trade in financial products)
- Operate a registered managed investment scheme
- Facilitate non-cash payments.

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

- A foreign company issuing securities, shares, stocks, deposits, debentures, bonds
- A foreign company facilitating or processing payments
- 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 (e.g., 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, but advice should be obtained. 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.

16.6. 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.

16.7. 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.

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 17
Insolvency and restructuring

17. Insolvency and restructuring

17.1. 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 if incurring the debt will cause the company to become insolvent.

17.2. 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.

17.3. 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 certain creditors.

To implement a scheme, creditors are usually divided into 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 debt of 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:

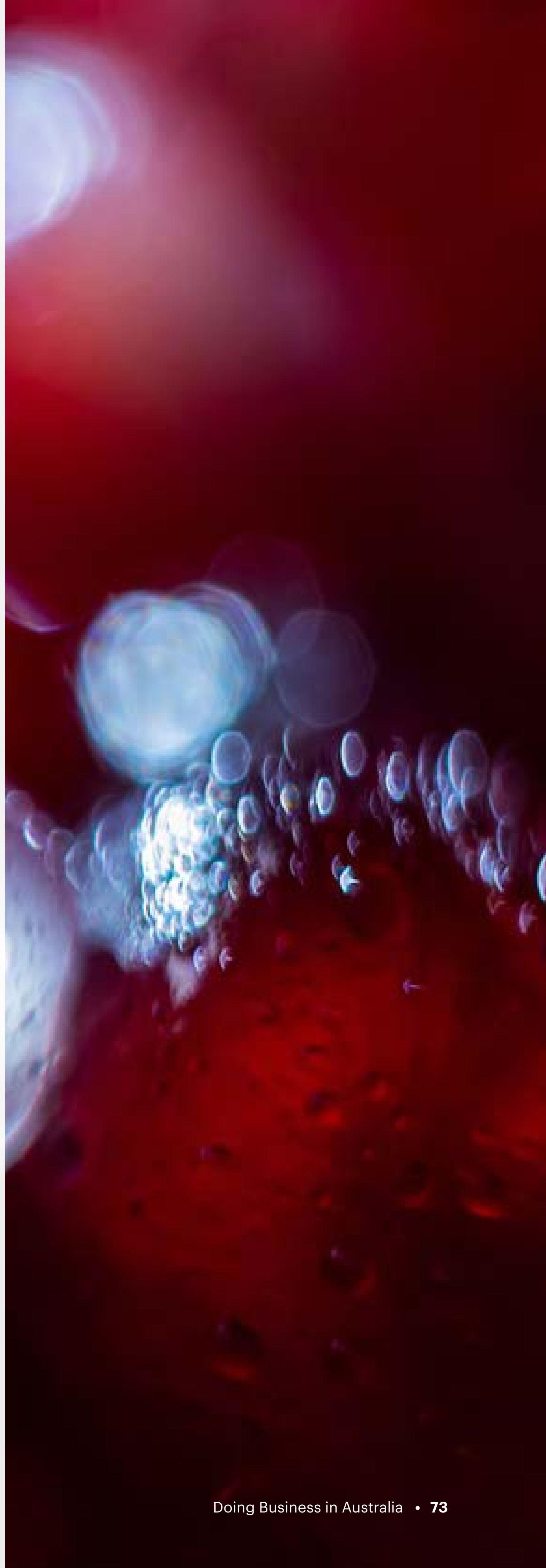
- maximises the chances of the company continuing under a deed of company arrangement (also known as a DOCA); or
- provides a better return to creditors (and possibly shareholders) than if there was an immediate liquidation.

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 18
Litigation and arbitration

18. Litigation and arbitration

18.1 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.

18.2. 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.

18.3. 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.

18.4. 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) and *Financial Transactions Reports Act 1988* (Cth), which can include applying to the Federal Court for a civil penalty order against a non-complying entity.

Section 19
Taxation

19. Taxation

19.1. 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 30 June 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 19 September 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.

19.2. 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 per cent 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 1 July 2019, the Medicare levy will increase from 2% to 2.7%. Legislation is currently being developed for this measure.

High income taxpayers (A$90,000 for individuals or A$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 11.5% and will remain at this rate until 1 July 2025 when the levy will increase to 12%.

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 Australian resident 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%. However, the Australian Government recently announced that the FRCGW rate will increase to 15% from 1 January 2025. 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.

Withholding taxes may also apply to distributions from certain trusts, known as managed investment trusts (MITs). These distributions may be subject to concessional rates.

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.

These rules apply to most multinational businesses operating in Australia with at least A$2 million in debt deductions (calculated on an associate inclusive basis). Different tests apply for 'general class entities' (which includes most multinational businesses) compared to banks and other financial entities. The rules for 'general class entities' were substantially amended in April 2024 and now contain three tests: the default "fixed ratio test", and two elective tests being the "group ratio test" and the "third party debt test".

The default test is the fixed ratio test, which disallows debt deductions to the extent that net debt deductions exceed 30% of "tax EBITDA". The excess is disallowed but the denied amount may be carried forward for up to 15 years subject to an integrity rule, and subject to the company continuing to use the fixed ratio test.

The group ratio test (allows a group company to claim net debt deductions up to the level of the worldwide group's net interest expense as a share of earnings) or third party debt test (allows all debt deductions that are attributable to genuine third party debt only) may be elected as alternatives to the fixed ratio test, but a taxpayer who chooses either of those tests cannot carry forward the amount of any disallowed debt deductions. Further, any carry forward disallowed amounts from prior years will be lost if the company switches from the fixed ratio test to either the group ratio test or the third party debt test.

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 A$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. Australia has also enacted hybrid mismatch rules which broadly implement the OECD BEPS Action 2 recommendations with respect to neutralising hybrid mismatches.

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 A$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 A$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 1 July 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 20
Corrupt practices legislation

20. 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 and 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.

20.1. 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 A$22.2 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 A$2.2 million.

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

20.2. 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.

20.3. Modern Slavery practices

In Australia, activities relating to "modern slavery" are governed by both commonwealth and state based legislation. The *Modern Slavery Act 2018* (Cth) (**Commonwealth Act**) was brought into force on 1 January 2019.

The Commonwealth Act defines modern slavery as including eight types of serious exploitation of people: trafficking in persons; slavery; servitude; forced marriage; forced labour; debt bondage; deceptive recruiting for labour or services; and the worst forms of child labour.

The Commonwealth Act sets out Australia's national Modern Slavery Reporting Requirements which create reporting obligations for entities that have:

- consolidated revenue of at least A$100 million for the relevant reporting period (a financial year); and which
- are Australian entities; or
- undertake business in Australia in that financial year.

20.4. What are the modern slavery reporting requirements in Australia?

The Commonwealth Act requires reporting entities to submit annual modern slavery statements describing the risks of modern slavery in the operations and supply chains of the reporting entity and any entities owned or controlled by those entities. The statements must also include information about actions taken to address those risks.

In making a modern slavery statement there are seven mandatory criteria which must be addressed which are as follows:

- Identify the reporting entity
- Describe the reporting entity's structure, operations and supply chains
- Describe the risks of modern slavery practices in the operations and supply chains of the reporting entity and any entities it owns or controls
- Describe the actions taken by the reporting entity and any entities it owns or controls to assess and address these risks, including due diligence and remediation processes
- Describe how the reporting entity assesses the effectiveness of these actions
- Describe the process of consultation with any entities the reporting entity owns or controls (a joint statement must also describe consultation with the entity giving the statement)
- Provide any other relevant information

20.5. Implications for directors arising from modern slavery legislation

Under the Commonwealth Act, the only express obligation on directors is that modern slavery statements must be approved by the Board and signed by a director. This means that directors and officers must understand modern slavery and the risks within the business, and the obligations under the Act, in order to avoid any allegation of breach of their statutory and common law duties as a director (for example, for making a misleading statement).

Whilst there are presently no penalties for non-compliance with the Commonwealth Act, the key driver for compliant disclosure is the public nature of the disclosure and potential reputational impacts. The Minister has the power to 'name and shame' a non-compliant reporting entity through the online register or by other means.

Section 21
International trade and investment agreements

21. International trade and investment agreements

21.1. International Investment Agreements (IIAs)

Australia is a very open economy. The Australian Government is committed to pursuing opportunities to increase trade and investment opportunities. One important way the government does this is by negotiating IIAs with important trading partners. IIAs is an umbrella term that covers both formal treaties, often referred to as Free Trade Agreements (**FTAs**) but which term fails to capture other important provisions, which are referred to below.

The government's strategy is to promote trade liberalisation at multilateral, regional and bilateral levels. It also seeks to promote foreign investment into Australia by providing investment protections to foreign investors.

Australia is a party to two different types of FTAs. The first are bilateral agreements. The second are multilateral agreements. Nearly all such agreements now contain much more content than the liberalisation or reduction of tariff trade barriers. They are so-called 'deep' trade agreements that, more importantly, contain non-tariff measures which go to the regulation and security measures provided to foreign investors into Australia. These measures include provisions such as the recognition of standards, and the protection of intellectual property rights and the protection of the competitive process. They also contain promises to prospective foreign investors to secure foreign investment.

In relation to the latter, those promises are of two types.

- The first type of promises are 'absolute' promises which apply regardless of what has been promised to other nation-States' investors, e.g., protections against expropriation of property, full protection and security of the property of the foreign investor, and (broadest of all) fair and equitable treatment.
- The second type of promises are 'contingent' promises which apply by reference to what has been promised to other nation-States' investors, e.g., national treatment (non-discrimination) and Most-favoured nation treatment.

In order to obtain the protections given to foreign investors, it is important to obtain advice as to the appropriate structuring of the investment so that it is clear that the relevant treaty is applicable to the investment.

It is also important to properly structure any agreement between the foreign investor and Australia (or one of its State-Owned Enterprises) so that appropriate risk-reduction measures (valid 'stabilisation' clauses in relation to changes in the law, agreement as to the applicable law, international arbitration and other provisions) are included in that agreement. This is especially important in relation to international investment contracts because many of the more recent investment treaties have not included direct Investor-State Dispute Settlement (**ISDS**) provisions that give a direct right of arbitration against a State for failure to comply with their promises in relation to protection of investments.

Australia currently has IIAs with ASEAN-Australia-New Zealand (AANZFTA), Chile (ACLFTA), China (ChAFTA), the parties to the CPTPP multilateral agreement, Hong Kong (A-HKFTA & IA), India (AI-ECTA), Indonesia (IA-CEPA), Japan (JAEPA), Korea (KAFTA), Malaysia (MAFTA), New Zealand (ANZCERTA), PACER Plus (many of the Pacific Island nations), Peru (PAFTA), RCEP (regional Asia-Pacific nations, including China), Singapore (SAFTA), Thailand (TAFTA), United Kingdom (A-UKFTA) and USA (AUSFTA). Other important IIAs are under negotiation.

While each of the IIAs signed and implemented by Australia differ in their specific content and obligations, the overall goals are often concurrent.

Foreign investment provisions are currently under close international scrutiny, with significant reforms being proposed or being investigated either at treaty level (*UNCITRAL Working Group III: Investor-State Dispute Settlement Reform*) or at the level of international investment contracts (*UNIDROIT Working Group on International Investment Contracts*). Each of these projects may significantly alter the rights and obligations of the States and foreign investors. For example, increasingly international treaties contain provisions about the

obligations of foreign investors with respect to the environment and other public policy issues. The relationship of those provisions to international contract law is being considered by UNIDROIT.

21.2. Comprehensive and Progressive Trans Pacific Partnership (CPTPP)

One of the most important treaties to which Australia is a party is the Comprehensive and Progressive Trans- Pacific Partnership signed on 8 March 2018 which is a regional treaty originally between Australia, Canada, Chile, Japan, Mexico, Peru, New Zealand, Singapore, South Korea and Vietnam. The CPTPP is seen as a platform that is open to others to join if they are able to meet the high standards for trade and governance set in that treaty.

The CTPP parties currently have a combined GDP of US$11.8 trillion and encompasses 6.6 per cent of the world population and 14.2 per cent of world trade.

On 16 July 2023, Ministers responsible for trade from CPTPP Parties and the UK signed the UK's Accession Protocol to enable the UK to join the CPTPP. Other states have made application to join the CTPP (including China) with the potential to expand membership in the future.

The most important provisions of the CPTPP are the 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 ISDS arbitration provisions that allow the direct enforcement of those obligations under international arbitration (parties need not wait for diplomatic action at state level).

21.3. Other treaties

Energy Charter Treaty

Australia is a signatory to, but has yet to ratify, the Energy Charter Treaty. Currently, 51 European and Asian countries have signed or acceded to the Energy Charter Treaty. Australia has made certain reservations in relation to the application of the Energy Charter Treaty.

The main aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues. It is focused on encouraging investment and trade, ensuring reliable transit, and promoting efficient energy use. It contains important protections in relation to rights of investors in member states.

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 per cent 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.

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