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Australia

AN INTRODUCTION FOR INVESTORS

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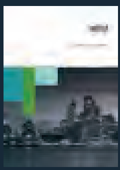

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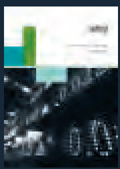

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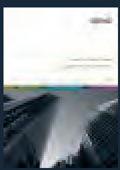

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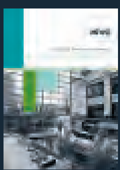

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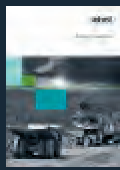
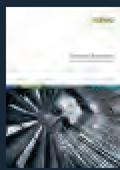


Mining In Australia – An Introduction for Investors

Mining in Australia offers a diverse range of opportunities for investors. This guide highlights the legal and regulatory framework in relation to mining projects, including the taxation and royalties regime applicable to mining projects and different structures an investor needs to know when conducting due diligence with a view to acquiring mining assets or seeking to raise funds for mining projects.



Petroleum In Australia – An Introduction for Investors

The Australian petroleum sector offers significant opportunities for investors. This guide provides an overview of the legal and regulatory framework in relation to petroleum and practical information for prospective investors.

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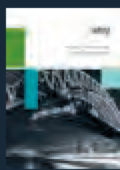
This guide explains the key legal issues in competition law across the Asia-Pacific Region. It looks at competition on a country by country basis and covers 27 countries.



Issuing in the Australian Debt Capital Markets

This guide provides an overview for offshore issuers of the structure process and documentation required for issuing Australian "Kangaroo bonds" in the Australian debt capital markets.

Disclaimer

Australian laws and regulations are constantly changing. This publication is up-to-date to January 2020.

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at aus.marketing@ashurst.com

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Contents

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Foreword

Welcome to our latest edition of *Australia: An Introduction for Investors*.

Doing business in another country can be challenging. This guide assists foreign investors to understand the legal, taxation and regulatory requirements of investing in the Australian market.

Australia's sustained economic growth, strong performing financial services and resources sectors, and growth in key industry sectors including agriculture, healthcare, infrastructure, real estate, technology and tourism make it a strategic location to operate a business.

The strength and transparency of Australia's legal and regulatory systems provide security. Recent reforms continue to improve the regulatory environment for business.

Ashurst is well positioned to help international investors to capitalise on the many opportunities in Australia. With more than 400 partners and 1400 lawyers across a network spanning Australia, Asia, Europe, the Middle East, the United States and the United Kingdom, our combination of local expertise and global experience enables us to provide innovative solutions to meet your legal needs. All our offices have native language speakers, and experience with successfully managing large and complex multi-jurisdictional transactions and projects.

With our expert knowledge of Australia's legal and regulatory framework, and understanding of the needs of foreign companies, we can advise you on the legal aspects required to help ensure the success of your business ventures in Australia. We can also assist in the development and implementation of a strategy to obtain the necessary Australian Government foreign investment approvals.

We trust our guide will provide you with a helpful overview of the Australian legal and regulatory framework current to January 2020, and answers many of the questions you may have relating to your business goals in Australia.

Please contact us if you require additional information or professional legal advice.

Paul Jenkins
Managing Partner, Ashurst
www.ashurst.com

Guide to publication

PLAN YOUR ENTRY AND SET UP YOUR BUSINESS IN AUSTRALIA

- Foreign investment regulation (Chapter 1)
- Understand business structures (Chapters 2 and 17)
- Distribute your goods and services in Australia (Chapters 10 and 11)
- Acquire an Australian base (Chapter 3)
- Merger control (Chapter 10)

FINANCE YOUR BUSINESS

- Banking and finance (Chapter 6)
- Financial services and markets (Chapter 7)
- Funds (Chapter 8)
- Private equity and venture capital (Chapter 9)

PROTECT YOUR ASSETS

- Real estate (Chapter 4)
- Energy and resources (Chapter 5)
- Competition law (Chapter 10)
- Anti-bribery and corruption (Chapter 12)
- Intellectual property (Chapter 13)

SERVICE YOUR CUSTOMERS

- Consumer protection (Chapter 10)
- Privacy and data protection (Chapter 14)
- Employment (Chapter 15)
- Environmental responsibilities (Chapter 16)

UNDERSTAND AUSTRALIAN TAXES

- Income tax and options for investing into Australia (Chapter 17)
- Petroleum tax (Chapter 18)
- GST, stamp duty and other indirect taxes (Chapter 19)

The Australian legal system

The Australian legal system is underpinned by a fundamental belief in the rule of law, justice and the independence of the judiciary. Australia's legal system is based on the English common law system.

SYSTEM OF GOVERNMENT

The Commonwealth of Australia comprises a federation of six States – New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania – and two Territories – the Northern Territory and Australian Capital Territory.

The Australian Constitution, which took effect on 1 January 1901, established a federal system of government which distributes power between the Federal Government and the State and Territory Governments. The Constitution vests legislative power in the Federal Government to pass laws on various specific areas such as taxation, defence, trade and commerce, immigration, foreign investment, communications, banking, corporations and external affairs. Where there is any inconsistency between Federal and State or Territory laws, Federal laws prevail. Federal laws apply to the whole of Australia.

The second tier, the State and Territory Governments, pass their own laws, except on matters exclusive to the Federal Government. They are particularly concerned with the running of State and Territory facilities (for example, education, transport, health and law enforcement).

The third tier is Local Government, which has restricted powers. Land use and development usually fall within Local Government control, although Federal, State or Territory Government bodies may have some authority, especially on major development projects.

The Federal Government is based in Canberra. Federal Parliament effectively comprises two levels: the House of Representatives (the Lower House) and the Senate (the Upper House). Members of each House are elected by popular vote. All States have equal representation in the Senate.

LEGISLATION

New laws are introduced into Parliament by a member from one of the two Houses of Parliament in the form of a Bill. Each Bill must be passed by both Houses of Parliament. This means it must be agreed to and voted on by a majority in each House. Once the Governor-General assents to the Bill, it is called an Act and becomes law. Laws are also made by State and Territory Parliaments in a similar way.

THE JUDICIAL SYSTEM AND DISPUTE RESOLUTION

Australia has two sources of law: legislation enacted by the Federal and State or Territory Governments; and common law which comprises judicial decisions. The common law system was developed in the United Kingdom and is distinct from the civil law systems that operate in Europe and Japan, which are derived from Roman law.

Under the separation of powers doctrine, the judicial system is completely separate and independent from the legislative and executive branches of government.

Each State, together with the Australian Capital Territory and the Northern Territory, has its own judicial system and hierarchy of courts headed by a Supreme Court. The hierarchy of courts includes specialised boards and tribunals established under legislation to handle disputes of a particular nature.

The High Court of Australia, established under the Federal Constitution, deals with Constitutional matters and is the ultimate appellate court for Federal, State and Territory matters. This has led to the uniform development of the common law throughout Australia and consistency in statutory interpretation. The Federal Court of Australia principally deals with matters arising under Commonwealth legislation.

In addition to the formal judicial resolution of disputes, a variety of alternative dispute resolution techniques are increasingly being utilised by parties in Australia. Some of these methods, such as mediation and arbitration, are now formal requirements of the court system and are designed to facilitate the commercial resolution of disputes.

AUSTRALIA – AN INTRODUCTION FOR INVESTORS

Doing business in Australia

PART

A

Overview

1 FOREIGN INVESTMENT REGULATION

The Australian Government encourages foreign investment. The regulation of foreign investment in Australia is complex, particularly as it is governed by a combination of legislation and Australian Government policy. Specific legislation or policy also regulates foreign investment in certain industry sectors. A foreign investment proposal needs to be carefully considered in regard to its circumstances to determine whether foreign investment restrictions exist and whether notification to the Foreign Investment Review Board is required.

2 BUSINESS STRUCTURES

A foreign investor may conduct business in Australia through a variety of business structures. When choosing a business structure, you need to ensure that the structure is the most efficient for your proposed operations in Australia. The choice of business structure should only be made after the taxation consequences of conducting business in Australia have been considered (see Part D – Taxation). If you establish an Australian business structure, you will need to ensure it complies with local regulatory requirements.

3 MERGERS AND ACQUISITIONS

If a foreign investor proposes to acquire the shares in, or the assets of, a listed company or trust there are two main methods of obtaining control – takeover bids and schemes. You need to be aware of takeover legislation, as well as Australia's foreign investment policy (see Chapter 1 – Foreign investment regulation) and also competition issues (see Chapter 10 – Merger control, competition law and consumer protection).

4 REAL ESTATE TRANSACTIONS

A stable and transparent real estate market, robust legal framework and efficient titles system makes Australian real estate attractive to local and foreign investors. You need to be aware of the legal and regulatory background, and the structuring and taxation of Australian real estate transactions to assist in your dealings with Australian real estate advisers and opportunities (see Part D – Taxation). It is important to consider not only the upfront costs and processes for acquiring real estate, but also those arising out of the ongoing holding and management of that real estate, and ultimately the disposal of the asset.

5 ENERGY AND RESOURCES

The Australian energy and resources sector is important to Australia's economy and offers a wide range of opportunities for overseas investors. Non-renewable resources include fossil fuels (coal, gas and oil) and nuclear energy fuels. Renewable energy sources include wind, solar and geothermal resources as well as potential wave, tidal and biomass sources of energy. The laws and regulations surrounding energy and resources project development are complex and need to be fully understood for successful project delivery. You also need to consider competition issues which may arise if you are seeking to own numerous vertically integrated assets, or assets of significant importance in the energy and resources industry (see Chapter 10 Merger control, competition law and consumer protection).

DOING BUSINESS IN AUSTRALIA

Foreign investment regulation

PART A
1

The Australian Government encourages foreign investment if it is in the national interest.

Although restrictions on foreign investment exist, the Australian Government actively promotes foreign investment. Broad-ranging programs of Government grants, trade incentives and income tax concessions are available to assist foreign investors to establish and conduct business in Australia.

Foreign investment in Australia is regulated primarily through a regime established under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) (and regulations made under that Act), as supplemented by Government policy. In addition, foreign investment is also restricted under legislation or regulations specifically applicable to particular sectors (eg aviation, media, banking and airports).

FATA REGIME – OVERVIEW

The FATA regime is administered by the Australian Treasurer and the Foreign Investment Review Board (FIRB), an advisory body within the Commonwealth Department of Treasury.

Broadly, FATA enables the Australian Government to monitor foreign investment by requiring prior clearance of certain investments by foreign persons (including foreign government investors). It empowers Australia's Federal Treasurer to block certain foreign investment proposals that the Treasurer considers contrary to Australia's national interest. Disposal orders may also be made if the investment is made without clearance and the Treasurer considers it to be contrary to Australia's national interest.

The notification of some investment proposals to FIRB is compulsory while the notification of others, although not compulsory, is advisable to avoid the risk that the transaction may subsequently be unwound if considered contrary to the national interest. Generally, notifications seeking clearance (or, as commonly referred to, "FIRB approval") are required to be lodged electronically through the FIRB website to be effective. FIRB publishes guidelines on what it expects applications to include.

As a practical matter FIRB will generally review the investment proposal, consult with a range of other Government agencies (including the Australian Taxation Office (ATO)) and make a recommendation to the Treasurer on whether the proposed acquisition should be approved under the Government's foreign investment policy. More sensitive applications will be considered by Treasury officials.

The vast majority of applications are cleared. The Treasurer may give clearance to the proposal either unconditionally or subject to conditions which the Treasurer considers necessary for the proposed investment not to be contrary to Australia's national interest. The conditions may include certain tax related "standard conditions" as well as, in certain circumstances, additional tax conditions.[1] A breach of conditions can result in prosecution, fines/penalties and potentially divestment of the asset.

Where notification under FATA is compulsory, it is a criminal offence to proceed with the proposal unless notification has been given and either the proposal has been cleared or the relevant time limit for making orders has elapsed since the notification was received by FIRB. Even where prior notification is not mandatory, the powers of the Treasurer may be enlivened if certain thresholds are exceeded for the transaction, so depending on the situation it may be prudent to obtain prior clearance.

AUSTRALIA'S NATIONAL INTEREST

The national interest, and what would be contrary to it, is not defined in FATA. In effect, FATA confers upon the Treasurer the power to decide in each case whether a particular investment would be contrary to the national interest. The Government reviews foreign investment proposals against the national interest on a case-by-case basis.

The Government publishes foreign investment policy guidelines (which are amended and fine-tuned regularly) which set out certain factors that it considers in relation to applications generally, including:

- **National security** – the extent to which investments affect Australia's ability to protect its strategic and security interests.
- **Competition** – whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia. (This is independent of any application made to the Australian Competition and Consumer Commission (ACCC).)
- **Other Australian Government policies (including tax)** – the impact of a foreign investment proposal on Australian tax revenues. Investments must also be consistent with the Government's objectives in relation to matters such as environmental impact.
- **Impact on the economy and the community** – the impact of the investment on the general economy. The Government also considers the nature of the funding of the acquisition, the level of Australian participation in the enterprise after the foreign investment occurs, and the interests of employees, creditors and other stakeholders.
- **Character of the investor** – the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision. The Government also considers the corporate governance practices of foreign investors. In the case of investors who are fund managers, including sovereign wealth funds, the Government considers the fund's investment policy and how it proposes to exercise voting power in relation to Australian enterprises in which the fund proposes to take an interest. The Government considers whether the investor complies with Australia's laws, including following both the spirit and the letter of Australian law and acting in good faith in complying with any conditions imposed by the Government.

Where a proposal involves a foreign government investor, the Australian Government also considers if the investment is commercial in nature or if the investor may be pursuing broader political or strategic objectives that may be contrary to Australia's national interest. Proposals from foreign government investors operating on a fully arm's length and commercial basis are less likely to raise national interest concerns than proposals from those that do not.

The Government may consult with Commonwealth, State and Territory government departments and agencies, including the ACCC and the ATO. It may (and, with respect to the ATO, will) provide them with a copy of the application. FIRB has said that the Government:

- respects any "commercial-in-confidence" information it receives and ensures that appropriate security is provided; and
- will not provide applications to third parties outside the Government unless it has permission or it is ordered to do so by a court of competent jurisdiction, and will defend this policy through the judicial system if needed.

1 See: http://firb.gov.au/resources/guidance/tax-conditions-gn47/

INVESTMENT PROPOSALS REQUIRING NOTIFICATION AND PRIOR CLEARANCE

Whether a proposal requires prior clearance under FATA depends on whether the applicable monetary screening threshold is met. The screening threshold also depends on the type of investor and type of investment proposed. Monetary screening thresholds are met when the amount paid for an interest, the total asset value for the entity or the total issued securities value for the entity (whichever is higher) or value of the asset, exceeds the relevant threshold amount (the exception being for agricultural land, where the test is cumulative). An indicative guide as to the types of investments which need prior clearance, and the monetary thresholds for them, is set out in the table below:

Investor type	Investment type	Threshold[2] – more than:
For nonland proposals[1]		
From FTA partner countries that have the higher threshold[3] (excluding foreign government investors)	Acquisitions of a "substantial interest" (20% or more on an associate inclusive basis[4]) in an existing Australian corporation or business in non-sensitive businesses	**A$1,192 million**
	Acquisitions of a substantial interest (20% or more on an associate inclusive basis[4]) in an existing Australian corporation or business in sensitive businesses[5]	**A$275 million**
	Acquisitions of 5% or more (on an associate inclusive basis[4]) in an Australian media business	**$0**
	Acquisitions of direct interests[6] in an Australian agribusiness	**For Chile, New Zealand and United States: A$1,192 million**
		For Canada, China, Japan, South Korea, Mexico, Vietnam and Singapore: A$60 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)
Other investors (excluding foreign government investors)	Acquisitions of a "substantial interest" (20% or more on an associate inclusive basis[3]) in an existing Australian corporation or business (all sectors)	**A$275 million**
	Acquisitions of 5% or more (on an associate inclusive basis[3]) in an Australian media business	**$0**
	Acquisitions of direct interests[6] in an Australian agribusiness	**A$60 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)**
Foreign government investors[7]	All direct interests[6] in an Australian entity or Australian business	**$0**
	Starting a new Australian business	**$0**

Investor type	Investment type	Threshold[2] – more than:
For land proposals[1]		
All investors	Residential land	**$0**
Investors from FTA partner countries that have the higher threshold[3] (excluding foreign government investors)	Agricultural land	**For Chile, New Zealand and United States: A$1,192 million**
		For Canada, China, Japan, South Korea, Mexico and Singapore: A$15 million (cumulative)
	Vacant commercial land	**$0**
	Developed commercial land	**A$1,192 million**
	Mining and production tenements	**For Chile, New Zealand and United States: A$1,192 million**
		Others: $0
Investors from non-FTA countries and FTA countries that do not have the higher threshold	Agricultural land	**For Thailand, where land is used wholly and exclusively for a primary production business: A$50 million (otherwise the land is not agricultural land)**
		Others: A$15 million (cumulative)
	Vacant commercial land	**$0**
	Developed commercial land	**A$275 million**
		Low threshold land (sensitive land)[8], A$60 million
	Mining and production tenements	**$0**
Foreign government investors[7]	Any interest in land	**$0**

Notes

1. Acquisitions of interests in an "Australian land corporation" or "agricultural land corporation" (generally, an entity whose Australian land or agricultural land interests, as the case may be, comprise more than 50% of the corporation's total assets) may be treated as acquisitions of interests in the land of the corporation and, accordingly, require prior notification and clearance (depending on the nature of the land interests of the corporation) as a land proposal. Land interests include interests as lessee or licensee giving rights to occupy Australian land, and any interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian land, where the term (including any extension or renewal) is reasonably likely to exceed 5 years at the time of acquisition.
2. The monetary thresholds cited in this section are current as at 1 January 2020. The thresholds are indexed against the GDP price deflator on 1 January each year.
3. FTA partner country investors (except foreign government investors) are Chilean, Chinese, Japanese, New Zealand, Singapore, South Korean and United States investors, and investors from a country (other than Australia) for which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, done at Santiago on 8 March 2018, is in force (**CPTPP**) (as at 1 January 2020, the CPTPP is in force for: Canada, Japan, Mexico, New Zealand, Singapore and Vietnam).
4. There are detailed provisions (including tracing and aggregation provisions, and anti-avoidance provisions) for working out a person's interest. In particular, association provisions operate on the basis of a number of deemed associate relationships. These should be checked carefully as they may catch persons the applicant would usually regard as unaffiliated.
5. 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.
6. A direct interest is:
   a.) an interest of at least 10% in the entity or business; or
   b.) an interest of at least 5% in the entity or business if the person who acquires the interest has entered a legal arrangement relating to the businesses of the person and the entity or business; or
   c.) an interest of any percentage in the entity or business if the person who has acquired the interest is in a position to:
      i.) participate or influence the central management and control of the entity or business; or
      ii.) influence, participate or determine the policy of the entity or business. Interests are calculated on an associate inclusive basis.
7. Foreign government investors include a foreign government, a "separate government entity" (such as an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country or a part of a foreign country, but not part of the body politic of a foreign country or of a part of a foreign country), a corporation or trustee of a trust in which a foreign government or separate government entity, alone or together with one or more associates, holds a substantial interest (ie, 20% or more on an associate inclusive basis[4]). For a foreign government investor, their associates presumptively include any other foreign government investor from the same country (of any part of that country).
8. Low threshold land includes certain mines and critical infrastructure (for example, an airport or port).

It will be apparent from the above that FATA is complex legislation. Any foreign investment proposal needs to be considered in the light of the specific facts, matters and circumstances of the proposed transaction.

As mentioned, even where prior notification is not mandatory, the powers of the Treasurer may be enlivened if certain thresholds are exceeded for the transaction; so depending on the situation it may be prudent to obtain prior clearance in such a case. This can include where the transaction would result in 40% or more of the shares in the Australian corporation being owned by non-associated foreign persons, or where the acquisition of the interest is in a foreign corporation which has interests in an Australian corporation, business or land.

Where doubt exists as to whether a proposed acquisition must be notified to FIRB, it should be notified and prior clearance obtained to avoid the risk of breaching the FATA or the Treasurer seeking to unwind the transaction.

An application for FIRB approval for a proposed acquisition can be made before the acquisition agreement is executed. If the acquisition agreement is executed prior to FIRB approval being obtained, which is often the case, then the agreement must state that the acquisition of the interest is subject to a condition precedent that FIRB approval is obtained.

CRITICAL INFRASTRUCTURE CENTRE

The Government has also established a dedicated centre to provide co-ordinated, comprehensive and timely national security advice to Government in relation to Australia's critical infrastructure including telecommunications, electricity, gas, ports and water. The centre will consider both publicly and privately owned assets.

"

Ashurst has "industry knowledge and good depth and breadth of talent".

CHAMBERS ASIA PACIFIC, 2020

TIMETABLE FOR DECISION

On receipt of the application (including payment of the prescribed fee – see below), the Treasurer initially has 30 days to decide whether to prohibit the proposal on the basis that it would be contrary to the national interest. FIRB has an additional 10 day period to advise the applicant of its decision. FIRB may also seek to extend the 30 day statutory period by one of two means:

- the Treasurer can make an interim order to extend the time for the Treasurer's decision by up to a further 90 days. The existence of an interim order would be made public as it is required to be published in the Commonwealth Gazette; or
- FIRB may (and often does) ask the applicant to agree to an extension of time. This would normally occur on a confidential basis.

FEES FOR APPLICATIONS

Prescribed fees are generally payable for making a foreign investment application at the time of application. Importantly, the timeframe for making a decision will not start until the correct fee as assessed by FIRB has been paid. The fees vary depending on the nature of what is being acquired and in some cases, its value. For example, for acquisitions of interests in Australian corporations or businesses, the fee is generally:

a) where the consideration for the acquisition is A$10 million or less: A$2,000

b) where the consideration for the acquisition is >A$10 million and <A$1 billion: A$26,200

c) otherwise (ie >A$1 billion): A$105,200.

Different fees apply for land proposals, depending on the type of land interest proposed to be acquired.

RECOMMENDED ACTION

The regulation of foreign investment in Australia is a highly complex area, particularly as it is governed by a combination of FATA and Australian Government policy. Specific legislation or policy also regulates foreign investment in certain industry sectors.

Any foreign investment proposal therefore needs to be carefully considered having regard to its specific circumstances to determine:

- whether foreign investment restrictions exist
- whether foreign investment notification is required or advisable
- where notification is to be given, what documentation should be submitted to FIRB
- whether the investment may be subject to conditions.

Where a proposal may potentially raise issues then it may be appropriate to consult with FIRB prior to any formal notification being made.

The potential for industry specific legislation to apply to a proposed investment should also be considered. Acquisitions of interests in corporations and businesses operating in certain industries are also separately regulated by specific Commonwealth or State/Territory legislation (eg banks and insurance companies, airports, media and telecommunications and certain energy and resources). Some of this legislation is discussed in other chapters of this publication.

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PART A

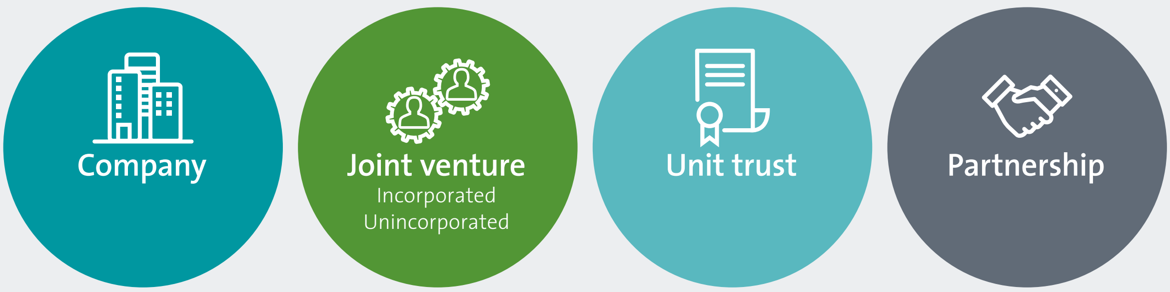
2

DOING BUSINESS IN AUSTRALIA

Business structures

The main structures for operating business enterprises in Australia are a company, a joint venture (JV), a unit trust or a partnership.

BUSINESS STRUCTURES IN AUSTRALIA



Each of these structures has different legal and tax implications which are discussed further below.

A foreign investor could also conduct business in Australia through a branch by registering as a foreign company under the *Corporations Act 2001* (Cth) (*Corporations Act*). This is also discussed further below.

Overview of key points

THE MOST COMMON FORM OF BUSINESS STRUCTURES – PROPRIETARY COMPANY

Most foreign investors choose a private (or proprietary) company as their business structure because it provides a separate entity which can carry on business in Australia with limited liability for its owners and low administration costs.

ISSUES TO CONSIDER IN CHOOSING A BUSINESS STRUCTURE

The decision as to which business structure to use will include consideration of the following issues:

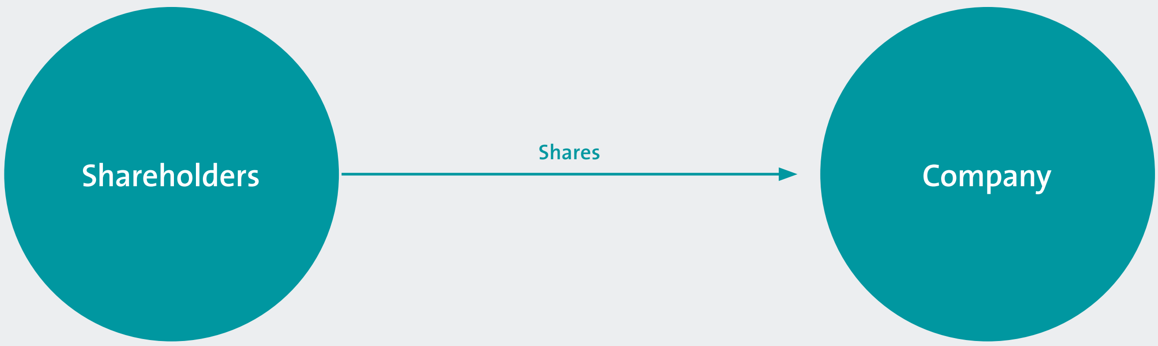
- **Control** – if the foreign investor is to have 100% control of the business, a company or unit trust will be the preferred vehicle
- **Tax treatment** – if the foreign investor wants to generate income and claim expenses directly in relation to income earned in the business, an unincorporated JV or partnership will be the preferred vehicle. A company will be taxed as a separate entity and the foreign investor will receive profits by way of dividends (subject to withholding tax). A trust is generally treated as a flow through vehicle unless it is a public trust conducting non-eligible investment businesses. Certain tax concessions apply to trusts that qualify as Withholding Managed Investment Trusts.
- **Access to public markets** – if the business proposes to raise capital from the market or list on the Stock Exchange, it will need to be a public company (or a public unit trust)
- **Limited liability** – all the business structures other than a general partnership can offer limited liability to the foreign investor
- **Exit** – a sale of shares in a company will usually provide a more straightforward exit than a transfer of an interest in a JV or a partnership
- **Complexity** – unit trusts, joint ventures and partnerships involve more complexity than a company. They require the preparation and negotiation of documents to regulate the rights and liabilities of the parties for the specific business venture
- **Administration costs** – a private company (limited by shares) involves lower administration and legal costs than the other business structures.

Set out below is a brief overview of each business structure.

"They work seamlessly and can draw on all the required expertise and make it easy for the client. They hire good people who work hard and they are 100% client-focused and deliver on quality."

CHAMBERS ASIA PACIFIC, 2020

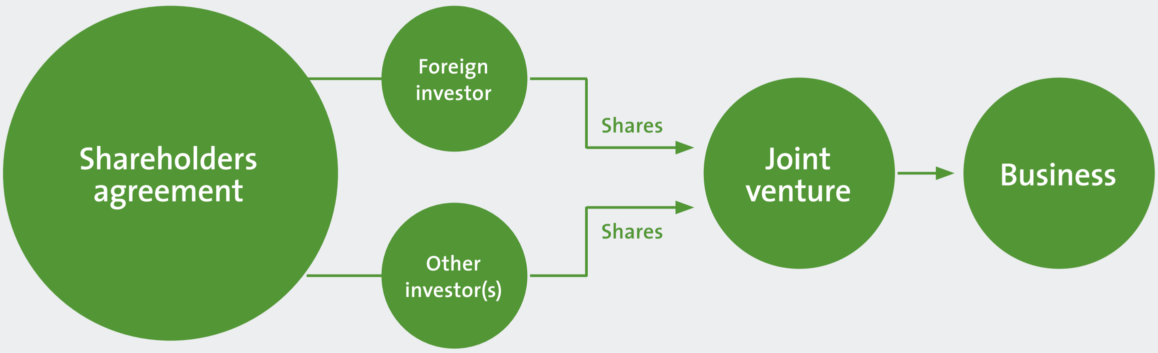
BUSINESS STRUCTURE
COMPANY



Companies are regulated by the *Corporations Act 2001* (Cth) and the Australian Securities and Investments Commission (ASIC) is responsible for its enforcement.

Private company limited by shares	• The most common business structure • Limited liability for shareholders • No minimum capital requirement • Minimum one shareholder and maximum 50 non-employee shareholders • Must have a registered office in Australia • Must have at least one director who must ordinarily reside in Australia (no secretary required) • Limited financial reporting requirements (no audit) (except for large proprietary companies) • All directors of a private company must comply with their duties under the *Corporations Act* • Cannot raise capital or list on public markets.
Public company limited by shares	• Limited liability for shareholders • No minimum capital requirement • Minimum one shareholder • Must have a registered office in Australia • Must have at least three directors of whom two must ordinarily reside in Australia • Must have at least one secretary who must ordinarily reside in Australia • Annual financial reporting requirements (including audit) • Must hold an Annual General Meeting • All directors of a public company must comply with their duties under the *Corporations Act* • Can raise capital and list on public markets.
Company limited by guarantee	• No share capital • Typically used for non-profit activities with individual members • Liability of members is limited to amount of guarantee • Not suitable as an investment/business structure.
Unlimited liability company	• Shareholders have unlimited liability • Not suitable as an investment/business structure.
No liability company	• Sole object must be mining purposes • Shareholders are not liable to meet amounts unpaid on their shares • Not generally suitable as an investment/business structure.

BUSINESS STRUCTURE
INCORPORATED JOINT VENTURE



An incorporated joint venture has the following features:

Structure – the business is conducted by a special purpose Joint Venture Company (JVC) which is owned by the foreign investor and other investors.

Shareholders Agreement – the rights and obligations of the investors are contained in a Shareholders Agreement which regulates shareholdings in the JVC, the Board of Directors, management of the business, dividends, financing, transfer of shares/exit and key business issues which may require a special majority or unanimous approval.

Liability – the liability of the shareholders in the JVC is limited.

Corporate structure – this structure facilitates the administration of the business and enables the investors to exit by sale of their shares in the JVC rather than an interest in an unincorporated joint venture.

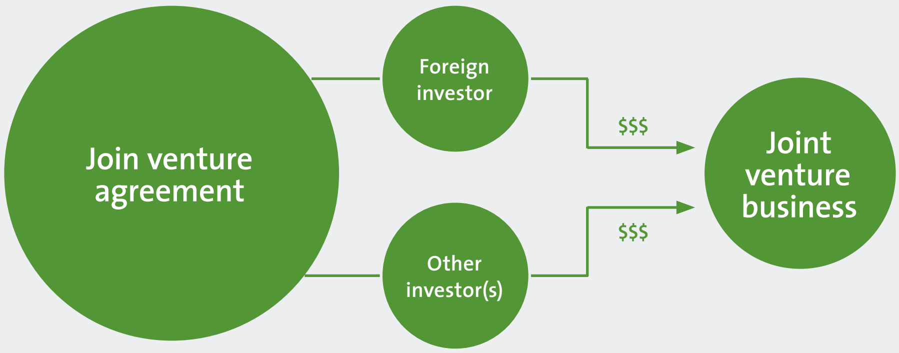
Directors duties – all directors of the JVC (including those appointed by the foreign investor) must comply with their duties under the *Corporations Act* including the duty to prevent insolvent trading.

Tax – from a tax perspective, the JVC will be taxed on the income of the business and unless the JVC decides to retain the profits, the investors will receive profits by way of dividends which may be subject to withholding tax for foreign investors. Any losses will accrue to the JVC and are not available to offset the investors' income. This makes it less tax efficient than some other business structures.

"Very impressed. It was very difficult to manage so many complex issues across multiple jurisdictions. The whole Ashurst team was cohesive and focused on getting the best outcome for the client."

CHAMBERS ASIA PACIFIC, 2018

BUSINESS STRUCTURE
UNINCORPORATED JOINT VENTURE



An unincorporated joint venture has the following features:

Structure – in an unincorporated joint venture the investors own the assets and conduct the project directly and there is no separate JVC in which they hold shares. They are typically used for specific projects rather than on-going business activities.

Joint Venture Agreement – the rights and obligations of the investors are contained in a Joint Venture Agreement which regulates the allocation of joint venture interests, the conduct of the joint venture project, sharing of the output of the project, financing, transfer of interests/ exit and key business issues which may require special majority or unanimous approval. Investors may agree to receive output from the JV in kind (eg mining joint ventures).

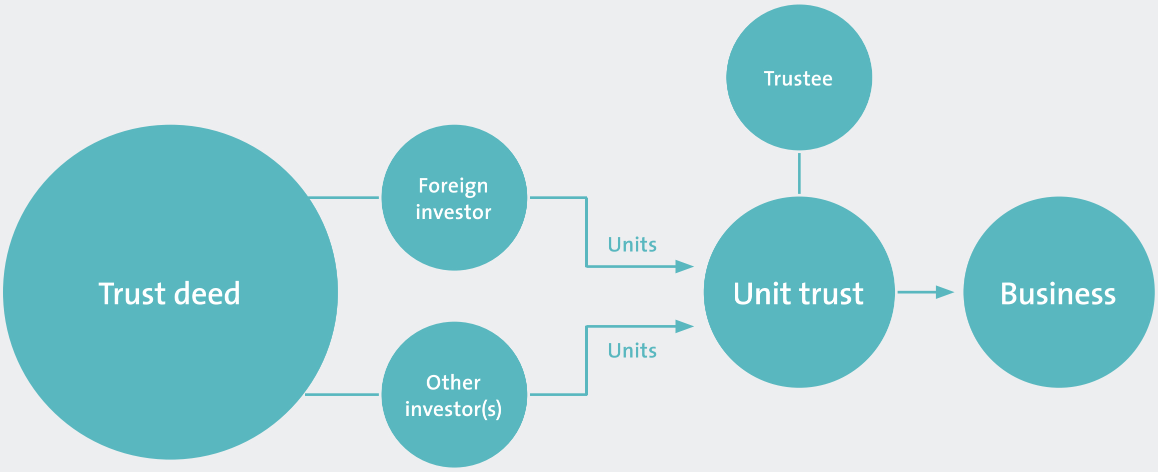
Manager – the investors will commonly appoint a manager for the Joint Venture (JV) to act as their agent which may be one of the investors or an external party.

Liability – the liability of the investors will normally be several rather than joint and they will seek to limit that liability to their interest in the JV (ie non-recourse). However, there is no JVC entity interposed between the investors and the project which would otherwise limit their liability as shareholders in the JVC.

Tax – an important tax advantage of the unincorporated JV is that any income or losses are taxed directly in the hands of the investors and can be offset against the investors' other income/losses.

Unlike a partnership – the investors do not act as agent and are not liable for each other's conduct and do not usually have fiduciary duties to the other investors unless the Joint Venture Agreement provides otherwise.

BUSINESS STRUCTURE
UNIT TRUST



A unit trust has the following features:

Structure – a unit trust comprises a trustee and the unit holders who are the investors. The investors hold "units" in the trust which represent their interest as beneficiaries in the trust. They may also hold shares in the trustee (usually a private company established for the purpose).

Legal relationship – a unit trust is not a separate legal entity but rather is the legal relationship between the trustee and the beneficiaries.

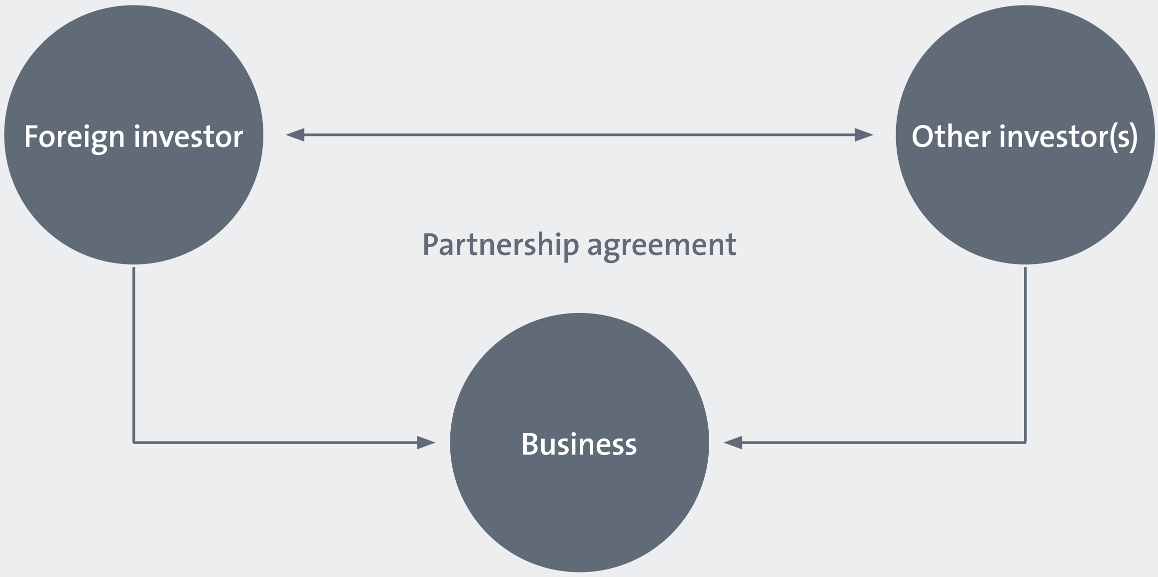
Trust Deed – the unit trust is governed by a Trust Deed which (like a Shareholders Agreement in an incorporated JVC) regulates unit holdings, the appointment of the trustee, management of the business, dividends, financing, transfer of units/exit and key business issues which may require a special majority or unanimous approval.

Corporations Act – private unit trusts are not regulated by the *Corporations Act*, although if the trustee is an Australian incorporated company, the trustee will have the usual obligations under the *Corporations Act*.

Liability – the trustee has the direct liability for conducting the business subject to a right of indemnity against the trust assets in respect of liabilities incurred. The unit holders will not usually have any liability for the activities of the trustee in the absence of any direct authorisation by them.

Tax – an important tax advantage of a unit trust is that, like an unincorporated JV or a partnership, it can allow income to flow directly to the investors for tax purposes without the trustee being taxed. However, tax losses of the trust cannot be distributed and must be retained by the trustee and may be able to be offset against future income of the business.

BUSINESS STRUCTURE
PARTNERSHIP



Partnerships have the following features:

Structure – in a partnership, the investors carry on the business in common with a view to profit. A partnership is not a separate legal entity but partnerships are regulated by the Partnership Acts of various Australian States and Territories and the common law relating to partnerships.

No separate JVC vehicle – as with an unincorporated JV, the investors in a partnership conduct the business directly and there is no separate JVC vehicle in which they hold shares.

Unlimited liability – under the Partnership Acts, each partner has unlimited liability in relation to the activities and liabilities of the partnership and is the agent of the other partners and may enter into contracts and incur liabilities on their behalf in the ordinary course of business. This distinguishes a partnership from a company or JV vehicle.

Partnership Agreement – the investors will typically enter into a Partnership Agreement which regulates their rights, powers and obligations as partners, management of the business, distribution of profits, financing, transfer of interests/exit and key business issues which may require a special majority approval.

Tax – the key tax advantage of the partnership is that both income and losses are taxed directly in the hands of the investors and can be offset against the investors' other income/losses.

Fiduciary duties – partners have fiduciary duties of mutual confidence and trust to each other under law which do not apply to investors in a company or JV vehicle.

Limited partnerships – forms of limited partnership are permitted in Australia and can limit the liability of the "limited partners". However, limited partnerships can be taxed as companies and the tax advantages of an ordinary partnership may not be available. This reduces their attractiveness as an investment vehicle.

REGISTERING A FOREIGN COMPANY

As an alternative to the business structures discussed above, if a foreign investor wishes to conduct business in Australia through a branch, it must register as a foreign company with ASIC under the *Corporations Act*.

1. Reserve the company name with ASIC

2. Lodge with ASIC an application form, certified copy of certificate of incorporation and constituent documents

3. Appoint a local agent to represent the company in Australia

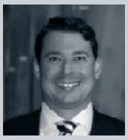
4. If ASIC is satisfied with the application, registration usually occurs within approximately two weeks

If any document required to be lodged with ASIC is not in English, a certified translation of the document must also be lodged with ASIC. Once registered, the company is required to lodge copies of its annual financial statements and comply with various other obligations contained in the *Corporations Act* (unless exempt).

RECOMMENDED ACTION

- When choosing a business structure, you need to ensure that the structure is the most efficient for your proposed operations in Australia.
- Your choice of business structure should only be made after you have also considered the taxation consequences of conducting business in Australia (see Chapter 17 – Income tax and section on options for investing into Australia).
- If you are considering acquiring shares in, or the assets of, a listed public Australian company or trust please see Chapter 3 – Mergers and acquisitions for further considerations.
- If you establish an Australian business structure, you will need to ensure it complies with local regulatory requirements.

AUTHORS AND CONTACTS



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DOING BUSINESS IN AUSTRALIA

Mergers and acquisitions

PART A

3

This chapter sets out a brief overview of public market M&A in Australia (as opposed to negotiated or private treaty M&A).

To enter into a public market M&A activity, a foreign investor must consider the following key issues:

- the Australian Government's foreign investment laws and policy (as discussed in Chapter 1 – Foreign investment regulation)
- the thresholds applying to acquisitions
- the acquisition structure
- the acquisition timetable
- the form of consideration offered
- the role of regulatory bodies, courts and legislation
- deal protection measures and key regulatory requirements.

This chapter will focus on takeover bids and schemes of arrangement as the main methods of obtaining control of a listed company or trust.

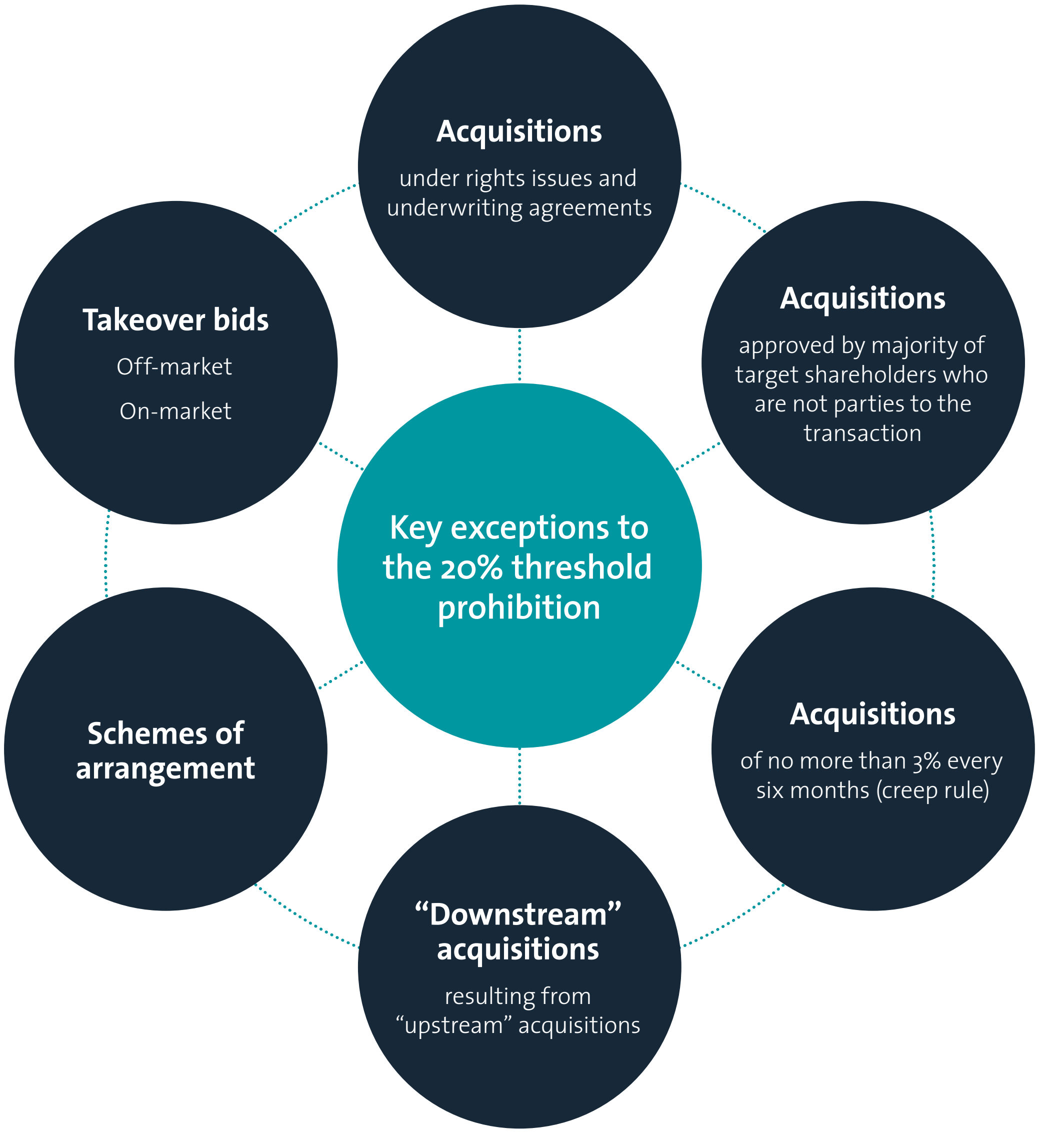
Whilst Australia's takeover laws apply to both listed companies and trusts, this Chapter will focus on listed companies as most M&A activity relates to them.

BASIC PROHIBITION – THE 20% THRESHOLD

To acquire more than 20% of the voting securities in listed companies or trusts in Australia there must first be a takeover bid by the acquirer or a scheme of arrangement by the target (or another available exception of the kinds discussed below).

Chapter 6 of the *Corporations Act 2001* (Cth) (*Corporations Act*) prohibits the acquisition of an interest in securities which results in any person's voting power increasing to more than 20% (or any person's voting power increasing between 20% and 90%). This applies to both listed companies and trusts and unlisted companies with more than 50 members.

However, there are a number of exceptions to this rule including the transactions shown below.



THRESHOLDS APPLYING TO ACQUISITIONS

In planning an acquisition strategy, a foreign investor must consider a number of thresholds:

0% + Tracing notices

A target company may issue tracing notices requiring holders of shares, and any person who is disclosed in the notice as having a relevant interest, to disclose anyone else who has a relevant interest in the shares. Some companies regularly issue these notices, particularly if they suspect someone is building up a stake.

5% Potential acquirer must publicly disclose level of shareholding

If the foreign investor has a "relevant interest" in voting shares or interests representing 5% or more of the total votes in the company, it generally is required to notify the company and ASX of its interests within 2 business days after becoming aware of the circumstances which give rise to that interest.

10% Potential capital gains tax (CGT) trigger (foreign investors)

If the company is "land rich", a 10% holding may trigger potential CGT for the foreign investor on any gain made on disposal of the shares. See Chapter 17 – Income tax and the section on options for investing into Australia for further details.

20% The takeover prohibition threshold

As noted above, there is a general prohibition on acquiring shares which carry voting power exceeding 20% of the target company unless a takeover bid is made, a scheme is proposed or another exception applies.

50%+ Ability to pass ordinary shareholder resolutions/remove director

A shareholder with more than 50% of the voting power of a company can pass ordinary shareholder resolutions of the target company, including resolutions to remove directors.

75% Ability to pass special resolutions/ scheme of arrangement approval

A shareholder holding more than 75% of the voting power of a company can pass special resolutions, including resolutions to amend the constitution of the target company. This is also part of the required level of approval for schemes (see "Acquisition structure" below).

80% Tax rollover relief for accepting shareholders in share bid

In the case of share bids, CGT rollover relief could be available to the selling shareholders if the acquirer acquires 80% or more of the voting shares in the target company.

90% Compulsory acquisition of minorities under a takeover bid

All target company shares are able to be compulsorily acquired at the takeover bid price if the acquirer (and its associates) have relevant interests in at least 90% by number of all the shares in the bid class and acquired 75% by number of the shares which were subject to the takeover bid. Under a scheme, all shares can be compulsorily acquired if the scheme is approved by target shareholders and by the court (see "Takeovers v Schemes – Key differences" below).

100% Tax consolidation

If 100% is achieved, tax consolidation allows losses, restructures and compliance costs to be grouped and provides possible benefits of resetting tax cost bases of target company assets.

Foreign investors also need to consider foreign investment approval thresholds. See Chapter 1 – Foreign investment regulation for further details.

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CHAMBERS ASIA PACIFIC, 2020

ACQUISITION STRUCTURE

Under Australian law, there are two main methods of obtaining control of a listed company or trust:

- takeover bid; or
- a scheme of arrangement.

Schemes of arrangement have been the preferred structure for the largest and most complex M&A transactions in Australia. Some of the reasons for the choice of schemes are discussed below (see "Takeovers v Schemes – Key differences").

The courts and ASIC have no objection to the use of schemes provided that target shareholders receive equivalent protection and disclosure as is required for takeover offers under Chapter 6 of the *Corporations Act*.

The following major Australian mergers over the last 5 years were completed by scheme:

- Novion Property Group and Federation Centres valued at A$7.9bn (2015)
- Asciano and Australian Logistics Acquisition Investments (a consortium which included Qube Holdings, Global Infrastructure Management, Canada Pension Plan Investment Board, Brookfield Infrastructure Partners, British Columbia Investment Management Corporation, Qatar Investment Authority and others) valued at A$8.9bn (2016)
- DUET Group and Cheung Kong Group valued at A$7.4bn (2017)
- Tatts Group and TABCORP Holdings valued at A$6.6bn (2017)
- Westfield Corporation and Unibail-Rodamco SE valued at A$20.8bn (2018).

The following major Australian acquisitions over the last 5 years were completed by takeover bids:

- Takeover of PanAust by Guangdong Rising HK (Holdings) valued at A$1.2bn (2015)
- Takeover of Broadspectrum by Ferrovial Services Australia valued at A$769m (2016)
- Takeover of Spotless Group Holdings by Downer EDI Services valued at A$1.3bn (2017)
- Takeover of Propertylink Group by ESR Real Estate (Australia) valued at A$723m (2019)
- Takeover of Automotive Holdings Group Ltd by A P Eagers valued at A$836m (2019).

TAKEOVER BID

- A takeover bid involves the acquirer making an offer to all shareholders in the target company to acquire their shares on the same terms
- The bid may be off-market or on-market. Most takeover bids are off-market
- An off-market bid involves written offers to shareholders
- In on-market bids, the bidder's broker stands in the market for a minimum period of one month and offers cash to buy all securities offered at the bid price
- On-market bids are relatively rare, because they must be cash and unconditional
- This Chapter focuses on off-market bids
- Chapter 6 of the *Corporations Act* regulates takeover bids.

SCHEME OF ARRANGEMENT

- A scheme of arrangement involves a court approved arrangement between the target company and its shareholders
- Rather than the acquirer making takeover offers direct to target shareholders, the target company agrees with the acquirer to propose a scheme of arrangement for approval by its members
- If the scheme is approved, 100% of the target shares are transferred to the acquirer or cancelled in exchange for cash and/or shares from the acquirer
- The scheme must be approved at a meeting of target shareholders by a majority in number of shareholders present and voting (in person or by proxy) who hold at least 75% of the votes cast at the meeting
- A scheme needs the support and cooperation of the target, and is therefore not an appropriate structure for a hostile bid
- Chapter 5 of the *Corporations Act* regulates schemes of arrangement.

TAKEOVERS V SCHEMES – KEY DIFFERENCES

A foreign investor who wishes to obtain control of a public listed company or trust should carefully consider the differences between a takeover and a scheme when planning its acquisition strategy.

The advantages of a scheme include significant flexibility in structuring the transaction and the certainty of obtaining 100% of the shares in the target company on a defined date (provided the requisite shareholder approval and court approval is obtained).

However, a disadvantage to the acquirer is that a scheme gives the target company control of the transaction process. This means that the acquirer is not able to adjust the terms of the offer quickly or control the communications with target shareholders.

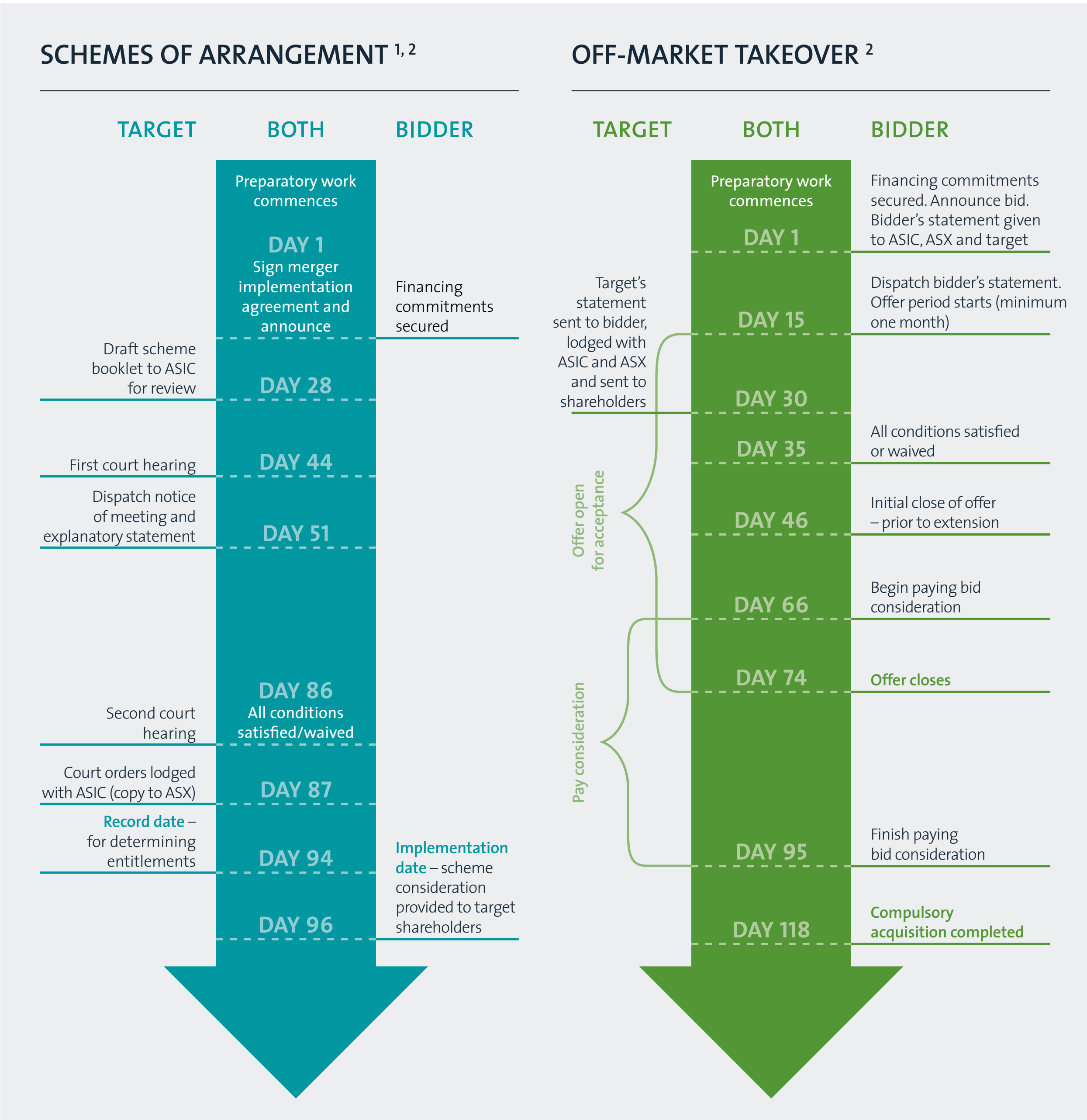
The table below summarises the key differences between takeovers and schemes.

Issue	Scheme	Takeover
Control of process	The target controls the process subject to the terms of an Implementation Agreement	The bidder has, and retains, the initiative at all stages
Target cooperation	Essential	Not essential
Court approval	First, to order the scheme meeting. Later, to approve the scheme. Note: Court hearings provide a forum for dissentients	Not required
Certainty of outcome	All or nothing	Depends on level of acceptances
Shareholder approval threshold	Lower threshold required to acquire 100% – passed by a majority in number of shareholders present and voting, holding 75% of the votes cast	Compulsory acquisition if "relevant interest" in 90% of securities in the bid class, having acquired 75% of securities the subject of the bid
Vulnerability to blocking stake	Generally medium (increases as bidder's stake diminishes eligible voting pool)	With 90% minimum acceptance condition – high With 50% minimum acceptance condition – low
Flexibility	Flexible – can include reduction/ return of capital, demerger and asset acquisitions	Flexibility to increase offer price and waive/ "modify" conditions
Timing	Varies – unlikely to be less than 3 months – but "closing date" more certain	Varies – unlikely to be less than 3 months
Mix and match consideration	Yes – flexible	Difficult – may require issue of a note (for which there is no CGT rollover relief)

ACQUISITION TIMETABLES

Indicative timetables for an off-market takeover bid and a scheme of arrangement are set out below. These will vary depending on the particular transaction including the time required to obtain any necessary regulatory and FIRB approvals.

From Day 1, the timetable up to bid close/record date is similar (approximately 70 days) although it may take longer to reach 100% under a takeover bid. Takeover offer periods are often extended whereas schemes operate on a more fixed timetable.



Notes

1. A similar procedure can be used for a listed trust, or for a stapled group comprising a listed company and trust.
2. Actual timing will vary from transaction to transaction. The off-market takeover timetable shown here assumes the initial offer period is required to be extended to secure sufficient acceptances, which is commonly the case.

FORM OF CONSIDERATION OFFERED

The consideration offered to target shareholders under an off-market takeover or scheme may be structured to include shares, cash or a combination of both. A number of issues must be considered by an acquirer which are summarised below.

Cash v shares	• The consideration for the target's shares can be in the form of cash, shares, other consideration or a combination of these to give shareholders a choice • Potential acquirers can either fix the cash and share components of the offer or allow variable components subject to maximum or minimum amounts of cash and/or shares provided all shareholders can participate • While this is possible under a scheme, the technical constraints of Australia's takeover laws make mix and match difficult in takeover bids • If the potential acquirer offers shares in itself as consideration, the potential acquirer's documents must include all information that would be required in a prospectus relating to the securities • If the shares offered as consideration have been quoted continuously on ASX for more than 12 months, the disclosure requirements are less onerous.
Bidder issues	• The acquirer would be expected to have regard to its relative costs of funding and any debt ratio covenants that apply to the acquirer under existing financing arrangements.
Shareholder issues	• The tax cost to shareholders in accepting a bid needs careful consideration • Cash consideration could be tax free to certain shareholders (eg nonresidents) or be taxed at concessional CGT rates • In the case of scrip bids, capital gains tax rollover relief could be available to the selling shareholders if the bidder acquires 80% or more of the voting shares in the target • If the relief applies, a selling shareholder incurs no capital gains tax on acceptance of the bid and defers paying tax until it sells the bidder scrip • Proportionate rollover relief may be available if the bidder offers a combination of shares and cash as consideration • Cash is usually compelling in takeover bids and schemes as it allows target shareholders to determine value quickly and simply • If shares in the acquirer are offered, this provides accepting shareholders with exposure to the upside or downside in the share price of the acquirer • In some cases, the acquirer may argue share consideration represents greater value than cash only. It also makes it unnecessary for accepting shareholders to seek out reinvestment opportunities.
Financing	• The Takeovers Panel has issued a Guidance Note confirming the principle that a bidder must at all relevant times have a reasonable basis to expect that it will have sufficient funding arrangements in place to satisfy full acceptances under its bid • In addition, under the *Corporations Act* a bidder that publicly proposes to make a bid commits an offence (subject to limited defences) if it is reckless as to whether it will be able to perform its obligations on acceptance of a substantial proportion of its offer • In a scheme, an acquirer is required to place the scheme funds with the target company in a bank account before implementation of the scheme.

ROLE OF REGULATORY BODIES, COURTS AND LEGISLATION

Australia has a number of regulatory bodies and courts which have an important role and function in mergers and acquisitions in Australia.

Australian Securities and Investments Commission (ASIC)

- ASIC has primary responsibility for the administration of the *Corporations Act*
- Also responsible for market supervision and compliance with *ASIC Market Integrity Rules*
- Has broad powers not only to enforce the Act, but also to modify the provisions of Chapter 6 and grant exemptions from strict compliance in appropriate circumstances
- Also issues Regulatory Guides, which give guidance on its approach to administering the *Corporations Act*.

Takeovers Panel (Panel)

- The Panel is the main forum for resolving takeover disputes until the bid period has ended. It does not have jurisdiction over schemes of arrangement
- It is a peer review body with part-time members appointed from members of Australian takeovers and business communities
- It is established by statute and has broad statutory powers. It can make declarations of "unacceptable circumstances" and wide-ranging consequential orders
- Disputes in relation to takeovers are generally resolved through the Panel (as opposed to a court).

Courts

- The courts (Federal and State) have primary responsibility for schemes of arrangement under Chapter 5 of the *Corporations Act*
- Under a takeover, only ASIC and certain other Australian State or Commonwealth authorities can commence court proceedings concerning a takeover or proposed takeover before the end of the bid period.

Other laws and regulations, in addition to the *Corporations Act,* that can affect M&A transactions:

Competition/anti-trust

- Mergers or acquisitions are subject to the *Competition and Consumer Act 2010* (Cth), which prohibits transactions which have the effect or are likely to have the effect of substantially lessening competition in a market in Australia (see Chapter 10 – Merger control, competition law and consumer protection).

Securities market

- If either the potential acquirer or the target is listed on ASX, additional requirements will apply under the ASX Listing Rules
- ASX is responsible for the day to day compliance with the ASX Listing Rules
- ASX listed entities must comply with the continuous disclosure regime.

Foreign investment

- See Chapter 1 – Foreign investment regulation for more information.

Industry specific legislation including

Banking

- *Banking Act 1959*

Financial Sector

- *Financial Sector (Shareholdings) Act 1998*
- *Insurance Acquisitions and Takeovers Act 1991*

Media/Telecommunications

- *Broadcasting Services Act 1992*
- *Telecommunications Act 1997*

Energy & Resources

- State and Territory, mining and gas legislation

Aviation

- *Qantas Sale Act 1992*

DEAL PROTECTION MEASURES AND KEY REGULATORY REQUIREMENTS

A foreign investor who wishes to obtain control of a public listed company will also need to consider a range of other issues including: conditions to which the transaction is subject, deal protection measures, and other key regulatory requirements for takeovers.

Bid conditions	Off-market takeover bids may be subject to various conditions which must be satisfied before the bid can proceed. These enable the acquirer to protect its position whilst allowing target shareholders to accept on a conditional basis. Typical bid conditions will include: • **Minimum acceptance** – a bidder must receive acceptances in relation to more than a specified percentage of shares (usually either 50% or 90%) • **No Material Adverse Change (MAC)** – no MAC occurs in relation to the target company • **FIRB approval** – see Chapter 1 – Foreign investment regulation for further details • **No material acquisitions or disposals** by the target company or other corporate actions • **No regulatory action** is taken or threatened which might prevent acceptance of the offer • All other **necessary regulatory approvals**. Schemes may also be subject to similar conditions.
Deal protection measures	There are a number of deal protection measures which an acquirer can use to assist in achieving its goal of control of the target. These include: • **Lock-up devices agreed with the target company** – including exclusivity, break fees (up to 1% of target equity value), no shop and no talk provisions (but subject to a “fiduciary carve-out” for target directors) • **Pre-bid stakes** – including the acquisition of strategic parcels of shares, option arrangements or cash settled equity swaps to give the acquirer up to the 20% threshold. The Takeovers Panel and the courts do not generally object to the use of these deal protection measures provided the applicable principles are followed.
Other key regulatory requirements for takeovers	**Other key regulatory requirements for takeovers** In relation to takeover bids, a foreign investor needs to be aware of the following requirements, which are designed to ensure that change of control transactions take place in an efficient, competitive and informed market. The regulation of schemes is less prescriptive and relies primarily on the discretion of the court in supervising and approving schemes. However, the courts have generally applied similar principles in terms of disclosure of information to target shareholders; fairness and equality. • **Truth in takeovers** – ASIC will require a bidder (or target or substantial shareholder) to abide by statements which it makes concerning the takeover during the course of a bid. A bidder who announces that an offer is “final” or will not be extended, may be held to those statements (ie not be permitted to increase or extend its offer) unless the statement contains a clear qualification. This can also apply to statements made in relation to schemes • **Collateral benefits outside the bid** – during the offer period, the bidder (and its associates) must not give a benefit to a target shareholder (or their associates) which is likely to induce acceptance of the bid or disposal of shares, unless the benefit is offered to all target shareholders • **Minimum consideration** – if a bidder (or its associate) acquires a pre-bid stake, this fixes a minimum bid price. Therefore, on a bid, the consideration offered (whether cash or scrip) must be equal to or greater than the highest value paid for securities in the bid class during the 4 months preceding dispatch of offers • **Variation of offers** – during the offer period, a bidder can increase or add a new form of consideration but this is subject to a number of restrictions, including paying any increase in consideration in an off-market bid to all accepting shareholders, including those who have accepted the offer before the increase.

RECOMMENDED ACTION

- A foreign investor who wishes to obtain control of a public listed company or trust should carefully consider the differences between a takeover and a scheme when planning its acquisition strategy.
- A foreign investor should also be aware of Australia's foreign investment policy (as outlined in Chapter 1 – Foreign investment regulation), competition issues (see Chapter 10 – Merger control, competition law and consumer protection) and the tax implications of the approach (see Chapter 17 – Income tax and section on options for investing into Australia).

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DOING BUSINESS IN AUSTRALIA

Real estate transactions

PART A

4

Australia's stable and transparent real estate market, supported by a robust legal framework and efficient titles system, is attractive to local and foreign investors.

The major forms of investment real estate tenure are freehold and leasehold. Investment real estate capital transactions typically involve dealings in freehold, and in some limited circumstances, long-term leasehold.

TORRENS TITLE

The Torrens title system of land registration underlies Australian real estate. Named after its inventor Sir Robert Richard Torrens, Torrens title began operating in Australia in 1858, and is now used in many parts of the world. Torrens drew on his merchant shipping background to devise a system of land ownership based on methods of registering ships under merchant shipping law. Torrens' aim was to devise a system to replace the complex old English land law, which made the transfer of real estate ownership time consuming and expensive.

Under the Torrens system, title or ownership right to real estate is created by the act of registration in a central register or record. Normally the person who is recorded as the owner of a parcel of land cannot have their title challenged or overturned. This concept is known as "indefeasibility of title".

As Australia is a federation, each State and Territory has a different registration system but they are all based on the Torrens title system. Real estate law in Australia is governed by relevant State or Territory legislation and case law.

In order to obtain the protection of registration under the Torrens system, transfers of land, mortgages, easements, restrictive covenants and profits à prendre must be registered.

With limited exceptions, the consequences of non-registration are that the holder of the unregistered interest has (at most) an equitable interest only, will lose priority to subsequent interests, and the interest will be defeated by the registration of a later dealing.

On a sale of Torrens land, title is transferred to the buyer on the registration of the transfer in the Land Titles Office of the particular State or Territory.

UNREGISTERED LAND

Whilst it is becoming increasingly rare, there remain some pockets of "old system" or "general law" land, to which title is proven through chains of conveyances and deeds, akin to the old English land law.

The policy in all jurisdictions of Australia is for land to be registered under the Torrens system where possible. Most land in Queensland and the Northern Territory is now under the Torrens system. Some areas of land, typically rural, have not yet been converted to the Torrens system and remain under old system title.

The main categories of land which are commonly unregistered are:

- **Crown land** – land owned by a State or a Territory. Each State and Territory has legislation governing dealings with Crown land
- **Commonwealth land** – land owned by the Commonwealth of Australia
- **Old system land** – land that has been the subject of a Crown grant by the State or Territory but has not been brought under the Torrens system.

Generally, the major parcels of unregistered land in private ownership are found outside urban areas.

APPLICABLE LAW

There are many matters particular to real estate law and common to many real estate transactions that are not covered by legislation and so must be decided under common law.

The Australian courts, in interpreting and applying the law of real property, have regard to the case law of other countries with similar or comparable legal systems.

The process of selling and buying real estate is governed by a combination of legislation and commercial practice. However, disclosure requirements vary across the different States and Territories.

Commercial leases which deal comprehensively with the rights and obligations of the landlord and tenant, are dealt with contractually. However, there is specific retail tenancy legislation which applies to retail shops and includes a wider range of requirements and obligations which are required to be complied with by landlords.

"They are commercial in thinking and where they shine is that they can offer the full spectrum of real estate knowledge."

CHAMBERS ASIA PACIFIC, 2020

RIGHTS OVER LAND

Freehold estates	
Fee simple	This is an estate of unlimited duration in land and represents the most common form of ownership of land in Australia.
Life estates	Australian law recognises life estates, although these are not common and grant a person exclusive possession of the real estate during their lifetime.
Leases	
Fixed-term	This is a lease for a fixed term of years and is the most common form of leasehold interest for commercial leases. The dates on which a lease is to begin and end must be known, or at least be ascertainable, before it commences.
Periodic tenancies	A periodic tenancy is created where land is leased from week to week, month to month or year to year, until one party terminates it by giving the appropriate amount of notice.
Tenancies at will	A tenancy at will arises when a person occupies land on the terms that either party may terminate it at any time. It cannot be alienated.
Tenancies at sufferance	A tenancy at sufferance will arise when the tenant remains in possession after the expiration of a lease without the landlord's assent or dissent.
Other rights over land	
Mortgages	Typically a mortgage is an interest in land that is created in favour of a party to secure repayment of a loan or other financing arrangements. Can be registered on the title to the land.
Easements	Generally, an easement is an interest in land to the extent that it creates a right to use, but not occupy, the land of another for a specific purpose. Examples are the right to use a road that crosses another person's land or the right to drain water across another person's land. Can be registered on the title to the land.
Restrictive covenants	While a restrictive covenant is an interest in land, it is in effect an agreement by one land owner with another that they will not use their land in a particular way. For example an owner of real estate may covenant with a neighbouring owner that they will not use the real estate other than for residential purposes. Can be registered on the title to the land.
Contractual rights (cannot be registered on the title to the land)	
Options to acquire land	The grant by a landowner to another person of an option to purchase the land is generally considered a right over land.
Licence	A permission to do what would otherwise be unlawful, for example, to enter upon or occupy the land of another.
Right of first refusal to acquire land	Where the land owner agrees with a person not to sell the land without first offering it to that person.

NATIVE TITLE

Australian law recognises and protects the traditional connection to land of Aboriginal people and Torres Strait Islanders (Indigenous Australians). Native title is the set of rights and interests of Indigenous Australians over land and waters arising from their traditional laws and customs. These rights are recognised by Australia's common law and differ between native title groups.

The *Native Title Act 1993* (Cth) is Commonwealth legislation which establishes the system through which native title is integrated into the Australian legal system. It applies in each State and Territory. This legislation recognises and protects native title, governs the validity of land dealings affecting native title, provides for the payment of compensation to native title holders and establishes a native title claims process.

Native title should be taken into account in relation to most land dealings to ensure their validity. Native title is particularly relevant in relation to non-freehold land and land owned by the Commonwealth or State government related entities. Native title has an impact on many resources and energy, and infrastructure projects. In many cases, a project developer must negotiate a suitable agreement with the Indigenous Australians claiming native title before the project can proceed. Correctly managing native title issues is imperative to ensure the validity of tenure and land dealings and to manage costs, timelines and risk.

INVESTORS MAY INVEST DIRECTLY OR INDIRECTLY IN AUSTRALIAN REAL ESTATE THROUGH A NUMBER OF DIFFERENT STRUCTURES

The most common choices of vehicles used to make direct and indirect real estate investments are the following vehicles.

UNIT TRUST

A unit trust is a trust in which the beneficiaries' interests are divided into units. As with all trusts, a trustee is necessarily involved and it is the trustee (usually a company) which owns the legal title to the assets. The trustee is often the manager of the investment as well. Otherwise the trustee appoints a manager to undertake and manage the investment.

A WHOLLY OR PARTIALLY OWNED SUBSIDIARY COMPANY

The *Corporations Act 2001* (Cth) (*Corporations Act*) allows for the incorporation of certain types of companies. Most relevantly for real estate investors:

- a company limited by shares
- a company limited by guarantee
- a company with unlimited liability.

The liability of the members of a company limited by shares or by guarantee is limited to the amount agreed to be contributed by the members by way of share capital or guarantee. The liability of the members on the winding up of an unlimited company is unlimited.

DIRECT FOREIGN INVESTMENT OR A BRANCH OF A FOREIGN COMPANY

A foreign company conducting business in Australia, other than through an Australian subsidiary, must register as a foreign company with ASIC. A foreign company wishing to apply for registration must:

- reserve the company's name with ASIC
- lodge with ASIC a certified copy of its certificate of incorporation and constituent documents together with an application form setting out various particulars relating to the company
- appoint a local agent to represent the company in Australia.

If ASIC is satisfied with the application and supporting documentation, registration usually occurs within approximately two weeks. Once registered, the company is required to lodge copies of its annual financial statements and comply with various other obligations contained in the *Corporations Act*.

See Chapter 2 – Business structures for more information.

REITS INCLUDING WHOLESALE REAL ESTATE FUND STRUCTURES

The Australian legal and regulatory framework for the Real Estate Investment Trust (REIT) market is investor focused and investor friendly. The legal framework has allowed flexible investment structures supported by well established and detailed legal principles, while at the same time requiring rigorous disclosure and corporate governance. These features have allowed the market to meet investor criteria such as liquidity, security of title, tax pass through treatment, expert management, and the requirement for transparent and responsive corporate governance.

The legal framework is responsive to cross border investment. The REITs listed on the Australian Securities Exchange (ASX) include a number of funds with substantial or exclusive offshore assets (eg mandates focused solely on US, European or Japanese assets).

The main legal vehicle used for both listed and unlisted REITs in Australia is the trust as understood and developed in common law systems.

In Australia REITs are a specific application of the general law of trusts. This differs from some other jurisdictions where the legal vehicle is a special form of corporation supported by the statute under which it is formed.

The general law of trusts provides a comprehensive set of core legal principles governing the relationship between trustees (as the holder of the fund), the investors (as beneficiaries) and the fund assets, including issues such as:

- who owns the assets and what kind of real estate interests they have
- powers of the trustee to deal with the assets, to borrow and generally to manage the fund
- kinds of securities that the trustee can issue (ie units in the trust)
- fiduciary duties owed by the trustee to the investors (ie the unitholders)
- tax treatment of the revenue, gains and losses derived from or incurred in relation to the assets
- rights and remedies of unitholders on an ongoing basis and on the closing of the fund
- liabilities of unitholders.

Overlaid onto this general law is a detailed regulatory structure implemented through the *Corporations Act*. REITs are regulated under this legislation as managed investment schemes (MIS). They are required to be registered, to have a responsible entity to manage the fund, to issue a product disclosure statement when interests in the fund are offered for investment, and to comply with the ongoing management and disclosure requirements applying to managed investment schemes.

Managed Investment Schemes are also subject to the provisions in the *Corporations Act* concerning takeovers and related party transactions. In recent years, consolidation of funds in the industry has put particular focus on these aspects of the law.

Where they are listed entities, REITs are also subject to the rules of the Australian Securities Exchange.

INCORPORATED JOINT VENTURE

An incorporated joint venture is operated by a special purpose joint venture company (JVC) in which the joint venture participants are shareholders. The joint venture has its own separate legal identity. A shareholders agreement between the participants is entered into and, at the same time, a company is formed to own and control the investment with an agreed number of directors appointed by each party.

UNINCORPORATED JOINT VENTURES (NOT A PARTNERSHIP)

In an unincorporated joint venture, the participants agree to co-operate in relation to a commercial undertaking or real estate investment, and to hold their interests and entitlements in the investment separately as to their respective shares rather than jointly.

As there is no company structure, the contract between the participants will contain all the terms governing their relationship, the operation of the venture and their obligations to each other. Each participant receives its benefit from the undertaking in kind. The output from the venture is shared in a predetermined way and each participant disposes of its share as it pleases.

See Chapter 2 – Business structures for more information on considering the best structure for conducting business in Australia.

KEY REAL ESTATE TRANSACTION TAXES

GOODS & SERVICES TAX (GST)

Most commercial real estate transactions will be subject to GST, and in an investment real estate context, the GST is passed through from seller to buyer (or from landlord to tenant), by way of recovery of an additional 10% of the price (or rent). From 1 July 2018, certain transactions involving the sales of "new residential premises" and "potential residential land" require a GST withholding by the buyer of land (or the tenant in the case of a grant of a long term lease).

There are important exceptions available in the context of commercial real estate transactions, and arguably the most significant is the treatment of a leased commercial property as not attracting GST as a "going concern". The rulings and requirements around this, and around GST generally, are complex and detailed.

STAMP DUTY

A major consideration for investors in Australian real estate is stamp duty, which in the context of a transfer of real estate is charged by the relevant State or Territory based on a sliding scale in proportion to the higher of consideration or market value.

The various jurisdictions also have complex stamp duty laws surrounding dealings in companies that are landholders. The objective of these laws is essentially to prevent revenue leakage by way of property transactions being effected notionally as entity transactions.

Significant care is required to ensure that proposed real estate transactions are appropriately structured, and done well in advance of contractually binding documentation being put into place.

See Part D – Taxation for more information about GST, stamp duty and other Australian taxes that will affect real estate transactions.

RECOMMENDED ACTION

- Consider and determine the structure into which the Australian real estate is to be placed, and put the necessary entities into place before any legally binding transaction is entered into.
- Have regard not only to the upfront costs and processes for acquiring real estate, but also to those arising out of the ongoing holding and management of that real estate, and ultimately the disposal of the asset, whether as a whole or by fractional interests.
- When investing in Australian real estate ensure you are familiar with the registration requirements under the Torrens system in the State or Territory in which you are investing and understand the legal rights applicable to specific real estate transactions.
- Native title issues should be taken into account when investing in and developing Australian projects to ensure the validity of tenure and land dealings and to manage costs, timelines and risk.

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DOING BUSINESS IN AUSTRALIA

PART A

5

Energy and resources

The Australian energy and resources sector is important to Australia's economy and offers a diverse range of opportunities for overseas investors.

Non-renewable resources include fossil fuels (coal, gas and oil) and nuclear energy fuels. Renewable energy sources include wind, solar and geothermal resources as well as potential wave, tidal and biomass sources of energy.

This chapter provides an overview of the laws that relate to energy and resources in Australia. Energy and resources projects inevitably involve large assets, extensive infrastructure and complex land, environment, access and financial arrangements. Further information on the legal issues surrounding development of energy and resources projects can be found in our related publications, including, *Mining in Australia – An introduction for investors* and *Petroleum in Australia – An introduction for investors*.

MINING LAWS

OVERVIEW

Mining regulation in Australia is primarily State and Territory based. Minerals are generally owned by the State or Territory in which the resource is located, and each State or Territory has legislation that governs the exploration for, and mining of, minerals including coal, gold, iron ore and uranium. Each State and Territory currently imposes royalties relating to the extraction of minerals. The rates of royalty imposed, and the basis for calculation, differ between States and Territories and between commodities.

A range of State, Territory and Commonwealth laws also govern other matters relevant to mining, including environment, native title, taxation, competition, foreign ownership and climate change. Further information on these laws can be found in Chapter 4 – Real estate transactions, Chapter 10 – Merger control, competition law and consumer protection, Chapter 15 – Employment, Chapter 16 – Environmental responsibilities, and Part D – Taxation.

TENURE

The detail of the applicable mining licensing regimes differ between jurisdictions, but generally comprise at least two stages – exploration and production. The tenement granted by the relevant Government gives the holder the exclusive right to explore for minerals in, or extract minerals from, the area specified in the tenement in accordance with its conditions and the applicable laws. The licence or lease overlays the underlying land title and generally allows the holder to enter the land for prescribed exploration and mining purposes, subject to the payment of compensation to the landholder (where applicable). Licences or leases may also be required for construction of infrastructure ancillary to a mining project, such as roads, pipelines and power lines. Typically, legislation in each State and Territory sets out:

- the types of licences that may be granted
- the processes to be followed for the grant of licences
- the transfer, revocation and surrender of, and other dealings with, licences.

OIL & GAS PRODUCTION

Like minerals, on-shore oil and gas is owned by the State or Territory in which the resource is located. If the reserve is located offshore it may be owned by the State or Territory, or the Commonwealth Government.

Generally, State and Territory legislation governs exploration and production of oil and gas (including coal seam gas) where the reserve is located on land or within the coastal waters of that State or Territory. Coastal waters are generally three nautical miles from the baseline of the relevant State or Territory. The Commonwealth has jurisdiction over offshore petroleum resources in Commonwealth waters, generally being the area beyond the three nautical mile point from the baseline and extending to the outer limits of the continental shelf. There is also an area in the Timor Sea that is governed by a treaty between Australia and East Timor, with its own regulatory regime.

A royalty may be payable to the relevant State or Territory based on the level of production from a reserve within the jurisdiction of the State or Territory. For petroleum projects in Commonwealth waters, the Petroleum Resource Rent Tax (PRRT) will generally apply, which is levied on profits of a petroleum project at a rate of 40%. For more information see Part D – Taxation, Chapter 18.

ENERGY

Australia's energy industry comprises power generation, transmission, distribution and retail activities for both the gas and electricity markets. Electricity power generation is dominated by non-renewable sources such as coal (black and brown) and gas (including coal seam and oil shale resources). Generation using renewable energy sources such as hydro, wind, solar and biomass accounts for approximately 20% of generation and is becoming increasingly relevant as Australia looks for ways to supply cleaner energy.

"The advice they provide is not off the shelf, but very well tailored to our issues and circumstances, and they understand project realities as well as those concerning time and costs."

CHAMBERS ASIA PACIFIC, 2020

ELECTRICITY INDUSTRY

The electricity industry comprises power generation, high voltage transmission and low voltage distribution system infrastructure and retail sales activity.

State based transmission networks, with cross-border interconnectors, provide a fully interconnected "national electricity grid" from Queensland through to New South Wales, the Australian Capital Territory, Victoria, South Australia and Tasmania. The grid supplies electricity to nearly 10 million residential and business customers. The transmission networks in Western Australia and the Northern Territory do not interconnect with the national electricity grid or each other. Distribution networks carry electricity from connection points on the transmission systems to customers. A distribution network consists of the poles, underground channels and wires that carry electricity, as well as substations, transformers, switching equipment, and monitoring and signalling equipment. Both transmission and distribution network pricing is subject to regulatory controls for the monopoly provision of transmission or distribution services.

In most States and Territories, Australian electricity customers are free to choose their electricity retailer. There is a level of regulatory price control for retail electricity prices in all States.

GAS INDUSTRY

Gas is used in major industrial applications, for power generation and retail consumer consumption.

Transmission pipelines transport natural gas from processing or storage facilities over long distances to domestic markets. A network of distribution pipelines delivers gas from points along transmission pipelines to industrial customers, and from gate stations to customers in cities and towns.

There is an interconnected pipeline network covering the Northern Territory, Queensland, New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory. The Northern Gas Pipeline, being the transmission pipeline interconnecting the Northern Territory and Queensland, was recently completed. Transmission pipelines in Western Australia are not currently interconnected with other jurisdictions.

In all States and Territories, Australian gas customers are free to choose their gas retailer (with a limited exception applying in Western Australia). There is some regulatory price control for retail gas prices in all States except Victoria.

OWNERSHIP AND REGULATORY FRAMEWORK

Until the early 1990s, energy utilities in Australia were State run businesses. However today energy assets and businesses are owned by a combination of Government and private interests, depending on the asset type and State in which they are located. For example, Victoria's and South Australia's electricity industries are fully privatised whereas in many other States (Western Australia and Queensland) assets such as power stations and transmission and distribution networks are still owned and operated by the relevant State Government. The gas sector is entirely privatised. Further privatisation of electricity assets is expected over the next few years through State Governments selling government owned energy assets through trade sales.

The electricity and gas industries are subject to a complex regulatory framework including State and Territory based legislation, regulations, codes and guidelines as well as Commonwealth regulation in relation to infrastructure access, competition and consumer protection.

RENEWABLE AND CLEAN ENERGY

Australia has abundant world-class renewable energy resources and the Australian Government is committed to ensuring renewables continue to play an important role in Australia's energy mix in the future. The Government's current scheme, the Renewable Energy Target (RET), has a target of achieving at least 33,000 gigawatt hours of electricity from renewable sources by 2020. The RET will result in more than 23.5% of Australia's electricity being derived from renewable sources by 2020. The RET scheme has been overseen by the Clean Energy Regulator and it was recently reported that enough capacity has now been approved to guarantee that the 2020 RET will be met. The Government has committed significant investment in wind, solar energy and Snowy Hydro 2.0 projects to support more innovation and deployment of clean energy and energy efficiency, including for technology research and development, and State Governments have also implemented smaller scale programs. See Chapter 16 – Environmental responsibilities for more information.

The National Energy Guarantee (which was announced by the previous government) has since been abandoned by the federal government and there is some uncertainty beyond the RET scheme.

Examples of Australian Government initiatives to encourage investment in renewable and clean energy technology include the establishment of:

Australian Renewable Energy Agency (ARENA)	An independent agency that complements the RET scheme. ARENA streamlines and coordinates the administration of support for research and development, demonstration and commercialisation of renewable energy technologies.
Clean Energy Finance Corporation (CEFC)	A corporate Commonwealth entity that invests in the commercialisation and deployment of renewable energy, energy efficiency and low-pollution technologies. CEFC is investing A$10 billion over five years from 2013-14 in two streams – the renewable energy stream, which invests in renewable technologies (which may include geothermal and wave energy and large scale solar power generation); and the clean energy stream, which invests more broadly, for example, in low-emissions cogeneration technology, but is still able to invest in renewable energy.

RECOMMENDED ACTION

- The laws and regulation surrounding resources and energy project development are complex and need to be fully understood for successful project delivery.
- Investors need to consider competition issues which may arise if an investor seeks to own numerous vertically integrated assets, or assets of significant importance in the energy and resources industry.
- There are significant investment opportunities arising as a result of renewable and clean energy initiatives in the energy industry.

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AUSTRALIA – AN INTRODUCTION FOR INVESTORS

Financial transactions

PART

B

Overview

6 BANKING AND FINANCE

Many foreign-owned banks now operate in Australia and foreign banks may conduct retail banking through subsidiaries in Australia. Wholesale banking may also be carried on through branches of foreign banks operating in Australia. Australia's banking system, and debt and derivatives markets, provide a secure basis for investor opportunities, offering a wide range of sophisticated products. Once you decide to establish a business in Australia you will need to consider your financial management strategy including funding options. Foreign banks seeking a banking licence to establish operations in Australia need to apply to the Australian Prudential Regulation Authority.

7 FINANCIAL SERVICES AND MARKETS

The provision of financial services, products and markets is heavily regulated, with extensive licensing, disclosure and conduct obligations. The application of the regulation is highly technical and you may need to seek advice on its application to your particular arrangements.

8 FUNDS

To offer collective investment schemes in Australia, foreign financial services industry participants need to consider many legal issues including licensing, disclosure, conduct-related issues and tax.

If you propose to provide financial services in Australia, whether by establishing a business in Australia or by providing services or products into Australia from offshore, you will need to consider the extent to which the provision of the services will become subject to Australia's licensing and disclosure regimes and whether you may fall within any relevant regulatory exemptions. In the absence of any available exemptions, you will need to apply to ASIC to obtain a licence to provide regulated financial services in Australia and you may be required to provide product disclosure to Australian investors.

9 PRIVATE EQUITY AND VENTURE CAPITAL

The Australian Private Equity (PE) and Venture Capital (VC) industry provides a range of opportunities to investors, including the opportunities to invest as a limited partner in a PE or VC fund, to attract investment from a VC fund, to access VC government assistance programs, to acquire a business from a PE or VC fund, to sell a business to a PE fund or an idea to a VC fund, and for a PE or VC fund to acquire an Australian business. Before investing, you should consider and obtain advice on how foreign investment regulation and tax may impact the proposed transaction.

PART B
6

FINANCIAL TRANSACTIONS

Banking and finance

Australia has a deep, sophisticated and competitive financial system.

Australia's financial system is made up of a number of separate but overlapping sectors:

MONETARY POLICY AND OTHER CENTRAL BANKING FUNCTIONS

RESERVE BANK OF AUSTRALIA

Australia's central bank is the Reserve Bank of Australia (RBA). The RBA manages Australia's monetary policy by setting target interest rates for overnight loans in the money market (known as the "cash rate"). The RBA's stated objective in setting the cash rate is to maintain an average consumer price inflation rate over the medium term of between 2 and 3%.

The RBA also oversees Australia's payment systems including the real-time gross settlement system. In addition, the RBA controls the production and issue of Australia's currency.

ELECTRONIC PAYMENT SYSTEMS

Cash and cheques (including bank cheques) have traditionally formed the backbone of Australia's payment systems. Like many other developed economies, however, the greater bulk of payments are now settled electronically through the banking system, including by retail users with tools such as credit cards, electronic funds transfer at point of service (EFTPOS) facilities, and electronic transfers in the form of direct credits or direct debits.

AUSTRALIA'S BANKING SYSTEM

THE BANKS

The Australian Prudential Regulation Authority (APRA) is responsible for the licensing and prudential supervision of banks, building societies, credit unions and friendly societies (referred to as "authorised deposit-taking institutions", or "ADIs"), life insurance and general insurance companies and most large superannuation funds.

An institution needs to be licensed by APRA as an ADI to carry on banking business in Australia (that is, a business which involves both the taking of money on deposit and making advances of money).

APRA's prudential guidelines for banks generally reflect the recommendations of the Basel Committee on Banking Supervision. APRA is generally regarded as a relatively conservative regulator, and Australia's major banks are strong and well-capitalised despite the global financial challenges of recent years. They have increased their depositor base in recent years to reduce their dependence on foreign borrowings but still have large foreign funding programs.

Australia has four major domestic banks which at the time of publication are all rated AA-/Aa2 by each of the three major international rating agencies. There are also a number of smaller, mostly regional banks, and a large number of foreign banks.

Deposits with ADIs of up to A$250,000 are guaranteed by the Federal Government.

Foreign banks operate in Australia either through a branch of the parent bank, through a locally-incorporated subsidiary, or through a representative office (however, the activities of that office need to be restricted to liaison purposes).

Foreign banks which are not authorised as ADIs in Australia may still provide services, including banking services, from offshore to customers in Australia on a cross-border basis, subject to guidelines issued by APRA. These guidelines provide that any such activity must be conducted from offshore (ie outside Australia) and limited to wholesale clients. The guidelines also specify that representatives of the foreign bank must only enter Australia for the limited purpose of executing documents and employees of group entities in Australia must not be involved in providing services on behalf of the foreign bank. The effect of these guidelines is to limit any meaningful physical activity by the foreign bank in Australia, even on a fly-in basis.

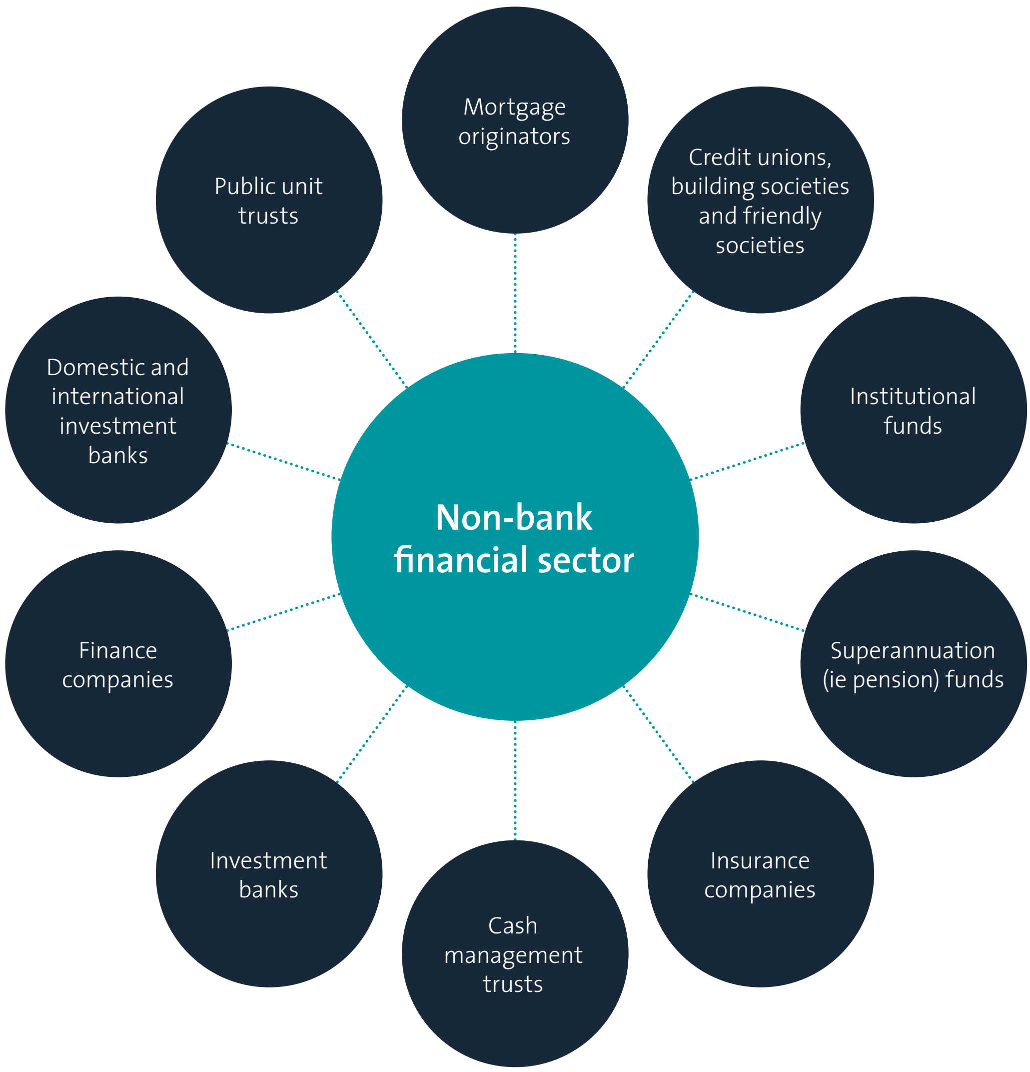
FINTECH SOLUTIONS

APRA supports the development of Fintech banking solutions through a Restricted ADI authorisation framework introduced in 2018. The Restricted ADI framework allows start-up operations to operate under a streamlined less regulated framework for up to 2 years as they develop their infrastructure and fully fledged operations in consultation with APRA. Concessions for start-up operations include lower capital and limited application of other prudential requirements. During the restricted period, there is a limit on the value of deposits which may be accepted by the Restricted ADI.

The initial phase of up to 2 years gives the Restricted ADI time to test its operations and to develop the infrastructure and resources to meet the requirements for full ADI authorisation. Transition to full ADI authorisation status must occur within 2 years, or the Restricted ADI must wind up its operations.

THE NON-BANK FINANCIAL SECTOR

The non-bank financial sector in Australia is made up of a wide range of participants:



A number of these organisations (credit unions, building societies, friendly societies, insurance companies and major superannuation funds) are also regulated by APRA. Many of the others will instead be required to hold an Australian Financial Services Licence issued by the Australian Securities and Investments Commission (ASIC), or will otherwise be subject to ASIC's market integrity and consumer protection regimes. For more information on ASIC and Australian Financial Services Licences, see Chapter 7 – Financial services and markets.

Financial corporations also need to be registered under the *Financial Sector (Collection of Data) Act 2001* (Cth). This Act requires registered financial corporations to provide statistical information to APRA.

DEBT CAPITAL MARKETS

Australian companies have traditionally raised the bulk of their debt finance through bank loan facilities. In recent years however a number of factors, including favourable pricing and constraints on the availability of bank debt (partly as a result of banks deleveraging and focusing on their home markets), have led Australian companies increasingly to meet their debt finance needs through the domestic and international debt capital markets.

Australia's domestic debt capital market does not yet have the depth of its major overseas peers. For that reason, Australian banks and corporates have been active issuers in offshore capital markets, principally in the US private placement and 144A markets but also in markets in Europe and Asia. Much of the issuance activity in Australia's domestic debt capital market has been done instead by non-Australian issuers, particularly sovereigns and supranationals, through the issuance of so-called Kangaroo bonds.

Before the global financial crisis, Australia also had a dynamic and diverse securitisation industry. The market was dominated by residential mortgage-backed securities, but issues had also been supported by a wide range of other asset classes. The securitisation market has continued to show signs of activity since the global financial crisis, but appears to be waiting for international financial conditions to stabilise before issuance volumes pick up again.

In late 2011 Australia's Federal Parliament amended the *Banking Act 1959* (Cth) to allow Australian banks to issue covered bonds. Australia's banks, particularly the four major banks, have made enthusiastic use of this new funding tool. This appears to be one of the reasons why residential mortgage-backed securitisation has struggled to find momentum in recent years.

CREDIT PRODUCTS

Australia's credit industry is flexible, competitive and innovative. In addition to being able to raise debt finance through the domestic and international debt capital markets, Australian borrowers can also raise finance from banks and specialist credit providers through a wide range of credit products, including:

- overdrafts and term loans, on either a committed or uncommitted basis
- letter of credit, bank guarantee or performance bond facilities
- residential or commercial property loans
- trade finance, including inventory and supply chain financing
- trade receivable and other cashflow finance
- leasing and other types of asset finance
- infrastructure and other forms of project finance.

Australia has also seen the emergence in the last couple of years of financing and credit support provided by export credit agencies from a number of different countries particularly for the larger LNG greenfield projects. Export credit agencies are expected to continue to provide a significant source of funding or credit support for the larger LNG, resource and infrastructure projects in planning.

Credit to consumers is regulated by Federal legislation, the *National Consumer Credit Protection Act 2009* (Cth), including by the National Credit Code that is contained in Schedule 1 to that Act. The regulatory regime established by the Act is administered by ASIC.

FINANCIAL MARKETS

The Australian financial system also provides a diverse range of markets for the creation and trade of financial exposures. They include:

- a short-term money market, for the trade of a wide choice of short-term and relatively liquid financial instruments
- clearing exchanges for a range of futures and options products
- an active over-the-counter derivatives market
- structured credit products for both wholesale and retail investors.

For further details see Chapter 7 – Financial services and markets.

ANTI-MONEY LAUNDERING

Australia has a detailed legislative regime that aims to prevent money laundering and the financing of terrorism. A range of legislation also prohibits dealings with the proceeds of crime.

In general terms, the anti-money laundering legislation requires certain regulated entities:

- to conduct appropriate customer identification procedures before contracting or transacting with their customers
- to provide ongoing due diligence and monitoring with respect to their customers
- to engage in various levels of reporting on transactions which are thought to be suspicious or are otherwise made relevant by the anti-money laundering laws.

The rules apply to an extensive range of designated services, largely focused on financial transactions involving the transfer of money or securities, gambling and bullion services. The financial transactions range from traditional banking services to the provision of most forms of finance, remittance arrangements and securities transactions.

DIGITAL CURRENCIES

Consistent with global developments, digital currencies have become prevalent in Australia. The regulatory framework is evolving to address this trend and the regulatory position of digital currencies is presently uncertain. We anticipate that, as the regulation evolves, many digital currencies are likely to be regulated as financial products (see Chapter 7).

In 2018, the anti-money laundering legislation was amended to include digital currency exchanges (DCEs) as a designated service for the first time, requiring DCEs to implement systems and controls to address AML/CTF risk and to meet the requirements discussed above.

EXCHANGE CONTROLS

There are no general exchange controls in Australia, so money and other financial assets may generally be transferred outside Australia without restriction. Payments or other transactions that have a prescribed connection with certain countries, entities and persons may however require the approval of the Department of Foreign Affairs and Trade, or be prohibited entirely, under Australia's anti-terrorism and sanctions laws.

"As 'a go-to firm in the region', Ashurst 'provides timely, accurate and well-considered advice' that 'consistently puts the client first'."

THE LEGAL 500 ASIA PACIFIC, 2019

RECOMMENDED ACTION

- Australia's banking system and its debt and derivatives markets provide a secure basis for investor opportunities, offering a wide range of sophisticated products.
- Once you decide to establish a business in Australia you will need to consider your financial management strategy including funding options.
- Foreign banks seeking a banking licence to establish operations in Australia need to apply to APRA.

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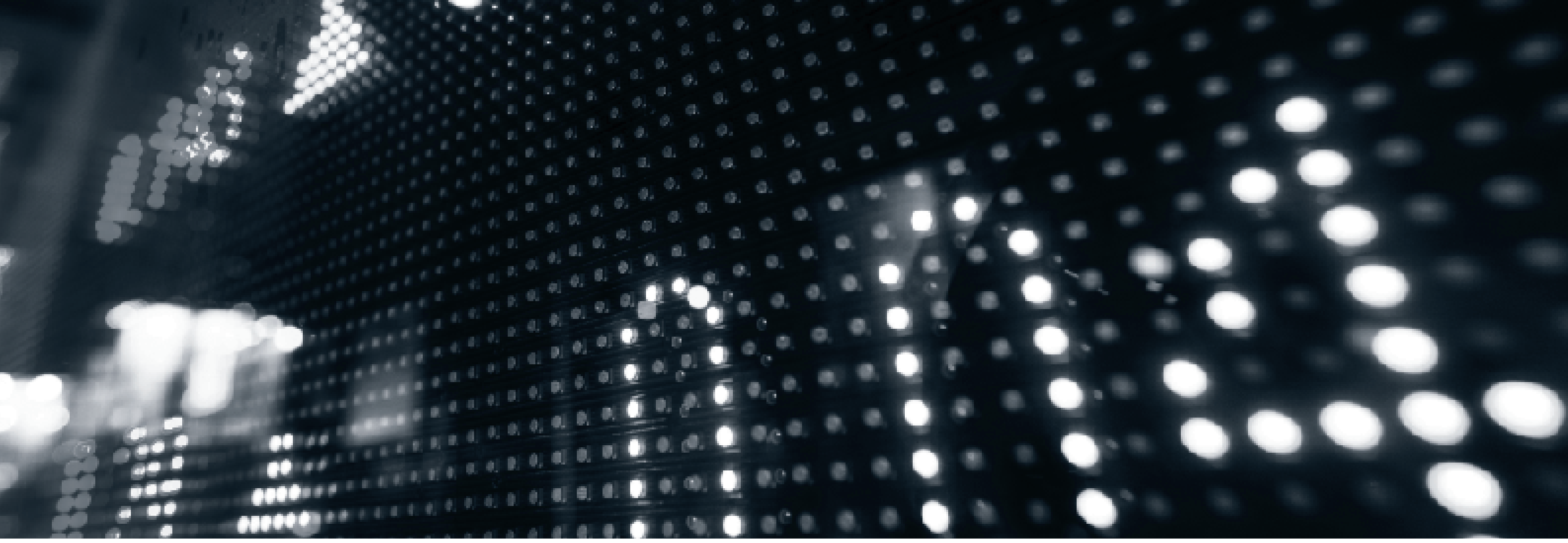
"They are a go-to firm for us. They know the market well, they know the participants and the banks, and they're fairly easy to work with."

CHAMBERS ASIA PACIFIC, 2018



PART B

7

FINANCIAL TRANSACTIONS

Financial services and markets

This chapter considers the application of Australia's financial services regulatory regime.

This chapter is primarily relevant to those who wish to provide financial services in Australia or to persons resident in Australia, including, for example:

Also see Chapter 6 – Banking and finance and Chapter 8 – Funds for more information on financial services.

OVERVIEW OF REGULATORY FRAMEWORK

The Australian Securities and Investments Commission (ASIC) regulates the provision of financial services in Australia. Certain providers of financial services (such as banks, building societies, credit unions, friendly societies, superannuation trustees, participants in certain credit card schemes and certain purchaser payment facilities) are also regulated by the Australian Prudential Regulation Authority (APRA). This is discussed further in Chapter 6 – Banking and finance.

The general regulatory position is that a person (whether an individual or corporate entity) carrying on a financial services business in Australia must either hold an Australian financial services licence issued to that person by ASIC or fall within a licensing exemption.

The licensing provisions in the *Corporations Act 2001* (Cth) (*Corporations Act*) are expressed to have extra-territorial effect, so as to capture regulated financial services activities conducted outside Australia, which are intended to or likely to have the effect of inducing persons in Australia to use those services.

Further the operation of financial markets (such as exchanges) and clearing and settlement facilities in Australia, or targeted at Australian users, is subject to a separate licensing regime.

The *Corporations Act* provides for a uniform approach to the regulation of financial services through a uniform licensing and disclosure regime.

REGULATED FINANCIAL SERVICES

The regulated financial services for which an Australian financial service licence is required are:

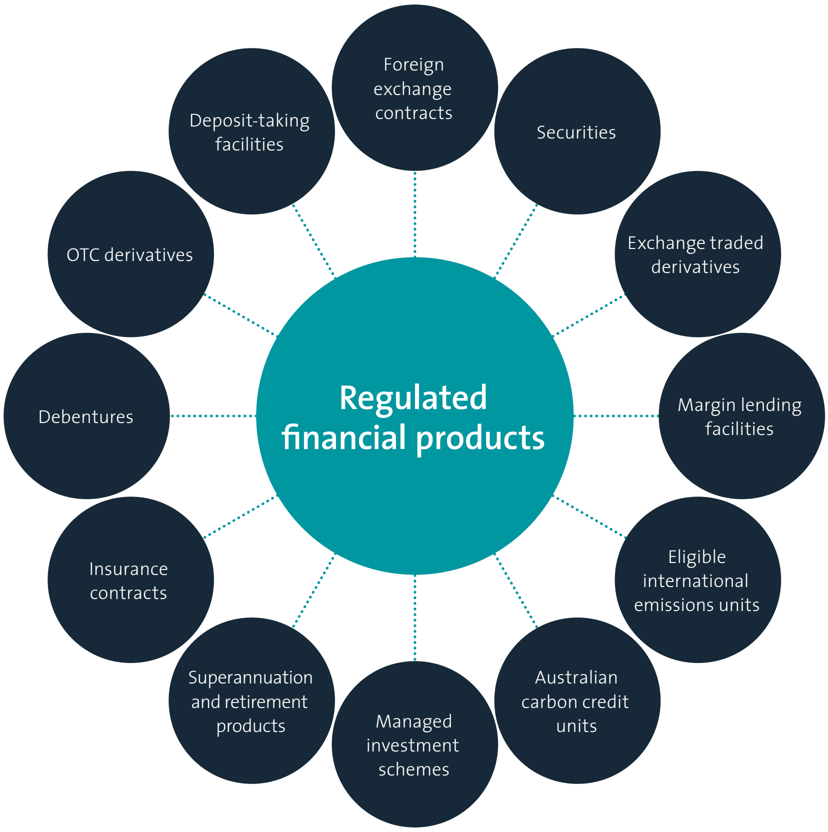
- dealing in a financial product (which includes issuing and arranging dealings)
- the provision of advice (which includes research, recommendations and opinions, and potentially marketing materials)
- making a market for a financial product (ie quoting firm prices at which counterparties deal)
- operating a registered managed investment scheme (for further details see Chapter 8 – Funds)
- providing a custodial or depository service in respect of financial products.

The scope of the above activities is broad, with the effect that the provision of services in relation to regulated financial products, either internally in Australia or on a cross border basis involving Australia, will generally require close consideration.

REGULATED FINANCIAL PRODUCTS

Central to the regulation is the concept of a "financial product". Under Australian law, the term is defined very broadly to cover facilities through which a person makes a financial investment, manages financial risk or makes non-cash payments.

The *Corporations Act* also lists specific types of products that are regulated financial products. These include, for example:



There are also a number of financial products that are currently not regulated as "financial products" such as many credit facilities (although credit facilities provided to consumers are separately regulated under a different national statutory regime).

Digital currencies may also be regulated as financial products, in one of the categories shown in the diagram above.

THE NEED FOR AN AUSTRALIAN FINANCIAL SERVICES LICENCE AND RELEVANT EXEMPTIONS

Unless a licensing exemption applies, a person may only provide a regulated financial service in Australia if they hold an Australian financial services licence that authorises the person to provide the regulated financial service.

Notably, there are a number of exemptions from the requirement to obtain an Australian financial service licence, including exemptions which are commonly relied upon by offshore providers, for example:

- an exemption for foreign entities which provide wholesale (ie non-retail) financial services and which are regulated by an overseas regulatory authority that is recognised by ASIC as being "sufficiently equivalent" to ASIC (although this exemption is scheduled to be revoked with effect from 31 March 2020 and replaced with a requirement for a "foreign AFSL" which recognises to some extent that the provider is regulated in a sufficiently equivalent jurisdiction)
- an exemption for offshore providers who deal with professional investors in derivatives and foreign exchange contracts
- exemptions for services provided to persons in Australia on an unsolicited basis
- exemptions for services arranged by a licensee.

This is not an exhaustive list, and the application of the exemptions are cumulative such that a number of exemptions can be relied on concurrently to cover particular regulated financial services and activities.

THE OBLIGATIONS OF A LICENSEE

A licensee is required under the *Corporations Act* to:

- do everything necessary to ensure that it provides its financial services efficiently, honestly and fairly
- ensure its representatives are competent to provide the financial services covered by its licence and are adequately trained
- have adequate financial, technological and human resources to provide the financial services, risk management systems, and have arrangements in place for managing conflicts of interest
- have in place dispute resolution systems and compensation arrangements for retail clients
- comply with relevant laws and the conditions on its licence, eg client money rules.

When applying for a licence, or seeking to vary an existing licence, the applicant must provide evidence to ASIC of the ability of the applicant to satisfy its statutory obligations. That involves preparing and delivering to ASIC detailed information in relation to internal management and operational aspects of the applicant's business and information demonstrating the experience and qualifications of management.

THE DISTINCTION BETWEEN RETAIL AND WHOLESALE CLIENTS

The *Corporations Act* draws a clear distinction between the provision of products and services to retail clients and wholesale clients. Extensive disclosure obligations apply when financial products and services are provided to retail clients. A retail client is any person who is not a wholesale client.

The distinction is particularly important to offshore providers because a number of exemptions from the licensing requirements for offshore providers apply only when the services are limited to wholesale clients.

To qualify as a wholesale client, the client must fall within specific categories which include (not an exhaustive list):

- persons certified as having gross income of A$250,000 or net assets of A$2.5 million
- clients classified by the licensee providing the service as "sophisticated" with prior experience which allows the client to assess the merits, value, risks, information needs and adequacy of information (with appropriate client acknowledgments)
- large businesses (manufacturing businesses with more than 100 employees and other businesses with more than 20 employees)
- persons who invest more than A$500,000 in a product will be "wholesale" for that investment
- persons who control A$10 million in assets
- other licensees.

There are extensive rules in the *Corporations Act* in relation to the offer of financial services and products to superannuation funds. Subject to limited exceptions, services provided in relation to superannuation are deemed to be provided to the investor as a retail client.

DISCLOSURE OBLIGATIONS

As noted above, there are extensive disclosure requirements when financial services are provided to retail clients. These include:

- **Financial Services Guide (FSG)** – this is a document prepared by the licensed service provider, outlining the financial services that the licensee is authorised by ASIC to provide as well as information regarding pertinent relationships between the licensee and other parties (including information about commissions) and available dispute resolution schemes
- **Statement of Advice (SoA)** – this must be given by a licensed adviser to a client when personal advice is given to the client. The document contains the advice provided as well as information regarding remuneration and pertinent relationships between the licensee and other parties

- **Product Disclosure Statement (PDS)** – this document is in the nature of a prospectus and is prepared by the product provider (issuer) and must include specific information about the significant characteristics, risks and benefits of the product and the costs of the product. A PDS is not required for an offer of securities (such as shares, options over unissued shares or debentures) – instead, for securities a prospectus must be given under Chapter 6D of the *Corporations Act*.

A new product governance regime is scheduled for commencement in Australia in April 2021, which will impose obligations on product issuers and distributors to ensure that products are appropriate for the target market for which they are designed.

There are other disclosure obligations required by the *Corporations Act* including, for example, transaction confirmations (contract notes), periodic statements for some products and certain prescribed warnings whenever general advice is given.

FINANCIAL MARKETS AND CLEARING AND SETTLEMENT FACILITIES

A "financial market" is a facility provided by an operator through which participants and users execute transactions in financial products with each other. A "clearing and settlement facility" (CS facility) is a facility provided by an operator through which participants and users settle their transactions in financial products.

If a financial market or CS facility is operated in Australia or targeted at Australian participants and users, the operator of the facility will require an Australian market licence (or an Australian CS facility licence) or needs to obtain a relevant exemption. Examples of financial markets include exchanges, liquidity pools, crossing systems and other trading platforms. Examples of clearing and settlement facilities include clearing houses and other central clearing counterparties.

Offshore exchanges and platforms seeking to tap into Australian based institutions and customers through "remote access" arrangements need to consider carefully whether such arrangements could trigger a licensing obligation or qualify for an exemption.

RECOMMENDED ACTION

- Australia's financial services regulatory regime is not dissimilar to financial services regulatory regimes in many other jurisdictions. The regulation is extensive and detailed.
- If you propose to provide financial services in Australia, whether by establishing a business in Australia or by providing services or products into Australia from offshore, you will need to consider the extent to which the provision of the services will become subject to Australia's licensing and disclosure regimes and whether you may fall within any relevant regulatory exemptions. In the absence of any available exemptions, you will need to apply to ASIC to obtain a licence to provide regulated financial services in Australia.

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PART B

8

FINANCIAL TRANSACTIONS

Funds

This chapter provides a brief overview of the regulatory requirements associated with operating collective investments schemes in Australia. The regulatory regime requires a consideration of licensing, disclosure and conduct-related issues.

This chapter builds upon the basic regulatory framework in relation to financial services and markets generally discussed in Chapter 7 – Financial services and markets.

WHAT IS A COLLECTIVE INVESTMENT?

In Australia, a "collective investment scheme", under which investors' moneys are pooled and invested together, is known as a "managed investment scheme". A managed investment scheme is a term of art, as it has a technical definition under the Corporations Act 2001 (Cth) (Corporations Act).

WHAT IS A MANAGED INVESTMENT SCHEME?

Under the *Corporations Act*, a managed investment scheme means:

a) a scheme that has the following features:

  – people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);

  – any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);

  – the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions); or

b) a time-sharing scheme.

Some of the terms referred to above have technical meanings, and whether a collective investment scheme falls within the statutory definition is a question of fact. Typical investment structures that generally fall within the definition include limited partnerships and unit trusts.

There are specific statutory exclusions from the definition of managed investment scheme, including certain large partnerships, bodies corporate, franchises, regulated superannuation funds, debentures and convertible notes, and barter schemes.

COLLECTIVE INVESTMENT SCHEMES THAT ARE COMPANIES

The definition of managed investment scheme excludes bodies corporate (other than a body corporate that operates as a time-sharing scheme). Therefore, a collective investment scheme based on a company structure (eg a foreign investment company) will not constitute a "managed investment scheme", however it will still be subject to licensing, disclosure and conduct-related requirements under the *Corporations Act*.

For example, an investment company will generally need an Australian financial services licence to issue its securities to Australian investors and will require a disclosure document (such as a "prospectus") to offer its securities to investors in Australia. A foreign investment company seeking to carry on business in Australia must also register with the Australian Securities and Investments Commission (ASIC) as a foreign company, and is subject to applicable corporate regulation. For more information see Chapter 2 – Business structures and the section on registering a foreign company.

Australia is consulting on the establishment of a corporate collective investment vehicle (CCIV) as an alternative to a managed investment scheme. Key elements of a CCIV are:

- a CCIV will be a public company that is limited by shares and structured as an umbrella fund with sub-funds, each of which may hold different assets and have different investment strategies
- the CCIV is to be operated by a corporate director that is an Australian public company and holds an Australian financial services (AFS) licence authorising it to operate a CCIV
- a retail CCIV will be required to have a depositary that is either an Australian public company or a foreign company registered under Part 5B.2 of the Corporations Act, and holds an AFS licence authorising it to act as a depositary of a CCIV
- the depositary will be responsible for holding the assets of the CCIV on trust and oversight of the operation of the CCIV.

The intention is that a CCIV would be subject to similar tax treatment to a managed investment scheme.

THE REQUIREMENT TO REGISTER A MANAGED INVESTMENT SCHEME

WHEN A MANAGED INVESTMENT SCHEME MUST BE REGISTERED

Under the *Corporations Act*, the operator of a managed investment scheme must register the scheme with ASIC if:

- it has more than 20 members;
- it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or
- a determination has been made by ASIC that it is one of a number of related schemes which together have more than 20 members.

However, the operator does not need to register the scheme if no issue of an interest in the scheme would require the giving of a regulated disclosure document (being a "Product Disclosure Statement" (PDS)). The operator of the scheme does not need to give a PDS to an investor if the investor is a "wholesale client" (a wholesale client is defined in Chapter 7 – Financial services and markets).

The team "offers the full range of services surrounding the entire life-cycle of funds, including the establishment, management and acquisition of funds" and is known for working "on complex matters relating to property and infrastructure funds as well as assisting domestic funds with offshore structures". The team also "acts in relation to both listed and unlisted funds and also assists investors with investments into funds".

CHAMBERS ASIA PACIFIC, 2020

WHAT ARE THE CONSEQUENCES OF REGISTERING A SCHEME

If a scheme requires registration, there are a number of significant regulatory consequences, including the following:

Regulatory consequences of registering a scheme

- the scheme operator must be an Australian public company
- the scheme operator must hold an Australian financial services licence authorising it to operate the registered scheme. The scheme operator will also need Australian financial services licence authorisations to issue and redeem interests in the scheme and possibly to invest scheme assets, and to give financial product advice in relation to interests in the scheme
- the scheme operator, known as the "responsible entity", is responsible for operating the scheme in accordance with prescriptive standards imposed by the *Corporations Act* and by ASIC policy
- the scheme must be established under a constitution, which meets prescribed content requirements and which is registered with ASIC
- the scheme must have a compliance plan, which sets out adequate measures for the responsible entity to apply to ensure compliance with the *Corporations Act* and the constitution of the scheme
- the scheme must have a compliance plan auditor, a scheme auditor and, if there are insufficient independent directors, a compliance committee
- the operation of the scheme is generally subject to ASIC surveillance. The scheme operator will also need to promptly report to ASIC actual or likely significant breaches of its Australian financial services licence and breaches of the *Corporations Act* in relation to the scheme that has or is likely to have a materially adverse effect on scheme members
- the scheme operator will need to comply with all conditions of its Australian financial services licence, including conditions in relation to holding sufficient human, technological and financial resources. In particular, the scheme operator must hold at least A$10 million or 10% of its average revenue (whichever is greater) in net tangible assets, unless for each registered scheme the scheme assets are held by a licensed custodian that holds these financial resources or another prescribed exception applies (in which case, the net tangible asset requirement will be lower)
- the scheme operator will need to provide "retail clients" with a PDS before issuing an interest in the scheme to them.

ASIC EXEMPTIONS

ASIC, the corporate regulator, has the power under the *Corporations Act* to exempt a person from the requirement to register a scheme, hold an Australian financial services licence, or provide a PDS to retail clients.

In general, ASIC will only give this registration, licensing, and disclosure relief to an operator of a foreign collective investment scheme if the foreign collective investment scheme and the foreign scheme operator are regulated in their home jurisdiction under a sufficiently equivalent regulatory regime, and there are effective co-operation arrangements between ASIC and the regulator in the home jurisdiction.

However, the relief that ASIC has formerly made available to operators of funds from certain recognised regulatory regimes (such as Singapore and Hong Kong) has either been repealed or not renewed on its sunset.

There is a Trans-Tasman mutual recognition regime which enables operators of collective investment schemes in New Zealand to offer interests in those schemes in Australia, which allows an issuer to use one disclosure document prepared under regulations in New Zealand, provided that they comply with some minimal entry and ongoing requirements in Australia.

Australia is also a signatory to the Memorandum of Cooperation on the Establishment and Implementation of the Asia Region Funds Passport (Memorandum of Cooperation), and has enacted legislation to give effect to this cross-jurisdiction regime. Other countries that are signatories to the regime are New Zealand, Japan, Korea and Thailand (each a participating economy).

Under this regime:

- a proposed passport fund established in a participating economy must be a regulated collective investment scheme and must apply to register in Australia
- the operator must be an eligible entity, including having officers with the relevant qualifications and meeting a financial resources test, organisational arrangements test, track record test and good standing test
- once registered in Australia, the passport fund must comply with the Passport Rules, including rules about permitted investments, portfolio restrictions and limits, breach reporting, notifying the home and host regulators of certain changes, custody, financial reporting, annual reviews of compliance with the Passport Rules, redemption and valuation and deregistration.

The Asia Region Funds Passport offers some alleviation from compliance with Australian laws which would otherwise apply to an Australian registered collective investment scheme, but operators must still comply with certain Australian regulatory requirements when offering their collective investment scheme into Australia, including distribution and marketing laws.

"The team has good depth, they're very knowledgeable, commercial and practical, and they've got support from other parts of the firm that go beyond just funds."

CHAMBERS ASIA PACIFIC, 2020

OTHER FINANCIAL SERVICES

It should be noted that the requirement to hold an Australian financial services licence and/or give a PDS may apply to those persons who wish to offer and market other financial products in Australia. For example, an Australian financial services licence is required if a foreign person seeks to provide financial product advice to Australian investors, or to arrange to issue foreign financial products to them.

Similarly, a PDS must be given to a retail client if a financial product is issued or sold to them, even if the product provider does not require an Australian financial services licence. However, there are a number of statutory and ASIC exemptions that may apply, and it is recommended that legal advice is sought prior to conducting a financial services business in Australia.

OTHER RELEVANT LAWS

The offering of interests in a managed investment scheme requires compliance with a number of other laws. For example, there are restrictions on issuing or selling financial products (such as interests in a managed investment scheme) on an "unsolicited" basis. There are laws governing the use of confidential or personal information (which are discussed in Chapter 14 – Privacy and data protection) and laws in relation to verifying the identity of customers under anti-money laundering legislation (see Chapter 6 – Banking and finance).

There is also a prescriptive legislative regime governing the conduct of banking and insurance business in Australia. In addition to the regime, there is an overall prohibition against engaging in misleading or deceptive conduct in the provision of financial services or in relation to a financial product. All these laws, along with applicable exemptions, will need to be considered as part of structuring a collective investment scheme offering in Australia.

RECOMMENDED ACTION

- Foreign financial services industry participants need to consider many legal issues including licensing, disclosure, conduct-related issues, tax, privacy and anti-money laundering laws.
- If you propose to provide financial services in Australia, whether by establishing a business in Australia or by providing services or products into Australia from offshore, you will need to consider the extent to which the provision of the services will become subject to Australia's licensing and disclosure regimes and whether you may fall within any relevant regulatory exemptions.
- In the absence of any available exemptions, you will need to apply to ASIC to obtain a licence to provide regulated financial services in Australia and you may be required to provide product disclosure to Australian investors.

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FINANCIAL TRANSACTIONS

PART B

9

Private equity and venture capital

The Australian private equity (PE) & venture capital (VC) industry is well established and a regular feature in the Australian corporate landscape.

The Australian PE and VC industry is mature when compared to most Asian countries but relatively young when compared with Europe and the USA. The first Australian VC fund was formed in 1970 and the first Australian PE fund was formed in 1987. Australian VC funds have experienced a marked resurgence from 2017 and we expect continued growth in the sector.

Australian PE growth and returns have generally surpassed the performance of the local public equity market indexes over a 1-to-10 year period, including during the global financial crisis. Australian VC funds have experienced a resurgence from 2017 and we expect continued growth in the sector.

Consistent with global practice, almost all Australian PE and VC investments in businesses are conducted through collective investment vehicles such as limited partnerships where:

- investors invest as passive investors / limited partners (LPs) and commit capital to the fund which is drawn down as and when investment opportunities are identified
- the private equity house acts as a general partner (GP) and/or fund manager, and makes and manages investments in businesses using the funds of the investment fund.

There are very favourable tax concessions for early stage venture capital funds that invest in Australia.

1. Seed investment

2. Early-stage investment

3. Expansion-stage investment

4. Buy-outs

Venture Capital (1–2)

Private Equity (3–4)

REGULATORY FRAMEWORK AND GOVERNANCE

Generally, the PE and VC industry is subject to the same laws and regulations that apply to other corporate entities undertaking equivalent transactions. Similarly, businesses owned by PE and VC funds are subject to the same legal and regulatory frameworks as they would be if they were owned by other forms of privately-held enterprise.

Where an investor in an Australian fund or in an Australian business is a foreign person, Australia's foreign investment laws and regulations will apply and foreign investment approval may be required before making the investment. (See also Chapter 1 – Foreign investment regulation.)

Since its inception in 1992, the Australian Investment Council (the ACI, formerly the Australian Private Equity Association), has been the key Australian industry body which actively regulates industry standards, promotes PE and VC to investors and acts as an industry advocate when dealing with Government and other stakeholders. Membership includes most domestic, regional and global PE and VC firms active in the Australian market.

GOVERNMENT SUPPORT FOR VC – AUSTRALIA'S INNOVATION PUSH

In December 2015 the Australian Government released its National Innovation and Science Agenda which contained a range of initiatives intended to encourage investment in innovation and entrepreneurship in Australia. These include tax incentives for high-growth potential start-ups, new and less restrictive arrangements for venture capital limited partnerships and early stage venture capital limited partnerships, a A$250 million Biomedical Translation Fund to co-invest with fund managers in biomedical commercialisation activities and an incubator support program.

(For further information on applicable Australian laws and regulations, see also Chapter 1 – Foreign investment regulation, Chapter 2 – Business structures and Chapter 3 – Mergers and acquisitions.)

PARTICIPANTS AND FEES

LOCAL AND OVERSEAS MARKET PARTICIPANTS IN PE AND VC FUNDS

LPs in Australian PE and VC funds include Australian and international insurance companies, banks, university endowments, PE and VC fund managers/GPs, superannuation/pension funds and other sophisticated investors (high net-worth individuals rather than retail investors). Increasingly, foreign state owned enterprises (such as sovereign wealth funds or certain government pension funds) have also been investing in Australian PE and VC funds. As in other markets, it is becoming more common for some classes of LPs to co-invest alongside PE funds on individual investments.

FEES AND RETURNS

Fees are subject to negotiation between LPs and GPs but historically have generally followed the conventional "2% and 20%" model, ie management fees of 1-2% per annum (depending on the size of the fund) and a "carried interest" of 20% of realised gains above an agreed hurdle rate of return (generally around 8% per annum), less management and other fees and expenses paid by the fund.

INVESTMENTS AND EXITS BY PE FUNDS

In 2018, private equity M&A transactions achieved the second highest aggregate deal value on record of $13bn which accounted for 13% of the total number of M&A transactions in Australia. Some notable transactions included KKR's acquisition of MYOB, TPG's acquisition of Greencross and The Carlyle Group's acquisition of winemaker Accolade from Champ Private Equity. 2018 was a year of record high fundraising of $5.3bn and saw the establishment of one of Australia's largest domestic funds, BGH Capital, which raised $2.6bn.

INVESTMENTS

PE investment in Australia has generally involved control transactions. Investments are usually made by acquiring private and publicly listed companies following a due diligence process.

VC investments in Australia involve the VC fund investing in unlisted private companies by subscribing for new shares. VC investments typically give the VC fund a strategic, but non-controlling stake with the right to appoint a director and a degree of control via a shareholders agreement. Investments are often done in rounds of increasing size commensurate with the company's need for funds.

A mature secondary debt market has developed in Australia. There are a number of special situations PE funds active in this market. This has resulted in an increase in "debt for equity" transactions, where debt is acquired by the PE fund in the secondary market and then converted into equity through a solvent or insolvent restructuring.

2018 saw a rise in deal activity from 2017. There was also an increase in aggregate deal value of 89%. The Healthcare sector was the most significant, taking a 45% of share of total invested dollars. The IT sector was an area of increased interest in 2018, representing 19% of the total number of PE deals.

The VC market in Australia has experienced a recent growth in investment activity. In 2018, the total VC deal value more than doubled from 2017 to a record $2.2bn. IT was the most significant industry, representing 83% of aggregate deal value. The VC fundraising market also showed strength, with $1.3bn in capital raised in 2018. We expect continued growth in this sector as both the number of VC funds and the amount being raised is growing and so too are the companies which VC funds initially invested in between 2015 – 2017.

DEBT FINANCE

There is currently significant liquidity in the Australian debt markets meaning financing is readily available for acquisitions of quality assets by PE funds. See Chapter 6 – Banking and finance for more information.

EXITS

Consistent with global trends, Australian PE funds generally have an investment horizon of 5 to 7 years.

Exits took a number of forms during FY 2019, with a good level of trade sales but more subdued IPOs and secondary sale levels. In FY 2019 there were a number of large trade sales as well as some secondary sales to other PE funds.

The use of warranty and indemnity (W&I) insurance has become customary in most PE exits by secondary sale and trade sale. The benefits of W&I insurance include ensuring a "clean exit" for the PE fund, reducing complications with "pricing" risk and certainty of purchase price and recourse.

RECENT TRENDS

- A broader number of players are now participating in the VC market with the re-emergence of Corporate Venture Capital ("CVC"). Recently the Federal Government contributed $100 million to the CSIRO which established Main Sequence Ventures and IAG established a new CVC fund with an initial $75 million to deploy. We expect this trend to continue.
- Changes in the FIRB legislation and process have resulted in significantly longer delays between transactions signing and closing. This has affected PE funds both in respect of their investments and their exits. As these delays become a more common feature of Australian transactions, PE funds are looking for ways of obtaining additional deal protection for those periods.
- There is strong government support for companies focused on innovation and technological disruption, creating an ideal environment for VC activity in these areas.

TAX

The Australian Tax Office (ATO) has a higher level of scrutiny of PE fund investments into Australia.

For example, the ATO has a number of tax determinations setting out the ATO's views on various Australian taxation implications for PE funds investing into Australian businesses. Generally, these determinations focus on Australia's right to tax the profit on the basis of asserting that the profits are ordinary income (and are not capital gains) that have an Australian source and the application of anti-avoidance provisions against treaty shopping. Where a PE fund is able to identify its underlying investors, one of the determinations allows treaty benefits of the investor to be claimed by the PE fund.

As part of the FIRB process, certain tax-related matters require disclosure to FIRB and the ATO, particularly with respect to financing (especially related party financing).

Foreign investors should be cognisant of the greater level of ATO scrutiny when making investments in Australia. (See also Part D – Taxation for further information.)

RECOMMENDED ACTION

- The Australian PE and VC industry provides a range of opportunities to investors, including the opportunity:
  - to invest as an LP in a PE or VC fund
  - to attract investment from a VC fund or to access VC government assistance programs
  - to acquire a business from a PE or VC fund
  - to sell a business to a PE fund or an idea to a VC fund
  - for a PE or VC fund to acquire an Australian business.
- Before investing, you should consider and obtain advice on how foreign investment regulation and tax may impact your proposed transaction.

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AUSTRALIA – AN INTRODUCTION FOR INVESTORS

Business transactions

PART C

Overview

10 MERGER CONTROL, COMPETITION LAW AND CONSUMER PROTECTION

Assessing whether a proposed merger, acquisition or trading arrangement gives rise to competition or consumer protection concerns under the *Competition and Consumer Act 2010* (Cth) is a complex issue and needs to be addressed at a preliminary stage.

11 TRADE REGULATION

Trade regulation and customs legislation and procedures for importing and exporting can be complex and you may need to seek specific advice regarding your particular business.

12 ANTI-BRIBERY AND CORRUPTION REGULATION

Each of Australia's Federal, State and Territory governments have enacted laws which strictly prohibit bribery and corruption. The Federal laws prohibit the bribery of foreign public officials and Commonwealth public officials, whereas the State and Territory laws prohibit the bribery of both public officials and private individuals.

13 PROTECTION OF NAMES AND OTHER INTELLECTUAL PROPERTY

As soon as a decision is made to establish a business in Australia, it is important to review all of the intellectual property you wish to use in Australia to determine the extent to which it is protected (for example, by granted patents or registration of trade marks) and, if it is not protected, to determine what may be required.

14 PRIVACY AND DATA PROTECTION

Privacy legislation operates in Australia at both Commonwealth and State levels. It places restrictions on the manner in which personal information can be used and transmitted inside and outside of Australia.

15 EMPLOYMENT

Working out how an enterprise will fit into the Australian industrial relations system is a complex matter and needs to be considered at the outset of planning.

16 ENVIRONMENTAL RESPONSIBILITIES

Businesses need to be aware of their environmental responsibilities, in regard to land use and development activities, as well as pollution compliance.

BUSINESS TRANSACTIONS

PART C

10

Merger control, competition law and consumer protection

Merger control, competition law and consumer protection are governed by the *Competition and Consumer Act 2010* (Cth) (CCA).

The Australian Competition and Consumer Commission (ACCC) is the key regulator in these areas. Further specific laws apply to access to "essential infrastructure", both under and outside of the CCA.

These laws have broad application to companies, including foreign corporations, carrying on business in Australia, and to Australian companies, subject to limited exceptions.

MERGER CONTROL

The CCA prohibits any acquisition of shares or assets which would be likely to have the effect of substantially lessening competition in a market in Australia. A wide range of markets "in Australia" may be considered for this purpose, from international markets of which Australia forms a part, through to small, highly localised markets. Transactions between two foreign businesses may be subject to this prohibition if they affect such a market.

There is no mandatory pre-merger notification requirement, but in practice, acquisitions which require foreign investment approval are typically notified to the ACCC, since the ACCC has a formal role in that approval process. In all other cases, the ACCC's merger guidelines encourage merger parties to notify the ACCC well in advance of completing a transaction if:

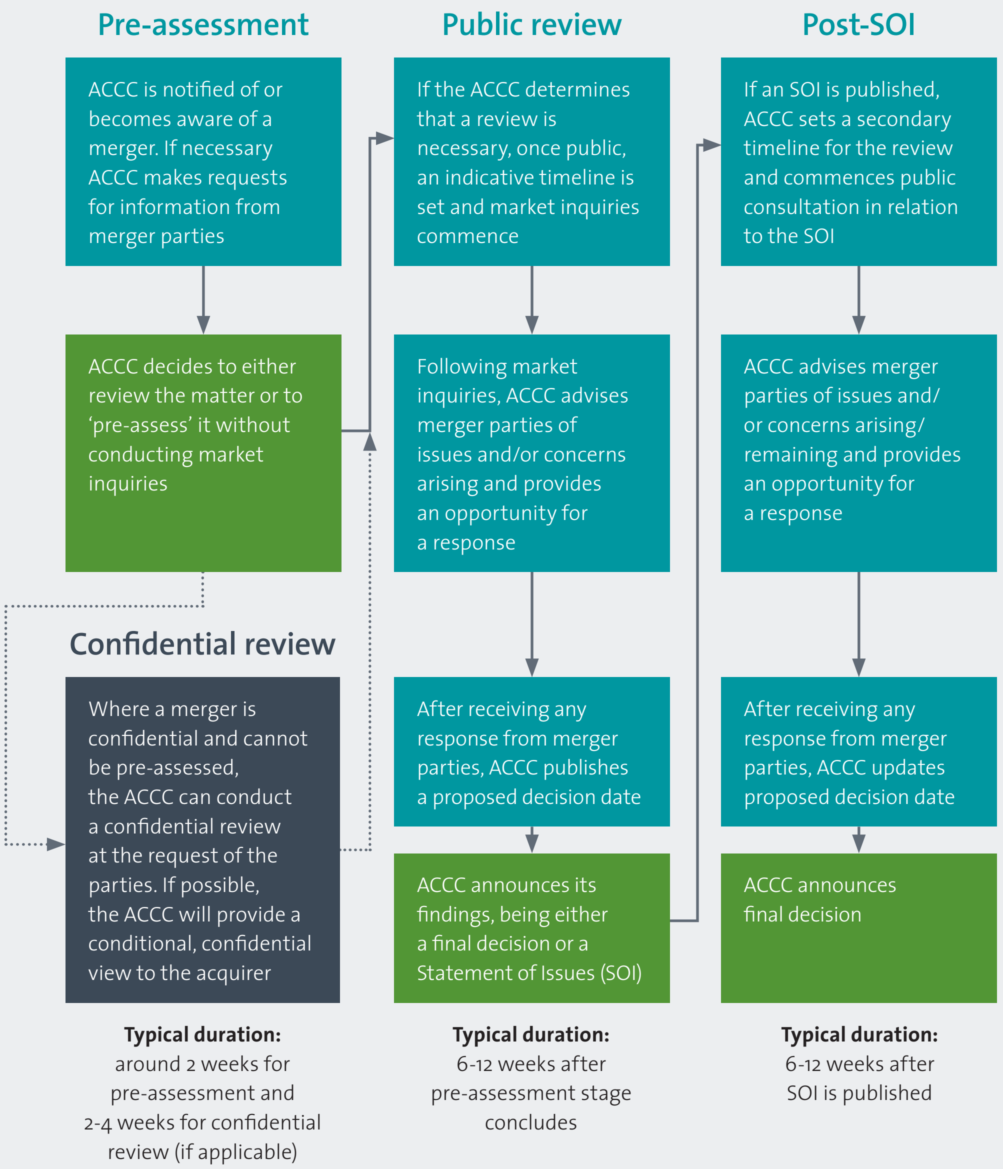
- the products of the merger parties are either substitutes or complements; and
- the merged company will have a post-merger market share greater than 20% in any Australian market or an international market of which Australia forms a part.

The ACCC also encourages notification where the ACCC has indicated to a company or industry that notification would be advisable (eg in particularly concentrated industries).

Once an acquisition is notified to the ACCC, the ACCC will make an initial assessment to determine whether it will undertake a public review. If the ACCC is satisfied that there is a low risk of the merger substantially lessening competition, the ACCC may decide that it is not necessary to conduct a public review. Mergers which fall into this category are referred to as having been "pre-assessed". Both public and confidential mergers may be pre-assessed, as the ACCC does not publish any details of pre-assessed mergers.

If the ACCC forms the view that a transaction cannot be pre-assessed, it will inform the parties that it cannot assess the transaction without conducting a public review. As part of any public review, the ACCC will usually undertake market inquiries, to investigate the likely effect of the transaction, with competitors, customers, suppliers and other interested industry participants.

OVERVIEW OF INFORMAL MERGER REVIEW PROCESSES



Source: ACCC Informal Merger Review Process Guidelines – Updated 2017, pg 4

It may also issue a compulsory notice requiring the parties to submit information and documents relating to the transaction and the markets affected. Compliance with such notices can sometimes be onerous. Details of the review, including the ACCC's decision, will be published on the ACCC's website and a press release may be issued. The ACCC's review may be concluded in as little as 6 weeks in simple cases, but may extend for many months in more complex or contentious cases.

In the case of a confidential transaction, if the ACCC forms the view that it cannot be pre-assessed, the parties may request the ACCC conduct a confidential review. Though there may be good reasons for requesting a confidential review, in such cases, the ACCC will only provide a highly qualified view, as it will not have had the opportunity to test the information provided to it by the parties.

The diagram above sets out an indicative timeline for the ACCC merger review process. These timelines may be paused and extended by the ACCC.

There exists one alternative avenue for merger approval in Australia. This alternate pathway is known as "merger authorisation". It is a more formal, public and lengthy process than informal clearance, with a different test applied. Following changes to the law in 2017, the ACCC is now also the relevant decision-maker for this pathway. The ACCC may grant authorisation of a merger where it is satisfied that the proposed merger will not substantially lessen competition, or where it is satisfied that the likely public benefit will outweigh any anti-competitive detriment of the transaction (including any lessening of competition). Merger authorisation is a relatively new power for the ACCC and is not commonly used.

If the parties do not approach the ACCC in relation to a transaction, the ACCC may nonetheless commence its own review of the transaction.

If a merger proceeds without clearance or authorisation from the ACCC, the ACCC may nevertheless review the completed transaction. In such circumstances, there is a risk that the ACCC may take legal action (seeking injunctions, divestiture and/or penalties) on the basis that the merger may substantially lessen competition.

COMPETITION LAW: ANTI-COMPETITIVE CONDUCT AND ARRANGEMENTS

Under the CCA, some anti-competitive conduct is absolutely prohibited, regardless of its actual effect on competition, while other conduct is only prohibited if it has the purpose or likely effect of substantially lessening competition.

The table below provides an overview of these prohibitions.

OVERVIEW OF COMPETITION PROHIBITIONS

Absolutely prohibited	Prohibited where conduct has an anti-competitive purpose and/or effect
Cartel conduct Arrangements involving two or more competitors, concerning: • price fixing; • bid rigging; • market sharing (eg allocating customers, suppliers or territories); • restrictions on production or capacity; or • restrictions or limitations on supply to or acquisition from particular persons/classes of persons. **Resale price maintenance** Specified conduct by a supplier preventing or seeking to discourage customers from reselling the supplier's products below a specified price, or otherwise discounting those products.	**Exclusive dealing** Certain types of conditional supply or acquisition are prohibited if they have an anti-competitive purpose or are likely to have an anti-competitive effect (eg, exclusive supply, distribution or acquisition arrangements). **Anti-competitive agreements / arrangements / understandings** Agreements, arrangements or understandings with the purpose or likely effect of substantially lessening competition are prohibited, regardless of whether the parties are competitors. **Merger control** Acquisitions of shares or assets are prohibited if they would have the likely effect of substantially lessening competition in a market in Australia. **Concerted practices** Any "concerted practice" conduct which has the purpose or likely effect of substantially lessening competition in a market in Australia is prohibited. According to ACCC Guidelines, "concerted practices" capture cooperative behaviour or communication between separate entities which falls short of the commitment required by Australian courts to establish a contract, arrangement or understanding. One example is the disclosure of competitively sensitive information between rival firms. **Misuse of market power** Any company or business with a substantial degree of market power must not engage in conduct which has the purpose or likely effect of substantially lessening competition in an Australian market. Conduct such as refusals to deal and below cost pricing may constitute a misuse of market power if these elements are satisfied.

Most of these prohibitions apply generally to businesses operating in Australia.

However, there are several specific exceptions to some (but not all) of the prohibitions in the CCA. These include exceptions for specified conduct that:

- is notified to and/or authorised by the ACCC, based on an analysis of public benefits and anti-competitive detriments associated with the conduct;
- is for the purpose of joint venture arrangements, is reasonably necessary for the joint venture and the joint venture is not for the purpose of substantially lessening competition, among other requirements;
- is between related bodies corporate (only);
- is a collective acquisition;
- concerns certain aspects of employment arrangements; or
- relates to the protection of a purchaser's goodwill in the context of a sale of a business.

These exceptions are all very limited in nature and legal advice should be sought before relying on them.

PENALTIES FOR BREACH OF ANTI-COMPETITIVE CONDUCT PROVISIONS AND CARTEL LENIENCY POLICY

For corporations, the maximum penalties or fines for contravention of the anti-competitive conduct prohibitions are up to the greater of A$10 million, three times the value of the benefit gained from the contravention, or if the value of the benefit cannot be ascertained, 10% of the annual turnover in Australia of the corporate group during the 12-month period prior to the contravention.

For individuals, the maximum penalty or fine for a contravention of the anti-competitive conduct provisions of the CCA is A$500,000. For serious cartel conduct, individuals may also go to jail for up to 10 years.

The ACCC has adopted cartel immunity and leniency policies which offer substantial incentives, including immunity for the "first-in", to encourage corporations and their executives to self-report serious cartel behaviour and to cooperate with the ACCC.

ACCESS TO ESSENTIAL INFRASTRUCTURE

Under Australian law, an owner or operator of a significant infrastructure facility may be required to allow third parties to use that facility in certain limited circumstances, even if the facility is privately owned and has been developed with private funds. These "access" obligations typically apply where the relevant regulator finds that access would promote competition in other (upstream or downstream) markets, and that the facility is able to meet demand for the relevant service at lower cost, compared to any 2 or more facilities, among other requirements. If an access obligation is determined, then the owner/operator of the facility may be required to negotiate terms with an access seeker, with recourse to arbitration of access terms by an economic regulator; if not agreed.

Specific, more prescriptive access obligations apply in relation to certain telecommunications, gas and electricity infrastructure, and further specific regimes apply to particular port and rail infrastructure in Australia. If a project involves negotiating a State agreement with Government (that is, an agreement to facilitate new infrastructure or other projects) third party access and/or pricing may also be raised by Government.

Investors in infrastructure in Australia should carefully consider the potential impact of access obligations on any proposed investment in brownfields or greenfields infrastructure (particularly any infrastructure assets with "natural monopoly" characteristics), and seek advice on options for managing that risk.

CONSUMER PROTECTION, FRANCHISING AND OTHER PRESCRIBED INDUSTRY CODES

CONSUMER PROTECTION

The CCA contains "The Australian Consumer Law", a detailed and wide-ranging consumer protection regime, which includes the following key elements:

- **Unfair conduct rules** – Rules prohibiting unfair conduct in consumer and business transactions, such as misleading or deceptive conduct, false or misleading representations about the sale of goods or services, and unconscionable conduct
- **Unfair terms** – Prohibitions on the use of "unfair terms" in certain standard form small business and consumer contracts; "unfair terms" can include terms which cause a significant imbalance in the rights of the parties, and are not necessary to protect the legitimate interests of the advantaged party. Unfair terms are void and unenforceable

- **Statutory consumer guarantees** – A series of statutory guarantees concerning the characteristics of goods and services supplied to consumers (for example, that goods are of "acceptable quality" and that services are provided with due care and skill). Consumers have several statutory remedies against manufacturers and suppliers of goods and services that do not comply with these guarantees, which can include the right to have goods repaired or replaced, or to receive a refund for the goods or services, and to recover loss or damage caused by the non-compliance. In practice these guarantees apply widely, including to many supplies made to businesses where the amount paid for the goods or services does not exceed A$40,000, and the business is the end user of the good or service. This regime prohibits contractual exclusion of these statutory remedies, and significantly limits contracting parties' ability to allocate risk between them when the statutory guarantees apply
- **Warranties against defects** – Specific rules requiring all "warranties against defects" to include specific prescribed text and comply with other prescriptive requirements. In practice, these requirements mean that standard product packaging and warranties used in other jurisdictions are likely to require modification before being used in Australia
- **Product safety regime** – A product safety regime which imposes strict liability on manufacturers of goods which have a safety defect, and requires such manufacturers to compensate individuals for injuries and certain other loss or damage caused by the safety defect. This product safety regime also creates reporting and other compliance obligations for manufacturers and suppliers, including to comply with product safety standards and product bans, and to undertake mandatory reporting of products associated with serious death or injury. It also establishes a process for product recalls
- **Sales practices** – Specific, prescriptive rules governing certain types of sales practices, including door-to-door sales, telephone sales and lay-by arrangements.

Corporations which contravene the Australian Consumer Law are subject to penalties of up to the greater of A$10 million, three times the value of the benefit gained from the contravention, or if the value of the benefit cannot be ascertained, 10% of the annual turnover in Australia of the corporate group during the 12-month period prior to the contravention. Individuals are subject to maximum penalties of A$500,000 per contravention of the Australian Consumer Law.

FRANCHISING AND OTHER PRESCRIBED INDUSTRY CODES

The CCA also prohibits contravention of certain codes which govern the conduct of participants in a particular industry, and which are prescribed by regulation for this purpose. A court may order a party which has contravened (or been involved in a contravention of) a prescribed industry code to compensate a person for loss or damage suffered as a result of that contravention. The ACCC may also issue an infringement notice imposing a penalty.

For example, one prescribed code governs conduct by suppliers, distributors and retailers involved in marketing petroleum, and another governs conduct by traders and growers concerning certain horticultural produce. A third code – the *Franchising Code* – governs conduct between franchisors and franchisees. The Franchising Code applies to arrangements (whether or not written) under which:

- a franchisor grants a franchisee the right to carry on a business of offering, supplying and/or distributing goods or services in Australia under a system or marketing plan substantially determined by the franchisor (or its associate)
- the operation of the business is substantially or materially associated with a trade mark, advertising or a commercial symbol owned, used, licensed or specified by the franchisor (or its associate)
- the franchisee must pay or agree to pay the franchisor (or its associate) an amount of money before starting or continuing the business, such as an initial capital investment payment, a payment for goods or services, a training fee, or a fee based on a percentage of income.

As a result, the *Franchising Code* applies to a wide range of business activities in Australia, including, for example, the conduct of retail businesses in the motor vehicle and fast food industries which fall within the definition outlined above.

The *Franchising Code* is highly prescriptive – for example, it requires a franchisor to provide specific information to a franchisee before entering into a franchise agreement, and governs the manner and form in which that information is provided. The *Franchising Code* also regulates the procedure for termination of a franchise agreement by a franchisor, and establishes a process for resolving disputes between parties to a franchise agreement, which includes recourse to mediation conducted by a mediator nominated by an appointee of the relevant Commonwealth Minister. Financial penalties may be applied where the code is breached.

"They are very good on international matters because they have that network, and their experience is broader than that of a lot of their competitors."

CHAMBERS ASIA PACIFIC, 2020

RECOMMENDED ACTION

- Consider whether a proposed merger, acquisition or joint venture should be notified to the ACCC, and take the ACCC's merger control processes and timelines into account when planning a transaction.
- Be aware of the prohibitions on anti-competitive conduct under the CCA when evaluating and structuring commercial arrangements.
- Consider the potential impact of third party access obligations on plans to invest in existing or new infrastructure in Australia.
- Identify and adopt the contractual, procedural and/or systemic changes which may be required to comply with the Australian Consumer Law, and any applicable industry code prescribed under the CCA.
- Implement an effective compliance program to minimise the risk of contravening the CCA.

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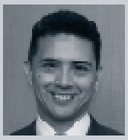

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PART C
11

BUSINESS TRANSACTIONS

Trade regulation

Australia is a signatory to the General Agreement on Tariffs and Trade and is a member of the World Trade Organization. Australia's control over its trade is largely exercised by the Australian Border Force under the *Customs Act 1901* (Cth), *Biosecurity Act 2015* (Cth), international conventions to which Australia is a party, and related regulations.

FREE TRADE AGREEMENTS

Free trade agreements (FTAs) are international agreements between two or more countries to eliminate tariffs on substantially all trade between them. FTAs promote stronger trade and commercial ties between participating countries, and open up opportunities for Australian exporters and investors in key markets.

Australia is party to 13 FTAs, with New Zealand, Singapore, Thailand, United States, Chile, Association of South East Asian Nations (ASEAN) (together with New Zealand), Malaysia, Korea, Japan, China, the signatories to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Hong Kong and Peru. The agreements with China, Japan, the United States and Korea alone account for 49.4% of Australia's exports.

The Indonesia-Australia Comprehensive Economic Partnership Agreement and the Pacific Agreement on Closer Economic Relations (PACER) Plus have been concluded but are not yet in force. Australia is currently negotiating six new FTAs – the Australia-European Union FTA, Australia-Gulf Cooperation Council (GCC) FTA, Australia-India Comprehensive Economic Cooperation Agreement, Pacific Alliance Free Trade Agreement, Regional Comprehensive Economic Partnership and the Trade in Services Agreement. It is also currently scoping entering into FTAs with the United Kingdom, which has left the EU. The countries that will be covered by these negotiations account for a significant share of Australia's trade.

IMPORTS

Most goods may be imported into Australia without restriction, although customs and biosecurity procedures must be followed. The importation of certain goods into Australia is prohibited absolutely or conditionally, depending upon the categorisation of the goods in the various schedules to the prohibited imports regulations.

Duty is payable on imported goods unless an applicable exemption applies. Duty is generally imposed as a percentage rate of the customs value of the imported goods. However, for some goods, such as alcohol or petroleum, the duty is calculated by volume.

There are several methods of valuing goods for customs purposes. The method most often applied is the transaction value which is based on the price actually paid for the imported goods subject to certain adjustments. A major condition for using the transaction value method is that there is no corporate or personal relationship between the buyer and seller which may affect the price.

A business can apply to be accredited as an Australian Trusted Trader, which involves assessment and accreditation against World Trade Organization standards. Australian Trusted Traders receive a range of benefits including priority customs processing and fewer checks on imported goods, simplified visa processing for skilled workers arriving from overseas, and duty deferrals.

SCHEMES ALLOWING FOR THE DUTY-FREE OR CONCESSIONAL IMPORTATION OF GOODS

Tariff Concession System	provides free or concessional entry to imported goods in the absence of Australian produced substitutes. The scheme involves the assessment of applications made by importers for Tariff Concession Orders. Certain classes of goods such as food, clothing and motor cars are excluded from the scheme
Deferment of Duty	provides a duty deferral facility whereby importers can store goods on which duty has not been paid "underbond" until they are ready to pay the duty
Enhanced Project By-Law Scheme	provides for duty concessions on eligible goods for major projects in the mining, resource processing, food processing, food packaging, manufacturing, agriculture and gas supply industry sectors (closed to new applicants)
Certain Inputs to Manufacture Program	provides for relief from duty on certain imported raw materials, and intermediate goods as well as metal materials and goods, that are demonstrated to be substantially superior to comparable goods available in Australia
Tradex Scheme	provides for an exemption from import duties and the goods and services tax (GST) on imported goods which are to be subsequently exported from Australia within one year, or used as a component in other goods that are exported. The Tradex Scheme is an alternative to the duty drawback regime which allows an importer to claim back duty which is paid on goods which are subsequently exported

GST is normally also levied on goods imported into Australia. In certain circumstances, an importer may defer payment of GST for a defined period (see Part D – Taxation for more information on GST).

Imports are also subject to the scrutiny of the Australian Border Force (ABF), which aims to prevent the entry and spread of pests and diseases coming into Australia.

Electronic reporting of cargo imports using the ABF's Integrated Cargo System (ICS) is mandatory.

CABOTAGE REQUIREMENTS

The Coastal Trading (Revitalising Australian Shipping) Act 2012 (Cth) *(Coastal Trading Act)* implements a three tier licensing regime for vessels involved in the coastal trade in Australia, replacing an older regime which required vessels to hold either a licence, single voyage permit or a continuing voyage permit.

The *Coastal Trading Act* provides that a vessel is engaged in "coastal trading" and will thus require a licence, if, for or in connection with commercial activity, the vessel transports passengers or cargo between one or more States and/or Territories. This particularly impacts upon importers seeking to discharge their goods at multiple ports in different States and/or Territories.

In October 2019, the Government commenced consultation on a number of reforms intended to simplify a number of aspects of the *Coastal Trading Act* and reduce administrative costs associated with the current regime, primarily in relation to temporary licences. These reforms do not yet have the force of law.

ANTI-DUMPING

Australia has enacted anti-dumping legislation which is administered by the Anti-Dumping Commission (ADC). Dumping occurs when goods are exported to Australia at a price below the "normal value" of the goods. "Normal value" is usually taken to be the domestic price of the goods in the country of export.

The ADC may investigate complaints of dumping and will make a final decision as to whether or not anti-dumping measures should be imposed.

Remedial action can be taken where dumping causes or threatens to cause material injury to an Australian industry. For example, a dumping duty can be imposed on imported goods to offset the effects of dumping, or a price undertaking from the exporter can be sought.

Exporters of goods to Australia may also receive financial assistance (or income or price support) from a foreign government. If the effect of this support causes or threatens to cause material injury to an Australian industry, remedial action may also be taken.

The legislation the ADC deals with is the *Customs Act 1901* (Cth), the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) and associated legislation and regulations.

The ADC has established the International Trade Remedies Forum (ITRF) which brings together representatives from manufacturers and producers, importers, unions and Australian Government agencies. The ITRF meets twice per year and is chaired by the Anti-Dumping Commissioner. The ITRF provides a mechanism for key users of the anti-dumping system to advise Government on the operation of the anti-dumping system and potential improvements to it.

"They are responsive, proactive, pragmatic and have the knowledge and experience of our industry, business drivers and values to add a commercial perspective to the legal advice they provide."

CHAMBERS ASIA PACIFIC, 2020

EXPORTS

There are relatively few restrictions on the export of goods from Australia.

Export of some goods is absolutely prohibited or is only permissible with the approval of the relevant Minister or authorised person. The main restrictions relate to weapons and goods (including technology) that could be used for military or other weapons purposes, and goods and services the subject of United Nations sanctions. In addition, a total prohibition applies to the export of protected wildlife and some heritage items. Other legislation may also apply to the export of specific goods (eg wine).

Although GST is generally not payable on exports, the Australian Taxation Office requires exporters to keep appropriate records to demonstrate that the relevant goods have actually been exported (see also Part D – Taxation).

Electronic reporting of cargo exports using the Integrated Cargo System (ICS) operated by ABF is preferred though manual reporting is also available.

The Department of Foreign Affairs and Trade (DFAT) administers Australia's sanction laws which restrict or prohibit the export of certain goods to some countries, individuals and entities. The Minister for Foreign Affairs may be able to grant a permit authorising an activity that would otherwise contravene a sanction law.

RECOMMENDED ACTION

- Customs legislation and procedures for importing, exporting and compliance can be complex and will depend on the type of goods your business deals with.
- You may need to seek specific advice as to whether your business practices will meet customs requirements.

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"They are prepared to provide practical and pragmatic advice."

CHAMBERS ASIA PACIFIC, 2018

BUSINESS TRANSACTIONS

Anti-bribery and corruption regulation

PART C

12

In 2018, Australia maintained its ranking of 13 out of 180 countries, and score of 77 (where 0 on the scale represents highly corrupt, and 100 represents very clean), on Transparency International's Corruption Perceptions Index.

While this reflects Australia's strong reputation globally as a jurisdiction that does not tolerate bribery or corruption, Australia's score has dropped since scoring 85 in 2012. As a result of various external pressures, including the Corruption Perceptions Index score, significant reforms are in process in Australia, which aim to strengthen anti-bribery and corruption regulation and better facilitate prosecution of corruption and bribery offences.

Each of Australia's Federal, State and Territory governments have enacted laws which strictly prohibit bribery and corruption. The Federal laws prohibit the bribery of foreign public officials and Commonwealth public officials, whereas the State and Territory laws prohibit the bribery of both public officials and private individuals.

The Australian Government has recently launched a series of reforms to strengthen Australia's anti-bribery and corruption regulation, highlighting the need for companies to take a considered and proactive approach to bribery and corruption issues.

BRIBERY OF FOREIGN OFFICIALS

THE OFFENCE

In Australia, bribing a foreign official is an offence under s 70.2 of the Schedule to the *Criminal Code Act 1995* (Cth) (Criminal Code). The offence has the following elements:

1. Provide or offer a benefit/cause a benefit to be offered or provided

2. Benefit is not legitimately due

3. Intention of influencing a foreign public official to obtain/retain business or a business advantage

A benefit includes any advantage and is not limited to property. The benefit provided/offered does not need to be given directly to the relevant public official – providing or offering to provide a benefit to, for example, a family member or friend of that official would suffice. Similarly, a person who does not personally provide or offer a benefit, but instead procures someone else to do so on his or her behalf, is likely to be found to have aided, abetted, counselled or procured a bribe, which is also an offence under the Criminal Code.

The prohibition is particularly broad because it is not necessary to prove that a benefit was actually provided or that a business advantage was in fact obtained/retained. Further, the concept of a foreign public official is broadly defined and could include, for example, employees of state-owned commercial enterprises.

The following types of benefits could be captured by s 70.2 if not legitimately due and offered or given with the intention of influencing a foreign public official to obtain or retain business or a business advantage:

- making political or charitable donations
- gifts or corporate hospitality
- promotional expenses, travelling expenses or accommodation
- employing foreign public officials or their relatives
- provision of services such as use of a car.

The offence applies where the relevant conduct occurs:

- wholly or partly in Australia; or
- wholly or partly on board an Australian aircraft or ship; or
- wholly outside Australia and the person is an Australian citizen, resident of Australia or a body corporate incorporated under a law of Australia.

There are defences under the Australian law for foreign bribery where:

- a foreign or local written law required or permitted the provision of the benefit (s 70.3); or
- the benefit to the foreign public official was a facilitation payment (s 70.4). A benefit is a facilitation payment where: the value of the benefit was of minor nature; the payment was made for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and a record of the conduct was made as soon as practicable after it occurred.

This facilitation payments defence is controversial and a March 2018 Senate inquiry into foreign bribery recommended it be abolished. Many foreign investors choosing to establish operations in Australia prefer to adopt a general policy against the use of facilitation payments, particularly where their operations also fall within the jurisdiction of anti-bribery regimes that do not permit such payments (for example, the United Kingdom's *Bribery Act*).

POTENTIAL PENALTIES

Bribing a public official carries significant penalties for offenders. For example, an individual who is found guilty of bribing a foreign public official may be imprisoned for not more than 10 years and/or a maximum fine of A$2.1 million imposed. In the case of a corporation, the maximum fine is the greater of:

- A$21 million;
- if the gain attributed to the bribery or corrupt conduct can be ascertained, 3 times the value of any benefit from the contravention; or
- if the gain attributed to the bribery or corrupt conduct cannot be readily ascertained, up to 10% of the turnover of the corporation and all of its related bodies corporate.

LIABILITY OF CORPORATIONS FOR THEIR REPRESENTATIVES

A corporation will be liable for bribery of foreign officials by its employees, agents or officers who are found to have bribed a foreign official if that person was acting within the actual or apparent scope of their authority, and the corporation expressly, tacitly or impliedly authorised or permitted the conduct (ss 12.1-12.3). The legislation gives an expansive definition of when conduct is "expressly, tacitly or impliedly authorised or permitted". This could include where:

- The board or a "high managerial agent" of the corporation knowingly or recklessly carried out the conduct, or expressly or impliedly authorised or permitted it
- A corporate culture existed that "directed, encouraged, tolerated or led to non-compliance" with the anti-bribery provisions
- The corporation failed to "create and maintain a corporate culture that required compliance with" the anti-bribery provisions.

In addition, the failure by directors or officers of a company to take proper measures to prevent and detect bribery by employees or other officers may be a breach of their duties under the *Corporations Act 2001* (Cth). The corporate regulator ASIC is taking an increasing interest in directors' oversight of bribery and corruption risks and is starting to work with the Australian Federal Police (who have responsibility for enforcing the foreign anti-bribery laws) to investigate foreign bribery.

PROPOSED REFORMS

Until recently, a Bill was before the Federal Parliament which proposed significant reforms to the existing foreign bribery offence, including:

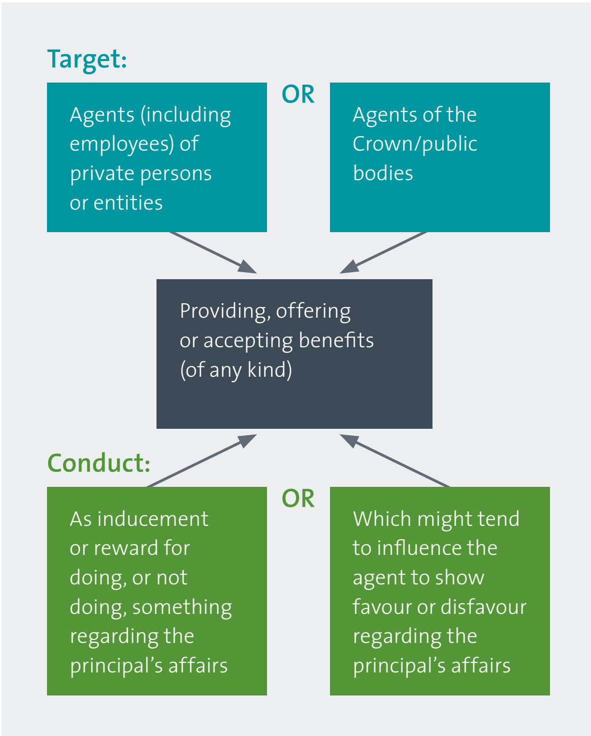
- replacing the requirement that a benefit or advantage is not "legitimately due" with the concept of "improperly influencing" a foreign public official;
- removing the need to demonstrate that an official was influenced in the exercise of his or her official duties; and
- extending the offence to include instances where the advantage sought is personal in nature, rather than being limited to business advantages.

The Bill also proposed to introduce a new offence of "failing to prevent" bribery of a foreign public official, which is modelled on a very similar offence in the UK Bribery Act. This offence will be committed by a company if an "associate" (which includes an officer, employee, contractor, agent or service provider) bribes a foreign public official for the profit or gain of the company. The company will have a defence if it can prove that it had in place "adequate procedures" designed to prevent the offence. The penalties for failing to prevent bribery would be the same as the penalties available in respect of the existing offence.

The Bill lapsed prior to the federal election in early 2019; however, in light of the focus being placed on anti-bribery and corruption laws, a similar Bill may be reintroduced in the foreseeable future.

DOMESTIC BRIBERY

Each State and Territory has legislation criminalising bribery of both public officials and private individuals. The Commonwealth also criminalises the bribery of Commonwealth public officials under Divisions 141 and 142 of the Criminal Code. Each statute is different but they have a number of similar features – the following situations are likely to give rise to a serious concern:



Courts infer an intention to influence from all the circumstances in which the benefit is given, eg the size of the benefit, the frequency of benefits, the context (eg if there was an impending decision regarding the grant of a licence or award of a contract) and whether the benefit was recorded by either party and recorded accurately.

POTENTIAL PENALTIES

The penalties for domestic bribery are also heavy: prison terms ranging from 7 years to up to 21 years may be imposed on individuals, and companies are liable to significant fines.

LIABILITY OF CORPORATIONS FOR THEIR REPRESENTATIVES

Companies may be criminally liable for bribery committed by their employees, officers or agents. Some States and Territories have adopted the expansive Commonwealth model (described above in relation to foreign bribery). In others, corporate liability is likely to arise only where a directing mind or will of the company – typically a director or senior manager – is involved in the offence.

As with foreign bribery, companies/directors may also be liable where they aid, abet, counsel or procure bribery – that is, if they intentionally participate in the offence, for example by requiring or encouraging bribery, or providing funds to allow employees or agents to commit offences.

ENFORCEMENT IN AUSTRALIA

In a world where business is conducted across national boundaries, foreign bribery and corruption is increasingly in the spotlight. Countries, including Australia, are now becoming more active in investigating suspected bribery both within and outside Australia and bringing enforcement action.

Investigation of bribery and corruption continues at a state level, with state-based anti-corruption agencies having conducted a large number of investigations this year, many of which have resulted in enforcement action.

The Australian Government is also taking steps to encourage internal and external reporting of bribery and other corporate crimes and misconduct. New laws enacted in 2019 have enhanced private sector whistleblower protections and signalled Australia's growing appetite for law reform targeting corporate misconduct. There have also been suggestions that Australia is looking to introduce a "deferred prosecution agreement" scheme that would allow a prosecutor and a company to reach a voluntary settlement in relation to alleged corporate crime (including bribery).

RECOMMENDED ACTION

- Organisations considering investment in Australia need to be conscious of anti-bribery legislation, have policies and procedures in place to comply with that legislation and take steps to ensure that compliance is embedded within the organisation's culture.

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BUSINESS TRANSACTIONS

PART C

13

Protection of names and other intellectual property

All businesses operating in Australia are entitled to the protection of brands and other intellectual property through legislation and the common law.

Federal legislation protects intellectual property such as patents, designs, copyright, trade marks, circuit layouts and plant varieties. Confidential information and trade secrets are protected by common law actions for breach of confidence.

Australia is a member of the Paris Convention for the Protection of Industrial Property, the Berne and Universal Copyright Conventions, the Madrid Agreement Concerning the International Registration of Marks, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), and the Patent Cooperation Treaty.

TRADING STYLES AND TRADE NAMES

Trading styles and trade names are governed by three areas of law in Australia:

- company and business names legislation – the *Corporations Act 2001* (Cth) and the *Business Names Registration Act 2011* (Cth)
- registration of trade marks under the *Trade Marks Act 1995* (Cth) and actions for infringement of trade marks registered under that Act
- action for misleading or deceptive conduct under the *Australian Consumer Law* contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) (ACL) and State and Territory fair trading legislation (which applies the *Australian Consumer Law* to businesses conducted in the States and Territories), as well as under the common law action for passing-off. (See Chapter 10 – Merger control, competition law and consumer protection for more information.)

Registration of company and business names merely complies with legislative requirements to register a name under which business is conducted by a person or entity trading in Australia. Registration conveys no proprietary right to the name (although common law rights to the name may arise from its use).

TRADE MARKS

To obtain registered trade mark protection, the owner is required to register the trade mark, which can be a word, device (logo/picture), shape, colour, scent, taste, sound or aspect of packaging, or a combination of any of the above, as long as they are used as trade marks.

Registration entitles the owner to sue for infringement of the trade mark if another person uses the same or a similar mark for the same or similar goods or services for which the trade mark is registered. Importantly, registration means that there is no requirement to prove reputation (whereas evidence of reputation is required to enforce unregistered rights in a trade mark).

PATENTS

A patent is a form of protection for inventions. It is a monopoly granted to a patentee for a limited period.

Australia has standard patents and innovation patents.

	Standard Patent	Innovation Patent
Duration of protection*	20 years	8 years
Requirements	Higher threshold. Must be novel and/or inventive	Lower threshold. Must be innovative and useful
Advantages	Longer period of protection	Simpler and faster to obtain. Appealing to small to medium businesses

Note

* In some cases, patents for pharmaceutical substances can be extended for up to a further 5 years.

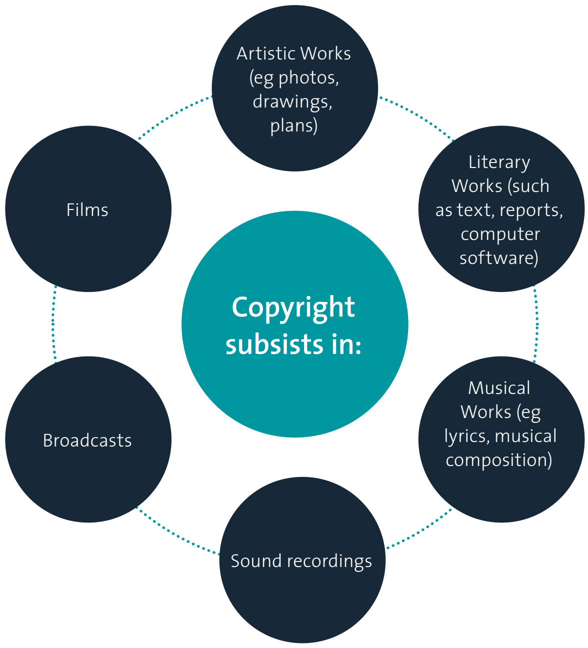
Patent specifications are usually prepared by specialist patent attorneys. Patent applications are then examined by the Commissioner of Patents to ascertain whether the specification provides an adequate written description of the invention and whether the claimed invention meets the threshold criteria of novelty, inventiveness (or, for innovation patents, the lower threshold of innovation) and usefulness.

When a patent is granted, the patentee may seek to prevent others from performing or producing the invention without the patentee's permission by an infringement action in the Federal or State Supreme Courts. It is also possible to apply to the courts to revoke a patent if the invention disclosed in the patent is not adequately described, lacks novelty, was obvious to a person skilled in the art (or, for an innovation patent, not innovative) as at the date of application or is not useful for its intended purpose or application.

Following amendments made to Australia's *Patents Act 1990* (Cth) in 2013, standard patents granted on applications that are filed or examined after 15 April 2013 are subject to more demanding tests for inventiveness and written description that are closer to the tests currently applied under the European Patent Convention.

COPYRIGHT

Copyright is regulated by the *Copyright Act 1968* (Cth) (*Copyright Act*) and does not require registration. Copyright can automatically subsist in various "works" and other materials.



Copyright confers on its owner a right to prevent someone else from making an unauthorised copy of the work or doing certain other actions.

In order to obtain copyright protection, it is necessary that a work be original (meaning that it is not copied from another source), and that it involves a sufficient degree of effort. The artistic quality or merit of the work is not relevant. It is not possible to obtain copyright protection for ideas, concepts, facts or opinions; it is only possible to protect the particular form in which they are expressed.

Copyright can be infringed as a result of a substantial reproduction being made but this is a qualitative rather than a quantitative test. "Moral" rights are also protected by the *Copyright Act*. These are the right of attribution of authorship, the right not to have a work falsely attributed and the right to maintain the integrity of a work.

CONFIDENTIAL INFORMATION

There is no limit on the length of time that information can be kept confidential, although there are obvious practical difficulties in making sure that the information is not disclosed or does not otherwise enter the public domain.

Obligations of confidentiality are commonly spelt out in contracts between the person giving and the person receiving the information. However, even if the contract remains silent, a breach of confidence can arise if three elements are satisfied:

- the information must be confidential in nature, as opposed to something that is public property or public knowledge;
- the information must have been communicated to others in circumstances which give rise to an obligation of confidence; and
- the recipient of the information must have made, or must be about to make, an unauthorised disclosure or use of that information which is to the detriment of the confiding party.

Once established, the duty of confidence remains until the information loses its quality of confidence. Once information is in the public domain it will cease to be confidential.

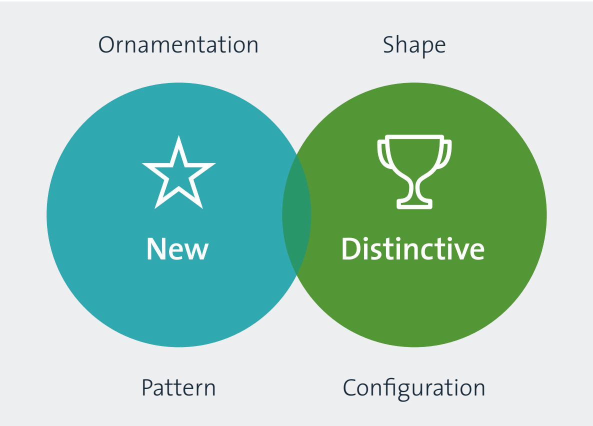
"They have been willing to take a practical approach to fulfil our commercial purpose."

CHAMBERS ASIA PACIFIC, 2020

DESIGNS

Designs are a form of monopoly and require registration in Australia. A design can be registered for a maximum of 10 years.

A "design" refers to the overall appearance of a product resulting from one or more of the following features of shape, configuration (3-dimensional aspects), pattern or ornamentation (2-dimensional aspects) of a product. This does not include a method or principle of construction, the feel of the product or the materials used in the products.



The *Designs Act 2003* (Cth) protects registered designs which are new and distinctive compared with designs publicly used in Australia, or published in a document anywhere in the world. However, publication or use of a design at an official or officially recognised international exhibition will not affect design protection as long as an application for design protection is filed within 6 months of the first publication or use. A design will qualify as new unless it is identical to a design that forms part of the prior art base for the design. A design will be distinctive provided it is not substantially similar in overall impression to a design that forms part of the prior art base.

DOMAIN NAMES

If you are considering establishing or operating a business in Australia, you may wish to register a ".com.au" domain name. To register a .com.au domain name, you must have a legitimate connection to the domain name. For example, the .com.au domain name registration may be based on an Australian trade mark application or registration, or an Australian company or business name or the name of a foreign company licensed to trade in Australia. This means that overseas entities which are not registered in Australia, but have an Australian trade mark registration or application, or a sanctioned presence in the Australian market, can obtain a .com.au domain name licence, provided that domain name is available and the other eligibility requirements are met.

Importantly, registration does not confer ownership of the domain name, but rather an exclusive licence to use it for the period of registration. Domain names are licensed on a first come, first served basis, and there is no hierarchy of rights (eg as between business names versus trade mark registrations) which can enable a party to claim priority over an existing registrant of a particular domain name, except where the registration is in bad faith (eg for "cyber-squatting" purposes).

BUSINESS NAMES

On 28 May 2012, a package of new business names legislation was enacted. The legislation establishes a new business names registration service managed by the Australian Securities and Investments Commission (ASIC) on an Australia wide basis, rather than on an individual State and Territory basis. If you are considering establishing a business in Australia, you only need to register your business name once on a single register and no longer need to register your business name in all Australian States and Territories in which the business will operate.

SECURITY INTERESTS IN INTELLECTUAL PROPERTY

Australia has a single, national, online Personal Property Securities Register (PPS Register) of security interests created over personal property. Personal Property includes all traditional statutory based intellectual property (ie trade marks, patents, designs, copyright and plant breeder's rights) and the licences of such rights. The register was created by the *Personal Property Securities Act 2009* (Cth) which commenced on 30 January 2012 and means that it is no longer necessary to search separate intellectual property registers maintained by IP Australia for security interests. If you are planning to operate a business in Australia, registration of your business' security interests on the PPS Register is necessary to protect the security interests. Registration on the PPS Register also affects the priority of your security interest over other security interests.

MANAGING YOUR INTELLECTUAL PROPERTY

A successful strategy to protect your company's intellectual property is vital to its success. Good ongoing intellectual property management will entail the following:

Intellectual property management strategy	
Key steps	**Benefits**
Maintain regular reviews of registered intellectual property to ensure all your company's variable IP is protected through registration where this is possible.	• Ensures the intellectual property as registered continues to be used • Ensures the company does not bear the cost of maintaining intellectual property no longer in use
Undertake thorough searches before adopting a new name, product or process not only of relevant registers but, in the case of trade marks, also of business and company name registers, domain name registers, trade directories and the internet generally	• Seeks to identify pre-existing rights of third parties to avoid infringement or passing-off or a breach of the *Australian Consumer Law* contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth) and State and Territory fair trading legislation
Commercialise technology and intellectual property by managing and documenting licensing, assignments and/or cross-licensing arrangements Have regard to the significant local and international tax and accounting consequences of such arrangements	• Maximises returns to the company from its intellectual property portfolio • Provides access to the intellectual property of third parties • Ensures appropriate tax and accounting structures • Ensures licensing, assignment and cross-licensing arrangements meet their commercial objectives
Align the intellectual property portfolio with the company's overall corporate goal For example, ensure that: • any sponsorship or other arrangements entailing use of its name or technology, are consistent with, and enhance, the corporate goal and company image • marketing, including marketing in social media, is consistent with the corporate goal	• Ensures that the management of the intellectual property portfolio is consistent with and enhances the broader company goals

RECOMMENDED ACTION

- As soon as a decision is made to establish a business in Australia, it is important to review all of the intellectual property you wish to use in Australia to determine the extent to which it is protected (for example, by granted patents or registration of trade marks) and, if it is not protected, to determine what may be required.

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Kellech's practice incorporates contentious and non-contentious IP law, including opposition, infringement and revocation proceedings. She holds a degree in science, with a major in chemistry and advises on the patent infringement and validity, trade marks, registered designs and copyright; IP due diligence and trade mark prosecution.

The team is "pre-eminent in the intellectual property space with regards to legal skills, application and consideration of the desirable commercial outcomes".

LEGAL 500, 2018

BUSINESS TRANSACTIONS

PART C

14

Privacy and data protection

Australia has a complex framework of privacy legislation, interacting and overlapping at Commonwealth and State levels.

This legislation places constraints on the manner in which personal information can be collected, used and disclosed, and it imposes consequences if personal information is transferred to a jurisdiction outside of Australia. There is also a mandatory data breach notification scheme.

The key issues to bear in mind are:

- the *Privacy Act 1988* (Cth) (*Privacy Act*) applies to Australian Federal Government agencies, all private sector and not-for-profit organisations with an annual turnover of over A$3 million, all private health service providers and some small businesses (collectively APP entities)
- a number of States and Territories have privacy legislation regulating the handling of personal information by State and Territory Government agencies in the State or Territory
- some States or Territories also have separate laws including privacy principles regulating the handling of health information in the State public and private sectors.

PRIVACY FRAMEWORK

Privacy in Australia is essentially governed by the *Privacy Act*. The Act contains Australian Privacy Principles (APPs) which regulate the handling of personal information in the public and private sector.

At common law, Australian courts traditionally did not recognise the right of privacy but the High Court has in recent years shown an inclination to revisit the issue – accordingly, additional privacy obligations may arise under the common law.

In addition to the privacy regulation imposed by the *Privacy Act,* Australia's *Spam Act 2003* (Cth) regulates the dissemination of unsolicited commercial electronic messages (generally emails and SMS) and the *Do Not Call Register Act 2006* (Cth) regulates and, in some cases prohibits, telemarketing calls. There is also State and Territory regulation of State and Territory Government agencies and of health information in that State or Territory.

EXTRA-TERRITORIAL APPLICATION

The *Privacy Act* will extend to an act done, or practice engaged in, outside Australia by an organisation that has an Australian link. An Australian link will exist if the organisation or operator is:

- an Australian Citizen
- a person whose continued presence in Australia is not subject to a limitation as to time imposed by law
- a partnership formed in Australia
- a trust created in Australia
- a body incorporated in Australia
- an unincorporated association that has its central management and control in Australia.

If an organisation does not fall into one of the above categories, it will have an Australian link (and therefore be obligated to comply with the *Privacy Act*) if:

- the organisation carries on business in Australia
- the personal information was collected or held by the organisation in Australia.

However, an activity engaged in outside Australia will not be an infringement of the Act if that activity is required by an applicable law of a foreign country.

EXEMPTIONS

There are a number of provisions that may exempt the private sector from complying with the *Privacy Act*. Small businesses with an annual turnover of A$3 million or less are, with some exceptions, exempt from the legislation.

The *Privacy Act* does not apply to personal information contained in "employee records". However, as the exemption does not apply to contractors and may not apply to all employee information collected in the course of employment, it is prudent for companies to operate on the basis that the APPs will apply to all personal information relating to employees.

The Act specifically permits the exchange of personal information (other than "sensitive information") between related bodies corporate, locally or internationally, although each of the related bodies corporate must observe the APPs in handling information received from another related body corporate. The provisions governing cross-border disclosures will apply to transfers of personal information by organisations from Australia to related bodies corporate overseas.

REGULATION IN AUSTRALIA

Of principal relevance to investors in Australia will be the APPs which are the primary source for regulating the handling of personal information. Paraphrased, the APPs provide that:

- an organisation must develop and implement practices, procedures and systems that ensure compliance with the APPs and enable the organisation to deal with inquiries (a privacy policy): APP 1
- an individual must have the option of not identifying themselves, or of using a pseudonym, when dealing with an organisation: APP 2
- personal information should only be collected if it is reasonably necessary for one or more of the organisation's functions or activities: APP 3.2
- an organisation must not collect sensitive information unless the individual has consented and the information is reasonably necessary for one or more of the organisation's functions or activities: APP 3.4
- personal information should only be collected by lawful and fair means: APP 3.5
- if it is reasonable and practicable to do so, an organisation must collect personal information about an individual only from that individual: APP 3.6

- an organisation must, within a reasonable period of receiving unsolicited personal information, determine whether the organisation could have collected the information under APP 3. If it could have collected such personal information, then APP 3 applies as if the information was collected as solicited personal information. If not, then the organisation must, as soon as it is practicable, but only if lawful and reasonable to do so, destroy the information or ensure that the information is de-identified: APP 4
- an organisation must at or before the time or, if that is not practicable, as soon as practicable after, an organisation collects personal information about an individual, take such steps (if any) as are reasonable in the circumstances to notify or make the individual aware of various matters such as the fact the entity collected the personal information, the purposes of collection, any other bodies the information is disclosed to, whether the information is disclosed overseas and the countries where it will be disclosed: APP 5
- an organisation must not use or disclose personal information about an individual for a purpose other than the primary purpose of collection, unless an exception applies: APP6
- an organisation must not use or disclose personal information for the purposes of direct marketing, unless an exception applies: APP7
- if an organisation discloses personal information about an individual to an overseas recipient, even if the APPs do not apply to the overseas recipient, the organisation must take reasonable steps to ensure that the overseas recipient does not breach the APPs in relation to the disclosed information, unless an exception applies: APP 8
- an organisation must also take reasonable steps in relation to personal information "held" by an entity to ensure that the personal information which it uses or discloses is accurate, up-to-date, complete and relevant, in light of the purpose of the use or disclosure: APP 10.2
- an organisation must take reasonable steps to protect the personal information it holds from misuse, interference, loss and unauthorised access, modification or disclosure: APP 11.1
- an organisation must take reasonable steps to destroy or de-identify personal information if it is no longer needed for the purpose for which it was collected: APP 11.2
- an organisation must provide an individual with access to his or her personal information on request by the individual, unless an exception applies: APP 12
- where an individual is able to establish, or the company suspects that personal information is not accurate, complete or up-to-date, the company must take reasonable steps to correct the information. The company must respond to a request to correct information within a reasonable time, and must not charge the individual for making a request or correcting the information: APP 13
- if the organisation corrects personal information that it has disclosed to a third party, then the company must take reasonable steps to notify the third party of the correction if requested to do so by the individual, unless it is impracticable or unlawful to do so: APP 13.2.

TRANSBORDER DATA FLOWS

Before an organisation transfers personal information overseas it must take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the APPs. Reasonable steps will include the organisation entering into an agreement with the overseas recipient for the overseas recipient to comply with the APPs. Where an organisation discloses personal information about an individual to an overseas recipient and the overseas recipient is not subject to the *Privacy Act* then, if that overseas recipient breaches the APPs (as if they applied to the recipient), that breach by the overseas recipient is taken to be a breach by the organisation.

An organisation will not be required to take reasonable steps (and will not be potentially liable for the acts of an overseas recipient) in a number of circumstances, including where:

- the organisation reasonably believes that:
  - the overseas recipient is subject to a law, or binding scheme, that has the effect of protecting the information in a way that, overall, is at least substantially similar to the way in which the APPs protect the information; and
  - there are mechanisms that the individual can access to take action to enforce that protection of the law or binding scheme; or
- if both of the following apply:
  - the organisation expressly informs the relevant individual that if he or she consents to the disclosure of the information, the reasonable steps requirement will not apply to the disclosure;
  - after being so informed, the individual consents to the disclosure.

DATA BREACH NOTIFICATION

Under the Notifiable Data Breach scheme an organisation is obliged to report eligible data breaches

An eligible data breach occurs where:

- there is unauthorised access to or disclosure of information that an organisation holds and the information is likely to result in serious harm to any of the individuals to whom that information relates, and the organisation has not been able to prevent the likely risk of serious harm with remedial action.

Whether a reasonable person would conclude that a person was likely to suffer serious harm as a result of the breach depends upon a broad range of factors including the nature and sensitivity of the information.

If a data breach occurs then organisations will be obliged to:

- assess whether there are reasonable grounds to believe an eligible data breach has occurred within 30 days of developing a suspicion of such a breach
- once an organisation has reasonable grounds to believe there has been a notifiable data breach, prepare a statement setting out the contact details of the organisation, the nature of the breach and steps it recommends affected individuals take in response. A copy must also be provided to the Office of the Australian Information Commissioner (OAIC)
- taking such steps as are reasonable in the circumstances to notify affected and at risk individuals of the contents of the statement as soon as is practicable. If direct notification is not practicable, the organisation must publish the statement on its website and take reasonable steps to publicise its contents.

The OAIC may also direct an entity to notify affected individuals if it becomes aware that there are reasonable grounds to believe that the entity has committed a notifiable data breach.

CONSUMER DATA RIGHT AND OPEN BANKING

In 2017 the Australian Government announced its intention to introduce a Consumer Data Right (CDR) in Australia. This right allows customers to direct organisations to share their data with other entities, to improve customer choice and encourage innovation. Banking is the first industry to which the CDR has been applied (known as the Open Banking regime). The Australian Government will next apply the CDR to the energy and telecommunications sectors.

The Australian Competition and Consumer Commission (ACCC) has made available a lock down version of the foundational rules required to implement the CDR in banking.

How the Government implements the CDR in the banking sector gives a good indication of what investors can expect from the CDR as it is rolled out across other sectors in Australia.

RECOMMENDED ACTION

- It is important for investors in Australia to ensure that any entity they acquire, or operation they establish, complies with the APPs and other applicable privacy laws.
- In addition, investors should ensure that contracts involving the transmission of personal information out of Australia place an obligation on recipients to comply with the APPs and any other privacy principles operating in the Australian jurisdiction of origin, unless the recipient is located in a jurisdiction which already has a privacy regime at least substantially similar to the regime in place in Australia. This may include requesting an indemnity from the recipient to cover any loss to the discloser relating to a breach of the APPs by the recipient.
- Similarly, investors should consider when transmitting personal information to Australia from a jurisdiction which has a sophisticated privacy regime, whether there are steps which the investor is required to take by the law of that other jurisdiction.

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BUSINESS TRANSACTIONS

PART C

15

Employment

All employment in Australia is founded on individual contracts, but is often affected by employment legislation and instruments made under that legislation.

In general, employers and employees may negotiate the terms and conditions of employment. However, the contract of employment between an employer and an employee will be subject to:

- employment legislation which includes National Employment Standards applicable to all employees;
- industrial instruments including collective awards and agreements; and/or
- the general law.

The main legislation is the *Fair Work Act 2009* (Cth), a Federal law. However, there is a variety of other legislation – Federal and State – which may apply depending on the circumstances.

CONDITIONS OF WORK

An employee's terms and conditions of employment are governed by legislation which:

Provides minimum standards for entitlements		Regulates other areas of the employment relationship
such as: • Maximum hours of work (38 hours per week plus reasonable additional hours); • Annual leave • Long service leave • Personal leave (including sick leave), carer's leave and compassionate leave • Unpaid parental leave • Public holidays • A right to request, and have considered, flexible working arrangements • Notice of termination of employment • Redundancy pay	AND	such as: • Discrimination • Workplace health and safety • Superannuation • Workers compensation

Employees in Australia generally enjoy 4 weeks paid annual leave (5 weeks in the case of 7-day shiftworkers) and are entitled to long service leave. Long service leave entitlements vary between States and Territories, from the rate of 3 months leave for 15 years service or in some locations or industries 2 or 3 months for 10 years service.

COLLECTIVE AGREEMENTS

Many employees work under terms regulated by collective enterprise agreements or similar instruments. These are underpinned by a set of statutory conditions, the National Employment Standards. The Standards set the minimum terms and conditions for employment in Australia. For certain industries and occupations, the Standards are supplemented by a modern award. A collective agreement must provide better terms and conditions than the Standards and any applicable award.

Executive, managerial and professional employees are generally employed under individual employment contracts. The National Employment Standards will be applicable to these employees as well.

TRANSFER OF BUSINESS

In the event of a transfer of business, laws may apply requiring the new employer to recognise the collective agreements applying to the old employer. Further, entitlements to redundancy pay may depend on whether, for example, the new employer offers employment on the same or similar terms and conditions as with the old employer and recognises prior service as being continuous.

WAGES

Wage movements for the general workforce are determined through a combination of individual contracts of employment, collective bargaining and minimum wage adjustments determined by a national employment tribunal known as the Fair Work Commission. Salary movements for managerial, executive, professional and many administrative staff are primarily determined through individual contracts and market forces.

SUPERANNUATION

In order to avoid adverse tax liabilities arising, employers must pay minimum employer contributions to recognised superannuation funds for their employees. There are limited exceptions for short-term casuals.

The minimum rate of employer contributions is currently 9.5% of an employee's ordinary time earnings, up to a maximum contribution base of A$221,080 per annum (as of 1 July 2019 – this figure is adjusted annually). Under superannuation legislation, the employer contribution rate will remain at 9.5% until July 2021, after which it will increase at .5% each year up to 12%.

UNIONS

The employment legislation permits active participation by unions in the Australian industrial relations system. The level of unionisation varies from industry to industry.

Employees have a legislatively protected choice about whether to belong to a union or to ask a union to act on their behalf in enterprise bargaining or other workplace matters.

Unions have statutory rights of entry to relevant workplaces in certain circumstances, such as to hold discussions with employees who are members of the union or to investigate a suspected contravention of the *Fair Work Act* or an applicable industrial instrument. Unions also have other rights in relation to enterprise bargaining.

REMEDIES AVAILABLE ON TERMINATION OF EMPLOYMENT

Termination of employment is regulated by legislation as well as by contract. Employers must comply with various rules when dismissing an employee whose employment is covered by an industrial instrument or is otherwise below a remuneration cap of A$148,700 (as of July 2019 – this figure is adjusted annually). Employers who fail to do so may be required to reinstate or compensate employees found to have been treated unfairly or unlawfully. These remedies are in addition to any rights stemming from the employment contract.

WORKERS COMPENSATION

Employers are obliged by legislation in each State and Territory to take out insurance for their liability to pay workers compensation unless, in exceptional cases, they qualify as a self-insurer.

The workers compensation systems in each State and Territory provide benefits to employees who are injured in the course of their employment.

WORKPLACE HEALTH AND SAFETY

Employers have a duty of care to provide a safe workplace for all workers, including employees and contractors. In order to ensure legal compliance, safety management and ongoing due diligence should form an integral part of business and management processes.

Legislation in each State and Territory regulates workplace health and safety. There is also specific legislation dealing with the regulation of factories, shops and industries, and the handling of hazardous substances and dangerous goods.

DISCRIMINATION

Unlawful discrimination in employment and employment-related activities is regulated by Federal, State and Territory anti-discrimination legislation.

These laws have wide coverage prohibiting discrimination on a number of grounds including:

Sex	Race	Religion
Age	Industrial activity	Pregnancy
Gender identity	Marital status	Family or carer responsibilities
Political belief or activity	Physical or mental disability	National extraction and social origin
Sexual orientation	Physical features	Other matters

Unlawful discrimination can also occur in the context of broader business activities, such as the provision of goods and services to customers.

INCOME TAX AND EMPLOYER TAXES

See Part D – Taxation for more information on income tax, fringe benefits tax and payroll tax.

RECOMMENDED ACTION

- Work out how your enterprise will fit into the Australian industrial relations system. This is a complex matter requiring specialist knowledge and experience.
- Obtain critical advantages and avoid damaging mistakes by considering industrial relations and employment issues at the outset.

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"Exceptionally well-resourced employment group with an impressive reputation for large-scale industrial relations disputes and major company restructurings. Called upon by many of Australia's largest mining and transport companies for its expertise in developing enterprise bargaining agreements. Also advises employers on health and safety issues as well as the employment law aspects of mergers, demergers and divestments."

CHAMBERS ASIA PACIFIC, 2020

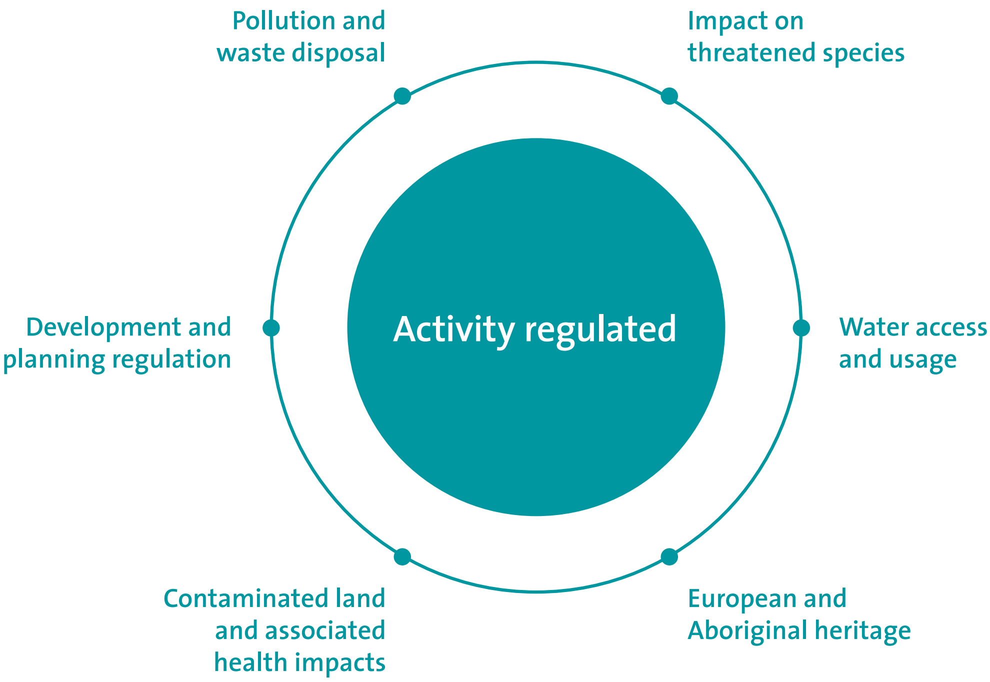
BUSINESS TRANSACTIONS

Environmental responsibilities

PART C
16

Businesses need to be aware of their environmental responsibilities, both in regard to land use and development activities, as well as pollution controls.

Throughout most of Australia there are increasingly stringent environmental controls restricting or regulating activity in the following areas:



FEDERAL AND STATE/ TERRITORY LEGISLATION

Most environmental controls are imposed by State or Territory legislation. However, since 1999, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) has regulated at the Federal level development having an impact on matters of "national environmental significance" including:

- migratory species
- threatened species and communities
- World Heritage properties
- National Heritage properties
- RAMSAR wetlands
- Commonwealth property and marine areas
- water resources impacted by coal seam gas and large coal mine developments
- the nuclear industry (including uranium mining)
- actions by Commonwealth agencies.

If development may have a significant impact on these matters of "national environmental significance", then a referral to the Commonwealth Minister for Environment is required. The Minister may decide that the development is a "controlled action" requiring approval and environmental assessment. This will often involve preparation of an Environmental Impact Statement before an approval can be granted.

The requirements for environmental impact assessment under the *Environment Protection And Biodiversity Conservation Act 1999* (Cth) are becoming increasingly relevant to major projects.

In late 2019, the Federal Government announced a review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) in an effort deliver greater certainty to business, farmers and conservation groups.

Areas of predominantly State or Territory-based regulation are discussed below.

> *"With Ashurst, we get a top-tier service which is commercially tailored to us."*
>
> **CHAMBERS ASIA PACIFIC, 2020**

DEVELOPMENT AND PLANNING REGULATION

The State and Territory systems of planning and development regulation are based primarily on comparable UK legislation, and have also been influenced by US environmental impact assessment legislation.

Land use is controlled at the broadest level by the division of land into "zones". Depending on the zoning of land, a particular development may be permitted without regulatory approval, only permitted with regulatory approval, or prohibited. For example, land in an urban area may be zoned "residential" and only certain kinds of dwellings and associated infrastructure may be permissible with development consent from the applicable consent authority. The details of the controls vary from State to State.

The relevant State or Territory government will usually be involved in the process of considering and approving large projects, and projects with regional significance. For example, the NSW Minister for Planning and Public Spaces has extensive powers to assess and approve major projects of State or regional significance and to override other assessment and approval requirements. The relevant State or Territory planning department will frequently be the approval body, and the responsible State or Territory Minister will often be involved in the approval process.

An environmental impact assessment (EIS) must usually be prepared in support of projects. Projects that are likely to have a significant environmental impact may require a detailed EIS. The level of detail required for an EIS is steadily increasing. For example, an EIS for a significant mining or infrastructure project typically runs to several volumes and is compiled by a team of planners, ecologists, engineers and other technical experts.

In some jurisdictions, major projects can be subject to more abbreviated and focused consultation and assessment regimes that can have the result of speeding up the approval process.

For large projects, there is often a public inquiry process at which opponents or the community generally may express their position before a panel, Commissioner or other arbitrator. In some States, specifically constituted "environmental courts" are given a role in this process. In most jurisdictions there are "open standing" provisions allowing third parties to take legal proceedings to ensure compliance with environment laws and to challenge project approvals. These inquiry and litigious processes must be carefully managed to minimise delays in the approval process for a project.

Development approvals may impose detailed conditions with which the project must comply. In some cases, these include a requirement that the project be commenced within a prescribed period (which may be around 5 years). There may be further approval requirements before a project can proceed, such as the grant of mining leases or pollution licences.

Approvals can impose requirements that the applicant pay levies or contributions towards the provision of public services, infrastructure and amenities.

POLLUTION AND WASTE DISPOSAL

There are comprehensive and onerous pollution and waste disposal laws in most jurisdictions.

Typically, a pollution licence is required to authorise certain water, air or land discharges or other impacts such as noise or vibration or to carry out certain activities listed in the legislation. Pollution licences impose discharge limits and regulate the polluting activity in some detail.

Pollution licences are generally granted by the relevant State or Territory environment protection authority (EPA). Each EPA periodically reviews the performance of licence holders. Managers or directors of licence holders may be required to certify compliance with relevant licence conditions on an annual basis.

A breach of a licence condition or of a control imposed by legislation is an offence. There is a range of enforcement options, including prosecution or the issue of penalty notices (and on the spot fines) for less serious contraventions. Significant penalties, including fines in the millions of dollars and imprisonment, can be imposed by the environmental courts for significant pollution offences. Generally, liability is strict, meaning that the fact of pollution is all that the EPA will be required to prove in any court proceedings. For the more serious offences (usually associated with maximum penalties of A$1 million or more), negligence or intent must be proved.

Typically, if a corporation commits an offence, then each person who is a director or person concerned in the management of the corporation is taken to have committed an offence, unless certain defences can be established. These defences typically require the exercise by the person of due diligence. In some jurisdictions (for instance, Tasmania, South Australia and Queensland), related corporations may also be liable. For example, Queensland has implemented "Chain of Responsibility" legislation to hold companies that become insolvent to their environmental responsibilities.

Waste processing, storage, transport and disposal is similarly regulated and disposal to licensed landfills or facilities is generally required. The owner of waste may in some cases commit an offence and be deemed liable for leakage or spillage and incidents, even if they did not cause the incident.

IMPACT ON THREATENED SPECIES

There are increasingly restrictive regulations being imposed in most jurisdictions regulating development with an impact on threatened species. Much of this legislation is modelled on the *Endangered Species Protection Act 1973* (US).

In New South Wales, for example, the *Biodiversity Conservation Act 2016* (NSW) lists a large number of threatened species and "ecological communities". Development or activities impacting on the listed items is prohibited in the absence of a special licence or development consent, which is granted only after consideration of appropriate environmental impact assessment. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) requires assessment and approval of actions that are likely to have a significant impact on species and ecological communities listed under that Act.

WATER ACCESS AND USAGE

In general, licences are required from the relevant State or Territory department for the sinking and use of groundwater bores and the use of river or stream water. Capacity limits will be imposed. Regulation is becoming more stringent.

Legislative and administrative arrangements are in place for trading water. The Australian water market is made up of several water markets, differentiated by water systems and administrative boundaries. For example, the Murray-Darling Basin, which extends across State borders, has its own water market. This market is based on a "cap and trade" system, where the cap represents the total amount of water available for use. The available water is distributed to users via water rights that are administered by the basin States.

EUROPEAN AND ABORIGINAL HERITAGE

State and Territory legislation protects significant items of post-settlement European heritage. Regulatory approvals may be required if a proposed development could affect European heritage items. Such legislation is frequently based on a list of significant heritage items located in the relevant State or Territory. Some legislation allows the relevant State or Territory authority to issue stop work or protection orders to protect such items.

Aboriginal heritage is also given broad protection by Commonwealth, State and Territory legislation. Regulatory approvals are required before Aboriginal heritage objects and places are impacted by developments. Comprehensive Aboriginal heritage assessment and management is necessary for mining and other major developments. Impacts on Aboriginal heritage are also frequently matters of political sensitivity, which need to be carefully managed to ensure optimal project outcomes.

CONTAMINATED LAND AND ASSOCIATED HEALTH IMPACTS

Contaminated land issues are particularly relevant to urban renewal projects of former industrial, commercial and defence sites, mining rehabilitation, agricultural "dipping" sites and areas with shallow groundwater or groundwater usage.

Legislation in most States and Territories regulates the use of contaminated land. The relevant EPA may have power to issue investigation or remediation orders in relation to contaminated land. Typically, the EPA can serve orders on the original polluter or on the owner or occupier of the contaminated land.

In some circumstances, receivers or other financial administrators or intermediaries with an interest in the land may be ordered to carry out investigations or remediation. The costs of complying with such orders may in some cases be recovered from the original polluter, if they can be located and are solvent.

Remedial standards vary across jurisdictions; but, generally, there is an acceptance of risk-based assessments to determine an appropriate level of remediation. This approach is described in the National Environment Protection Measure for the Assessment of Contaminated Sites, issued by the National Environment Protection Council.

Numerous occupational health and safety issues arise in relation to work on a contaminated site, and State and Territory legislation deals with such matters.

Risk and liability containment issues become important where contaminated land is concerned, necessitating careful drafting of contracts for purchase and sale of contaminated land.

GREENHOUSE/CLIMATE CHANGE

The Australian Government ratified the Kyoto Protocol in December 2007. The Kyoto Protocol imposes binding commitments for the reduction of greenhouse gas (GHG) emissions from developed countries. Australia committed to reducing national GHG emissions to a level equivalent to 108% of 1990 levels during the first commitment period, which ran from 2008 to 2012. Australia's target for the second commitment period from 2013 to 2020 is a 5% reduction of emissions by 2020 against 2000 levels. The Paris Agreement entered into force on 4 November 2016 and was ratified by Australia on 9 November 2016. Australia's "nationally determined contribution" submitted under Article 4 of the Paris Agreement includes a 2030 target of reducing emissions by 26% to 28% below 2005 levels.

In 2019, the Australian Government announced the Climate Solutions Package, a $3.5 billion investment to deliver on Australia's 2030 Paris climate commitments. However, there is growing momentum in Australia to adopt more aggressive emission reduction targets than Australia has committed under the Paris Accord.

The practice's "hallmark is to bring a level of pragmatism to what can be a very technical and arcane area of law – plus an ability to see the big picture and think outside the box."

CHAMBERS ASIA PACIFIC, 2018

In order to inform Australian Government policy on climate change and help meet Australia's international reporting obligations, Australia has a National Greenhouse and Energy Reporting Scheme (NGERS). For corporate groups that exceed the reporting thresholds, NGERS requires the corporation at the top of the corporate structure in Australia to report to the Government, on an annual basis, the GHG emissions, energy consumption and energy production from facilities under the operational control of members of the group.

In 2014, Australia's carbon pricing mechanism was repealed and replaced with the Emissions Reduction Fund, which is a voluntary scheme that allows participants to earn "Australian Carbon Credit Units" (ACCUs) for certain types of emission reducing activities. Those ACCUs may be sold to the Australian Government through a reverse auction process, and can also be traded. The Climate Solutions Fund (part of the Climate Solutions Package) will further build on the success of the Emissions Reduction Fund and continue the momentum to reach Australia's 2030 target of reducing emissions.

A "safeguard mechanism" commenced on 1 July 2016 and is intended to ensure that emissions reductions purchased by the Australian Government are not undermined by significant increases in emissions elsewhere in the economy. The "safeguard mechanism" applies to facilities that directly emit more than 100,000 tonnes of carbon dioxide equivalent per year. Approximately only 140 facilities meet this threshold. These facilities must keep their GHG emissions at or below a baseline level which is set by the Clean Energy Regulator. This obligation may be met by purchasing or generating, and surrendering ACCUs to offset any emissions above the baseline.

The baseline is set using data collected by the Clean Energy Regulator through the National Greenhouse and Energy Reporting Scheme, which requires facilities and controlling corporations that meet certain thresholds to report annually to the Clean Energy Regulator on their GHG emissions and production and consumption of energy.

There are also obligations for the sourcing of electricity from renewable sources. The Australian Government has enacted a Renewable Energy Target (RET) to achieve the production of 33,000GWh of renewable electricity by 2020, which equates to a 23.5% share of renewables in Australia's electricity market. The RET scheme requires most electricity retailers to meet a share of the RET in proportion to their share of the national wholesale electricity market by purchasing or generating and surrendering renewable energy generation certificates based on the volume of electricity they acquire each year.

The RET scheme is overseen by the Clean Energy Regulator which has recently reported that the Clean Energy Regulator has now approved enough capacity to guarantee that the Large-scale RET target will be met in 2020. This represents a major milestone for renewable energy in Australia.

In late 2017, in an effort to address Australia's energy needs the then Government proposed a National Energy Guarantee (NEG). The NEG required retailers and large users to deliver reliable, more affordable and lower emissions generation each year. The NEG consisted of two components, a reliability guarantee to meet the needs of the national energy system , and an emissions guarantee to ensure that Australia is meeting its international commitments. The NEG however was never implemented. A range of policy options, including the NEG, an extended RET or a Clean Energy Target or any number of carbon pricing mechanisms are the subject of debate over a national carbon emissions policy.

A number of States and Territories have also announced the introduction of their own renewable energy targets and schemes, which generally mandate higher targets over longer timeframes than the RET.

The Australian Government has also established the Clean Energy Finance Corporation (CEFC) and the Australian Renewable Energy Agency (ARENA), which invest public funds in clean energy projects and technologies with the objective of increasing the flow of finance into the clean energy sector, improving the competitiveness of clean energy technologies and increasing the supply of those technologies in Australia.

The Federal Government has enacted legislation to regulate offshore carbon capture and storage and some States have enacted legislation to regulate onshore carbon capture and storage.

All these measures will have a commercial and legal impact on investments in Australia but also provide opportunities for businesses that are able to take advantage of the regulatory environment in Australia, including renewable energy, and carbon capture and storage projects.

Recently, there has been a strong focus on the impact of climate change on planning decisions. In early 2019, the NSW Land and Environment Court delivered a landmark decision in which the Court refused consent for a coal mine having regard to its climate change impact arising from use of the produced coal.

The climate change debate in Australia is an area of controversy and polarised views, and the regulatory area is constantly changing.

RECOMMENDED ACTION

- Environmental responsibilities are wide ranging and affect many businesses and industries. You will need specific advice regarding your particular business or project.
- It is important to understand the environmental impacts of your business activities and implement an environmental management plan to help ensure compliance and to fulfil due diligence requirements.
- If you are planning to undertake major projects or land development activities you may need to obtain a number of approvals from Local, State and Commonwealth authorities. You need to identify these approval requirements and the risks involved in obtaining approvals and factor these into project budgets and timelines. You need to understand the decision-making processes of the authorities and have a strategy in place to efficiently progress assessments and applications.
- Water allocation is an increasingly controversial issue. For projects with high dependency on water availability, be careful to put in place a strategy for validly securing water entitlements.
- You will need to consider the GHG emissions associated with your project and factor in the potential impact of future climate change laws and policies as well as commercial opportunities to mitigate GHG emissions into the structuring of your business or project.
- Before buying land or committing to a project, carry out due diligence to help ensure the environmental constraints and liabilities are identified, assessed and can be efficiently managed.

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AUSTRALIA – AN INTRODUCTION FOR INVESTORS

Taxation

PART

D

Overview

AUSTRALIAN TAXATION SYSTEM

Australia has a sophisticated income tax system underpinned by a substantial body of legislation, case law and administrative interpretations issued by the Federal tax regulator, the Australian Taxation Office (ATO). In addition to the body of Australian domestic law, Australia also has a wide treaty network having entered into double taxation agreements with most of its major trading partners.

Australian tax law is constantly changing and the government holds inquiries and consultations in relation to proposed changes to the law.

17 INCOME TAX AND OPTIONS FOR INVESTING INTO AUSTRALIA

Income tax in Australia is levied at the Federal level. The ATO is a vigilant regulator of the income tax law, with wide ranging powers of audit, investigation and recovery, and regularly litigates contentious matters in the Australian courts. In addition to its audit and investigation powers, the ATO also provides guidance to taxpayers on interpretative issues such as through the issuance of public and private rulings.

There are a number of different structures through which a foreign resident can invest into Australia. For example, investment can be made into Australia directly or indirectly through an Australian entity. The structure chosen will result in different Australian tax consequences, which depend on the particular facts and circumstances of the foreign resident.

18 PETROLEUM RESOURCE RENT TAX

Broadly, the tax imposes tax on the profits of certain petroleum projects.

19 GST, STAMP DUTY AND OTHER INDIRECT TAXES

Indirect (or non-income) taxes, such as goods and services tax, stamp duty, land tax, fringe benefits tax, excise tax, payroll tax and Local Government taxes are also levied.

TAXATION

PART D

17

Income tax and options for investing into Australia

Income tax is an important consideration when choosing your business structure to invest into Australia.

Income tax

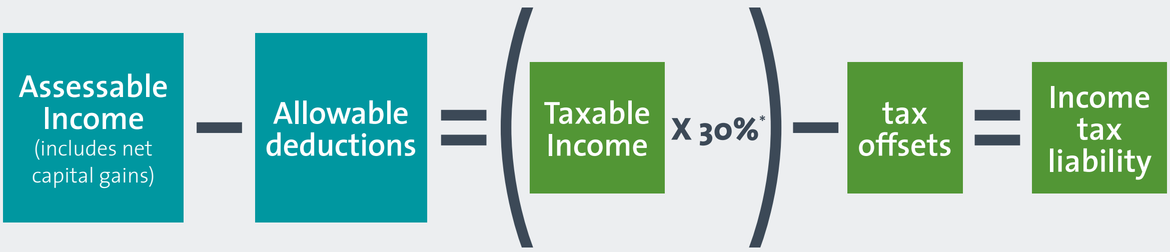
Income tax in Australia is levied at the Federal level. The ATO is a vigilant regulator of the income tax law, with wide ranging powers of audit, investigation and recovery, and regularly litigates contentious matters in the Australian courts. In addition to its audit and investigation powers, the ATO also provides guidance to taxpayers on interpretative issues such as through the issuance of public and private rulings.

TAXABLE INCOME

Australia levies income tax on a person's "taxable income" which, in turn, is based on a person's "assessable income".

A person who is a tax resident of Australia is generally taxable on their worldwide income while a foreign resident is generally taxable only on their income from Australian sources. In addition, certain types of income (including, but not limited to dividends, interest and royalties) are subject to a final withholding tax in the hands of foreign resident investors. This is discussed further under the headings "Taxation of Dividends, Interest and Royalties", "Dividends, Interest and Royalties witholding tax rates" and " Other foreign resident witholding rules".

The following diagram broadly illustrates how a company's liability to Australian tax (other than withholding tax) is determined:



* or 27.5% for certain small business entities

The elements of this diagram are discussed in more detail below.

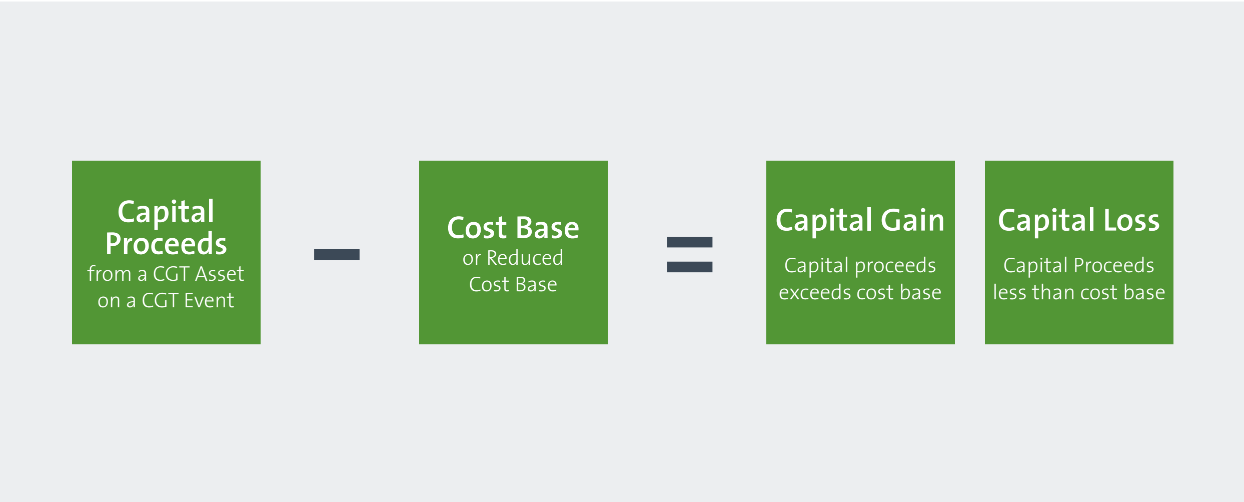
ASSESSABLE INCOME

Assessable income consists of income according to "ordinary concepts" (for instance, business profits of an enterprise) and other amounts which are specified under Australian legislation (statutory income).

A taxpayer's assessable income also includes net capital gains (being the sum of capital gains less available capital losses) and taking into account any applicable CGT Discount (which is not available to companies, or to foreign residents for capital gains accruing after 8 May 2012). Capital gains are made on the happening of defined "CGT Events" relating, broadly, to the disposal of "CGT Assets" by the taxpayer.

CAPITAL GAIN OR CAPITAL LOSS FROM CGT EVENT CALCULATION

Broadly, the capital gain or capital loss from the happening of a CGT Event is calculated below. A net capital gain will be included in assessable income.



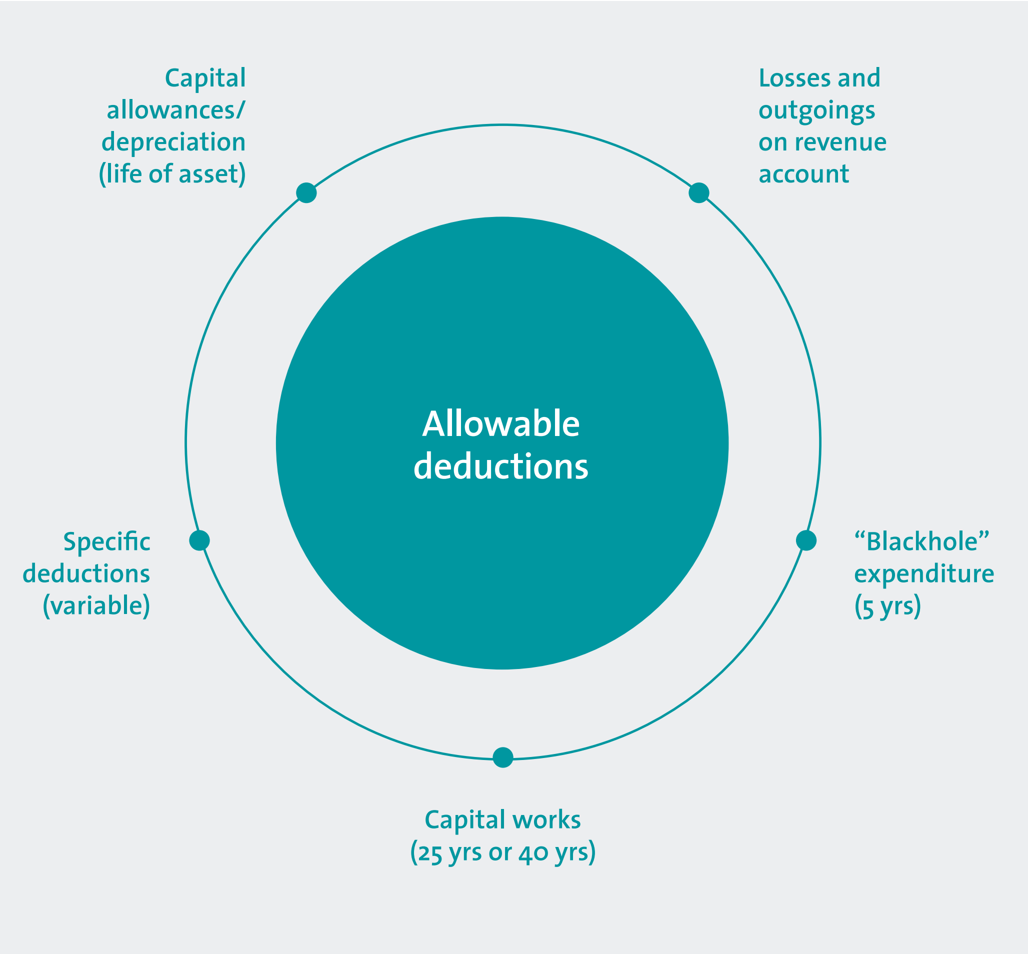
The above concepts are defined for each CGT event. For CGT event A1 which involves a change of ownership of a CGT asset (eg the sale of shares):

- the capital proceeds generally consists of the amount of money and the market value of any property the taxpayer receives or is entitled to receive in respect of the CGT event happening;
- the cost base generally consists of the amount of money paid and the market value of any property provided to acquire the CGT asset plus certain incidental costs of ownership, non-deductible costs of ownership and certain capital expenditure in relation to the CGT asset.

A number of exemptions may be available to reduce or eliminate a capital gain (eg capital gains derived by a foreign resident investor from an asset that is not “taxable Australian property”).

ALLOWABLE DEDUCTIONS

The diagram below illustrates the type of deductions a taxpayer can potentially claim to reduce its taxable income.



TAX LOSSES

An excess of deductions over assessable income can lead to a tax loss. Tax losses can be carried forward and can be used to offset assessable income derived in a later income year where a taxpayer (in the case of a company or trust) meets the applicable carry forward loss tests.

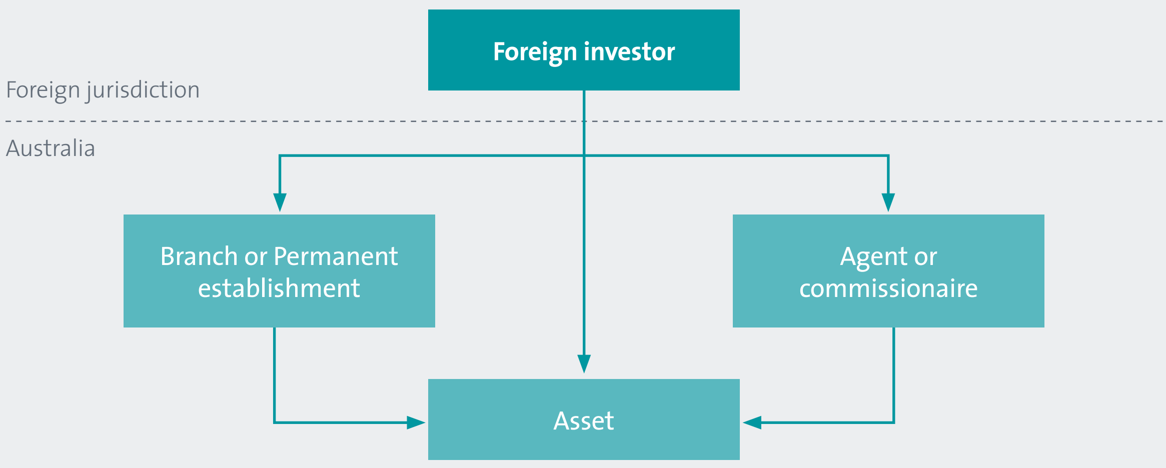
A deduction or tax loss can be used to offset assessable income (including a net capital gain). However, a capital loss can only offset a capital gain and cannot be used to offset a taxpayer's other assessable income. Instead, a net capital loss may be carried forward and used to offset future capital gains (subject to any applicable loss carry forward rules).

Options for investing into Australia

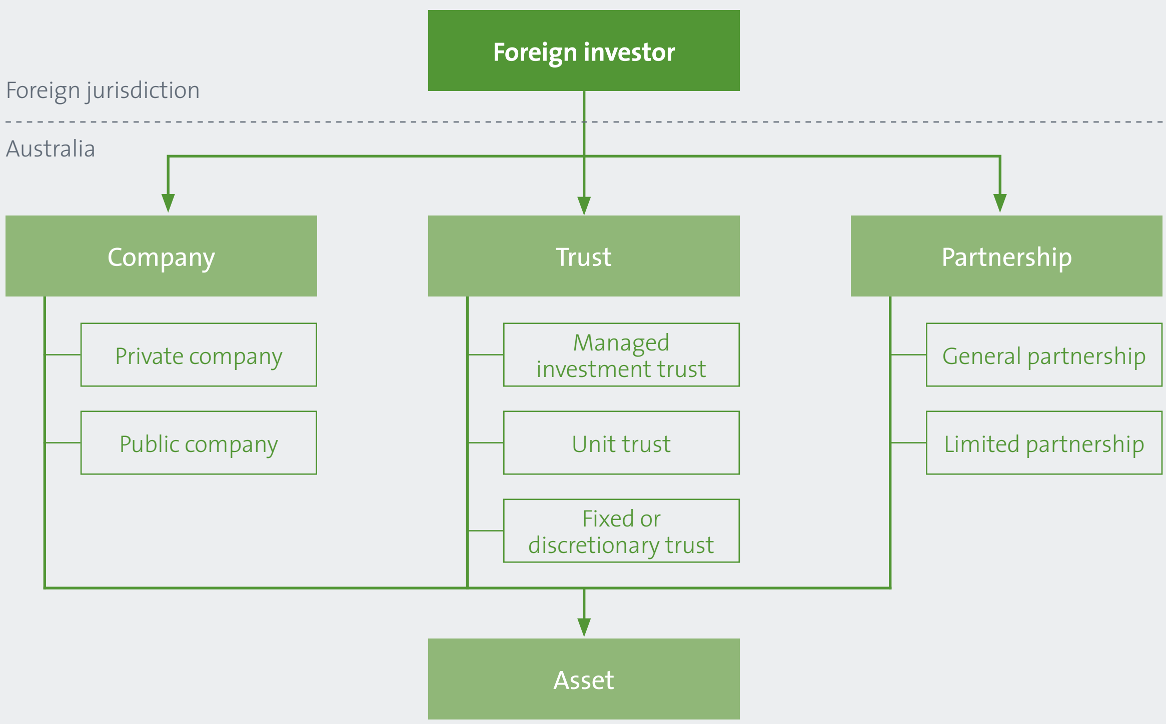
There are a number of different structures through which a foreign resident can invest into Australia.

For example, investment can be made into Australia directly or indirectly through an Australian entity. The structure chosen will result in different Australian tax consequences for the foreign resident.

DIRECT INVESTMENT



INVESTMENT THROUGH AN AUSTRALIAN INTERPOSED ENTITY



DIRECT INVESTMENT

TAXATION OF BUSINESS INCOME

A foreign resident is generally only taxable in Australia on business income derived from Australian sources. In addition, if the foreign resident is resident in a country with which Australia has a double tax agreement (DTA[1]), the foreign resident is generally taxable on business income only if it carries on a business in Australia through a permanent establishment to which that business income is attributable.

Notwithstanding the above, certain types of income (eg, dividends, interest and royalties paid by Australian residents and gains from the disposal of Australian land based assets) may be taxed in Australia irrespective of whether the income has an Australian source or (in the case of a treaty country foreign resident investor) if the foreign resident investor has a permanent establishment in Australia.

Permanent establishments, which can be constituted through the use of agents, are explained further in the following tables.

Permanent establishment	Agent
• Generally, a permanent establishment is a fixed place of business through which the business of the foreign resident is carried on. • A permanent establishment can include a branch, an office, a factory, a workshop and other fixed places of business. • Treaties may also deem a foreign resident to have a permanent establishment in Australia in certain circumstances – such as where the foreign resident maintains substantial equipment in Australia or carries on business in Australia through certain kinds of agents. • Where a permanent establishment exists, a treaty usually provides that income of a foreign resident will be subject to Australian tax to the extent to which the income is attributable to the permanent establishment. • Australia does not impose a branch withholding tax.	• An agent of a foreign resident is not directly subject to tax on income received as an agent. • However, if the principal is a foreign resident of Australia, the agent must retain sufficient money to meet the Australian income tax liability of the principal, if so required by the ATO. The ATO has wide powers to order Australian third party payers to direct part or all of a payment due to a foreign resident to the ATO, to meet a tax liability. • As mentioned above, it is possible that an agent may constitute a permanent establishment of the foreign resident, depending on the circumstances. • Generally, an agent will constitute a permanent establishment if it has, and habitually exercises, an authority to conclude contracts on the foreign resident's behalf in Australia. • However, no permanent establishment is generally created if the agent is an independent agent (eg, a broker or general commission agent) acting in the ordinary course of their business.

Note

1. Where relevant, as amended or affected by the Multilateral Convention to Implement Tax Treating Related Measures to Prevent Base Erosion and Profit Shifting.

DEFINITION OF RESIDENCE

Different taxation rules and taxation rates apply between residents and foreign residents of Australia for Australian tax purposes.

COMPANIES

A company will be a resident of Australia for taxation purposes where:	
it is incorporated in Australia; or	it carries on business in Australia, and either: • its central management and control is in Australia; or • the voting power of the company is controlled by shareholders resident in Australia.

TAXATION OF CAPITAL GAINS

A foreign resident is normally only taxed on capital gains in respect of "taxable Australian property". Taxable Australian property includes the following:

Taxable Australian property for foreign residents

1	Taxable Australian real property – for example, Australian land, buildings, fixtures, leases of Australian land and mining, quarrying or prospecting rights over Australian minerals, petroleum or quarry materials
2	Indirect Australian real property interests – certain membership interests in entities whose assets consist principally (by value) of Australian real property assets (see further below)
3	CGT assets used at any time in carrying on a business through a permanent establishment in Australia
4	An option or right to acquire an asset covered by items 1-3
5	CGT assets for which a gain or loss on ceasing to be an Australian resident was chosen to be disregarded

Generally, until a CGT Event occurs, changes in the value of the property resulting in unrealised gains or losses are not relevant.

Membership interests (eg shares) in an entity may be an "indirect Australian real property interest" if, broadly, the foreign resident and its "associates" together hold at least 10% of the membership interests in the entity at the time of the relevant CGT Event or for at least 12 months during the 24 months before the time of the relevant CGT event, and where the principal asset test is satisfied (discussed below).

There are some important points to note regarding the application of the above tests for "indirect Australian real property interests":

- there is no requirement for a test entity to be an Australian resident for a membership interest to be an "indirect Australian real property interest" (meaning, for example, that shares in non-Australian entities may be taxable Australian property)
- the definition of "associate" for these purposes is wide-reaching and includes a trustee and beneficiaries, partners in a partnership and companies which are under common control (meaning either having a majority voting interest or sufficient influence)
- the application of the "principal asset test" is complex and highly dependent on the individual circumstances of the entity in which the membership interest is held.

Under specific non-resident CGT withholding rules, a purchaser may be required to withhold part of the purchase price of assets disposed of by foreign resident sellers (refer below).

For capital gains accruing from 8 May 2012, foreign residents are not eligible for the CGT discount which applies in certain circumstances to individuals, trusts and complying superannuation funds.

Special CGT rules apply to taxpayers that either become or cease to be a resident of Australia.

TAXATION OF DIVIDENDS, INTEREST AND ROYALTIES

Australian residents are generally required to withhold tax from interest, dividends or royalties paid to foreign residents.

The foreign resident withholding tax rates are set out below and may be reduced if there is a double tax agreement in existence between Australia and the foreign resident's country of residence (discussed below, under the heading "Mechanisms for double taxation relief and other tax considerations").

DIVIDEND, INTEREST AND ROYALTIES WITHHOLDING TAX RATES

The withholding tax operates as a final tax and foreign resident investors in receipt of income to which withholding tax applies are not required to file an Australian tax return disclosing such amounts.

The definitions of "dividends" and "interest" for withholding tax purposes are generally subject to the debt/equity rules, which considers the economic substance of the financial instrument in its classification.

There is a withholding tax exemption for interest on debentures and some debt interests issued by an Australian resident company (or some unit trusts) or an Australian permanent establishment of a foreign resident company, if they are issued in a way that satisfies a "public offer" test. Exemptions may also be available for certain specific types of foreign residents (eg, dividend and interest withholding tax exemptions for certain foreign superannuation funds that hold portfolio interests in the payer).

	Domestic rate	Reduced double tax agreement rate
Dividends	30% to the extent unfranked and 0% to the extent fully franked (see further below)	0% to 15%
Interest	10% (however, interest from publicly-offered debentures and some debt interests is exempt from withholding tax)	10% (with a 0% rate available under some double tax agreements for certain government entities, banks and financial institutions)
Royalties	30%	5% to 15%

Note

These withholding tax rules do not apply to dividends, interest and royalties that a foreign resident derives through an Australian permanent establishment (as these will be assessable as branch profits). The rules can also apply to interest and royalties paid to a foreign resident by another foreign resident if the interest and royalties are paid from and are attributable to an Australian branch of the payer foreign resident.

Foreign residents that operate a permanent establishment in Australia will not generally be subject to withholding tax when the permanent establishment remits any profits to the foreign head office (ie, Australia does not impose a branch profits tax).

OTHER FOREIGN RESIDENT WITHHOLDING RULES

A foreign resident withholding regime imposes a withholding obligation in respect of specified payments made to foreign residents of Australia (other than dividends, interest and royalties).

Income type	Withholding rate (%)
Mining *	4%
Gaming junket **	3%
Entertainment or sports activities	15-30% (company) 32.5-45% (individual)
Construction and related activities	5%
Proceeds from disposal of taxable Australian property	12.5% (see below)

Notes

* These rates can be found in Division 4, Part 5 of the *Taxation Administration Regulations 1976* (Cth).

** These rates can be found in Division 6, Part 5 of the *Taxation Administration Regulations 1976* (Cth).

A foreign resident capital gains withholding regime also applies in relation to the transfer of, or granting of an option to acquire "taxable Australian property". Taxable Australian property includes real property located in Australia (including certain mining, quarrying and prospecting rights) and certain indirect interests in real property. The rate of withholding is 12.5% of the purchase/option price. There are some exemptions from the regime and, in some circumstances, the rate of withholding may be varied by the ATO.

Unlike the withholding tax on dividends, interest and royalties, withholding under these regimes is not a final tax. Foreign resident investors receive a credit for amounts withheld on filing an Australian tax return and may receive a refund of tax if amounts have been withheld in excess of the foreign resident's actual Australian tax liability.

INVESTMENT THROUGH AN AUSTRALIAN COMPANY

As discussed above, an Australian resident company is liable to tax on income derived from all sources, whether in or out of Australia, at a 30% rate (or a lower rate as low as 27.5% rate for certain companies which constitute "small business entities"). In addition, the Government has enacted legislation to gradually reduce the tax rate for small business entities to 25% by 2026-27.

A number of special taxation rules apply to Australian companies, some of which are discussed below.

TAX CONSOLIDATION

Groups of wholly owned Australian resident companies may choose to form a consolidated group for income tax purposes. For groups which are owned by a common foreign parent, a "multiple entry consolidated" (MEC) group may be formed without a common Australian resident parent company, with slightly different rules applying.

Once a group has consolidated, the group is effectively treated as a single entity for income tax purposes.

DIVIDEND IMPUTATION SYSTEM

Australia effectively prevents double taxation of company profits under a mechanism known as "imputation" (imputation also applies to distributions made by limited partnerships and certain public unit trusts taxed as companies for Australian tax purposes).

Under the imputation system, for a "franked" or partially franked dividend, resident shareholders and foreign residents who hold their shares in carrying on business through a permanent establishment in Australia are required to include a "gross-up" of the "franking credit" attached to dividends as assessable income and are also entitled to a "franking tax offset" for that amount of franking credits. Franking credits reflect the Australian corporate tax paid by the company on its underlying profits.

If that tax offset exceeds the tax otherwise payable on the recipient's taxable income, recipients who are individuals, complying superannuation entities or tax exempt charities are entitled to a refund of the excess amount. Companies are not entitled to a refund of excess franking credits but may convert excess franking credits into a tax loss.

"Unfranked" dividends are dividends paid to shareholders with no franking credits attached.

Where the recipient of a dividend is a foreign resident (other than foreign residents who hold their shares in carrying on business through a permanent establishment in Australia) the "gross-up and credit" mechanism discussed above does not apply. Instead, dividend withholding tax applies but the dividend is generally exempt from withholding tax to the extent it is franked (discussed above under heading "Dividend, interest and royalties withholding tax rates").

Key points for foreign residents receiving dividends from Australian companies

1	Foreign resident recipients of franked distributions are entitled to an exemption from dividend withholding tax, to the extent that the dividend has been franked. No refund of excess franking credits is available
2	Foreign resident recipients of unfranked dividends will generally be subject to dividend withholding tax
3	An exemption from dividend withholding tax may apply if the dividend was paid out of foreign sourced income derived by the Australian resident company
4	Dividend withholding tax may be reduced if the foreign resident is a resident in a country which has a double tax agreement with Australia (discussed below under the heading "Double Tax Agreements").

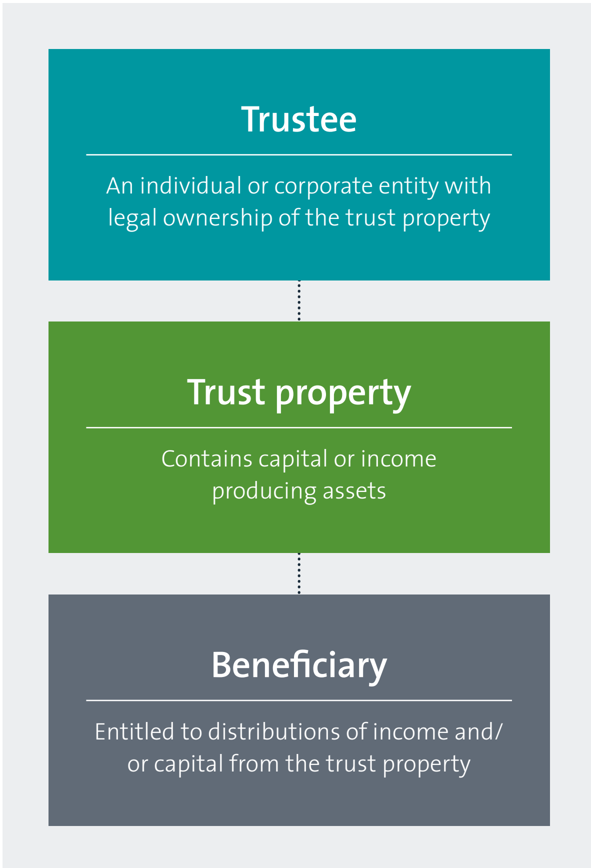
TAX LOSSES OF COMPANIES

Tax losses of companies can be carried forward and can be used to offset assessable income derived in a later tax year where a taxpayer meets a number of complex tests (which include a continuous direct and indirect ownership test or a same or "similar" business test). Concessional ownership tracing tests apply to widely held companies.

INVESTMENT THROUGH AN AUSTRALIAN TRUST

TRUSTS GENERALLY

The use of trusts as a vehicle for investment in Australian business structures is not uncommon. A trust is constituted by a trust deed, which establishes the terms of the trust.



Trust estates comprise the following minimum elements:

Trusts are not separate legal persons, and are not generally treated as separate taxable entities (other than certain public unit trusts that are taxed like companies).

Generally, the beneficiaries of a trust are taxed on a share of the "net income" of the trust corresponding to the share of the trust income to which the beneficiary is "presently entitled". For these purposes, the "net income" of the trust is, broadly, the taxable income of the trust calculated as if the trust were a resident taxpayer.

Foreign resident beneficiaries are subject to tax on their share of the net income of the trust estate that is attributable to sources in Australia, at the marginal rates applicable to foreign residents. However, if the income consists of interest, dividends or royalties, tax is not imposed at marginal rates but is imposed on the distribution at withholding tax rates.

The trustee administering a resident trust estate is subject to income tax at the maximum marginal rate for individuals on that part of the net income of the trust estate to which no beneficiary is "presently entitled". Special rules enable the streaming of capital gains and franked distributions to specific beneficiaries.

The trustee is also liable for tax on the net income of a foreign beneficiary. Tax is normally levied at the top marginal rate if the beneficiary is an individual or the trustee of a trust estate and at the company tax rate if the beneficiary is a company. This tax operates like a non-final withholding tax and the beneficiary is entitled to a credit for tax paid by the trustee upon filing their Australian tax return and is entitled to a refund of any excess tax paid by the trustee.

Tax losses of the trust are not transferable to the beneficiaries. Instead, trusts can carry forward losses if they satisfy certain loss recoupment tests. Under the current law, the carry forward of capital losses is not subject to the loss recoupment tests.

The trustee of certain Australian resident trust estates (broadly, closely held or discretionary trust estates) must also disclose to the ATO the identity of any "trustee beneficiary" to whom it distributes the net income and any tax-preferred amounts. If it fails to provide the ATO with the correct disclosures, the trustee may be liable for "trustee beneficiary non-disclosure tax", which is levied at maximum personal tax rates.

Special tax rules apply in respect of trusts which are managed investment trusts, as discussed below.

MANAGED INVESTMENT TRUSTS

Managed investment trusts (MITs) offer significant tax concessions compared to investments in Australian companies and non-MIT trusts.

Broadly, MITs are widely held Australian resident and managed trusts which carry on passive investment activities (eg investing in Australian rental property).

Trustees of MITs are required to withhold amounts on any distributions that comprise a "fund payment" made to foreign resident unit holders at either a 10%, 15% or 30% rate (see below). "Fund payments" generally consist of distributions from Australian sourced income (other than interest, dividends and royalties which are subject to a separate withholding tax regime) and capital gains in respect of taxable Australian property.

MIT concessions

Concessions are available for both foreign residents and Australian residents.

For certain MITs (Withholding MITs), foreign residents of information exchange countries (broadly, countries with which Australia has signed a comprehensive exchange of information agreement on tax matters as specified in the tax regulations) can access a reduced rate of withholding tax on most fund payments of 15% (instead of the normal 30% rate which applies to residents of other countries), which is further reduced to 10% if the MIT only holds newly constructed energy efficient commercial buildings (office or retail).

From 1 July 2019, fund payments which comprise non-concessional MIT income (NCMI) are subject to a higher withholding tax rate (30%) for all foreign residents. NCMI comprises various categories of income and includes:

- income from or that is attributable to, and capital gains from or that are attributable to, residential housing (other than affordable housing, disability accommodation, or housing that qualifies as commercial residential premises such as hotels and some forms of student accommodation)
- income from or that is attributable to, and capital gains from or that are attributable to, agricultural land
- income derived indirectly through entities that derive trading income
- certain cross-staple income (for example, cross-staple rental income), except where the cross-staple income is attributable to rent received from a third party or satisfies certain de minimis rules, or the amount derived is a capital gain.

Certain transitional provisions may apply so that the 15% rate remains available for NCMI to the year ended 30 June 2026 (for non-economic infrastructure assets) and the year ended 30 June 2034 (for economic infrastructure). The NCMI rules, including the transitional provisions, are complex and detailed consideration should be given to their potential implications for Withholding MITs.

MIT withholding tax generally operates as a final tax and foreign resident investors in receipt of distributions to which the withholding tax applies are not required to file an Australian tax return disclosing those distributions (ie, the rules described under "Trusts generally" do not generally apply to such distributions).

There are a number of tests that must be satisfied to qualify as a Withholding MIT. These tests include:

- the MIT must conduct passive (ie, not active business) activities;
- licensing requirements in **some circumstances**;
- a widely held and "not closely held" test; and
- a substantial proportion of investment management activites must be performed in Australia.

Other concessions

In addition to the above, certain MITs may make an election to treat its assets on capital account for Australian tax purposes, enabling eligible Australian residents to access the CGT Discount (of up to 50%) on capital gain distributions.

An attribution regime applies to MITs that are qualifying "Attribution" MITs (AMITs). One of the key features of this regime is that investors in the AMIT are taxed on the amounts attributed to them from the AMIT, rather than on their share of the income of the AMIT to which they are presently entitled.

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INVESTMENT THROUGH AN AUSTRALIAN PARTNERSHIP

A "partnership" is defined for taxation purposes to include, in addition to partnerships at general law, persons in receipt of income jointly. This would include some forms of joint ventures that may not be a partnership at general law.

While a partnership must lodge an income tax return, no tax is imposed on the partnership itself (except for certain limited partnerships, as discussed below). Rather, each of the partners is required to include in their assessable income their share of the net income of the partnership and they may claim a deduction for their share of the net loss of the partnership. The net income of a partnership is calculated as if the partnership were a resident taxpayer. However, the CGT rules are not applied to the partnership but are applied separately to the partners in respect of their interests in the partnership assets.

Limited partnerships are generally treated as companies for Australian tax purposes. However, certain foreign hybrid entities (ie entities that are normally treated as companies for Australian tax purposes but are flow-throughs for foreign tax purposes, such as a US LLC) may be treated as partnerships (ie flow-throughs) for Australian tax purposes where certain conditions are met. Similarly, certain Australian "venture capital" limited partnerships may be treated as partnerships (and not companies) for Australian tax purposes.

Mechanisms for double taxation relief and other tax considerations

DOUBLE TAX AGREEMENTS

Foreign residents may be able to rely on a double tax agreement to reduce the incidence of Australian taxation from the foreign resident's Australian investments.

Double tax agreements generally reduce the rate of Australian withholding tax on dividends, interest and royalties and limit Australia's right to tax certain other types of income which Australia may otherwise tax because it has an Australian source under domestic law principles (eg business income).

Australia has entered into agreements with various countries for the purposes of avoiding double taxation of income, as set out in the table below.

AUSTRALIA'S DOUBLE TAX AGREEMENTS AS AT 30 NOVEMBER 2019

Argentina	Finland	Japan	Papua New Guinea	Sri Lanka
Austria	France	Kiribati	Philippines	Sweden
Belgium	Germany	Republic of Korea	Poland	Switzerland
Canada	Hungary	Malaysia	Romania	Taipei
Chile	India	Malta	Russia	Thailand
China	Indonesia	Mexico	Singapore	Turkey
Czech Republic	Ireland	Netherlands	Slovakia	United Kingdom
Denmark	Israel (not yet in force)	New Zealand	South Africa	United States
Fiji	Italy	Norway	Spain	Vietnam

Australia also has "information sharing agreements" with a number of countries/territories. These agreements are designed to enhance Australia's ability to administer its domestic tax law through mutual exchange of information procedures with foreign taxing authorities.

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OTHER TAX CONSIDERATIONS

TAXATION OF FINANCIAL ARRANGEMENTS (TOFA)

The TOFA rules contain a comprehensive code for the taxation of "financial arrangements". The TOFA rules generally operate to tax gains and losses arising from "financial arrangements" on revenue account (ie not as capital gains) and contain a number of different methods for bringing such gains and losses to account for tax purposes. In some circumstances, these methods may bring to account unrealised gains and losses which would not be brought to account under the normal (non-TOFA) tax rules.

Individuals are generally exempt from the application of TOFA unless they make an election for it to apply. Other entities may also qualify for an exemption if their assets or turnover are sufficiently small to fall below the applicable thresholds for the application of TOFA (unless they make an election for TOFA to apply).

TRANSFER PRICING

International transfer pricing rules are contained in both Australian domestic law and double tax agreements. Broadly, these rules allow the Commissioner to determine and substitute an arm's length pricing, terms and conditions for Australian tax purposes if the Commissioner is satisfied that the parties are not dealing at arm's length in relation to an international transaction.

Significant changes have been made over the last several years to the transfer pricing rules under Australian domestic law as a result of Australian court decisions and Organisation for Economic Co-operation and Development (OECD) developments in the transfer pricing area:

- In 2012, Australia's transfer pricing rules were changed such that the transfer pricing articles contained in Australia's tax treaties are able to apply independently of Australia's domestic law transfer pricing rules in treaty cases. This change was designed to overcome any uncertainty that Australia's tax treaties provide an independent source of power for the Commissioner to make transfer pricing adjustments.
- The second change in 2012 were the amendments to the transfer pricing rules to ensure that they are interpreted in a manner that is consistent and aligned with international standards.
- The transfer pricing rules were further amended in 2013 to require taxpayers to self-assess whether their cross border dealings or transactions with foreign entities or permanent establishments satisfy arm's length principles. A power was also given to the Commissioner to "reconstruct" the arm's length conditions and amend the taxpayer's assessment on that basis and impose penalties.
- In order to satisfy the Commissioner that an acceptable arm's length pricing methodology has been adopted in relation to such a transaction (for example, in accordance with OECD guidelines), sufficiently detailed contemporaneous documentation must be maintained.
- Taxpayers may also enter into an Advanced Pricing Arrangement (APA) with the ATO (and, in the case of bilateral or multilateral APAs, one or more taxing authorities) and agree an appropriate transfer pricing methodology for a set of transactions over a fixed period of time. Once the APA comes into effect, the ATO is administratively bound by the terms of the APA.

In addition to the above, the Government has also recently enacted a new "diverted profits tax", which is discussed below under the heading "Diverted profits tax".

LIMITS TO DEBT DEDUCTIONS FOR THINLY CAPITALISED ENTITIES

Thin capitalisation rules operate to deny debt deductions (including interest and borrowing costs) where an entity's debt levels exceed certain prescribed thresholds.

The main thresholds in relation to foreign investment in Australia are:

- broadly, the average value of total debt used to fund the investment must not exceed 60% of the average value of the total assets (subject to some adjustments for non-debt liabilities and associate entity equity); or
- if debt exceeds the above threshold, the debt must not exceed an arm's length amount or in certain cases, a "worldwide gearing" amount.

The thin capitalisation rules are complex and depend on the individual characteristics of the taxpayer and associated entities.

The characterisation of debt and equity for the purposes of applying the thin capitalisation rules is based on the debt/equity rules in the Australian tax law. These rules, broadly speaking, seek to characterise instruments as debt or equity for tax purposes based on economic substance rather than legal form.

There is a de minimis rule which provides that where the total debt deductions of the entity and its associate entities do not exceed A$2,000,000 for the income year, the thin capitalisation rules will not apply to deny the entity's debt deductions regardless of the entity's gearing ratio.

THE INVESTMENT MANAGER REGIME

The Government has enacted an Investment Manager Regime (IMR). The IMR has a number of elements.

One element of the IMR provides an exemption from Australian income taxes (other than Australian withholding taxes) for returns and gains derived by foreign residents in relation to certain portfolio investments (<10%) made directly from offshore (not through an Australian permanent establishment) by widely held foreign funds. A number of conditions apply to these exemptions.

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ANTI-AVOIDANCE RULES

There are numerous specific anti-avoidance rules and general anti-avoidance provisions in the Australian tax law. In almost every significant transaction, consideration of the general and specific anti-avoidance provisions is necessary.

The general anti-avoidance rule (Part IVA) enables the Commissioner to make determinations to cancel tax benefits obtained by a taxpayer (and include an amount of assessable income, disallow a deduction, capital loss or a foreign income tax offset or impose a withholding tax liability) if, having regard to various matters, it would be concluded that a "scheme" was entered into for the sole or dominant purpose of obtaining the tax benefit. The promoter of a scheme to which the general anti-avoidance provision applies may also be subject to substantial civil penalties.

Australia has introduced a multinational anti-avoidance rule (MAAL) which targets the avoidance of a permanent establishment by large foreign multinational taxpayers (with a global turnover of A$1 billion or more). Broadly, the MAAL may be applied where:

- under or in connection with a scheme, certain supplies are made by a foreign resident to an Australian customer with the assistance of associated or dependent Australian entities such that the income derived is not attributed to an Australian permanent establishment; and
- it would be concluded that the principal purpose of the scheme is to obtain an Australian, or an Australian and foreign, tax benefit.

If applied by the Commissioner, the MAAL could result in the imposition of Australian tax on that income and significant penalties and interest.

DIVERTED PROFITS TAX

The Government has enacted a "diverted profits tax".

Broadly, the measure is designed to target arrangements entered into by large multinational taxpayers which are Australian residents or Australian permanent establishments of foreign residents, where:

- the taxpayer "diverts" profits offshore to a low-tax related party which results in an overall tax reduction on the profit by more than 20%; and
- it would be concluded that the arrangement has insufficient economic substance as it was designed to secure the tax reduction.

The Commissioner is empowered to impose a significant "diverted profits charge" on the taxpayer at a rate of 40% of the diverted profit, and if invoked, there will be prescribed periods in which the taxpayer may request a review and/or challenge the assessment.

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TAXATION OF INDIVIDUALS

If foreign residents are considering investing in Australia, it is important to consider the Australian tax implications for individuals who are involved in the foreign resident's business.

LIABILITY TO INCOME TAX AND RATES

Taxpayers who are residents of Australia are generally liable to tax on income derived from all sources, whether in or out of Australia (ie "worldwide income").

Broadly, a foreign resident is taxable on:

- all Australian-sourced income and certain capital gains, on an assessment basis; and
- dividends, interest, royalties and fund payments from managed investment trusts, which are subject to withholding tax at the applicable withholding tax rates.

The marginal rate of tax applicable to an Australian resident individual is scaled according to his or her annual taxable income.

Resident individual tax rates for 2019-20

Taxable income	Tax on this income
$0 – $18,200	Nil
$18,201 – $37,000	19% on excess over $18,200
$37,001 – $90,000	$3,572 plus 32.5% on excess over $37,000
$90,001 – $180,000	$20,797 plus 37% on excess over $90,000
$180,001 and over	$54,097 plus 45% on excess over $180,000

Note These rates do not include the Medicare Levy or Medicare Levy Surcharge.
The reference is to Australian dollars.

The foreign resident individual tax rates are as follows:

Foreign resident tax rates for 2019-20

Taxable income	Tax on this income
$0 to $90,000	32.5% for each $1
$90,001 to $180,000	$29,250 plus 37% on excess over $90,000
$180,001 and over	$62,550 plus 45% on excess over $180,000

Note Foreign residents do not pay the Medicare Levy and Medicare Levy Surcharge, nor are they entitled to rebates.
The reference is to Australian dollars.

MEDICARE LEVY

Resident individuals are required to pay the Medicare levy. The basic rate of the Medicare levy is at the rate of 2% of taxable income. The rate is reduced in certain circumstances and a surcharge can apply to individuals that do not have private health insurance.

An individual will be a resident of Australia for taxation purposes where the individual meets any one of the tests set out in the table below:

An Australian individual taxpayer is a resident if the individual satisfies one of the following:			
• resides in Australia **Common Law Test**	• is domiciled in Australia (and does not have his or her permanent place of abode outside Australia) **Domicile Test**	• spends more than one half of the income year in Australia (unless his or her usual place of abode is outside Australia and he or she does not intend taking up residence in Australia) **183 Day Test**	• is a member of a Commonwealth Government superannuation scheme, or is a spouse or child under 16 of a member of such a scheme **The Commonwealth Superannuation Fund Scheme Test**

TEMPORARY RESIDENTS

A person who holds a temporary visa may qualify for concessions for temporary residents, such as concessions in relation to foreign sourced income, capital gains and certain interest payments made by them to foreign investors.

RECOMMENDED ACTION

- Operating a business in Australia involves complying with a range of taxation requirements and record-keeping responsibilities.
- To assist you with your tax obligations, and in view of further major tax reforms, we recommend that you seek advice specific to your circumstances.

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Petroleum Resource Rent tax

Broadly, the Petroleum Resource Rent Tax (PRRT) seeks to impose tax on the profits of certain petroleum projects.

An entity's liability for PRRT is based on its proportionate interest in a petroleum project.

Key features of the PRRT are below:

Scope	All petroleum projects, both onshore and offshore, including coal seam methane and oil shale projects. PPRT applies to onshore projects and the North West Shelf from 1 July 2012 but not to the Joint Petroleum Development Area in the Timor Sea
Rate	40%
Deductible for income tax purposes	Yes
Deductibility of expenditure	Deductible expenditure includes expenditure directly related to a petroleum project and can be capital or revenue. Some expenditure is subject to specfic rules or is excluded from deductibility
State royalties	State royalties are generally allowed as credits against PRRT liability. Uplift rules apply to unlisted royalty credits

RECOMMENDED ACTION

- Operating a business in Australia involves complying with a range of taxation obligations and record-keeping responsibilities.
- To assist you with your tax obligations, and in view of further major tax reforms, we recommend that you seek advice specifically for your circumstances.

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Vivian specialises in the areas of corporate mergers, acquisition and reorganisations, financial products and funds management. Clients particularly value her expertise with international tax and tax disputes. She is rated as a leading individual in the area of tax for Australia in Chambers Global and Asia-Pacific in every year since 2008 and in Best Lawyers Australia since 2014.

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Ian specialises in corporate and international tax, regularly advising clients on tax outcomes for mergers and acquisitions, corporate restructures, financing and other major transactions. Ian is a qualified chartered accountant and is recognised as a leading individual in the area of tax for Australia by Chambers Asia-Pacific 2016 and Best Lawyers Australia 2016.

At Ashurst, 'the partners are directly approachable and very accessible".

LEGAL 500, 2018

TAXATION

PART D

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GST, stamp duty and other indirect taxes

Indirect (or non-income) taxes, such as goods and services tax, stamp duty, land tax, fringe benefits tax, excise tax, payroll tax and Local Government taxes are also levied.

GOODS AND SERVICES TAX (GST)

The GST is a broad-based Federal consumption tax imposed at the rate of 10% on the supply of most goods, services, real property and other things in Australia made on or after 1 July 2000.

A "supply" is defined very broadly and includes the supply of goods, services or real property and the creation, grant, transfer, assignment or surrender of any right.

A supply will generally only be a taxable supply if it is made by a registered supplier (or someone who is required to be registered) for consideration and in the course or furtherance of an enterprise carried on by the supplier. All persons carrying on an enterprise with an annual turnover of A$75,000 or more are required to be registered (the threshold is A$150,000 for non-profit organisations). Only supplies that have a connection with the "indirect tax zone" (generally, Australia), however, are taken into account in calculating annual turnover.

From 1 October 2016, a new test was introduced for non-resident entities, aimed at ensuring that a non-resident is not unnecessarily drawn into the Australian GST net. Where a non-resident supplier makes some specifically listed supplies (eg intangible supplies made to an Australian business recipient) and does not make a supply through an enterprise carried on in Australia, the supply is not subject to GST. Whether or not an enterprise is carried on in Australia used to rely on the "permanent establishment" test. However, this test has been amended such that an entity will be carrying on an enterprise in Australia where one or more particular individuals (such as employees or agents) carry on the enterprise of the entity through a fixed place in Australia, or through one or more places in Australia for more than 183 days in a 12 month period.

GST is to be remitted to the ATO by the supplier on either a monthly, quarterly or annual basis, depending upon the size of the supplier's annual turnover, although any registered supplier may choose to remit on a monthly basis.

To be taxable, a supply must also be connected with Australia. There are a number of specific rules which determine whether or not a supply is connected with Australia. Different tests apply depending upon whether the supply is one of goods, real property or something else (such as rights).

From 1 July 2017, the GST law extends the scope of GST to supplies of services and intangibles made by any supplier (including a non-resident) to an "Australian consumer" (generally, a person who is not carrying on an enterprise). These changes impact supplies such as the streaming or downloading of movies, music, and apps, as well as other consultancy and professional services. However, in some circumstances, responsibility for the GST liability that arises may be shifted from the supplier to the operator of an "electronic distribution platform". This occurs if the supply is made through such a platform, and the platform operator controls any of the key elements of the supply such as the price, terms and conditions or delivery arrangements. Platform operators and suppliers may also agree that the platform operator will assume GST liability for certain other supplies made through the electronic distribution platform.

With effect from 1 July 2018, supplies of low value goods (ie goods with a customs value of less than A$1,000) from non-resident suppliers to Australian consumers are subject to GST. The supplier, or a deemed supplier (such as an operator of an electronic distribution platform or a redeliver), will be required to be registered for GST (where the turnover threshold is met) and remit GST to the ATO. The measure will impact non-resident online retailers who currently ship goods to Australian customers.

Certain supplies are input taxed. If a supply is input taxed, no GST is payable on the supply but the supplier will not be entitled to full input tax credits in respect of its acquisitions or inputs which relate to the making of that input taxed supply. Certain financial supplies are input taxed. However, a reduced input tax credit (generally 75% but in some cases 55% of the amount of any GST) may be claimed in respect of some limited inputs which relate to making financial supplies.

A number of supplies are GST-free. These include exports, international transport and certain foods, health care, education and businesses acquired as a going concern. If a supply is GST-free, no GST is payable on the supply but the supplier is still entitled to full input tax credits in respect of GST on its acquisitions or inputs which relate to the making of the GST-free supply.

In broad terms, provided valid tax invoices are held, a registered supplier will be able to claim an input tax credit in respect of GST included in the cost of inputs (unless the acquisition relates to making supplies that are input taxed, or is of a private or domestic nature). The input tax credit ensures that the end consumer ultimately bears the tax burden.

EXPORTS AND GST

As GST is primarily a tax on consumption in Australia, exports and other supplies for consumption outside Australia will generally be GST-free. Specific requirements must be met before an export will be GST-free.

IMPORTS AND GST

Generally, foreign supplies of goods will be subject to GST if they are imported into Australia.

GST is payable on "taxable importations" made by an entity importing goods through Australian Customs (whether or not it is registered for GST or carrying on an enterprise). The GST is paid by the importer, that is, the party responsible for bringing the goods through Customs. If registered, the importer may be entitled to an input tax credit for the GST paid. In some cases, where the importer is registered for GST, the importer is allowed to defer payment of GST on importations until its GST return is submitted rather than at the time of importation, at which time there is generally an offsetting input tax credit available.

In some limited cases, acquisition of services and other intangibles which take place outside Australia and are made in connection with input taxed supplies are brought within the GST net through a reverse charge mechanism. In this case, it is the Australian recipient who is liable to remit the GST.

A foreign supply may also fall within the GST regime if the supply is "connected with Australia" and the foreign supplier is registered or required to be registered for GST. Normally the foreign supplier would be liable to pay GST and would need to gross up its sales price to recover the GST from the Australian recipient. However, it is often possible for the foreign supplier and the Australian recipient to agree that the GST will be payable by the Australian recipient. This voluntary reverse charge mechanism may relieve certain foreign suppliers from having to register for GST. Certain requirements must be satisfied before the voluntary reverse charge mechanism can be applied (eg the supplier cannot be making the supply through an enterprise carried on in Australia).

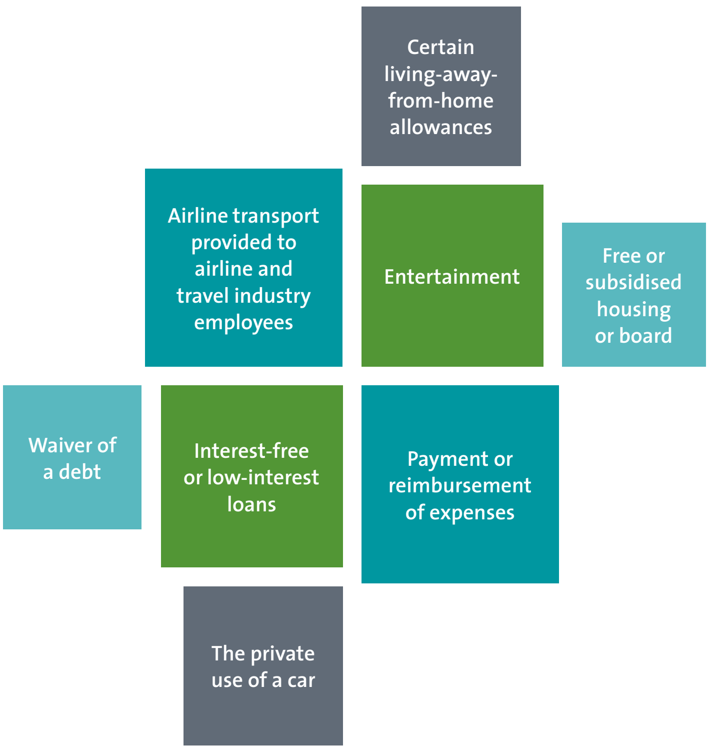
Where resident agents act for non-resident suppliers, the resident agent will be responsible for GST payable on any taxable supplies made by the non-resident through the agent.

An Australian subsidiary of a foreign body will be required to register for GST if it meets the annual turnover threshold. A foreign body doing business through an Australian branch will also be required to register for GST if supplies made through the Australian branch (together with any other supplies connected with Australia) exceed the annual turnover threshold (which is generally A$75,000).

FRINGE BENEFITS TAX (FBT)

Fringe benefits tax is a Federal tax payable by employers on the value of certain fringe benefits provided to employees or to associates of employees. A "benefit" is widely defined to include any right (including any property, right, privilege, service or facility). Fringe benefits are exempt from tax in the hands of the employee.

The principal Act dealing with FBT is the *Fringe Benefits Tax Assessment Act 1986* (Cth). This Act specifies how the taxable value of specific types of fringe benefit is to be determined, including:



Certain fringe benefits are exempt from FBT.

The general rate of FBT is noted below. It is levied on the taxable value of fringe benefits provided during the FBT year ending on 31 March, grossed up by the factor of 1 divided by (1 – the FBT rate for that FBT year) so that FBT is levied on the pre-tax value of fringe benefits provided. It is also grossed up by a further amount for GST where the employer is entitled to input tax credits on inputs or acquisition costs of the fringe benefits supplied to the employee. The FBT payable by an employer is deductible for income tax purposes.

PAYROLL TAX

Payroll tax is a State/Territory tax calculated on Australian wages paid by an employer to its employees. "Wages" are broadly defined in each State/Territory and include, for example, salary and wages, commissions, certain allowances, bonuses, directors' fees, fringe benefits, some payments to "contractors" and some superannuation benefits paid by an employer.

Payroll tax is payable by the employer by way of a periodic (usually monthly) return. Small businesses may not incur the tax if their total wages are below the thresholds applying in each State/Territory. The general exemption levels and the rates at which payroll tax is charged vary between the States/Territories and may change over time. The rates are currently around 5% to 7%.

Where employers are part of the same corporate group or certain other conditions are satisfied, employers may be "grouped" for payroll tax purposes, such that payroll tax is calculated on the aggregate amount of wages paid by the grouped employers and the general exemption may be claimed only once, by the nominated member of the group.

Under an agreement between the States and Territories in 2007, the payroll tax legislation in each jurisdiction has been harmonised to reduce compliance costs.

STAMP DUTY

Stamp duty is a tax imposed by each Australian State and Territory. Depending upon the particular head of duty, stamp duty is charged either at a fixed rate (nominal) or on an increasing scale on the greater of the value of the property and the GST inclusive consideration for the transaction (ad valorem). Rates generally vary between 4.50% and 7%. In addition, surcharges apply to acquisitions of residential property by foreign purchasers in Tasmania (3% and 0.5% for primary production land), Victoria (8%), New South Wales (8%), Queensland (7%) and South Australia (7%) and Western Australia (7%).

Traditionally, stamp duty has been imposed on instruments, for example, on share transfer forms and instruments of transfer of land. However, stamp duty has, in a number of circumstances, evolved into a tax on transactions as well as on instruments. For example, the legislation in most jurisdictions requires the production and lodgement of a statement where there is a transaction that causes or results in a change in the beneficial ownership of certain types of property where there is no written instrument otherwise brought into existence. Stamp duty is required to be paid on the statement as if it were an instrument of transfer.

The stamp duty legislation in most States and Territories has been rewritten to adopt a "Duties Act" model, which broadly operates to impose ad valorem stamp duty on a "dutiable transaction" in respect of "dutiable property". "Dutiable property" may include land, goods sold with land and certain business assets. Duty is also imposed on certain leases of real property, insurance policies and motor vehicle registrations and transfers and dealings in landholder companies and trusts.

LAND TAX

Land tax is an annual tax based on the "ownership" of land, and in some cases on the "usage" of land. It is imposed by all States and the Australian Capital Territory, but not the Northern Territory. Broadly, land tax is levied on the total unimproved value of land held by the owner at a specified date (subject to certain exemptions, for example, land used for primary production and principal place of residence). Land tax rates and thresholds vary across jurisdi ctions. By way of example, a non-residential property in Victoria not owned in a trust with an unimproved land value of A$1 million would incur an annual land tax charge of approximately A$2,975. There are also surcharges for foreign owners in some cases in the ACT, Victoria, New South Wales and Queensland, as well as surcharges for vacant residential land imposed by the Commonwealth and Victoria.

MUNICIPAL/COUNCIL RATES

Municipal rates are levied by the Local (Municipal) Councils across the country. Rates are paid by owners of land within each municipality and are set differently depending, on the State or Territory in which the Local Council is located and, in some cases, depending on the individual Council.

The amount of rates payable will generally relate either to the value of the land which may be the capital improved value or the unimproved value, or the net annual rental value. Rates typically would be significantly less than 1% per annum of the value of the property.

In addition, some States now impose emergency services levies as part of the rates assessment process.

RECOMMENDED ACTION

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- To assist you with your tax obligations, and in view of further major tax reforms, we recommend that you seek advice specifically for your circumstances.

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Geoff's tax experience spans over 25 years, and he has advised a wide range of clients, across a range of industries and transaction types and issues, across all Australian jurisdictions.

AUSTRALIA – AN INTRODUCTION FOR INVESTORS

About Ashurst

PART

E

Useful websites

ASHURST
www.ashurst.com
The Ashurst Website includes information about our firm, our expertise, insights and updates on legal information, partner profiles and contact details.

AUSTRADE
www.austrade.gov.au
The Australian Trade and Investment Commission (Austrade) is the Australian Government's trade and investment promotion agency offering services to potential investors in Australia.

FOREIGN INVESTMENT REVIEW BOARD
www.firb.gov.au
FIRB examines proposals by foreign interests to undertake direct investment in Australia and advises the Treasurer and the Government on Australia's Foreign Investment Policy.

GOVERNMENT INFORMATION
www.gov.au
The Government Entry Point provides access to Australian Federal, State, Territory and Local Government websites.

www.business.gov.au
The Business Entry Point is a government resource providing a range of tools and resources useful to businesses.

www.treasury.gov.au
The Treasury advises on Government economic policies, including for business. It also includes information on Australian tax treaties (double taxation agreements and double taxation conventions).

CORPORATE REGULATION
www.asic.gov.au
The Australian Securities and Investments Commission regulates Australia's companies.

AUSTRALIAN SECURITIES EXCHANGE (ASX)
www.asx.com.au
ASX operates Australia's primary national stock exchange.

TAXATION
www.ato.gov.au
The Australian Taxation Office's website includes information for business, large corporates and multinationals.

FINTECH
www.fintechaustralia.org.au
FinTech Australia is a national Australian Fintech Industry Association. It aims to position Australia as one of the world's top markets for Fintech innovations and investment.

COMPETITION
www.accc.gov.au
The Australian Competition and Consumer Commission promotes competition and fair trade, and regulates national infrastructure.

ENVIRONMENT
www.awe.gov.au
The Department of Agriculture, Water and the Environment helps develop agricultural industries, manages our environment and heritage and supports regional communities.

FINANCIAL SERVICES REGULATION
www.apra.gov.au
The Australian Prudential Regulation Authority is an independent statutory authority that supervises institutions across banking, insurance and superannuation and promotes financial system stability in Australia.

HOME AFFAIRS
www.homeaffairs.gov.au
The Department of Home Affairs website includes information on importing and exporting, visas, and employing and sponsoring employees.

PROTECTION OF INTELLECTUAL PROPERTY
www.ipaustralia.gov.au
IP Australia administers Australia's IP rights system: patents, trade marks, designs and plant breeder's rights.

WORKPLACE RELATIONS
www.dese.gov.au
The Department of Education, Skills and Employment provides information for both employers and employees.

AUSTRALIAN BUREAU OF STATISTICS (ABS)
www.abs.gov.au
The ABS website provides statistics for a wide range of social, economic and environment indicators.

AUSTRALIAN LEGAL MATERIALS (LEGISLATION AND CASE LAW)
www.austlii.edu.au
This website provides access to Australian legal information.

TOURISM AUSTRALIA
www.australia.com
This website is the gateway to Australian tourism information.

ABOUT ASHURST

PART E

Ashurst – local knowledge with global experience

Ashurst is a leading global law firm advising Australian and international companies, financial institutions and governments on leading transactions, projects and disputes. We represent nearly two thirds of ASX 100 companies and more than 80% of Australian companies in the Forbes Global 2000, demonstrating the trust placed in our firm by todays' most influential organisations. Our leading international team of partners and lawyers offer expertise across a range of practice areas and industry sectors, combining local knowledge with global experience ensuring our clients receive advice that facilitates informed commercial decision-making.

OUR GLOBAL NETWORK

Ashurst offices
Faisal Adnan Baassiri Law Firm (In Association with Ashurst LLP)
Indian Law Partners (Best Friend Firm with Ashurst)
ADTLaw LLC (Singapore Formal Law Alliance)
Oentoeng Suria & Partners (Associated Office with Ashurst)
Guantao Law Firm (Joint Operation Office)

*Brisbane has two office locations

Our clients value us for being approachable, astute and commercially minded. As a global team we have a reputation for successfully managing large and complex multi-jurisdictional transactions, disputes and projects, and delivering outstanding outcomes for clients.

Our people are our greatest asset. We bring together lawyers with the technical knowledge, industry experience and regional know-how to provide the incisive advice our clients need.

Ashurst is well positioned to help international investors to capitalise on the many opportunities in Australia. Australia's close proximity to Asia, the world's fastest growing region, makes it a strategic location from which to operate a business. With offices across the Asia Pacific in Sydney, Melbourne, Brisbane, Perth, Canberra, Beijing, Shanghai, Hong Kong, Singapore, Tokyo and Port Moresby, plus on-the-ground affiliations with local counsel, including Oentoeng Suria & Partners in Jakarta, Indian Law Partners in India, ADT Law LLC in Singapore and Guantao in Greater China, we ensure the seamless coordination of our services.

AWARDS AND RECOGNITION

AUSTRALASIAN LAW AWARDS

Debt Market Deal of the Year 2019 – World Bank bond-I

Energy & Resources Deal of the Year 2019 – Santos acquisition of Quadrant

Property, Infrastructure & Projects Deal of the Year 2019 – Hunter Class Frigate and ASC Shipbuilding restructure

Equity Market Deal of the Year 2018 – Yancoal Capital Raising

M&A Deal of the Year 2018 – Yancoal Acquisition of Coal & Allied

Insolvency & Restructuring Deal of the Year 2017 – Arrium Group insolvency

Debt Market Deal of the Year 2016 – Warehouse securitisation of GE assets

Insolvency & Restructuring Deal of the Year 2016 – Atlas Iron restructure

Property, Infrastructure & Projects Deal of the Year 2016 – WestConnex Stage 2

CHAMBERS ASIA PACIFIC

Ashurst is recognised as one of Australia's leading firms in the Chambers Asia Pacific directory

In 2020, the firm was ranked in 29 Australian practice areas, including 11 Band 1 rankings

FINANCIAL REVIEW CLIENT CHOICE AWARDS

Best Provider to Mining and Oil & Gas

FT ASIA PACIFIC INNOVATIVE LAWYERS

Innovation in Legal Expertise: Driving Value 2018

Most Innovative Law Firm (internationally headquartered) 2018

Ashurst ranks top 5 in the FT Asia Pacific Innovative Lawyers Report 2017 and 2019

HICAP ANZ DEAL OF THE YEAR AWARDS

Real Estate Transaction of the Year 2019

IFLR LMG ASIA WOMEN IN BUSINESS LAW

Law Firm of the Year, Australia 2017

INFRASTRUCTURE PARTNERSHIPS AUSTRALIA NATIONAL INFRASTRUCTURE AWARDS

Project of the Year Award 2019 – WestConnex Transaction

LAWYERS WEEKLY AUSTRALIAN LAW AWARDS

Government Team of the Year 2019

Employee Program of the Year 2018

Insurance Team of the Year 2017

LEGAL WEEK

Law Firm of the Year 2019

LEGAL 500 ASIA PACIFIC

Ashurst is consistently recognised highly in the Legal 500 Asia Pacific directory, with our Australian practices receiving 15 Band 1 rankings in 2019, and 126 individuals recognised

MERGERMARKET M&A AWARDS

Business Services M&A Legal Adviser of the Year 2018

PPP AWARDS

Gold Legal Adviser of the Year 2018

MOST INNOVATIVE FIRM OF THE YEAR

British Legal Technology Awards 2019

LEGAL WEEK LAW FIRM OF THE YEAR

British Legal Awards 2019

CASE STUDIES

We have demonstrated professional excellence in legal practice in a number of market leading and innovative matters, including advising:

- **AGL:** on all aspects of the development of an LNG import terminal at Crib Point on the east coast of Australia, including all project approval strategies.
- **Airservices Australia:** on successfully defending a "first of its kind" employment class action. This was one of the most significant employment claims before an Australian court.
- **ANZ Bank:** on all aspects of ANZ's preparation and responses to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.
- **Brookfield Capital Partners' acquisition of Healthscope:** advising the finance parties on the secured syndicated facilities provided to Brookfield for its A$4.4bn acquisition of Healthscope.
- **Capcoal:** in a dispute with the major mining union, the CFMMEU, which led to adverse action proceedings in the Federal Court.
- **Department of Defence – Land 400:** on the Australian Army's A$5.2bn acquisition of 211 combat reconnaissance vehicles from Rheinmetall Defence Australia, as a part of the LAND 400 Phase 2 Project which is the largest acquisition project in the history of the Australian Army.
- **Department of Defence – SEA 5000:** on the A$35bn Hunter class frigate program, which is one of the largest naval shipbuilding projects ever undertaken in Australia.
- **KKR's acquisition of MYOB**: the lenders on the US$1.25bn US Term Loan B financing to KKR to finance its acquisition of MYOB.
- **Native Title Agreements:** successfully negotiating between mining companies and native title groups to enable valid grants of mining tenure for major projects, including Rio Tinto, Yancoal and BHP.
- **Navitas Ltd:** on its A$2.1bn acquisition by BGH Consortium.
- **Nine Entertainment Co.:** on its acquisition of 100% of the issued share capital in Fairfax Media Limited for A$4bn.
- **NorthWest Healthcare Properties REIT:** on the acquisition and leaseback of A$1.3bn of hospital property assets from Healthscope Limited as part of the proposed A$4.4bn takeover of Healthscope Limited by Brookfield.
- **Nutrien and Landmark:** in securing competition clearance from the Australian Competition and Consumer Commission for Nutrien's proposed acquisition of Ruralco Holdings Ltd.
- **Oxford Properties Group:** on the acquisition of 100% of the units in Investa Office Fund for A$3.35bn; and advising on the loan facility as part of Oxford's acquisition.
- **Phoenix Energy**: on the A$1.5bn Kwinana Waste to Energy Project, Australia's first large scale waste-to-energy plant.
- **QBE:** on its award-winning investment in the World Bank's issuance of notes via distributed ledger technology (DLT) platform operated by CBA (Blockchain Bonds).
- **QGC:** on the A$3.4bn infrastructure sharing and gas purchasing arrangements with APLNG.
- **Queensland Government:** on the A$4.4bn New Generation Rollingstock PPP Project.
- **Sydney Metro:** on all aspects of the A$12bn Sydney Metro City & Southwest Project.
- **Sydney Motorway Corporation Pty Limited:** on all aspects of the A$16.8bn development of WestConnex motorway including its A$9.26bn sale to successful bidder, Transurban.
- **Victorian Government:** on the sale of its interest in Snowy Hydro to the Commonwealth Government for A$2bn; and on the A$1.75bn Regional Rail Revival program, an initiative to upgrade stations, signalling and track across every regional passenger train line in Victoria.
- **Vodafone Group:** advised the syndicate of Australian and Asia Pacific lenders on the A$4.75bn self-arranged loan facility to be provided to Vodafone Hutchison Australia Pty Limited.
- **Western Sydney Airport:** on the procurement of the A$5.3bn project including its contract with a joint venture between CPB Contractors and Lendlease Engineering, the first major contract signed in the development of the new Western Sydney International Airport.
- **Woodside:** on the A$15bn expansion of Woodside's Pluto LNG Project.
- **WorkPac:** on the test case to determine the entitlements of casuals under Australian employment law.

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