Doing business in Australia

Latest Edition

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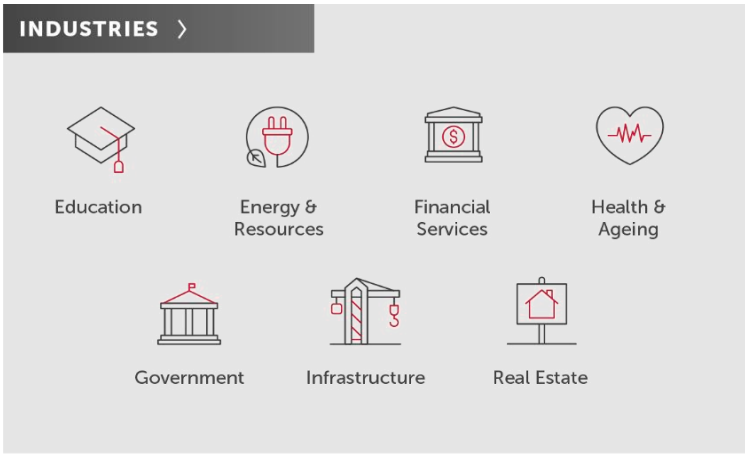

DIVERSITY ›

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Why Australia

OVERVIEW

Foreign investment is welcome in Australia, with all levels of government keen to promote business, economic development and employment growth.

Australia's highly developed economy ranks among the 13 largest in the world. Living standards are high, with a per capita GDP on par with Denmark and the Netherlands.

Business in Australia is conducted in a transparent, well-regulated and politically stable environment. The judiciary is open, independent and accessible. The climate is superb.

The Australian labour force is highly educated with a strong multicultural background. Approximately 63% of Australia's working age population have a university degree, diploma or trade qualification. Of the approximately 27 million people in Australia, around 30.7% of the population was born overseas.

Government

Australia is a very stable democracy with a federal system of government, which is based on the United States model (where power is shared between a federal government and the government of each state or territory).

The Commonwealth of Australia's government and each state or territory government operates in a manner similar to the United Kingdom's Westminster system, where the executive is directed by and reports to the parliament via ministers.

Under the Australian Constitution, the federal parliament may legislate in, and therefore controls, taxation, foreign investment, defence, the banking and monetary system, telecommunications, interstate and overseas trade, trade mark and patent registration and foreign affairs.

The states and territories retain responsibility for education, health, policing, roads and traffic, although the federal government's predominant revenue raising capacity has resulted in its growing influence over these areas.

Below the federal, state or territory governments are local governments comprised of locally elected representatives. These exist as city, town or shire councils and oversee local land use, development and planning laws.

Legal system

Australia's legal system is based on the British model where laws are developed and shaped not just by the federal parliament and parliaments of the states and territories, but also through the decisions of an independent judiciary.

The Australian judiciary consists of two branches: a federal branch and state and territory branches. The High Court of Australia is the highest court in the country and has ultimate appellate jurisdiction over federal, state and territory courts.

The Federal Court of Australia hears appeals from inferior tribunals and retains original jurisdiction over federal law matters, including immigration, industrial relations and corporations.

All states and territories have a Supreme Court as their highest court, with appeal divisions in civil and criminal matters. Most states also have a District Court, which has jurisdiction over civil matters (usually below a A$1,250,000 limit) and criminal matters that are less serious indictable offences, and a Magistrate's Court or Local Court, which has jurisdiction over smaller civil matters and summary matters.

Foreign investment and trade

OVERVIEW

The Australian Government's foreign investment regime, generally speaking, encourages foreign investment in Australia.

The regime consists of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**), associated legislation and various regulations. The regime is also supported by Australia's Foreign Investment Policy (**Policy**) and 15 guidance notes released by the Foreign Investment Review Board (**FIRB**), which are updated from time to time. The Australian Treasurer administers the FATA with the advice and assistance of FIRB. The regime aims to ensure that foreign direct investment is not 'contrary to Australia's national interest'.

Foreign persons are required to notify FIRB of certain transactions and obtain clearance before proceeding with the transaction. Voluntary notifications can also be made in certain circumstances.

If a transaction requiring FIRB clearance proceeds without this clearance, the Treasurer has powers to make adverse orders, including divestment. There are also criminal and civil penalties which can be applied at the Treasurer's discretion for non-compliance with the FATA.

The Treasurer also has powers to call-in and review transactions that have not been cleared by FIRB and give rise to a national security concern for a period of 10 years, even after they have been completed. If a transaction is called-in for review, the Treasurer can make orders (such as prohibition or divestment orders) if the Treasurer is satisfied that the transaction would be contrary to national security. The effect of this call-in period is that investors will need to consider whether there is merit in making a voluntary application, even where FIRB clearance is not expressly required, to extinguish the risk of their transaction subsequently being called in and potentially unwound at any time during the call-in period.

Foreign person status

Foreign persons includes private foreign investors as well as foreign government investors, with the regime applying differently to each type of investor.

A private foreign investor is an entity which is not a foreign government investor.

A foreign government investor is an entity controlled by a foreign government (at any level of government) or their related bodies, including corporations in which:

- a single foreign government and its associates (defined broadly) has a direct or indirect interest of 20% or more (including through actual or potential voting power); or
- multiple foreign governments and their associates have a direct or indirect interest of 40% or more in aggregate (including through actual or potential voting power) – provided the interest holders do not meet certain passive investor requirements.

The term, 'associate', is broadly defined and includes foreign government investors who are ultimately controlled by the same foreign government.

There are tracing provisions in the FATA which have the effect that the foreign person characterisation of an entity is determined by the status of the ultimate legal and beneficial interest holders of the entity. The test means that listed entities can also be considered foreign government investors.

There are also citizenship and residency tests for individuals to determine whether they qualify as a foreign person under the FATA.

Foreign investment clearance

Proposals that may require prior notification to FIRB and approval from the Treasurer for private foreign investors may include:

- acquisitions of interests in 'Australian land' – this being any legal or equitable interest in agricultural land, commercial land, vacant land, residential land

or a mining or production tenement and includes, freehold interests, leases and licences of 5 years or more (including any options to extend), the acquisition of interests (e.g., shares or units) in entities that have more than 50% of their assets in Australian land, mortgage security interests, and certain profit-sharing arrangements;

- acquisitions of a 'substantial interest' (that is, 20% or more) in Australian corporations, unit trusts or businesses, or their assets;
- acquisitions of a 'direct' (that is, 10% or more) interest in an Australian corporation, unit trust or business that is an Australian media business or agribusiness;
- acquisitions of a direct interest in a 'national security business',

in each case, where the relevant asset is valued in excess of the relevant threshold.

Foreign government investors generally require clearance, regardless of the value of the transaction or the relevant asset, for:

- acquisitions of interests in 'Australian land';
- acquisitions of a direct interest (generally, 10%) in an Australian corporation, unit trust or business;
- starting a new Australian business;
- acquisitions of legal or equitable interests in mining, production or exploration tenements;
- acquisition of a direct interest in the securities of a mining, production or exploration entity (being an entity whose interests in mining, production, or exploration tenements comprise more than 50% of its total asset value);
- acquisitions of a direct interest in a 'national security business'; and
- acquisitions of a direct interest in an Australian media business or agribusiness.

Direct and substantial interests

Interests of less than 20% can still be caught by the FIRB regime if it involves a veto right – a concept that may apply more broadly than expected, including negative control. Once a substantial interest has been acquired, the clearance requirements apply to all subsequent increases to that interest.

A direct interest is an interest in the entity or business of at least 10%. However, it can be less if the acquirer has entered into a legal arrangement relating to the business of the target, or is in a position to influence or control the target.

Thresholds

The applicable monetary thresholds will differ depending on the foreign person status of the acquirer; that is, whether they are a 'private' foreign investor or a 'foreign government investor'. The monetary thresholds are indexed annually to account for inflation.

Private foreign investors will be subject to certain monetary threshold levels depending on the type of asset being acquired (e.g. A$330 million for Australian entity acquisitions). However, note that there is no monetary threshold for certain acquisitions of an interest in national security businesses, Australian media businesses, residential land, vacant land for development, and mining and production tenements for private foreign investors.

The monetary threshold for all acquisitions by foreign government investors is nil at $0.

Private foreign investors from certain countries with free trade relationships with Australia benefit from higher monetary thresholds in certain circumstances.

Conditions

During the FIRB review process, FIRB may identify sensitivities with the transaction. FIRB's preferred approach is to seek to mitigate any sensitivities through the imposition of conditions on the FIRB approval.

While these conditions are generally transaction specific, the most common conditions imposed on foreign investment clearances are the 'standard' and 'additional' tax conditions. That is, as a condition of being allowed to proceed with a transaction caught by the FIRB regime, foreign persons may, among other things, be required to provide details of their tax affairs, pay outstanding tax debts, and provide a range of information to FIRB and the Australian Taxation Office (**ATO**) about the transaction.

Fees

There are application fees associated with foreign investment applications. The fee is based on the type of target being acquired and the transaction value. The fees are indexed annually to account for inflation.

The fees are calculated using a table which is based on four separate fees scales for residential land acquisitions (no established dwellings), residential land (established dwellings) agricultural land acquisitions, and all other commercial acquisitions.

Register of Foreign Ownership of Australian Assets

On 1 July 2023, the ATO introduced the Register of Foreign Ownership of Australian Assets (**Register**). Foreign investors must notify the Register within 30 days of acquiring an Australian interest (assets, entities, land). These Register notification

requirements are generally tied to the receipt of a FIRB approval. However, foreign persons are required to make a notification to the Register if they acquire certain 'interest in Australian land' irrespective of whether FIRB approval was required for that acquisition.

Foreign exchange issues

Most dealings in foreign currencies in Australia must be transacted with an institution holding an authority from the Reserve Bank of Australia or licensed to do so by the Australian Securities and Investments Commission (**ASIC**).

Inward investment is not subject to exchange controls, although this does not preclude the need to obtain FIRB clearance in certain situations (see earlier). Outward exchange flows are not restricted. However, both outward bound and inward bound exchange flows are subject to cash transaction reporting guidelines imposed on 'cash dealers' and other persons who send or receive international fund transfer instructions.

Cash dealers, which include banks, financial institutions, insurance companies, currency and bullion dealers and others, must report to the Australian Transaction Reports and Analysis Centre details of certain transactions, including:

- significant cash transactions involving the transfer of currency (coin and paper money of Australia or a foreign country) of A$10,000 or more, including foreign currency equivalents, unless the transaction has been specifically exempted;
- international telegraphic or electronic funds transfers to and from Australia, unless the transaction has been specifically exempted; and
- transactions that the cash dealer has reasonable grounds to suspect are relevant to criminal activity.

Trading with Australia

It is possible to do business in Australia without setting up formal structures, although having some form of legal identity or other formal arrangement is often advisable.

The Australian Government's trade policy combines multilateral, regional and bilateral approaches. Australia pursues every opportunity to open up global markets for exporters and to encourage investment flows across all sectors. As part of this commitment, the Australian Government has negotiated special access for Australian suppliers of goods and services to key export markets through free trade agreements (**FTAs**).

Australia has eleven FTAs currently in force with China, Japan, Republic of Korea, New Zealand, Singapore, Thailand, US, Chile, Malaysia, the Association of Southeast Asian Nations (**ASEAN**) (with New Zealand) and the Trans-Pacific Partnership (**CPTPP**). Australia is also currently engaged in eleven FTA negotiations, including the Regional Comprehensive Economic Partnership Agreement and the Trade in Services Agreement. Four separate agreements with Hong Kong, Indonesia, Peru and a group of Pacific countries (including New Zealand, Cook Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tonga and Tuvalu) (**PACER**) have been concluded but are not yet in force. The following issues should be considered:

- tariffs apply to some goods imported into Australia, such as clothing, footwear and passenger cars and components. As the federal government seeks to establish enhanced trading relationships with many countries, tariffs and other duties are under constant review; and
- agency and distribution arrangements are not specifically regulated, although franchising is subject to separate regulation. The terms of any contract between agent and principal should address all aspects of the relationship.

Other legal issues that may arise include:

- protection of intellectual property rights;
- the law of the contract, the relevant forum for enforcing the contract and the possible impact of the United Nations Convention on Contracts for the International Sale of Goods;
- security for payment, including title retention;
- dispute resolution and the relevant forum for settling disputes;
- currency of payment and protection against exchange rate fluctuations;
- potential product liability claims; and
- taxation, although Australia has an extensive system of agreements to avoid double taxation with its main trading partners.

Sanctions

There are two types of sanctions enforced under Australian law:

- multilateral sanctions based on resolutions made by the United Nations Security Council (**UNSC**); and
- unilateral autonomous Australian sanctions.

UNSC-based sanctions generally mirror those imposed by other UN members in terms of the scope of measures imposed and the countries, individuals and entities to which they apply. However, to address

situations of concern to Australia where there is no UNSC resolution (or to further supplement UNSC-based sanctions that are in place), Australia may impose 'autonomous' sanctions.

Measures imposed under these regimes tend to be 'targeted' sanctions rather than outright trade embargoes on particular countries. Sanctions almost always focus on prohibiting trade in goods and services that relate to military or paramilitary activities, as well as nuclear, chemical or biological weapons programs. Australian sanctions also usually prohibit certain financial transactions by restricting dealings with the assets of designated individuals or entities.

Permits and authorisations may be sought for transactions that are subject to sanctions.

It is a criminal offence for corporations to engage in conduct that contravenes a sanctions law and severe penalties apply. As this is a strict liability offence, the prosecution does not need to prove the company intends to engage in the prohibited conduct. However there is a defence where a corporation can prove it took reasonable precautions, and exercised due diligence, to avoid contravening a sanctions law. This makes it important for corporations to have in place an effective compliance program.

Export controls

Although it is relatively straightforward to export most goods and services from Australia, for some defence and dual military-civilian use products and technologies, Australia maintains strict export controls.

Certain defence and dual-use goods may not be exported from Australia without a permit. Dual-use goods to which these rules apply include certain computing and telecommunications equipment.

This means that the scope of Australian export controls goes well beyond the defence sector. Particularly strict controls apply to goods and services that may assist in the development of weapons of mass destruction and weapons delivery systems.

The scope of Australian export controls also includes 'intangible' exports of controlled technology (for example, through emailing plans or discussing know-how with foreign persons). This also controls 'brokering' of controlled technologies whereby an Australian national or an entity present in Australia arranges for controlled products to be traded between points outside of Australia.

Under this legislation, a special regime has been created for US-Australia defence trade. Certain entities engaged in this trade will be able to gain accreditation to an 'approved community'. Such accreditation is intended to streamline access by community members to highly controlled US defence technologies though its use is limited depending on the overall supply chain of a business.

UN and OECD business conventions

Australia is a signatory to the United Nations Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. These instruments require steps to be taken to combat corruption in both the public and private sectors. Bribery of foreign public officials is prohibited under the *Criminal Code Act 1995* (Cth) and involves the following elements:

- an Australian citizen, resident or corporation anywhere in the world;
- offers a 'benefit' to another person;
- the benefit is not legitimately due to the other person; and
- the offeror does so with the intention of influencing a foreign public official in the exercise of their duties.

Bribery of Australian officials is also an offence. Australian laws also address other corrupt conduct, in some cases dealing with private bribery, for example through the giving of secret commissions.

Unlike some legislation overseas, such as the *UK Bribery Act 2010*, Australia's foreign bribery laws allow for the payment of 'facilitation payments' to secure minor government actions (although the Australian Government has consulted on and continues to consider the abolition of the defence). It is also a defence if it can be proved that the conduct in question was permitted under a written law of the country where it takes place.

In order to address corruption risks, it is appropriate for businesses in Australia to promote a corporate culture that discourages bribery and other corrupt practices. As other Western countries also become 'active enforcers' of their own foreign bribery laws, multinationals operating in Australia are frequently integrating aspects of Australian law compliance into their global anti-bribery and corruption programs. This typically involves an actively enforced anti-bribery and corruption policy, and organisation-wide training and compliance programs.

Establishing a business presence

OVERVIEW

A foreign company establishing a business presence in Australia usually establishes an Australian subsidiary company or a branch office registering itself as doing business in Australia.

The significant practical differences between establishing a subsidiary company and doing business through a branch office are that:

- a subsidiary company is a separate legal entity and is required to have at least one director who is a resident of Australia, whereas a branch office is not a separate legal entity and is considered an extension of a foreign parent company; and
- a subsidiary only needs to lodge its own accounts with ASIC and may be exempted from that requirement if it is a small company, whereas a branch office must lodge the accounts for the foreign company (not just the accounts for the branch office).

Business in Australia may be conducted through any of the following structures:

- company;
- partnership;
- joint venture;
- trust; and
- sole trader.

Companies

Types of companies

Four types of companies may be incorporated in Australia:

- a company limited by shares (public and proprietary);
- a company limited by guarantee;
- an unlimited company (public and proprietary); and
- a no liability company (available only where the entity's business is limited to mining).

The type of company incorporated will depend on the nature of the business or activity.

There are more than 3.4 million companies registered in Australia, the vast majority of which are either public or proprietary companies limited by shares. Members of a company limited by shares contribute capital by subscribing and paying for shares in that company and their liability is limited to the unpaid amount on those shares.

Proprietary companies are the most common because they have simple and cost-effective administration requirements.

A proprietary company, which may be further classified as small or large, is a private company designed for a relatively small group of persons (maximum of 50 non-employee members) that places restrictions on the transfer of its shares.

A public company may have a much larger membership and does not have to be subject to these transfer restrictions.

Registration

To register a company, an application is made to ASIC. On registration, each company is allocated an Australian Company Number (**ACN**), a unique identifying number.

For taxation purposes, trading companies are entitled to apply for an Australian Business Number (**ABN**), which is issued by the Australian Business Register on behalf of the ATO.

Registration entitles a company to carry on business anywhere in Australia. Each company must:

- nominate the state in which it will be registered;

- register its name (limited liability companies must include 'Limited' or 'Ltd' in their name and proprietary companies must also include 'Proprietary' or 'Pty');
- have a registered office, which must be located in Australia;
- appoint the directors (at least one of whom must be a resident of Australia) and other officers (which include a Public Officer for tax administration purposes) prescribed for its type;
- provide and keep updated information about its shareholders and ultimate holding company; and
- lodge statements and financial reports as prescribed for its type and circumstances.

Provided that all necessary information is available, a company can be registered by ASIC within one business day.

Regulation

Company law in Australia is regulated by a national scheme. The *Corporations Act 2001* (Cth) (**Corporations Act**) and the *Australian Securities and Investments Commission Act 2001* (Cth) govern companies, securities and futures law in Australia.

This legislation was enacted by the federal parliament following a referral of power from each of the Australian states and territories.

The activities of companies listed on the Australian Securities Exchange Limited (**ASX**) are also regulated by the ASX's Listing Rules.

Fundraising

A proprietary company is prohibited from raising funds from the public and a public company must comply with the fundraising provisions of the Corporations Act.

Subject to certain excepted circumstances (for example, an offer to 'wholesale' investors), an offer of securities must be accompanied by a disclosure document.

Depending on the size and nature of the offering, the disclosure document may be a prospectus, profile statement or offer information statement.

Partnerships

In Australia, a partnership is the relationship that exists between persons carrying on a business in common, with a view to profit. In addition to any agreement between the partners, partnerships are regulated by the Partnership Acts of each state and territory. Because a partnership is not a separate legal entity:

- each partner is the agent of the other partners and may make contracts, undertake obligations and dispose of partnership property on behalf of the partnership in the ordinary course of the partnership business;
- although not required, written agreements between partners will protect them in their relationship with each other;
- third parties without knowledge to the contrary, however, are protected from actions committed by partners beyond their authority;
- each partner is personally liable, jointly and severally, for the liabilities of the partnership; and
- the partnership must submit an annual tax return disclosing its income and outgoings and the allocation to partners, although it is the partners individually who must pay tax on their share of partnership profits at the partner's applicable tax rate and not the partnership as a whole. Such profits will become part of each partner's other income (or losses).

If a partnership carries on business other than under the names of the partners, its business name must be registered in each relevant state and territory.

Quite often, a partnership will appoint a company to carry on the partnership business and act as an agent for the partners.

The liability of each partner for the liabilities of the partnership is unlimited, except in the case of limited partnerships when the property of the partnership is owned by the partners personally.

A form of limited partnership may be formed in each state and territory in Australia. A limited partnership must have at least one limited partner (a partner whose liability is limited) and one general partner (a partner whose liability is unlimited). A limited partnership is taxed as a company.

Joint ventures

A joint venture is established by parties co-operating for a common purpose, with the aim of sharing the product of an enterprise as opposed to sharing the profits. Joint ventures are common in the mining industry. They are not separate legal structures and are governed by the terms of the agreement between the joint venturers and by the common law (i.e. judge-made law in Australia).

Joint venturers often appoint a company to manage the business of the joint venture. Although not strictly

correct, the term ‘joint venture’ is often used by business people to refer to:

- a special purpose proprietary company where two or more parties have subscribed for shares to carry out a project; and
- a partnership between two or more parties carrying on a business with a view to making a profit.

A true joint venture does not itself receive income. Only the participants in the joint venture actually receive income, which arises when they sell the product they receive from the joint venture. The income arising from the products of a joint venture can be aggregated with all other income and expenses of a party.

Trusts

In a trust structure, the assets of the business are held by a trustee, which carries on the business for the benefit of the beneficiaries. There are many types of trusts including unit, fixed or discretionary trusts. Trusts may be private or public. A public trust can be listed.

The usual unit trust structure provides for beneficiaries to hold units to which entitlements attach and which may be transferred in a similar way to shares in a company. Income arising from a unit trust is generally taxed in the hands of the beneficiary rather than the trustee.

Acquiring a company or business

OVERVIEW

- Acquisitions of shares and businesses in Australia are regulated by:
  - the Corporations Act;
  - the FATA;
  - the *Competition and Consumer Act 2010* (Cth);
  - the Listing Rules of the ASX; and
  - legislation affecting the relevant industry of the corporation or business being acquired.
- Depending on the method of acquisition, several issues may need to be considered when acquiring shares or businesses in Australia.

Acquisition methods

Private treaty

For Australian companies with less than 50 shareholders, it is possible to effect an acquisition by way of private agreement or treaty (usually in a share sale agreement) between the selling shareholders and the purchaser. The document will typically set out the shares in the target being sold, the price to be paid, the conditions of sale, warranties and indemnities in favour of the purchaser and restraints of trade.

Takeovers

Acquisitions of substantial interests in Australian companies are regulated by the takeover provisions of the Corporations Act. Subject to a few exceptions (including unlisted companies with 50 or fewer members), if a person wishes to acquire a 'relevant interest' in more than 20% of the issued share capital of a company, that person must make a takeover bid (unless otherwise via a scheme of arrangement or with the approval of target shareholders). The concept of 'relevant interest' covers a broad range of direct and indirect interests in securities and a person can reach the 20% threshold without becoming a registered holder of securities.

If a person acquires interests in more than 90% of the voting shares of a company under a takeover offer, the compulsory acquisition provisions may be used to acquire the balance, if certain criteria have been met. Compulsory acquisition provisions can be used in other circumstances where thresholds are met.

Schemes of arrangement

Schemes of arrangement are the dominant deal structure and the preferred way in which 'friendly' takeovers of Australian listed companies are effected. 'Hostile' takeovers cannot be undertaken via a scheme of arrangement and will need to be structured as either on-market or off-market takeovers bid, which are akin to 'tender offers'. Schemes are highly regulated including the requirement for shareholder and Court approvals.

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

A scheme can be used to acquire a target company by transferring all shares in the target to the bidder.

A scheme cannot be effected without the target's cooperation and for this reason, schemes are only used for friendly transactions. The target is required to produce the scheme booklet and convene the necessary meetings.

Friendly transactions are often structured as a scheme of arrangement owing to the certainty it can provide. If target shareholders and the court approve a scheme, 100% control will pass to the acquirer by a fixed date. On the other hand, if the scheme fails, the target's current ownership structure continues.

Schemes also require a lower shareholder approval threshold (i.e. approval by at least 75% (by value) and more than 50% (by number) of target shareholders present and voting at the scheme meeting, in person

or by proxy) to achieve full control, compared to the 90% compulsory acquisition threshold required for a takeover bid.

Reduction of capital

Sometimes a change of control may be achieved through a reduction of capital. Reductions of capital are regulated under the Corporations Act. A reduction of capital requires shareholder approval, must be fair and reasonable for shareholders and must not materially prejudice the company's ability to pay its creditors.

Other matters for consideration

There are other restrictions that may apply to a particular transaction.

Under the Corporations Act, substantial shareholding notices must be lodged with both the company and with the ASX when a 5% threshold is reached and updated notices must be lodged whenever the holding increases or decreases by 1% or more. The threshold relates to the number of votes attached to shares in which a person and their associates have a relevant interest. It may be reached before shares are actually acquired or transferred.

Under the Listing Rules of the ASX, there are provisions regulating various activities, including the sale of a company’s main undertaking or the issue of shares over a prescribed level which require shareholder approval and compliance with certain ASX requirements.

The Corporations Act also regulates the circumstances in which a company may financially assist a person to acquire shares in itself.

A company can only do this if:

- the financial assistance does not materially prejudice the company, the shareholders or the company’s ability to pay its creditors; or
- if the shareholders give their prior approval to the financial assistance.

Trading in securities while in possession of information that is not generally available to the public and that, if it were available, would have a material effect on the price of the securities is prohibited by the Corporations Act under insider trading provisions.

Taxation

OVERVIEW

Australian tax consists of a combination of direct and indirect taxes imposed by federal and state governments. The imposition of certain taxes is subject to the application of a Double Taxation Agreement (**DTA**) between Australia and other contracting countries.

Taxes levied by the federal government include those on income and capital gains made by both individuals and businessess, Goods and Services, Fringe Benefits, Superannuation and various cross-border taxes and duties. Federal taxes are mainly regulated by:

- *Income Tax Assessment Act 1936* (Cth);
- *Income Tax Assessment Act 1997* (Cth);
- *Fringe Benefits Tax Assessment Act 1986* (Cth); and
- *A New Tax System (Goods and Services Tax) Act* 1999.

Each of Australia's states and territories imposes their own form of taxes and are regulated by each state and territory's own state taxes legislation. The main state taxes are:

- Stamp duty (which includes transfer duty, 'landholder' duty, motor vehicle registration duty and insurance duty);
- Land tax; and
- Payroll tax.

Income tax overview

Australia imposes taxation on the worldwide income of entities resident in Australia for taxation purposes and the Australian sourced income of non-residents subject to the application of a DTA.

Residence

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

- it is incorporated in Australia, or
- where the company is not incorporated in Australia, it carries on business in Australia and either:
  - has its central management and control in Australia; or
  - its voting power is controlled by shareholders who are residents of Australia.

It was announced in the FY 2020/21 budget that the corporate residency test was going to be amended so that a foreign registered company will be a resident of Australia for tax purposes if it conducted trading activity in Australia. This budget announcement has not yet been enacted into law.

Foreign registered companies should apply the ATO's view on the corporate residency test, outlined in TR 2018/5 and PCG 2018/9 as the ATO will seek to apply these positions when determining whether a foreign registered company is a resident of Australia for tax purposes until any future legislative amendments are made.

An individual is a resident of Australia for tax purposes if, generally, he or she:

- resides in Australia;
- is domiciled in Australia, unless the Commissioner is satisfied that the person's permanent place of abode is outside of Australia;
- is in Australia for at least 183 days in a tax year, unless he or she does not intend to take up Australian residence and has a usual place of abode overseas; or
- is a member or eligible employee under certain superannuation legislation or is the spouse or a child under 16 of a person covered by such superannuation legislation.

For individuals that are classified as temporary residents (broadly where they hold a temporary visa and are not defined as a resident or spouse of a resident under Australian social security laws), they will be treated in the same way as non-residents and generally only taxed on their Australian sourced income (plus any income earned from employment performed overseas for short periods while a temporary resident of Australia) subject to the application of a DTA.

It was announced in the FY 2020/21 budget that the individual residency tests were going to be amended so that a new primary 'bright line' test would be implemented so that an individual would become an Australian tax resident if they are physically present in Australia for 183 days or more in any tax year. Where an individual does not meet this primary test, secondary tests apply. These secondary tests would set out objective criteria, e.g. whether an individual has the right to reside permanently in Australia, whether they have Australian accommodation, family located in Australia, or Australian economic connections.

This budget announcement has not yet been enacted into law.

Foreign individuals should apply the ATO's view on the individual residency tests outlined in TR 2023/1 as the ATO will seek to apply this position when determining whether a foreign individual is a resident of Australia for tax purposes until any future legislative amendments are made.

Registration

Australian resident companies and individuals are required to be registered with the ATO to have a tax file number (**TFN**).

Trading companies registered with the ATO will have various tax compliance obligations, including filing of an annual company tax return and the periodic reporting of activity statements.

Source of income

The source of particular items of income is dependent in most cases on matters of practical fact and, with certain exceptions, is generally determined on a common law rather than statutory basis. Australian income tax law also has rules in a number of instances which deem income to have an Australian source (for example, royalties paid to non-residents and premiums paid to insurance companies).

Taxable income

'Taxable income' is generally computed in the same manner for both individuals and companies. Tax is assessed on taxable income, which is broadly calculated as the assessable income, less allowable deductions.

Generally, losses and outgoings incurred in gaining or producing the assessable income, or necessarily incurred in carrying on business for that purpose, are deductible except for losses and outgoings that are of a 'capital, private or domestic nature'.

Certain tax deductions can be claimed by a taxpayer notwithstanding that they are of a capital nature, such as for depreciation of plant and equipment (known collectively as capital allowances and generally claimed over the effective life of the asset) and certain expenses in establishing a business (generally claimed over five years or immediately in the case of some start-up expenses for small businesses).

In addition, under a temporary measure, eligible businesses with an aggregated turnover of less than A$10 million may immediately deduct the full cost of eligible capital assets costing less than $20,000 (which are, broadly, depreciable assets), first used or installed ready for use for a taxable purpose between 1 July 2024 and 30 June 2025.

Consolidated groups

An Australian company can elect to form a tax consolidated group with its wholly owned subsidiaries. The effect is to treat the group as a single entity for Australian income tax purposes. This means that intra-group transactions will be ignored for income tax purposes.

Capital gains

Gains on the disposal of assets will be treated as either revenue gains (income) or capital gains. Whether an asset is on revenue or capital account will depend on the relevant facts and circumstances.

Capital gains are included in the calculation of the taxable income. Capital gains made by resident individuals and trusts (but not companies) that dispose of assets held for at least 12 months will generally be reduced by half. Capital gains made by complying superannuation entities that dispose of assets held for at least 12 months will generally be reduced by one-third. Capital gains derived by companies are not eligible for the CGT discount. The CGT discount has been modified for non-residents. Broadly, any gains made by non-residents that are referrable to the period after 8 May 2012 will not be reduced by the CGT discount.

Small businesses may be eligible for certain CGT concessions, generally provided that the business has an aggregated turnover of less than A$2 million or the taxpayer has assets less than A$6 million (and fulfils

the active asset test). These concessions broadly relate to the assets used to conduct the business of the taxpayer. The concessions include a 50% reduction in capital gains for active business assets, a retirement exemption whereby active business assets that are sold may be partly or wholly exempt from tax if the proceeds are paid into a complying superannuation fund (for certain age limits), roll-over relief and a 15-year exemption whereby tax may not be required to be paid in respect of a gain when an active business asset that has been used for at least 15 years is disposed of.

Non-residents will generally only be subject to tax on capital gains made on the disposal of 'Taxable Australian Property' (**TAP**) subject to the application of a DTA. TAP is defined broadly to include Taxable Australian Real Property (**TARP**) (including mining, quarrying or prospecting rights), indirect Australian real property interests and assets (**IARPI**) used in carrying on business in Australia through a permanent establishment as well as an option or right to acquire any of the foregoing.

In the FY 2024-25 budget, it was announced that the type of TAP that will be subject to CGT for non-residents would expand to include those that have a 'close economic connection to Australian land and/or natural resources'. The Government is currently undertaking a consultation process for this change, but has indicated that they consider, amongst other things, infrastructure and machinery installed on land situated in Australia, such as wind turbines and solar panels to have a 'close economic connection to Australian land and/or natural resources'.

A non-resident will have an IARPI where it has a non-portfolio interest (that is, 10% or more together with associates) in a company or trust that has TARP interests where those real property interests represent more than 50% of the market value of the underlying assets.

Currently, subject to certain exceptions, the purchaser in a transaction is required to pay to the ATO 12.5% of the proceeds payable in relation to a transaction entered into after 30 June 2017 where:

- the transferor is a foreign resident (or deemed to be a foreign resident); and
- the transaction involves an asset that is TAP.

This measure will not apply to real property transactions valued under A$750,000.

However, in the 2023–24 Mid-Year Economic and Fiscal Outlook, the Government announced that the rate payable to the ATO will increase from 12.5% to 15% and that the threshold would reduce from A$750,000 to A$0. These changes will apply from the later of 1 July 2025 and the commencement of the relevant legislation.

Rollover relief may be available in respect of capital gains made in relation to a disposal event where shares or units in one entity are exchanged for shares or units respectively in another entity. The Australian rules also provide demerger relief in some instances.

Where rollover relief is available, any capital gain made on the disposal of the original shares or units will be deferred until the disposal of the exchanged asset. In addition to the instances outlined above there are a number of other potential rollover provisions such as those relating to small business restructures or compulsory acquisition.

Losses

Generally, a company or a trust can carry forward its tax losses on revenue account indefinitely, and can set off those losses against both income and capital gains. Capital losses can also be carried forward indefinitely, however they can only be set off against capital gains.

Broadly, the ability for a company to utilise its carried forward tax losses depends on whether it satisfies the continuity of ownership test. This test requires that more than 50% of all voting, distribution and capital rights be beneficially owned by the same natural persons in the year of loss, in the year of recoupment and all intervening years.

If a company fails to satisfy the continuity of ownership test, it may utilise its carried forward tax losses if the company carries on a similar business to the business that it carried on immediately before the failure of the continuity of ownership test. For tax losses incurred prior to 1 July 2015, the more restrictive same business test should apply. In addition to these rules, there are also specific carry forward tax loss rules that apply to trusts.

The carry forward loss rules for companies are modified for certain widely held companies. Where a company that has tax losses joins a tax consolidated group, its losses may be transferred to the head company of the tax consolidated group. These transferred losses will be available to the consolidated group based on the relative value of the company to the rest of the consolidated group. The use of the transferred losses are also subject to the continuity of ownership test and/or the similar business test.

Australian tax rates

Tables 1 and 2 summarise the principal rates of taxation that currently apply in Australia, exclusive of

the Medicare levy of 2.0%. The rates may be changed by the Australian Government at any time.

The taxation year runs from 1 July in each year to 30 June in the following year, however certain entities may qualify for a substituted accounting period.

Table 1: Resident individuals (2024-25)

Taxable income (A$)	Tax on this income (A$)
$0 – $18,200	Nil
$18,201 – $45,000	16c for each $1 over $18,200
$45,001 – $135,000	$4,288 plus 30c for each $1 over $45,000
$135,001 – $190,000	$31,288 plus 37c for each $1 over $135,000
$190,001 and over	$51,638 plus 45c for each $1 over $190,000

Table 2: Non-resident individuals (2024-25)

Taxable income (A$)	Tax on this income (A$)
$0 – $135,000	30c for each $1
$135,001 – $190,000	$40,500 plus 37c for each $1 over $135,000
$190,001 and over	$60,850 plus 45c for each $1 over $190,000

Companies

Companies are generally taxed at the fixed rate of 30%. Special rates apply to small businesses, life insurance companies, complying superannuation funds, friendly societies and other registered organisations.

Employment taxes

PAYG withholding

Employers are required to collect and withhold pay as you go (**PAYG**) amounts from salary, wages, commission, bonuses or allowances paid to employees. PAYG withholding obligations are imposed on employers to help their employees meet their income tax liabilities.

Fringe benefits tax

Fringe benefits tax (**FBT**) is payable on certain cash and non-cash benefits provided to an employee in connection with the employee's employment. FBT is imposed on and payable by the employer.

Superannuation

Employers have superannuation guarantee obligations under which they are required to contribute to their employees' nominated superannuation (pension) fund in order to avoid incurring a 'superannuation guarantee charge'.

See also *Employment and industrial relations*.

Employee share schemes (ESS)

Australia has specific rules dealing with the taxation of benefits provided to employees under employee share schemes.

Broadly, any 'discount' to the market value of the ESS interest is taxable to the employees as ordinary income (not as a capital gain) in the tax year in which the benefits are granted. However, there are certain concessions:

- a A$1,000 tax-free concession – under this concession, the first A$1,000 of the 'discount' is exempt from tax; or
- tax deferral – under this concession, the tax liability is deferred generally until the earlier of when the award vests or is exercised or 15 years from the date that the benefit is granted.

There are different 'gateway' tests that must be met depending on which concession applies.

Separately, employees of qualifying start-up companies may be eligible for a tax concession. Any discount on ESS interests acquired by employees of start-ups is generally tax free subject to conditions. The CGT rules will then apply to the ESS interest, with the 12 month minimum holding period for the CGT discount starting from when the ESS interest was acquired by the employee.

Employers / providers must also give each employee and the ATO certain information about ESS benefits that have been granted to the employee (such as the number of benefits granted and the amount of the 'discount').

Payroll tax

All employers are subject to payroll tax based on the amount of wages (and deemed wages) they pay to employees and, in certain cases, payments they make to contractors. Each state has set certain exemption thresholds. These thresholds mean that payroll tax is not payable until the total amount of Australian group wages paid by an employer reaches the threshold.

Other features of the Australian tax system

Dividends

Dividends distributed from after tax profits are subject to Australia's 'imputation system'. Generally, the system operates to impute the tax paid by the company as a credit to shareholders. To the extent that the shareholder's tax liability is less than the credit, the shareholders may be entitled to a refund.

Dividends with an imputation credit attached are known as 'franked dividends'. The franked portion of a dividend paid to non-residents is not subject to dividend withholding tax. However, the unfranked portion of a dividend paid to non-residents will be subject to dividend withholding tax at the rate of 30%, which may be reduced by the application of a relevant DTA.

Branch operations

An overseas company carrying on business in Australia through a branch or a permanent establishment is subject to Australian company tax at the current rate of 30% on profits attributable to that branch. There is no separate branch profits tax.

Interest

Generally, Australia levies a withholding tax rate of 10% on interest paid to a non-resident, provided that the interest is not sufficiently connected to a permanent establishment of the non-resident in Australia. The interest withholding tax rate may be reduced by the application of a relevant DTA. An exemption from interest withholding tax applies to interest on debentures, notes and syndicated facilities that meet public offer requirements.

Interest derived by non-residents carrying on business in Australia through a permanent establishment is subject to the corporate tax rate.

Interest income derived by Australian residents will be included in the Australian resident's assessable income and subject to tax at individual or company tax rates.

Interest incurred is generally deductible when incurred. However, Australia's thin capitalisation rules may apply to limit interest deductions subject to a number of safe harbours.

Royalties

Royalties are payments made for the use of rights. The payments may be periodic, irregular or one off. Royalties are deemed to have a source in Australia if they are paid to a non-resident by a resident of Australia, unless the resident pays the royalty in the course of carrying on a business outside of Australia or through a permanent establishment in another country.

Royalties are also deemed to have a source in Australia if they are paid or credited to a non-resident by another non-resident, and are, or are in part, an outgoing incurred by the non-resident payer in the course of carrying on a business in Australia at or through a permanent establishment in Australia.

Under domestic law, royalty income derived by a non-resident from Australian sources is subject to Australian withholding tax at a rate of 30% on the gross royalty payment. Where a DTA applies, the rate of Australian withholding tax is generally reduced. The entity paying the royalty is required to withhold and remit the Australian withholding tax to the ATO.

Royalty income derived by Australian residents will be included in the Australian resident's assessable income and subject to tax at individual or company tax rates.

Managed investment trusts

Where a non-resident has an interest in an Australian trust that qualifies as a managed investment trust (**MIT**), MIT withholding tax may apply on the distributions made by the trust to non-residents.

Where the non-resident is located in an information exchange country, then a reduced rate of withholding of 15% generally applies. Where the non-resident is located in a jurisdiction with which Australia does not have an information exchange agreement, the rate of withholding is a 30% final tax.

For the purposes of determining the distribution subject to MIT withholding tax, dividends, interest and royalties are excluded (they will be subject to the dividends/interest/royalty withholding taxes), as well as non-Australian sourced amounts.

Further, where the MIT distributions include capital gains in relation to assets that are not TAP, such gains will continue to be disregarded and will also not be subject to MIT withholding.

Eligible MITs can elect for certain common asset classes (shares, trust units and land) to be treated as capital assets for tax purposes. This provides greater certainty and can enable foreign investors an exemption from Australian tax on such assets and reduce the gain otherwise taxable to Australian investors.

Attribution Managed Investment Trusts

Under the Attribution Managed Investment Trust (**AMIT**) regime, a trustee may be able to elect for a MIT to be an AMIT.

To qualify to make the election to be an AMIT, the rights to income and capital arising from each of the membership interests in the trust must be clearly defined at all times. If the trust is a registered scheme, members are taken to have clearly defined rights in the income and capital of the trust under a safe harbour provided in the rules.

The benefits of electing to be an AMIT include:

- the trust being treated as a fixed trust for income tax purposes;
- for income tax purposes, the trust being able to attribute amounts of taxable income, exempt income, non-assessable non-exempt income, tax offsets and credits to members on a fair and reasonable basis in accordance with their interests as set out in the constituent documents of the trust;
- the trust being able to reconcile variances between the amounts actually attributed to members for an income year, and the amounts that should have been attributed in the income year ('unders and overs');
- amounts derived or received by the trustee that are attributed to members retain their character for income tax purposes in the hands of members;
- the position under the trust rules in Division 6 of the *Income Tax Assessment Act 1936* (Cth) (**ITAA36**), where a member's share of the net income of the trust exceeds their share of the distributable income of the trust, is addressed by allowing an upward adjustment to the cost bases of their units.

Another key feature that applies to both MITs and AMITs is the arm's length test. Under the arm's length test, the Commissioner of Taxation may make a determination that a MIT or an AMIT has derived non-arm's length income, and the trustee may be liable to pay income tax, at the corporate tax rate, in respect of the non-arm's length income. Ordinary or statutory income is non-arm's length income if:

- it is derived from a non-arm's length scheme; and
- the amount is more than the MIT might have expected to receive if the parties had dealt with each other at arm's length.

The key differentiator between the general trust rules in Division 6 of the ITAA36 and the AMIT regime is the attribution model of the AMIT regime. Under the general trust rules, the net income of the trust for tax purposes is allocated to members based on their proportionate entitlement to the income of the trust. Under the AMIT regime, the tax liability is attributed to members based on their clearly defined interests in the income and capital of the trust. Relevantly, where the trust is an AMIT, a member's tax liability is not contingent on the trustee making a distribution. The trustee can distribute an amount it chooses without impacting the attribution of the tax liability to the member. However, the amount of the distribution is relevant to adjustments to the cost base of members' units. That is, any excess of the distribution over the amount attributed to a member may decrease the cost base of the member's units or result in a capital gain, and any excess of the amount attributed to a member over the distribution may increase the cost base of the member's units.

Tax concessions for inbound investment

Australia offers general incentives to encourage investment in Australia. However, some specific concessions are available, including:

- exemption from dividend withholding tax for certain foreign source dividends;
- eligible entities with aggregated annual turnover of less than A$20 million undertaking eligible research and development (**R&D**) activities will be able to access a refundable offset pegged at 18.5% above the corporate tax rate;
- eligible entities with an aggregated turnover of greater than A$20 million per annum will have a two tier R&D intensity framework based on the entity's eligible R&D expenditure as a proportion of its total expenditure for the year (**R&D Intensity**). Entities will receive a non-refundable tax offset equal to 8.5% above their corporate tax rate where it has an R&D Intensity of up to 2%, and 16.5% above the corporate tax rate for an R&D Intensity above 2%;
- capital gains on the sale of non-portfolio shareholdings in a foreign company held by an Australian company may be disregarded where the foreign company has an active underlying business; and
- venture capital tax concessions which are designed to encourage investment by giving concessions to eligible investors. Under the Venture Capital Limited Partnership (**VCLP**) program, certain foreign VCLP investors are exempt from capital gains on the profits of the VCLP's eligible venture capital investments. Similar concessions are available for an early stage VCLP's (**ESVCLP**) by Australian resident and foreign resident investors, whereby tax concessions from capital gains/losses are provided on eligible investments.

In addition, where eligible investors purchase shares in a qualifying early stage innovation company (**ESIC**), they may receive a non-refundable carry forward tax offset equal to 20% of the value of the investment up to A$200,000. The offset applies in addition to modified capital gains treatment.

General anti-avoidance regime

In addition to the specific anti-avoidance measures contained in Australian tax law, Australia has a general anti-avoidance regime contained in Part IVA of the ITAA36 which gives the ATO the power to effectively reverse a tax benefit where it considers that a scheme was entered into or carried out for the sole or dominant purpose of enabling a taxpayer to obtain a tax benefit in connection with the scheme.

International taxation

Transfer pricing

Australia's transfer pricing rules impose arm's length terms and conditions on cross border transactions. The purpose of the rules is to ensure that an appropriate level of profit, and therefore tax, is returned to Australia. Transfer pricing applies to transactions such as goods, services, royalties and licencing, loans, guarantees and capital transactions. It also applies to behaviours such as shifting functions and risks outside of Australia or starting up a hub offshore.

The basic concept of transfer pricing, whereby related party transactions are to be priced by applying the arm's length principle to the transaction as structured by the taxpayer, is subject to three powerful 'reconstruction' exceptions. These can be summarised as follows:

- firstly, the form of the arrangement between the related parties is to be disregarded to the extent that it is inconsistent with the substance of the relations (i.e. written arrangements may be ignored where they are inconsistent with the arrangements actually taking place);
- secondly, if independent entities in comparable circumstances would not have entered into the particular arrangement, and instead would have entered into a substantially different arrangement, the assessment should be based on those relations; and
- finally, if independent entities in comparable circumstances would not have entered into the arrangement at all, assessment is based on that absence of relations.

Australian taxpayers have an annual obligation to self-assess their cross-border arrangements with regard to local transfer pricing legislation, case law and the relevant OECD transfer pricing guidelines. This includes the preparation of specific records that explain and evidence cross-border transactions and pricing arrangements.

To the extent that these documentary records are not maintained and do not meet the ATO's prescribed requirements, the taxpayer will be deemed not to have a Reasonably Arguable Position in relation to their transfer pricing arrangements, which can have penalty implications in the event of any future ATO transfer pricing audit adjustment.

The ATO was emboldened in its application of Australia's transfer pricing provisions following a win in the Chevron transfer pricing case. MinterEllison's tax controversy team represented the ATO in this case. The Chevron case has had deep implications for multinational corporations that engage in cross border transactions, both in Australia and overseas. It means companies will need to carefully review the terms and conditions of their related party transactions and work out whether they have sufficient evidence to support their position should they be challenged by the ATO.

However more recently, the Federal Court and the Full Federal Court found in favour of the taxpayer in the Glencore case. The original decision reaffirmed many of the key principles articulated in the Chevron case and established that the ATO must identify the actual arrangements in place and price the transaction according to these arrangements, resorting to 'reconstruction' of the arrangements only in exceptional circumstances. On appeal, the Full Federal Court upheld and endorsed the decision of the Federal Court, finding in favour of the taxpayer on all major issues, save for one. Accordingly, the outcome of this appeal provides greater guidance and clarity to multinational taxpayers on their cross-border related party transactions.

However, this judgement may be limited in application given the introduction of the 'reconstruction' provisions applicable for income years commencing on or after 1 July 2013 (Subdivision 815-B).

The ATO has also reviewed its guidance for businesses about transfer pricing. It recently issued practical compliance guidelines that set out factors that the ATO will consider when assessing the risks of particular cross border arrangements (for example, intangible migration arrangements, financing, offshore hubs and inbound distribution activities).

Country by country reporting

Country-by-country reporting (**CbCR**) forms part of international measures targeting tax avoidance, by providing a comprehensive basis of tax data and legal

information reported within countries and between countries.

Australian CbCR requirements apply to a 'significant global entity' (**SGE**) (multinational groups with annual global income of A$1 billion or more), but only if they also meet the 'country-by-country reporting entity' (**CBCRE**) definition. Broadly, CBCREs are SGEs within a group (excluding individuals) that would still be SGEs even if the exceptions to consolidation, under accounting standards, were to be applied.

The provided information assists the ATO to assess risk and select taxpayers for further investigation.

Thin capitalisation

Australia has thin capitalisation rules that disallow debt deductions where the debt-to-asset ratio of Australian operations exceeds prescribed limits. The rules seek to limit the amount of debt that can be allocated to Australian entities that are foreign controlled and to non-residents with Australian investments.

The thin capitalisation rules will only apply where an entity has at least A$2 million of debt deductions (on an associate inclusive basis).

As of 1 July 2023, the thin capitalisation rules changed and introduced 3 new tests for non-financial entities to align with the OECD recommended approach under Action 4 of the BEPS Action Plan. These are:

- Fixed ratio test – This test limits an entity's net debt deductions to 30% of its tax EBITDA. Denied deductions can be carried forward and claimed in subsequent income years (subject to the 30% EBITDA limit each year), for a maximum of 15 years.
- Group ratio test - This test limits net debt deductions using a ratio of the worldwide group's net interest expense and EBITDA based on the worldwide group's financial statements.
- Third-party debt test – This test limits debt deductions to the amounts that are only attributable to the entity's external third-party debt that meet the relevant conditions.

In addition to the above rules, as of 1 July 2024, entities with at least A$2 million of debt deductions (on an associate inclusive basis) will be denied debt deductions that arise in connection with relevant related party arrangements (**debt deduction creation rules**). The debt deduction creation rules will reduce the ability to create debt through internal transactions in order to utilise any additional debt deduction capacity under the new thin capitalisation tests.

OECD Pillar One and Pillar Two

In October 2020, the OECD released 'Pillar One and Two' blueprints to address the tax challenges arising from the digitalisation of the economy. Notably, Pillar One outlines the basis for potential future international agreements dealing with taxable presence and profit allocation rules between countries.

On 9 May 2023, as part of the 2023-24 Budget the Australian Government announced it will implement key aspects of Pillar Two of the OECD/G20 Two-Pillar Solution to address the tax challenges arising from the digitalisation of the economy. The Government has proposed changes to implement a global minimum tax and a domestic minimum tax.

Although the measure is not yet law, the ATO is undertaking steps to progress this before it becomes law. This includes designing domestic returns and developing the systems required to administer the measure in advance of the first lodgements, due by 30 June 2026.

Multinational Anti-Avoidance Law

The Multinational Anti-Avoidance Law (**MAAL**) provisions, which came into effect in late 2015, have strengthened the Australian general anti-avoidance provisions contained in Part IVA of the ITAA36. The measures apply to certain arrangements on or after 1 January 2016, regardless of when the arrangement actually commenced.

MAAL applies where the following requirements are met:

- a multinational group is a 'significant global entity' (multinational groups with annual global income for the period of A$1 billion or more);
- there is an arrangement under which a foreign entity in the group supplies goods and/or services (other than equity interests, debt interests or options over equity or debt interests) to unrelated Australian customers;
- activities are undertaken in Australia 'directly in connection with' the supply;
- activities are undertaken in whole or in part by an associated Australian entity or an Australian permanent establishment for the foreign entity, or by an unassociated Australian entity that is 'commercially dependent' upon the foreign entity or an Australian permanent establishment of that commercially dependent entity;
- the foreign entity obtains 'ordinary income' or 'statutory income' from the supply;
- some or all of that income is not attributable to an

Australian permanent establishment of the foreign entity; and

- it can be concluded that the arrangement was entered into for the 'principal purpose' or a principal purpose of enabling a taxpayer to reduce Australian taxes or reduce Australian and foreign taxes (with a deferral of foreign tax being relevant unless there are reasonable commercial grounds for the deferral).

Diverted Profits Tax

The Diverted Profits Tax (**DPT**) targets arrangements that transfer profits earned in Australia to an offshore related party. It applies to income years that start on or after 1 July 2017, but can apply to arrangements entered into before that date.

Broadly, the DPT applies to an arrangement, in relation to a 'DPT tax benefit' (broadly, an Australian tax saving) if the following conditions are met:

- a relevant taxpayer has obtained the DPT tax benefit in connection with the arrangement in an income year;
- it would be concluded, having regard to certain matters, that the person who carried out the arrangement did so for a 'principal purpose' of enabling the relevant taxpayer, or another taxpayer, to obtain a DPT tax benefit, or both to obtain a tax benefit and to reduce a foreign tax liability;
- the relevant taxpayer is a 'significant global entity' (multinational groups with annual global income of A$1 billion or more) for the income year;
- a foreign associate of the relevant taxpayer entered into, carried out or is connected with the arrangement; and
- it is reasonable to conclude that no other exemptions apply in relation to the relevant taxpayer, in relation to the DPT tax benefit.

The exemptions to the DPT include satisfaction of a 'A$25 million income' test, 'sufficient foreign tax' test and 'sufficient economic substance' test. Relevantly, the sufficient foreign tax test will broadly only be satisfied if the increase of the foreign tax liability is equal to or exceeds 80% of the Australian tax reduction. Given the push from other OECD countries to reduce corporate tax rates, satisfaction of this test whilst Australia's corporate tax rate remains 30% could prove problematic.

Certain types of entities are also excluded from the operation of the DPT, including foreign entities owned by a foreign government. If the above conditions are met, the ATO will be able to issue a DPT assessment, imposing a tax on the amount of the 'diverted profit' at a penalty rate of 40%, which will be payable within 21 days after the issue of the notice.

A DPT assessment will be subject to a method of review whereby the taxpayer is required to pay first and then have 12 months to provide the ATO's General Anti-Avoidance Rules Panel with additional information to show that its DPT assessment should be reduced. If the taxpayer is still dissatisfied with its original or amended DPT assessment after this process, it will have 60 days to challenge the assessment by making an appeal to the Federal Court of Australia.

Significantly, any appeal will generally be restricted to evidence provided to the ATO before the end of the 12 month review period. The effect of such a limitation is that during the review period, taxpayers and their advisers will need to directly consider how a court would interpret the material it provides to the ATO and how rules of evidence would apply to such material.

Residency, double taxation and foreign tax offsets

Australia's capacity to tax non-residents may be limited where the non-resident is a resident in a country with which Australia has entered into a DTA (see Table 3).

Generally, DTAs allocate taxing rights to the country of residence of the taxpayer. However, the country of the source of the income may impose withholding taxes on dividends, interest and royalties and may also tax in full the actual or attributed profits of any commercial enterprise carried on through a 'permanent establishment' in the country.

Australia has a general non-resident withholding tax regime. The taxation of worldwide income earned by Australian residents may in certain circumstances result in double taxation problems. Australia manages double taxation by either a foreign tax offset or a tax exemption.

A foreign tax offset is a non-refundable credit allowed for foreign tax that is paid by an Australian resident on foreign sourced income which is also assessable in Australia. While the offset is based on the amount of foreign tax paid, it is generally capped at the amount of Australian income tax payable on that foreign sourced income. Excess foreign tax offsets cannot be carried forward to use in later years.

Generally, Australian tax rules provide an exemption for dividends from controlled foreign companies, branch profits from operations in foreign jurisdictions and capital gains derived on the sale of shares in a foreign entity which carries on an active business.

Table 3: Countries with which Australia has a DTA

Argentina	Israel	Singapore
Austria	Italy	Slovakia
Belgium	Japan	South Africa
Canada	Kiribati	Spain
Chile	Malaysia	Sri Lanka
China	Malta	Sweden
Czech Republic	Mexico	Switzerland
Denmark	Netherlands	South Africa
Fiji	New Zealand	South Korea
Finland	Norway	Taiwan
France	Papua New Guinea	Thailand
Germany	Philippines	Turkey
Hungary	Poland	United Kingdom
India	Romania	United States
Indonesia	Romania	Vietnam
Ireland	Russia	

Multilateral Instrument

The Multilateral Instrument (**MLI**) is a multilateral treaty that enables jurisdictions to modify their existing bilateral tax treaties in order to implement measures to address multinational tax avoidance and more effectively resolve tax disputes.

The MLI came into force for Australia on 1 January 2019, however the date that a MLI will take effect is dependent on the matching actions of other jurisdictions as treaty partners need to take steps to implement a MLI for a specific tax treaty.

As at 12 August 2024, the MLI was in force between Australia and each of Belgium, Canada, Chile, China, Czech Republic, Denmark, Finland, France, Hungary, India, Indonesia, Ireland, Japan, South Korea, Malaysia, Malta, Mexico, Netherlands, New Zealand, Norway, Papua New Guinea, Poland, Romania, Russia, Singapore, Slovakia, South Africa, Spain, Thailand, UK and Vietnam.

Goods and services tax

A goods and services tax (**GST**) has applied in Australia since 1 July 2000 to the supply of goods, real property and other supplies (such as intangible rights and services).

Broadly, the GST is similar in operation to the value added tax systems operating in Europe.

GST is payable at a flat rate of 10% of the value of a taxable supply. A taxable supply arises where:

- the supply is made for consideration;
- the supply is made in the course of an 'enterprise' the supplier carries on;
- the supply is 'connected with the indirect tax zone' (broadly Australia and its external territories);
- the supplier is registered or required to be registered for GST; and
- the supply is neither a 'GST-free' nor an 'input taxed' supply (see below).

An entity is required to be registered for GST if it carries on an enterprise (which includes but is not limited to a business) that has an annual turnover in excess of A$75,000 from supplies that are connected with the indirect tax zone. An entity may voluntarily register for GST if it does not meet the registration threshold, provided it is carrying on (or intends to carry on) an enterprise in the indirect tax zone. Registering for GST enables an entity to recover input tax credits (effectively a GST refund) for GST it pays on its business inputs.

However, registering for GST imposes compliance obligations (for example, reporting requirements – see below) on the entity, which should be considered against the benefit of claiming input tax credits.

In order to relieve non-resident suppliers of the obligation to account for GST on certain revenue neutral business-to-business supplies, the GST law was amended with effect from 1 October 2016 so that certain supplies are no longer subject to GST. The amendments primarily apply to supplies that are made by non-residents who don't carry on an enterprise in Australia (for example, the leasing of domestically operated aircraft by a non-resident lessor to an Australian lessee).

The definition of 'supply' under the GST law is drafted broadly as 'any form of supply whatsoever' and includes the supply of goods, services, real property, advice, information and rights. It also includes an obligation to do anything or refrain from an act or to tolerate a situation.

Similarly, consideration is defined broadly to include 'any payment, act or forbearance' made in connection with the supply or for the inducement of the supply. This includes the provision of non-monetary consideration.

The supply will be 'connected with the indirect tax zone' if:

- in the case of goods, the goods are delivered in the indirect tax zone, made available in the indirect tax zone or are imported into or exported from the indirect tax zone, or in the case of real property (including an interest in, or right over, land), if the real property is located in the indirect tax zone; or

- in the case of anything other than goods and real property, the 'thing' is done in the indirect tax zone or supplied through an enterprise carried on in the indirect tax zone (as defined for this purpose). If the 'thing' is neither done in the indirect tax zone nor supplied through an enterprise carried on in the indirect tax zone and the 'thing' is a right or option to acquire another thing that would be connected with Australia, then the supply will be connected with the indirect tax zone.

Whether a supply is 'done' in the indirect tax zone will depend on its nature. For example, the ATO regards a supply of rights to be 'done' in the place where the agreement to supply those rights is made.

From 1 July 2017, supplies of services and digital products provided by non-residents to Australian consumers have been subject to GST (colloquially referred to as the 'Netflix' tax). If you sell through an electronic distribution platform (for example, an app store), the platform operator is responsible for registering, reporting and paying the GST. Limited GST registration obligations will be available to entities that make such supplies to simplify the process for remitting GST.

A GST registered supplier's entitlement to claim an input tax credit (effectively a GST refund) for the GST component of the cost of things acquired in the course of carrying on their enterprise will depend on the type of supply the acquisition is used to make.

GST withholding measures

From 1 July 2018, rules relating to the sale of new residential premises and subdivided residential land were introduced. The rules are aimed at addressing non-compliance within the property development industry, by requiring the purchaser of the property to withhold an amount from the purchase price and pay that amount directly to the ATO. Under the previous rules, the obligation was on the seller to collect the GST payable on a sale of property and remit the GST amount to the ATO.

GST on low value goods

With effect from 1 July 2018, offshore supplies of goods into Australia with a customs value of A$1,000 or less may be subject to GST where that supplier exceeds the GST turnover threshold of A$75,000 and the supply is made to an Australian consumer (generally, a private individual). These measures were introduced to 'level the playing field' for domestic Australian retailers that were required to charge GST on their sales within Australia. There are also special rules that provide that, where there is more than one entity involved in the goods being brought to Australia (including electronic distribution platforms and re-deliverers), the GST liability may shift to those entities.

For GST purposes there are:

Taxable supplies: for which GST is payable by the supplier when it makes the supply, but the supplier is entitled to an input tax credit (that is, a GST refund) for GST incurred on things acquired to make the supply. Examples of taxable supplies include commercial rent and most types of services consumed in the indirect tax zone.

GST free supplies: for which no GST is payable by the supplier when it makes the supply, but the supplier is entitled to an input tax credit (that is, a GST refund) for GST incurred on things acquired to make the supply. Examples of GST free supplies include certain types of food, education courses and the export of goods or outbound supply of intangibles such as rights or services for use or consumption outside of the indirect tax zone.

Input taxed supplies: for which no GST is payable by the supplier when it makes the supply, but the supplier will not be entitled to an input tax credit for GST incurred on things acquired to make the input taxed supply. Examples of these supplies include financial supplies and residential rent.

The importation of goods into the indirect tax zone ordinarily attracts 10% GST on the value of the goods at the time of the importation. If the importer is registered for GST in Australia and imports the goods in carrying on its enterprise, it may be entitled to claim back the GST incurred on the importation (that is, a GST refund). Some GST registered importers, upon application, may qualify for deferred payment of GST on importations.

A GST registered entity is required to submit GST returns to the ATO either quarterly or monthly depending on its annual turnover. An entity with an annual turnover of A$20 million or more is required to submit returns monthly.

Entities with an annual turnover of less than A$20 million may submit returns quarterly or may elect to submit returns monthly.

State taxes

Each of Australia's states and territories imposes their own form of taxes. The more significant types of state-based tax are:

- stamp duty (which includes transfer duty, 'landholder' duty, motor vehicle registration duty and insurance duty);
- land tax; and

- payroll tax (see *Employment taxation*).

Stamp duty

In all states and territories with the exception of South Australia, stamp duty is a tax imposed on transactions (called 'dutiable transactions') concerning 'dutiable property'. In South Australia, stamp duty is predominantly a tax on instruments, such as contracts and transfer forms (as opposed to transactions).

Although the definition of 'dutiable property' varies by jurisdiction, it generally includes land and, in some states, business assets (such as plant and equipment, goodwill, and intellectual property) and particular rights. Transfers of dutiable property and declarations of trust over dutiable property are two types of dutiable transactions.

Generally, stamp duty will not be payable on the establishment of a business. However, as stated above, a stamp duty liability will arise in some states where an existing business is purchased and the assets of the business include dutiable property.

Stamp duty remains payable on the transfer of most types of land and interests in land in all states and territories.

The rate of transfer duty imposed by stamp duties legislation is imposed on a sliding scale that varies by jurisdiction, generally ranging from a top rate of 4.5% in Tasmania to a top rate of 6.5% in Victoria based on the dutiable value of the dutiable transaction. Further, all states (but not the territories) have introduced regimes to impose additional duty where a 'foreign purchaser' acquires 'residential land' (noting that these terms can be broadly defined and that Tasmania's foreign purchaser duty regime also extends to primary production land).

There is no longer stamp duty on the transfer of shares or units themselves. However, in addition to the direct acquisition of land, a liability to stamp duty may also be triggered upon the acquisition of shares in a company or interests in a trust at the same rate as for a transfer of land where the transaction effects an indirect acquisition in land.

Although the provisions vary between jurisdictions, often 'landholder' duty is triggered when a person or entity (either alone or together with associated entities) acquires a 50% or greater interest in a company or trust that directly or indirectly holds interests in land (though note that this threshold can be 20% or greater in Victoria and New South Wales in certain circumstances). Further, in Queensland and South Australia, duty may in certain circumstances be imposed on the acquisition of an interest in a trust as if it were a direct acquisition of the trust property.

All states also impose landholder duty on the acquisition of a 90% or greater interest in a listed entity that holds (directly or indirectly) interests in land. In some states, a concessional rate of duty (being 10% of the private landholder duty rates) applies in respect of such acquisitions.

Further, all states impose insurance duty on general insurance (some states still impose duty on life insurance). Insurance duty is levied on the amount of the premium paid in relation to a contract that effects general insurance or the sum insured in relation to policies of life insurance, where relevant. Generally the insurer pays the insurance duty, although the cost is usually passed on to the insured.

Land tax

Each of the states and territories (other than the Northern Territory) generally impose an annual land tax on the 'owner' of land in the relevant jurisdiction. 'Land' generally includes vacant land, land that is built on, and lots in building unit plans. In Victoria, a surcharge may apply in respect of vacant 'residential land' (which is broadly defined and can include unimproved land in certain circumstances).

Land tax is assessed on the taxable value of an owner's total land holdings. Broadly, the taxable value is the aggregate of the relevant unimproved values of all land owned less the value of any exempt land.

Land tax is generally imposed on the taxable value of the relevant land above a certain threshold amount (for example, A$1,075,000 in New South Wales for the 2024 land tax year). The applicable rate of land tax varies across states and holding structures, however the rate is generally around 2.5% per annum (noting that higher rates can apply where a foreign entity or person directly or indirectly owns the relevant land).

New Victorian Taxes

The Victorian government has recently introduced two new taxes, the Windfall Gains Tax (**WGT**) which commenced to rezonings from 1 July 2023 and the Commercial and Industrial Property Tax (**CIPT**), commencing from 1 July 2024.

Windfall Gains Tax

The WGT operates as a tax (generally of 50%) on the amount by which the capital improved value of Victorian land increases as a result of a rezoning of that land. This is subject to a number of exceptions, exclusions and deferrals.

Commercial and Industrial Property Tax

The CIPT is a new regime will start to apply in respect of commercial and industrial properties in Victoria.

Broadly, a commercial or industrial property may enter the new CIPT regime if it is transacted (directly or indirectly) or certain subdivisions or consolidations occur in relation to the property and no relevant exemption applies.

Where a property enters the regime, the first purchaser of that property on or after 1 July 2024 will be the last person to ever pay stamp duty in respect of that property (provided that the property continues to have a qualifying commercial or industrial use). CIPT will then become payable annually at a rate of 1% of the property's unimproved value, with the first 'CIPT year' being 10 years after the property enters the regime.

'Change of use' duty may apply where a property already in the CIPT regime is transacted again and the property ceases to be used for a qualifying commercial or industrial use.

Tax reform

Tax policy in Australia is continually evolving to meet changing conditions. New reforms are regularly proposed.

For the latest news in tax reform, visit our website.

Competition and consumer protection

OVERVIEW

The *Competition and Consumer Act 2010* (Cth) (**CCA**) (formerly known as the *Trade Practices Act 1974* (Cth)) regulates competition and consumer protection law in Australia.

The competition provisions of the CCA are broadly similar to anti-trust provisions in the EU and US.

The CCA prohibits:

- cartels (as *per se* civil prohibitions and criminal offences);
- resale price maintenance (**RPM**) (as a *per se* prohibition);
- anti-competitive arrangements and concerted practices;
- misuse of market power;
- exclusive dealing;
- anti-competitive mergers; and
- a range of unfair business practices, including when dealing with consumers and small businesses, such as false or misleading representations.

The CCA also imposes obligations on businesses designed to protect consumers and small businesses, confers non-excludable statutory guarantees for consumers acquiring goods or services, provides an access regime for essential facilities, and provides a specific access and competition regime for the telecommunications industry.

The Australian Competition and Consumer Commission (**ACCC**) is responsible for administering and enforcing the CCA. It has the power to authorise, on public benefit grounds, certain types of conduct that may otherwise breach the CCA.

There are significant consequences for contraventions of the CCA, including potential imprisonment, compensation, corrective action and other orders, as well as substantial financial fines/penalties. For companies, a contravention of a key competition and consumer law prohibition has a maximum penalty of the greater of A$50 million, three times the 'gain' obtained from the conduct or (if that cannot be determined) 30% of turnover. For individuals, it is a maximum penalty of A$2.5 million per contravention.

Cartels and RPM

The CCA strictly (*per se*) prohibits cartel conduct and RPM (i.e. regardless of any anti-competitive purpose or effect).

- Cartel conduct includes contracts, arrangements or understandings between competitors to:
  - fix, maintain or control prices;
  - split up or allocate a market or customers;
  - restrict or limit supply, production, capacity or acquisition; or
  - rig bids.
- RPM involves a supplier imposing or attempting to impose a minimum resale price or inducing resellers to not sell products below a specified price (i.e. to stop discounting).

Concerted practices

The CCA prohibits 'concerted practices', which involve coordination between two or more parties that may otherwise fall short of an agreement, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition in a market.

Other anti competitive arrangements or practices

The CCA also contain a general prohibition on any contracts, arrangements or understandings that have the purpose, or would have the effect or likely effect of substantially lessening competition in a market.

Misuse of market power

Under the CCA, it is illegal for a corporation with a substantial degree of market power to engage in conduct which has the purpose, or would have the effect or likely effect of substantially lessening competition in the market in which it holds market power, or in any other market in which it supplies or acquires goods or services.

Exclusive dealing

Various forms of exclusive dealing (including restrictions on acquiring or supplying) are illegal under the CCA if they have the purpose, or would have the effect or likely effect of substantially lessening competition in a market.

Merger control regime

As at 30 August 2024:

- The CCA prohibits the acquisition of shares or assets of a company if the acquisition is likely to have the effect or likely effect of substantially lessening competition in a market in Australia. The CCA captures foreign to foreign transactions, i.e. where the acquisition of a foreign company by another foreign company results in an interest in a company in Australia being acquired.
- Parties to transactions which raise (or may raise) competition concerns can seek clearance or authorisation from the ACCC. A transaction can also be subject to ACCC review as a result of the FIRB approval process, press coverage or a complaint by a third party.

The merger control regime in Australia is likely to change substantially in the near future.

The Australian Government is proposing to introduce a mandatory, suspensory merger control regime with the ACCC as administrative decision maker. These reforms are currently the subject of consultation and foreshadowed to commence on 1 January 2026.

Small business protection

The CCA – through the Australian Consumer Law (**ACL**) – seeks to regulate unfair business practices and includes a range of protections for businesses (particularly small businesses) for example by:

- prohibiting misleading or deceptive conduct – this is extremely broad and includes not only the making of untrue statements about present matters, but also the making of unfounded or unreasonable predictions or statements as to future matters;
- prohibiting a business from proposing, or relying on, an unfair term in a standard form contract that is a 'small business contract'; and
- prohibiting unconscionable conduct in business transactions – for example, the use of a strong bargaining position to extract unreasonably onerous terms from another business.

For contracts entered into, varied or renewed from 9 November 2023, the unfair contract terms regime includes any contract where at least one contracting entity has fewer than 100 employees **or** an annual turnover of less than A$10 million. An 'unfair' term is a term that would produce a significant imbalance in the parties' rights and obligations arising under the contract, is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and would cause detriment to a party if it were to be applied or relied on. Unfair terms are void, and significant pecuniary penalties may also be imposed.

Consumer protection

The ACL aims to protect consumers by:

- prohibiting a wide range of misleading or deceptive conduct – this is extremely broad, and includes not only the making of untrue claims or statements but

also omitting to give all relevant details and failing to correct mistaken impressions;

prohibiting certain types of pricing practices – for example, not providing a total single price;

- prohibiting unconscionable conduct – for example, taking advantage of a party's weaker bargaining position or lack of knowledge or expertise in the subject matter of a negotiation;
- prohibiting unfair contract terms in standard form consumer contracts, with 'unfair' being assessed by the same tests which apply to unfair terms in small business contracts (see above). Such terms are void, and significant pecuniary penalties may also be imposed;
- establishing a statutory consumer guarantees regime that applies to goods and services supplied to 'consumers' (this has a broad definition so that it also applies to business to business transactions depending on the value of the supply and/or type of goods/services) – the guarantees relate to the quality and standard of goods and services supplied and cannot be excluded, limited or modified even with the agreement of the consumer (it is also illegal to misrepresent the existence of these rights or remedies (including through puporting to exclude or limit liability));
- imposing requirements with respect to any 'express' warranties given with a product (e.g. a manufacturer's warranty);
- making manufacturers and importers liable for defective goods – the ACL essentially defines defective goods as those that are unsafe. Liability for defective goods can rest with a manufacturer, an importer, or someone who allows their name or logo to appear on a good sold in Australia; and
- imposing mandatory reporting obligations on suppliers/manfuacturers when commencing a voluntary product safety recall, and in respect of death, serious injury or serious illness associated with a consumer good or product related service.

Industry codes

The CCA provides a regime for the declaration of industry codes whereby a code can be established to regulate the conduct of participants in an industry towards consumers or other participants in the industry. Industry codes can be voluntary or mandatory, focusing on general competition and consumer protection issues.

Intellectual property

OVERVIEW

Australia's laws provide comprehensive protection for intellectual property, including copyright, patents for inventions, trade names and trade marks, plant varieties, domain names, trade secrets and confidential information, and registered designs.

Australia's intellectual property laws meet its international trade and treaty obligations (for example, under the General Agreement on Tariffs and Trade and the TRIPS Agreement) and have also been amended in the light of the free trade agreement between Australia and the USA.

Intellectual property rights in Australia are primarily regulated through provisions of the following Acts: *Copyright Act 1968* (Cth) (**Copyright Act**), *Patents Act 1990* (Cth), *Trade Marks Act 1995* (Cth), *Designs Act 2003* (Cth) (**Designs Act**), *Plant Breeder's Rights Act 1994* (Cth) and *Circuit Layouts Act 1989* (Cth) (**Circuit Layouts Act**).

Copyright

Copyright is the exclusive right to reproduce, publish, perform, communicate and adapt original literary (including computer programs), artistic, dramatic and musical works, together with other protected subject matter such as films and sound recordings. Australia's copyright laws also provide for the protection of moral rights, which give authors the right of attribution, the right to prevent false attribution and the right to have copyrighted works treated with integrity.

Copyright arises automatically on creation of a work and generally continues for 70 years after the death of the author. Australia is a member of the various international conventions on copyright and so affords reciprocal protection for copyright recognised in other member countries.

The Copyright Act has been through a number of reforms to address copyright issues arising in the 'internet age' and as a result:

- protects copyright owners from the unauthorised digitisation of their works and unauthorised communication of their works over the internet and other electronic means;
- limits the liability of internet service providers and software manufacturers for copyright infringement by users of their facilities and software; and
- prohibits the making, sale, distribution and use of circumvention devices for the purpose of circumventing a technological protection measure.

Prohibition of unauthorised imports is subject to significant exceptions. The Copyright Act permits the parallel importation of overseas published books and sound recordings, as well as, more recently, electronic literary and music items and computer software.

Patents

A standard patent confers on the patentee the exclusive right to exploit commercially the patented invention for a term of 20 years. In some cases, patents that claim pharmaceutical substances may be eligible for a patent term extension of up to 5 years.

Australia's criteria of patentability for standard patents is closely aligned with international standards.

Currently, Australia's second-tier patent system, the innovation patent, is in the process of being phased out. Innovation patents only require an 'innovative step', a lower threshold than the 'inventive step' required for standard patents. The innovation patent provides all the same rights and remedies as a standard patent but only provides protection for a term of 8 years. As such, they provide a powerful tool for protecting incremental innovations with a short market life, such as computer based innovations.

Currently, innovation patents can only be applied for in divisional applications where the parent application was filed prior to 25 August 2021 and in other limited circumstances. However, there are a large number of granted (and certified) innovation patents, which remain enforcable. These innovation patents will all expire by 26 August 2029.

For both types of patents, the invention must be detailed in a specification (which may be provisional, later followed by a complete specification) describing the invention and concluding with claims that determine the ambit of the monopoly afforded by the patent.

The invention must be novel and amount to a manner of manufacture (that is, the subject matter must be patent eligible). The invention must also involve either an inventive step (for a standard patent) or an innovative step (for an innovation patent). The specification must be clear and not ambiguous and the claims fully supported by the information disclosed in the specification.

Importantly, Australia has a so-called 'grace period', which allows applicants who have publicly disclosed their inventions a period of up to 12 months to file a patent.

Trade names and trade marks

Australia protects reputation and goodwill in names through passing off law and consumer protection laws that prohibit misleading commercial conduct.

In addition, Australia has a registered trade mark system for names, logos, devices, sounds, smells, colours and shapes that distinguish the goods or services of an owner from those of other owners. Registering a trade mark provides the owner with the exclusive right to use and commercialise that mark in relation to specified classes of goods and services.

Trade mark registration usually lasts for an initial term of 10 years and can be renewed on an ongoing basis. If the owner of a registered trade mark does not use their mark, it may be removed from the register for non-use.

Australia follows the international system of classification of goods and services. Early trade mark registration is desirable for those seeking to enter into the Australian market.

Australia also has a federal system for registering business names for persons carrying on a business under a name other than their own name or company name.

Registered designs

The Designs Act provides for the registration and protection, for a period of up to 10 years, of any design that is both ‘new’ and ‘distinctive’. A design is the ‘overall appearance of a product resulting from one or more visual features of a product’, including shape, configuration, pattern and ornamentation.

Registration in Australia requires that the design be novel. Historically, it was required that the design not be publicly used in Australia or published in a document anywhere in the world prior to applying for registration in Australia. However, on 10 March 2022, the Designs Act was amended to introduce a grace period of 12 months for applications filed, and disclosures that occurred, on or after this date.

A person infringes a registered design if they deal in certain ways with a product that embodies the design or a substantially similar design. A defence applies for spare parts, allowing third parties to manufacture legitimate spare parts for complex products without infringing the registered design in the complex product.

Domain names

Various classes of domain names ending in .au may be registered. Domain names ending in .com.au and .com are the most popular as addresses for commercial entities operating in Australia.

For a .com.au domain name, a substantial and close connection must exist between the commercial entity and that entity’s domain name, which can be demonstrated by reference to the trade marks, ‘nicknames’ or acronyms of an entity not just its company or business name.

Registration of a .com.au domain name does not create any proprietary rights in the name. Australian courts will, however, recognise rights in domain names where there is a reputation or goodwill in the name (see *trade names and trade marks*).

Trade secrets and confidential information

Both through contract and where information is imparted in confidential circumstances for a limited purpose, effective protection can be provided for technical know-how, customer lists and other confidential information against disclosure and use for an unauthorised purpose.

Plant breeder's rights

The plant breeder's rights scheme allows certain varieties of plant species to be registered, granting the breeder exclusive commercial rights with respect to that variety of plant.

Registration requires that the variety be distinct, and for propagations to be uniform and stable, and gives the breeder a series of exclusive rights including producing, selling and exporting the plant material. Protection may last for up to 25 years depending on the plant species.

Circuit layouts

Circuit layouts are automatically conferred protection under the Circuit Layouts Act, so there is no requirement to register the layout in order to be granted the exclusive right to copy, commercially exploit in Australia, or make an integrated circuit of the layout. Circuit layouts may be protected for a term of up to 20 years.

Employment and industrial relations

OVERVIEW

The Australian workplace operates subject to a combination of federal, state and territory legislation, industrial instruments (including awards and enterprise agreements) and employment contracts.

The primary legislation regulating the employment relationship is the *Fair Work Act 2009* (Cth) (**FW Act**). This legislation sets minimum terms of employment (known as the National Employment Standards), provides some specific employee protections, regulates unions and the collective bargaining process, sets out the role of the independent employment tribunal (Fair Work Commission) and deals with a range of other matters.

There are also a number of other federal and state employment related laws including, for example, long service leave, superannuation and taxation, work health and safety, workers' compensation, discrimination and equal opportunity laws.

National Employment Standards (NES)

The NES set out minimum standards or entitlements in relation to:

- hours – a maximum 38 hour working week plus reasonable additional hours;
- annual leave – four weeks' paid leave per year, untaken leave is carried forward and is paid out on termination;
- personal (sick) /carer's - includes 10 days' paid per year for permanent employees – untaken leave is carried forward but not paid out on termination;
- compassionate leave - two days' paid leave on each permissible occasion (unpaid for casual employees);
- parental leave – 12 months' unpaid leave with a right to request an extension of up to 12 months (the federal government also has a government-funded parental leave pay scheme);
- notice of termination and redundancy – up to five weeks' notice and 16 weeks' redundancy pay based on age and length of continuous service;
- long service leave – usually based on state legislation and provides for extended paid leave for long service (three months' leave after 15 years' continuous employment, but pro rata leave can be taken after a lesser number of years' employment);
- public holidays – eight core public holidays plus some additional state and region specific holidays;
- community service leave – generally unpaid;
- rights to request flexible work arrangements (can be exercised by certain categories of employees, including permanent employees with at least 12 months' continuous service and long-term casuals who have a reasonable expectation of continuing employment on a regular and systematic basis);
- family and domestic violence leave - employees (including casual employees) are entitled to 10 days' paid leave in a 12 month period from the day they start employment;
- provision of the Fair Work Information Statement (as well as a Casual and Fixed (Maximum Term) Statement for those categories of employee) which sets out key entitlements under the FW Act;
- superannuation - employers' obligation to make superannuation contributions (below) forms part of the NES, giving most employees an enforceable right to superannuation;
- employee choice about casual employment - casual employees (as defined under the FW Act) have the right to notify an employer to change to full-time or part-time employment in some circumstances.

Awards

Awards are legally enforceable industrial instruments that establish minimum terms and conditions of employment for those employees to whom they apply.

There are more than 100 'modern' awards that cover many employees in Australia based typically on their industry or occupation. It can be complex to

determine which award applies in some cases – and sometimes more than one award will cover an employer's business.

Modern awards contain terms dealing with broadly similar matters, including:

- minimum wages – including job classification structures;
- arrangements relating to hours of work – including span of hours, rostering arrangements and rest breaks;
- type of work performed – such as full time, part time or casual employment;
- overtime, penalty rates and other monetary entitlements; and
- consultation and dispute resolution procedures.

Ensuring award compliance is a significant issue for Australian employers (with many reported underpayment or 'wage theft' claims), as award terms can be prescriptive and challenging at times for payroll systems to administer.

Enterprise agreements and industrial relations

Australia has a complex industrial framework by international standards. This framework provides for, among other things, rights of entry for union officials into workplaces, rights for workplace delegates to allow them to represent members and eligible members of unions, enterprise bargaining for enterprise agreements and an industrial action regime overseen by the Fair Work Commission.

Enterprise agreements are enterprise-specific agreements negotiated between an employer and its employees (or union(s) on their behalf). The FW Act governs all aspects of the negotiation, approval and operation of enterprise agreements.

Enterprise agreements will usually operate to the exclusion of an award. However, before an agreement can take effect, it must pass a test (called the ‘better off overall test’) to ensure the employees are not disadvantaged when compared against the terms of the applicable award.

There are complex rules about the permitted content of enterprise agreements, how they are negotiated, and how they may be approved and terminated.

Recently, the circumstances where multi-enterprise bargaining may occur has been expanded so that more employees may become covered by enterprise agreements and some employers may be forced to bargain together. The Fair Work Commission has also been given new powers to arbitrate long running, intractable enterprise agreement disputes. The result is that employers who have not had an industrial or bargaining strategy in place to date in Australia should now consider developing one.

Employment contracts

Subject to legislation and to applicable industrial instruments, employers are able to (and typically do) make written contracts of employment with employees, covering a range of matters.

Policies and practices covering employment and industrial relations issues may also be implemented. It is important for anyone planning to establish or purchase a business in Australia to ascertain the terms of any awards, agreements and employment legislation that may apply to existing or prospective employees. The terms of contracts of employment and relevant policies and practices should also be reviewed or be carefully considered when being drafted.

There are a number of considerations when drafting contracts in Australia. For example, contract terms that purport to prohibit disclosures about remuneration and any terms and conditions that are reasonably necessary to determine remuneration outcomes (eg hours of work) (i.e. 'pay secrecy' provisions) are now prohibited (and penalties apply).

The use of certain fixed (and outer limit) term employment contracts is also now prohibited in some circumstances (and penalties apply). Employers cannot employ an employee on a contract:

- for more than two years;
- that has an option to renew or extend for more than two years or more than once; or
- for a consecutive period for the same or substantially similar work in certain circumstances.

Some limited exceptions apply including to casual employment and training contract arrangements and where the employee earns more than the high income threshold (pro-rated for part-time employees) for the first year ($175,000 at 1 July 2024 – this amount is indexed in July each year).

Superannuation (pension fund)

Broadly speaking, under the federal superannuation guarantee legislation, an employer must make superannuation contributions of at least the prescribed minimum rate of each employee’s ordinary time earnings to avoid incurring a charge called the ‘superannuation guarantee charge’ or ‘SGC’. These contributions must be made quarterly. The minimum prescribed rate is currently 11.5%, and is scheduled to increase to 12% on 1 July 2025).

This rate is applied to the employee's ordinary time earnings (which excludes overtime but generally includes bonuses, allowances and commissions) up to 'maximum earnings base' set by legislation.

However, certain exceptions apply in respect of some employees, including:

- non-resident employees paid for work done outside Australia; and
- resident employees employed by non-resident employers for work done outside Australia.

In most cases, employers must allow employees to choose the fund into which their superannuation contributions are paid. If a new employee does not choose a fund, employers must request the employee's 'stapled' fund (i.e. an existing superannuation fund linked to an individual employee that follows them between jobs) from the ATO and contribute to that fund. Where an employee does not have a 'stapled' superannuation fund, or choose another fund, their contributions must be paid into the employer's default fund.

The federal superannuation guarantee legislation operates alongside and may overlap with other superannuation entitlements an employee may have under an industrial instrument or their contract.

More information is available in *Taxation*.

Workplace health and safety (WHS)

Employers (and other persons conducting a business or undertaking - PCBUs) have a duty to ensure the physical and psychological safety of workers and workplaces so far as is reasonably practicable under federal, state and territory legislation. 'Workers' are defined broadly to include employees, contractors, labour hire workers, volunteers etc.

If WHS duties are breached, organisations can be prosecuted. It is also possible, in some cases, for officers or senior managers of the organisation to be prosecuted (significant financial penalties and potential imprisonment terms may apply for some WHS offences). Officers have a personal obligation to exercise due diligence to ensure that their organisation complies with its WHS duties.

Workers' compensation

All organisations must maintain statutory worker's compensation insurance for workers who are injured in the course of their work.

Workers' compensation legislation also has detailed claims management processes that include obligations on employers to, broadly, provide suitable alternative employment for ill and injured employees who have some work capacity.

Discrimination and equal opportunity

Both federal and state legislation prohibit discrimination (in a range of areas including all aspects of employment such as recruitment, promotion and termination) on the basis of certain unlawful grounds, including sex, race, disability, religion and age.

Sexual and sex-based harassment in the workplace is also unlawful and there is now a positive duty on employers and PCBUs to eliminate sexual harassment, sex-based harassment and discrimination, hostile work environments and victimisation as far as possible (under federal legislation and some state legislation).

Under the *Workplace Gender Equality Act 2012* (Cth), certain employers have reporting and other obligations to support and improve women's workforce participation and to increase workplace equality.

Redundancy procedures and payment

A redundancy generally arises where an employee's position is no longer required to be performed by anyone at the workplace.

If an employee's employment is terminated for redundancy, the employee will be entitled to notice of termination (or payment in lieu) and may be entitled to a redundancy payment under the NES (unless one of the limited exceptions applies), an applicable industrial instrument or, possibly, their employment contract or a binding policy or procedure.

Awards include redundancy consultation procedures. Additional notification and consultation obligations under the FW Act (involving unions) can apply where an employer proposes to implement 15 or more redundancies.

Unfair dismissals

The primary remedy for successful unfair dismissal claims is reinstatement of the employee to their previous position. However, where reinstatement is found to be inappropriate an award of compensation, which is capped at the lesser of six months' pay or the equivalent of half the high income threshold applicable at the time of the dismissal, may be made (the high income threshold is A$175,000 as at 1 July 2024 and is indexed every year. This means the maximum amount of compensation that can currently be awarded is A$87,500).

Generally, to be eligible to make an unfair dismissal claim, an employee must have been employed for

the minimum employment period and either earn less than the high income threshold or be covered by an award or enterprise agreement. The minimum employment period is one year for small businesses and six months for all other businesses.

General protections

An employer must not take 'adverse action' against an employee or prospective employee for a number of prohibited reasons in Australia, including because:

- the person is a member of a union or has engaged in industrial activities;
- the person has a protected attribute (eg race, sex, sexual orientation, disability, age etc); or
- the person has a workplace right, or has or has not exercised a workplace right (eg a union official with a right to enter a workplace to inspect WHS breaches).

'Adverse action' broadly means any form of detrimental action (e.g. not promoting an employee because they have made a complaint about their employment, giving an employee a written warning because of their union activities, or dismissing an employee because they have taken paid personal leave or made a workers' compensation claim).

There is no minimum service requirement or maximum remuneration cap in relation to a general protections claim. A court may order reinstatement or damages (with no cap) for breach of the general protection provisions. Also, a reverse onus of proof applies – which means the employer must prove it acted for only lawful reasons.

Right to disconnect

Employees now have a right under the FW Act to refuse to monitor, read or respond to contact (or attempted contact) from an employer (or third party if work related) outside of their working hours – unless that refusal is unreasonable.

If there is a dispute about out of hours contact, the parties must first attempt to resolve it at the workplace level. If this fails, either party can apply to the Fair Work Commission to make an order to deal with the dispute. Penalties can be imposed if an order is breached.

Underpayments / wage theft

From 1 January 2025, it will be a Commonwealth criminal offence for an employer to intentionally engage in conduct that results in the underpayment of their employees. Significant penalties will apply. Directors and senior leaders may also face personal liability including imprisonment.

Independent contractors / labour hire

Various protections exist to protect independent contractors and to prevent sham contracting arrangements in Australia. Among these protections, independent contractors are now able to make applications for unfair contract disputes in the Fair Work Commission if they earn below the contractor high income threshold ($175,000 as at 1 July 2024 - to be indexed each year).

A number of other new complex protections apply to employee-like workers engaged to work on digital platforms, and for labour hire workers designed to ensure they receive the same pay as host workers for doing the same work.

Transfer of undertakings and employees

Unlike in Europe, there is no Australian equivalent to the Transfer of Undertakings Regulations (or TUPE). If a business is sold or outsourced, employees will only transfer if the ‘new employer’ makes an offer of employment that the employee accepts. Where employees transfer in these circumstances, the new employer may become liable for their accrued leave entitlements. In addition, any enterprise agreement covering the employees is also likely to transfer to the new employer.

Immigration

OVERVIEW

Entry, work and residence entitlements are governed by the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) (together, the **Migration Legislation**) and administered by the Department of Home Affairs (**Home Affairs**).

All non-Australian passport holders must hold a valid visa in order to enter Australia and, to work in Australia, that visa must contain work rights entitlements.

The Australian visa program contains a large number of visas, most of which are either temporary residence (allowing stays of a limited duration and purpose) or permanent residence (which give the holder an unlimited right to live and work in Australia). There are a wide variety of visas available, including employer-sponsored visas, independent skilled visas, family visas and business skills visas. Eligibility depends on individual circumstances, skills, background and experience and, given the potential cost (both financial and in terms of time and opportunity) of getting an application wrong, it is important that applicants and their family and business sponsors understand the eligibility, documentation and procedural requirements in detail before submitting an application.

Visiting Australia for short-term business or work

The Migration Legislation makes a distinction between 'work' and 'business' activities. Care must be taken to ascertain which activities are being undertaken so the correct visa can be obtained.

Home Affairs policy contains detailed guidance on what activities comprise 'business activities'. However, in general terms, they include:

- making general business or employment enquiries;
- investigating, negotiating, signing or reviewing a business contract;
- activities carried out as part of an official government-to-government visit; and
- participating in conferences, trade fairs or seminars, as long as you are not being paid by the organisers for your participation.

The appropriate visas for 'business activities' are the various visitor visas issued for business purposes.

The appropriate visa for short-term work situations is the Temporary Short Stay Specialist (Subclass 400) visa, which permits work in limited circumstances where the work is highly specialised in nature or required due to an emergency, and is non-ongoing.

Under Home Affairs policy, 'non-ongoing' means a position that needs to be filled on a short term basis, not exceeding three months, or a maximum of six months in very limited circumstances.

Remote work arrangements

Currently, Australia does not have a specific visa program designed for remote workers.

Depending on the employer's operations however, as well as the circumstances of an employee's visit to Australia, an employee may be able to work remotely from Australia on certain relevant visas.

Long-term work

The Temporary Skill Shortage (Subclass 482) (**TSS**) visa is the primary visa program available to and used by businesses to sponsor overseas employees to work in Australia on a temporary basis. It is available to organisations already established in Australia, as well as organisations based outside of Australia that want to either establish operations in Australia for the first time, or fulfil contractual obligations in Australia.

The TSS visa is a sponsored visa. This means that the organisation wishing to hire an overseas worker must be approved as a 'standard business sponsor' by Home Affairs before the organisation can sponsor that person on a TSS work visa.

482 visa application process

Step 1 (Sponsorship Application): The employer applies for approval as a business sponsor.

Step 2 (Nomination Application): The employer nominates the position to be filled.

Step 3 (Visa Application): The prospective employee applies for the Subclass 482 visa.

The TSS visa has a short term stream (visa granted for up to 2 years) and a medium term stream (visa granted for up to 4 years). In order to qualify for the TSS, the role needing to be filled must appear as an occupation on the Combined List of Skilled Occupations and must be advertised in a prescribed way before the application can be lodged.
The applicant must have a minimum of two years of relevant work experience, the skills to fulfil the role and meet the English language, health and character requirements. The Australian Government is regularly reviewing the visa programs, requirements and conditions. The Australian Government website should be checked for updates.

Home Affairs' published service standard for processing TSS sponsorship, nomination and visa applications varies and can be anywhere from 5 days (for 'accredited sponsors') to four months for very complex applications. Processing times vary according to demand and the complexity of the application, so it is important for employers to plan ahead to factor application preparation and processing times into the hiring process.

Immigration compliance

This is an increasingly complex and important aspect of the Australian immigration system. Underpinning immigration compliance is the premise that non-Australian citizens can only work in Australia if they have a visa containing appropriate work rights.

Similarly, the Employer Sanctions provisions of the Migration Legislation provide that employers may only employ workers with the right to work in Australia on their visa. The provisions impose strict liability, and employers who inadvertently employ a foreign worker without appropriate work rights will automatically be liable for an offence under the civil liability provisions of the Migration Legislation unless they can show that they took certain prescribed steps (including conducting work rights checks).

Permanent residence in Australia

Employer nominated migration under the Employer Nomination Scheme (Subclass 186) enables businesses to nominate highly skilled workers for permanent residence from overseas, or in Australia on temporary visas. It requires evidence of, at least, a two year contract with the nominating employer from grant of the permanent residence, but the visa holder becomes a permanent resident and can effectively remain in Australia indefinitely. No sponsorship obligations are imposed on the employer pursuant to this visa scheme.

Privacy and freedom of information

OVERVIEW

In the digital age, privacy, data protection, good governance, as well as data rights and ownership, and freedom of information are more important than ever.

In Australia, the *Privacy Act 1988* (Cth) (**Privacy Act**) gives individuals rights in relation to their personal information and imposes corresponding responsibilities on businesses with a turnover of A$3 million or more, or which are related to an entity with a turnover of A$3 million or more (subject to some exceptions). There is also state and territory based information (including health and surveillance) privacy laws. In addition, Freedom of Information laws enable businesses and individuals to seek access to government information, promoting transparency and accountability. Where businesses hold information on behalf of a government agency that is the subject of a Freedom of Information (**FOI**) request (for example, if the business provides services to a government agency), they may also be required to produce this information in response to the FOI request.

Privacy

The Privacy Act is the primary means of privacy protection in Australia. It applies to the handling of personal information and also has specific requirements for handling credit information and tax file number and other government related identifiers. Compliance with the Privacy Act is regulated by the Australian Privacy Commissioner (**Commissioner**) and their office (the **Office of the Australian Information Commission**, or **OAIC**).

Australian privacy laws are principles based. The Privacy Act contains 13 Australian Privacy Principles (**APPs**) that set out how both private sector organisations and public sector agencies must collect, use, disclose and store personal information.

The APPs also give individuals certain information privacy rights, including the right to access the personal information an entity holds about them, a right to correct that information and a right to make a complaint and have it dealt with.

There are restrictions on using personal information for direct marketing purposes and other laws will apply if direct electronic marketing (for example, emails, texts) or telemarketing is being conducted. While personal information may be disclosed overseas, certain steps must first be taken and entities generally remain accountable for the handling of personal information by the overseas recipient. Employers' handling of employee records about their current or former employees is generally exempt from the Privacy Act.

The Privacy Act confers on the Commissioner various functions and powers, which include the power to receive and investigate privacy complaints, make determinations (including payment of compensation), conduct own motion investigations, seek enforceable undertakings from an entity and apply to court for civil penalties for the greater of $50 million; three times the value of the benefit obtained by the company; or 30% of the company's adjusted turnover in the relevant period, for serious or repeated interferences with privacy.

The Australian Government is presently considering a range of regulatory reforms to significantly augment Australia's privacy regime. These reforms include a number of proposals designed to increase the enforcement capability of the Commissioner, including:

- implementing new civil penalties for mid-tier and lower level privacy breaches; and
- conferring increased powers on the Federal Court and the Federal Circuit and Family Court of Australia to make orders once a civil penalty has been imposed; and
- providing the Commissioner with the power to undertake public inquiries and reviews into specified matters approved by the Attorney-General.

Draft legislation to implement these (and many other) changes to the Privacy Act are expected to be introduced into Parliament in September 2024.

The Privacy Act also includes a notifiable data breach scheme, which requires regulated entities to notifiy *eligible data breaches* (i.e. where a person is likely to

suffer serious harm from a privacy data breach) to the Commissioner and affected individuals. Entities must also assess suspected eligible data breaches.

Consumer data right

The Australian Government has recently introduced new laws that create a Consumer Data Right for consumers (individuals and businesses) in Australia. The purpose of the right is to:

- give consumers greater control over access to, and direct sharing of, their consumer data; and
- increase competition in a sector by making it easier for consumers to compare product and service offerings.

The Consumer Data Right only applies in the banking and energy sectors at this stage and is proposed to be implemented subsequently on a sector-by-sector basis.

Freedom of information

The *Freedom of Information Act 1982* (Cth) and simliar state and territory FOI legislation grants every person a qualified right to access information in the possession of an agency (meaning a government department, council or prescribed public authority). The legislation also requires government agencies to publish information about their operations and powers affecting members of the public, as well as manuals and other documents used in making decisions and recommendations affecting the public.

Government departments and agencies must provide access to documents in their possession on receipt of an FOI request unless the document is exempt from release under the legislation.

There are a range of exemptions. These include documents which are subject to legal professional privilege and documents disclosing trade secrets or commercially valuable information, the unreasonable disclosure of personal information, or information that would or could reasonably be expected to adversely affect an organisation in respect of its lawful business or commmercial affairs.

Where an exemption is claimed by an agency, and an applicant contests that exemption, there are avenues for review of an agency's decision through Commonwealth and State Information Comissioners and Tribunals.

Environment

OVERVIEW

In Australia, all three levels of government (federal, state/territory and local) play a role in making and enforcing environmental laws. There is a multitude of environmental law considerations to note when starting a project including;

- At the federal level, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) mandates businesses involved in environmentally harmful activities to obtain approval and meet reporting requirements.
- Land access and planning, emphasizing the importance of zoning laws in regulating land use and the need for planning approvals managed primarily by local councils.
- Australian Carbon Credit Unit Scheme and a new biodiversity certificate system incentivize projects that reduce greenhouse gas emissions and rehabilitate native ecosystems, respectively.
- Native title and Indigenous heritage, highlighting the protections afforded under the *Native Title Act 1993* (Cth).

Environmental Impact Assessment at Federal and State Levels

At the federal level, businesses engaged in environmentally harmful activities must obtain approval and comply with mandatory reporting requirements. The *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**) governs developments that may significantly affect 'matters of national environmental significance'. This legislation adds an extra layer of approval, requiring federal consent for any proposed development that could impact a nationally listed threatened species or ecological community. This is in addition to the standard approvals required at the state or territory level, ensuring a comprehensive governance framework for environmental protection.

Recent reforms to the EPBC Act, particularly concerning the Safeguard Mechanism as defined in the EPBC Act, have introduced new criteria-based information requirements for projects referred to the Department of Climate Change, Energy, the Environment, and Water. The Safeguard Mechanism is the Australian Government's strategy to reduce greenhouse gas emissions from major industrial sites, targeting facilities with annual emissions exceeding 100,000 tonnes of CO2 equivalent. The updated reporting obligations apply to new facilities expected to fall under the Safeguard Mechanism upon EPBC approval, as well as activities that increase emissions from existing facilities already covered by the Mechanism.

Additionally, the Australian Government has introduced a Bill that, if enacted, would establish the framework for a new, internationally aligned, mandatory climate disclosure reporting regime. This disclosure requirement would apply to businesses that lodge financial reports under Chapter 2M of the Corporations Act and meet certain size thresholds or have emissions reporting obligations under the National Greenhouse and Energy Reporting Scheme.

At the state/territory and local levels, development approval is required for most businesses, though the type of approval needed depends on the size and nature of the development. Each state or territory has its own contaminated land regime, which includes a contaminated land register and, in most cases, a duty to notify authorities of contamination. State or territory laws also make pollution a strict liability offence, except where permitted under environmental licences. Owners and occupiers of relevant properties may face similar liability, and these offences are prosecuted by state environmental authorities.

It is important to emphasize that these regulatory frameworks are dynamic, frequently under review, and subject to modification by policymakers and public analysis.

In July 2024, the Australian Government introduced major reforms to national environmental legislation in response to the Samuel Review's recommendations for the EPBC Act. These reforms aim to create a 'Nature Positive Australia,' focusing on repairing and

regenerating nature and establishing new statutory bodies to oversee and enforce environmental laws. This overhaul of environmental laws will impact all sectors, and those involved in current or future projects should closely monitor developments to stay informed about the latest changes and opportunities in Australian legislation.

Land Access and Planning

When securing land access rights, project planners must consider various factors, including land use restrictions and obtaining regulatory approvals for planning, building, and environmental considerations. In Australia's urban areas, zoning laws strictly regulate land use, categorizing land into specific zones to ensure compatibility with surrounding areas. Common zoning categories include residential, commercial, light industrial, general industrial, rural, and public or special uses.

Within each zone, land use may be classified as permitted with planning approval, prohibited, exempt from approval, or requiring further assessment. Many projects will need planning approvals, which are primarily managed by local councils—over 500 exist across the country. However, larger developments may require approval from state ministers or planning authorities. Typically, both planning and building approvals are needed before construction can begin.

Carbon Trading and Biodiversity Certificates Scheme

The *Australian Carbon Credit Unit* (**ACCU**) *Scheme* incentivizes projects that reduce greenhouse gas emissions or capture and store carbon. Eligible projects include those related to vegetation management, agriculture, forestry, energy consumption, waste, transport and industrial processes. Projects may involve altering vegetation management to store more carbon, changing land practices to prevent emissions, or upgrading technology to reduce energy use or methane emissions. For every tonne of carbon dioxide equivalent (tCO2-e) emissions avoided or sequestered, participants earn an ACCU.

Additionally, the Australian Government has established a biodiversity certificate system and marketplace to recognize landowners who rehabilitate or maintain native ecosystems. This initiative supports indigenous habitats by enabling property owners to acquire biodiversity certificates that can be traded. Similar to the carbon credit framework, landowners can accumulate ACCUs through activities that reduce or prevent greenhouse gas emissions, which can then be sold to the government or private enterprises. The proposed biodiversity certificates and trading scheme will be regulated by the Clean Energy Regulator.

Native Title and Indigenous Heritage

Native title recognizes the enduring connection some Indigenous Australians have to their ancestral lands and waters through their traditional laws. The *Native Title Act 1993* (Cth) enshrines the protection of these rights. Typically, both native title and heritage conservation require negotiated agreements with traditional custodians before a project can begin. Project owners must engage with native title holders or claimants when establishing or renewing project tenure, such as mining rights or pastoral leases. Native title stakeholders have the right to object, consult, or negotiate compensation for impacts on their rights.

Owners must also adhere to existing agreements with native title holders, which typically address compensation, community benefits such as job creation, and access to ancestral lands and heritage. Following a 2019 Federal Court of Australia ruling, project owners might also be accountable for compensation that reflects both the tangible value of lost native title rights and the intangible cultural harm from a weakened connection to the land.

The protection of Aboriginal cultural heritage is also governed by specific Commonwealth and state laws. These laws safeguard sites, objects, and landscapes significant to Aboriginal and Torres Strait Islander people. Cultural heritage can exist on land regardless of native title status, and its protection often requires additional measures beyond those covered in native title agreements.

Directors' duties

OVERVIEW

Boards of directors are responsible for the overall governance and direction, and oversee performance and compliance, of Australian companies. Australian law requires individuals who hold certain roles in Australian organisations to abide by prescribed duties and obligations. The legal duties of directors is primarily governed by the Corporations Act and a large body of Australian case law.

The core legal duties that apply to directors and their practical implications are considered in more detail below. There is a significant amount of case law on the scope and content of these duties and their application in different factual scenarios. Given its breadth, that case law are not explored in this guide.

Common law duties

Directors are subject to a number of common law duties, including to:

- **act with care and diligence:** to exercise their powers and discharge their duties with due care, skill and diligence;
- **act in good faith and for proper purpose:** to act in the best interests of the company, and not for some private advantage or for any purpose for which the power was not granted;
- **not misuse information or position:** not to improperly use or profit from their position or information obtained as a director to gain an advantage for themselves or someone else, or to cause detriment to the company;
- **avoid conflicts of interest or duty:** to avoid conflicts between the director's personal interests and the company's interests, and between the director's duties to the company and the director's duties to anyone else; and
- **not fetter discretions:** to give adequate consideration to matters for decision and to keep discretions unfettered.

Statutory duties

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

The directors' statutory duties under the Corporations Act are set out below.

Duties of care and diligence

The Corporations Act requires a director to act with the degree of care and diligence that a reasonable person would exercise if he or she:

- were a director in the company's circumstances; and
- had the same responsibilities as that director.

In determining the required standard of care, the court takes into account the company's circumstances and the individual director's responsibilities within the company. Whilst the scope of the duty depends on the circumstances, all directors are required to satisfy some core, non-delegable, minimum standards of care, skill and diligence, which include to:

- become familiar with the fundamentals of the business and operations of the company;
- stay informed and make appropriate inquiries about the company's activities;
- generally guide and monitor the company's activities;
- maintain familiarity with the financial status of the company (and to have the ability to read and understand financial statements and have a basic knowledge of accounting practice and material accounting standards);
- have a reasonably informed opinion of the company's financial capacity and solvency; and
- carefully review, and apply their own minds to, any financial report and directors' report that the company is required to prepare under the Corporations Act (including by considering whether the information in the report is consistent with their own knowledge or omits any material matters, and making appropriate inquiries if they are uncertain).

A director is also expected to attend board meetings unless exceptional circumstances (such as illness) prevent their attendance. Further, a director must be attentive at board meetings and cannot be excused from liability on the basis that he or she paid no attention to proceedings.

A director is entitled to delegate to others some responsibilities that would otherwise need to be performed by the director. However, the director is still responsible for adequate supervision, and for applying an inquiring mind and their own knowledge to the conduct of, and information provided by, the delegate. Wilfully ignoring the delegate's performance will not be satisfactory. There are also some other responsibilities that cannot be delegated (for example, final approval of accounts).

Duties of good faith and proper purpose

The Corporations Act requires a director to act:

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

What is meant by the 'interests of the company'?

A director will breach this duty if he or she fails to give proper consideration to the separate interests of the company ahead of other interests. This is because the duty is generally owed to the company itself, not to individual shareholders or third parties.

Directors must take into account the interests of the company's shareholders in order to satisfy the duty to act in the best interests of the company.

Where the only shareholder is the company's parent company it is, of course, appropriate for the directors to bear in mind the interests of that parent company.

Under the Corporations Act, a director is taken to act in good faith in the best interests of a wholly owned subsidiary if the subsidiary's constitution authorises the director to act in the best interests of the holding company, the director does so in good faith, and the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's acts.

Further, it is necessary for directors to have regard to the interests of creditors, particularly where the company is insolvent or nearing insolvency.

What is a 'proper purpose'?

The powers of a director must be used for the purpose for which they were given, not a collateral purpose.

An improper purpose would include where the director uses a power to obtain an advantage for themselves or someone else.

This is not an assessment of whether a business decision was a good or a bad decision. Rather, it is an assessment of how and why a particular power was used, and whether this is consistent with the purpose for which the power was given. For example, where directors issue new shares, was the share issue intended to raise money for the company or were the shares issued for a collateral purpose such as delivering control of the company to a particular person, ensuring that the directors remain on the board or obtaining some financial benefit for a director?

Duty to manage conflicts of interests

Directors must avoid or appropriatly manage conflicts between personal interests and the company's best interests. Once a conflict has been identified, the board must decide if it can be managed and how (eg. the conflicted director may be required to refrain from particpating in discussions on the matter, remove themselves from the meeting, or abstain from voting). Directors must disclose to the other directors the nature and extent of matters in which he/she has a material personal interest.

Duties not to misuse information or position

The Corporations Act requires that a director must not improperly use their position or information obtained because they are or have been a director, to:

- gain an advantage for themselves or someone else; or
- cause detriment to the company.

The statutory duties not to misuse information or position in practice mean that:

- a director may not apply the company's property either for the director's personal benefit or for the benefit of any other person without the company's authority (commonly requiring shareholder approval or constitutional authorisation); and
- a director must not make unauthorised use of confidential information belonging to the company.

Being a director may bring various profitable business opportunities to one's attention. Although directors may wish to take advantage of these opportunities, they must exercise care and might ultimately not be able to do so legally. Due to the obvious possibility of directors being attracted to business opportunities and the conflicts which may arise, the law curtails the freedom of directors to exploit those opportunities.

To ensure that directors comply with these requirements, the simple rule is to regard all corporate property, opportunities and information that has come into one's possession as a director as belonging solely to the company and unavailable for the director's use. Only if a director can demonstrate that the property or information does not belong to the company or is otherwise public, will the director be free to make use of it.

Other duties including the duty to prevent insolvent trading

Under the Corporations Act, there are other duties that impose specific obligations on directors. These include provisions prohibiting the falsification of records and the provision of false and misleading information.

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

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

There are also specific provisions under which the director may become personally liable to the company (including at the instigation of a liquidator) or to a third party creditor for the amount of the debt and any loss or damage suffered by the creditor in relation to the debt because of the company's insolvency.

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

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

The Corporations Act provides directors with a defence to civil action for insolvent trading known as the safe harbour protection. Directors are afforded an exception from liability for insolvent trading where the debt that the liquidator alleges had been incurred whilst the company was insolvent was incurred in connection with a course of action that is reasonably likely to provide a better outcome for the company than the immediate liquidation or administration.

Directors also have duties which are found in other legislation and which may impose significant personal liability on directors for a company's non-compliance (for example, duties found in taxation laws, workplace health and safety laws, privacy law, financial services legislation, environmental legislation and trade practices regulations).

Consequences of breaching directors' duties

Under Australian law, directors can be exposed to significant criminal and/or civil liabilities, or liability to pay compensation (damages), for a breach of their duties as a director. In addition, any alleged breach of directors' duties could have a significant impact on a director's and company's reputation.

The specific consequences of breach and available remedies vary depending on the particular duty and the source of the duty (that is, whether contractual, equitable or statutory).

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

- the company;
- shareholders under the statutory derivative action provisions (provided the court in its discretion grants leave to the applicant);
- regulators such as ASIC or the ACCC;
- third parties for misleading and deceptive conduct or anti-competitive behaviour; and
- creditors and insolvency administrators in the context of insolvent trading.

Directors can be exposed to criminal liability in relation to a breach of certain statutory duties if the breach is committed with intentional dishonesty. The maximum criminal penalties for breaches of directors' duties include up to 15 years' imprisonment and/or the larger of:

- A$1,565,000; and
- three times the value of the benefit derived and the detriment avoided by the director because of the contravention.

The offences that attract these inceased penalties include:

- intentionally, recklessly or dishonestly contravening directors duties;

- contravention of insider trading provisions;
- dishonestly failing to comply with financial and audit obligations under the Corporations Act; and
- knowingly or recklessly providing defective disclosure documents or statements under the Corporations Act.

The Corporations Act also gives the court power, on application of ASIC, to disqualify a person from managing companies (which includes being a director) for a contravention of some provisions in the Corporations Act.

General information and not legal advice

The content in this guide is intended only to provide a summary and general overview on matters of interest. It's not intended to be comprehensive, nor to constitute legal advice. You should always obtain legal or other professional advice, appropriate to your own circumstances, before acting or relying on any of that content.