INTRODUCTION

Australia welcomes new business and foreign investment by providing a strong economy, a stable political environment and a skilled and talented workforce. We believe that a combination of these factors, rising domestic demand and foreign investment, reduced company tax rates and Australia’s agility to adapt to changes in global demand, will continue to make Australia an attractive place for offshore investors to allocate their capital.

This guide has been designed to assist you in understanding some of the key structuring issues and regulatory processes required when establishing a business or investing in Australia. It is necessarily general in nature, and will likely prompt inquiries into other related issues.

Our lawyers are experienced in dealing with inbound investments and operations of foreign companies across Australia. With offices in Brisbane, Melbourne, Perth, and Sydney, we provide international clients with advice and counsel on legal issues on a broad array of matters impacting business operations. We would be delighted to discuss any opportunities or concerns with you.

**Nick Nichola**  
Managing Partner, Australia  
Melbourne

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Partner, Tax Practice Group Coordinator  
Sydney
Chapter Three - Investment Funds

Investment Fund Vehicles

Unit Trusts

Managed Investment Trusts

Limited Partnerships

Venture Capital Limited Partnerships and Early Stage Venture Capital Limited Partnerships

Companies

Australian Financial Services Licensing

Distinction Between Retail and Wholesale Investors

Investment Fund Initiatives and Reforms

Corporate Collective Investment Vehicles

Asia Region Funds Passport

Chapter Four - Corporate Governance

Capital

The Board of Directors

Directors’ Duties

Safe Harbour Laws

Meetings

Notification and Lodgement

Chapter Five - Regulation of Markets

Takeovers

Dealings in Securities
Chapter Nine - Privacy ................................................................. 48

Chapter Ten - Workplace Regulation ...................................... 51

Industrial Relations ................................................................. 51

Chapter Eleven - Immigration ........................................................ 54

Temporary Visas ........................................................................ 54

Permanent Migration .................................................................. 55

Independent Skilled Migration Scheme ...................................... 55

Distinguished Talent Visa / Global Talent Visa ......................... 55

Other Options ............................................................................ 55

Chapter Twelve - Real Estate .................................................. 58

Acquiring Land .......................................................................... 58

Land Ownership ........................................................................ 58

Caveat Emptor – Buyer Beware and the Need for Due Diligence ................................................................. 58

Buying Off-the-Plan .................................................................. 59

Strata Title ................................................................................ 59

The Contract of Sale .................................................................. 59

Settlement .................................................................................. 60

Leases and Licences to Occupy Land ........................................ 60

Leases ....................................................................................... 60

Legal Nature of a Lease ............................................................ 60
Chapter Thirteen - Taxation System .................................................... 65

Taxation ........................................................................................................ 65
Income Tax ...................................................................................................... 65
Income Tax Rates – 1 July 2020 to 30 June 2021 ........................................ 66
  Individual Residents Individual Nonresidents ........................................ 66
  Companies ............................................................................................... 66
  Superannuation Funds ............................................................................ 66
  Capital Gains Tax .................................................................................. 67
  Foreign Source Income ......................................................................... 67
  Tax Consolidation ................................................................................ 67
  Imputation ............................................................................................... 68
  Withholding Tax .................................................................................... 68
  Conduit Foreign Income Rules .............................................................. 68
  Losses ..................................................................................................... 68
  Thin Capitalisation ............................................................................... 69
  Transfer Pricing .................................................................................... 69
  Double Tax Treaties ............................................................................. 69
Goods and Services Tax ........................................................................... 70
Australian Business Number ..................................................................... 70
Fringe Benefits Tax .................................................................................. 70
State Taxes ................................................................................................. 70

Stamp Duty .............................................................................................. 71
Payroll Tax .............................................................................................. 71
Land Tax ................................................................................................. 71
Superannuation Guarantee .................................................................... 71

Chapter Fourteen - Industry Sectors ....................................................... 73

Energy and Resources .............................................................................. 73

Regulatory Framework ............................................................................ 73
Mining Sector ......................................................................................... 73
Industry Specific Codes ......................................................................... 74
Petroleum Sector .................................................................................. 74
Power Sector ........................................................................................ 74
Gas and Electricity Access .................................................................... 75
Project Structuring ................................................................................ 76
Foreign Investment ................................................................................ 77
Taxes and Royalties ................................................................................ 77

Environmental, Native Title and Heritage Issues in Energy and
Resources Sectors ................................................................................ 77

Infrastructure ....................................................................................... 77

Transport ..................................................................................................... 78
Sea ........................................................................................................ 78
Air ......................................................................................................... 79
Land ...................................................................................................... 81
Telecommunications ............................................................................. 81

Electronic Commerce ........................................................................... 82
CHAPTER ONE

Foreign Investment
Chapter One -
FOREIGN INVESTMENT

Overview

Under Australia’s foreign investment framework, foreign investors (including individuals, companies, trustees and governments) may need to apply for foreign investment approval prior to entering a proposed transaction. This guide provides a high-level overview of Australia’s foreign investment framework, drawing attention to recent legislative changes affecting foreign persons who are considering investing in Australia.

Under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA), certain proposed actions by foreign persons to make investments in Australia are ‘significant actions’ or ‘notifiable actions’. In these circumstances, a foreign person needs to determine whether they are obliged to, or should, provide prior notification to the Foreign Investment Review Board (FIRB) and seek a no objections notification.

Under the FATA, the treasurer has the power to make a range of orders in relation to a significant action that a person is proposing to take or has already taken. In particular:

- Where the treasurer is notified of a significant action before it is taken, the treasurer may decide that:
  - They do not object to the action and give the person a ‘no objection notification not imposing conditions’;
  - They do not object to the action provided the person complies with one or more conditions, and give the person a no objection notification imposing conditions; or
  - Taking the action would be contrary to the national interest and make an order prohibiting the proposed significant action.

- Where the significant action has already been taken without notification to the treasurer, the treasurer may determine the action is contrary to the national interest and may (for instance) make a disposal order, which is directed at unwinding the action.

Some significant actions are also ‘notifiable actions’ under the FATA. Notifiable actions must be notified to the treasurer before the actions can be taken. Offences and civil penalties may apply if a ‘notifiable action’ is taken without a notice having been given.

If a significant action is not a notifiable action, a foreign person is not obliged under the FATA to notify that action to the treasurer before it is taken. However, it is still prudent to notify any significant action to the treasurer, before the action is taken, given the powers of the treasurer and the associated risks.

When making foreign investment decisions, the treasurer is guided by the FIRB, which examines significant actions and notifiable actions and advises on the relevant national interest implications.

Monetary thresholds (which depend on whether or not the investor is from a free trade agreement partner country and whether or not the foreign investor is a ‘foreign government investor’) apply to determine whether prior notification to the treasurer ought to be made with respect to a particular action. Thresholds are indexed annually.
A ‘foreign person’ is generally:

- An individual that is not ordinarily resident in Australia;
- A foreign government or foreign government investor;
- A corporation, trustee of a trust or general partner of a limited partnership where a substantial interest of at least 20% is held by an individual not ordinarily resident in Australia, a foreign corporation or a foreign government; or
- A corporation, trustee of a trust or general partner of a limited partnership in which two or more foreign persons hold an aggregate substantial interest of at least 40%.

A foreign government investor is a foreign government or separate government entity, a corporation or trustee of a trust, or a general partner of a limited partnership in which:

- A foreign government or separate government entity holds a substantial interest of at least 20%; or
- Foreign governments or separate government entities of more than one foreign country (or parts of more than one foreign country) hold an aggregate substantial interest of at least 40%.

**Investor Reporting Obligations**

Foreign investors must meet certain reporting requirements under the FATA.

**Notification Requirement**

From 1 January 2021, all foreign investors who have been issued a no objection notification or an exemption certificate after that date must notify the treasurer of certain events (or situations) or when they take certain ‘actions’ (as defined in the FATA).

**Reporting on Conditions and Other Matters**

Conditions imposed under an exemption certificate or a no objection notification may also include a requirement that the foreign investor report back to treasury on certain matters, including compliance with their conditions.
## Approvals

### FIRB APPROVAL REQUIRED – NON LAND PROPOSALS

<table>
<thead>
<tr>
<th>Investor</th>
<th>Action</th>
<th>Threshold – More Than:</th>
</tr>
</thead>
<tbody>
<tr>
<td>All investors</td>
<td>National security businesses</td>
<td>AU$0</td>
</tr>
<tr>
<td></td>
<td>Australian media businesses</td>
<td>AU$0</td>
</tr>
<tr>
<td>Private investors from Free Trade Agreements (FTA) partner countries that have the higher threshold¹</td>
<td>Acquisitions in non-sensitive businesses</td>
<td>AU$1,216 million</td>
</tr>
<tr>
<td></td>
<td>Acquisitions in sensitive businesses²</td>
<td>AU$281 million</td>
</tr>
<tr>
<td></td>
<td>Agribusinesses</td>
<td>For Chile, New Zealand and United States, AU$1,216 million Others, AU$61 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person (with associates) in the entity)</td>
</tr>
<tr>
<td>Other private investors</td>
<td>Business acquisitions (all sectors)</td>
<td>AU$281 million</td>
</tr>
<tr>
<td></td>
<td>Agribusinesses</td>
<td>AU$61 million (based on the value of the consideration for the acquisition and the total value of other interests held by the foreign person (with associates) in the entity)</td>
</tr>
<tr>
<td>Foreign government investors</td>
<td>All investments</td>
<td>AU$0</td>
</tr>
</tbody>
</table>

¹ Agreement country or region investors are those from: the United States of America, New Zealand, Chile, Japan, the Republic of Korea, China, Singapore, Peru, the region of Hong Kong China, and any other countries (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), done at Santiago on 8 March 2018, is in force.

² Sensitive businesses include media; telecommunications; transport; defence and military related industries and activities; encryption and securities technologies and communications systems; and the extraction of uranium or plutonium or the operation of nuclear facilities.
<table>
<thead>
<tr>
<th>Investor</th>
<th>Action</th>
<th>Threshold – More Than:</th>
</tr>
</thead>
<tbody>
<tr>
<td>All investors</td>
<td>National security land</td>
<td>AU$0</td>
</tr>
<tr>
<td></td>
<td>Residential land</td>
<td>AU$0</td>
</tr>
<tr>
<td></td>
<td>Vacant commercial land</td>
<td>AU$0</td>
</tr>
<tr>
<td>Private investors from FTA partner countries that have the higher threshold&lt;sup&gt;3&lt;/sup&gt;</td>
<td>Agricultural land</td>
<td>For Chile, New Zealand and United States, AU$1,216 million</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Others, AU$15 million (cumulative)</td>
</tr>
<tr>
<td></td>
<td>Developed commercial land</td>
<td>AU$1,216 million&lt;sup&gt;4&lt;/sup&gt;</td>
</tr>
<tr>
<td></td>
<td>Mining and production</td>
<td>For Chile, New Zealand and United States, AU$1,216 million</td>
</tr>
<tr>
<td></td>
<td>tenements</td>
<td>Others, AU$0</td>
</tr>
<tr>
<td>Other private investors</td>
<td>Agricultural land</td>
<td>For Thailand, where land is used wholly and exclusively for a primary production business, AU$50 million</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Others, AU$15 million (cumulative)</td>
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<tr>
<td></td>
<td>Developed commercial land</td>
<td>AU$281 million</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Where the land is sensitive&lt;sup&gt;5&lt;/sup&gt;, AU$61 million</td>
</tr>
<tr>
<td></td>
<td>Mining and production</td>
<td>AU$0</td>
</tr>
<tr>
<td></td>
<td>tenements</td>
<td></td>
</tr>
<tr>
<td>Foreign government investors</td>
<td>Any investment</td>
<td>AU$0</td>
</tr>
</tbody>
</table>

<sup>3</sup> Agreement country or region investors are those from: the United States of America, New Zealand, Chile, Japan, the Republic of Korea, China, Singapore, Peru, the region of Hong Kong China, and any other countries (other than Australia) for which the CPTPP, done at Santiago on 8 March 2018, is in force.

<sup>4</sup> For Hong Kong and Peruvian investors however, where developed commercial land is also sensitive land (see section 52(6) of the Foreign Acquisitions and Takeovers Regulation 2015 (FATR)), a threshold of AU$61 million will apply.

<sup>5</sup> Sensitive developed commercial land (see section 52(6) of the FATR), includes mines and critical infrastructure (for example, an airport or port).
Timing

Once proper notice is given and the correct fee is paid, the treasurer has 30 days to consider an application and make a decision. The treasurer may extend this period by up to a further 90 days by notifying the investor in writing, as well as a further 90 days by publishing an interim order. Investors can also voluntarily extend the time period by providing written consent. Applicants will be informed of the treasurer's decision within 10 days of it being made.

Sector-Specific Legislation

In addition to the FIRB requirements, foreign investment in various sectors is also governed by specific legislation. For instance:

- Foreign ownership in the banking sector must be consistent with the Banking Act 1959 (Cth), the Financial Sector (Shareholdings) Act 1998 (Cth) and banking policy;
- Aggregate foreign ownership in an Australian international airline (including Qantas) is limited to 49% (see Air Navigation Act 1920 (Cth) (Air Navigations Act 1920) and Qantas Sale Act 1992 (Cth));
- Foreign ownership of some airports is limited by the Airports Act 1996 (Cth) to 49% with a 5% airline ownership limit, and this legislation also imposes certain cross-ownership limits between certain airport operator companies;
- The Shipping Registration Act 1981 (Cth) requires a ship to be majority Australian-owned if it is to be registered in Australia, unless it is operated by a foreign resident under a demise charter and is exempted from the requirement to be registered during the term of the charter; and
- Under the Telstra Corporation Act 1991 (Cth), aggregate foreign ownership of Telstra is limited to 35% and individual foreign investors are only allowed to own up to 5%.

State and Territory Requirements for Foreign Investors

Each Australian state or territory may also have specific legislative requirements, which impose obligations on foreign investors.

For example, in Queensland, the Foreign Ownership of Land Register Act 1988 (Qld) requires acquisitions and disposals of an interest in land by a foreign person to be notified to the Registrar of Titles within 90 days. A person who holds an interest in land and who subsequently becomes a foreign person or a trustee of a foreign person must also lodge a notification within 90 days.

Penalties for Noncompliance

From 1 January 2021, failure to comply with FIRB notification requirements will attract increased criminal and civil penalty amounts (as outlined in the Foreign Investment Compliance Framework Policy Statement.)

For instance, the maximum civil penalty amount for failing to provide notice, or for the provision of false or misleading information, is the greater of 5,000 penalty units (or 50,000 penalty units if the person is a corporation) or 75% of the value of the investment to a maximum monetary value of 2.5 million penalty units.
National Security

Foreign persons have previously been required to obtain approval before engaging in notifiable actions and significant actions. Recent reform (which took effect on 1 January 2021) has implemented an additional mandatory pre-approval regime for ‘notifiable national security actions’. Foreign persons must provide notification to FIRB if they engage or propose to engage in the following action irrespective of the value of their investment:

- Start a national security business;
- Acquire a direct interest in a national security business;
- Acquire a direct interest in an entity that carries on a national security business;
- Acquire an interest in Australian land that, at the time of acquisition, is national security land; or
- Acquire a legal or equitable interest in an exploration tenement in respect of Australian land that, at the time of acquisition, is national security land.

National Security Test

The national security test provides the treasurer with powers to address new and emerging national security risks from foreign investment. The national security test:

- Requires mandatory notification of proposed investments in national security land, interests in exploration tenements over national security land, a proposed direct investment in a national security business or starting a new national security business;
- Allows investments that are not notified to be ‘called-in’ by the treasurer for review on national security grounds;
- Allows investors who choose to voluntarily notify to receive certainty from being subject to call-in; and
- Incorporates a last resort power, which, in exceptional circumstances, permits the treasurer to impose conditions, vary existing conditions, or, as a last resort, require the divestment of any approved investment where national security risks emerge. This power is subject to a number of safeguards.

National Security Business

National security businesses are endeavours that if disrupted or carried out in a particular way may create national security risks. This would include (without limitation) businesses such as critical infrastructure assets (as defined in applicable legislation), telecommunications carriers, manufacturers or suppliers of goods of technology intended to be for military or intelligence use, providers of critical services to defence and intelligence personnel or businesses that collect or store personal information on defence and intelligence personnel (for example). A business would not be a national security business unless it is publicly known, or could be known upon making reasonable inquiries, that the business meets the relevant criteria.

National Security Land

Land is national security land if it is ‘defence premises’ (as defined in applicable legislation) or land in which an agency in the national intelligence community has an interest, if the existence of that interest is publicly known or could be known upon the making of reasonable enquiries.
Voluntary Notification

The treasurer cannot call-in an action that has been notified to the treasurer or for which a no objection notification or exemption certificate exists. Therefore, a foreign person can choose to extinguish the treasurer’s ability to use the call-in power by voluntarily notifying a ‘reviewable national security action’. Voluntary notification will not, however, extinguish the treasurer’s ability to use the ‘last resort’ power.

Application Fee Changes

From 1 January 2021, amendments to the Foreign Acquisitions and Takeovers Fees Imposition Act 2015 (Cth) and the introduction of the Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020 (Cth) changed the way that fees are calculated for applications and notices. A summary of the fees for a single action is provided below.

Summary of Fees for a Single Action

<table>
<thead>
<tr>
<th>KINDS OF ACTIONS AND APPLICABLE FEES FOR A SINGLE ACTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kind of action</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
</tr>
<tr>
<td>Residential land</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Agricultural land</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Commercial land and tenements</td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

For guidance on how to determine the ‘kind of action’ that relates to a specific transaction, see Determining the ‘kind of action’ taken. See also Fees when a single action is captured by two or more provisions of the Act.

Where an action is a reviewable national security action, fees are calculated at 25 per cent of the fee for an equivalent notifiable action.

Under section 53 of the Fees Regulation, a lower fee of AU$2,000 will apply where the consideration value of an action is less than AU$75,000. See Adjusting fees and lower fee rules for further information.

Ibid.

Ibid.
## KINDS OF ACTIONS AND APPLICABLE FEES FOR A SINGLE ACTION

<table>
<thead>
<tr>
<th>Kind of action</th>
<th>Applicable fees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Starting an Australian business (including starting a national security business)</td>
<td>AU$2,000 flat fee</td>
</tr>
<tr>
<td>Entering agreements and altering documents</td>
<td>AU$12,700 flat fee</td>
</tr>
<tr>
<td>Internal reorganisations</td>
<td>AU$12,700 flat fee</td>
</tr>
</tbody>
</table>
Chapter Two -

BUSINESS STRUCTURES

In determining which structure to use to make an investment in Australia, there are a range of legal, tax, accounting and regulatory issues which need to be considered. Business structures include:

- Companies incorporated in Australia;
- Australian branches of foreign companies;
- Partnerships;
- Joint ventures;
- Sole proprietorships; and
- Trusts.

Companies Incorporated in Australia

In Australia, there are both proprietary (private) and public companies. Procedures exist for changing the status of a company, if required as the company and its operations evolve. The differences between a proprietary company and a public company are:

- A proprietary company’s disclosure requirements are less onerous, but for this reason its shares may not be offered to the general public (and therefore cannot be traded on a public stock exchange).
- A proprietary company must have at least one member, but cannot have more than 50 nonemployee members, whereas a public company can have an unlimited number of members and can raise funds from the public.
- Public companies may be listed on the Australian Securities Exchange (ASX), in which case they must comply with the ASX Listing Rules.
- Most companies, particularly small companies, are proprietary limited and must include the word ‘Proprietary’ and ‘Limited’ or ‘Pty Ltd’ in their name (whereas a public company is only required to include the word ‘Limited’ or ‘Ltd’) to indicate its structure to all relevant stakeholders.
- Proprietary limited companies are also classified as large or small. A proprietary company is classified as small only if it meets specified criteria relating to its consolidated revenue, consolidated gross assets, and the number of its employed persons.
- Most large proprietary companies are required to appoint an auditor and lodge appropriate financial statements with the Australian Securities and Investments Commission (ASIC). Small proprietary companies need only prepare audited financial statements if ordered to do so by ASIC or in particular circumstances, where required by its members or where it is controlled by a foreign company.
- The most common type of company in Australia is a proprietary company limited by shares. This type of company has shareholders and the liability of each shareholder to the company or its creditors is limited to the capital originally invested. A shareholder’s personal assets are protected in the event of the company’s insolvency, but money originally invested will be lost. Most limited liability companies (whether public or private) as noted above are required to have the word ‘Limited’ or ‘Ltd’ included in their names.
• Distinct from a company limited by shares is a no liability company. In Australia, no liability status is restricted only to mining companies whereby the company is not entitled to calls on the unpaid issue price of its shares. A no liability company must include the words ‘No Liability’ or ‘NL’ in its name.

An Australian Company Number (ACN) or an Australian Registered Body Number (ARBN) will be assigned by ASIC to each newly registered company or foreign company (meaning a foreign incorporated entity, which is registered in Australia, as opposed to a foreign subsidiary, which would be a locally incorporated entity). The ACN or ARBN must appear on all of the company’s public documents, negotiable instruments and where relevant, the company seal.

**Australian Branches of Foreign Companies**

A foreign company wishing to establish a place of business or carry on a business in Australia without incorporating a local subsidiary must register as a foreign company with ASIC and obtain an ARBN. The requirements for registration of a foreign company include:

• Appointment of an Australian resident individual or company who will act as an agent for the service of notices and who may also be liable for acts of the foreign company in Australia;
• Maintenance of a registered office in Australia;
• Lodgement of a certified copy of its certificate of incorporation and constitution, and a list of its current directors including names, addresses, and dates and places of birth; and
• A list of powers of the Australian resident directors.

Foreign companies are prohibited from carrying on business in Australia without becoming registered. A registered foreign company may only trade under the specific name registered with ASIC. If the name of a registered foreign company changes, it must notify ASIC of the change within 14 days.

Most registered foreign companies must annually lodge with ASIC a copy of their balance sheet, profit and loss statement and cash flow statement for the previous financial year. These must be prepared in accordance with the laws of the company’s place of incorporation, together with any other documents, which they are required to prepare under the laws of their place of incorporation.

**Partnerships**

Partnership law is set out in the relevant state or territory legislation and is also provided for by common law. A partnership is a valid agreement typically formed between two or more businesses or individuals in which the partners (owners) agree to carry on a business (any trade, occupation or profession) with a view to generating a profit. The partners ultimately share the profits or losses formed by the partnership. As a partnership must operate with a view to profit, charitable organisations cannot operate under this business structure. A partnership is not a separate legal entity and partners are, therefore, collectively and individually liable for the debts and obligations of the partnership.

**Limited Partnerships**

State and territory legislation caters for limited partnerships, which have two types of partners—‘limited partners’ and ‘general partners’—whose duties and liabilities vary. Limited partners are not involved in managing the limited partnership and their liability for its debts is limited to the amount of money contributed to that partnership as recorded in the relevant register for each state and territory. Limited partners therefore contribute to the capital of the partnership in return for a share of its profits.
A general partner is responsible for the day-to-day management of the limited partnership and their liability for its debt is unlimited. There must be at least one general partner. Limited partnerships are formed upon registration as a limited partnership.

**Joint Ventures**

A joint venture (JV) is a term that describes the relationship between two or more parties entering into an agreement to work towards the same strategic goals while remaining separate legal entities. There is no law expressly governing JVs in Australia and the term 'joint venture' has no settled meaning under statute or common law in Australia.

A JV is usually constituted by a formal agreement, which specifies the parties’ rights and obligations. A JV may be incorporated, where each party subscribes for shares in a JV company, or unincorporated, where the parties agree by contract to a particular arrangement. Care must be taken in the constituent document to ensure the relationship does not, for tax and liability purposes at least, constitute a partnership.

Generally, the proceeds of an unincorporated JV are proportionately distributed to each of the joint venturers and, accordingly, each joint venturer may adopt differing accounting and tax treatments for the income and expenses of their part of the JV. In an unincorporated simple JV, there is no other legal entity through which gains and losses must pass. However, to facilitate dealing with third parties, the title to the property of the JV may be held by a separate entity, which may also serve as manager of the JV.

An alternative vehicle for two or more parties who wish to operate a business venture jointly is by means of a JV company. In this scenario, the shares and directorship in the JV company are proportionately held by the JV parties in accordance with their respective contributions to the project or venture. A written shareholders’ agreement (tailored to the specific requirements of the project, venture and parties involved) governs the relationship between the parties and the operation of the JV company. The main advantage of this structure is the limited liability conferred on its participants as shareholders in a proprietary limited company.

**Sole Proprietorships**

A sole proprietorship is a type of business entity that is owned and run by one individual and in which there is no legal distinction between the owner and the business. The owner receives all profits and is personally liable for all losses, debts and other obligations incurred by the business. Every asset of the business is owned by the proprietor and all debts of the business are the proprietor’s. This means the owner has no less liability than if they were acting as an individual instead of as a business. If a sole proprietor uses a name other than their own name as the trading name of the business, that name must be registered in accordance with the applicable legislation. This requirement applies to all forms of business entity carrying on business under a name which is not the entity’s name. This type of structure is rarely used by foreign persons investing in Australia or businesses of any significant size.
Trusts

A trust is a legal relationship which arises when a person (the trustee) holds property for the benefit of some persons (the beneficiaries) or for some object permitted by law (such as a charitable object) in such a way that the real benefit of the property accrues to the beneficiary or other object of the trust and not to the trustee. Relevantly:

- The trustee has a fiduciary relationship with the beneficiaries of the trust who may enforce those fiduciary obligations;
- A business may be carried on by means of a trust where a trustee (often a proprietary limited company) owns assets of the business and carries on the trading activities on behalf of the beneficiaries of the trust; and
- The most common business trust is a unit trust under which the interest in the trust is divided into ‘units’. Units may be transferred in a similar manner to shares of a company.

Distribution and Franchising

Under a distribution agreement, the distributor is usually granted ‘sole’ or ‘exclusive’ rights of distribution. It is vital that the rights and liabilities of the parties be defined with precision in a written agreement. Particular care must be taken not to infringe the Competition and Consumer Act 2010 (Cth) (Competition and Consumer Act) by entering into ‘anticompetitive’ agreements.

The advantage of dealing with a distributor is that an enterprise wishing to do business in this way need only deal with a single person whose credit and standing are capable of being accurately assessed. The distributor’s profit is the difference between the buying and selling price of the merchandise, whereas an agent earns a commission.

Generally speaking, a distributor is not an agent. Subject to some exceptions relating to manufacturers’ liability, a distributor, as principal, will itself have legal responsibility to third parties, following distribution and sale of the supplier’s products. By contrast, an agent will legally bind its principal in relation to the agent’s dealings with third parties (unless acting outside the agent’s authority). A disadvantage is that the price of the merchandise that an enterprise is attempting to market may be raised as a result of using a distributor, thus weakening the competitiveness of the merchandise in the local market.

Franchising is a fast growing business model and has spread to virtually every sector of the economy in Australia. ‘Franchising’ captures arrangements that meet the legal definition of being a ‘franchise’ even if they do not call themselves a franchise. It is important that the parties to an arrangement identify upfront whether the arrangement will be governed by laws regarding franchising. Franchising in Australia is highly regulated and franchisors must comply with the Franchising Code of Conduct if they propose to grant a franchise that will be operated in Australia.

Agency

Notwithstanding international measures aimed at unifying the principles of agency law, in particular the Convention on Agency in the International Sale of Goods, this is a complex area of law. In Australia, the relationships and rights created in contracts of agency are largely defined by common law rules. An agency agreement creates three relationships: principal/agent, principal/third party and
agent/third party. Depending on whether the principal is undisclosed, unnamed or named, the third
case, the principal will be in a position to sue the third party should the latter be at fault. Agents
reasonable diligence in carrying out their duties, to disclose material acts which
concern their principals, not to make hidden or secret profits, not to divulge information of a
confidential nature and, finally to account to their principals in respect of all agency transactions. A
principal is bound to pay the agent’s commission and to indemnify the agent on account of expenses
and liabilities if incurred with the principal’s approval.

**Ethical Supply Chains and the Modern Slavery Act**

The Modern Slavery Act 2018 (Cth) was passed by the Australian Parliament on 29 November 2018
and came into effect on 1 January 2019 for many Australian businesses. Modern slavery exists in
many forms and includes forced labour, wage exploitation, involuntary servitude, debt bondage,
human trafficking and child labour, both in Australia and globally. The purpose of the legislation is to
identify and remediate with a longer term aim to remove modern slavery from all supply chains.

This new law is relevant for businesses that fall within the following criteria:

- Has a consolidated revenue of >AU$100 million over the 12 months reporting period; and
- Is an Australian entity at the time of reporting; or
- Is a foreign entity carrying on business in Australia at the time of reporting.

Australian businesses, which are caught by the criteria above, are required to prepare a Modern
Slavery Statement and report to government annually. Businesses have to report within six months of
the end of their full financial year (e.g. after 30 December 2019 or 30 June 2020).

The Modern Slavery Statement must address six areas as part of the mandatory criteria:

1. Identify your reporting entity;
2. Describe your business structure, operations and supply chains;
3. Describe the risks of modern slavery practices in your supply chains;
4. Describe actions your business takes (or will take) to assess and address risks;
5. Explain how your business will assess the effectiveness of your actions to address modern
   slavery risks; and
6. Describe the process of consultation with any entities your business owns or controls.

K&L Gates has an environmental, social, and corporate governance (ESG) taskforce that operates at
a global level to monitor trends and developments in the various regulatory environments, which can
provide guidance and support: [https://www.klgates.com/ESG](https://www.klgates.com/ESG).

The Australian Government’s Department of Home Affairs has set up a website with further details:
CHAPTER THREE
Investment Funds
Chapter Three -

INVESTMENT FUNDS

Investment Fund Vehicles

In Australia, the legal structures typically used for investment funds are unit trusts, limited partnerships and companies. The structure of a fund will commonly be determined based on the types of investors in the fund (i.e. wholesale or retail), the jurisdiction of investors, the types of investments of the fund and their location.

Unit Trusts

In Australia, investment funds are predominantly structured as unit trusts as they generally provide flow-through tax treatment. Under a unit trust structure, the trustee holds the assets of the fund on trust for investors (unitholders) who hold units in the fund. The governing rules of a unit trust are set out in a trust deed, which typically provides broad discretionary powers of management for the trustee. These management powers are often delegated to an investment manager. The trustee of a unit trust has certain fiduciary obligations imposed on it under Australian general law and also pursuant to legislation in each state and territory of Australia.

Most unit trusts will fall within the definition of a ‘managed investment schemes’ under the Corporations Act 2001 (Cth) (Corporations Act). A managed investment scheme is a collective investment vehicle where investor contributions are pooled for a common purpose and investors do not have day-to-day control over the scheme.

While most investment funds that are trusts are unlisted, it is common for trusts to be listed on a stock exchange, often as a real estate investment trust or a listed investment trust.

Managed Investment Trusts

A Managed Investment Trust (MIT) is a unit trust which meets certain requirements under Australian tax laws (including that it is a managed investment scheme) that allows beneficial tax treatment for investors. This has made unit trusts that are MITs a popular investment structure in Australia.

Limited Partnerships

Limited partnerships are a less common structure than unit trusts and are typically used for private equity and venture capital funds. A private equity fund may comprise one limited partnership, or a primary limited partnership alongside parallel and feeder funds (which may be structured as limited partnerships or unit trusts) to cater for different stages of investment and investor types.

Under a limited partnership structure, the general partner is responsible for managing the partnership and has unlimited liability for the debts of the partnership, while limited partners (investors) have limited liability unless they play a role in management of the partnership.

Limited partners obtain limited partnership interests and are required to contribute capital to the fund in accordance with the limited partnership agreement.
The general partner or manager of the limited partnership (or venture capital limited partnership (VCLP) or early stage venture capital limited partnership (ESVCLP), see below) will generally be required to be authorised under an Australian Financial Services Licence (AFSL) for its activities in relation to the limited partnership unless an exemption applies.

**Venture Capital Limited Partnerships and Early Stage Venture Capital Limited Partnerships**

The VCLP and ESVCLP regimes were introduced by the federal government in order to encourage investment in Australian venture capital. VCLPs and ESVCLPs offer flow-through tax treatment and certain tax concessions for investors.

In order to qualify and obtain registration as a VCLP or ESVCLP, the limited partnership must meet certain criteria set out in the Venture Capital Act 2002 (Cth). These criteria are prescriptive and extensive. VCLPs and ESVCLPs must hold only 'eligible venture capital investments'. For an ESVCLP, it must have committed capital of at least AU$10 million and each of its investee entities must not have total assets of more than AU$50 million at the time of acquisition, and for a VCLP this limit is AU$250 million. Additionally, investee companies, businesses and trusts must not primarily engage in 'ineligible activities' including property development, land ownership, banking, securitisation or construction.

**Companies**

Another form of investment structure in Australia is the listed investment company. Listed investment companies are closed ended funds incorporated as companies. Investors generally acquire shares in the listed investment company on a stock exchange.

A new corporate investment structure has also been proposed to be introduced (refer below). However, while draft legislation to introduce this structure was released in 2019, it is not clear if or when this new structure will be available.

**Australian Financial Services Licensing**

Unless an exemption applies, the entities involved in establishing and operating a fund in Australia (e.g. the trustee and the investment manager) will generally be required to hold an AFSL that authorise them to carry on their activities in relation to the fund regardless of how the fund is structured and the types of investors.

**Distinction Between Retail and Wholesale Investors**

Different legislative and regulatory requirements apply depending on whether fund managers deal with wholesale or retail investors. The AFSL financial and compliance requirements applying to fund managers dealing with wholesale investor are less onerous than those applying to retail investors.

Subject to limited exceptions, if interests in a managed investment scheme are offered to retail investors, the managed investment scheme must be registered with the ASIC and will be subject to prescriptive requirements under the Corporations Act including in relation to operation and disclosure.

For retail investors, a product disclosure statement or prospectus must be provided (depending on the form of investment vehicle), whereas for wholesale investors there is no prescribed disclosure document which must be provided under the Corporations Act.
There is usually no requirement to register a managed investment scheme that is only offered to wholesale investors with ASIC. However, there are still AFSL considerations that apply when establishing a wholesale fund.

**Investment Fund Initiatives and Reforms**

**Corporate Collective Investment Vehicles**

A revised exposure draft for the introduction of a Corporate Collective Investment Vehicle (CCIV) investment structure was released by the Australian government in January 2019. The proposed CCIV regime is modelled on the United Kingdom’s Open Ended Investment Companies regime, and is intended to attract more foreign investment into Australia through the introduction of an internationally recognised investment vehicle.

The CCIV utilises a conventional company limited by shares with most of the powers, rights, duties and characteristics of a company. In order to maintain regulatory parity, certain features of Australia’s existing managed investment scheme regime will be incorporated into the design of the CCIV.

The CCIV is intended to attract flow-through tax treatment in a similar way to managed investment schemes.

**Asia Region Funds Passport**

The Asia Region Funds Passport (ARFP) is a regime to allow eligible funds in one member economy to be ‘passported’, or marketed and offered to retail investors across other participating member economies with limited additional regulatory requirements. The ARFP is expected to promote the entry of fund managers from participating economies into new markets across the Asia region and provide greater investor choice. As at the date of publication, Australia, along with Japan, New Zealand, South Korea and Thailand, are currently the participating economies.

In order to qualify as an ARFP fund, the fund must satisfy the core operating rules contained in the Memorandum of Cooperation on the Establishment and Implementation of the ARFP. The fund must also satisfy further specific requirements in its ‘home economy’ and in the ‘host economy’ into which it is passported.
CHAPTER FOUR
Corporate Governance
Chapter Four -

CORPORATE GOVERNANCE

Federal legislation enables the Australian federal government and the authority it established, ASIC, to assume responsibility for the regulation of companies and securities. The administration is regulated nationally, with ASIC’s computer system containing a public record of certain particulars of all companies operating in Australia.

Capital

Subject only to the requirement that there be at least one shareholder, there is no prescribed minimum for shareholders’ capital. The thin capitalisation tax rule may influence debt/equity capital structure. Share capital can also be consolidated or split as required, to allow for future investment and structuring requirements of the business, subject of course to any tax impact of such changes.

If certain procedures and requirements are met, companies may buy back their shares, which are then cancelled. Different shareholder approval processes apply to equal reductions and selective reductions, but both require that approval be obtained at a general meeting. Before the notice calling the general meeting is sent to shareholders, the company is required to notify ASIC of the proposed buy back, thereby enabling creditors and other interested persons to receive advanced notice of a proposed reduction in capital. In addition, the notice must include a statement, which sets out all information known to the company that is material to the decision on how to vote on the resolution.

Companies may also cancel or reduce their issued share capital with requisite members’ approval. In all cases, any return of capital must not render the company insolvent (unable to pay its debts in the ordinary cause).

The Board of Directors

For proprietary companies, a minimum of one director is required. At least one director of a company must be resident in Australia. Public companies require at least three directors, two of whom must be resident in Australia. One secretary resident in Australia is also required (that person can also be a director) for a public company.

The head of the board of directors (if any) is called the chairperson and he or she is also normally the chairperson of the company in general meetings. For tax purposes, a public officer (who also must reside in Australia) must be appointed and the Commissioner of Taxation must be notified of the details. All companies are required to maintain a registered office in Australia. Agreements and documents, which are signed by a company, may be signed by a duly authorised officer (usually a director or secretary) or under a power of attorney.

For more important or certain types of documents, a company may execute a document without a seal if the document is signed (or where a seal is fixed to the document and the fixing of the seal is witnessed) by:

- Two directors of the company; and
- A director and a secretary of the company; or
• The director, in the case of a proprietary company that has a sole director who is also the sole company secretary.

If a company executes a document in the above fashion, the other party may assume that entry into the document was properly authorised without further enquiry. For this reason, proprietary companies ordinarily do appoint a company secretary. Execution of a deed or agreement, however, also remains subject to common law requirements as to enforceability and procedural matters related to signing.

A company is required under the Corporations Act to maintain a register of members, a register of office holders, a register of security interests affecting the company’s property, and, if the company has issued any options or debentures, a register of option holders and debenture holders. It is this register, which is deemed to reflect the legal position of the membership and officeholders of an Australian company. This means that while ASIC is required to be notified of changes, it is the company’s registers and not ASIC’s records that reflect the true legal position under Australian law.

**Directors’ Duties**

Under the Corporations Act and common law, directors must:

• Act honestly;
• Exercise care and diligence;
• Act in good faith in the best interest of the company and for a proper purpose;
• Not improperly use their position or company information;
• Disclose their material personal interest and avoid conflicts of interest; and
• Prevent the company from trading while insolvent.

If directors breach the duty to prevent insolvent trading and cannot take advantage of defences such as safe harbour laws, directors can be pursued for the value of the debts incurred during the period that the company traded whilst insolvent, and risk exposure for prosecution for contravening the Corporations Act.

**Safe Harbour Laws**

The safe harbour provisions grant directors protection against liability for insolvent trading if after a director suspects the company is or may become insolvent, the director starts to develop ‘one or more courses of action that are reasonably likely to lead to a better outcome for the company’. A ‘better outcome’ is one that is ‘better than the immediate appointment of an administrator or a liquidator’. If a company is facing financial difficulties, the board of directors ought to obtain professional advice as to the company’s options which may include utilising the insolvency processes described in more detail on page 37 of this guide.

**Meetings**

A public company must convene and hold a general shareholders’ meeting within 18 months after its registration and, thereafter, at least once in each calendar year and within five months after the close of each financial year (the annual general meeting). A proprietary company is not required by law to hold an annual general meeting, although it may be required to do so by its constitution.

The financial year of most Australian taxpayers ends on 30 June, so, for public companies, most annual general meetings must be held prior to 30 November. However, relief can be obtained from ASIC to align the year-end with a foreign parent’s year-end.
The agenda for the annual general meeting includes:

- The presentation of the company's accounts, including group accounts where applicable, together with directors' and auditors' reports; and
- The resignations and appointments of directors—the constitutions of public companies usually provide that a proportion of the directors (e.g. one-third) must retire by rotation each year, and the resignations and appointments of directors are also usually considered at the annual general meeting.

Other meetings may be convened by directors or members from time to time, in accordance with the company's constitution and the Corporations Act.

**Notification and Lodgement**

A public register of certain company information is maintained by ASIC, which may be accessed by the public for a small fee. Changes of name or address of shareholders (for proprietary companies only) or officers, allotment of shares, passing of special resolutions, registration of charges against the company and the like, are all required to be notified to, or lodged with, ASIC, usually within 28 days of the event happening (45 days for registration of a charge). ASIC will, within 14 days of the company’s review date (which is based on the anniversary of the company’s registration date), send each company (or its agent, if one is used) an annual statement to review and update, and an invoice statement to pay, which will include an annual review fee. The annual statement is a statement of the company details as held by ASIC (e.g. details of the current directors, issued shares, options, top 20 members, holding company) and any change must be notified to ASIC within 28 days after the issue date of the annual statement.

Public companies, large proprietary companies, and, in some circumstances, small proprietary companies must provide ASIC with a copy of their audited financial report, auditor’s report and directors’ report within three months (for disclosing entities) or four months (for all other companies) of the end of its financial year.
CHAPTER FIVE
Regulation of Markets
Chapter Five -
REGULATION OF MARKETS

Takeovers

In general, the Corporations Act prohibits any person (alone or together with associates) acquiring an interest of 20%, or more, of the securities of an Australian listed public company (or an unlisted company with more than 50 members); or increasing an existing 20%, or more, interest in a company, other than by way of one of the specific exceptions. The major exceptions are:

- Making an off-market takeover bid under which target shareholders are offered either cash or scrip consideration;
- Making a cash only, on-market, takeover bid;
- Having the relevant acquisition approved by target shareholders;
- Implementing a scheme of arrangement, which must be approved by the court and target shareholders; and
- Satisfying the ‘creep’ provisions (i.e. the number of target securities acquired by the person in any six-month period does not exceed 3% of the target’s securities on issue).

The principal laws, which regulate share acquisitions in Australia, are:

- The Corporations Act;
- The Competition and Consumer Act;
- The FATA; and
- Industry specific laws in areas such as broadcasting and banking.

Dealings in Securities

Dealings in securities (which include shares, debentures and options) are heavily regulated under Australian law.

For example:

- Subject to limited exceptions, a person may not raise equity in Australia other than pursuant to a formal disclosure document (usually a prospectus) lodged with ASIC;
- Persons may not engage in misleading or deceptive conduct (either by act or omission) in relation to any dealings in securities;
- Persons may not trade on inside information;
- Various obligations are imposed on Australian listed public companies in relation to the public disclosure of price sensitive information; and
- Participants in the securities markets (e.g. brokers, dealers and investment advisers) are also subject to additional licensing and regulatory controls.

Companies listed on the official list of the ASX are subject to the ASX Listing Rules and other operating rules. Among other things, these rules regulate:

- Issues and trading of shares and other securities;
- The transfer of listed securities;
• Transactions involving related parties;
• Substantial transactions; and
• The disclosure to the market of price sensitive information.

Foreign companies may apply for admission to the ASX. To avoid being subject to all the requirements of the ASX Listing Rules, they can apply for ‘exempt foreign entity status’. An exempt foreign entity is exempt from complying with the majority of the ASX Listing Rules (including rules relating to the disclosure of price sensitive information) provided the foreign entity is subject to the equivalent rules of its home exchange. Companies with an ASX Foreign Exempt Listing will still be required to provide ASX with reports and documents on an ongoing basis. The criteria for admission as an exempt foreign company include:

• Being a member of certain approved overseas exchanges (including the New York, London, Paris, Hong Kong, Tokyo and Amsterdam stock exchanges);
• Having net tangible assets or a market capitalisation of at least AU$2,000 million or having an operating profit before tax over each of the last three years of at least AU$200 million per annum; and
• Being registered as a foreign company under the Corporations Act.

Different criteria for admission to the ASX as an exempt foreign entity applies for entities established in New Zealand, including:

• A lower threshold for the assets and profits test, being that the entity must:
  • have net tangible assets of at least AU$4 million or a market capitalisation of at least AU$15 million; or
  • have an aggregated profit from continuing operations for the last three full financial years of at least AU$1 million

• The entity must satisfy the ASX that each proposed director, chief executive officer and chief financial officer of the entity is of good fame and character.

**Exchange Control**

Currently, few formal exchange control requirements apply. From time to time, Reserve Bank of Australia approval may be required in relation to transactions involving countries subject to international sanctions. Under the Financial Transactions Reports Act 1988 (Cth), there are reporting obligations imposed upon cash dealers with respect to certain transactions involving amounts over AU$10,000. Individuals are also obliged to report transfers of Australian or foreign currency in or out of Australia of amounts greater than AU$10,000, to the Australian Transaction Reports and Analysis Centre (AUSTRAC).

**Financial Services Regulation**

Financial regulation in Australia is split mainly between ASIC, and the Australian Prudential Regulatory Authority (APRA). Other regulators like AUSTRAC, Australian Financial Complaints Authority, the Australian Competition and Consumer Commission, Reserve Bank of Australia and the Department of Treasury also share certain roles or functions under the Australian financial regulatory regime.
ASIC

ASIC is the financial sector conduct regulator who is generally responsible for conduct of Australian companies, financial markets, financial services organisations and professionals who advise on or deal in financial products. ASIC has general regulatory power over Australian Financial Services licensing, Australian Credit Licence (ACL), training to financial advisers, financial product disclosure, consumer protection and enforcement within the sector.

Some entities looking to provide financial services from outside Australia may qualify for mutual recognition arrangements. However, these arrangements are limited in scope and are the subject of potential reforms.

APRA

APRA is the financial system prudential regulator responsible for the licensing and regulatory oversight of financial entities to protect the interests of depositors, insurance policyholders and superannuation fund members. It mainly supervises bank, credit unions, different types of insurance companies and superannuation industry, with a key aim to protect the interests of depositors, policy holders and superannuation fund members to develop a robust prudential system in Australian financial market.

AUSTRAC and Anti-Money Laundering

AUSTRAC regulates financial businesses against financial criminal abuse and uses financial intelligence to disrupt money laundering, terrorism financing and other serious crimes. It is also a member of national and state task forces and provides specialist financial intelligence to national security and regulators internationally.

AUSTRAC applies its anti-money laundering and counter-terrorism financing (AML/CTF) supervision by supervising ‘designated service’ defined under the AML/CTF Act 2006, which includes a wide variety of banking and financial services, such as lending funds in the course of conducting a lending business, opening bank accounts, operating managed investment schemes and trading in securities and foreign exchange on behalf of another person, gambling services, bullion dealing and digital currency exchange.

All those who provide designated services are considered ‘reporting entities’ and will generally have onerous obligations imposed on them to identify and verify their customers and monitor their customers’ transactions. Their obligations under the AML/CTF laws mainly include:

- Have in place an AML/CTF program which comprises Part A and Part B to identify, manage and mitigate the money laundering and terrorist financing risks a reporting entity may reasonably be exposed to when it provides designated services to its customers;
- Conduct customer due diligence like Know-Your-Customer in accordance with the requirements set out in the AML/CTF regime;
- Report certain types of matters and transactions to AUSTRAC, including threshold transaction reports, suspicious matters reports and international fund transfer instructions; and
- Conduct due diligence on correspondent banking relationships.
Fintech and Regulatory Sandbox

The fintech industry has been experiencing an extraordinary rise in Australia over the last few years and has attracted various financial regulators’ responses. Similar to the general financial regulatory regime outlined above, the specific regulatory requirements for fintech companies depend on the type of financial services they provide. For instance, a fintech company may need to decide whether an AFSL or an ACL is required, whether it needs to apply to be regulated as a bank, whether it is subject to Australian anti-money laundering laws, among other considerations.

Fintech companies looking to launch in Australia often look to do so by partnering with an existing regulated entity. Domestic or foreign fintech companies may also be able to rely on a specific regulatory sandbox, which could allow them to test their financial services without the need for licensing. This exemption is subject to a range of caps and restrictions.
CHAPTER SIX
Consumer Protection
Chapter Six -
CONSUMER PROTECTION

The Competition and Consumer Act is the federal legislation that regulates corporations and individuals in their business dealings. The Competition and Consumer Act seeks principally to:

- Encourage corporations and individuals to act fairly in their business dealings;
- Encourage competition and, through it, efficiency in the economy; and
- Provide for consumer protection.

The Competition and Consumer Act is administered by the Australian Competition and Consumer Commission (ACCC) and is enforced by Australian courts and tribunals. The ACCC’s role includes:

- Encouraging compliance by investigating breaches of the Competition and Consumer Act and, if necessary, taking legal action;
- Ensuring that consumers are treated fairly;
- Determining whether businesses should be exempted from the restrictive trade practices provisions of the Competition and Consumer Act on the grounds of public benefit under authorisation or notification procedures; and
- Providing guidance on compliance with the Competition and Consumer Act through education programs, publications and the media to make businesses and consumers aware of their rights and responsibilities under the Competition and Consumer Act.

The ACCC also has wide powers to compel the production of information, to require evidence to be given on oath and to enter premises to inspect, copy and possibly seize documents.

Antitrust and Competition Law

The Competition and Consumer Act contains specific prohibitions against cartels and other forms of anti-competitive conduct. Set out below are the key prohibitions.

<table>
<thead>
<tr>
<th>Cartel conduct</th>
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<tbody>
<tr>
<td>Cartel conduct including price fixing, restricting output, allocating customers and bid rigging is strictly prohibited by the Competition and Consumer Act.</td>
</tr>
<tr>
<td>The Competition and Consumer Act contains civil and criminal contraventions for cartel conduct that can apply to corporations and individuals. Individuals found guilty of criminal cartel conduct face a maximum penalty of up to 10 years in jail in addition to financial penalties.</td>
</tr>
<tr>
<td>The ACCC operates an immunity policy for companies and individuals who ‘blow the whistle’ on cartel conduct in certain situations and subject to a number of conditions. Given that immunity is generally available only to those who are first to report the relevant cartel conduct to the ACCC, the timing of any approach to the regulator can be crucial.</td>
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<table>
<thead>
<tr>
<th>Price fixing</th>
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<tr>
<td>Price fixing occurs when a company enters into a contract, arrangement or understanding with a competitor that has the</td>
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</tbody>
</table>
Price fixing may occur in the form of agreed:

- Selling or buying prices (this does not necessarily mean that prices are set at the same level by all parties to the agreement);
- Minimum prices;
- Formula for pricing or discounting goods and services; and
- Rebates, allowances or credit terms.

Such agreements may be in writing but are often informal and verbal.

Price fixing need not have any impact on competition for it to be strictly prohibited conduct. Evidence that a contract, arrangement or understanding has been reached between competitors to fix prices will suffice.

### Restricting output

Restricting outputs in the production or supply chain occurs when a company enters into a contract, arrangement or understanding with a competitor that has the purpose of directly or indirectly preventing, restricting or limiting the:

- Production, or likely production, of goods or services by any or all the parties;
- Capacity, or likely capacity, of any or all of the parties; and
- Supply, or likely supply, of goods or services to persons or classes of persons by all or any of the parties.

### Allocating customers

Allocating customers, suppliers or territories occurs when a company enters into a contract, arrangement or understanding with a competitor that has the purpose of directly or indirectly allocating between any or all of the parties:

- Customers or classes of customer of goods or services of all or any of the parties;
- Suppliers or classes of suppliers of goods or services to all or any of the parties; and
- Geographical areas in which goods or services are supplied or acquired by all or any of the parties.

### Bid rigging

Bid rigging occurs when a company enters into a contract, arrangement or understanding with a competitor that has the purpose of directly or indirectly ensuring that in the event of a request for bids:

- One or more parties bid but one or more do not;
- Two or more parties bid on the basis that one of those bids is more likely to be successful;
- Two or more parties bid but not all of those parties proceed with their bids;
- Two or more parties bid and proceed with their bids but on the basis that one of those bids is more likely to be successful; and
- Two or more parties bid but a material component of at least one of those bids is worked out between the bidders.
### Some exceptions to cartel conduct

There are some limited exceptions to the strict prohibitions against cartel conduct. They include:

- JVs;
- The buying and selling activities of joint (or co-operative) buying and selling groups;
- The joint advertising and re-supply of goods or services collectively acquired; and
- Genuine recommended price arrangements.

If conduct between competitors falls within an exemption, it may still be prohibited if its purpose or effect is to substantially lessen competition.

### Resale price maintenance

Minimum resale prices cannot be specified by a supplier to any customer nor can attempts be made to persuade a customer not to advertise or resell goods or services below a specified price.

There is scope, however, to recommend resale prices but a prominent statement must be included on a product or a price list that the price is a recommended price only.

### Concerted practices

A corporation cannot:

- Be a party to any contract, arrangement or understanding, or
- Engage with one or more persons in a concerted practice, which has the purpose or effect of substantially lessening competition in an Australian market.

An example of a concerted practice may include using the confidential information of competitors as a substitute for competition.

### Misuse of market power

A corporation with substantial market power must not engage in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.

A corporation may have substantial market power if it can act independently of, and not be constrained by, other competitors in the market. Corporations with market power must take care to consider the effect of their conduct on competition upfront.

### Predatory pricing

A corporation that has a substantial degree of market power (or even a substantial market share) must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to it of supplying such goods or services, for the purpose of:

- Eliminating or substantially damaging a competitor;
- Preventing a competitor from entering a market; and
- Deterring or preventing another person from engaging in competitive conduct in a market.

### Exclusive dealing (including third line forcing)

Conditions cannot be imposed on the resupply or acquisition of goods or services if the purpose or effect of any such condition would be to substantially lessen competition in an Australian market. An example of this practice is supplying goods only on the condition a customer will not buy the same goods from a competitor of the supplier.
Another example (known as ‘third line forcing’) occurs if a supplier forces or insists that a customer purchase goods or services from a particular third party as a condition of its supply of goods or services to that customer.

Certain exclusive dealing arrangements may be notified to the ACCC on public benefit grounds which, if accepted, provide immunity.

<table>
<thead>
<tr>
<th>Anti-competitive mergers and acquisitions</th>
</tr>
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<tbody>
<tr>
<td>A corporation is prohibited from acquiring shares in a body corporate, or assets from a body corporate, or a natural person, if the effect would be to lessen competition substantially in any market in Australia.</td>
</tr>
<tr>
<td>The Competition and Consumer Act sets out a list of matters which must be considered when determining whether an acquisition is likely to lessen competition substantially in any market including, for example, the actual and potential level of import competition in the market, barriers to entry and market concentration levels. The ACCC has also published useful guidelines on merger regulation to which any company considering an acquisition or merger should refer.</td>
</tr>
<tr>
<td>In Australia, there are no mandatory filing thresholds that require parties to file a proposed merger or acquisition with the ACCC (however, filing with the ACCC is recommended in many circumstances, particularly if the parties’ combined market share were to exceed 20%).</td>
</tr>
<tr>
<td>Parties seeking to have a merger cleared by the ACCC can choose between the informal clearance process or the merger authorisation process. Most mergers proceed through the informal clearance process whereby the ACCC assesses whether the merger will substantially lessen competition in any Australian market. The merger authorisation process is more costly but can be advantageous for contentious mergers as a merger can be authorised if it will result in benefits to the public that outweigh any public detriments (which includes any lessening of competition).</td>
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**Key Consumer Protection Provisions**

The Competition and Consumer Act includes a number of consumer protection provisions, which form part of the Australian Consumer Law. Some important provisions are detailed below:

- Individuals and corporations are prohibited from engaging in conduct in trade or commerce that is misleading or deceptive. It is irrelevant whether the person engaging in the conduct intended to mislead or deceive. A claim or statement is misleading if it is likely to lead an ordinary member of the public into error.
- Although there are no criminal sanctions or fines that apply to misleading or deceptive conduct, the ACCC or an aggrieved party can seek damages, compensatory orders or an injunction to restrain misleading or deceptive conduct. Further, the ACCC may apply for probation, community service or corrective advertising orders.
- It is unlawful to make false or misleading representations in connection with the supply or promotion of goods or services, including making false or misleading representations relating to:
  - The standard, quality, value, grade, price of or need for goods or services;
  - The newness, composition, style, model or history of goods;
  - Testimonials or sponsorships;
• The place of origin of goods;
• The availability of repair facilities or spare parts for goods; and
• Any conditions, warranties, guarantees or rights of remedy, including the statutory guarantees.

• Unconscionable conduct in trade or commerce is prohibited. ‘Unconscionable’ conduct essentially involves the unfair exploitation of a weaker party by a stronger party. Certain prohibitions require the weaker party to suffer from a special disability or disadvantage, while other prohibitions may extend to protect from unfair exploitation a party who is less sophisticated, not legally represented, may not possess all relevant information and may have a weaker bargaining position than the other party.

• Specific types of unfair trading and marketing practices, including bait advertising, pyramid selling and referral selling, are prohibited in Australia. The practice of offering gifts, prizes, rebates or other free items, as well as unsolicited supplies, is also regulated.

• The Competition and Consumer Act contains provisions governing unsolicited selling, including door-to-door selling, telesales and other direct or indirect marketing, which, amongst other things, regulates the times during which unsolicited sales approaches can be made and provides for a 10-day cooling off period.

• The Competition and Consumer Act contains detailed rules relating to lay-by agreements, including requirements that these agreements must be in writing and transparent, and any termination charges must reflect the reasonable costs to the business of the agreement being terminated.

• Consumers have certain statutory guarantees that:
  • Goods are of acceptable quality;
  • Goods are reasonably fit for any disclosed purpose;
  • Goods match their description or correspond to the sample or demonstration model; and
  • Repair facilities and spare parts are reasonably available for a reasonable period after the goods have been supplied.

• The Competition and Consumer Act contains provisions governing product safety and liability. This regime specifically provides provisions relating to:
  • Product safety and information standards;
  • Unsafe goods;
  • Interim and permanent bans;
  • Voluntary and compulsory product recalls; and
  • Safety warning notices.

• The Competition and Consumer Act provides that unfair contract terms in standard form consumer and small business contracts are void and sets out the relevant criteria in order to determine whether a term of a consumer contract is unfair. This has become a major priority for the ACCC, particularly in business-to-small business contracts and the ACCC has recently commenced proceedings against a number of companies seeking court orders to make certain terms void. The ACCC is also lobbying to make unfair terms illegal and subject of penalties.

In 2009, the commonwealth government introduced the Personal Property Securities Act 2009 (PPS Act) and the online Personal Property Securities Register commenced operation in early 2012. The
PPS Act introduces a new regime for the registration of security interests in virtually all forms of property other than land and some statutory licences. Such personal property includes goods and equipment, inventory, intellectual property (such as trademarks and patents), currency, contractual rights, shares, units and debt securities, livestock, crops and artworks. The PPS Act also introduces new rules for the creation, priority and enforcement of security interests in personal property. These reforms bring together the different commonwealth, state and territory laws and registers under one national system.
CHAPTER SEVEN

Insolvency
Chapter Seven -

INSOLVENCY

Insolvency Processes

In light of the COVID-19 pandemic, a simplified debt restructuring process and simplified liquidation process is now available to eligible small businesses. It allows financially distressed small businesses to either appoint a small business restructuring practitioner using a ‘debtor in possession’ model, or use a streamlined creditors voluntary liquidation process which reduces or removes obligations involved in a traditional liquidation.

Both reforms have a restricted eligibility criteria and are only available to companies with liabilities of less than AU$1 million, excluding employee entitlements.

The three principal corporate insolvency processes in Australia are:

1. Receivership;
2. Administration (sometimes referred to as voluntary administration); and
3. Liquidation (also referred to as winding up).

Receivership

Receivers are usually appointed under, and governed by, the terms of a security. A receiver can also be appointed by the court.

A receiver takes possession and control of secured property and realises it in order to pay the proceeds to the security holder. The loan agreement or the court may also confer powers to manage the company. A company can continue to trade while in receivership.

Administration

This involves the appointment of an external administrator to take control of a financially troubled company. The purpose of administration is to investigate the business, property and affairs of an insolvent company (or a company nearing insolvency). Administrators consider possible outcomes for the company, that is:

- To enter a Deed of Company Arrangement (DOCA);
- Liquidation; or
- Return to the control of directors.

During an administration, the company continues to trade. The directors’ and officers’ powers are suspended and there is a moratorium on the enforcement of debts. An administration must adhere to a strict timeline for giving notice, calling meetings of creditors, investigating the financial position of the company, and executing a DOCA.

An administration will progress to a DOCA when creditors resolve to execute a DOCA at the second meeting of creditors.
A DOCA is a binding compromise agreement on the company, its creditors, officers and shareholders. The DOCA may provide for realising assets, closing down the business or restructuring the company, as well as the distribution of payments to creditors. Once the tasks are completed and creditors are paid, the company is released from those debts and the DOCA terminates.

Liquidation

Liquidation is the process of winding up a company’s affairs. A company is placed into liquidation by a court order, by ASIC, voluntarily by a special resolution of shareholders, or by resolution of the creditors at the second meeting of creditors during administration.

A liquidator controls the company and acts as its agent. The powers of directors and officers are suspended and the company ceases to carry on its business, except as necessary for the disposal of the company's assets.

The purpose of a liquidation is to realise the company’s assets (including recoveries from voidable transactions or insolvent trading claims as outlined below), administer creditor’s claims and distribute the realisations to creditors and if there is a surplus, to shareholders. The company’s existence will then be brought to an end by deregistration.

Voidable Transactions

Certain transactions entered into before a company is wound up can be avoided by the liquidator of the insolvent company. Directors and others can be liable for claims made in relation to transactions deemed ‘voidable transactions’ as discussed below.

Unfair Preferences

An unfair preference is a transaction between the company and a creditor carried out at a time when the company was insolvent (or the company became insolvent as a result of the transaction) that results in the creditor receiving from the company, in respect of an unsecured debt, more than the creditor would receive on a winding up of the company.

Uncommercial Transaction

An uncommercial transaction is a transaction that a reasonable person in the company’s position would not have entered into, having regard to the benefits and detriment to the company of entering into the transaction, the benefits to the other parties to the transaction of entering into it and any relevant matters.

Unreasonable Director-Related Transaction

An unreasonable director-related transaction involves payments (or other dispositions of property) made by a company to a director or a close associate, or someone on their behalf. It applies the same considerations as an uncommercial transaction to determine if the payment is unreasonable.

Unfair Loan

An unfair loan is voidable if the interest charged on the loan, or the charges in relation to the loan, were extortionate when the loan was made or have since become extortionate.
Security Interests Granted in Anticipation of Insolvency

A security interest is a voidable transaction if granted by the company in respect of ‘circulating assets’ in the six-month period leading up to the liquidator’s appointment (except, generally, where the security interest relates to a new advance). Security interests which are taken in the six-month pre-insolvency period may also risk being unenforceable if not perfected (e.g., by on-time registration).

Creditor-Defeating Dispositions

A creditor-defeating disposition is a new category of voidable transaction, which seeks to prevent illegal phoenixing. It applies to a disposition, which was less than either the market value or the best price reasonably available, and has the effect of preventing, or hindering or significantly delaying, property from becoming available for the benefit of creditors in a wind-up.

Risk Mitigation: Protecting Your Position in Event of a Third Party Insolvency

In the event a third party, such as a contracting supplier, becomes insolvent, enforceable security arrangements will provide the most effective method of protecting rights to payment and goods.

It is important to enter into a security agreement prior to providing finance or goods on credit terms. Register that security interest over supplied goods on the Personal Property Securities Register within the relevant time frame.

Priority agreements may be required if there are multiple security interests registered over the supplied goods.

Failure to register a security interest over goods supplied on credit terms may lead to loss on insolvency of the counterparty.

The ability to terminate a contract with an insolvent counterparty may be restricted by an ipso facto moratorium, depending on the precise circumstances.

In the event of a counterparty insolvency, it is important to establish the precise nature of the insolvency (e.g. by conducting an ASIC search) before determining the commercial strategy and priorities and considering whether to extend further supplies or credit.
CHAPTER EIGHT

Intellectual Property Protection
Chapter Eight -

INTELLECTUAL PROPERTY PROTECTION

Intellectual property is protected in Australia primarily by federal legislation. Australia is also a party to most of the prominent international treaties dealing with intellectual property rights, including the:

- Paris Convention;
- Berne Convention;
- Universal Copyright Convention;
- Hague Agreement;
- GATT Agreement on Trade Related Aspects of Intellectual Property; and

**Patents**

Patents in Australia are regulated by the Patents Act 1990 (Cth) (Patents Act). The grant of a patent confers on the patentee the exclusive right during the term of the patent to exploit (or allow another person to exploit) the invention and prevent unauthorised use of the invention by third parties. The Patents Act allows for the registration of two types of patents: standard patents and innovation patents. A standard patent lasts for a term up to 20 years (with extensions available for pharmaceutical patents in certain circumstances).

An invention, the subject of a patent, must be a ‘new manner of manufacture’, which is usually in respect of a vendible product or process that:

- Has a distinct commercial value;
- Has not been anticipated by prior use or publication; and
- Involves an inventive step.

To be novel, the invention must not have been publicly disclosed or used anywhere in Australia or around the world prior to the filing date (however, Australia does allow for a 12-month grace period in which use or disclosure can occur prior to filing without destroying novelty).

A patent application lodged at the Australian Patent Office must be either a complete application or a provisional application. A provisional application must describe the invention in a way that is clear and complete enough for it to be performed by a person skilled in the relevant art, and it allows time to further develop the invention.

To continue the protection initiated by the provisional application, the applicant must lodge a complete application for the invention within the 12-month period of filing. The complete application must include all the claims and the essential elements of the invention, and the invention must be clearly disclosed by the provisional application to preserve the priority date of the filing of the provisional application. The claims must also be clear, succinct and supported by the material disclosed in the specification.

An applicant may also file a single international application under the Patent Cooperation Treaty (PCT) within 12 months of filing the provisional application, nominating the countries of interest on the
PCT application into which the applicant intends to enter national filings within 30-31 months (depending upon the country) from the earliest priority date of the patent.

Australian law currently provides a second tier patent system known as the innovation patent. In contrast to a standard patent, an innovation patent proceeds to grant without substantive examination and has an eight-year term of protection. Examination and certification of an innovation patent is required to have enforceable rights. While innovation and standard patents must meet the same novelty requirement, the ‘innovative step’ inventiveness standard for an innovation patent is lower than for a standard patent.

The Australian government will phase out the innovation patent system on 25 August 2021. Innovation patent applications filed on or before this date will be afforded their full term. It will be possible to seek innovation patent protection after 25 August 2021, provided there exists pending standard patent rights in Australia on or before that date.

Copyright

Copyright in Australia is regulated by the Copyright Act 1968 (Cth) (Copyright Act). Copyright confers no product monopoly, but simply gives to the copyright owner the exclusive right to certain acts in relation to a literary, dramatic, musical or artistic work, or a sound recording, cinematograph film, broadcast or published edition. In Australia, there is no system of registration of copyright. For copyright to subsist in a work it must be an ‘original work’ from the person claiming to be its author, meaning that the person has originated it or brought it into existence and has not copied it from another. The fact that another similar work is already in existence is not necessarily a bar to copyright subsisting in both. Copyright subsists in recordings, films, broadcasts and published editions by virtue of being made or published.

The period for which copyright subsists depends on the type of work. For literary, dramatic, musical or artistic works, copyright subsists for 70 years after the end of the calendar year in which the author died. For sound recordings and films, copyright subsists for 70 years after the year it was first made or first made public (depending on the circumstances). Copyright in broadcasts subsists for 50 years after the year of the first broadcast. For published editions of works, copyright subsists for 25 years after the calendar year in which the edition was first published.

The Copyright Act also provides for moral rights of authors, giving creators of certain works rights of attribution as owner and rights to prevent unfair treatment of the work. These moral rights are personal and therefore not assignable and are separate from the commercial exploitation rights. The Copyright Act provides that the holder of moral rights may consent to the doing of acts, which would otherwise infringe those moral rights.

The Copyright Act also provides for a resale royalty right (of 5%) applicable only to art works. This scheme is administered by a collecting society.

International treaties such as the Berne Convention, TRIPS Agreement and Convention on Damage Caused by Foreign Aircraft to Third Parties (Rome Convention) facilitate automatic protection of Australian copyright material overseas, whereby other treaty members would extend the same rights to Australian copyright owners as they would to their own nationals.

Designs

Designs in Australia are regulated under the Designs Act 2003 (Cth) (Designs Act). A design, as defined in the Designs Act, in relation to a product, means the overall appearance of the product
resulting from one or more visual features of the product such as its shape, pattern or ornamentation. Design protection only operates to protect the appearance of articles, rather than the way they are made or how they operate (which may instead constitute patentable subject matter).

Once filed, an Australian designs application proceeds to registration without substantive examination. However, examination must be requested and certification achieved in order to obtain enforceable designs rights.

To be valid, a design must be ‘new and distinctive’. A design will be considered new unless it is identical to a design that forms part of the prior art base. A design is considered to be distinctive unless it is substantially similar in overall impression to a design that forms part of its prior art base. The ‘prior art base’ for a design includes designs publicly used in Australia, published anywhere in the world or disclosed in other design applications with earlier priority dates. In considering whether a design is substantially similar in overall impression to an existing design, more weight is given to the similarities between the two designs than the differences between them.

A person will be found to have infringed a registered design if the person, without the consent of the owner of the registered design, makes, imports, sells, hires or offers for sale or hire ‘a product, in relation to which the design is registered, which embodies a design that is identical to, or substantially similar in overall impression to, the registered design’. The considerations set out in relation to the registrability of designs must be assessed in determining whether a design is substantially similar in overall impression.

Under the Designs Act, the maximum term of protection that is afforded to a registered design is 10 years.

Design applications can also be filed in other countries. As Australia is party to relevant international conventions governing industrial designs, if an international design application based on an Australian design application is filed within six months of the Australian application, it is possible to claim ‘convention priority’ of the earlier priority date of the Australian application. If an international application for a design the subject of an Australian design application is filed more than six months after the Australian application, the Australian priority date cannot be claimed and the newness of the design may be affected.

Australia currently does not have a grace period for use of designs prior to filing, which means a design cannot have been shown to members of the public prior to an application being filed. However, amendments to the Designs Act have been proposed, and are expected to come into force at the end of 2021. The amended Designs Act will provide a 12-month grace period and a prior use defence for third parties who use a published design during the grace period, among other things.

**Trade Marks**

Trade marks in Australia are regulated by the Trade Marks Act 1995 (Cth) (Trade Marks Act). A trade mark is a sign that is used to indicate the trade origin of goods or services. A trade mark can include, or comprise of any combination of, any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent. The trade mark must be able to be represented graphically to be registrable.

Registration of a trade mark provides the owner of the trade mark with the exclusive right to use and authorise others to use the trade mark in relation to the goods or services (and goods or services closely related to the goods and services) for which the mark is registered. Applications are examined by IP Australia to see if they meet the requirements of the Trade Marks Act.
To be registrable as a trade mark in Australia, a trade mark must not be the same as, substantially identical with or deceptively similar to another trade mark which is the subject of a prior application or registration in Australia. A further consideration under the Trade Marks Act is the extent to which the trade mark is capable of distinguishing the applicant’s goods and services. If a trade mark is not capable of distinguishing the applicant’s goods and services from those of others, the trade mark will be initially rejected. In certain circumstances, IP Australia may decide that a trade mark is capable of distinguishing an applicant’s goods or services if the trade mark has acquired distinctiveness as a result of being used extensively in Australia for the goods or services for which registration is sought.

Once accepted by IP Australia, the trade mark is advertised for opposition for two months. Any person may oppose registration, but an opposition is generally filed by a person who will be in some way affected by the presence of a trade mark on the register. The Trade Marks Act prescribes several grounds upon which registration of a trade mark may be registered. Oppositions may be heard by a court or, more commonly, in administrative proceedings before IP Australia. The opposition process before IP Australia is streamlined so that an opposition will succeed if the trade mark applicant does not file a notice of intention to defend the opposition within a prescribed period after it is commenced.

Registration of a trade mark, once achieved, can be maintained indefinitely provided renewal fees are paid every 10 years. However, third parties can apply to revoke or remove a trade mark registration on several grounds, including where the owner of a trade mark has not used, or controlled the use of, the trade mark for the registered goods or services in Australia in the previous three years.

Unregistered trade marks in Australia or ‘common law’ trade marks, are capable of being protected in the Australian courts through a common law action for passing off, and in appropriate circumstances, the misleading and deceptive conduct provisions of the Competition and Consumer Act.

Since July 2001, Australia has been a signatory to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol). The Madrid Protocol enables trade mark applicants to seek protection in all or any of the countries that are currently signatories to the Madrid Protocol by filing a single application in Australia. Applicants can also designate countries, which become members in future without filing a new application. The application will then be considered by the trade marks office of each designated country and, if registration is achieved, the mark will generally be granted the same protection afforded to marks registered in that country.

In order for an Australian resident or company incorporated in Australia to seek protection under the Madrid Protocol an application must be based on an Australian trade mark registration or application.

As Australia is also a signatory to the Paris Convention, any trade mark application filed in Australia within six months of the first application for the same mark in a convention country will have the same priority date as that first application. Similarly, where a trade mark application is filed in Australia, any application filed in a convention country within six months of the Australian application will have the same priority date as the Australian filing date.

**Circuit Layouts**

Original layout designs for integrated circuits and computer chips are protected under the Circuit Layouts Act 1989 (Cth) (Circuit Layouts Act).

Similar to copyright, the protection provided under the Circuit Layouts Act is automatic and no registration is required. To qualify for protection, the circuit layout must be original and made by an Australian person or corporation or first commercially exploited in Australia. Original circuit layouts
created by a citizen, resident or national of a World Trade Organisation member country, or first commercially exploited in such a country, are also protected.

The maximum term of protection under the Circuit Layouts Act is 20 years.

**Domain Names**

Although not strictly intellectual property, domain names are important to consider. The rules governing the registration of domain names vary depending upon the level of the domain name (for example, .com, .biz, .info and .org). The .au top level domain is administered by .au Domain Administration Ltd. To register a domain in the .au domain space, the applicant must be an Australian business, partnership, statutory body, association or company, a foreign company with an ARBN, or own a registered or pending trade mark application corresponding exactly with the domain name. Domain names are granted to registrants meeting these criteria on a first come, first served basis. As there can be numerous parties with a legitimate interest in any one domain name, it is therefore important to assess the availability of and apply to register your business’ preferred domain names at the earliest opportunity.

Where a party without a legitimate interest in a domain name has registered or used the domain name in bad faith, it may be possible to have the domain name transferred to a party with a legitimate interest in the domain name by filing an application under the .au Dispute Resolution Protocol (in the case of .au domain names) or the Uniform Dispute Resolution Protocol (in the case of most other top level domain names, including .com domains). Depending upon the circumstances, such conduct may also amount to trade mark infringement or passing off.

**Breach of Confidence**

Generally, the cause of action known as breach of confidence protects the holder of confidential information from an improper use of that information by another party. The elements of the action are that the information must be confidential, have been imparted in circumstances, which the law regards as creating an obligation of confidence, and have been used without the owner’s actual or implied consent.

Accordingly, it is considered best practice in Australia only to disclose confidential information to a third party in circumstances where they have entered into a written agreement to keep the information confidential. If such an agreement is breached, the aggrieved party may wish to seek injunctive relief from a court to restrain the further communication or distribution of the confidential information.

**Plant Breeders Rights**

Plant Breeder’s Rights (PBR) are regulated in Australia under the Plant Breeder’s Rights Act 1994 (Cth) and provide the rights holder exclusive marketing rights to a registered plant variety for a period of 20 years (or 25 years in the case of tree or vine species). Specifically, the rights holder has the exclusive right to do any of the following relating to propagating material of their variety:

- Produce or reproduce the material;
- Condition the material for the purpose of propagation (e.g. seed treatment);
- Offer for sale or sell the material;
- Import or export the material; and
- Stock the material for any of the above purposes.
In some instances, the rights may extend to material harvested from the variety (e.g. its fruit or flowers), and products of the material (e.g. wine or olive oil).

To obtain PBR in Australia, a plant variety must be:

- New;
- Distinct;
- Uniform; and
- Stable.

If an application fails to comply with any of these criteria, protection will not be granted.

A plant variety is 'new' if plant material has not been exploited (e.g. sold, disposed of, or used commercially) within Australia with the breeder’s consent more than one year before the date on which the application was lodged. It is also possible for the novelty of a variety to be lost if there has been a sale or disposal outside of Australia more than six years before the application date in the case of trees and vines, or, in other cases, not more than four years before the lodgement date.

A plant variety is ‘distinct’ if it is clearly distinguishable by one or more characteristics, which can be clearly described, from any other variety whose existence is a matter of common knowledge at the time of application.

A plant variety is ‘uniform’ if it is sufficiently consistent in those characteristics that make it distinct. This means that nearly all individual plants among a population of the variety must bear the characteristics that make the variety distinct.

Lastly, a plant variety is ‘stable’ if it remains true to description after repeated propagation or reproduction.

A PBR application is lodged in two parts (Part 1 and Part 2). The initial application provides details of the applicant, origin of the variety and a prima facie case for eligibility. If the variety is already commercialised in Australia then time limits apply (as noted above). The application is examined by the PBR office and objections may be raised and dealt with accordingly. On acceptance of the Part 1 application, the variety is provisionally protected in Australia.

Part 2 application provides information in support of the claims made in the Part 1 and provides a detailed description of the variety. Details of differences from other similar varieties are also included. An accredited qualified person generally completes the Part 2 application and plans and supervises any comparative or verification trial of the variety that is necessary.

K&L Gates provides services in relation to both parts of the application process.

Click here for the K&L Gates IP Law Watch blog: www.iplawwatch.com.
CHAPTER NINE

Privacy
Chapter Nine - PRIVACY

Under the Privacy Act 1988 (Cth) (Privacy Act), the public sector is subject to rules concerning collection, use of, and access to, personal information. Since December 2001, the private sector has been subject to similar obligations. The privacy provisions do not apply to small businesses—those with a turnover of less than AU$3 million—unless the business deals with certain types of information. The provisions also have exemptions for some employee information.

Personal information is any information that can be used to identify an individual and may relate to any kind of information; such as the individual’s name, date of birth, bank account details and email address, even if these are otherwise publicly available.

The Privacy Act applies to personal information that is collected, stored, used or disclosed by an organisation that is Australian (including Australian subsidiaries of non-Australian organisations) or that otherwise has an ‘Australian link’.

An organisation has an Australian link if it carries on business in Australia and collects or holds personal information in Australia. These concepts are broad and depend on the particular circumstances of the organisation’s operations.

An organisation does not need a physical presence in Australia in order to carry on business in Australia. The Office of the Australian Information Commissioner (OAIC) has indicated that organisations that have an online presence in Australia and that collect personal information from individuals who are physically present in Australia will carry on business in Australia.

Organisations may also be subject to the Privacy Act without an Australian link, if they deal with an Australian organisation that discloses personal information to them—for example, in the course of a transaction or in the provision of services to or from the Australian organisations. In these circumstances, the Australian organisation may request (and may be required to ensure) that the overseas organisation complies with the Privacy Act as part of its negotiation on contractual terms.

There is also a mandatory data breach notification regime under the Privacy Act. An organisation must notify affected individuals and the OAIC when the organisation becomes aware of reasonable grounds to believe an ‘eligible data breach’ has occurred. This includes unauthorised access to or disclosure of personal information, where the access or disclosure would reasonably be considered likely to result in serious harm to an individual to whom the information relates, as well as loss of information in circumstances where such unauthorised access or disclosure is likely to occur.

Organisations are also required to promptly investigate suspected notifiable data breaches and take all reasonable steps to ensure the assessment is completed within 30 days.

As at early 2021, there are also proposed amendments to the Security of Critical Infrastructure Act 2018 (Cth) that would extend its operation beyond the water, gas, ports and electricity sectors, to also cover entities in the data storage and processing, food and grocery, energy, financial services and markets, defence industry, higher education and research, health care and medical, transport, water and sewerage, space technology, and communications sectors. The proposed requirements include establishing positive security obligations for critical infrastructure assets, reporting obligations for serious cyber security incidents, implementing risk management programs, and a framework to allow
(and in some cases require) government assistance in responding to significant cyber-attacks. Questions an organisation should consider to determine whether Australia’s Privacy Laws apply to them include:

- Is personal information collected from someone in Australia?
- Is the collection or use in accordance with the Privacy Act?
- Does your organisation have a privacy policy compliant with the Privacy Act?
- Does the personal information get disclosed (even if not physically transferred) outside of Australia?
- Does the personal information get used for direct marketing?

CHAPTER TEN

Workplace Regulation
Chapter Ten -
WORKPLACE REGULATION

Industrial Relations

The Fair Work Act 2009 (Cth) (Fair Work Act) is the primary piece of legislation governing relationships between employers, their employees and, where relevant, unions. In addition to this, modern awards, enterprise agreements and employment contracts are critical for the creation, management and termination of employment relationships.

The Fair Work Act prescribes the minimum safety net of terms and conditions of employment for employees. This safety net is comprised of 10 minimum terms and conditions of employment, which are known as the National Employment Standards (NES). The NES includes terms and conditions of employment regarding the maximum hours of work on a weekly basis, annual leave, personal/carer’s leave, community service leave, long service leave, public holidays, requests for flexible working arrangements, notice of termination and redundancy. Employers that fail to comply with the NES or any applicable modern award may be heavily penalised.

Modern awards prescribe minimum terms and conditions of employment which cover employees engaged in certain industries and occupations, and who fall within specified classifications. Modern awards provide terms and conditions of employment in relation to both monetary and nonmonetary matters, including minimum wage rates, overtime and penalty rates, allowances, dispute resolution procedures and consultation.

The Fair Work Act allows for the establishment of enterprise agreements, which set out the terms and conditions of employment for particular workplaces and employees. Employees have the right to be represented by bargaining representatives of their choice during negotiations for an enterprise agreement, with the default position being representation by any union of which the employees are members. The employer and employee representatives must bargain in good faith, which means they must, amongst other things, attend and participate in meetings, give genuine consideration to any proposals put forward by the other party, and refrain from engaging in capricious or unfair conduct. A government body known as the Fair Work Commission (FWC) has powers to facilitate bargaining and deal with bargaining disputes.

Under the Fair Work Act, employers must not take adverse action against employees and contractors, and prospective employees and contractors, for specified reasons. These reasons include circumstances where the person is entitled to the benefit of a workplace law or instrument, has made a complaint or inquiry in relation to his/her employment (if an employee), or the person is, or is not, a member of a union, or has, or has not, engaged in industrial activity. Generally, adverse action includes terminating the employment or contractor relationship, altering the position of the employee or contractor to the employee or contractor’s prejudice, and refusing to employ or engage the prospective employee or contractor, as a result of any of the abovementioned specified reasons. Notably, a threat to take such action or organising for such action to be taken, is also considered a form of adverse action.

In Australia, industrial action is unlawful unless it meets specific criteria, in which case it will be ‘protected’. Employees may generally only take industrial action to support or advance claims in
relation to a proposed enterprise agreement and the action must be approved by a majority of employees. An application must be made to the FWC for approval to conduct the vote. The Fair Work Act enables employers to also initiate action in response to industrial action taken by employees. If it appears to the FWC that unlawful industrial action is happening, threatened, or impending, it is required to make an order that the industrial action stop, not occur or not be organised. Significant penalties are available against organisations and persons involved in unlawful industrial action.

In addition, unions in Australia have limited rights of entry into workplaces. Right of entry is available to union officials who hold entry permits for the purpose of investigating suspected breaches of industrial legislation that relate to, or affect a member of, the union and suspected contraventions of occupational health and safety legislation. Right of entry is also available for the purpose of holding discussions with employees whose industrial interests the union is entitled to represent. Unless FWC has issued an exemption certificate for the entry, the permit holder must give at least 24 hours’ notice of the intention to enter the workplace.

An employer may exclude or vary its award obligations by entering into an enterprise agreement with its employees. To be valid, the employees to be covered by the enterprise agreement must be ‘better off overall’ under the agreement than they would be under any applicable modern award. The enterprise agreement must also be approved by a majority of employees who are subject to the agreement and vote. The parties must (amongst other things) comply with specific good faith bargaining obligations when negotiating an agreement.

An employer in the process of setting up a new business may seek to make an enterprise agreement with relevant unions before any employees are employed. Further, a group of employers carrying on the same type of business, such as in a franchise situation, may seek to make a multi-enterprise agreement which would set the terms and conditions of employees employed by all the employers involved.

Under the Fair Work Act, employers must not terminate the employment of particular employees in a manner that is harsh, unjust or unreasonable. This means that the employer must have a valid reason for the termination (such as poor performance or misconduct) and must afford the employee procedural fairness in the termination process (such as an opportunity to respond). The primary remedy for breaching this requirement is reinstatement of employment or, where impractical, compensation of an amount equal to up to six months remuneration (less mitigation).

Employers in Australia also have obligations under federal and state legislation not to discriminate against their employees or prospective employees on certain grounds including age, sex, race, disability, and family responsibilities. Employers are not permitted to discriminate when hiring, in the terms and conditions of employment they offer to employees, during employment, or when terminating an employee’s employment.

Under federal and state legislation, employers (also referred to as persons conducting businesses or undertakings in some jurisdictions) must also satisfy work health and safety obligations. These obligations generally require employers and persons conducting businesses or undertakings to take reasonably practicable steps to ensure the health and safety of their workers (defined to include employees and contractors). Both corporations and individuals involved in making key decisions for their organisations may be liable for breaches of these obligations. Amongst other things, corporations and individuals convicted of breaches may be subject to criminal penalties including fines. Individuals may also be subject to terms of imprisonment for more serious offences.
CHAPTER ELEVEN
Immigration
Chapter Eleven -

IMMIGRATION

Non-Australian citizens coming to Australia may only do so with a valid visa. To be able to work in Australia, that visa must contain work rights. The primary pieces of Australian immigration legislation are the Migration Act 1958 (Cth) and the Migration Regulations 1994 (Cth).

Due to the impact of the COVID-19 pandemic, non-Australian citizens outside Australia may also require travel exemptions to enter Australia in addition to a visa. Travel exemptions are governed by policy and subject to change on short notice. People planning to travel to Australia should consult the Department of Home Affairs or a migration adviser on the latest requirements of COVID-19 travel exemptions before they travel.

The rules and criteria governing any change of status from visitor or temporary resident to permanent resident for business or employment reasons are strict. Generally, people applying for Australian temporary or permanent residence visas must undergo health and character checks as part of the migration application process, as well as fulfil a number of other specific criteria. The health requirement for temporary workers varies according to the type of visa and the country of origin.

There are a number of options for people seeking to live and work temporarily or permanently in Australia. It is important to remember that only lawyers or migration agents registered with the Migration Agents’ Registration Authority are permitted to give advice in relation to migration issues in Australia.

Temporary Visas

Broadly, there are three types of visas that address the needs of Australian businesses:

- A short-term visitor visa for people who have a genuine intention to come to Australia for business visitor purposes for periods of up to three months at any one time. The Australian government has also introduced electronic travel authorities, which are available for this type of visa in some participating countries. Visa holders can only perform ‘business visitor activities’ and will not be permitted to work without first obtaining an alternative work visa.
- A short-term working visa, which allows people to travel to Australia to do short-term, highly specialised, nonongoing work. Generally the stay period allowed is up to three months but up to six months may be considered by the Department of Home Affairs in limited circumstances (and when supported by a strong business case).
- Medium to long-term stay visa which are most commonly used when companies wish to sponsor foreign employees for employment in Australia. Temporary residence is generally permitted for periods of up to four years (or five years in regional Australia) depending on the type of visa and the stream, although it may be possible to apply for a subsequent visa to effectively extend the initial period of temporary residence, depending on the circumstances involved in each case.
Permanent Migration

The Skilled Migration Program is intended to attract migrants with entrepreneurial or specific skills and may be divided into the Employer Nomination, Independent Skilled / State Sponsored Distinguished / Global Talent categories.

Under the Employer Nomination Scheme, Australian employers who sponsor highly skilled, experienced personnel from overseas can offer permanent employment in specific positions.

The employer must be able to show (amongst other things) that:

- The position is highly skilled;
- There is a genuine need for the position;
- The position is for at least two years (evidenced by a contract); and
- (at least) The minimum market salary is paid.

The applicant must (amongst other things):

- Have their skills positively assessed by a relevant authority and have at least three years of relevant work experience; or
- Have worked for their Australian sponsoring employer while holding a Temporary Skilled Shortage Visa for at least three years (unless a transitional arrangement applies); and
- Be under 45 and demonstrate English language proficiency, unless exempt.

Independent Skilled Migration Scheme

This visa is for points-tested skilled workers who are not sponsored by an employer or family member or nominated by a state or territory government. Such visas are designed for applicants who are well qualified, with matching skills, English language ability and experience. Skilled applicants generally must pass a 'General Points Test', with points awarded for various factors including age, qualifications, experience and training and English language ability.

Distinguished Talent Visa / Global Talent Visa

This visa is designed for applicants with unique and beneficial talents and experience (e.g. a profession, sport, the arts or academia and research) and an exceptional record of achievement in their field. Relatively few Distinguished Talent Visas are granted each year, as the applicant’s achievements are required to be acclaimed as exceptional in the country where the relevant field is practised. Furthermore, the relevant field needs to have both international standing and recognition in Australia.

The new Global Talent Scheme visas intend to attract high-calibre individuals with recognised achievements/reputation in a few select ‘target industries’. Applicant must demonstrate their ability to attract a high salary and be nominated by an Australian organisation or individual with notable reputation in their field.

Other Options

- Family Migration includes visas for spouses, prospective spouses, dependent children, fiancées, retired parents, parents who have at least half of their children residing in Australia,
aged dependent relatives and remaining relatives of permanent residents or citizens in Australia.

- Student Visas are also available for people wishing to undertake schooling, undergraduate, postgraduate and nonaward courses in Australia.
- Visitor Visas are available for either single or multiple-entry travel for people who intend to visit Australia as a tourist, for prearranged medical treatment, to visit relatives or for short term academic purposes (of less than three months).
CHAPTER TWELVE
Real Estate
Chapter Twelve -
REAL ESTATE

Acquiring Land

Land Ownership

Land ownership in Australia generally provides the owner with unrestricted control of the land, subject to certain rights and minerals reserved to the state or territory. In some cases, the government retains control of the land and 'ownership' takes the form of a long-term lease over the land.

Interests in land are generally registered on a common land titles system for each state or territory, which allows interested third parties to search the land register and understand who else has an interest in the land.

Caveat Emptor – Buyer Beware and the Need for Due Diligence

Real estate in Australia is generally purchased ‘as is where is’—in the state and condition at the time of contract, subject to various disclosure requirements, warranties and termination rights contained in state and territory legislation, and the various state or territory-specific standard contract forms.

Both vendors and purchasers should consider whether there are any prescribed disclosure requirements including:

- Information relating to title, encumbrances and outgoings;
- Prescribed documents which must be annexed to the Contract of Sale (such as planning certificates and drainage diagrams);
- Building disclosures which will apply if the property is a strata property; and
- Whether there are any implied warranties, which are deemed to be given.

Accordingly, it is important for purchasers to undertake due diligence inquiries before entering into the Contract of Sale including (as appropriate):

- Considering whether FIRB approval is required (see Chapter One - Foreign Investment);
- Undertaking a physical inspection of the property;
- Obtaining and reviewing title searches to verify the information provided by the vendor;
- Reviewing the terms of any mortgages, easements, restrictions on use and leases affecting the title to the property;
- Reviewing the planning controls affecting the property, including the local planning scheme, to ensure that the intended use of the property will be permitted;
- Obtaining a survey report to identify any encroachments on or by the property;
- Obtaining reports in relation to the condition and state of repair of any buildings, plant, machinery and equipment on the property; and
- Ordering searches of the contamination registers maintained in each justification and obtaining a contamination report from an environmental consultant if there is a risk that material contamination may be present.
Buying Off-the-Plan

Buying ‘off-the-plan’ occurs where a property is purchased before land has been subdivided or a particular building has been constructed on the property. In the case of a proposed development, prospective purchasers can generally view architectural plans and models or visit display suites in order to see what they will be purchasing. Each state in Australia has statutory protections for these types of purchases.

Contracts for off-the-plan sales can be complicated and subject to restrictive terms and conditions. Purchasers must be aware of the:

- Quality of construction and need to ensure that the vendor is contractually obliged to deliver the promised product within an acceptable timeframe;
- Ongoing costs and contractual arrangements entered into by the body corporate on establishment of a strata scheme;
- Effect of price increases;
- Risks associated with delays in the vendor providing the finished product;
- Application of statutory protections under state and territory legislation; and
- Wording of variation, withdrawal and sunset clauses.

Properties bought off-the-plan are often part of larger complexes governed by an ‘owners corporation’ (Victoria and New South Wales), ‘body corporate and community management statement’ (Queensland) or ‘strata company’ (Western Australia).

Strata Title

Where a property is a unit in a building or townhouse/villa, it is often subject to a collective ownership scheme known as strata title or community title. In these kinds of schemes, the building or the ‘common areas’ are owned by an owners corporation/strata company. These entities are created upon the registration of a plan of subdivision (Victoria, New South Wales and Queensland) or strata plan or survey strata plan (Western Australia), and all lot owners on the plan automatically become members.

Any area of property that is co-owned among several property owners is called common property. Owners’ corporations/strata companies/body corporates operate to provide a democratic process by which to govern this common property. Managers are often appointed to deal with maintenance, letting and other services. These arrangements must be included in pre-contract disclosure. Standard rules are established under state regulations, but additional rules can be created by resolution of the owners corporation/strata company/body corporate.

The Contract of Sale

Contracts of Sale for land are ordinarily prepared by the solicitors for the vendor. The standard form of contract varies depending on the state or territory in which the property is located. The contract is formed when it is signed by both parties, often referred to as ‘exchange’. ‘Conveyancing’ refers to the process of transferring ownership of a property from the vendor to the purchaser. Electronic conveyancing, using online settlement platforms, has been widely adopted in Australia and is now mandatory in Victoria, New South Wales, South Australia and Western Australia (with other jurisdictions to follow). Electronic conveyancing removes the requirement to attend a physical
Settlement

Settlement (also known as ‘completion’ in some jurisdictions) is the date on which the balance of the purchase price is to be paid to the vendor and when the title of the property is handed to the purchaser. This date is normally stated in the Contract of Sale and in:

- Victoria is often 30, 60 or 90 days after the date of the Contract of Sale;
- New South Wales, is normally 42 days after the date of the Contract of Sale;
- Western Australia, is often 30, 60 or 90 days after the date of the Contract of Sale; and
- Queensland, is normally 30 days after the date of the Contract of Sale, and cannot be less than 14 days after title is required.

A 60-day settlement period is most common (except in New South Wales and Queensland), although it is ultimately a matter for agreement between the vendor and the purchaser.

A statement of adjustments or settlement statement is prepared at the final stage of settlement, detailing the purchase price, the deposit paid and the pro-rata adjustment of rates such as council, water and owners corporation/strata fees.

Typically, the purchaser will also be liable to pay stamp duty on the purchase price of the property (see Chapter Thirteen -, State Taxes, Taxation System section).

Leases and Licences to Occupy Land

Leases

Many businesses in Australia operate from leased premises, whether they are commercial, industrial or retail. While some business owners choose to purchase business premises rather than lease, the leasing of business premises is far more common, particularly for commercial offices and retail shops. Leasing premises rather than purchasing offers numerous advantages to business owners, including:

- Less capital is required;
- Greater flexibility to exit the premises after a set period of time, without having money tied up in the premises; and
- Rent is fully tax deductible, as opposed to purchasing premises where payments towards the premises are not deductible, other than the interest on borrowings to purchase the premises.

Legal Nature of a Lease

In basic terms, a lease is a right granted by the owner (usually referred to as a ‘lessor’ or ‘landlord’) for the occupant (a ‘lessee’ or ‘tenant’) to use land or a building or part of a building in return for a regular payment of rent (usually monthly).

A lease constitutes a legal interest in the land. By having a legal interest in the land, the tenant has various rights which flow from that interest, including:

- The lease is binding on subsequent purchasers (although if it is a lease of property in any state or territory other than Victoria, then it might need to be registered to be binding on subsequent purchasers, depending on the length of the term of the lease). This means that if
a landlord sells the land after having leased it to a tenant, the purchaser will buy the land subject to the terms of the lease.

- A tenant is usually able to transfer its interest in the lease interest to another party (for instance, if the tenant wanted to sell its business, it is able to transfer the lease to the purchaser, subject to certain conditions specified in the lease including obtaining landlord consent).

- A tenant is usually able to mortgage the lease, so that if a tenant requires finance for its business, a bank is able to take a mortgage over the lease and loan against the security of the lease (again, subject to certain conditions specified in the lease including obtaining landlord consent).

- A tenant may have certain statutory rights, including the right to have a lease reinstated, where the lease is terminated by a landlord for breach by a tenant, subject of course to the terms of the lease and the ability of a tenant to remedy any breach of the lease.

- Where the lease is of a retail premises a tenant will have various rights, which arise under retail leases legislation in Australia.

Licences

Occupancy rights can also be granted under a licence, which is a contractual arrangement, rather than an interest in land.

Unlike leases, licences do not grant exclusive possession of the land.

Licences are often used in multi-tenant office or retail tenancies for ancillary areas, such as car parking, storage or seating areas, particularly where the tenant will not have exclusive use of the area.

Native Title

Australian laws give recognition to the prior interests in land held by Aboriginal and Torres Strait Islander people under their traditional laws and customs. This prior interest is referred to as native title and is protected and regulated by statute under the Native Title Act 1993 (Cth) and state-based laws. Generally speaking, native title is extinguished over all land which prior to 1 January 1994 was:

- Owned by a private individual or a company (most land on which development is carried out falls within this category); or
- Subject to dedication for a public use, such as a road.

However, if native title has not been extinguished (because, for example, the land remains owned by the Crown) then it is necessary to comply with specific processes under the native title legislation in order to obtain a valid property interest in the land. These processes can take some time to resolve so it is important to ensure that any native title issues are identified at an early stage in carrying out new developments.

Planning and Development

State Regulation of Development

Australian laws require planning and environmental approvals to authorise most new developments and uses of land. While each state and territory has its own land-use planning and environmental laws, it is possible to identify the following common themes across all Australian jurisdictions:
• **Zoning:** Local planning instruments typically divide land into zones (for example, ‘industrial’ or ‘residential’ zones), or apply on an overlay or other planning control which regulates the use, development and subdivision of land. Within each zone, particular types of land use or development may be either:
  - Permitted without the need for any approvals;
  - Permissible with approval; or
  - Prohibited.

• **Requirement for planning approval:** In general, planning approval is required to change the use of land or a building (for example from a light industry to a warehouse) or to erect any substantive structure, such as a building, on land. An application for planning approval is typically, though not always, placed on public exhibition and may be subject to third party appeal rights to planning appeal tribunals or courts. Planning approvals are typically issued subject to detailed conditions. A failure to comply with a condition imposed on a planning approval is a criminal offence.

• **Secondary environmental approvals:** A range of additional environmental related approvals may also be required for specific types of development and uses including:
  - Resource specific leases and licences for coal, mineral and petroleum exploration, mining and production activities;
  - Heritage permits for activities which will impact on historic or cultural heritage artefacts;
  - Approvals to clear native vegetation; and
  - Water licences and approvals to authorise the take and use of water from natural water sources.

• **Consequences of breach:** In general, if all required planning and environmental approvals have not been obtained or are not being complied with, there is a risk that:
  - The relevant government authority may prosecute the occupier of the land for a criminal offence;
  - The relevant government authority may issue an order requiring the occupier to stop using the land without all required approvals; or
  - In some jurisdictions, a third party may commence civil enforcement proceedings to restrain any breach of environmental or planning legislation.

**Federal Regulation of Development**

The most significant federal legislation regulating development is the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). The EPBC Act regulates ‘controlled actions’ that are likely to have a significant impact on a matter protected under the EPBC Act including:

- Commonwealth land; and
- A matter of national environmental significance such as World Heritage properties, National Heritage places, Ramsar wetlands of international significance, listed threatened species and ecological communities and listed migratory species, be subject to a rigorous assessment and approval process.

An ‘action’ includes a project, development, undertaking, activity or series of activities. If a person proposing to carry out an action thinks that the action may be a controlled action under the EPBC Act,
then they must refer the action to the Commonwealth Minister for the Environment for a determination as to whether or not the action is in fact a controlled action.

Pollution Control and Contamination

Each Australian state and territory has enacted laws regulating pollution and contamination. Generally speaking, these laws:

- **Environmental licences:** Require that environment licences be obtained and complied with for large-scale industrial activities (including mining) or to authorise discharges to water.
- **Environmental offences:** Make it an offence to pollute air, water or land unless authorised by an environmental licence or controlled as required by environmental regulation. In each jurisdiction:
  - Primary legal responsibility for a pollution incident rests with the person in occupation of the premises from which the pollution emanates, or the person who holds the environmental licence for the premises; and
  - Directors and persons concerned in the management of a company can be personally liable for environmental offences committed by the company unless they can establish an available defence (for example, that they used all due diligence to prevent the offence by the company).

- **Obligations to notify regulators of pollution incidents and contamination:** Each Australian jurisdiction imposes an obligation persons (including companies) to notify environmental regulators if:
  - They cause material contamination of land or groundwater or become aware that land they own is materially contaminated; or
  - Cause a material pollution incident.

- **Powers to require clean-up:** Give environmental regulators broad powers to require persons responsible for pollution incidents or contamination to take clean up action. Liability for clean-up is generally directed to the person responsible for the pollution incident or contamination. However, if that person cannot be found or lacks capacity to clean up, land owners may become liable.

- **Contamination registers:** Environmental regulators in each jurisdiction maintain a register of land, which has been notified to them as being materially contaminated and these registers can be searched. However, the registers do not record all land, which is impacted by contamination.
CHAPTER THIRTEEN
Taxation System
Chapter Thirteen -

TAXATION SYSTEM

Taxation

Tax is imposed in Australia at both a federal and state (or territory) level. The Australian Taxation Office (ATO) is charged with addressing the tax laws, which are imposed at the federal level—primarily income tax and goods and services tax (GST)—and the states and territories each have their own administrative body for the laws imposed in their jurisdiction.

Australia does not impose death or gift duties.

Income Tax

Australia has a self-assessment income tax system where taxpayers are required to lodge annual income tax returns for the 12 months to 30 June each year and pay tax in accordance with those returns. Returns may be subject to a subsequent audit by the ATO, generally for a period of four years subsequent to lodgement of the returns. Subsidiaries of nonresident companies often obtain permission from the Commissioner of Taxation to lodge tax returns with a year-end other than 30 June (a ‘substituted accounting period’) corresponding with the accounting and tax year end in their home jurisdiction.

A distinction is drawn between residents and nonresidents, with residents being liable to pay tax on their worldwide income and nonresidents generally only on their Australian sourced income. Rather than impose a separate tax on capital gains, Australia’s capital gains tax (CGT) legislation is incorporated in the income tax legislation and net capital gains are included in a taxpayer’s assessable income.

<table>
<thead>
<tr>
<th>Entity</th>
<th>Residence Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual</td>
<td>An individual is a tax resident if he or she resides in Australia. This is extended to include, among others, a person who does not reside in Australia but who:</td>
</tr>
<tr>
<td></td>
<td>• Is in Australia for at least 183 days (whether continuously or not) in a year of income unless the Commissioner of Taxation is satisfied that his or her usual place of abode is outside Australia and that he or she does not intend to take up residence in Australia; or</td>
</tr>
<tr>
<td></td>
<td>• Is domiciled (a legal concept) in Australia unless the Commissioner of Taxation is satisfied that his or her permanent place of abode is outside Australia.</td>
</tr>
<tr>
<td>Company</td>
<td>A company is a resident of Australia if it:</td>
</tr>
<tr>
<td></td>
<td>• Is incorporated in Australia; or</td>
</tr>
<tr>
<td></td>
<td>• Carries on business in Australia and either:</td>
</tr>
<tr>
<td></td>
<td>• Its central management and control is in Australia; or</td>
</tr>
<tr>
<td></td>
<td>• Its voting power is controlled by Australian resident shareholders.</td>
</tr>
<tr>
<td>Trust</td>
<td>A trust is a resident of Australia if the:</td>
</tr>
</tbody>
</table>
Entity | Residence Test
--- | ---
Trustee is an Australian resident; or  
Central management and control of the trust is in Australia.

Trust for CGT purposes
For nonunit trusts, the test is the same as the normal trust residence test.
For unit trusts, residence for CGT purposes will exist where:
• Trust property is located in Australia; or  
• The trust carries in business in Australia and either:  
  • The central management and control of the trust is in Australia; or  
  • One or more Australian residents hold more than 50% of the income or property of the trust.

### Income Tax Rates – 1 July 2020 to 30 June 2021

<table>
<thead>
<tr>
<th>Taxable Income</th>
<th>Tax payable</th>
<th>Taxable Income</th>
<th>Tax payable</th>
</tr>
</thead>
<tbody>
<tr>
<td>AU$0 – AU$18,200</td>
<td>Nil</td>
<td>AU$0 – AU$120,000</td>
<td>32.5 cents for each AU$1</td>
</tr>
<tr>
<td>AU$18,201 – AU$45,000</td>
<td>19 cents for each AU$1 over AU$18,200</td>
<td>AU$120,001 – AU$180,000</td>
<td>AU$39,000 plus 37 cents for each AU$1 over AU$120,000</td>
</tr>
<tr>
<td>AU$45,001 – AU$120,000</td>
<td>AU$5,092 plus 32.5 cents for each AU$1 over AU$45,000</td>
<td>AU$180,000 and over</td>
<td>AU$61,200 plus 45 cents for each AU$1 over AU$180,000</td>
</tr>
<tr>
<td>AU$120,001 – AU$180,000</td>
<td>AU$29,467 plus 37 cents for each AU$1 over AU$120,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>AU$180,001 and over</td>
<td>AU$51,667 plus 45 cents for each AU$1 over AU$180,000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Residents are also liable to pay a Medicare Levy equal to 2% of taxable income.

### Companies

Companies, including nonresident companies, carrying on business in Australia or deriving Australian sourced income that is not subject to withholding tax or otherwise exempt, are taxed at 30% (although a 25% rate can apply to some companies with an annual turnover of less than AU$50 million from the 2021–22 income year and future years).

### Superannuation Funds

The income of most superannuation funds, known as complying superannuation funds, is taxed at 15%. Income includes superannuation contributions for which the contributor has received a tax deduction, and investment returns. Capital gains made on assets held by complying superannuation
funds for more than 12 months are taxed at 10%. The income of noncomplying superannuation funds is taxed at 45%.

Capital Gains Tax

Capital gains are taxed as part of the income tax regime. For residents, the CGT rules bring into the tax net gains from the disposal of assets acquired on or after 20 September 1985. Net capital gains are included in a taxpayer’s overall assessable income.

For nonresidents, CGT applies only in respect of gains arising from a disposal of an asset that is taxable Australian property. This includes:

- Direct and interests in Australian real property;
- An indirect interest in Australian real property;
- An asset used in carrying on a business in Australia at or through a permanent establishment; and
- Options or right to acquire any of the abovementioned assets.

Capital losses can only be offset against capital gains. To the extent that capital losses exceed capital gains, the excess can be carried forward to offset capital gains made in future years. Capital losses cannot be offset against revenue gains.

Net capital gains, on the other hand, can be set off against revenue losses.

When a nonresident becomes a resident for tax purposes, the law deems the former nonresident to have acquired those assets that were not already subject to CGT and which were actually acquired on or after 20 September 1985 to have been acquired at the time of the change of residence for their then market value.

When a resident taxpayer becomes a nonresident for tax purposes, the taxpayer is deemed to have disposed of all assets that are not taxable Australian property and that were acquired on or after 20 September 1985, for their current market value, unless certain elections are made.

Foreign Source Income

There are special rules for the taxation of foreign source income of residents. In addition to a system of foreign income tax offsets (in essence, foreign tax credits), Australia operates a controlled foreign companies (CFC) system and a controlled foreign trust/transferor trust (CFT) system. The aim of the CFC and CFT systems is to tax foreign source income accumulated offshore at low rates of tax in the hands of Australian controllers of the offshore entity. These systems allow Australia to tax certain income and gains that have not been repatriated to Australia.

Tax Consolidation

Wholly owned groups of companies may elect to form a tax consolidation group. This means that the group is treated as a single entity for income tax purposes, (i.e. a single income tax return is required to be lodged by the head entity of the tax consolidated group). Consolidation is optional but irrevocable.
Imputation

Australian tax paid by resident companies gives rise to franking credits that attach to dividends paid from those taxed profits to shareholders. Such dividends are ‘franked dividends’. Resident shareholders include both the cash dividend and the franking credit in their income, and can then apply the franking credit against their tax liability. Individuals and superannuation funds are eligible to claim refunds of franking credits where their franking credits exceed the tax otherwise payable on their income. Nonresident shareholders that receive franked dividends are not subject to dividend withholding tax (discussed below).

Withholding Tax

Unfranked dividends, interest and royalties paid to nonresidents are subject to withholding tax. If withholding tax is paid, then no further tax is payable in Australia on that income.

The general rates of withholding tax are set out below:

- Interest – 10%;
- Unfranked dividends – 30%; and
- Royalties – 30%.

Note that lower rates are usually prescribed in applicable tax treaties, and certain domestic exemptions may also apply (for example, interest paid on certain types of offshore debt is exempt from withholding tax).

Withholding tax may also apply to distributions from MITs. Those distributions may be subject to withholding at either 10%, 15% or 30% depending upon the classifications of the MIT and the nature of the income being distributed.

Additionally, where a nonresident disposes of certain types of taxable Australian property, the purchaser will be required to withhold a nonfinal withholding tax at a rate of 12.5% of the purchase price, and remit the amount withheld to the ATO.

Conduit Foreign Income Rules

Special rules allow ‘conduit foreign income’ to flow through Australian resident companies to foreign shareholders without being taxed in Australia. Conduit foreign income is foreign income that is ultimately received by foreign residents, through one or more interposed Australian resident companies.

Australian resident companies that receive an unfranked distribution that is declared to be conduit foreign income will not pay Australian tax on that income if the conduit foreign income is on-paid to shareholders within a certain period. In such cases, the conduit foreign income will not be assessable to the Australian resident company. Conduit foreign income is also exempt from dividend withholding tax when it is on-paid to a foreign resident as an unfranked distribution.

Losses

Losses can be carried forward indefinitely by individuals.

Losses can be carried forward indefinitely by corporate taxpayers subject to the taxpayer satisfying one of two tests. The first is the continuity of ownership test, which requires that a majority underlying
ownership of the company is maintained in the same hands in the loss recoupment year as was the case in the year the losses were incurred. The alternative test is the same business test, which requires that the same, or a similar, business is conducted in the loss recoupment year as was conducted immediately prior to the failure of the continuity of ownership test. The similar business test, however, only applies to losses incurred in an income year beginning on or after 1 July 2015.

Different and more complex tests apply for the recoupment of losses by trusts.

Revenue losses can be offset against assessable income, which may include both income and capital gains. Capital losses can only be utilised against capital gains.

**Thin Capitalisation**

Broadly, Australia’s thin capitalisation rules operate to disallow deductions for interest expenses and borrowing costs on loans from related parties, where the amount of related offshore debt exceeds a permitted level, having regard to the amount of related offshore equity capital. There are a number of different debt limits for calculating the maximum debt allowed including the ‘safe harbor’ limit, the ‘arm’s length’ limit and the ‘worldwide gearing’ limit, but these debt limits vary depending on the kind of entity. The rules apply to both foreign controlled Australian corporates and to Australian corporates with offshore operations. Specifically, companies and trusts subject to the thin capitalisation regime must complete an ‘International Dealings Schedule’ as part of their income tax return.

**Transfer Pricing**

Australia’s transfer pricing rules are broadly in accordance with the Organisation for Economic Co-operation and Development (OECD) model. These rules require that related party cross-border transactions are conducted on arm’s length terms. Taxpayers undertaking related cross-border transactions are required to disclose details of these transactions with their annual income tax return.

The ATO has undertaken a number of audits and other reviews that have resulted in substantial adjustment to the taxable income of taxpayers where it has been found that the rules have not been complied with.

Companies are required to maintain contemporaneous documentation in relation to related party cross-border transactions, and a transfer pricing policy. Certain taxpayers may qualify for the simplified record keeping options.

**Double Tax Treaties**

Australia is a party to over 40 bilateral income tax treaties (or double tax agreement (DTA)) which aim to reduce or eliminate double taxation caused by overlapping tax jurisdictions. These DTAs, therefore, set out to regulate the taxing rights between the countries involved over different categories of income, and provides rules to resolve dual claims in relation to the residency status of taxpayers or the source of income. Most of the treaties follow the OECD model agreement and provide for reduced rates of withholding tax or tax relief from double taxation by either allowing a taxpayer to apply for foreign tax credits or specific exemptions (where relevant). Business profits earned by a resident of one country from sources in the other country are generally exempt from tax in the source country, unless the profits have been earned through a permanent establishment in the source country.
**Goods and Services Tax**

A 10% GST applies to most supplies connected with Australia, at each step along the production chain. It also applies to most importations. Registered suppliers are obliged to remit GST on supplies they make. For the most part, registered recipients of supplies will be entitled to a credit for any GST included in the price of acquisitions they make. Nonresidents may be entitled to register, thereby enabling input tax credits to be claimed in relation to expenses incurred in Australia.

GST does not apply to limited categories of goods and services, including (amongst others):

- Exports;
- Financial supplies;
- Residential accommodation;
- Basic food; and
- A supply of a going concern.

From an administrative perspective, the GST system relies on registration of businesses and the issuance of tax invoices by the suppliers of taxable goods and services.

Like income tax consolidated groups, a GST group may also be formed by two or more associated business entities so that they may operate as a single business for GST purposes. To this effect, the representative member of the group completes activity statements and accounts for GST on behalf of the whole group.

**Australian Business Number**

The Australian Business Number (ABN) is a unique identifying number used by all businesses in their dealings with the ATO and other government departments. All enterprises registered for GST must have an ABN. It follows that nonresidents, which register for GST must also apply for an ABN. Nonresidents which are not registered for GST but carry on an enterprise in Australia should also consider applying for an ABN. Business customers of nonresidents, which make supplies in the course or furtherance of an enterprise carried on in Australia, must withhold 47% of amounts payable to the non-resident unless they are provided with an ABN.

**Fringe Benefits Tax**

Fringe Benefits Tax (FBT) is imposed at 47% on the grossed up value of benefits provided to employees in respect of their employment. The effect of taxing fringe benefits in this way is that employers pay FBT equivalent to the income tax that an employee on the top marginal rate of tax receiving the benefit would have paid had they purchased the benefit themselves from their after-tax income. FBT is deductible to the employer for income tax purposes. Certain benefits, such as superannuation, are exempt from FBT, while other benefits, such as motor vehicles, are concessionally taxed.

**State Taxes**

As mentioned earlier, the states and territories also impose taxes. These taxes include stamp duty, payroll tax and land tax.
Stamp Duty

Stamp duty, or ‘duty’, is generally a tax payable on transactions, including the transfer or conveyance of property or assets situated in, or attributable to, that state or territory. Generally, the amount of duty is calculated on the higher of the consideration or the unencumbered value of the property transferred. Stamp duty is usually payable by the purchaser or transferee. The stamp duty rates vary between each state and territory. Stamp duty is an important factor in any purchase of land, or purchase of an interest in a company or trust, which has interests in land.

Stamp duty must also be considered in the context of the purchase of a business, but the rules on which assets are dutiable vary from state to state, and can operate differently if a different mix of assets is acquired (for example, an asset may be exempt from duty if acquired in isolation, but brought into the duty net if acquired along with land).

In most jurisdictions, a foreign purchaser of residential premises will be liable for a surcharge rate of duty.

Payroll Tax

Payroll tax is a tax levied in each state and territory on the gross salaries and wages paid by an employer for services rendered by employees in that state or territory. Certain payments to contractors may also be deemed to be wages. Payroll tax is payable on a monthly basis with a final reckoning at the end of the year. The rates vary across the states and territories as do the thresholds from which point the tax becomes payable.

Land Tax

Land tax is a tax levied annually on the unimproved value of freehold land held within a state. Some lessees may be deemed to own the freehold land for tax purposes. The rate of land tax varies from state to state. Generally, land tax is calculated using a progressive tax scale, however, the threshold level for the imposition of the tax also varies from state to state. An owner’s principal place of residence is generally exempt from land tax, as is land used for primary production. Nonresident owners of residential land may be subject to a land tax surcharge.

Superannuation Guarantee

Employers are required to provide the prescribed minimum level of superannuation contributions in respect of an employee during a contribution period (a quarter) to a complying superannuation fund. In order to meet their superannuation guarantee obligations, employers are required to contribute a minimum of 9.5% of each employee’s earning base for each quarter (this rate will increase to 10% for eligible employees from 1 July 2021). There is a cap on the maximum contributions payable in respect of any particular employee.

If an employer fails to provide the prescribed minimum level of superannuation contributions in respect of an employee during a contribution period (a quarter) to a complying superannuation fund, it will be liable for a charge equivalent to the amount of the shortfall plus an interest component and an administrative charge.

Unlike the employer’s payment of superannuation contributions, the payment of the superannuation guarantee charge is not deductible for income tax purposes.
CHAPTER FOURTEEN

Industry Sectors
Chapter Fourteen -

INDUSTRY SECTORS

Energy and Resources

Regulatory Framework

Australia’s mining and petroleum industries are regulated at the commonwealth, state and territory levels. Generally, minerals are owned by the Crown, (i.e. the commonwealth and state and territory governments), which authorise companies and individuals to undertake specific mining activities in designated areas in accordance with regulations.

The regulations cover the life cycle of resources projects from exploration, retention, development, operations and sales.

A range of licences and permits cover each aspect of this life cycle including:

- Exploration tenements authorising exploration activities;
- Retention tenements reserving title pending development; and
- Production tenements authorisation production of resources and related operations.

Tenements may be applied for and granted in respect of certain minerals, a class of minerals or for minerals generally. Typically, transfers of tenements require relevant ministerial consent to ensure tenement holders have the financial and operational credibility to develop Australia’s resources.

Beyond specific tenements, regulations extend to planning and environment (page 61), native title (page 61), taxation (pages 64-71, and 77), workplace health and safety (page 50), and corporate governance (page 21) of industry participants.

Australia’s electricity and gas industries are similarly regulated. The Australian Energy Market Agreement sets out the legislative and regulatory framework for Australia’s energy markets. It provides for national legislation that is implemented in each participating state and territory. South Australia is the lead legislator and other jurisdictions introduced application legislation to give effect to the South Australian legislation.

Mining Sector

Mining rights may be applied for on a first-come, first-served basis or via a formal tender process (where applicants submit detailed work program bids or cash bids) depending upon the jurisdiction and mineral class involved.

Rights of access to land to undertake mining activities are may be obtained via legislation or contracts with private landowners.

Mining tenements are generally granted on conditions including minimum works and expenditures, payment of royalties, compliance with employment and environmental laws and rehabilitation requirements.
Industry Specific Codes

The industry specific code for mining is the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves (JORC Code) for public reporting by way of annual reports, information memoranda and other disclosure documents.

The JORC Code applies to all public reporting companies and has been embedded within the ASX Listing Rules so that all ASX-listed companies must comply with the JORC Code when reporting their exploration results, mineral resources and ore reserves.

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

Petroleum Sector

Like the mining sector, the petroleum sector is regulated by the Crown. State and territory governments allocate and administer petroleum titles on land and up to three nautical miles from the shoreline and the Commonwealth regulates offshore petroleum activities beyond that point under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth).

Such titles include exploration, retention and productions tenements but also include infrastructure and pipeline licenses to govern the construction and management of those critical assets.

Access to natural gas transmission facilities is governed by the National Gas Law (NGL). For further information on the NGL and the wholesale and retail gas markets see ‘wholesale and retail markets’ sub-section of this Energy and Resources sub-chapter which sets the rules for the trading of the commodity in the market, establishes an independent market operator and sets the access arrangements for pipelines.

Power Sector

Similarly, access to electricity transmission facilities is governed by the National Electricity Law (NEL). For further information on the NEL and the wholesale and retail electricity markets, see the ‘wholesale and retail markets’ sub-section of this Energy and Resources sub-chapter.

Australia’s generation mix has, historically, been primarily coal-based together with gas-fired generation for peak periods. In recent years, with the increased uptake of renewable generation, Australia’s power sector has been through and continues to go through unprecedented change. Energy security, reliability and affordability remain key priorities and shape the core regulatory reforms. Australia’s policy on reducing carbon emissions also continues to oscillate and balancing this with the core priorities means regulatory frameworks in the power sector remain unsettled and continue to evolve.

Much of the early growth in the Australian renewable energy industry was facilitated by the Australian federal government’s 2020 Renewable Energy Target (RET) scheme. The RET scheme was designed to reduce greenhouse gas emissions and boost the generation of electricity from sustainable and renewable sources. Renewable energy now accounts for 27.7% of all electricity generation in Australia.

Under the RET renewable energy generators may create and sell tradeable certificates, separate from the electricity generated. Demand for these certificates is placed on electricity retailers who must
acquire and surrender a certain number each year as part of the mandatory RET requirements. Outside of the mandatory RET requirements, Australia has an active market for certificate trading as these certificates are increasingly used as offsets for businesses to achieve sustainability targets on a voluntary basis.

The target of generating 33,000 gigawatt hours of renewable energy under the RET scheme was met a year early. While there are no current indications of extending the RET scheme, growth in renewable energy projects continues. Further, states and territories have also introduced their own schemes to incentivise the development and implementation of renewable energy projects and broader energy efficiency measures (Queensland, Victoria, South Australia, New South Wales and the Australian Capital Territory), some of which are tradeable credit schemes.

There is also an emissions reduction fund under which the government will purchase lowest cost of abatement in the form of Australian Carbon Credit Units to encourage the proactive reduction of emissions.

The Australian renewable energy sector continues to receive support from government institutions, such as Clean Energy Finance Corporation (CEFC) and the Australian Renewable Energy Agency (ARENA). Both CEFC and ARENA fund and invest in renewable projects, clean energy technologies and knowledge sharing in Australia. CEFC is responsible for investing AU$10 billion and as at May 2021, ARENA has invested AU$1.67 billion in grant funding.

Outside of conventional bi-lateral agreements between generators and retailers, favourable market conditions have allowed for a boom in corporate power purchase agreements (PPAs) with long-term offtake periods. This has enabled renewable project developers to continue to access debt financing over a long-term period. In 2020 alone, 26 corporate renewable PPAs were announced and over AU$2 billion was invested in renewable energy through corporate PPAs.

The federal government has published Australia’s National Hydrogen Strategy, which focuses on making Australia a major global player in the clean hydrogen industry by 2030. In line with this strategy, the government has made several new investments in clean hydrogen, hydrogen hubs and carbon capture technologies as part of its 2021–2022 budget. As yet, the regulatory environment for hydrogen is uncertain but there is increased focus on reforms at both state and commonwealth level and this is a priority for this year.

Gas and Electricity Access

Access

To facilitate competition, legislative provisions and access arrangements ensure that entities wishing to establish new operations may access existing gas and electricity infrastructure services, subject to capacity.

Under the National Electricity Law, National Electricity Rules, National Energy Retail Law and National Energy Retail Rules (applicable to most of the eastern states and territories), registered generators and end-use customers are entitled to connect to transmission and distribution systems and access network services provided by them in accordance with those laws. Retailers are also entitled to use of the networks. Economic regulation by an independent regulator is applied to the pricing of network services. State-based legislation in some of the eastern states confers similar rights. Western Australia and the Northern Territory have separate electricity access regimes with similar aims.
In respect of gas pipelines, third party access is addressed in the National Gas Law and National Gas Rules. Pipeline service providers may also need to have an approved access arrangement, depending on the classification of particular pipelines. Very large users of gas would generally negotiate an access arrangement with a pipeline operator while other gas users would rely on the access arrangement put in place between their gas retailer and a pipeline operator.

**Wholesale and Retail Markets**

In the electricity sector, a national wholesale spot market for trading electricity operates in Queensland, New South Wales, the Australian Capital Territory, Victoria, South Australia and Tasmania.

In the National Electricity Market, electricity generators and other participants (generally retailers) participate in a pooled system of exchange, which instantaneously matches supply with demand. The spot market price is calculated at half hourly intervals and has a cap and a floor. This market is an ‘energy-only’ market. For most participants in this market, the spot market is supplemented by bilateral contracts such as hedges. Given its geographical distance from the states participating in the National Electricity Market, Western Australia has established a separate wholesale electricity market, which operates as a ‘capacity and energy’ market. The Northern Territory also operates its own wholesale electricity market, which similarly operates as a capacity and energy market.

Electricity users who have not registered to participate in the National Electricity Market, or the wholesale electricity markets, will generally buy electricity from a retailer at fixed prices. Full retail competition exists in the eastern states and territories, and retail competition for large customers exists in Western Australia. Supply to small customers is highly regulated, including retail price regulation in some jurisdictions.

In all jurisdictions, wholesale contracting, for a long term supply of gas, takes place through direct bilateral contracts. However, the Victorian Gas Market and the Short Term Trading Market (which operates in New South Wales, South Australia, and Queensland) allows participants in these markets to adjust their long-term position by trading quantities of gas. The retail supply of gas is regulated in a similar manner to the retail supply of electricity.

**Project Structuring**

The most popular structure for developing resources and petroleum assets in Australia are unincorporated joint ventures (JV). Each participant holds its interests and entitlements to project assets as tenants in common and a JV agreement between the participants governs the rights and obligations each participant has to each other, and by, and to the operator, or manager of the JV.

Farm in arrangements are also frequently used in Australia and involve a new participant assuming some expenditure obligations (typically in the exploration phase) in exchange for earning a participating interest in the unincorporated JV.

An alternative structure is the an unincorporated JV where two or more project proponents establish a special purpose vehicle (SPV) to own and operate a project and a shareholders agreement governs the operations of the SPV and how the project is to be administered.

In the power sector, the most popular structures for developing energy assets are incorporated companies or simple trusts. Participants hold interests as shareholders or unitholders and a shareholders’ or unitholders’ agreement governs the rights and obligations each participant has to
each other in respect of the decision making and operational management (among other things) of the energy asset.

Each structure has different particular legal, commercial, financial and taxation implications.

**Foreign Investment**

Mining and petroleum tenements and power assets are specifically governed by Australia’s foreign investment laws given that they are interests in Australian land.

Many, if not most, investments by foreign persons in the Australian mining, petroleum and power sectors are likely to require approval from the treasurer via FIRB. For further information, see Chapter One - Foreign Investment.

**Taxes and Royalties**

Royalties are payable to state or territory governments upon the production of minerals or petroleum. While calculated on a quantity of production basis, the rates differ depending upon production methods and between jurisdictions and different types of commodities.

Further, oil and gas projects in commonwealth waters are subject to the Petroleum Resource Rent Tax, which is a tax generally on profits generated from the sale of marketable petroleum commodities such as crude oil, condensate, liquefied petroleum gas and ethane.

**Environmental, Native Title and Heritage Issues in Energy and Resources Sectors**

Environmental approvals for energy and resources projects are regulated at state and territory level.

In addition, the EPBC Act applies to projects of national environmental significance. Many resources projects are of such significance and bilateral arrangements between state and territory governments and the commonwealth have facilitated a streamlining of environmental approvals to minimise inefficient duplication.

For more information on environmental consideration for energy and resources projects, see Chapter Twelve -, Real Estate, Planning and Development section.

As noted on page 61 of this guide, native title describes the land rights granted to Aboriginal and Torres Strait Islander peoples under their traditional laws and customs. If a resources project is developed on land subject to native title, project proponents must comply with the procedures of the Native Title Act 1993 (Cth). This may involve negotiations, and entry into land use agreements, with such native title holders or claimants. Also, projects affecting sites of cultural heritage must follow certain requirements. These processes can take some time to resolve so it is important to ensure such issues are resolved at an early stage in developing new projects or extending existing projects.

**Infrastructure**

Resources projects often involve significant infrastructure investment, such as rail lines, pipelines and ports. Australia’s access regime allows for third party market entrants to potentially access such significant infrastructure. For further information on third party access to existing gas and electricity
infrastructure, see Chapter Fourteen -, Industry Sectors, Access in the Gas and Electricity Access section.

**Transport**

**Sea**

As a major exporter and importer of goods, in particular bulk commodities, agricultural products and consumer goods, Australia relies heavily on both local and international shipping services. Approximately 99% of Australia’s total international trade by volume\(^{12}\) and 12% of world trade by volume either comes into Australia or out of Australia by sea.\(^{13}\)

The majority of shipping services into and out of Australia are conducted by non-Australian shipowners. Sydney and Melbourne are among the largest container ports in the Southern Hemisphere and are hub ports for cargo movements to and from Tasmania, South Australia and New Zealand. The expansion of online retailing during the COVID-19 pandemic has placed greater capacity pressures on all of the nation’s major ports—especially those in the major population centres of Sydney and Melbourne.

Regional centres such as Newcastle, Port Kembla, Geelong and Portland are linked to specific products including grain, coal and metals. These regional centres also have a modest container handling capacity. In more recent times, we have seen the growth and development of single commodity ports, exporting principally iron ore and coal—e.g. ports such as Dampier and Port Hedland in Western Australia for the export of iron ore and Dalrymple Bay, Wiggins Island and Abbot Point in Queensland for the export of coal.

Import and export liner trade is largely organised through formal shipping conferences. Government policy is to permit liner carriers to operate through conferences, provided that the conference complies with the requirements of the Competition and Consumer Act and is registered with the Register of Liner Shipping. There are strict requirements for registration, including an obligation to negotiate rates and cargo volumes with the peak shipper bodies, formed to represent cargo shippers. Registration provides limited exemption from some of the antitrust provisions of the Competition and Consumer Act.

In Australia, the past decade has seen significant reform in the shipping area, with a number of acts passed under the policy title ‘Stronger Shipping for a Stronger Economy’. The key areas of reform were:

- Tax, with zero corporate tax on qualifying shipping revenues, accelerated depreciation on certain vessels, abolition of royalty withholding tax on certain charter transactions and tax exemptions for Australian seafarers working substantially outside Australia;
- The establishment of a new Australian International Shipping Register, with crewing cost advantages;

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\(^{12}\) Australian Government, Department of Infrastructure and Regional Development, *Trends: Transport and Australia’s Development to 2040 and Beyond* (Report, 2016) 47.

• An overhaul of the way in which cabotage is regulated, with the abandonment of the former licence and (single or continuing) voyage permit system, and the introduction of three classes of licence (General, Temporary and Emergency);
• Introduction of a Maritime Workforce Development Forum; and
• The harmonisation of state-based commercial vessel safety regulations into a single, uniform national standard.

Australia has adopted many international maritime conventions in relation to the carriage of cargo. The Hague Rules were adopted in 1924 followed by the adoption of the Visby and Special Drawing Rights Protocols in 1991. In 1998, Australia introduced a hybrid cargo liability regime still based on the Hague-Visby Rules but incorporating some features of the Hamburg Rules. Amongst other things, these changes extended the carriers’ liability to cargo, from the ships’ rail to the container yard gate. Australia is yet to sign up to the Rotterdam Rules.

Ship arrest in Australia is relatively straightforward and inexpensive in comparison to a number of other jurisdictions in the Asia Pacific region. Australia is not a signatory to the Arrest Convention although there are many similarities between the Arrest Convention and Australia’s governing legislation for ship arrest, the Admiralty Act 1988 (Cth).

Australia’s cruise industry was severely affected during the COVID-19 pandemic and remains suspended for international travel at the time of writing.

The recently opened Brisbane International Cruise Terminal developed by the Port of Brisbane has been designed to handle the new generation of mega cruise liners and will be well-positioned to service this industry once the pandemic is overcome.

Apart from the United States, Australia is the only country that has a full visa system for foreign seafarers. Maritime crew visas have been introduced as a means of strengthening Australia’s border security. Any foreign seafarer on a vessel entering Australia without a passport and a visa can be subjected to a substantial fine and/or detention.

Protection of the environment continues to be a high priority for federal and state governments alike with both commonwealth and state and territory legislation governing the area. Australian laws provide for some of the most severe penalties in the world for breach of environmental legislation and defences are limited. Apart from some defined small craft, all Australian owned vessels are required to be registered under Commonwealth legislation, being the Shipping Registration Act 1981 (Cth). Liens, mortgages and charges over vessels are registered on the Personal Property Security Register.

**Air**

In a country as large and as isolated as Australia, air travel is a necessity. Australia therefore has a number of air carriers, operating nationally and internationally. The two major carriers are the Qantas Group and Virgin Australia.

The Qantas Group (which includes QantasLink and Jetstar) operates an average of 5,600 domestic flights and around 970 international flights every week, serving more than 182 destinations in 44 countries.
countries. Virgin Australia also services the domestic and international market. International air travel has been severely disrupted during the COVID-19 pandemic but with the recent air travel ‘bubble’ opening between Australia and New Zealand, the promise of international air travel re-commencing is real.

All of Australia’s state capital cities are serviced by major international airports. Sydney Airport, the nation’s busiest, conducted around 850 aircraft movements per day and catered to around 33 million passengers per year pre-pandemic. The air route between Melbourne and Sydney is the second busiest air route in the world. Brisbane Airport recently underwent a significant expansion with the development of a second A380 capable runway. The development of a major new airport in Sydney to be known as the Western Sydney Airport is also in progress and is due to open in 2025–2026 to help ease congestion at Mascot Airport. Perth, Adelaide, Canberra and Melbourne Airports have all recently enjoyed significant modernisation and capacity upgrade works. There are also a vast number of major regional airports, some of which are also capable of handling international services. All airports close to the capital cities and major regional centres are serviced by efficient local transportation.

The resources boom of recent years has seen huge growth in charter operations known as Fly-In-Fly-Out, particularly in Queensland and Western Australia (in between intermittent State border travel restrictions). These operations carry workers and equipment from the more highly populated regional centres and urban areas to remote mining operations. A number of these airports regularly cater to the Antonov 124, among the world’s largest aircraft, ferrying mining and military equipment. Other than for limited curfew arrangements and COVID-19 restrictions, there is no restriction on access to any of Australia’s main airports, other than for some limited peak controls at Sydney airport, which have little effect on international or domestic regular public transport.

Airfares, airport and other user charges are competitive on an international basis. Australia’s air and safety record is unparalleled. Australia’s domestic and international airline operations are among the safest, if not the safest, in the world and Australia maintains a Category 1 safety rating according to a US Federal Aviation Administration audit in 2017.

In January 2009, Australia ratified the Montreal Convention 1999 through amendments to the Civil Aviation (Carriers' Liability) Act 1959 (Cth) (Carriers' Liability Act). The Carriers' Liability Act also gives the provisions of the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, Montreal Protocol No. 3 and Montreal Protocol No. 4 the force of law in Australia. Australia previously ratified the Rome Convention but denounced the Rome Convention in 1999 and in lieu thereof enacted the Damage by Aircraft Act 1999 (Cth) which imposes a strict and unlimited liability regime in Australia on aircraft engaged in overseas or interstate operations. Complimentary legislation also imposing a strict liability regime for damage by aircraft has been enacted in all Australian states.

Australia maintains a sophisticated regulatory environment in relation to air transportation and safety. The Air Navigation Act 1920 gives effect to the Chicago Convention, which Australia ratified in 1947. The Civil Aviation Safety Authority, which was established pursuant to the Civil Aviation Act 1988, performs the role of Australia’s aviation safety regulator, which performs its function in a manner that is consistent with Australia’s obligations pursuant to the Chicago Convention. Airservices Australia is the civil air navigation services provider and was established pursuant to the Air Services Act 1995. Aviation accidents and incidents are investigated by the Air Transport Safety Bureau, which was established pursuant to the Transport Safety Investigation Act 2003.
Land

Australia has a comprehensive network of highways and other roads linking all capital cities and regional centres. Haulage contractors compete strongly for business with the national and state railway systems and are capable of reaching many urban and industrial centres not served by the rail network. The road network in Australia continues to be upgraded with ongoing improvements to major highways such as the pacific highway and provide vital infrastructure for the movement of people and are a vital facilitator of trade and commerce in a country that manages vast distance with a relatively small population. Australia’s rail network comprises approximately 40,000 kilometres of track of three major gauges. The Inland Rail project is currently in progress and will deliver a 1700km dedicated freight rail link between Melbourne and Brisbane. The project is due to be operational in 2024–2025.

The freight rail operations of the Commonwealth, New South Wales, Victoria, Queensland and Western Australia have now been privatised. However, rail infrastructure assets such as track, sleepers, ballast and formation are in a combination of public and private ownership. Some jurisdictions have also leased the corridor and track to private operators in addition to selling rail assets (such as rolling stock and locomotives). Bulk commodities are well supported by rail infrastructure and operators, particularly in Queensland for coal and in Western Australia for iron ore.

Australia has not adopted any of the International Conventions on liability for the carriage of goods by road or rail. However, both the road and rail transport industries have had to adjust to an avalanche of major state-based regulatory changes over the last decade. Much of this legislation is based on the concept of ‘chain of responsibility’—the notion that all parties in the road transport supply chain (including consignors, packers, loaders, operators, drivers, owners and consignees) have obligations to improve safety and prevent a breach of the transport laws from occurring. The concept does not lead to equal responsibility between those parties, but rather to responsibility proportionate to each party’s level of involvement in the transport supply chain. Notable regulatory changes include legislation that imposes liability for serious road traffic infringements, mass, dimension and load infringements and driver fatigue.

The introduction of this concept of chain of responsibility into road and rail legislation has meant that consignors (which by definition under the legislation can include air and sea carriers needing to subcontract for inland transport) need to familiarise themselves with the chain of responsibility laws as a matter of risk management.

Telecommunications

The Australian telecommunications sector has grown rapidly in recent years pushed along by deregulation, the impact of the internet and technology advancements.

The telecommunications and radio communications regulator in Australia is the Australian Communications and Media Authority (ACMA). The ACCC also has a role in relation to competition and consumer law in the telecommunications industry.

Telstra, Optus, and TPG (formerly Vodafone) own and operate Australia’s national mobile networks. The introduction of Mobile Number Portability in 2001 and significant ACCC oversight has led to significantly increased competition in the mobile market. Each of the three mobile carriers has commenced widespread commercial rollout of 5G technology.

Telstra (now a listed company, but previously a government-owned monopoly telecommunications carrier in Australia) has, by far, the largest fixed line telecommunications network in Australia. Its main
fixed line competitor is Optus (wholly owned by Singtel). The unbundling of the local loop and the growth of asymmetric digital subscriber line (ADSL) and broadband services throughout the Australian telecommunications market has introduced greater competition between providers of fixed line services.

The federal government-owned NBN Co owns and operates the national broadband network. This is a multi-mode network that provides wholesale broadband services across a combination of fibre to the home, fibre to the node, fibre to the curb, cable-TV, fixed wireless and satellite technologies. The network was built with the intention of providing broadband services to all of Australia. Services on the network are sold by many retail service providers, the largest of which are Telstra (now a private entity, but originally the government owned telecommunications monopoly provider), Optus (owned by Singtel) and TPG. Almost all Australian residential broadband services are provided over NBN networks. There are strict competition rules enforced by the ACCC to protect NBN's monopoly provision of wholesale fixed-line broadband services. The federal government plans to privatise NBN Co in coming years.

NBN Co has more competition in the commercial sector. There are other large operators of fixed-line networks such as Telstra, Vocus and TPG.

**Electronic Commerce**

More and more Australian businesses are using the internet and email to conduct transactions. Laws that affect any contract, marketing or public document continue to apply in the electronic environment and will need to be considered in relation to e-commerce transactions. In addition, various authorities play a role in overseeing certain aspects of e-commerce. These include the OAIC, ACMA and the ACCC. Some industries also have codes of conduct in place dealing with e-commerce transactions that are registered with relevant government authorities. Examples include the Australian Direct Marketing Association and the Internet Industry Association. State and Commonwealth Electronic Transactions and Evidence Acts make provision for the enforceability of certain electronic transactions. The Corporations Act and taxation legislation also recognise electronic records. State and Commonwealth legislation also recognises electronic signatures to varying extents. Amendments made to State and Commonwealth Crimes Acts to protect electronic communications and data storage recognise the importance of e-commerce. Government funding is available on application for information economy research and development projects, which meet relevant government criteria.

**Fintech**

Australia aims to position itself as an attractive destination for fintech companies. With unprecedented engagement from all levels of government and Australia’s financial regulators, Australia represents an attractive destination for fintech. Australia’s legal and regulatory system operates predictably and provides a level of certainty to business and consumers.

The fintech industry is experiencing an extraordinary rise, buoyed in part by the growing surge in investments, collaboration between incumbents and market disruptors, and regulatory advancement across the globe. These developing trends have been occurring in the industry as companies capitalise on current and future value.

Australia has recently launch an open banking framework, as part of a broader consumer data right. It is intended to give consumers a right to direct the information held by financial institutions to be shared with other accredited entities. Initially, customers of Australia’s four largest banks (ANZ,
Commonwealth Bank, NAB, and Westpac) may request and share information about their transaction accounts, credit and debit cards, home loans, personal loans, etc with accredited data recipients.

Click here for the K&L Gates FinTech and Blockchain Law Watch blog: www.fintechlawblog.com.