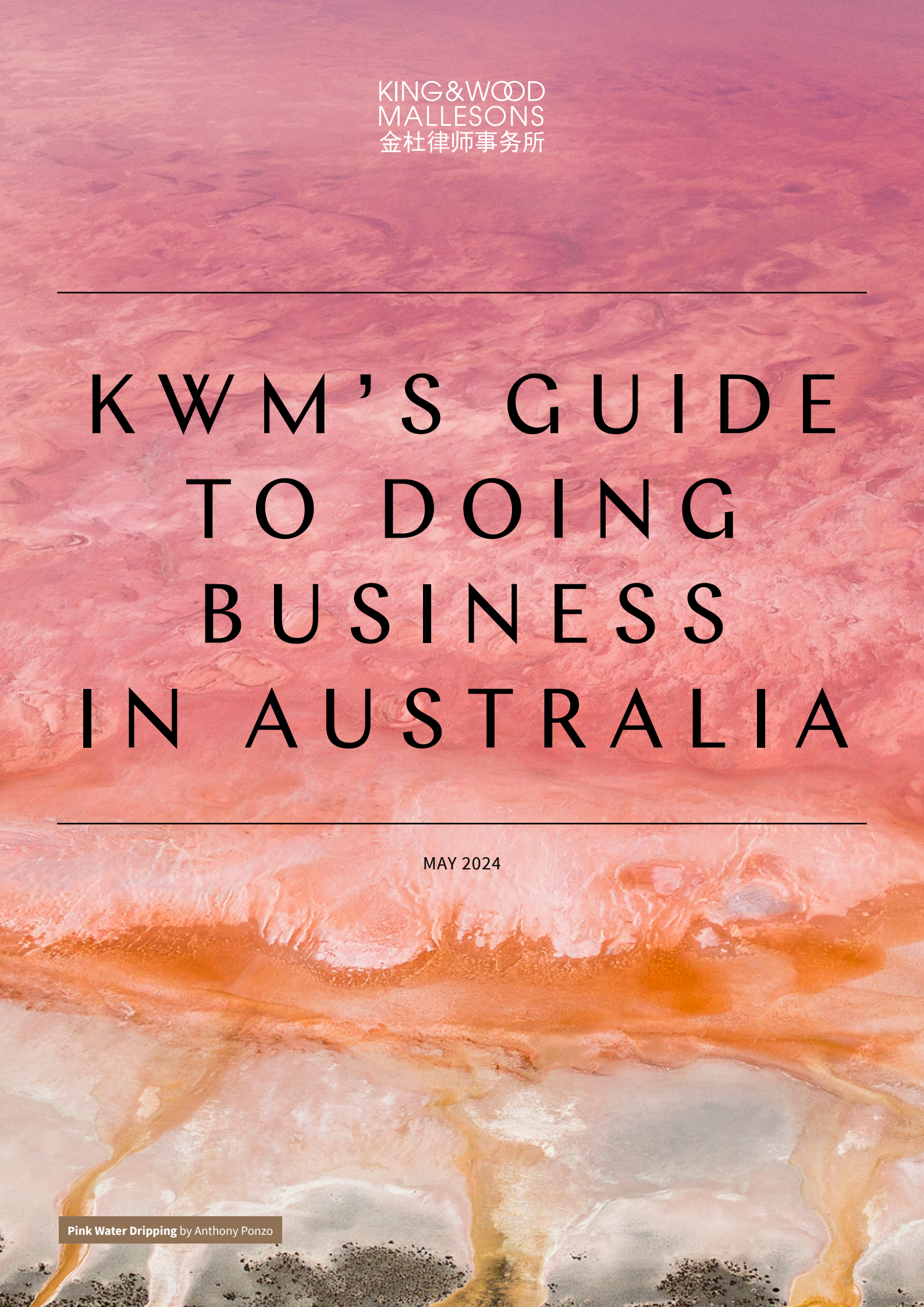
KING&WOOD MALLESONS
金杜律师事务所

KWM'S GUIDE TO DOING BUSINESS IN AUSTRALIA

MAY 2024



Pink Water Dripping by Anthony Ponzo

Our interactive wheel provides a snapshot of the legal, social and tax considerations relevant to doing business in Australia that are covered in this Guide. The numbers in the outer wheel refer to page numbers of this Guide. If you are viewing an electronic version of this Guide, click on a consideration to jump to the relevant part of the Guide.

INTRODUCTION

Welcome to the 2024 edition of *KWM's Guide to Doing Business in Australia*.

Extensive opportunities continue to exist for investors in Australia across traditional sectors such as healthcare, infrastructure and resources, as well as other sectors such as the exciting and dynamic FinTech sector.

Australia continues to be a centre of innovation in the Asia Pacific region and attracts investors looking for stable growth. Investment conditions in Australia continue to be attractive, providing extensive opportunities for investors.

Building on our unrivalled depth of capability and experience, in this publication we provide an outline of the key legal, social and tax considerations relevant for anyone investing in Australia. We share our industry experts' knowledge and insight into issues and trends impacting a number of sectors, including Energy and Resources, Infrastructure and FinTech and we also provide commentary on issues which are becoming increasingly relevant, including the focus on Environmental, Social and Governance (ESG), Modern Slavery and threats to businesses such as cyber security breaches.

Throughout our Guide you will find references to other King & Wood Mallesons publications and the websites of various industry and regulatory bodies which can provide you with additional information.

Thank you to Annabel Griffin and Kate Creighton-Selvay who are the KWM sponsoring partners of this Guide, together with each of the contributors named in each section and at the end of this publication.

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

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The information contained in this publication is current as at 12 April 2024.
Intending investors should obtain specific and detailed professional advice about any proposed business activity in Australia.

CHANGES SINCE OUR LAST GUIDE

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Australia has seen significant changes in law since our last published Guide to Doing Business in Australia.

In 2022, a new Labor government came to power, replacing a Coalition that had been in power for almost a decade. With the new government came ambitious reforms, in particular in the arenas of:

- Labour laws – including swathes of reform strengthening protections for employees (such as the 'same job, same pay' arrangements, reforms to address employment underpayments and 'rights to disconnect') and targeted policy objectives such as the 'closing the gender pay gap' - see page 89 for details
- Consumer protections – by expanding the unfair contract terms regime under the Australian consumer law and applying significant penalties - see page 59 for details
- Financial industry accountability – through the passing of the *Financial Accountability Regime Act 2023* (Cth) which implemented the recommendations of the Financial Services Royal Commission by establishing a new accountability regime for institutions and their senior executives in the banking, insurance, and superannuation sectors - see page 47 for details
- Regulation of inbound investments – by imposing new registration obligations for foreign investors in the newly established Register of Foreign Ownership of Australian Assets - see page 22 for details
- Export control laws for sensitive assets – through the amendment of the Defence Export Controls Act. Amendments are currently in progress, which will significantly impact businesses (including subsidiaries of foreign companies) when operating in Australia - see page 96 for details
- Government accountability – through the establishment of the National Anti-Corruption Commission and Act, which grants the Commissioner broad investigatory powers including suppliers to government – see page 6 for details

In addition to changes in laws, Australia has seen significant shifts in community expectations of business since our last Guide. Compliance with laws is no longer sufficient. It is important for businesses to understand how this scrutiny is playing out – not only are businesses subject to heightened transparency and accountability standards, but we are also seeing governments seemingly held accountable for actions of businesses in ways not seen before. The impact of this is a greater need for risk management.

Corporate Australia has been exposed to considerable pressure, including businesses being requested, or compelled, to appear in front of government/public inquiries. With favourable investment conditions, Australia continues to be a great place to grow your business, particularly for the well-prepared investor who understands the regulatory and practical business landscape.

We bring you this guide as the Federal Government releases what may be a pre-election budget at a time of macroeconomic challenge – nagging inflation concern is prolonging higher interest rates and will serve to temper the Government's scope to subsidise the energy transition and manufacturing under its Future Made in Australia industrial policy

Subscribe here to stay up to date on our latest thinking.

1. FUNDAMENTALS OF THE AUSTRALIAN LEGAL AND REGULATORY SYSTEM

OVERVIEW OF THE AUSTRALIAN LEGAL AND REGULATORY SYSTEM

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Overview

Australia consists of 6 States which in 1901 federated into a single Commonwealth (which is a separate body politic) under the Commonwealth Constitution.

As well as the States, there are 2 Territories on the mainland and 6 'external' Territories on islands near the mainland and in the Antarctic. The Territories are all under the control of the Commonwealth, although the 2 mainland Territories are self-governing.

The Commonwealth, each of the States and the mainland Territories each have a legislature, an Executive (including Government Departments) and a judiciary. For the external Territories, the Commonwealth Parliament is the legislature, the courts are Commonwealth courts and Commonwealth Departments administer them.

All jurisdictions are democracies, with universal suffrage and secret ballots and Ministers (who are all elected members of the relevant legislature) accountable to the legislatures of their jurisdictions.

Federal Constitution

While each State has a written Constitution, the Commonwealth Constitution is the basis of federation and established the federal government by providing for the federal Parliament, the federal Executive Government and the federal judiciary. It sets out the powers of the Commonwealth to make laws and the basic jurisdiction of federal courts. The executive power is vested in the UK Monarch and is exercised by the Governor-General who appoints members of the Parliament to be Ministers, each with responsibility for specific departments covering a specified area of administration.

The federal Constitution can only be altered by referendum. To be successful, the proposal must be approved by a majority of voters nationally and also by a majority of voters 'in a majority of the States'. Where a proposal affects an individual State the proposal must also get majority approval in that State. Very few proposed Constitution alterations have been successful; only 8 out of 45.

FUNCTIONS	
Legislative (law making)	Each Australian legislature makes written laws (statutes). In most cases these statutes authorise Ministers or other administrators to make regulations or other subsidiary laws under these statutes. State Parliaments have fairly comprehensive legislative power (with some exceptions, eg they cannot enact laws imposing excise duties). A statute of the Commonwealth Parliament, on the other hand, must be based on a specific head of legislative power listed in the Commonwealth Constitution. These include corporations, inter-State and international trade and commerce, taxation, communications, banking, insurance and industrial disputes. If a State or Territory law is inconsistent with a valid Commonwealth law, the Commonwealth law prevails. The common law (or unwritten law) also applies throughout Australia. Much contract law, for example, is common law. It is applied by the courts on the basis of precedent, which means that a court decides similar cases in a consistent way and on the basis that a higher court's reasoned decision on a particular point of law is followed by lower courts.
Executive Governments	The Commonwealth, the States and the mainland Territories each have an Executive Government. The Commonwealth is headed by the Governor-General, appointed by the UK Monarch. The States have Governors, also appointed by the UK Monarch. The mainland Territories and several external Territories have Administrators, appointed by the Commonwealth.
Judiciary	The Commonwealth, the States and the mainland Territories each have a system of courts. The Commonwealth Courts are the High Court, the Federal Court, the Family Court and the Federal Circuit and Family Court. States and mainland Territories have Supreme Courts (in some cases also a Court of Appeal), District or County Courts and Magistrates Courts. The High Court is the ultimate appeal court in Australia.

At the local or municipal level local councils (also elected) administer State or Territory laws on matters such as local environmental matters, roads, local zoning and building control and deliver a range of services.

The Federal system and the State systems have been described as 'Washminster' systems; that is, a combination of the United States model (without the Electoral College) but with direct election and Ministers accountable to Parliament.

While there is no 'Bill of Rights' as there is in the United States, the federal Constitution has limited guarantees to protect freedom of interstate commerce, to protect political discourse, to require 'just terms' for compulsory acquisitions of property and a prohibition on establishment of religion. Some (but not all) of these are also reflected in State Constitutions.

Inter-governmental relationships

The Commonwealth has effective control of major tax policy and powers over significant areas of economic activity (eg banking, insurance, interstate trade and corporations). The Commonwealth and the States have substantial inter-governmental arrangements on a wide range of matters to ensure co-operation and collaboration.

The Commonwealth and each State and Territory has separate procurement rules that apply to the purchase of goods and services, so those looking to sell to government will benefit from understanding the different rules and requirements that apply to their customers. Conflicts of interest and corrupt conduct are regulated by each jurisdiction, including at the Federal level through the *National Anti-Corruption Commission Act 2022* (NACC Act). The NACC Act provides for broad jurisdiction to investigate serious or systemic corruption, including criminal and non-criminal conduct and conduct and, significantly, covers not just parliamentarians and public servants, but 'any person' who 'could' seek to corrupt a public official.

DISPUTE RESOLUTION IN AUSTRALIA

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Overview

Before taking a matter to court it is important to select the correct court in which to commence proceedings.

Each court in Australia has unique jurisdictional features. At the simplest level, State Supreme Courts have jurisdiction to hear matters concerning State legislation and the common law (eg, the law of contract or torts), and the Federal Court has jurisdiction to hear matters concerning Commonwealth legislation. Differences between jurisdictions become more complex when considering limitations on the time to file and the types of matters which a specific court can determine.

Generally speaking, a breach of contract or tort claim must be commenced within 6 years of the relevant breach or conduct, although differing limitations periods may apply depending on the claim.

To commence proceedings in an Australian court, the initiating party (usually referred to as the 'plaintiff' or the 'applicant') must file a document prescribed by the relevant court rules and pay an accompanying fee set by the court. The document filed in court sets out the background and basis for the initiating party's claim and outlines the relief or orders sought from the court. The other party (usually referred to as the 'defendant' or the 'respondent') then files a responsive document outlining its response to the claim made against it.

Case management

Each Australian court has a set of procedural rules (often referred to as 'court rules') which outline the availability and application of the different court processes available to the parties.

Most Australian courts take an active role in managing the progress of cases by, eg, requiring parties to appear before the court at case management hearings, making time-tabling orders for the various steps necessary to prepare the case for trial and ruling on disputes arising between the parties as they prepare their cases for trial.

Australian courts often require parties to utilise alternatives outside the court system in an effort to reduce costs, promote time-effective resolutions and reduce demands on the courts. The most common alternative dispute resolution method is mediation (with arbitration and conciliation also common in some contexts).

Role of the judge

Most civil matters are heard by a judge. Jury trials are not very common and typically only occur in some personal injury cases and defamation proceedings.

Australia has an adversarial approach to litigation where the parties separately present their evidence and arguments. The judge's role is to independently determine the dispute, based on evidence and argument presented by the parties following a public trial. The judge's reasons and orders are then ordinarily recorded in written documents, which are provided to the parties and made publicly available.

Evidence and production of documents

There are statutory and common law requirements on both individuals and corporations to preserve documents that may potentially be relied upon in litigation. The penalties for intentional or reckless destruction of documents can be significant.

Parties to litigation are compelled to produce documents potentially relevant to the proceeding in discovery, which generally occurs after the parties' respective claims and defences are filed with the court.

The most common exception to the compulsion to produce documents in discovery applies to documents which are subject to legal professional privilege. This involves confidential communications or documents which record legal advice or which were prepared for the dominant purpose of the provision of legal advice or were made or prepared for the dominant purpose of use in relation to actual or reasonably contemplated legal proceedings. This privilege may be waived expressly or by implication (usually through the relevant party ceasing to treat the privileged document or communication as confidential, eg, by referring to it publicly or disclosing it to a third party).

Interim and final remedies

Before a matter is determined by a court, judges have discretion to grant interim relief to a party to prevent the court process from being frustrated. The most common form of interim relief is an interlocutory injunction (which is designed to preserve the status quo until the court has had an opportunity to hear and determine the matter on a final basis). Other interim orders include orders freezing accounts or otherwise preventing the defendant from disposing of property the subject of the proceedings.

In terms of final remedies, Australian courts have a broad discretion as to what they can order. Generally speaking, the purpose of the final remedy is to put the innocent party in the position they would have been in had the wrong not occurred and/or to prevent the wrong continuing or being repeated.

The most common remedies include declarations of breach of the law, awards of monetary damages and injunctions. Other less common remedies include an account of profits obtained from the wrong, cancellation of a contract, rectification of a contract and specific performance of a contract. The remedies available for statute-based causes of action generally reflect those remedies available under the common law (although some statutes have bespoke remedies specifically adapted for the wrong).

Costs

A portion of legal costs incurred in conducting proceedings are generally awarded to the successful party. In all Australian jurisdictions, the court has a discretion to award costs on 2 bases:

- **Party/party costs**, which are determined by reference to various court scales of properly incurred costs. In practice, this usually means the successful party recovers between 50% to 70% of their legal costs.
- **Solicitor/client costs**, otherwise known as costs on an 'indemnity' basis where, as a result of unreasonable or unsatisfactory conduct by the unsuccessful party, the other party recovers all of their costs reasonably incurred. Costs are usually awarded on an indemnity basis where a party has refused an offer to settle proceedings which would have provided a better result for that party than the eventual outcome of the proceeding.

When a costs order is made on either of the 2 bases, the parties can either agree the sum of costs to be paid between themselves or have a formal costs assessor appointed to analyse the successful party's bills to determine what costs are reasonably incurred and determine the total sum of costs to be paid.

Appeals

In most Australian jurisdictions, the unsuccessful party has a right of appeal from the decision of the judge at first instance. Limitations on appeal exist in some contexts. For example, appeals to the High Court require special leave to first be obtained, something which is only granted in a small minority of cases. Interlocutory decisions (such as those relating to discovery or interlocutory injunctions) are also difficult to appeal. Appeals are usually heard by 3 judges and are subject to their own processes and procedures.

Foreign judgments and proceedings

Judgments of certain foreign courts are recognised and enforceable in Australia. The Schedule to the *Foreign Judgments Regulations 1992* (Cth) records which courts are recognised. Notably, the Schedule does not include any courts of the United States, although a party can apply to the court for recognition of a foreign judgment on common law principles where the jurisdiction in question is not listed in the Schedule. The party seeking to enforce a foreign judgment must apply to the appropriate Australian court for registration of the judgment within 6 years, after which the foreign judgment has the same effect as judgments made by the court in which it is registered.

Class actions

Class actions (also known as representative proceedings) are available in the Federal Court and most State Supreme Courts, to groups of 7 or more persons if the claim arises out of similar circumstances giving rise to common issues of law or fact. Australian class action regimes do not include any certification process to be undertaken by the Court upon initiation of proceedings to assess whether these requirements are met. It is up to the defendant to challenge non-compliance with these requirements, raise issues with the adequacy of class representation or argue that the class action is not an effective or efficient means of dealing with claims.

Common types of claims involve securities, financial products, government liability, and consumer and product liability. Lawyers are currently prohibited from charging contingency fees in all jurisdictions for damages claims, although one State (Victoria) has a regime that enables a Court to make a “Group Costs Order” under which a plaintiff firm can charge legal costs as a percentage of the amount recovered in the proceeding. Actions are typically funded by plaintiff law firms and/or third-party litigation funders.

See KWM’s annual publication, The Review – Class Actions in Australia, for a review of significant judgments, events and developments, accessible from https://www.kwm.com/au/en/expertise/practices/dispute-resolution-and-litigation/class-actions.html.

2. CORPORATE STRUCTURING AND INVESTMENT

CARRYING ON BUSINESS IN AUSTRALIA

AMANDA ISOUARD

PARTNER
SYDNEY

MARK MCFARLANE

PARTNER
SYDNEY

Australia has a comprehensive tax regime with taxes imposed at both the Federal level and the State/Territory level. The Australian Taxation Office (ATO) is responsible for administering the tax laws imposed at the Federal level and each State and Territory has a different body which administers the tax laws imposed in that particular jurisdiction.

ARE YOU CARRYING ON BUSINESS IN AUSTRALIA?

A foreign company which carries on business in Australia must be registered to do so. Whether a foreign company's activities constitute the carrying on of business in Australia depends on a variety of factors.

ASIC registration

A foreign company cannot carry on business in Australia unless it is registered with the Australian Securities and Investments Commission (ASIC) or has applied to be registered and the application has not yet been dealt with.

We can advise as to whether circumstances or activities may give rise to carrying on business in Australia and assist with registration.

The Corporations Act

A body corporate carries on business in Australia under the *Corporations Act 2001* (Cth) (Corporations Act) if it:

- has a place of business in Australia (such as a permanent office);
- establishes or uses a share transfer office or share registration office in Australia; or
- administers, manages or otherwise deals with property situated in Australia as an agent, legal personal representative or trustee, whether by employees or agents or otherwise. This is potentially a very broad deeming provision.

Also, a foreign company that makes an offer of debentures in Australia that requires compliance with the Corporations Act's debenture trust requirements (principally retail offers), or acts as guarantor for that offer, is taken to carry on business in Australia.

Expanded classification

Foreign companies include bodies corporate and some unincorporated bodies. An unincorporated body formed outside Australia is a foreign company if it may sue, or be sued, or may hold property in the name of its secretary or an officer of the body duly appointed for that purpose. Some foreign limited partnerships and other business structures may be classified as bodies corporate.

General law also applies

Under general law in Australia, whether a person is carrying on business in Australia is a question of fact. A company may be carrying on business in Australia even if the bulk of its activities are conducted elsewhere, and it is not necessary to have a fixed place of business in this jurisdiction. The territorial concept of carrying on business involves acts within the relevant territory that amount to, or are ancillary to, transactions that make up or support the business. A typical factor that can lead to carrying on business in Australia is physical activity in Australia (eg business visits).

System, repetition and continuity of activities in a particular jurisdiction in Australia may not be essential to constitute carrying on business in Australia. A one-off event in a jurisdiction has been held to be enough to constitute carrying on business in that jurisdiction, particularly if that event is part of a business carried on elsewhere, there is an intention to engage in further activities in that jurisdiction or it is of significant scale. It has also been held that carrying out an activity 5 or 6 times is enough to constitute carrying on a business.

Other activities which may result in a foreign entity being considered to be carrying on business in Australia include:

- having a representative in Australia who has authority to bind the foreign entity;
- appointing a representative (such as an agent) in Australia whose activities would be regarded as forming part of the activities of the foreign entity rather than merely of the representative, or whose activities go beyond merely 'ministerial' matters;
- exercising a significant degree of control over the activities of any agent or other person in Australia, including a subsidiary;
- developing a significant client base in Australia;
- conducting a series of regular or continuous dealings in Australia;
- paying or contributing to the costs of running an office in Australia or the office of an agent or representative in Australia;
- employing staff in Australia, or paying or contributing to the salaries of staff employed in Australia by an agent or representative;
- entering into contracts that are formed (accepted) in Australia; or
- locating or using business infrastructure in Australia (eg IT servers).

Importantly, the overall likelihood of carrying on business in Australia increases if any of these activities are undertaken in combination.

Traditionally, the Australian courts have tended to focus on activities that physically occur in Australia in analysing whether a foreign company carries on business in Australia, including the activities of agents in Australia or third parties in Australia that are considered to be carrying on the business of the foreign company. There is, however, an increasing trend in court decisions that suggests a broader approach. This broader approach involves giving significant weight to all the points of connection that a cross-border business may have with Australia. Examples of such points of connection include incurring significant business expenses in Australia, engaging suppliers or distributors in Australia, earning significant revenue from Australian customers, sending invoices into Australia, entering into contracts governed by Australian law or accepted in Australia, engaging in activities aimed at protecting and preserving goodwill in Australia, operating a website outside Australia that targets the Australian market and installing and removing cookies or executable code on devices that are located in Australia (at least where the business in question is a data processing business).

If this approach of 'connectivity' continues to be adopted by the courts in the future, it may significantly increase the circumstances in which a foreign company conducting business into Australia on a remote cross-border basis is held to be carrying on business in Australia. The extent to which this broader approach will be adopted in the context of the Corporations Act is not, however, clear.

Not carrying on business in Australia

Under the Corporations Act, a body corporate does not carry on business in Australia merely because it:

- is or becomes a party to a proceeding or effects settlement of a proceeding or of a claim or dispute in Australia;
- holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs in Australia;
- maintains a bank account in Australia;
- effects a sale through an independent contractor in Australia;
- solicits or procures an order that becomes a binding contract only if the order is accepted outside of Australia;
- creates evidence of a debt, or creates a charge on property in Australia;
- secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts in Australia;
- conducts an isolated transaction in Australia that is completed within a period of 31 days and is not repeated from time to time; or
- invests any of its funds or holds any property in Australia.

However, an entity engaging in these activities in combination may give rise to a determination that the entity is carrying on business in Australia.

ARE YOU CARRYING ON A FINANCIAL SERVICES BUSINESS?

In Australia, if you carry on a financial services business, you need:

- to hold an Australian financial services licence (AFSL) or a foreign AFSL;
- to be appointed as an authorised representative of an AFSL holder; or
- to be exempt from the requirement to hold an AFSL (under Chapter 7 of the Corporations Act).

Generally, lenders are not covered by this licensing system (see the *Consumer Credit* section of this Guide regarding licensing for providers of credit), but most other types of financial services are covered (including deposit taking, foreign exchange contracts, derivatives, custody, managed investments, stockbroking, insurance and superannuation). This also includes wholesale over-the-counter treasury and derivative trading, potentially even by entities which would consider themselves end users.

Under the Australian legislation:

- a financial services provider may be deemed to be carrying on a financial services business in Australia even though it has no physical presence in Australia; and
- while there are some general licensing exemptions based on a financial services provider only dealing with institutional Australian counterparties (eg Australian banks, financial services licence holders, insurers and fund managers), such exemptions are subject to specific limitations and will generally only apply to services provided from outside Australia.

When do you need an AFSL?

A foreign company may be affected by the AFSL regime if it:

- enters into spot, swap, repo, option or forward transactions in currency, commodities, metals, rates and indexes with persons in Australia through either the over-the-counter markets or through automated dealing systems;
- issues securities, shares, stocks, deposits, debentures, bonds, managed investment products or insurance to persons in Australia;
- effects secondary market trades in securities, shares, stocks, debentures, bonds or managed investment products as an agent or trustee of a person in Australia;
- enters into secondary market trades in securities, shares, stocks, debentures, bonds or managed investment products with counterparties who are persons in Australia while acting as an agent or trustee of a third person;
- provides giro post or other electronic non-cash payment facilities to persons in Australia; or
- holds securities, shares, stocks, debentures, bonds, managed investment products, or interests in such products, on trust for persons in Australia.

Do AFSL exemptions apply?

AFSL exemptions may be available to foreign financial services providers in certain situations, including for:

- transactions arranged or effected by an AFSL holder;
- certain products or services offered to Australian wholesale clients by financial services providers who are regulated by certain approved foreign regulators, and who comply with other applicable conditions so as to qualify for this relief (noting that at the date of this publication, financial services providers who are not currently relying on these 'passport' exemptions may apply for individual relief in the form of the 'passport' exemption, but with such relief (if granted) likely to expire on 31 March 2025);
- certain foreign financial services providers who are not otherwise carrying on business in Australia and who only provide limited financial services to Australian wholesale or professional investor clients from outside Australia (it is likely that the relief for services to wholesale clients will be replaced with a more limited form of relief in future); and
- supplementary services to an Australian client in relation to a product issued and acquired outside Australia.

The exact scope of these exemptions is technical and complex and, at the date of publication, certain exemptions are likely to be subject to reform proposals. Much depends on the individual circumstances of the relevant financial services provider.

AFSL regime

AFSLs are issued by ASIC on satisfaction of the relevant licensing application criteria. Licence applications can require extensive information in support of the application. AFSL holders have a large range of obligations imposed on them. The Australian financial services regime differentiates between retail and wholesale clients. There are significant additional disclosure and conduct requirements where financial services are provided to retail clients. Breaches of the AFSL regime can lead to criminal sanctions and the possibility that counterparties can cancel transactions.

ARE YOU OPERATING A FINANCIAL MARKET?

Persons who operate financial markets in Australia, including by having Australian market participants on a financial market otherwise operated outside Australia, must obtain an Australian market licence or be exempt from this requirement.

CORPORATE VEHICLES

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WHICH BUSINESS STRUCTURE SHOULD YOU USE?

The choice of structure used to invest and conduct business in Australia is central to your success in the market and will be influenced by a number of factors, including the nature of the business, tax issues and the needs of investors. Business structures include companies, trusts or managed investment schemes, joint ventures and partnerships. Relatively recently, corporate collective investment vehicles became another business structure available to investors in the Australian market. For more information about corporate collective investment vehicles, see the *Corporate Collective Investment Vehicles* section of this Guide.

BUSINESS STRUCTURE	KEY FEATURES	REGULATION
Companies	***Proprietary companies*** • At least 1 shareholder but no more than 50 non- employee shareholders • Must have at least 1 director who is ordinarily resident in Australia • Can, but need not, have a secretary • Must have a public officer for tax purposes • Must have a registered office in Australia • Managed by its directors • Shareholders' rights in relation to the company are governed by the company's constitution. A shareholders' agreement governs the relationship between the shareholders • Cannot engage in any activity that would require the lodgement of a prospectus (except for an offer of shares to existing shareholders or employees) ***Public companies*** • Must have at least 1 shareholder • Must have at least 3 directors (2 of whom are ordinarily resident in Australia) • Must have at least 1 secretary who is ordinarily resident in Australia • Must have a public officer for tax purposes • Must have a registered office in Australia • Managed by its directors • Shareholders' rights in relation to the company are governed by the company's constitution. If unlisted, a shareholders' agreement governs the relationship between the shareholders • May, but need not, be listed on the Australian Securities Exchange (ASX) • Subject to securities and other applicable laws, may issue a prospectus for the offer of shares, debentures or other securities	• Regulated by the Australian Securities and Investment Commission (ASIC) under the *Corporations Act 2001* (Cth) (Corporations Act) • In some cases, disclosure to investors may be required for capital raising purposes

BUSINESS STRUCTURE	KEY FEATURES	REGULATION
Trusts/ Managed Investment Schemes (MIS)	***Trusts and MISs*** • A trustee owns the assets of the business and carries on the business for the benefit of the beneficiaries of the trust • The trustee may be an individual or a corporation • The MIS is a common trust structure which allows people to pool funds for a common purpose and make a profit	
	Wholesale investors as beneficiaries • If investors are all wholesale, the trust will not need to be registered as an MIS • The MIS is managed by a trustee and/or investment manager	• Need to operate under an Australian financial services licence (AFSL). The AFSL is usually held by the trustee, by the investment manager, or by an external party through representative and/or intermediary arrangements • Regulated by the general law of trusts and the Corporations Act. See KWM's publication, Investing Down Under, for a basic guide to trust law in Australia. This guide is accessible from https://www.kwm.com/au/en/insights/latest-thinking/publication/a-guide-to-investing-in-australian-real-estate.html
	Retail investors as beneficiaries • The MIS is managed by a responsible entity and/or investment manager • If there are any retail investors, the trust will generally need to be registered as an MIS. This also allows the MIS to raise capital from a larger pool of potential investors • May, but need not, be listed on the ASX	• If the trust is registered as an MIS, there is a heavier regulatory and compliance burden (additionally, there are likely to be disclosure and compliance obligations if the investors are retail) • If registered, the responsible entity must be a public company and hold an AFSL • Regulated by the general law of trusts and the Corporations Act
Joint ventures	• A joint venture creates a common enterprise for parties to assist each other with a common goal or project • Investors' rights are governed by a joint venture agreement, a unitholders' agreement (where the joint venture vehicle is a trust) or a shareholders' agreement (where the joint venture vehicle is a company) • Can be used in conjunction with all of the above structures • Enables co-operation with other market participants – eg ability to access other market participants' resources	• Regulation can depend on the type of joint venture vehicle (eg a trust or company)
Partnerships	• Not a separate legal entity – the partners are jointly and individually liable for the debts of the business • Subject to certain exceptions, there cannot be more than 20 partners • Shared control and management of the business by the partners • A partnership deed would govern and regulate the relationship between partners	• Partnership Acts of the States and Territories • Partnership deed • Common law

CORPORATE COLLECTIVE INVESTMENT VEHICLES

GLENDA HANSON

CONSULTANT
SYDNEY

In February 2022 the Australian Government passed legislation to amend Australia's corporations and tax laws to allow for a new type of investment fund, the corporate collective investment vehicle (CCIV). The new laws commenced on 1 July 2022.

A CCIV has a number of key features:

A company with a corporate director

A CCIV will be a company with variable capital registered under the Corporations Act. It must have a single corporate director which is a public company that holds an AFSL. This differs from many foreign corporate fund models which require the appointment of natural person directors (such as the Hong Kong SAR and Singapore models). The Australian CCIV is based on the UK's OEIC (open ended investment company) model which allows for the appointment of a single authorised corporate director to manage the fund. This structure is similar to existing Australian retail MISs which are operated by a licensed company known as the 'responsible entity'. A CCIV is similar to an MIS in the way applications, redemptions, reporting and other operational matters are regulated.

Sub funds: protected cells

A CCIV can have an umbrella structure and will be required to have at least one sub-fund but may have many. Each sub-fund has a class of shares which are referable to it and which represents a separate pool of assets with separate investors, but is not a separate legal entity. However, a sub-fund will be a 'protected cell' in the sense that each sub-fund will be a separate taxpayer, and the assets and liabilities of a sub-fund must not be attributed to or affect the other sub-funds. It will also be treated for various practical purposes, including liquidity, as if it was a separate fund.

Listing and quotation

A CCIV with a single sub-fund can have that sub-fund listed on ASX. Sub-funds can also have shares quoted on the AQUA market (an ASX platform tailored for managed funds and structured products).

Licensing and registration

The corporate director of a CCIV must have an AFSL with a specific authorisation. To register a CCIV, the applicant is required to lodge a constitution with ASIC and for a retail CCIV, a compliance plan. Registration of subsequent sub-funds is expected to be a simple process. ASIC guidance on collective investments has been expanded to cover CCIVs and investment advisers were offered an automatic authorisation to recommend CCIV investments.

Tax treatment

If a CCIV sub-fund makes only passive investments and otherwise qualifies, it can have flow through tax treatment as if it were an attribution managed investment trust or AMIT. The qualification requirements include that the sub-fund must be widely held and not closely held (with a ramp up period). A CCIV sub-fund that does not meet that widely held test will be taxed as a trust, with members 'presently entitled' to income if it is distributed within 3 months of financial year end.

Transition

There have been submissions requesting streamlined processes and tax and stamp duty relief, for an existing MIS fund to convert into a CCIV, simply changing its corporate form. This has not been ruled out, but how and when it may be accommodated remains uncertain.

Asia Region Funds Passport

The CCIV was originally intended to be launched at the same time as the Asia Region Funds Passport (ARFP) regime which was the subject of a Memorandum of Co-operation signed in April 2016 among Australia, Japan, South Korea and New Zealand (with Thailand joining subsequently). The ARFP enables cross-border offerings of certain investment funds but a number of requirements must be satisfied. Legislation to implement the ARFP was passed by Parliament in June 2018, well ahead of the introduction of the CCIV.

W&I INSURANCE

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Warranty & Indemnity (W&I) insurance has become a cornerstone of Australian transactions in the M&A , real estate and investment space. Familiarity with the Australian W&I insurance market and process will greatly assist in ensuring appropriate risk allocation between buyers and sellers.

What is W&I insurance?

W&I insurance is a risk management tool used by corporates, private equity firms, property groups and investors in the sale and purchase of assets (including shares, units in a trust and land). It covers the buyer of the asset against financial loss resulting from a breach of a seller warranty under the sale agreement. In effect, following a seller's breach, the buyer recovers its loss directly from the W&I insurer under the policy as opposed to from the seller under the sale agreement. W&I insurance typically also covers any general and tax indemnities given by the sellers.

W&I insurance is usually obtained by the buyer to protect itself. However, it is also possible, although not common, for the seller to purchase a 'sell side' policy. This type of policy operates like a liability insurance policy and covers the seller for claims made against it by the buyer for breaches of warranties and under the indemnities.

Why should the parties to a transaction consider W&I insurance?

W&I insurance has advantages for both the buyer and the seller in a transaction. For the seller, it can help provide a clean exit and protect the entity's directors, officers and employees who could otherwise face a claim for warranty breaches. This can be a significant benefit for investors and holding companies wanting to have a clean exit from their investments and subsidiary operations. For the buyer, a W&I policy enhances the competitiveness of the bid because the buyer can transfer the risk of some potential warranty breaches to an insurer and therefore agree to a more balanced liability regime with the seller. It can also help reduce credit risk in respect of claims for breaches of warranties.

For both parties, W&I insurance assists in navigating roadblocks when negotiating the sale document. It also helps maintain ongoing relationships as the buyer will not need to claim directly against a seller who may be a long-term or potential business partner.

Who should consider obtaining W&I insurance?

W&I insurance is prevalent across the corporate landscape in Australia and globally. Sellers in competitive sale processes will often require the successful bidder to obtain W&I insurance as it limits the seller's exposure post-completion. Even in circumstances where the seller does not require W&I insurance, corporates and investors have considered W&I insurance to facilitate the negotiation of the sale or to lessen the impact of unknown breaches.

Ultimately, the decision to obtain W&I insurance will depend on the nature and the risks of the transaction, the due diligence conducted and any findings of that due diligence, the extent of cover being provided and the associated costs.

The importance of due diligence and good advisors

A W&I policy, as with any kind of insurance policy, is subject to terms, conditions and exclusions. Other than the nature and inherent risks of a particular transaction, cover provided under a W&I policy will primarily depend on the extent and quality of due diligence as well as the findings of the due diligence process. Accordingly, to secure adequate coverage, it is important that the buyer and its advisors fully engage with the due diligence process, including any Q&A with the seller, and be prepared to justify their position to the insurer during underwriting.

W&I insurance will not cover known issues. An expert legal team assisted by other specialist advisors such as tax and business advisors and subject-matter experts, will be able to use the due diligence and negotiate with insurers to limit the scope of exclusions to the known issues , instead of broader formulations which insurers may impose in the first instance. The legal advisors can also test the scope of the standard exclusions to ensure these are narrowed as much as possible.

The buyer's legal team will otherwise negotiate the W&I policy wording, particularly in respect of conditions, procedures and limitations to enhance the coverage available and rights afforded to the insureds. Insurance brokers also play a key role for the insured by leveraging their knowledge of the industry to champion more buyer friendly market positions and push back against unusual exclusions or limitations.

What trends in W&I insurance should you know about?

In parallel with ever-increasing demand for W&I insurance over the last few years and lessons learnt from past claims, the market is seeing certain trends take shape. Buyers should consider these trends at the outset of the transaction (not just before or during underwriting) so that they can structure their due diligence and negotiations accordingly.

ANTI-MONEY LAUNDERING (AML), ANTI-BRIBERY AND CORRUPTION (ABC) AND COUNTER-TERRORISM FINANCING (CTF)

With renewed corporate activity involving cross-border elements following COVID-19, and several high-profile AML proceedings in Australia brought by ASIC and AUSTRAC, it is no surprise that AML, ABC and CTF compliance continues to be difficult to insure. Buyers seeking to acquire targets operating overseas, in particular in East Asia, South East Asia and the United Arab Emirates, should ensure that the target's overseas operations and AML/ABC/CTF compliance programs are adequately covered during the due diligence process to secure market coverage.

CYBER RISKS

Buyers should be mindful that insurers are wary of underwriting cyber risks. The current state of the cyber market is not helped by large-scale cyber attacks against several Australian companies in 2022 and 2023. This is due to more frequent and severe ransomware attacks, significant penalties for non-compliance with data protection laws and the continuous evolution of data risks. Combined with the difficulty in securing standalone cyber insurance solutions for targets at a commercial premium, buyers should undertake adequate due diligence to obtain (usually limited) W&I cover in this respect.

EMPLOYMENT AND PENSION MATTERS

Compliance with employment and social security laws is another area of focus for insurers. With a few instances of 'wage underpayment scandals', non-entitlement to JobKeeper payments and subsequent recovery by government, breaches of employment laws and modern awards due to misclassification of workers and defined benefit pension underfunding, insurers require extensive due diligence and payroll sampling before they consider offering more favourable coverage terms. Engaging with these exercises early on is important if the buyer requires coverage for such matters, in particular in respect of sampling which can be costly and time consuming.

Cross-jurisdictional risks and Russo-Ukrainian War

Cross-border activity has picked up following the COVID-19 pandemic, comprising 60% of all deals.[1] With the exception of jurisdictions with comparable compliance regimes to Australia (mainly the United States, United Kingdom and New Zealand), it is more difficult to ensure compliance with all regulatory requirements in all foreign jurisdictions in which the target group operates. As a result, the insurer may seek to read down the seller warranties. Buyers should nonetheless ensure that they diligence the operations of the target group in its foreign jurisdiction (including sales and trade activity and legal compliance) to optimise insurance coverage to the extent possible.

On a related note, most policies will include and, since February 2022, have included a Russia/Ukraine/Belarus exclusion to preclude losses arising out of the war in Ukraine and its geographical surroundings. Prospective insureds requiring coverage in this area should discuss options with their broker and legal advisors.

How do you contact a W&I insurer?

The W&I insurance market in Australia is intermediated, meaning that contact with insurers is via insurance brokers. After the buyer appoints an insurance broker, the broker approaches insurers, typically providing them with draft transaction documents, key information about the deal and the coverage sought. The broker then comes back to the buyer with a list of potential insurers and recommendations, and a choice is made by the buyer in consultation with its advisors.

Occasionally, especially in competitive sales, the seller may start this process on behalf of a buyer and then 'flip' it to the buyer, who will then work with whichever broker and insurer the seller has chosen.

Making claims under W&I insurance policies

The W&I policy often has a number of conditions with respect to making a claim, including strict time limits on reporting, procedures and claim notice content requirements. An important precondition to claims can also be claim value- both individual claim value and aggregate values of all claims. It is important that all levels of management (to the extent they are involved in the process of identifying and notifying breaches) are familiar with the requirements of the W&I policy so that they can assist with the timely and effective notification of claims.

1 King & Wood Mallesons, 'DealTrends FY23' (publication, 24 October 2023) c.f., King & Wood Mallesons, 'W&I', *DealTrends* (Web Page, 14 February 2023) <https://dealtrends.au.kwm.com/2022-report/w-i/>.

FOREIGN INVESTMENT REGULATION

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DO YOU NEED FOREIGN INVESTMENT REVIEW BOARD APPROVAL?

Are you a foreign person under the FIRB regime? If so, your Australian investment may need prior approval.

Foreign investment in Australia is regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA), the *Foreign Acquisitions and Takeovers Regulation* (Regulations) and the Australian Government's Foreign Investment Policy (collectively, the FIRB regime). The Australian Government minister responsible for making decisions under the FIRB regime is the Australian Federal Treasurer (Treasurer). The Treasurer is advised and assisted by the Foreign Investment Review Board (FIRB) which is an administrative body. Applications to the Treasurer under the FATA are made through the FIRB and processed by the Federal Department of Treasury.

Where a proposed acquisition falls within the scope of the FIRB regime, a foreign person needs to consider whether they must, or should, provide prior notification of the acquisition and seek a no objection notification from the Treasurer through FIRB (FIRB approval).

A foreign person is:

- an individual who is not ordinarily resident in Australia (ordinarily resident, for a person other than an Australian citizen, means that the person has resided in Australia for 200 days or more in the immediately preceding 12 months);
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest of 20% or more;
- a corporation in which 2 or more foreign persons hold an aggregate substantial interest of 40% or more;
- the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, holds a substantial interest of 20% or more of the assets or income of the trust;
- the trustee of a trust in which 2 or more foreign persons hold an aggregate substantial interest of 40% or more of the assets or income of the trust; or
- a person prescribed by the Regulations to be a foreign government investor.

A foreign government investor is:

- a foreign government or separate government entity; or
- a corporation, trustee of a trust or general partner of a limited partnership in which:
    - one or more foreign governments or separate government entities from the same country hold an aggregate interest of at least 20%; or
    - foreign governments or separate government entities of more than one foreign country, together with any one or more associates, hold an aggregate interest of at least 40%.

A fund with passive foreign government entities in its ownership of 40% but no single holding of 20% (including by foreign government investors from a single country) is not a foreign government investor.

A foreign government means an entity that is:

- a body politic of a foreign country;
- a body politic of part of a foreign country; or
- a part of a body politic of a foreign country or a part of a body politic of part of a foreign country.

A 'separate government entity' means 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.

Government entities can include State pension funds, teacher funds, municipal employee pension funds, police funds, firefighter funds and State university funds.

When is FIRB approval compulsory?

Certain proposed acquisitions require prior FIRB approval in order to avoid civil and criminal sanctions under the FATA. This is where a foreign person proposes to acquire:

- a substantial interest (20% or more) in an Australian corporation where the consideration value or the total assets are valued at A$330 million or more. A substantial interest includes actual voting power, number of shares held and a 'potential voting power' or a 'right to issued shares' amounting to a substantial interest (20%) being acquired (eg through a convertible note);
- a direct interest (10% or more) in an Australian agribusiness where the cumulative interests held in Australian agribusinesses by the foreign person are valued at A$71 million or more. A direct interest can be 0% where there is a control element acquired such as the right to appoint a director;
- a direct interest (10% or more) in an Australian media business;
- a direct interest (10% or more) in an Australian land entity over the applicable monetary threshold values depending on its land holdings;
- a direct interest (10% or more) in a national security business;
- any interest in national security land;
- any interest in Australian land, in the absence of an exemption, over the following threshold values:
    - vacant commercial land, national security land or residential land – A$0;
    - sensitive commercial land (including land used for public infrastructure, storage of biological agents, telecommunications, storage of bulk data, financial institutions or to be leased to a government body) – A$71 million;
    - non sensitive commercial land – A$330 million; and
    - agricultural land (being land used or which could reasonably be used for the purpose of primary production) - cumulative interests held by the foreign person valued at A$15 million.

Certain passive increases in securities holdings are also required to be notified to the Treasurer within 30 days. Notification is required where the increase results in a foreign person holding an interest that exceeds a relevant ownership threshold where the relevant monetary thresholds are also met.

When determining whether prior FIRB approval must be obtained, bear in mind that:

- an interest in land includes any interest in a land entity (a company or trust where more than 50% of the assets of the target are Australian land);
- foreign investments where potential voting power or potential shareholdings will be acquired (including the entry into of options or acquisition of convertible notes) require prior FIRB approval if the relevant interest and value thresholds under the FATA are met; and
- holdings of any associates of a foreign person will be included when determining whether a substantial interest or direct interest is to be acquired.

Monetary threshold A$ amounts are indexed annually on 1 January, except for the more than A$15 million (cumulative) threshold for agricultural land and the more than A$50 million threshold for agricultural land for Thailand investors, which are not indexed, and a higher threshold of A$1,427 million (indexed) may apply for non-government investors from some countries under trade agreements.

Are exemptions available under FATA?

If an acquisition falls within an exemption under the FATA, then FIRB approval will not be required. There are a number of exemptions under the FATA. Common exemptions include:

- acquisitions from government entities (this exemption is not available in relation to critical infrastructure (such as proposed roads, a telecommunications network or nuclear facility), national security businesses, national security land, Australian businesses the assets of which include exploration tenements in respect of national security land or for foreign government investors);
- acquisitions that occur in the ordinary course of carrying on a business of lending money and the interest is held solely by way of security for the purposes of the money lending agreement; and
- acquisitions of interests in securities of an entity through a pro-rata rights issue.

Is a 'voluntary' FIRB notice advisable?

Some proposed acquisitions are not compulsorily notifiable but may activate the Treasurer's powers to make adverse orders. If the Treasurer considers a proposal to be contrary to Australia's national interest, the Treasurer can make orders including prohibition or divestment. To remove this risk, a foreign person can obtain prior FIRB approval.

Proposed acquisitions for which a 'voluntary' notice may be given and FIRB approval should be obtained include:

- the acquisition of a substantial interest in a foreign target with downstream Australian assets or revenue valued at A$330 million or more;
- the acquisition of assets comprising an Australian business valued at A$330 million or more;
- the acquisition is in a national security sector but does not require a mandatory notification (a reviewable national security action);
- where a foreign person has the ability to determine the policy of an Australian corporation in relation to any matter; and
- certain board representation arrangements or alterations of the constitution or other constituent documents of an Australian corporation carrying on an Australian business.

The Treasurer can 'call in' for review reviewable national security actions which are not otherwise notified if the Treasurer considers that the action may pose national security concerns. The review can occur when the action is still proposed or up to 10 years after the action has been taken.

Foreign government investors

The FATA provides that prior FIRB approval by foreign government investors must be sought for:

- direct interest (10%) acquisitions in an Australian entity or business acquiring an interest in a tenement, including exploration tenements;
- direct interest (10% or more) acquisitions in mining, production or exploration entities; and
- all acquisitions of interests in Australian land (subject to narrow exceptions).

Foreign government investors must also notify FIRB of any proposals to establish new businesses in Australia.

National interest considerations

In examining proposed investments, the Australian Government will typically have regard to 'national interest considerations' as follows:

- whether an investment may impact on Australia's national security;
- whether an investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned;
- whether an investment may impact on Australian Government revenue or other policies;
- whether an investment may impact on the operations and directions of an Australian business, as well as its contribution to the Australian economy and broader community; and
- the character of the investor:
    - whether an investor's operations are independent from any relevant foreign government including any level of control or influence the foreign government may have and the reasons for their investment and interest in the investor; and
    - whether an investor is subject to and adheres to the law and observes common standards of business behaviour.

A fundamental concern for foreign government related investment is that any investment by a foreign government investor is made on a commercial basis, with understood and clear predictable outcomes. It cannot be an investment made for a strategic government objective.

The test against which all FIRB applications (excluding national security only applications) are assessed is whether the proposal is contrary to Australia's national interest. There is no definition of 'the national interest' and applications are assessed on a case-by-case basis. There is no obligation to demonstrate that positive benefits to Australia will flow from the proposal. Rather, the Treasurer may attach conditions to a FIRB approval where compliance with the conditions is necessary in order to prevent the proposal from being contrary to Australia's national interest.

FIRB will circulate the proposal among relevant Australian and State Government departments and other bodies, such as the Australian Taxation Office and the Australian Competition and Consumer Commission, to ascertain their views as to whether the proposal is contrary to the national interest.

What is a national security action?

Any acquisition of an interest in national security land or a direct interest (10% or more) in a national security business is considered a 'notifiable national security action' and will be subject to a A$0 threshold. In addition, the proportionate ownership threshold for interests in a national security business reduces to 0% where there are control elements acquired.

National security land is defined as Defence premises or land where a National Intelligence Community agency holds an interest that is publicly known, or ascertainable through reasonable inquiries.

A business is considered a national security business if it is carried on, wholly or partly, in Australia whether or not in anticipation of profit or gain and it is publicly known, or could be known through reasonable enquiries, that the business is of one of the following kinds:

- it is a responsible entity for, or a direct interest holder in, a critical infrastructure asset under the *Security of Critical Infrastructure Act 2018* (Cth) (SOCI Act);
- it is a telecommunications carrier or nominated carriage service provider;
- it develops, manufactures or supplies critical goods, technology or services for a military or intelligence use;
- it stores or has access to classified information; or
- it collects, stores or maintains security sensitive personal information for the Australian Defence Force, the Department of Defence or an intelligence agency.

Recent changes to the SOCI Act have considerably expanded the types of critical infrastructure assets and sectors. This means that more businesses will be deemed 'responsible entities' and 'direct interest holders' for critical infrastructure assets under the SOCI Act, which in turn renders these businesses as national security businesses under the FIRB regime.

The sectors now covered by the SOCI Act are communications, data storage or processing, financial services and markets, water and sewerage, energy, healthcare and medical, higher education and research, food and grocery, transport, space technology and the defence industry. See the *Critical Infrastructure* section of this Guide for more information on the SOCI Act.

Timing

Once a proposed acquisition is notified to FIRB under the FATA and the relevant fee received by FIRB, the Treasurer has 30 days to decide whether or not to object to the acquisition and a further 10 days to notify the applicant of the decision. Where the Treasurer considers that further time is required to assess a proposal, the applicant may request a voluntary extension of time or, alternatively, the Treasurer may unilaterally extend the time by up to 90 days or issue an Interim Order, which is made public, and extend the time by up 90 days. Extensions are common.

Application fees

Fees apply to FIRB applications. The fee will vary depending on the nature of the interest being acquired and the amount of consideration. The fees generally range from A$4,200 for small transactions to up to A$1,119,100 for some significant transactions. For example, the fee for commercial land and business acquisitions valued at A$100 million or less, but not less than A$50 million, is A$28,200, and the fee increases by A$28,200 increments with every A$50 million increase in consideration.

Where a voluntary notification of a reviewable national security action is being made, the fees range from A$1,050 for small transactions to up to A$279,775, increasing based on the consideration for the transaction. The application fees are indexed annually.

Residential and agricultural land attract higher application fees, but there is some relief for build to rent projects.

Exemption certificates

An exemption certificate provides a standing pre-approval enabling the relevant foreign person to undertake acquisitions. There are various types of exemption certificates, including those that cover acquisitions of Australian business assets and entities, interests in Australian land and, in limited circumstances, interests in national security land or national security businesses. Exemption certificates allow acquisitions to be made within a defined scope of coverage, including a set financial limit, and are valid for a specified period (1 year to up to 3 years).

Instead of notification before each separate acquisition, a foreign person holding a valid exemption certificate would notify acquisitions to FIRB after completion.

Register of Foreign Ownership of Australian Assets

On 1 July 2023, the new Register of Foreign Ownership of Australian Assets (Register) commenced operation. The purpose of the Register is to provide the Australian government with visibility of the level of foreign ownership in Australian assets. The registration obligation is a separate and additional obligation to the notification regime. Unlike the pre-transaction notification requirements, the Register registration requirements apply after the relevant transaction or event and may be required even if pre-transaction notification is not required.

In general, the Register requires registration of:

- any acquisition of land, regardless of the value; and
- acquisitions of entities and businesses that receive a no objection notification or are covered under an exemption certificate.

Certain changes in and disposal of the assets will also need to register. A new foreign person that holds certain assets also have to consider their registration obligation, as well as those that cease to be a foreign person.

COMPETITION AND ANTI-TRUST

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Before commencing business in the Australian market it is important to be familiar with Australia's competition laws, which restrict certain activities by businesses in Australia. Australia's competition laws also include a merger control regime which is actively enforced.

Australia's competition and consumer laws are contained in the *Competition and Consumer Act 2010* (Cth) (Competition Act). The Competition Act has a degree of extra-territorial application and may apply to conduct engaged in outside of Australia by corporations incorporated in Australia, registered as a foreign company in Australia or carrying on business in Australia.

The competition authority in Australia, the Australian Competition and Consumer Commission (ACCC), takes compliance very seriously. The ACCC has a range of investigatory powers, including powers to compel the production of information and documents and to examine individuals under oath and without privilege against self-incrimination.

In 2024, the ACCC announced that it will continue to focus on the protection of consumer rights and promoting competition in essential services, like telecommunications, electricity, gas and financial services. Competition and consumer issues in the supermarket and aviation sectors will also be scrutinised. Investigating and prosecuting cartels remains one of the ACCC's highest and enduring enforcement priorities, as are scams, anti-competitive conduct and product safety issues which have the potential to cause serious harm to consumers.

The ACCC has established ties with foreign competition law and intelligence agencies, governed by treaties, free trade agreements and bilateral and trilateral co-operation agreements. The ACCC is an active participant in the International Competition Network, a global forum for national competition law agencies designed to encourage international co-operation and the convergence of competition regulation on an international basis. Gina Cass Gottlieb, the Chair of the ACCC, has confirmed that the ACCC sees continued collaboration with its international counterparts as a key component of its effectiveness as a regulator.

Merger and investment control

The Competition Act prohibits direct and indirect acquisitions of shares or assets, including of minority stakes, that would be likely to have the effect of substantially lessening competition in an Australian market.

Even though Australia's merger control regime is currently, in a technical sense, neither mandatory nor suspensory, it is administered by the ACCC as if it is (see reforms below). Further, as a practical matter, parties who are required to notify their proposed acquisition to the Foreign Investment Review Board (FIRB) (see the *Foreign Investment Regulation* section of this Guide) will not obtain a no objection notification from Australia's Federal Treasurer under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) unless and until the ACCC has informed FIRB that there are no competition law issues with the acquisition.

The ACCC's policy is to further investigate acquisitions that would result in the acquirer having a market share of 20% or more in an Australian market and where the products supplied by the seller and the buyer are substitutes or complements.

In cases where an investment in Australia would come within the ACCC's policy for further investigation, it is advisable for the investor to apply to the ACCC to clear the investment and to include a condition precedent allowing for that in the transaction documents. Obtaining clearance from the ACCC usually takes at least 8 weeks and in complex cases, considerably longer. The ACCC has powers to clear an investment conditional on the parties taking certain steps, including to divest shares or assets to a third-party buyer pre-approved by the ACCC.

In addition to its investigative powers, the ACCC may apply to the Federal Court of Australia for orders for divestiture, to void a transaction from the outset, for orders for civil pecuniary penalties (against companies and individuals) and for orders against individuals banning them from being involved in the management of Australian companies.

In some foreign-to-foreign transactions, the ACCC may also apply to the Australian Competition Tribunal for an order that the Australian subsidiary of the seller ceases carrying on business in Australia.

Australia's proposed merger reform

In April 2024, the government announced its proposal to overhaul Australia's merger laws by 1 January 2026. The changes would include:

- **the introduction of a new mandatory and 'suspensory' regime:** Transactions which meet certain (yet to be set) thresholds, must be notified to the ACCC and cannot proceed unless clearance is granted. This will replace the existing voluntary informal regime and formal authorisation process. The mandatory and suspensory regime will mean that businesses will have greater certainty over which deals must be notified to the ACCC, the information required to be provided, and the timelines for the ACCC's review (although this will depend on ACCC ability to 'stop and start' clock).
- **changes to the legal standard and test:** the ACCC will be required to clear a transaction unless it has a 'reasonable belief' that it would or would be likely to substantially lessen competition. This legal test will also be expanded to include, as part of the ACCC's assessment of likely effect, an additional concept of 'creating, strengthening or entrenching market power'. Further, the jurisdiction of the new merger control regime will shift from the existing application on 'any acquisition of shares or assets' to a 'change of control in a business or asset' (which will capture transactions involving de facto control or material influence).
- **fees for merger parties:** new fees for merger clearance applications will also be introduced (proposed to be between A$50,000 and A$100,000, with exemptions for small businesses).

Treasury will continue finalising the details of this new regime – including in relation to filing thresholds, timeframes and other procedural matters – through consultation.

Cartels

The Competition Act prohibits cartels outright (price fixing, market sharing, output restrictions and bid rigging), irrespective of their effect on competition. The prohibitions can be civil or criminal.

The ACCC remains focused on investigating criminal cartel conduct and will continue to include individual officers and employees as co-defendants.

The ACCC has also committed to continuing its focus on detecting and prosecuting civil cartel conduct.

Attempts to induce others into engaging in cartel conduct are also prohibited. In 2023, the highest penalty ever imposed for cartel conduct in Australia was ordered in an attempt case.[2]

The consequences of engaging in a cartel, or even attempting to do so, include fines of up to 30% of the Australian group's annual turnover, follow on actions for damages, (including through class actions) and up to 10 years' imprisonment and banning orders for individuals involved in the cartel.

The ACCC has an immunity policy for cartel conduct. It also has a co-operation policy for granting leniency for cartel conduct.

There are some complete defences and exceptions to the prohibitions on cartels, including for limited types of joint ventures and collective acquisitions.

Defendants bear the evidentiary burden of proving that the complete defences or exceptions apply in their case.

Concerted practices

A 'concerted practice' is intended to capture conduct that falls short of a contract, arrangement or understanding that is required to establish cartel conduct.

It can be any form of co-operation between 2 or more persons or conduct that would be likely to establish co-operation which reduces uncertainty or 'the risks of competition'. In effect, persons engaging in a concerted practice are not responding to market conditions in an independent way.

A concerted practice will amount to a civil contravention of the Competition Act if it has the purpose, or the effect or likely effect, of substantially lessening competition.

There is no need to show reciprocity or commitment between those involved in a concerted practice (although reciprocity and commitment may assist a finding of a concerted practice) and a concerted practice may be established in the absence of any direct contact between the persons.

However, concerted practices are not intended to capture instances of mere parallel conduct.

The ACCC has suggested that it is a fairly low bar to establish a concerted practice and the types of conduct that may be caught are quite broad.

Although the ACCC is yet to bring formal action against a party, this will continue to be an area of focus.

2 *ACCC v BlueScope Steel Limited (No 6)* [2023] FCA 1029

Other forms of anti-competitive conduct

The Competition Act prohibits other types of anti-competitive conduct, including:

- vertical arrangements that have the purpose or likely effect of substantially lessening competition, vertical price fixing and certain types of tying conduct;
- abuses of dominance, where a company has a substantial degree of power in a market; and
- other arrangements that have the purpose or likely effect of substantially lessening competition in a market.

Standard form contracts

The Competition Act also contains provisions aimed at protecting smaller counterparties to contracts. These provisions might impact an investor's approach to entering into contracts in Australia, including where the investor has standard form contracts that they prefer to use in other countries. A standard form contract is one that has been prepared by one party to the contract and where the other party has little or no opportunity to negotiate the terms, traditionally offered on a 'take it or leave it' basis.

The Competition Act contains:

- an unfair contracts regime, designed primarily to protect small businesses and consumers from unfair terms in standard form contracts;
- a prohibition on unconscionable conduct, which applies to conduct that is very unfair or particularly harsh or oppressive. To be considered 'unconscionable conduct', the conduct in question must be more than simply unfair, it must be against conscience as judged against the norms of Australian society; and
- certain consumer guarantees, which automatically apply to products and services to the benefit of consumers and irrespective of any limitations in the contract of sale.

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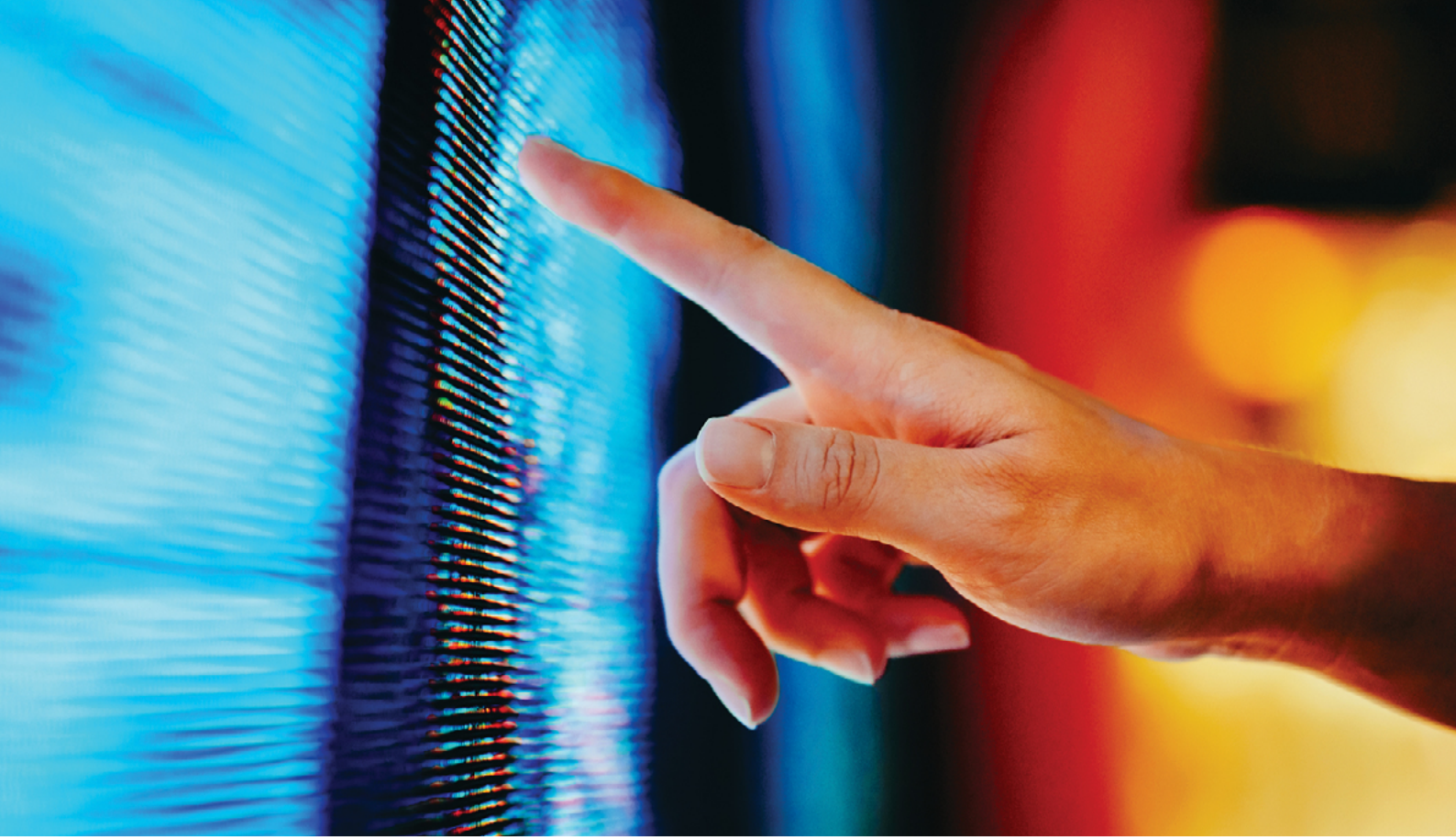

LISTED SECURITY MARKETS AND PUBLIC TRANSACTIONS

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HOW ARE AUSTRALIA'S LISTED SECURITY MARKETS AND PUBLIC TRANSACTIONS REGULATED?

Australia's well-developed, innovative and highly regarded markets play an economically essential role in bringing together saving and investment, allocating capital to its most efficient uses, and managing cash flow and balance sheet risks for investors, business and government.

Trading activity in many Australian listed security market sectors is higher than the size of the economy might indicate. In addition, Australia has one of the largest pools of managed assets in the world, with total funds under management at about A$4.6 trillion in September 2023. Around 80% of these funds are attributable to Australia's superannuation funds. The finance sector comprises 7.4% of Australia's key economic output as identified by the Reserve Bank of Australia, behind only the mining (14.3%) and health and education (12.8%) sectors, and ahead of the construction (7.1%) and manufacturing (5.7%) sectors. The Australian dollar is one of the 10 most actively traded currencies globally and while the Australian debt market is relatively small on a global scale, Australian dollar denominated debt is included in several key global indices used by institutional investors.

ASIC and the Corporations Act

Companies, registered MISs and the securities industry are governed by the *Corporations Act* 2001 (Corporations Act), overseen by the Australian Securities and Investment Commission (ASIC). The Corporations Act includes provisions which govern:

- the administration of companies, including financial reporting requirements;
- listed entity mergers and acquisitions;
- disclosure of interests by shareholders in listed entities;
- licensing of dealers, advisers, trustees, custodians, market makers, market operators and other providers of financial products or services in relation to financial products such as securities, managed investment products, deposits, certain types of insurance, derivatives, foreign exchange contracts and government debentures, stocks or bonds;
- conduct and disclosure requirements for participants in the financial services industry;
- trading in financial products by holders of inside information and other forms of prohibited conduct relating to financial products and services; and
- fundraising by companies and other entities.

Many provisions of the Corporations Act are technical and complex. Professional advice should be sought whenever it is intended to undertake activities which may come within its operation.

Australian Securities Exchange (ASX) and the ASX Listing Rules

The ASX is operated by ASX Limited (which is a listed company). ASIC supervises trading activities by market participants, as defined in the Market Integrity Rules. Listed entities must comply with the ASX Listing Rules (as well as the Corporations Act). The ASX Listing Rules include provisions requiring listed entities:

- to make regular reports and disclosures;
- to make prior disclosure and seek shareholder approval if they wish to undertake certain transactions; and
- to ensure that matters of administration (eg issue of holding statements for securities) and transactions (eg on market share buy backs) conform to certain requirements and standards.

ASX's market statistics

- Market capitalisation: A$2.5 trillion
- Number of listed entities: 2255
- New listings: 57
- Capital raised in FY23: A$51.7 billion

As at financial year ended 30 June 2023. Source: ASX Limited Annual Report 2023

Cboe (formerly Chi-X)

Cboe Australia Pty Ltd (Cboe) also has a market licence to operate a securities exchange in Australia and offers trading in ASX quoted equities and other products, including warrants and funds. In 2015, Chi-X, which was acquired by Cboe Global Markets in June 2021, launched an investment products platform that enabled it to compete with the ASX in the quotation of investment products that are exclusively traded on its market. The investment products platform complemented its continued growth as an established execution platform for Australian listed cash equities.

Entities continue to list on, and deal solely with, the ASX, and securities are officially quoted on the ASX only. Cboe determines which securities in the S&P/ASX 200 and ASX-listed exchange traded funds (ETFs) may be traded on its market. In the last quarter of 2023, Cboe handled 19.1% of the total dollar turnover in equity market products.

Additionally, in March 2023, Cboe launched Cboe BIDS Australia, a type of dark pool, which is a block and large-sized trading execution service allowing Cboe Australia market participants and their clients to submit messages indicating trading interest and provides an opportunity to firm-up that trading interest, after it is matched, by submitting a firm order. Matched firm orders result in an on-exchange trade execution on Cboe BIDS Australia.

Takeovers and schemes of arrangement

There is a takeovers prohibition in Chapter 6 of the Corporations Act which applies in relation to the acquisition of interests in all Australian listed companies, listed MISs and unlisted companies with more than 50 members. Under this prohibition, a person must not obtain a 'relevant interest' in issued voting shares of a company or voting interests in an MIS that results in a person having 'voting power' of more than 20%, except through one of the permitted exceptions (eg a takeover bid, a scheme of arrangement, with target securityholder approval or making a permitted 'creeping' acquisition).

Takeover bids

A takeover bid may take the form of an off-market bid or a market bid. Off-market bids are made by written offers to a target's securityholders. Market bids are undertaken by on-market acquisitions on the ASX by the bidder at a stated price.

Off-market bids are more common due to their flexibility. They may be conditional, either full or partial bids and the consideration offered may be cash, securities or a combination. There are few market bids as they must be unconditional, in cash and a full bid for all securities in a class.

During a takeover bid, various documents must be lodged with ASIC and the ASX, including the bidder's statement and target's statement which provide disclosure to the target's securityholders and the market. The Federal Treasurer may need to be notified of certain proposals under the Foreign Acquisitions and Takeovers Act (see the *Foreign Investment Regulation* section of this Guide). For mergers which may affect competition, clearance or authorisation from the ACCC may need to be sought (see the *Competition and Anti-Trust* section of this Guide). The Takeovers Panel is the primary adjudication body for takeovers in Australia.

Schemes of arrangement

A scheme of arrangement is an alternative to a takeover bid and requires the support of the target and its securityholders to implement the scheme. It is a court approved process and provides flexibility to combine multiple schemes in a transaction for multiple purposes (eg an acquisition with a demerger). A successful scheme needs the approval of 75% by value and 50% by number of each class of securityholders present and voting at a scheme meeting (excluding any votes cast by the bidder or any of its associates) plus the court to exercise its general discretion to approve the scheme.

The flexible structure of a scheme of arrangement is a key advantage over the relatively prescriptive regime for takeover bids and allows a bidder not only to pay any combination of cash or scrip as consideration for an acquisition (eg having a maximum cash pool available) but also enables an acquisition simultaneously to incorporate additional complexities, such as the transfer or demerger of specified assets or liabilities or the reduction of a target's capital.

KWM's Guide to Takeovers and Schemes in Australia
https://www.kwm.com/au/en/insights/latest-thinking/publication/kwms-guide-to-takeovers-and-schemes-in-australia.html

3. FINANCIAL MARKETS AND REGULATION

FINANCIAL MARKET INFRASTRUCTURE

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As of 2020, financial market infrastructures (FMIs) in Australia supported transactions in securities with a total annual value of $18 trillion and derivatives with a total annual notional value of $185 trillion.

In Australia the key regulators of FMIs are the Reserve Bank of Australia (RBA) and ASIC.

There are 4 classes of FMI currently subject to licensing requirements under the *Corporations Act 2001* (Cth) (Corporations Act). These are:

- Financial market operators;
- Clearing and settlement (CS) facilities;
- Financial benchmark administrators; and
- Derivative trade repositories.

Financial markets

A person that operates a financial market in this jurisdiction must hold an Australian market licence that authorises the person to operate the market in this jurisdiction unless the financial market is exempt from the requirement to hold a licence.

ASIC supervises licensed financial markets, issues market integrity rules, and monitors Australian market licensees' and participants' compliance with those rules. ASIC also monitors the compliance of Australian market licensees with the conditions of their licence and obligations set out in the Corporations Act.

Market integrity rules made by ASIC can deal with the activities and conduct of licensed markets and of persons in relation to licensed markets and financial products traded on licensed markets.

Clearing and settlement facilities

A person that operates a CS facility must hold an Australian CS facility licence that authorises the person to operate the facility in this jurisdiction unless the CS facility is exempt from the requirement to hold a licence.

ASIC and the RBA have complementary supervisory responsibilities in relation to CS facility licensees. Broadly, ASIC has responsibility in relation to licensing and conduct of CS facility licensees and the RBA has responsibility in relation to financial stability and managing systemic risk. The Minister has a range of enforcement powers in both areas, and ASIC also has various ancillary enforcement powers.

Derivatives trade repositories

Under the Corporations Act, ASIC is responsible for licensing derivative trade repositories that provide services in Australia. Derivative trade repository licensees are regulated under the Corporations Act. ASIC can make derivative trade repository rules that deal with the way licensees may provide their services, handling of data, governance of licensees, reporting and other matters.

Financial benchmarks

Benchmark administrator licensees are regulated under the Corporations Act. Administrators of significant financial benchmarks must be licensed by ASIC or exempt from the requirement to hold a licence. ASIC may impose, vary or revoke conditions on a licence.

ASIC can make 2 kinds of rules with respect to financial benchmarks. Firstly, the financial benchmark rules prescribe detailed requirements relating to the operation of financial benchmarks specified in a licence. Secondly, the compelled financial benchmark rules confer powers for ASIC to compel certain activity relating to significant financial benchmarks. These sets of rules deal with the responsibilities of licensees, the design of the benchmarks, use of data, governance of licensees and other matters.

Widely held market bodies

Certain Australian market licensees, CS facility licensees, and the holding companies of such licensees can be subject to ownership limits. The Corporations Act imposes a 15% restriction on a person's voting power within certain bodies prescribed in regulations. These are known as "widely held market bodies". Exceeding the 15% voting power limit requires the approval of the Minister. Specific arrangements in this regard exist for ASX Limited.

The RBA's regulatory role

The *Reserve Bank Act 1959* (Cth) (Reserve Bank Act) sets out the RBA's regulatory role including the responsibility of the Payments System Board for determining the RBA's payments system policy in a way that will best contribute to controlling risk in the financial system, promoting the efficiency of the payments system, and promoting competition in the market for payment services, consistent with overall stability of the financial system.

The *Payment Systems (Regulation) Act 1998* (Cth) is one of the Acts which sets out powers of the RBA in relation to the payments system. This Act gives the RBA the broad powers, including to designate payment systems and, in relation to a designated payment system, to impose an access regime on the participants in the payment system, make standards which must be complied with by participants in the payment system, arbitrate disputes relating to the payment system and giving directions to participants in the payment system.

The RBA may obtain information from payments system participants, to designate a payment system, and to set access regimes and standards for designated payment systems. To date, these powers have been used in the retail space, most notably in the regulation of card schemes' interchange fees and in the establishment of access regimes for card schemes and the ATM system.

DERIVATIVES MARKET

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In Australia derivatives are traded both on financial markets and over-the-counter (OTC). A person that operates a financial market in this jurisdiction must hold an Australian market licence as an Australian market licensee unless the financial market is exempt (see *Financial Market Infrastructure* above). Trades are commonly conducted through brokers who are members of the relevant financial market. Alternatively, derivatives can be traded outside a market, OTC. Additionally, some OTC derivatives are required to be cleared through a clearing house.

Close-Out and Netting

Close-out netting is critical to the management of credit risk which arises in derivatives. In Australia, the close-out netting process effected under derivatives contracts can be protected in certain circumstances by laws such as the *Payment Systems and (Netting Act) 1998* (Cth). In addition to close-out netting, the Netting Act deals with multilateral netting, market netting, and approved RTGS systems.

Derivative Market Regulation

Like all financial contracts, there are a range of possible regulatory regimes which can be applicable to derivative transactions.

Licensing

Derivatives and foreign exchange transactions are financial products that are subject to the licensing requirements of the Corporations Act (see "*Carrying on Business in Australia*" above for more details).

Global regulation of derivatives

As part of the G20 nations, Australia has implemented a number of laws reflecting G20 commitments for the global reform of financial markets and the laws which govern them, following the global financial crisis. These include laws and regulations relating to:

- derivatives trade reporting;
- central clearing of OTC derivatives; and
- margining and risk mitigation requirements in relation to OTC derivatives.

Other regulatory requirements

Other regulatory requirements applicable to derivatives include, but are not limited to, AML/CTF obligations (see the *Financial Crime* section), insider trading and market misconduct requirements (see the Governance Overview section), sanctions requirements (see the *Sanctions* section) and prohibitions or restrictions on the issue and distribution of certain types of OTC derivative to retail clients.

Additionally, the RBA can direct persons not to deal in foreign currency in certain circumstances.

Certain entities also may have additional regulatory obligations or prohibitions in connection with their use of derivatives. These entities may include superannuation funds, life companies, retail clients, and ADIs.

PAYMENTS SYSTEMS

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How does Australia regulate electronic payment systems?

The payments systems in Australia enable consumers and businesses to exchange value using cash, cheques and electronic funds transfers.

The Reserve Bank of Australia (RBA), Australian Payments Network (AusPayNet) and New Payments Platform Australia Limited (NPPA) oversee and administer the different payments systems in Australia. To settle transactions directly with other financial institutions, a party needs to have an Exchange Settlement Account (ESA) at the RBA and be a member of the relevant payments systems administered by AusPayNet, NPPA or other scheme administrator. A party can also be sponsored by an institution that has an ESA and the necessary AusPayNet, NPPA or scheme memberships.

AusPayNet administers the following payments systems:

- BECS, for direct entry payments;
- IAC, for card payments (which are also administered by commercial schemes, eg eftpos for domestic debit cards, or international credit card schemes such as MasterCard and Visa);
- APCS, for cheques and other paper based instructions; and
- HVCS, for high value payments between institutions.

Settlement of payments

HVCS payments are settled individually using the 'Reserve Bank Information and Transfer System' (RITS) on a real time basis. Transactions processed through the other payment systems listed above are settled on a net basis through ESAs.

Some are settled on a same day basis, while others are settled the following day at 9:00am.

The NPP

Australia's New Payments Platform (NPP) was launched in February 2018. It allows real time payments for low value transactions initiated between participants supported by the Fast Settlements Service, operated by the RBA. There are a number of ways to connect to the NPP, including by becoming a participant or being sponsored by a participant.

Payments made via the NPP are able to include more data than those sent using the AusPayNet systems.

The NPP also facilitates PayID, which allows users to link information such as a phone number or email address to their bank account. This enables payments to be made to the user by entering their 'PayID' rather than their BSB and account number.

A new service called 'PayTo' is also set to gradually replace BECS. Facilitated through the NPP, PayTo is a new way to pre authorise payments (including recurring payments) from a bank account and is intended to function similarly to a direct debit arrangement. However, PayTo will be controlled by the payer and payments will be settled in real time.

Regulation of payments

Specific protections are given to approved payments systems under Australian legislation. Together with payments specific regulations overseen by the RBA, regulation of payments systems includes licensing, market integrity and consumer protection requirements administered by ASIC and the ACCC. The regulation of Australia's payments industry is currently under review. Details of this are set out in the FinTech section of this Guide.

Anti-money laundering and licensing

Providing a payment service (such as accepting retail payment instructions, exchanging currencies or making funds available) may be caught by anti-money laundering and counter-terrorism financing legislation if there is a sufficient geographical link to Australia. Payment service providers that are subject to the legislation are required to register with AUSTRAC (Australia's financial intelligence agency), comply with transaction reporting requirements and apply 'know your customer' procedures (KYC), among other obligations (see the *Financial Crime* section of this Guide). An AFSL may also be required if a payments service is intended or likely to induce a consumer to buy a 'financial product' (including non- cash payment facilities, foreign exchange contracts or making a market in foreign exchange products and other derivatives). There are significant upfront and ongoing compliance costs, but exemptions may be available in certain circumstances.

FINTECH

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Australia has one of the most exciting and dynamic FinTech industries in the world. The past few years have seen the Australian FinTech industry grow at a rapid pace from a $250 million dollar industry in 2015, to a $45 billion industry in 2023, according to industry body, Fintech Australia. A relationship of mutual respect between regulators and the privat sector, as well as a technology-neutral and principles-based legal regime for regulating financial services, has cultivated fertile ground for innovation and growth in FinTech related industries including payments, Buy Now Pay Later, blockchain and the consumer data right.

Consumer Data Right

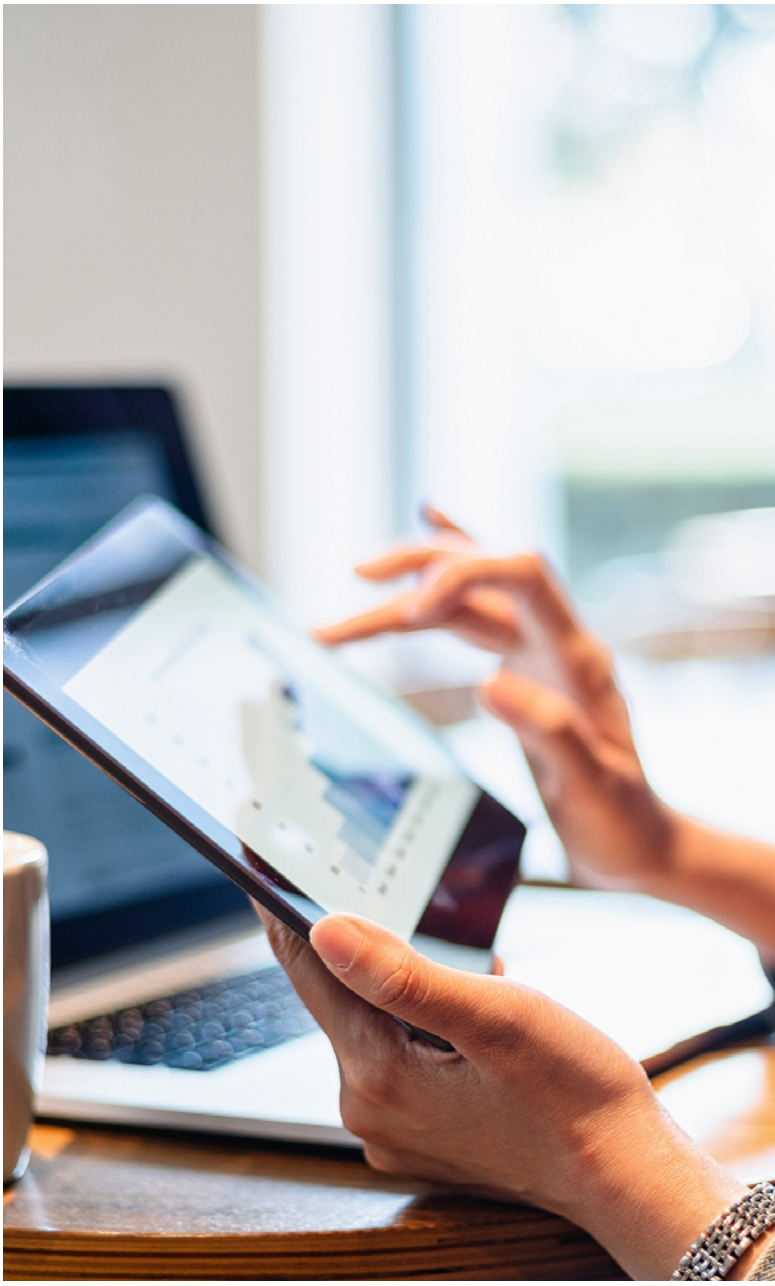
Exponential growth in the collection and use of consumer data by Australian businesses has prompted the Australian Government to establish a 'consumer data right' (CDR). The CDR gives Australian consumers the right to safely access certain data held about them by businesses and to direct that this data be transferred safely, efficiently and conveniently to trusted and accredited third parties of their choosing.

By reducing the barriers that currently prevent customers from shifting between providers, the CDR is expected to facilitate greater consumer choice and mobility, driving innovation and competition across the economy.

Banking is the first sector of the Australian economy to which the CDR applies. This graduated approach applies to all data on credit card, debit card, deposit and transaction accounts and mortgages. Extension to include non-bank lending is currently in development.

Beyond finance, the CDR expanded to energy in October 2022.

Parliament is currently considering a Bill which would enable accredited third parties, with the consumer's consent, to apply for and manage products on the consumer's behalf, known as action initiation. These actions could include making a payment, opening and closing an account, switching providers, and updating personal details (such as an address) across providers.



Crypto assets and blockchain

Blockchain is a digital technology that combines cryptography, data management, networking and incentive mechanisms to support the checking, execution and recording of transactions.

Australian regulators are actively engaging with the fresh challenges brought by blockchain, including the increasing prevalence of crypto assets. A variety of people providing all types of services in relation to crypto assets may need to consider and comply with various legal obligations, including licensing. Some key areas to consider are:

- **financial services and markets:** ASIC will consider each crypto asset, product or offering on its merits against the existing regulatory regime meaning many activities in relation to crypto assets are likely to be caught under the existing framework.
- **AML/CTF:** Australia's anti-money laundering and counter terrorism financing regulation applies to digital currency exchanges and may apply to other activities too.
- **tax:** The Board of Taxation is expected to report on the interaction of taxation with crypto assets. In addition, the Australian Taxation Office provides guidance on its website in relation to taxation of crypto assets.
- **prudential obligations:** The Australian Prudential Regulation Authority (APRA) has identified that activities linked with crypto assets that could be undertaken by regulated entities present new risks and challenges to regulated entities. Also, alongside international regulators and the Basel Committee, APRA is actively considering the prudential treatment for bank exposures to crypto assets.

In addition, the Australian Treasury is actively examining the regulatory treatment of digital assets and in 2023 published for consultation a proposal to regulate digital asset platforms, including exchanges and custody providers.

This collaborative regulatory environment has placed Australian start-ups and incumbents at the forefront of real-world adoption of blockchain technology.

CBDC and stablecoins

Australia is also at the forefront of central bank digital currencies (CBDCs) and stablecoins. The Reserve Bank of Australia has been part of a number of Australian and international projects exploring the potential for CBDCs including:

- international cross border payments, as part of Project Dunbar;
- wholesale CBDC, as part of Project Atom, a proof of concept for the issuance of a tokenized form of CBDCs that could be used by wholesale market participants for the funding, settlement and repayment of a tokenized syndicated loan; and
- alongside the Digital Finance Cooperative Research Centre and industry participants, 16 pilot use cases, including focusing on improving the background processes of the financial system, making payments and settling transactions.

Australia is also consulting on proposals for payment stablecoins to be regulated as a form of stored value facility under our payments regulation. Reforms to the *Payments Systems (Regulation) Act 1998* (Cth) also include proposals for payment systems relating to the transfer of "digital units of value, including digital currency" to be brought within the regulation.

Payments

The regulatory framework for payments in Australia is subject to significant reform and may capture many participants in the payments industry who are not currently subject to regulation. See *Payment Systems* for further details regarding these proposals.

Buy Now, Pay Later

The Government announced in May 2023 that it will regulate buy now pay later (BNPL) products as credit products. In March 2024, the Government released exposure draft legislation and explanatory materials to regulate the BNPL industry. The draft legislation amends the *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act) and the *National Consumer Credit Protection Regulations 2010* (Cth) to bring BNPL products into the existing regulatory framework for other credit products. At a high level, the proposed legislation will require BNPL providers to: hold and maintain an Australian credit licence; comply with the licensing obligations under Chapter 2 of the NCCP Act, including the general conduct obligations; comply with the requirements under the National Credit Code; and conduct suitability assessments in accordance with modified responsible lending obligations.

Crowd-sourced funding

Introduced by the Australian Government in September 2017, equity crowd-sourced funding (CSF) was a new way for start-ups and small to medium sized companies to raise money from the public to finance their business.

CSF is available to eligible Australian registered proprietary and unlisted public companies with less than A$25 million in assets and annual turnover. Eligible companies are able to make offers of ordinary shares to raise up to A$5 million in any 12 month period.

Under the CSF regime, intermediaries (such as CSF platforms) are required to hold an AFSL with an authorisation to provide a crowd funding service.

Restricted ADI licensing framework

Since May 2018, the framework for licensing of authorised deposit taking institutions (ADIs) has included creating a pathway for financial institutions to become ADIs through a 'Restricted ADI licence'. This pathway sits beside the well established ADI and foreign ADI authorisations.

The Restricted ADI (RADI) licensing framework introduces a restricted licensing option intended to allow new entrants more time to develop the resources and capabilities to comply with all ADI licence requirements. The regime permits the grant of a 'RADI licence' before an institution is ready to be fully licensed as an ADI with a restricted range of permitted activities. Regulatory obligations such as capital and liquidity requirements, are phased in over a 2 year period following which a Restricted ADI is expected to progress to an ADI licence. APRA provides strict guidelines for eligibility and minimum and ongoing requirements for RADIs.

Regulatory Sandboxes

The Australian regulatory sandbox allows FinTech start-ups to test certain select financial services and credit activities without an AFSL or credit licence for a limited period of time.

The FinTech Sandbox set out in the *Corporations (FinTech Sandbox Australian Financial Services Licence Exemption) Regulations 2020* and the *National Consumer Credit Protection (FinTech Sandbox Australian Credit Licence Exemption) Regulations 2020* provides relief to entities that meet the general conditions from licensing for a period of 24 months.

This provides relief for businesses:

- providing personal or general financial advice in respect of eligible financial products;
- dealing by applying for or arranging for another to deal in eligible financial products;
- issuing non-cash payment facilities or insurance (including as an agent);
- providing a crowd-funding service; or
- lending money to consumers.

It cannot be relied on in all circumstances, including to provide financial services in respect of derivatives, or to operate a registered managed investment scheme. This supersedes an earlier regulatory sandbox administered by the Australian Securities and Investments Commission (ASIC) which was introduced in December 2016.

The regulatory sandbox does not provide relief from other regulatory requirements (such as privacy and anti-money laundering obligations) and is also subject to limitations which may make reliance challenging.

FINANCIAL CRIME

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HOW DOES AUSTRALIA'S ANTI-MONEY LAUNDERING REGIME OPERATE?

Australia, like most countries, has an anti-money laundering and counter-terrorism financing (AML/CTF) regime based on the recommendations of the global Financial Action Task Force. What distinguishes Australia's regime is how it applies, which may not always be clear cut.

Does the AML/CTF regime apply?

The first step in working out whether the AML/CTF regime applies to persons is considering whether they are providing a 'designated service'. There are currently 70 designated services, most of which are financial services like making a loan, issuing or selling a security or derivative, providing a money remittance service and providing a custodial or depository service. Bullion sales and gambling services are also designated services.

The second step is considering whether the designated service is provided 'at or through a permanent establishment in Australia'. A permanent establishment is a physical base where a person (or its agent) carries on activities or business. The AML/CTF regime may also apply to designated services provided offshore, if provided by an Australian resident (eg an Australian incorporated company or a subsidiary of an Australian incorporated company).

Reporting entities

If Australia's AML/CTF regime applies to a particular person, that person is required to enrol with AUSTRAC (Australia's AML/CTF regulator) as a 'reporting entity'. A number of obligations apply to reporting entities, including customer due diligence, beneficial owner and politically exposed person identification, transaction monitoring, reporting of certain cash transactions and international funds transfers, suspicious matter reporting, record keeping, training and independent reviews.

Risk based assessment

A key element of the regime is that it is risk based. This means a reporting entity must consider for itself the risk that its specific services may involve or facilitate money laundering or terrorism financing.

Based on this assessment (which must be written), the reporting entity must design systems and controls that manage and mitigate these risks. The systems and controls must be documented in an AML/CTF program adopted by the reporting entity. For example, what factors may make prospective clients higher risk must be considered and enhanced measures must be applied to those clients at onboarding and throughout the life of the relationship between the reporting entity and the client.

Civil penalties

AML/CTF obligations in Australia are typically 'civil penalty provisions'. This means that if an obligation is breached, AUSTRAC may apply to a court to order a penalty to be paid. Currently the maximum penalty is A$31.3 million per contravention. The highest penalty to date is A$1.3bn, the penalty agreed in resolution of proceedings between Westpac and AUSTRAC in 2020. There are also a number of criminal offences, such as for tipping off a third party about a suspicious matter or providing false or misleading information or documents to the authorities.

AUSTRAC is also able to accept an enforceable undertaking, which documents a binding obligation on the reporting entity to either take a specified action or refrain from taking an action that may contravene the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)(AML/CTF Act) or the *Anti-Money Laundering and Counter-Terrorism Financing Rules 2007* (Rules). If the reporting entity does not comply with the undertaking, it can be enforced by the courts. AUSTRAC may issue a remedial direction to inform an entity of a specific action it must take to avoid contravening the AML/CTF Act or Rules. AUSTRAC can suspend or cancel the registration of digital currency exchange providers or remittance providers if it is satisfied that the provider has contravened the AML/CTF Act or Rules or presents a significant risk of doing so.

AUSTRAC may also issue infringement notices (without the need for Court intervention) for contraventions of key obligations dealing with:

- customer identification procedures to be carried out by reporting entities;
- reporting certain suspicious matters;
- reporting a threshold transaction;
- reporting an international funds transfer instruction;
- reporting on compliance with the AML/CTF Act and other instruments;
- providing information on request;
- making and retaining certain records; and
- providing certain digital currency exchange services without being registered.

AML/CTF reform

In April 2023, the Attorney General's Department (AGD) released the first of 2 consultation papers to:

- extend the application of the AML/CTF Act to certain high-risk professions (ie, the long-touted "Tranche 2 reforms"); and
- modernise the Act more generally in response to various reviews including the 2016 Statutory Review of the AML/CTF Act and the 2022 review conducted by the Senate Legal and Constitutional Affairs Reference Committee.

A further paper is expected from the AGD in early 2024 with significant reform in these areas over the next 12 to 24 months.

In response to a series of reviews and reports into the payments system, the Australian government is currently consulting on and developing a long-term plan that is expected to impact the way AUSTRAC regulates digital currency, stored value facilities and remittance.

Other relevant legislation

The AML/CTF Act is only one component of Australia's legislative landscape that addresses money laundering and terrorism financing. Other legislation includes:

- the *Criminal Code Act 1995* (Cth), which contains money laundering and terrorism financing offences;
- the *Proceeds of Crime Act 2002* (Cth), which contains provisions aimed at preventing people from benefitting from assets derived from criminal activity through a confiscation scheme, which includes mechanisms such as freezing orders where there are reasonable grounds to suspect that funds are the proceeds of an indictable offence or foreign indictable offence;
- State and Territory based legislation, which contain powers such as property seizure and forfeiture in relation to proceeds of crime and unexplained wealth; and
- sanctions legislation (Australia implements both UN Security Council sanctions and autonomous sanctions - see the *Sanctions* section of this Guide).

CASE STUDY: AUSTRAC V CROWN

AUSTRAC commenced proceedings against Crown Melbourne and Crown Perth in March 2022 alleging widespread non-compliance with the AML/CTF Act. The allegations included that Crown failed to appropriately assess the money laundering and terrorism financing risks faced by its business (and had not identified all designated services provided) and as a consequence, many of the systems and controls included in its AML/CTF Program could not be "appropriate and risk based". AUSTRAC alleged this led to Crown facilitating significant money laundering activity and a failure to apply appropriate processes to mitigate and manage risk posed by high risk customers.

Crown agreed to pay a $450 million penalty and the Court approved this settlement in July 2023.

Justice Lee also provided substantive commentary on aspects of AUSTRAC's claims.

ISSUE	JUSTICE LEE'S COMMENTS
What is required for Part A to have the primary purpose of identifying, mitigating and managing risk?	For Part A to have the Primary Purpose it must: (a) refer to or incorporate an ML/TF risk assessment and methodology; (b) include systems and controls that are aligned to the risk assessment (eg the systems were not capable of identifying the risk of junket channels and complex transactions); and (c) establish an appropriate framework for approval and oversight.
What is required for the board and senior management to have ongoing oversight?	Ongoing oversight of Part A of a Program should include: (a) the board determining ML/TF risk appetite; (b) complete and regular reporting to the board and senior management regarding AML/CTF compliance and a process to ensure the board discusses against measurable criteria; and (c) clear and well-understood reporting lines, documented roles and responsibilities.
What is required for an effective OCDD framework?	(a) Transaction monitoring must not be overly reliant on manual processes, must be supported by appropriate information management systems and assurance; (b) ECDD must have appropriate systems to obtain, analyse and record Source of Wealth/ Source of Funds information; and (c) adequate guidance must be provided not only in relation to ECDD measures to be applied but also to senior management when considering whether to continue a business relationship.
What is an appropriate risk-based systems and controls for ACIP?	Part B must include appropriate risk-based systems and controls to: (a) identify high risk customers at the time ACIP is being carried out and have risk-based procedures to determine whether to collect and verify additional KYC information in respect of those customers; and (b) consider the nature and purpose of the business relationship with customers (eg junket operators, representatives and players have different business relationships to other players).

CONSUMER CREDIT

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Consumers in Australia are legally protected in a number of ways when they engage in retail, credit or banking transactions.

Consumer credit

Consumer credit in Australia is regulated by the *National Credit Code* (NCC). The NCC provides a consumer protection framework for consumer credit transactions and applies when someone charges a natural person or strata corporation for credit which is used for personal, domestic or household purposes, or for the purchase, renovation or improvement of residential property for investment purposes. The credit must be provided in the course of carrying on a business of providing credit in Australia. This generally means that the NCC applies to home loans, credit cards and personal loans offered to natural persons.

Licensing regime for credit activities

The *National Consumer Credit Protection Act 2009* (Cth) (NCCP Act) establishes a licensing regime for entities engaging in credit activities which includes responsible lending obligations. The primary responsible lending obligation is to conduct an assessment that the credit contract (or increase to a credit contract) is not 'unsuitable' for the consumer.

A contract will be unsuitable if:

- it does not meet the consumer's requirements and objectives; or
- the consumer will be unable to meet the repayments, either at all or only with substantial hardship.

Undertaking the unsuitability assessment involves an assessment of the consumer's financial situation (by making reasonable inquiries about their financial situation and taking reasonable steps to verify their situation) and making reasonable inquiries about the consumer's requirements and objectives.

There are also other general obligations under the NCCP Act and, importantly, the definition of 'credit activity' is very broad.

If credit regulated by the NCC is provided, the provider of that credit will be captured by the NCCP Act. Even if a person does not provide the actual lending but is involved in the lending process (eg brokers) when the credit is NCC regulated, that person is also captured.

Unfair contract terms

Under the unfair contract terms regime a consumer contract or small business contract relating to a financial service, or a financial product, is void if it is unfair where the contract is a standard form contract.

A term of a consumer contract or small business contract will be unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- it is not reasonably necessary in order to protect the legitimate interests of the party which would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be relied on.

Certain contractual terms (such as the main subject matter of a contract) are exempt from the unfair contract terms regime.

From 9 November 2023, amendments to the unfair contract terms regime took effect to introduce civil penalties for each contravention of the prohibition on proposing, applying, or relying on an unfair contract term in a standard form contract.

The maximum penalty for body corporates is the greater of:

(a) 50,000 penalty units (currently A$15.65 million);

(b) the amount of the benefit derived and detriment avoided because of the contravention multiplied by 3; or

(c) 10% of the annual turnover of the body corporate for the 12-month period at the end of the month in which the body corporate contravened or began to contravene the unfair contract terms prohibition (but limited to 2,500,000 penalty units, currently A$782.5 million).

Design and distribution obligations and product intervention powers

New obligations relating to design and distribution of financial products (including consumer credit products) came into effect in October 2021. Product issuers are now required to make a 'target market determination' in relation to certain retail financial products which describes the class of retail clients the product is aimed at and requires distributors and issuers to take reasonable steps to ensure that dealings in the product are consistent with that determination.

On 6 April 2019, ASIC was granted powers to make a 'product intervention order' that can require persons not to engage in certain conduct in relation to a product. ASIC can make such an order if it is satisfied that a financial or credit product has resulted in, or will or is likely to result in, significant detriment to retail clients or consumers. ASIC has exercised this power to impose conditions on the issue and distribution of contracts for difference and certain short term and continuing credit contracts.

Other obligations

There are also prohibitions in Australian legislation from engaging in unconscionable conduct in connection with financial services, including credit, and engaging in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

AUSTRALIA'S FINANCIAL ACCOUNTABILITY REGIME

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Following a lengthy parliamentary process, the Financial Accountability Regime Act 2023 (Cth) (the FAR Act) was passed on 5 September 2023. The FAR Act establishes a new accountability regime for financial institutions and their senior executives in the banking, insurance, and superannuation sectors. The regime is jointly regulated by the Australian Prudential Regulation Authority (APRA) and the Australian Securities Investments Commission (ASIC) (together, the Regulators).

The Financial Accountability Regime (**FAR**) commenced for authorised deposit-taking institutions (**ADIs**) on 15 March 2024 and replaced the Banking Executive Accountability Regime (**BEAR**). The FAR will apply to the superannuation and insurance industries from 15 March 2025.

IDENTIFYING ACCOUNTABLE ENTITIES AND SIGNIFICANT RELATED ENTITIES

FAR applies directly to "accountable entities" and indirectly to "significant related entities" of accountable entities.

Accountable entities

The following financial services participants are accountable entities under FAR:

- ADIs;
- general insurers, life companies and private health insurers;
- non-operating holding companies (NOHCs) of ADIs, general insurers and life companies; and
- trustees of APRA-regulated superannuation funds (RSE licensees).

Significant related entities

(a) ADIs, insurers and their NOHCs

An entity is a significant related entity (SRE) of an accountable entity (other than an RSE licensee) if:

- it is a subsidiary of the accountable entity; and
- it (or its business or activities) has (or is likely to have) a material and substantial effect on the accountable entity (or on the accountable entity's business or activities).

A body corporate is a subsidiary of an accountable entity if the accountable entity:

- controls the composition of the body corporate's board; or
- is in a position to cast, or control the casting of, more than 50% of the maximum number of votes that may be cast at a general meeting of the body corporate; or
- holds more than 50% of the issued share capital of the body corporate, or
- the body corporate is a subsidiary of a subsidiary of the accountable entity.

(b) RSE licensees

An entity is an SRE of an RSE licensee if:

- it is a "connected entity" of an RSE licensee; and
- it (or its business or activities) has (or is likely to have) a material and substantial effect on its accountable entity (or on the accountable entity's business or activities).

A "connected entity" is defined by reference to the *Superannuation Industry (Supervision) Act 1993* (Cth) and captures several entities including:

- subsidiaries of the RSE licensee;
- other related bodies corporate of the RSE licensee (for example, parent companies and related party service providers (sister companies)); and
- entities with certain control relationships with the RSE licensee.

(c) Identifying SREs

In determining which entities will be SREs subject to FAR, financial services participants should:

- consider their group structure and identify all subsidiaries and connected entities of their accountable entities; and
- consider the relationships and arrangements between their accountable entities and any subsidiaries and connected entities identified. This should include a consideration of the nature/extent of any subsidiaries' and connected entities' financial, operational and reputational impact on their respective accountable entities (including the accountable entities' business and activities).

IDENTIFYING ACCOUNTABLE PERSONS

An individual is an **accountable person** of an **accountable entity** if any of the following apply:

1. they hold a position in the accountable entity or in another body corporate of which the accountable entity is:
    a. a subsidiary (of a non-RSE licensee) or a connected entity (of an RSE licensee); and
    b. because of that position they have actual or effective senior executive responsibility for management or control of the accountable entity or a significant or substantial part or aspect of the operations of the accountable entity or the accountable entity's relevant group (noting that the relevant group of an accountable entity means that accountable entity and its significant related entities);
2. they hold a position in, or relating to, the accountable entity and because of that position they have a responsibility, relating to the accountable entity, prescribed by the Minister rules; or
3. they hold a position in an accountable entity that is a position prescribed by the Minister rules.

An individual is an **accountable person of an SRE** if:

1. they hold a position in the SRE; and
2. because of that position they have actual or effective senior executive responsibility for management or control of the accountable entity or a significant or substantial part or aspect of the operations of the accountable entity or the accountable entity's relevant group (noting that the relevant group of an accountable entity means that accountable entity and its significant related entities).

ACCOUNTABILITY OBLIGATIONS UNDER FAR

Accountable entities

Under FAR, an accountable entity must comply with the following accountability obligations:

(i) to take reasonable steps to conduct its business with honesty and integrity, and with due skill, care and diligence;

(ii) to take reasonable steps to deal with the Regulators in an open, constructive and cooperative way;

(iii) in conducting its business, to take reasonable steps to prevent matters from arising that would (or would be likely to) adversely affect the accountable entity's prudential standing or prudential reputation;

(iv) to take reasonable steps to ensure that each of its accountable persons meets their accountability obligations (see below); and

(v) to take reasonable steps to ensure that each of its significant related entities complies with each of the foregoing paragraphs, as if the significant related entity were an accountable entity.

Accountable persons

Under FAR, accountable persons must conduct the responsibilities of their position:

(i) by acting with honesty and integrity, and with due skill, care and diligence;

(ii) by dealing with the Regulators in an open, constructive and cooperative way;

(iii) by taking reasonable steps in conducting those responsibilities to prevent matters from arising that would (or would be likely to) adversely affect the prudential standing or prudential reputation of the accountable entity; and

(iv) by taking reasonable steps in conducting those responsibilities to prevent matters from arising that would (or would be likely to) result in a material contravention by the accountable entity of a range of financial services legislation, including the FAR Act, the Banking Act, the Insurance Act and the Superannuation Industry (Supervision) Act.

Concept of "taking reasonable steps"

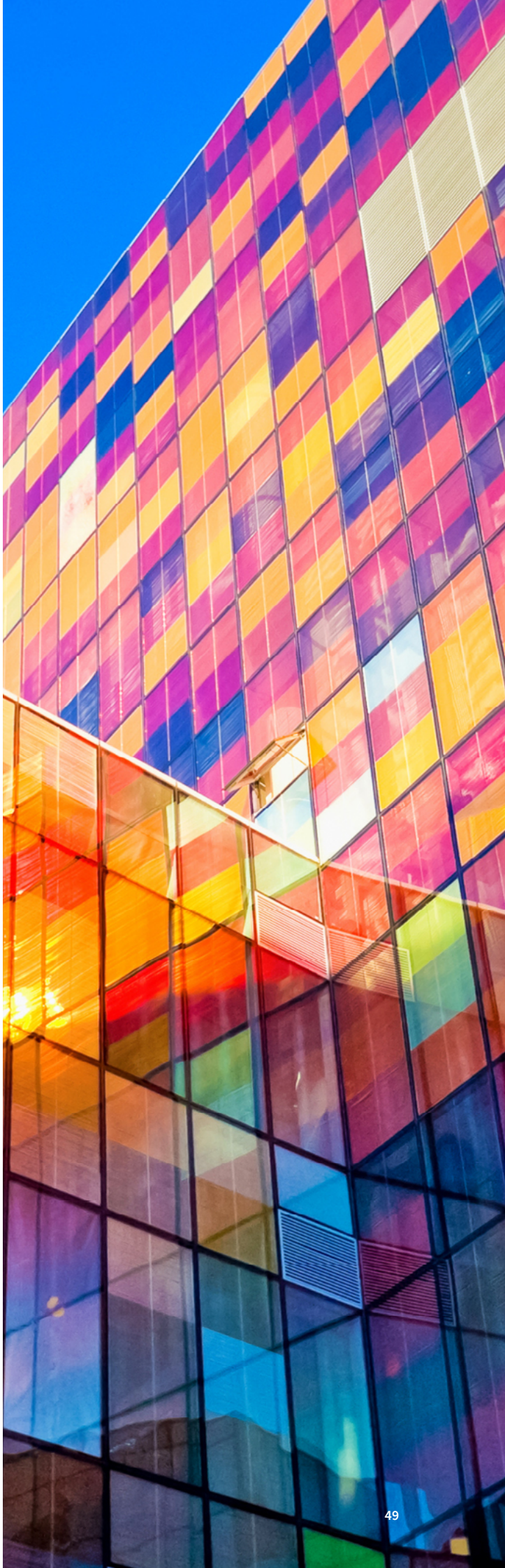
The FAR Act uses the concept of "taking reasonable steps" as the yardstick for several accountability obligations. Taking reasonable steps is defined (non-exhaustively) in the FAR Act as including, in relation to a matter:

(i) having appropriate governance, control and risk management in relation to that matter;

(ii) having safeguards against inappropriate delegations of responsibility in relation to that matter;

(iii) having appropriate procedures for identifying and remediating problems that arise or may arise in relation to that matter; and

(iv) taking appropriate action in response to non-compliance, or suspected non-compliance, in relation to that matter.



SANCTIONS

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How does Australia implement sanctions laws?

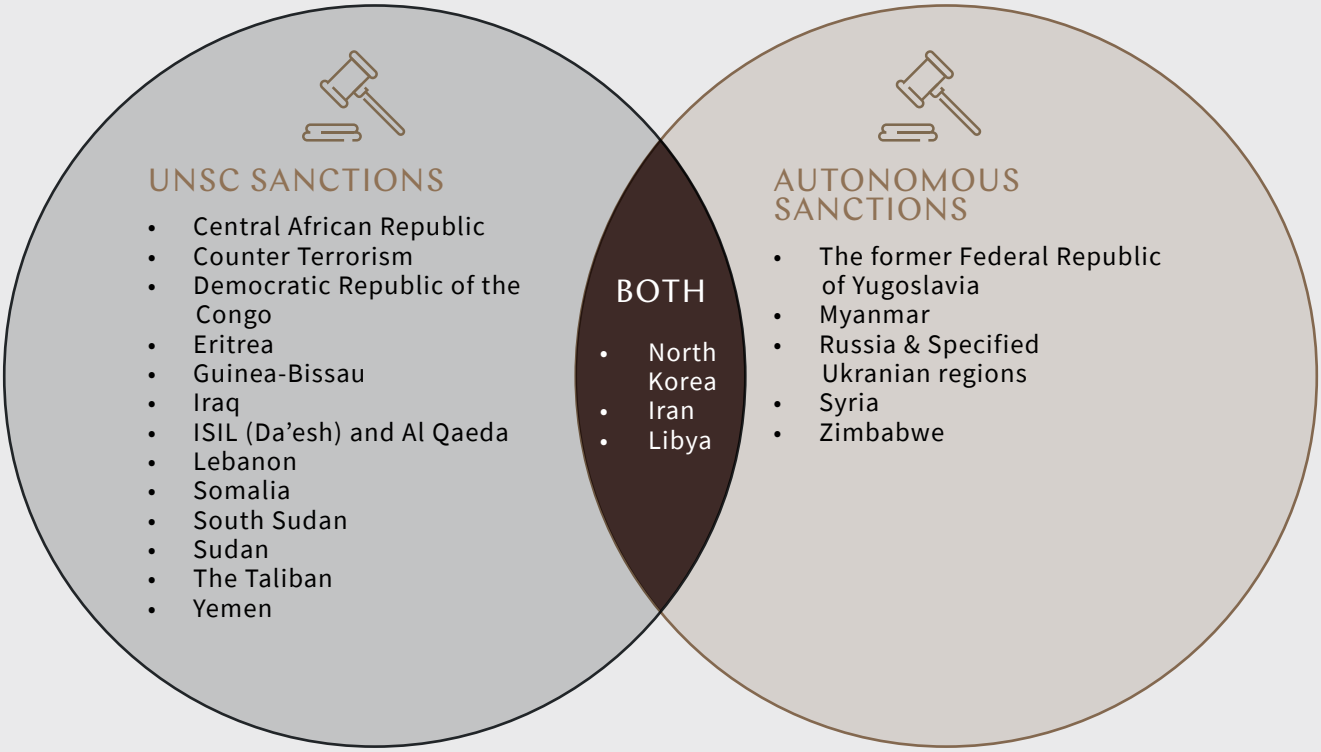
Australia's sanctions laws

Australian sanctions laws are comprised of 2 sanctions regimes:

- sanctions made under the *Charter of the United Nations Act 1945* (Cth) to give effect to resolutions passed by the UN Security Council (the 'UNSC Sanctions'); and
- sanctions independently made by the Australian government under the *Autonomous Sanctions Act 2011* (Cth) (the 'Autonomous Sanctions').

The key offences created under the two regimes are broadly similar, although the regions to which the sanctions apply differ.

This diagram illustrates the various regions and organisations impacted by Australia's sanctions regimes.



Extended geographical application

The sanctions offences created under the regimes have extended geographical application. This means for Australian incorporated entities and Australian individuals, they may commit an offence irrespective of whether they engage in conduct in Australia or overseas. For foreign entities and persons, they will only commit an offence if their conduct or a result of conduct constituting the offence has a geographical link to Australia.

Main sanctions offences

The main offences under the UNSC Sanctions and Autonomous Sanctions regimes are:

- ***engaging in a sanctioned supply****:* the regimes designate particular goods as 'export sanctioned goods' for specific sanctions affected regions. The Minister for Foreign Affairs can specify under legislative instruments that certain items are 'export sanctioned goods' and these can change frequently. For example, the export of certain luxury goods to Syria and Russia is considered a sanctioned supply;
- ***engaging in a sanctioned import****:* the regimes also designate particular goods from each sanctions affected region as 'import sanctioned goods'. Like export sanctioned goods, the Minister for Foreign Affairs can specify under legislative instruments that certain items are 'import sanctioned goods'. Some present examples include goods such as all goods from specified Ukraine regions, coal and types of petroleum oils from Russia and crude oil, petroleum and petrochemical products from Syria;
- ***providing a sanctioned service****:* generally speaking, these are services which assist with or are provided in relation to another sanctioned activity (eg sanctioned supply, import or commercial activity). The types of services can include technical advice, assistance or training, financial assistance, financial services, investment services or another service;
- ***engaging in sanctioned commercial activity****:* sanctioned commercial activities differ depending on the sanctioned jurisdiction. For example, in relation to Russia, dealings with certain financial instruments and arrangements to make loans or credit to specified Russian entities are prohibited;
- ***dealing with a designated person or entity****:* this offence prohibits a person from directly or indirectly making an asset available to, or for the benefit of, a designated person or entity. The Department of Foreign Affairs and Trade (DFAT) maintains a consolidated list of designated persons and entities under both sanctions regimes; and
- ***dealing with a controlled asset****:* if a person holds a controlled asset (ie an asset owned or controlled by a designated person or entity) they will commit an offence if they use or deal with that asset, or allow or facilitate the use of or dealing with that asset. In essence this requires the person to freeze the controlled asset. A person can request help from the Australian Federal Police (AFP) to determine whether an asset they hold is a controlled asset. They must also notify the AFP if they form an opinion that they hold a controlled asset.

These offences have a maximum penalty of:

- 110 years imprisonment, or a fine which is the greater of 3 times the value of the transaction or 2,500 penalty units (currently A$782,500) for individuals; or
- a fine which is the greater of 3 times the value of the transaction or 10,000 penalty units (currently A$3.13 million) for body corporates.

DFAT information about Australia's sanctions regime
https://www.dfat.gov.au/international-relations/security/sanctions

Special considerations for body corporates

For body corporates, sanctions offences are strict liability offences. This means that companies can commit an offence merely by engaging in the prohibited conduct, irrespective of whether it is inadvertent or unintentional. However, a company can rely on a defence of reasonable precautions if it can demonstrate that it took reasonable steps to avoid committing a sanctions offence. This may include actions such as implementing a sanctions policy, conducting sanctions screening of customers, suppliers or other business relationships and providing employee sanctions training.

A company may also be liable for acts of its subsidiaries or other entities under its control. Both sanctions regimes have provisions that deem a body corporate to have committed an offence if it has effective control over the actions of another body corporate or entity, which engages in certain sanctioned activities.

Permits

The Minister of Foreign Affairs may issue a permit to an entity or person to engage in conduct that would otherwise constitute a sanctions offence if it is in the national interest to do so. Applicants submit permit requests to the Australian Sanctions Office (ASO), which will then make a recommendation to the Minister as to whether the application should be granted. Applicants can also request an indicative assessment from the ASO regarding whether their activities require a permit.

Enforcement

Offences under the UNSC Sanctions and Autonomous Sanctions regimes are federal criminal offences, meaning that the Commonwealth Department of Public Prosecutions must commence proceedings against sanctions offenders. Proceedings have only been commenced under Australian sanctions laws on 2 occasions and have never been commenced against a corporation:

- *R v Chan Han Choi (No 10)* [2021] NSWSC 891, where Mr Choi pled guilty to providing a sanctioned service (a brokering service for the supply of arms and related materiel and coal from North Korea) under the UNSC Sanctions regime and the Autonomous Sanctions regime; and
- *R v AA* (No 3) [2019] NSWSC 1892 and *R v BB* (No 7) [2021] NSWSC 1504, where husband and wife co-offenders pled guilty to providing a sanctioned supply to Iran under the UNSC Sanctions regime by procuring representatives of an Australian company, Metalloy Pty Ltd to supply export-sanctioned goods (being nickel alloys) to an Iranian-owned Dubai-based company.

4. DATA, MARKETING AND IP

PRIVACY

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Australian privacy law regulates the collection, storage, use and disclosure of personal information by organisations carrying on business in Australia and the rights of individuals to access information held about them.

Key obligations are set out in the Australian Privacy Principles, being a schedule to the *Privacy Act 1988* (Cth). The Australian Privacy Principles are largely based on the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. The Australian Privacy Principles apply to:

- most Australian Government agencies;
- all private sector and not for profit organisations established under Australian law with an annual turnover of more than A$3 million;
- all private health service providers (including those with an annual turnover of less than A$3 million); and
- foreign organisations that carry on business in Australia.

Special rules also apply to:

- the use and disclosure of consumer credit information by credit providers and credit reporting agencies; and
- the collection and use of tax file numbers.

The Australian Privacy Principles include an obligation to establish a system designed to ensure compliance with the principles. Ordinarily these systems involve the appointment of a Privacy Officer (whose duties may be combined with other roles within an organisation) but, unlike the position in Europe, it is not mandatory to appoint an individual to such a position.

The Australian Privacy Principles also regulate the disclosure of personal information to a person outside Australia. Generally, a regulated entity must take steps to ensure that the offshore recipient of personal information will act consistently with the requirements of the Australian Privacy Principles, but this is subject to certain exceptions. As a result, it is common for multi-national corporate groups with an Australian branch or subsidiary to put in place intra-group data sharing agreements.

There are a number of broad exemptions under the Privacy Act, such as an employee records exemption and an exemption for small businesses. For the purposes of the Privacy Act, a small business is a business with an annual turnover of A$3 million or less. These exemptions are the main reason why the European Union has not recognised the Australian regime as providing an adequate level of protection to personal data exported from the EU. Most exports of personal data from the EU to Australia rely on the EU's standard contractual clauses. After the 'Schrems II' ruling of the Court of Justice for the European Union, this has required exporters to conduct a data transfer impact assessment of the powers of Australian public authorities to require the disclosure of personal data exported from the EU.

A mandatory notifiable data breach regime also applies to entities that are subject to the Australian Privacy Principles. Under the regime, a regulated entity is required to notify the Information Commissioner and affected individuals if there is a data breach that is likely to result in serious harm to affected individuals (subject to certain exemptions). Notices must include details about the entity, information about the incident and the records affected, and recommendations for affected individuals to protect themselves from harm. Further, a regulated entity that discloses personal information to an offshore recipient may be required to prepare a notice for an eligible data breach that occurs in respect of the offshore recipient.

The Privacy Act does not confer a direct right on an individual to sue a regulated entity to recover loss or damage suffered as a result of a contravention of the Act by the entity. Rather, a complaint must be made initially to the entity and escalated to the Information Commissioner if the individual is not satisfied with the entity's response. The Commissioner has power to investigate and make a determination requiring payment of compensation. In practice, it has been rare for such determinations to be made. The Commissioner also has power to institute proceedings in court to recover a civil penalty in a case involving serious or repeated contraventions of the Act. The maximum civil penalty for a corporation is A$2.2 million in respect of conduct that occurred between March 2014 and November 2022. The maximum civil penalty increased substantially for conduct that occurs after November 2022 to the greater of:

- A$50 million;
- if the contravention results in a benefit to the corporation that the court can determine the value of, 3 times the value of that benefit; or
- if the court cannot determine the value of that benefit, 30% of the adjusted Australian turnover in a 12 month period.

Although these new penalty provisions have not been tested at the time of writing, it appears that if the contravention does not result in a benefit to the corporation, the maximum penalty would be A$50 million.

At the time of writing, the Privacy Act is subject to proposed reforms which (if implemented into law) would result in significant changes to a number of the key aspects of the Privacy Act set out in this section.

Office of the Australian Information Commissioner
www.oaic.gov.au/privacy-law

DIRECT MARKETING

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General consumer protection laws (see the *Consumer Protection* section of this Guide), or sector-specific consumer protection laws (eg for financial services or therapeutic goods), regulate the content of direct marketing communications, generally with the objective of ensuring that consumers are not misled.

In addition, direct marketing, and the means of engaging in it, are regulated under the *Privacy Act 1988* (Cth), the *Spam Act 2003* (Cth) (Spam Act) and the *Do Not Call Register Act 2006* (Cth) (Do Not Call Register Act). Further, there is some sector-specific regulation of direct marketing activities, such as the anti-hawking laws that apply to the marketing of financial services and financial products and provisions in the *Therapeutic Goods Act 1989* (Cth) that prohibit the promotion of certain therapeutic goods to consumers.

The Spam Act applies to 'commercial electronic messages', which are essentially promotional messages sent by email, SMS or instant messaging platforms. The Do Not Call Register Act applies to telemarketing. There is also an Australian Privacy Principle (see the *Privacy* section of this Guide) which applies to all other forms of direct marketing (eg 'snail mail' and online targeted advertising).

Spam

A person or organisation can only send a commercial electronic message which has an 'Australian link' if:

- the recipient has consented to receiving messages (consent can be express or can be inferred from the recipient's conduct or the parties' relationship);
- it contains a statement detailing an electronic means of unsubscribing from receiving messages in the future; and
- it identifies the sender and contains the sender's contact details.

The prohibition on sending commercial electronic messages does not apply to the sending of an electronic message which is purely factual and not for the purpose of promoting or selling goods or services.

Substantial penalties may apply for repeat offenders. The supply, acquisition or use of email address harvesting technology is also an offence. The enforcement of the Spam Act is the responsibility of the Australian Communications and Media Authority. Persons receiving unsolicited commercial electronic messages do not have standing to commence proceedings for contraventions of the Spam Act.

Do Not Call Register

Australia also has a Do Not Call Register on which individuals, emergency services and government bodies can place their phone or fax numbers without charge. The listing remains valid for a minimum of 8 years.

It is an offence to make an unsolicited marketing call, or send an unsolicited marketing fax, to a number on the Do Not Call Register unless consent has been given.

Like the Spam Act, the Do Not Call Register Act is administered by the Australian Communications and Media Authority.

Australian Communications and Media Authority
www.acma.gov.au

IP PROTECTION

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SYDNEY

CATE NAGY

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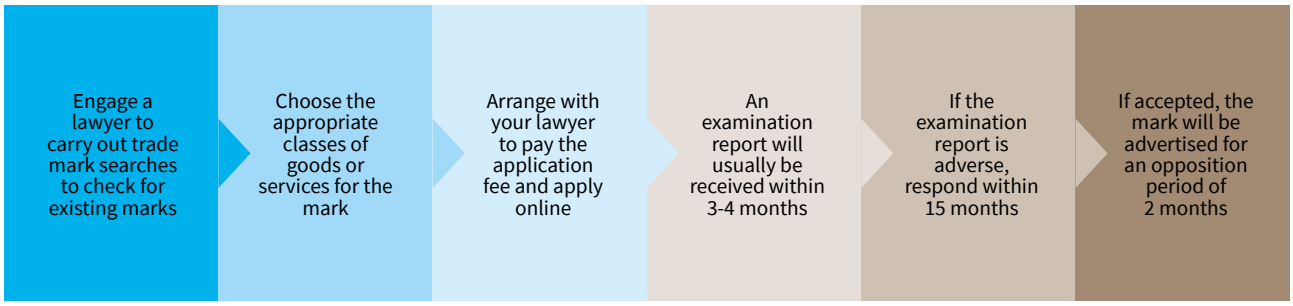
HOW CAN YOU PROTECT YOUR IP AND IDEAS?

Australia has extensive laws that protect the valuable intellectual property assets of a business, including copyright works and other materials, branding, inventions, innovations and designs. Forms of intellectual property protected in Australia include trade marks, copyright, patents and designs. The registration system is administered by IP Australia, a Commonwealth government agency.

Trade mark application process



Trade marks

Trade marks are protected under the *Trade Marks Act 1995* (Cth) and associated regulations. They can be registered for names, logos, aspects of packaging, shapes, colours, sounds and scents.

Once your trade mark is registered, you can stop anyone else using a similar trade mark for similar goods/services.

As the application process can take between 6 to 12 months, traders should consider applying to register trade marks as far in advance of starting to trade in Australia as possible.

Trade marks provide 10 years of protection which is renewable indefinitely for further 10 year terms.

Australia is a signatory to a number of international trade mark conventions. This means that if an application for registration of a trade mark is made in Australia within 6 months of an application by the same person in a convention country, the applicant can claim the convention country filing date as the priority date.

Passing off and misleading or deceptive conduct

Trade marks, names and brands may also be protected under the tort of 'passing off' and the Australian Consumer Law which prohibits corporations from engaging in misleading or deceptive conduct in trade or commerce. In both cases, it is necessary to establish a reputation for the trade mark, name or brand. Legal advice should be sought if a product new to the Australian market is coming close to an existing product design or get up, whether registered or unregistered in the Australian market.

Australian courts have found infringement where a company has copied the colours, size, shape and get up of another brand's packaging.

Patents

Patents to protect inventions are granted under the *Patents Act 1990* (Cth) (Patents Act) and associated regulations.

A patent confers an exclusive right to exploit the invention claimed during the term of the patent.

A standard patent typically provides 20 years of protection but may be extended by up to 5 years in the case of certain patents that claim a pharmaceutical substance.

In order for a patent to be valid, it must claim an invention which is patentable subject matter. The invention must also be novel, inventive and useful.

Prior to applying to register a patent, a patent clearance search should be conducted to determine whether the claimed invention infringes other granted patents (or will infringe a patent that is being prosecuted). This search should include patents and applications included in IP Australia's database, AusPat.

The patent application can be made through the online registration system. An application fee is payable.

Innovation patents

The Patents Act also recognises innovation patents, which have a term of 8 years (which cannot be extended). Inventions claimed in innovation patents are required to be 'innovative'. This is a lower threshold than standard patents (which must be inventive).

Following extensive consultation, the Australian Government is phasing out innovation patents. As of 26 August 2021, it is no longer possible to apply for an innovation patent. Innovation patents filed on or before 26 August 2021 continue to be in force until their expiry.

Copyright

Copyright is protected in *Australia under the Copyright Act 1968* (Cth) (Copyright Act) and associated regulations. Copyright protects the original expression of ideas or information. It does not protect ideas themselves.

In general, copyright in a work subsists until 70 years following the death of the author. In the case of works where the author is unknown, the standard term is 70 years after the making of the work unless the work is made public within 50 years of its making, in which case the term will be 70 years after first being made public.

Copyright protection in original works and other subject-matter is automatic from the time of creation – registration is not required.

Australia is a signatory to the Berne Convention for the Protection of Literary and Artistic Works. This means that works created in countries which are also signatories will be treated as if they were created in Australia for the purposes of Australian copyright protection.

What is protected under copyright?

- Literary works (such as articles, emails, copy, lyrics and books)
- Dramatic works
- Artistic works (such as drawings, paintings and photographs)
- Musical works
- Sound
- Films and advertisements
- Radio and television
- Computer programs and databases

Infringement of copyright will occur if a substantial part of a work is reproduced, published or performed in public (among other acts) without the copyright holder's authorisation. Currently, there are only limited defences to infringement and no broad US-style 'fair use defence'.

Attorney General Department's Short Guide to Copyright
https://www.ag.gov.au/rights-and-protections/copyright/copyright-basics

Moral rights protection

In Australia, authors' 'moral rights' are also protected. These non-economic rights ensure integrity of authorship and attribution and protect against false attribution of authorship. They also create a right for authors and performers to not have their works subjected to derogatory treatment.

Designs

Designs are protected under the *Designs Act 2003* (Cth) and associated regulations. Designs protect the overall visual impression of a product including features of shape, configuration, pattern and ornamentation.

A design can be registered for a period of 5 years and can be renewed for a further 5 years.

In order to register a design in Australia, the design must be new and distinctive when compared to other designs that have been publicly used in Australia, published in a document in or outside Australia before the application date or disclosed in an Australian design application with an earlier priority date.

Infringement will occur if a product embodies a design that is identical or substantially similar in overall impression to a registered design.

Existing designs are searchable online. Drawings that fully display the design must be included in the application, which can be made online. An application fee is payable.

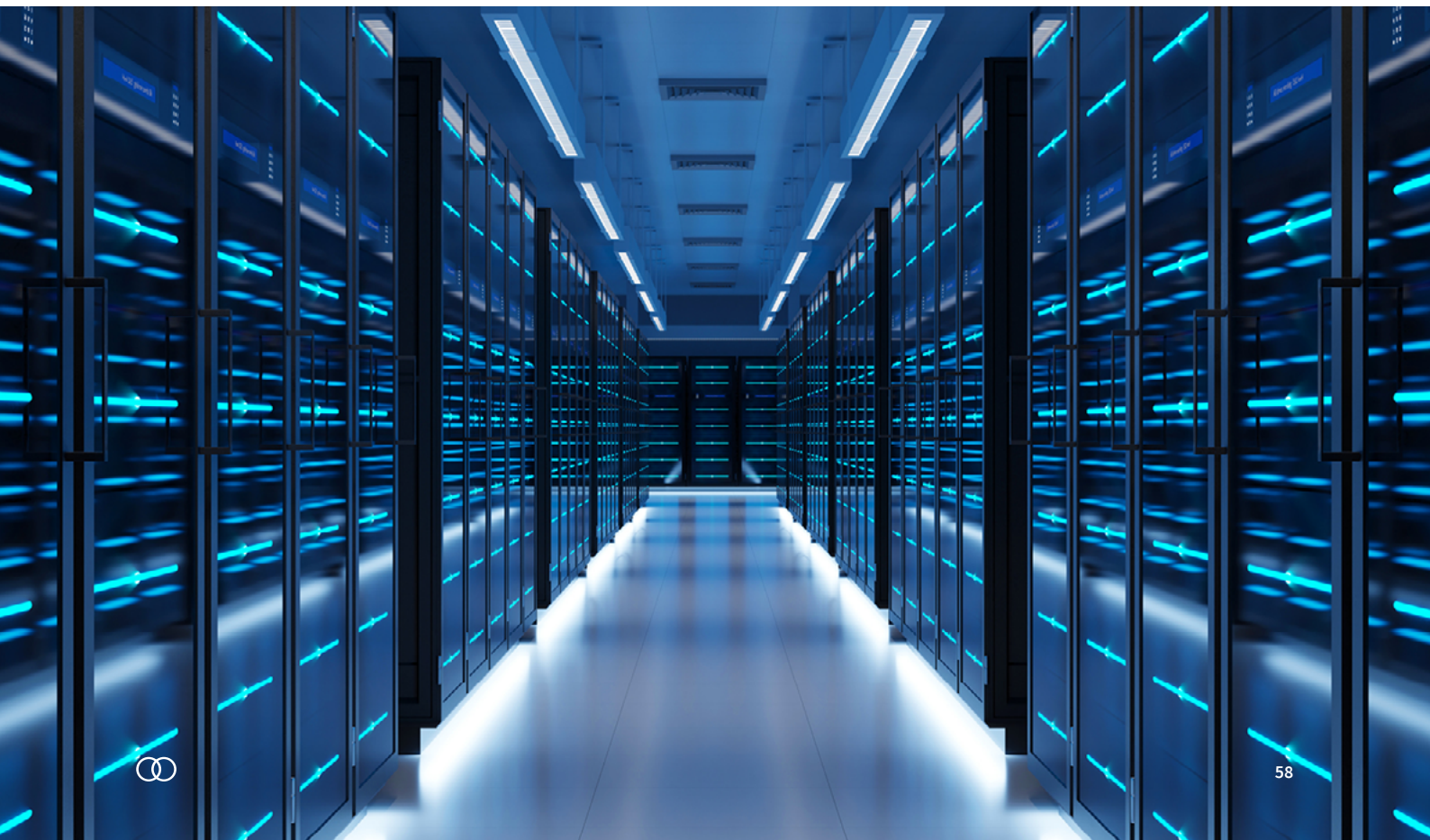
Convention priority can be claimed for designs filed internationally not more than 6 months prior to the application date in Australia.

IP Australia
www.ipaustralia.gov.au/designs

.au Domain names

An investor intending to use a website with an Australian top level domain (ending in the .au suffix) can register a domain name with a number of providers so long as the investor meets the eligibility and allocation criteria for the relevant domain under the .au Domain Administration Rules (eg by being an Australian registered company or a foreign company that has an Australian Business Number (ABN)). Where the investor is a foreign company that does not have an ABN, the investor will be eligible to hold a .au domain name only if they have applied for or registered an Australian trade mark which is an exact match of the domain name. There must also be a connection between the registering entity and the domain name (eg that the domain name is identical to the entity's business name). These requirements are also set out in the Rules. Care should be taken to ensure that the domain name and associated website do not infringe the rights of anyone holding a trade mark registered in Australia or otherwise constitute misleading or deceptive conduct contrary to the Australian Consumer Law.

Disputes over .au domain names may be addressed through administrative proceedings under the .au Dispute Resolution Policy (auDRP). Commencement of an administrative proceeding does not prevent either party from initiating legal proceedings at any time.



CONSUMER PROTECTION

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HOW ARE CONSUMERS PROTECTED IN AUSTRALIA?

Australia has strict consumer laws that safeguard consumers and protect their rights against unfair, misleading or unsafe conduct by businesses.

Consumer protections

The Australian Consumer Law (ACL) sets out the national approach to consumer protection in Australia. The ACL contains a range of consumer protections, breaches of which may result in serious penalties, including:

- civil penalties of up to:
  - (for corporations) the greater of A$50 million, 3 times the value of the benefit obtained or, if the court cannot determine the benefit obtained from the act/omission, 30% of the corporation's adjusted turnover during the 'breach turnover period' (effectively, the value of all supplies connected with Australia for the longer of 12 months or the period over which the breach took place); and
  - (for individuals) A$2.5 million; or
- substantiation notices, infringement notices or public warning notices.

The Australian Competition and Consumer Commission (ACCC) is the relevant regulator at the national level and enforces consumer protection laws vigorously. State and Territory consumer regulators may also enforce consumer protection laws at the relevant level.

Key protections

The ACL prohibits conduct in trade or commerce that is misleading or deceptive or likely to mislead or deceive. This can include misleading and false advertising, names and market practices such as lookalike products.

The ACL also prohibits false or misleading representations in connection with the promotion or supply of goods or services, including for example, false or misleading testimonials or statements about the price, standard, quality or characteristics of goods or services.

The ACL gives 'consumers' the benefit of certain non-excludable guarantees and warranties in respect of goods and services. 'Consumers' can include businesses. The guarantees apply to any goods or services up to A$100,000 in value, goods or services that are normally bought for personal or household use (of any value) and vehicles or trailers used mainly to transport goods on public roads. The guarantees include that the goods are fit for purpose and of acceptable quality, and that services are rendered with due care and skill.

Consumers are entitled to specific remedies if these guarantees are not met, including refund, repair or replacement.

The ACL prohibits 'unfair' contract terms in standard form contracts where a contract has been prepared by one party and where the other party has little or no opportunity to negotiate the terms) that are made with:

- **consumers:** an individual acquiring a good or service wholly or predominantly for personal, domestic or household use or consumption, or a sale or grant of an interest in land; or
- **small businesses:** where at least one party is a small business (employing fewer than 100 persons, including casual employees employed on a regular and systematic basis) or has an annual turnover of <A$10 million.

If either of these criteria are met, any unfair contract terms are void and, since November 2023, penalties apply for proposing, applying or relying on an unfair contract term.

Country of origin labelling

Country of origin labelling laws were introduced to the ACL in 2016 and 2017. These laws govern representations, eg, about where goods were made, grown or produced.

For helpful guidance regarding country of origin labelling in Australia, see:

The ACCC's guide to assist businesses
https://www.accc.gov.au/business/advertising-and-promotions/country-of-origin-claims/country-of-origin-food-labelling

For regular updates on consumer protection matters and reforms, see KWM's InCompetition blog
www.incompetition.com.au

Product liability

Federal law makes manufacturers and importers strictly liable for injury caused by defective or unsafe goods.

It also empowers the relevant Federal Minister to make mandatory safety standards, issue a recall notice, issue disclosure notices to third parties, publish a written safety warning notice or introduce a mandatory minimum standard of information relating to specified goods or services.

Mandatory safety and information standards apply to a wide range of household and consumer goods. Penalties apply where a business supplies products that fail to comply with those standards.

Product liability may also arise under tort and contract and the Sale of Goods Acts in each state or territory.

Methods of enforcement

Product recalls are governed by the *Competition and Consumer Act 2010* (Cth) and industry protocols.

Class actions in relation to product liability claims are available to groups of 7 or more consumers if the claim arises out of similar circumstances giving rise to common issues.

Reporting requirements apply under which suppliers of consumer goods and product-related services who become aware of death, serious injury or illness caused by the use, or foreseeable misuse, of that good or service generally must report it to the minister within 48 hours of becoming aware.

Industry specific codes

Traders entering the Australian market should ensure that they receive advice on any codes relevant to their industry.

The ACCC regulates mandatory industry codes for the gas market, electricity retailers, franchising, dairy, sugar, horticulture, oil, wheat ports and unit pricing. The ACCC has the power to conduct industry code compliance checks to ensure businesses comply with applicable mandatory codes.

There are also voluntary codes developed by industry or the ACCC. An example of an ACCC developed voluntary code is the Food and Grocery Code of Conduct.

Codes may also be prescribed under other legislation. For instance, the Australia New Zealand Food Standards Code applies to businesses involved in the production, processing and/or marketing of food.

DIGITAL IDENTITY

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THE PATHWAY TO AN ECONOMY-WIDE DIGITAL IDENTITY FRAMEWORK

Australia is moving towards the adoption of Digital Identity to reduce theft of identities, stop the oversharing of identity documents and enable businesses to reduce the information they need to collect about individuals. New legislation is expected to be passed soon which will allow them to be used more widely.

What is a digital identity?

A digital identity is a unique collection of information about an individual that allows them to prove who they are in the digital world. Digital identity can be used for a wide range of purposes including identity verification.

Whether and how to implement economy-wide digital identity frameworks are matters that many countries globally are grappling with. Australia has a limited framework for digital identity, which the government is currently working towards expanding.

Australia's current digital identity framework

The Trusted Digital Identify Framework (TDIF) is an accreditation framework for digital identity services. Currently, the framework is managed by the Department of Finance and is not underpinned by any legislation.

Right now, the Australian Government Digital ID System (AGDIS) is based around a Commonwealth identity service provider (myGov ID) delivered by two TDIF-accredited Commonwealth government entities (Services Australia and the Australian Taxation Office). myGov ID is already used by over 10 million Australians to verify their identities when accessing a range of government services.

In addition to myGov ID, some Australian states have State-based digital identity schemes. Private sector business can also apply to be accredited to provide digital identities under the TDIF (but operate outside the AGDIS once accredited). At this stage, only Australia Post (a government owned entity) and a few other private sector entities have been accredited under the TDIF.

What is changing?

The Australian Government is in the process of legislating to enable a phased expansion of Digital Identity. At the time of publication the *Digital ID Bill 2023* (Cth) has been passed by the Senate and is progressing towards enactment.

The Bill sets out the requirements for different types of Digital ID service providers to become accredited and maintain their accreditation. The Bill strengthens the enforcement mechanisms against accredited digital ID providers. Initially, the ACCC will be appointed as the independent regulator of Digital Identity (phase 1). The ACCC will be responsible for:

- accrediting digital identity services against the Digital ID Accreditation Rules which are included in the legislation;
- approving which services can participate in the AGDIS; and
- using investigative and compliance powers under the legislation to ensure digital identity providers and services adhere to the legislation.

Eventually, Australians will be able to:

- use State and Territory digital identities to access Commonwealth services (phase 2),
- use their myGov ID in the private sector (for instance to open a bank account or verify a telco contract) (phase 3), and
- use accredited privately provided digital identities to access government services (phase 4).

The Attorney General has offered 1 July 2024 as the tentative rollout date for phase 1, but information has not yet been released about the timing of the following phases. The most significant changes will come when digital identities can be used reciprocally between the private and government sectors, but we don't yet know when this will happen. Interested parties should watch this space.

ONLINE SAFETY

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Online Safety Act

In Australia, online safety is regulated by the *Online Safety Act 2021* (Cth) (**Online Safety Act** or **Act**). The Online Safety Act applies to a range of online service providers, including those providing:

- social media services, app distribution services, hosting services, internet carriage services and internet search engine services;
- services that enable end-users to communicate with other end-users (e.g. email, instant messaging, SMS, MMS and other chat services), referred to in the Act as 'relevant electronic services'; and
- all other services that allow end-users to access material on the internet (e.g. webpages), referred to in the Act as 'designated internet services'.

The Online Safety Act also applies to manufacturers, suppliers, maintenance providers and installation providers of equipment that is for use by Australian end-users of the regulated online services.

The Online Safety Act regulates online safety by:

- establishing an eSafety Commissioner (**eSafety**) to monitor and promote compliance with the Online Safety Act and to investigate relevant complaints;
- enabling individuals to make complaints to eSafety about certain types of online material;
- providing for the development of a set of Basic Online Safety Expectations (**BOSE**); and
- providing for the development of industry codes and standards that set out the obligations of different sections of the online industry in relation to online material.

Removal of certain online material

The Online Safety Act enables individuals to complain to the Commissioner about the following types of online material: cyber-bullying material (directed at either children or adults), non-consensual sharing of intimate images, and other harmful online content that either would be refused classification or limited to an 18+ audience under Australia's National Classification Scheme (also referred to as 'class 1' and 'class 2' material), which can include things such as pro-terror content and child sexual exploitation material.

After investigating a complaint, eSafety may require end-users or providers to remove the relevant material, or in some cases ensure that material is subject to a restricted access system (to protect against access by persons under the age of 18). For certain types of material, eSafety is not limited to responding to complaints and can issue removal notices on its own initiative. In some cases, eSafety may also require internet service providers to block access and internet search engine services to cease providing links to the relevant material.

Basic Online Safety Expectations (BOSE)

The BOSE are a set of expectations, defined in a Ministerial determination, intended to increase the accountability and transparency of online service providers. Currently, the BOSE only apply to providers of social media services, relevant electronic services and designated internet services, though further categories of providers can be added in the future.

Under the BOSE, service providers are amongst other things expected to:

- take reasonable steps to ensure that end-users are able to use the service in a safe manner;
- take reasonable steps to minimise cyber-bullying material, non-consensual intimate images and material that depicts, promotes, incites or instructs abhorrent violent conduct;
- implement measures to prevent children from accessing certain types of harmful material; and
- enable end-users to report and make complaints about certain types of harmful material.

While these expectations are technically non-binding, service providers may be required to report against their compliance, which may be made public by eSafety (see examples here). Fines can, and have, been issued for failing to comply with these reporting requirements.

Industry codes and standards

The Online Safety Act provides for industry bodies that represent defined sections of the online industry to develop codes to deal with certain matters regulated by the Act, and for eSafety to register the codes if they meet statutory requirements. If a code does not meet the requirements, eSafety can develop an industry standard for that section of the online industry.

The first phase of industry code development focused on the regulation of class 1A and class 1B material (covering child sexual exploitation material, pro-terror material, and certain types of material concerning, crime, violence and drugs). eSafety has registered industry codes for six sections of the online industry on this topic. However, eSafety declined to register the draft industry codes proposed by providers of relevant electronic services and designated internet services, noting that these draft codes did not contain appropriate community safeguards for Australian users. eSafety has instead developed its own draft industry standards for these two sections of the online industry. The consultation process on these standards is still ongoing.

The second phase of industry code development will focus on the regulation of class 2 material (covering sexually explicit content and other material not suitable for a minor) and will commence following the conclusion of the first phase.

eSafety's powers

eSafety has information-gathering powers that enable it to obtain end-user identity information and contact details from service providers service.

eSafety also has investigative powers that allows it to require a person to produce documents or give evidence relevant to the subject matter of an investigation under the Online Safety Act. The Act also provides eSafety with a range of enforcement powers, including the power to make public statements about service provider contraventions (effectively 'naming and shaming' such providers), issue service providers with formal warnings, direct service providers to take remedial direction and issue infringement notices. eSafety may also bring court proceedings for a service provider to pay a civil penalty, to seek an injunction or (where there have been multiple previous contraventions and the ongoing provision of a service is considered to represent a significant community safety risk) to seek a cease service order.

At the time of writing, the maximum penalty that may be sought by eSafety is $782,500 per contravention.

Upcoming developments

The Australian government is currently undertaking a review of the Online Safety Act, which will involve a period of public consultation. In addition to a general review of the overall operation and effectiveness of the Online Safety Act and the BOSE regime, the review will consider the following issues:

- the potential impact of a range of emerging technologies, including generative artificial intelligence, immersive technologies, recommender systems, end-to-end encryption and decentralised platforms;
- whether penalties should apply in a broader range of circumstances;
- whether eSafety should have a duty of care requirement or additional investigation and enforcement powers;
- whether industry should be required to act in the best interests of the child; and
- whether it would be appropriate to require industry to contribute to eSafety's regulatory activities.

The final report is due to the Minister for Communications by 31 October 2024.

The Australian government also intends to conduct a separate public consultation on the National Classification Scheme in the first half of 2024. As the National Classification Scheme informs many of the definitions in the Online Safety Act, any developments will likely be significant to the online safety regime.

5. ENERGY AND INFRASTRUCTURE

CRITICAL INFRASTRUCTURE

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Security of Critical Infrastructure

In late 2021 and early 2022, the Australian Government amended the *Security of Critical Infrastructure Act 2018* (Cth) (SOCI Act) to uplift security and resilience obligations applicable to participants in 11 critical infrastructure sectors due to a worsening threat environment and a greater understanding of the interconnectedness of Australia's critical infrastructure. The 11 critical infrastructure sectors are communications, data storage and processing, financial services and markets, water and sewerage, energy, health care and medical, higher education and research, food and grocery, transport, space technology and defence.

As part of its 2023-2030 Cyber Security Strategy, the Australian Government is planning to further amend the SOCI Act to improve the security and resilience of Australia's critical infrastructure against increasingly complex cyber security risks.

There are 4 primary requirements imposed by the SOCI Act: reporting, risk management, enhanced cyber security obligations and government assistance.

Reporting Obligations

Entities that are responsible for a critical infrastructure asset (responsible entities), or have an interest of at least 10% in, or that gives them influence or control over, a critical infrastructure asset (direct interest holders), must provide operational and ownership information respectively to the Register of Critical Infrastructure Assets.

In addition, responsible entities for critical infrastructure assets must notify the Australian Cyber Security Centre (ACSC):

- of critical cyber security incidents within 12 hours of becoming aware of the incident; and
- of other cyber security incidents within 72 hours of becoming aware of the incident.

Risk Management

Under the *Security of Critical Infrastructure (Critical infrastructure risk management program) Rules* (LIN 23/006) 2023, responsible entities for certain critical infrastructure assets must adopt, maintain, comply with, review and update a critical infrastructure risk management program to:

- identify each hazard where there is a material risk that the occurrence of the hazard could have a relevant impact on the asset;
- reasonably minimise or eliminate any material risk of such a hazard occurring; and
- reasonably mitigate the relevant impact of such a hazard on the asset.

Each year, the board of each responsible entity must approve an annual report on their risk management program for submission to the relevant Commonwealth regulator or the Secretary of Home Affairs. Submission of the first annual report is due in September 2024.

Enhanced cyber security obligations

There are additional obligations that apply to a subset of critical infrastructure assets known as 'Systems of National Significance' which are regarded as most important to the nation. These obligations include:

- adopting, maintaining and complying with an incident response plan if required by the Secretary of Home Affairs;
- participating in cyber security exercises to test their ability to respond appropriately to, and mitigate the impacts of a cyber security incident;
- undertaking vulnerability assessments; and
- providing periodic reports on the operation of the system (or allowing the installation of a program to collect and transmit information) to the Australian Signals Directorate (ASD).

Government Assistance Powers

The Government has wide powers to enable it to act and intervene to respond to cyber security incidents affecting critical infrastructure in Australia. These powers allow it to give directions requiring entities to provide information about a cyber security incident, to take action to respond to a cybersecurity incident and, most controversially, to authorise the ASD to intervene or 'step in' to a critical infrastructure asset and take action to respond to cyber security incidents.

There are protections that apply to the exercise of these powers – in particular, their use must first be authorised by the Minister for Home Affairs on the basis that he or she is satisfied that:

- a cyber security incident has a relevant impact on a critical infrastructure asset;
- there is a material risk that the cyber security incident is likely to seriously prejudice Australia's social or economic stability, defence or national security; and
- no existing Commonwealth, State or Territory regulatory system could be used to provide a practical and effective response to the incident.

In addition, before authorising an intervention request, the Minister for Home Affairs must obtain the agreement of the Prime Minister and the Defence Minister.

Additional cyber security obligations and powers are being considered for the SOCI Act.

Proposed changes to SOCI Act to address cyber risks

The Australian Government commenced consultation on proposed changes to the SOCI Act in December 2023, prompted by recent cyber incidents in Australia and foreshadowed in its 2023-2030 Cyber Security Strategy. The consultation includes the following 5 proposed amendments to the SOCI Act:

1. including data storage systems for business- critical data within critical asset definitions to ensure that they are covered by the obligations under the SOCI Act (in the same way as those systems that are outsourced to a data storage or processing provider are currently covered);
2. the addition of last resort consequence management powers for the Minister for Home Affairs;
3. the amendment of protected information provisions under the SOCI Act to simplify how government and industry share protected information;
4. the addition of a power to direct responsible entities to remedy serious deficiencies in their critical infrastructure risk management programs; and
5. the consolidation of telecommunications security requirements into the SOCI Act from the Telecommunications Act 1997 (Cth).

For more information on the 2023-2030 Cyber Security Strategy and the other legislative reform proposals, see the *Cyber* section of this guide.

Interaction between Critical Infrastructure and FIRB

As a consequence of the broadened definitions of 'critical infrastructure asset' in the SOCI Act, the scope of 'national security business' under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA) has been significantly expanded. 'National security business' includes a business which is a responsible entity or direct interest holder of a critical infrastructure asset. Under the FATA, the acquisition of an interest of 10% or more in a national security business is a 'notifiable national security action', requiring investors to first give notice to the Treasurer and receive a no objection notification before being able to proceed.

Investors will need to carefully assess the nature of the businesses they are looking to acquire or obtain an investment in, particularly where those businesses are operating in a critical infrastructure sector.

For more information on FIRB requirements, see the *Foreign Investment Regulation* section of this Guide.

ENERGY AND RESOURCES

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Government renewable energy targets

In 2021, the then Labor opposition (which has since been elected into government) outlined its plan to reduce emissions, entitled 'Powering Australia', under which it committed to reducing emissions by 43% relative to 2005 levels by 2030, increase the share of renewables in the National Electricity Market to 82% by 2030 and achieve net zero emissions by 2050. Seven of the States and Territories have also independently set their own 2030 emissions reduction targets. They aim to reduce emissions by the following percentages relative to 2005 levels:

- Queensland: 30%;
- Victoria: 45-50%;
- New South Wales: 50%;
- South Australia: more than 50%;
- Australian Capital Territory: 65-75% (with net zero achieved by 2045);
- Tasmania: 100% (with net zero achieved by 2030); and
- Western Australia: 80% below 2020 levels.

With the need to increase the speed of Australia's energy transition away from fossil fuels to meet these targets and growing government support for the development of renewable energy, there will continue to be a strong pipeline of opportunities in the renewables space (in both new and existing assets) for corporates, developers and investors.

New energy policies

A range of government policies and initiatives have been implemented and maintained as part of attempts to meet renewable energy targets.

At a federal level, one of the Australian Government's core schemes to encourage investment in renewable energy generation projects is known as the Renewable Energy Target (RET). Under the RET, wholesale buyers of electricity have an obligation to buy and surrender an annually increasing number of renewable energy certificates which are created by or in respect of certain renewable energy generators or other sources. The RET, which concludes in 2030, requires that at least 30% (or 33,000 GWh) of Australia's electricity generation be provided by renewable sources. This target was met ahead of schedule in 2019. The RET will expire in 2030.

Another core scheme is the 'Emissions Reduction Fund', which is a voluntary scheme that aims to incentivise the adoption of practices and technologies that reduce carbon emissions. Under the scheme, participants can earn Australian Carbon Credit Units (ACCUs). One ACCU is earned for each tonne of carbon dioxide equivalent stored or avoided by a project. Once earned, project proponents can earn revenue through sales of ACCUs to the government or in the secondary market for ACCUs.

The Labor Government has recently published a more targeted policy entitled 'Rewiring the Nation', that focuses on an investment of A$20 billion to upgrade Australia's transmission network infrastructure. These upgrades are intended to, among other things, relieve issues with Australia's transmission infrastructure that have hampered the progress of renewable energy in taking over primary responsibility for generating Australia's baseload power from fossil fuels.

Guarantee of Origin Scheme

In December 2022, the Australian Government released 2 consultation papers on the Guarantee of Origin (GO) certificate scheme. The voluntary scheme is due to commence in 2025 and will introduce 2 types of certificates – Renewable Electricity GO (REGO) certificates and Product GO certificates. New legislation administered by the Clean Energy Regulator (CER) will establish the GO scheme, and the certificates will be located on CER managed public registers with general information available. It will initially cover hydrogen producers, hydrogen energy carriers and renewable electricity power stations, with subsequent expansion proposed. It is intended for the scheme to be legislated in 2024.

REGOs are associated with tracking renewable electricity generation and will each represent 1 MWh of net renewable electricity generation. The types of renewable energy generation eligible to create REGO certificates are those defined as eligible renewable energy sources under section 17 of the *Renewable Energy (Electricity) Act 2000* (Cth). The REGO certificates which can be traded independently, resemble the current large-scale generation certificates (LGCs) under the Renewable Energy Target (RET) scheme.

The differences between the LGC and REGO schemes are minor, with the primary difference being that eligibility under the REGO scheme is broader than under the LGC scheme. REGOs will initially exist alongside LGCs but will continue beyond 2030 when the RET ends.

Product GOs are associated with the product-based emissions accounting framework, initially covering hydrogen and hydrogen energy carriers, and will represent a standard 1 kilogram unit of the product that has been produced. The purpose is to verify the carbon intensity of products across the product's lifecycle using a provenance approach, capturing emissions associated with the supply of raw materials, production, and transport and storage up to consumption or international departure. Product GO certificates cannot be traded independently of the product itself.

A new emissions reduction objective in the National Electricity Market

On 21 September 2023, amendments to the national energy laws incorporating an emissions reduction objective into the National Electricity Objective, National Gas Objective and National Energy Retail Objective (the national energy objectives) respectively came into force. The new emissions reduction objective is in addition to the legacy objectives of price, quality, safety, reliability and security.

The new objective will guide how Australia's energy market bodies — the Australian Energy Market Commission (AEMC), the Australian Energy Market Operator (AEMO) and the Australian Energy Regulator (AER) and Western Australia's Economic Regulation Authority (ERA) — consider Australia's emissions reduction targets in the undertaking of their respective powers and functions.

On 1 February 2024 the AEMC incorporated emissions reduction considerations into the national electricity rules. This rule change adds 'changes to Australia's greenhouse gas emissions' as a class of market benefit for the Integrated System Plan (ISP), and the Regulatory Investment Test for Transmission and Distribution (RIT-T and RIT-D) processes. The ISP is the market operator's whole-of-system plan that provides an integrated roadmap for the efficient development of the National Electricity Market over the next 20 years and beyond.

The rule change also allows electricity networks and gas pipeline operators to propose expenditure that contributes towards achieving emissions reduction targets in their revenue proposals and access arrangement proposals.

Offshore Wind

To promote the growth of the offshore wind industry in Australia, the federal government also enacted the *Offshore Electricity Infrastructure Act 2021* (Cth) and regulations associated with that legislation will be made in due course. This new legislation introduces a framework for a new federal licensing scheme for proposed developments of offshore wind projects.

On 6 March 2024 the Australian Government declared an offshore wind zone in the Southern Ocean off western Victoria. This is the third officially declared offshore wind zone in the country. The final declared zone is approximately 20% of the size of the original consultation area. The zone could generate up to 2.9GW of offshore wind energy. Feasibility licence applications for offshore wind projects in the Southern Ocean zone will open from 6 March until 2 July 2024.

Expanded Capacity Investment Scheme

On 23 November 2023, the Australian Government announced an expansion of the Capacity Investment Scheme (CIS) to target a total of 32 GW of new capacity nationally. Under the CIS the Australian Government will provide revenue underwriting for successful tender projects, with an agreed 'floor' and 'ceiling'. This safety-net is designed to decrease financial risks for investors. The expanded target is to be comprised of 23 GW of new capacity representing $52 billion in investment, and 9 GW of clean dispatchable capacity representing $15 billion in investment and an additional 7.9 GW to that planned in the first stage of the CIS. The first stage of the CIS was launched in 2023 and includes a:

- Commonwealth/NSW tender in partnership with the NSW Electricity Infrastructure Roadmap
- tender for dispatchable capacity in South Australia and Victoria.

The expanded CIS will be rolled out from 2024 to 2027. There will be regular competitive tenders held approximately every 6 months, starting in April/May 2024. 14 GW of the CIS will be rolled out through a guaranteed national tender, with the remaining 18 GW delivered through Renewable Energy Transformation Agreements. Renewable Energy Transformation Agreements are agreements that will be negotiated between the Australian Government and the states and territories to achieve shared objectives in the renewable energy transformation.

At the State and Territory level, there is considerable (and growing) support for large scale renewable energy projects, with some States electing to implement their own policies and development strategies for the energy transition. For example, the New South Wales government has commenced implementation of its 'Electricity Infrastructure Roadmap', which is aimed at attracting A$32 billion of investment from the private sector by 2030 into renewable energy assets. Numerous states (including New South Wales, Queensland and Victoria) have also published and commenced implementing strategies for the implementation of 'Renewable Energy Zones' that will provide new regions of coordinated transmission infrastructure for renewable energy assets.

New baseload energy sources

As Australia continues to shift away from reliance on traditional baseload power supplied by coal fired power stations, there are new opportunities for investment in various classes of energy sources such as hydrogen.

For example, Fortescue Metals Group has established a new division entitled 'Fortescue Future Industries' (FFI) that is dedicated to harnessing upcoming opportunities to establish a portfolio of green hydrogen and green ammonia projects. FFI has published a target of having a portfolio capable of producing 15 million tonnes per year of green hydrogen by 2030 and 50 million tonnes per year by 2040.

Distributed energy and battery storage

Technological innovation, particularly in the form of distributed energy and battery storage, also continues to present new opportunities for investment in Australia's sustainable energy future as evidenced by the continuing proliferation of proposed new renewable energy generation projects contemplating inclusion of a battery to provide 'firming' services to the generation asset. In particular, there has continued to be a material uptake in the penetration of 'behind the meter' generation through new smart rooftop solar photovoltaic systems, which is set to continue as the technology becomes more cost competitive and installed capacity increases. As Australia's energy market continues its transition to one that requires less capital intensive infrastructure and is focused on the wider integration and deployment of distributed energy resources, it is anticipated that there will be new innovative markets for development and investment.

Resources – coal faces headwinds and surge in demand for rare earths

In response to the pattern of increasing scrutiny in Australia on the ESG impacts of businesses, coal miners and coal intensive businesses or assets are expected to face increasing commercial headwinds. For example, listed resource businesses have faced increasing pressure from shareholders at general meetings around their ESG concerns, as well as difficulties in obtaining competitive pricing and terms in debt markets.

Given surging global demand for rare earth metals (in part driven by supply chain constraints and increased consumption by new forms of assets such as big batteries), there are opportunities for rare earth metals companies to capitalise. These opportunities are likely to remain present, at least in the short term, in the face of ongoing uncertainty in global geopolitics and commodity markets.

TELECOMMUNICATIONS

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REGULATION OF AUDIO VISUAL MEDIA

Licensing of broadcasting

The key regulatory framework is the licensing and regulation of broadcasting by the Australian Communications and Media Authority (ACMA) under the *Broadcasting Services Act 1992 (Cth)* (BSA). There are various broadcasting licences, such as licences to provide commercial free to air television, commercial radio and international broadcasting services delivered from Australia. In addition, radiofrequency spectrum licences are required under the *Radiocommunications Act 1992* (Cth) (Radiocommunications Act) (see below for more detail).

Licence conditions vary and they regulate matters such as Australian content quotas, classification and advertising. Under the BSA, a person cannot have control of:

- more than 2 commercial radio broadcasting licences in a licence area – the 'two to a market radio rule'; and
- more than 1 commercial television broadcasting licence in a licence area – the 'one to a market television rule'.

In addition, and subject to grandfathering rules, at least 5 independent media voices must be present in metropolitan commercial radio licence areas and at least 4 in regional commercial radio licence areas.

A foreign person with company interests in an Australian media company of 2.5% or more must notify ACMA at the time of obtaining those interests and on disposition of the interests.

REGULATION OF RADIOCOMMUNICATIONS

Licensing of spectrum

The use of radiofrequency spectrum (and the associated licencing requirements) is regulated by the ACMA under the Radiocommunications Act.

Under the Radiocommunications Act, there are 3 broad forms of licensing for radiocommunications devices:

- spectrum licences – these allow the operation of a range of radiocommunications devices in the specific geographic area and frequency band in the licence. Spectrum licences are usually allocated via an auction process and are valid for up to 20 years;
- apparatus licences – these allow the operation of transmitters or receivers covered by the license in the specific geographic area in the licence. Apparatus licences involve an application process and are usually issued by the ACMA for a year; and
- class licences – these allow the operation of common radio equipment on shared frequencies (for example WiFi and Bluetooth transmitters). Class licences don't need to be applied for and do not involve the payment of fees.

The Radiocommunications Act also includes, among other things, licensing requirements that apply before a satellite network that transmits to places in Australia, and exceptions for the use of otherwise banned equipment.

REGULATION OF TELECOMMUNICATIONS, INFORMATION AND DATA

Licence authorisations

The Australian telecommunications licensing regulation distinguishes between:

- carriers – entities that own or operate telecommunications infrastructure (generally, line links or certain radiocommunication facilities);
- carriage service providers (CSPs) – entities that supply carriage services using a carrier's infrastructure; and
- content service providers – entities that provide online services (including those for information and entertainment) and pay TV services.

Carriers must be individually licensed by the ACMA. An entity that owns telecommunications infrastructure, but is not a licensed carrier, must ensure that a licensed carrier takes carrier related responsibility for the telecommunication infrastructure, in the form of a 'nominated carrier declaration', unless an exception applies (eg, some electricity, gas and water supply bodies are exempt).

Carriers are required to comply with certain regulatory obligations, most of which are set out in the *Telecommunications Act 1997* (Cth) (Telecommunications Act) and depending on the infrastructure the carrier owns, certain obligations in the *Competition and Consumer Act 2010* (Cth) and any conditions in the carrier licence.

While CSPs and content service providers are not required to be licensed, they are required to comply with certain regulatory obligations, most of which are set out in the Telecommunications Act, the Telecommunications (Consumer Protection and Service Standards) Act and in various determinations and standards issued under those acts. For example, CSPs must undertake two factor authentication before undertaking certain customer interactions.

As part of these CSP obligations, there is a particularly strong focus on consumer protection. These include broad obligations under the Telecommunications Consumer Protection Code, the Consumer Service Guarantee, the Priority Assistance Code, and the Telecommunications Financial Hardship Industry Standard. The enforcement of consumer protection obligations (especially in relation to financial hardship and customers experiencing domestic and family violence) is a compliance priority of the ACMA in 2023-2024.

Entities can be both a carrier and a carrier service provider under Australian law.

Assisting law enforcement

Carriers and CSPs also have obligations under the Telecommunications Act and the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA) to assist law enforcement agencies. These include obligations to do their best to prevent their telecommunications networks and facilities from being used in relation to the commission of offences and to ensure that their networks and facilities have appropriate interception capabilities.

In 2021, the interception framework was expanded to allow Australia to enter into agreements with other countries facilitating a new international production order mechanism. This mechanism streamlines requests from Australian law enforcement for data from overseas communications providers (and vice versa, for law enforcement from those countries), by allowing law enforcement or national security agencies to request the information directly from communications providers in the other country. The *Australia-US CLOUD Act Agreement* is the first agreement with another country under this framework and entered into force in January 2024.

Telecommunications sector security

The Telecommunications Act and associated instruments also contain regulatory requirements designed to manage law enforcement and national security risks within the telecommunications sector. These include:

- an obligation on carriers and CSPs to 'do their best' to protect telecommunications networks and facilities from unauthorised interference or access;
- an obligation on carriers to inform the Australian Government about network changes and procurement intentions that are likely to have a material adverse effect on their ability to fulfil their network security obligations;
- broad powers for the Australian Government to issue directions to, and gather information from, carriers and CSPs in relation to security matters;
- an obligation on carriers and CSPs to provide the Australian Home Affairs Department with operational information in relation to its assets (including information where an entity other than the carrier or CSP holds a direct interest in a relevant asset); and
- an obligation on carriers and CSPs to notify the Australian Signals Directorate (ASD) within 72 hours (or 12 hours if it will have a significant impact) of a cybersecurity incident occurring.

In December 2023, the Australian Government proposed that the security requirements in the Telecommunications Act should be consolidated into the SOCI Act. More information can be found in the Critical Infrastructure section of this Guide.

Industry assistance relating to national security

The Telecommunications Act also establishes an 'Assistance and Access' regime, which allows certain government agencies to require 'designated communication providers' to provide technical assistance or develop technical capabilities to assist the agencies to perform their national security and law enforcement functions. However, designated communications providers cannot be compelled to do anything which would create a systemic weakness or vulnerability into a form of electronic protection (such as encryption). Designated communication providers include carriers, CSPs and a wide range of other entities in the communications industry, including device manufacturers, software providers and providers of electronic services.

Abhorrent and violent material

There are also telecommunication specific offences in the *Criminal Code Act 1995* (Cth) (Criminal Code). Most notably, it is a criminal offence for internet service providers and content and hosting service providers to provide access to 'abhorrent violent material' (which is material that depicts serious violent terrorist acts or other crimes, such as murder, torture, rape or kidnapping). An offence may be committed if the service provider fails to notify the Australian Federal Police or to take the material down. The maximum penalty under the regime for corporations is currently the greater of A$15.65 million and 10% of annual turnover (including turnover of related bodies corporate).

Data retention

The TIA requires carriers and CSPs to retain a prescribed set of telecommunications data (including information about the communication such as its source, destination, date, time and type but not including the contents or the substance of the communication) for at least 2 years. Data relating to web browsing history is not required to be retained.

Telecommunications information

Carriers and CSPs are subject to regulation around how they can use and disclose information about their customers and the substance of communications under Part 13 of the Telecommunications Act. This sort of information may only be used and disclosed in limited circumstances set out in the Telecommunications Act.

Consumer data right

On 24 January 2022, the Telecommunications Sector was the subject of a designation under the *Competition and Consumer Act 2010* (Cth), meaning CDR rules and standards can be made for the sector. However, the application of the CDR to the telecommunications sector was paused in 2023. For more detail on the consumer data right, refer to the *FinTech* section of this Guide.

INFRASTRUCTURE

ROD SMYTHE

PARTNER
SYDNEY

CATHERINE DANNE

PARTNER
MELBOURNE

There has been continued growth in the infrastructure sector driven mainly by an increasing need to deliver infrastructure services to a growing and aging population and the current need for economic stimulus. Infrastructure projects are typically attractive to larger funds who prioritise long term consistent returns (such as pension funds) over shorter term, less stable returns.

Infrastructure focus areas

There are clear areas of focus for new infrastructure investment in Australia at the Federal, State and Territory levels across different sectors, including (but not restricted to) the areas of priority listed below. We are also seeing an appetite for M&A of established infrastructure assets and platforms, together with a trend towards the 'taking private' of listed infrastructure assets.

Transport

Road, rail and air transport infrastructure remain a high priority for Federal, State and Territory Governments. The most significant allocation of funding from the 2023/2024 budget across all jurisdictions is towards the development and upgrading of transport infrastructure. Ongoing projects include the Inland Rail Project, a 1600km freight rail line connecting Melbourne and Brisbane and the development of the new Western Sydney Airport for which the Australian Government has committed up to A$5.3 billion in equity through a government-owned company.

Housing

Federal, State and Territory Governments remain focused on the need for well planned new or replacement social, affordable and public housing infrastructure initiatives that respond to the needs of Australia's growing population. The net present value of the capital cost of meeting the shortfall of social and affordable housing in Australia over the next 20 years has been estimated to be around $290 billion.[3]

Recently announced initiatives include the Federal Government's $2 billion Social Housing Accelerator which will provide funding to State and Territory programs to address housing affordability and supply, and the Housing Australia Future Fund and National Housing Accord which will collectively support the delivery of 40,000 new social and affordable homes across Australia over 5 years. In Victoria, the Government is using an availability PPP under a ground lease model to deliver new social, affordable and market rental homes. The Queensland Government also recently announced a pilot ground lease project.

3 C Leptos "Statutory Review of the Operation of the National Housing Finance and Investment Corporation Act 2018: Final Report", Australian Government, August 2021, p 30 and Appendix 1

Health, aged care, and disability

As Australia's population ages, demand for health care continues to increase. Increased health care infrastructure and the delivery of government services involving both the public and private sectors will be required to meet this growing demand. It is expected that Public Private Partnerships (PPPs) and 'take private' transactions will continue to be the vehicles used to invest in this sector.

Electricity transition

The transition from a fossil fuel-intensive to renewables-based electricity sector is requiring significant investment in the electricity transmission network. The cost of the transition and the path we're on to achieve that is unprecedented. Over $320 billion will be needed to develop, operate and maintain the generation, storage and future network investments of the National Electricity Market (NEM) to 2050, according to a recent report by AEMO. The astronomical cost of delivering the required infrastructure will require both public and private capital investment. Government support is manifesting is numerous ways including:

- the Federal Government's Capacity Investment Scheme designed to de-risk projects by providing long term revenue certainty to developers and investors; and
- the development of regulated renewable energy zones (REZs) in the NEM designed to ensure renewable-rich areas within Australian States are connected to the grid. The NSW Government for example is utilising a PPP-style model to support the development of at least 5 onshore and offshore REZs.

Tech infrastructure

Over the past few years, technology-linked infrastructure has become increasingly sought after in the Australian market, and there has been significant activity in the secondary market with start-ups and PE sponsors selling to core-plus funds. This has included data centres, electricity metering businesses, mobile phone towers and Government registries.

DELIVERY MODELS AND FUNDING SOURCES

Public Private Partnership model

The Public Private Partnership (PPP) model has continued to be a fruitful method of delivering priority infrastructure projects in a timely manner and according to budget. These are typically used for social infrastructure (such as hospitals, schools, and prisons) where the private sector receives an availability style payment. This model is used less frequently where the private sector income stream is based on patronage. There is a clear recognition in Australia of the utility of developing a variety of infrastructure projects using the PPP model involving both the public and private sectors.

We are seeing the influence of PPP frameworks and processes being rolled out in a wider range of sectors, including social and affordable housing and energy infrastructure.

Asset and capital recycling policy

State and Territory Governments have also adopted asset recycling (or capital recycling) of infrastructure assets as a key infrastructure policy. This involves developing and constructing assets and privatising assets once operational. The NSW Government has been a leading proponent in asset recycling over recent years. Its long term leasing of interests in Transgrid, Ausgrid and Endeavour Energy and its sale of the WestConnex Motorway, each generated significant proceeds that allowed billions in capital to be allocated to new projects without raising public debt levels.

This model has also been successfully implemented by other State and Territory Governments, such as Victoria's 50 year lease of the Port of Melbourne. More recently, State Governments have looked to evolve this model through the privatisation of non-traditional infrastructure such as land titles offices and motor vehicle registries.

6. CYBER

CYBER SECURITY IN AUSTRALIA

CHENG LIM

PARTNER
MELBOURNE

JESSICA KRUGER

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MELBOURNE

Nearly 94,000 reports were made to law enforcement authorities through ReportCyber in the 2022-2023 financial year – almost 1 report every 6 minutes. Cyber incidents are therefore increasingly becoming a question of when, not if. It is a constant and costly reminder that effective cyber resilience is fundamental to realising the promised benefits of digitisation.

Introduction

The cyber threat environment in Australia is complex and constantly evolving, fuelled by continuing geopolitical tensions, the rapid development of state and non-state actors' cyber capabilities and emerging technologies such as artificial intelligence. At the same time, recent high-profile, large-scale data breaches in Australia have highlighted the enormous reputational and business risks for organisations if they are unprepared for a cyber attack or mishandle the incident. Against this backdrop, it is critical that businesses, boards and senior management understand the cyber security regulatory environment and their obligations, so that they can be prepared when a cyber incident eventually occurs.

Regulatory environment

There is no single legislative framework that governs cyber security in Australia. Instead, Australia's cyber security regulations are found in a number of existing legislative regimes which together form an interlinking patchwork of obligations and requirements that businesses need to navigate. Some of these legislative regimes apply economy-wide, such as the *Privacy Act 1988* (Cth) (Privacy Act) and the *Corporations Act 2001* (Cth). Recent reforms to the *Security of Critical Infrastructure Act 2018* (Cth) (SOCI Act) (see the *Critical Infrastructure* section of this Guide) have also expanded its scope to cover:

- 11 sectors deemed to be critical to Australia's economy, security and sovereignty; and
- 22 different types of critical infrastructure assets across those 11 sectors.

Still other legislative regimes have a sectoral focus – for example, the prudential standards administered by the Australian Prudential Regulation Authority (APRA).

The cyber security regulations can comprise both proactive obligations (eg obligations that are aimed at building up organisations' resilience and preparedness for a cyber incident) and reactive obligations (eg obligations requiring organisations to report, respond to and remediate cyber incidents).

Notification obligations

Once a cyber incident has occurred, a number of separate (and potentially overlapping) reporting obligations may kick in. It is important for businesses to understand which reporting obligations apply to it and what the requirements are, as reporting timeframes can be as short as 12 hours after the business becomes aware of the cyber incident.

We've set out in the table below a high-level summary of the most common reporting obligations that may be triggered by a cyber incident.

REPORTING OBLIGATION	ENABLING LEGISLATION	APPLICABLE ENTITIES	SUMMARY
Notifiable data breach (**NDB**) scheme	*Privacy Act 1988* (Cth)	APP entities, credit reporting bodies, credit providers and file number recipients	An entity must notify the Australian Information Commissioner (OAIC) and affected individuals of an eligible data breach as soon as practicable after becoming aware that there are reasonable grounds to believe that there has been a data breach which is likely to result in serious harm to any of the individuals whose personal information is involved.
NDB scheme for consumer data right (**CDR**) data	*Competition and Consumer Act 2001 (Cth)*	Accredited data recipients, designated gateways	The NDB scheme reporting obligation under the *Privacy Act 1988 (Cth)* also applies to accredited data recipients and designated gateways under the CDR regime as if personal information were CDR data.
Mandatory cyber security incident reporting obligation	SOCI Act	Responsible entities for critical infrastructure assets	A responsible entity must report a critical cyber security incident to the Australian Signals Directorate within 12 hours of becoming aware of a cyber security incident. Other relevant cyber security incidents must be reported within 72 hours.
Reportable situations for Australian financial services (**AFS**) and credit licensees	*Corporations Act 2001* (Cth) *National Consumer Credit Protection Act 2009* (Cth)	AFS and credit licensees	AFS and credit licensees must notify the Australian Securities and Investments Commission (ASIC) about 'reportable situations' (which may include significant data breaches), generally within 30 calendar days.
Information security incident reporting obligation	Prudential Standard CPS 234	APRA-regulated entities (such as banks, general insurers, life insurers and private health insurers)	APRA-regulated entities must notify APRA as soon as possible, and in any case no later than 72 hours, after becoming aware of an information security incident that: • materially affected, or had the potential to materially affect, financially or non-financially, the entity or the interests of depositors, policyholders, beneficiaries or other customers; or • has been notified to other regulators. APRA-regulated entities are also required to report material information security control weaknesses which the entity expects it will not be able to remediate in a timely manner.

REPORTING OBLIGATION	ENABLING LEGISLATION	APPLICABLE ENTITIES	SUMMARY
My Health Records data breach reporting obligation	*My Health Records Act 2012* (Cth)	Organisations that are registered to participate in the My Health Record system	An organisation that is registered to participate in the My Health Record system must notify the Australian Digital Health Agency and the OAIC of: • any unauthorised collection, use or disclosure of health information included in a healthcare recipient's My Health Record; or • any event or circumstance that compromises, may compromise, has compromised or may have compromised, the security or integrity of the My Health Record system.
Continuous disclosure obligations	*Corporations Act 2001* (Cth)	Listed companies	See the continuous disclosure section below.

Ransoms – to pay or not to pay?

The Australian Government strongly discourages businesses and individuals from paying ransoms to cyber criminals. There is no guarantee that any stolen information will be returned, or that it will not be sold or leaked online. In addition, it could encourage the same or another cyber criminal to target the entity again, and generally supports the ransomware business model. However, the Government has not implemented an outright prohibition on ransom payments on the basis that Australia is not yet cyber mature enough and does not have the appropriate support in place for businesses that do suffer cyber incidents. As such, paying the ransom remains an option for boards and management when deciding how to manage an active ransomware attack.

It is important for businesses to seek legal advice if they are considering paying a ransom, as there are a number of legal requirements that may be relevant depending on the particular circumstances of the cyber incident. These include sanction laws under the Autonomous Sanctions Act 2011 and the Charter of the United Nations Act 1945, and money laundering and terrorism financing offences in the Criminal Code Act 1995. The Government has also proposed a no-fault, no-liability ransom reporting regime as part of its 2023-2030 Australian Cyber Security Strategy.

Interestingly, the Government's first use of its autonomous cyber sanctions framework was for a Russian individual linked to the 2022 cyber attack on Medibank Private, Aleksandr Ermakov. The sanction makes it a criminal offence, punishable by up to 10 years' imprisonment and significant fines, to provide assets to Aleksandr Ermakov, or to use or deal with his assets, including through cryptocurrency wallets or ransomware payments.

Directors' duties and continuous disclosure

There are no specific duties imposed generally on directors in Australia in relation to cyber security. However, directors already owe general duties of care, skill and diligence. These duties arguably require directors to take reasonable steps to ensure cyber security risks are adequately addressed, managed and mitigated. There is also a trend of increasing governance implications and accountability for boards and management in particular industry sectors – for example, the SOCI Act requires boards of entities in critical infrastructure sectors to sign off on an annual report on the organisation's risk management program.

As a starting point, we recommend directors familiarise themselves with the Australian Institute of Company Directors' (AICD) Cyber Security Governance Principles, released in October 2022. Whilst not mandatory, these principles are likely to set a baseline regarding cyber security governance expectations. The AICD's 'Governing Through a Cyber Crisis: Cyber Incident Response and Recovery for Australian Directors' publication also contains useful guidance for directors on cyber preparation, response and recovery.

Continuous disclosure

The basic continuous disclosure obligation for a listed company is to immediately disclose to the ASX any information concerning it that a reasonable person would expect to have a material effect on the price or value of the company's securities. Announcements should contain sufficient detail for investors or their professional advisors to understand its ramifications and impact on the share price.

What comprises a 'material effect on price or value' in the context of a cyber incident can be very difficult to determine, particularly in the early stages. While recognising this complexity, the ASX indicated in 2022 that it was unwilling to implement prescriptive thresholds as to what comprises a "material effect" in the context of a cyber incident, and that listed companies should remain guided by their existing continuous disclosure obligations. Absent a prescriptive standard, what constitutes a 'material effect' in the context of cyber incidents will likely evolve as the market grapples with the increasingly regular attacks and what they mean for disclosure obligations.

There is increasing regulatory scrutiny regarding continuous disclosure obligations in the context of a cyber security incident. ASIC recently indicated that it will be seeking "record penalties for breaches of market disclosure amid new findings that listed companies are acting illegally by failing to disclose material cyber attacks". The ASX has also encouraged listed companies to prepare in advance and update their plans regarding how they intend to inform the market in the event of a cyber attack or data breach.

Regulatory and class action risks

Recent high-profile, large-scale data breaches in Australia have highlighted the increased regulatory and public scrutiny that businesses can expect following a cyber incident.

The OAIC has publicly raised concerns that organisations are taking too long to assess and notify data breaches, particularly given that the NDB regime came into effect more than 5 years ago and organisations should now have established effective compliance processes.

The OAIC has powers under the Privacy Act to investigate businesses that suffer a data breach involving personal information. The OAIC's focus in an investigation is whether there has been a breach of the Australian Privacy Principles (APPs), including in particular APP 11, which requires APP entities to take such steps as are reasonable in the circumstances to protect personal information from misuse, interference and loss, or unauthorised access, modification or disclosure.

At the same time, recent reforms to the Privacy Act have significantly increased the penalties that can be imposed for a serious or repeated interference with the privacy of an individual, with body corporates liable for a maximum amount that is the greater of:

- $50 million;
- 3 times the value of the benefits obtained from the breach; or
- if the court cannot determine the total value of those benefits, 30% of the adjusted turnover in Australia during the 'breach turnover period' (being the longer of 12 months prior to the breach or the period over which the breach occurred).

Other regulators are also likely to initiate regulatory scrutiny in relation to data breaches. For example, following its review of the 2022 cyber attack on Medibank Private, APRA imposed an increase in Medibank Private's capital adequacy requirement of $250 million to reflect weaknesses identified in Medibank Private's information security environment. The Chair of ASIC has also publicly stated that ASIC would seek to make an example of board directors and executives who were recklessly ill-prepared for cyber attacks by taking legal action against compromised companies that did not take sufficient steps to protect their customers and infrastructure from hackers.

Finally, businesses that have been subject to a cyber incident also face very real risks of class actions and representative complaints (under the Privacy Act) being initiated by class action law firms. There are a number of significant examples of this in the Australian market in recent years.

Cyber Security Strategy 2023-2030 and proposed legislative reforms

In November 2023, the Government released its 2023-2030 Australian Cyber Security Strategy (Strategy), accompanied by an Action Plan detailing key initiatives to be implemented across the next two years. The Strategy charts a path for Australia to achieve its ambitious goal of becoming a global leader in cyber security by 2030.

The Strategy is built around six layers of defence (or 'shields'): (i) strong businesses and citizens; (ii) safe technology; (iii) world-class threat sharing and blocking; (iv) protected critical infrastructure; (v) sovereign capabilities; and (vi) resilient region and global leadership. The six shields are further broken down into 20 specific actions (some of which will involve further consultation) scheduled for implementation over the next 2 years.

The Government consulted on a number of proposed legislative reforms that were foreshadowed in the Action Plan at the end of 2023 and the start of 2024. The proposed reforms included a no-fault, no-liability ransom reporting obligation, under which businesses would be subject to 2 reporting obligations in relation to ransom demands:

- the first notification would be required when a ransom demand is received to decrypt data or prevent data from being sold or released; and
- the second notification would be required if a ransom payment is made.

The timeframe for providing the reports may be aligned to existing reporting requirements, and the Government has proposed that a civil penalty would apply to any failures to comply with these reporting obligations. There would be no criminal penalties.

The table below sets out a high-level summary of some of the other key reform proposals.

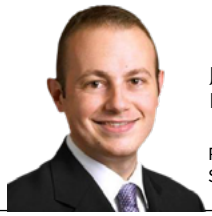
NO.	PROPOSED REFORM	SUMMARY
1.	Limited use obligation	The Government has proposed a 'limited use' obligation to restrict how cyber incident information shared with the Australian Signals Directory and the National Cyber Coordinator can be used by other Australian Government entities, including regulators. This reform is intended to encourage businesses to share real-time cyber incident information with the Government.
2.	Cyber Incident Review Board	The Government has proposed a Cyber Incident Review Board, which would conduct no-fault incident reviews to reflect on lessons learned from cyber incidents, and share these lessons with the Australian public.
3.	Extension of the SOCI Act to cover data storage systems and business critical data	Following a number of recent cyber incidents, the Government has proposed to expand the SOCI Act to not only capture critical infrastructure assets, but also the data storage systems that hold business critical data relevant to those assets.
4.	New consequence management powers	The Government has proposed an 'all-hazards' power of last resort for the Minister for Home Affairs, to enable the Government to manage the consequences of a cyber incident (for example, by directing a critical infrastructure entity to address issues onsite or suspend operation).
5.	Clarification of protected information provisions	The Government has proposed to clarify the operation of the protected information provisions of the SOCI Act to make it clearer for entities to know when they can disclose protected information for the purposes of the operation or risk mitigation of their critical infrastructure assets and to clarify information sharing rights between Government agencies (including with State and Territory agencies).
6.	Consolidation of telecommunications security requirements	The Government has proposed to consolidate the Telecommunications Sector Security Reforms and other critical infrastructure provisions in telecommunications regulation in the SOCI Act, to avoid unnecessary duplication or confusion.

7. TAX

THE MAIN FEATURES OF AUSTRALIA'S TAX SYSTEM

JUDITH TAYLOR

PARTNER
SYDNEY



JUSTIN ROSSETTO

PARTNER
SYDNEY

Australia has a comprehensive tax regime with taxes imposed at both the Federal level and the State/Territory level. The Australian Taxation Office (ATO) is responsible for administering the tax laws imposed at the Federal level and each State and Territory has a different body which administers the tax laws imposed in that particular jurisdiction.

The Australian tax regime is complex. Australian tax laws also change frequently, both in response to changes at a domestic level (such as a change in government) and changes at an international level (such as the ongoing OECD BEPS initiative). Given the ever changing nature of the Australian tax system, you should always consult with your Australian tax adviser before engaging in any transaction which has a connection to this jurisdiction.

We outline in further detail below:

- the core concepts relevant to the imposition of Australian income tax;
- some of the key issues that are relevant for entities investing into Australia; and
- an overview of some of the other transaction taxes imposed in Australia.

Australian income tax

Australian income tax is levied annually on the 'taxable income' of an entity, which is equal to an entity's 'assessable income' less 'allowable deductions'. The standard income year in Australia runs from 1 July to 30 June.

The assessable income of an entity is based upon its tax residency. Broadly:

- Australian residents must include in their assessable income both ordinary income (ie revenue gains) and statutory income (including capital gains) from all sources (ie their worldwide income); and
- non-resident entities must include in their assessable income both ordinary income which has an Australian source and other amounts which are specifically required to be included pursuant to the tax law, such as any capital gains arising on the disposal of Australian real property interests.

Allowable deductions include general business outgoings to the extent they are incurred in gaining or producing assessable income or in carrying on a business. A number of specific deductions are also provided for in the tax law.

If a taxpayer's allowable deductions exceed their assessable income for a particular income year, this may give rise to a tax loss for that year which may be carried forward and applied against their assessable income in a subsequent income year. However, companies and trusts must satisfy stringent statutory tests before being able to utilise tax losses in this manner.

Australia has a comprehensive set of double tax treaties (DTTs) with other jurisdictions which may also be relevant to non-resident entities. The Australian tax law provides that to the extent Australian tax laws are inconsistent with a DTT, the DTT will prevail. This means that if the Australian tax law seeks to impose income tax on a particular gain or amount of income but the relevant DTT allocates the taxing rights to the other jurisdiction, no Australian income tax will generally be imposed.

Certain other types of income received by a non-resident entity, such as dividends, interest and royalty payments received from an Australian entity, may also be subject to Australian income tax by way of a final withholding tax.

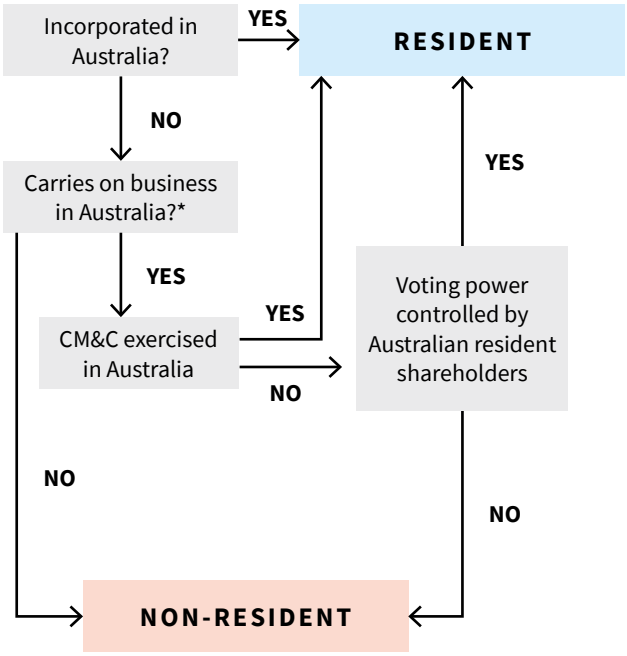
Residency

The tax residency of an entity is fundamental to understanding how the Australian income tax law will apply to that entity.

A company will be an Australian resident for income tax purposes if it is incorporated in Australia. A company that is not incorporated in Australia can still be an Australian tax resident as indicated in the diagram to the right.

There is no definitive test as to what constitutes Central Management and Control (CM&C) but factors such as where board meetings are held, how day to day management occurs and where business and investment decisions are made will be relevant in determining where the CM&C of a company is exercised.

The residency tests for other types of entities are summarised in the table below:



* A company may carry on business in Australia where its CM&C is exercised in Australia.

ENTITY	RESIDENCY TEST
Trust	Trustee is an Australian resident or CM&C is in Australia. For a unit trust, a trust will also be a resident trust for capital gains tax purposes if any property of the trust is situated in Australia and CM&C is in Australia or the trust carried on business in Australia and Australian residents hold more than 50% of the beneficial interest in the income or property of the trust.
Individual	Domiciled in Australia, has been physically in Australia continuously or intermittently for more than one half of an income year or is a resident under common law principles.
Partnership	Not taxed as a distinct entity, so each partner will need to consider their own position in this regard.

NATURE AND SOURCE OF INCOME

Revenue vs capital

There is a significant body of case law and ATO guidance in Australia which is relevant in determining whether an amount of income or a particular gain is on 'revenue account' or 'capital account'.

Income or gains which are on revenue account will generally form part of a taxpayer's ordinary income whereas income or gains which are on capital account will form part of their statutory income (as statutory income includes any net capital gains).

The revenue/capital distinction is important for the following reasons:

- different categories of tax losses can only be applied against certain categories of assessable income. Most importantly, capital losses cannot be used to offset a revenue gain in either the current or a future income year;
- the capital gains tax (CGT) provisions contain a number of concessions which do not apply to revenue income or gains. Accordingly, it may be advantageous for a gain to be on capital account because this may result in a lower income tax liability for the taxpayer after applying the relevant concession; and
- non-residents will generally not be subject to income tax in Australia on income or gains which are on capital account unless it arises in connection with the disposal of, or dealing in, an Australian real property interest (which may include an interest in a company or trust which itself holds Australian real property).

In broad terms, income or gains made in the ordinary course of carrying on a business will be on revenue account. Examples would include profits from ordinary trading activities (ie selling products to customers). Gains or losses may be taken to be on capital account where they result from the mere realisation of an asset that was either held for a long period of time or was acquired with the intention of holding it for a long period of time.

Source

The Australian tax laws do not contain comprehensive source rules, so source is generally determined on the basis of common law principles. Factors such as where trading activities take place and where relevant contracts are signed may be relevant in determining whether an amount of income or a particular gain has an Australian source.

Again, foreign residents will need to consider the application of any DTT, because even if an amount of ordinary income has, on the face of it, an Australian source, many DTTs contain a provision that will not allow Australia to impose income tax on any such income unless the non-resident taxpayer had a permanent establishment in Australia (known as the 'business profits article').

CGT

Unlike other jurisdictions, there is no separate CGT regime in Australia. Instead, taxpayers must include in their assessable income, for a particular income year, any net capital gains made by the taxpayer in that year. Net capital gains form part of a taxpayer's 'statutory income' and are calculated by taking the total of the capital gains arising in that year and subtracting any capital losses. If a taxpayer has more capital losses than capital gains, they will have no net capital gain for that income year and may carry forward the net capital loss to future income years.

In general terms, a capital gain or capital loss will arise in connection with a 'CGT event'. There are numerous events that may occur, but they may broadly be broken into 'disposal' events (ie where an asset is disposed of by one taxpayer to another) or 'creation' events (ie where an asset such as a legal right is created).

A taxpayer will make a capital gain in connection with a CGT event if the 'capital proceeds' received in connection with the event exceed the asset's cost base. A capital loss will arise if the capital proceeds are less than the asset's reduced cost base.

Broadly, capital proceeds include the total of the money the taxpayer receives (or is entitled to receive) and the market value of any other property that the taxpayer receives (or is entitled to receive) with respect to the CGT event. Provisions exist which in certain circumstances (eg if the parties to a transaction are not acting at arm's length) may deem the taxpayer to have received the market value of the asset that is the subject of the CGT event (even though they received less) and the taxpayer must calculate their income tax liability on the basis of the deemed proceeds.

Generally, the cost base or reduced cost base of an asset is what the taxpayer paid to acquire the asset (plus other amounts which go to the preservation of the asset to the extent those amounts have not already been tax deducted), which again may be altered in certain circumstances.

Discount CGT concession

Certain Australian resident taxpayers may be eligible to reduce certain capital gains by the CGT discount. Eligible taxpayers include individuals, trusts and complying superannuation funds. Companies are not eligible for this concession.

Broadly, the taxpayer must have held the asset that is the subject of the CGT event for at least 12 months before the time of the event. There are several other requirements that must be satisfied.

If applicable, individuals and trusts may reduce their capital gain by 50% and complying superannuation funds may reduce their capital gain by 33.3%. The reduced capital gain is then included in the taxpayer's statutory income for the income year (subject to applying any current or carried forward capital losses).

This concession is not applicable to all CGT events.

What about non-resident entities?

A non-resident entity is only required to include a net capital gain in its assessable income for certain categories of assets, known as 'taxable Australian property' (TAP). If a CGT event occurs in respect of an asset that is not TAP, the non-resident is not required to calculate whether a net capital gain arises for them.

TAP includes:

- Australian real property (including a lease of land if the land is situated in Australia);
- mining, quarrying or prospecting rights if the minerals, petroleum or quarry materials are situated in Australia;
- indirect Australian real property interests (ie certain membership interests in an entity (generally requiring a 10% or greater interest in the entity which is tested at particular times) where the majority of assets of that entity comprise either of the above items), noting that this test requires tracing through interposed entities;
- assets used at any time in carrying on a business through a permanent establishment in Australia (eg assets used by an Australian branch of a foreign company which carries on business in Australia); and
- an option or right to acquire any of the assets mentioned above.

CURRENT TAX RATES

Individuals – Australian resident

TAXABLE INCOME	TAX PAYABLE*
0 - A$18,200	Nil
A$18,201 - A$45,000	19 cents for each A$1 over A$18,200
A$45,001 - A$120,000	A$5,092 plus 32.5 cents for each A$1 over A$45,000
A$120,001 - A$180,000	A$29,467 plus 37 cents for each A$1 over A$120,000
A$180,001 and over	A$51,667 plus 45 cents for each A$1 over A$180,000

* A 2% Medicare levy also applies to residents.

The Australian Government began implementing gradual reforms to the personal income tax rates from the 2017/18 income year. Various changes to the proposed reform of personal income tax rates have been announced since then. It is not certain whether these reforms will be enacted. However, based on current proposals, the new tax rates for individual Australian residents that will apply from 1 July 2024 would be as follows:

TAXABLE INCOME	TAX PAYABLE*
0 - A$18,200	Nil
A$18,201 - A$45,000	19 cents for each A$1 over A$18,200
A$45,001 - A$200,000	A$4,288 plus 30 cents for each A$1 over A$45,000
A$135,001 – A$190,000	A$31,288 plus 37 cents for each A$1 over A$135,000
A$190,001 and over	A$51,638 plus 45 cents for each A$1 over A$190,000

* A 2% Medicare levy also applies to residents.

Individuals – non-resident

TAXABLE INCOME	TAX PAYABLE*
A$0 - A$120,000	32.5 cents for each A$1
A$120,001 - A$180,000	A$39,000 plus 37 cents for each A$1 over A$120,000
A$180,001 and over	A$61,200 plus 45 cents for each A$1 over A$180,000

* Non-residents are not liable for the 2% Medicare levy.

Companies – both resident and non-resident

The current corporate tax rate is 30%.

For certain smaller companies with an aggregated turnover of less than A$50 million, a reduced rate of 25% applies.

Aggregated turnover included the annual turnover of the company plus the annual turnovers of any business entities that are affiliated or connected with the company.

OTHER FEATURES OF THE AUSTRALIAN INCOME TAX SYSTEM

Tax consolidation

Australian tax laws permit wholly-owned corporate groups to form a 'tax consolidated group' which means that all members of the group are treated as a single entity for certain income tax purposes.

Tax consolidation is very common among corporate groups in Australia and has the following effects:

- most intra-group transactions are ignored for income tax purposes (eg, any gain or loss arising on the transfer of assets between members of the group would be ignored);
- tax losses and other attributes such as franking credits of the various group members are pooled together;
- group restructuring can be streamlined because assets and shares can be moved between group entities without any formal rollover requirements; and
- compliance costs are reduced as the group lodges a single tax return for a unified accounting period and makes consolidated tax payments.

There are 2 types of tax consolidated groups:

- 'Consolidated Groups' comprising of a single Australian head company which wholly owns one or more Australian companies.
- 'Multiple Entry Consolidated Groups' comprising of at least 2 Australian companies which themselves are directly owned by a common foreign company.

To form a tax consolidated group in either scenario, the relevant entities need to make a written election and notify the ATO of that election.

Dividend imputation

Australia has a dividend imputation system. This means that certain distributions made by companies may attach tax credits (called 'franking credits') which are referable to the tax that has been paid at the company level.

The system eliminates double taxation by allowing Australian resident shareholders to claim a credit for Australian tax paid by a company on the profits from which the dividend is paid and it also allows a non-resident shareholder to receive any such dividend free from any dividend withholding taxes.

Withholding taxes

Withholding taxes may be imposed on certain dividends, interest and royalty payments that are made by an Australian entity to a non-resident entity.

The rates imposed under domestic law are:

- 30% for unfranked dividends;
- 30% for royalties; and
- 10% for interest payments.

If an applicable DTT applies, the rate applicable to any of the above type of payments may be reduced in accordance with that DTT.

Furthermore, the withholding tax that may otherwise apply to dividends will be reduced under Australian tax laws if the dividends are 'franked' (ie the dividend has franking credits attached to it which provide a credit for tax paid at the company level) or are paid out of what is known as 'conduit foreign income' (meaning that the dividends are sourced from foreign profits and which pass through an Australian company under specific circumstances).

Withholding taxes may also apply to distributions from certain trusts, known as managed investment trusts (MITs). These distributions, known as fund payments, are taxed at a concessional rate of 15% (subject to comments below). There are stringent rules for what constitutes an MIT, both in terms of how the trust is organised and held and what types of investments will qualify for this concessional tax rate on distributions. MITs are generally used for widely held investments which involve an investment in Australian real estate. A 10% withholding rate applies where a Clean Building MIT makes a fund payment to a recipient in an information exchange country. An MIT is a Clean Building MIT if it holds one or more Clean Buildings and does not derive assessable income from other types of assets (other than certain incidental assets).

Currently, where a non-resident disposes of certain types of TAP, the buyer will be required to withhold a non-final withholding tax at a rate of 12.5% of the purchase price, and remit the amount withheld to the ATO. However, the Australian Government has recently announced that the withholding tax rate will be increased to 15% and the withholding threshold will be reduced from $750,000 to nil for disposals of certain types of TAP that are entered into from 1 January 2025.

Withholding taxes also apply to natural resource payments that are made to foreign resident entities where that payment is based wholly or partly on the value or quantity of a natural resource produced or recovered in Australia. The amount to be withheld is as advised by the ATO, as before such a payment is made, the payer must notify the Commissioner of Taxation of the proposed payment.

Transfer pricing

Australia has stringent transfer pricing rules which are designed to prevent taxpayers engaged in cross-border transactions from increasing deductions or decreasing income to reduce their Australian income tax liability. The ATO may deem the consideration receivable under a cross-border agreement to be equal to the arm's length consideration, allowing the Commissioner to 'negate a transfer pricing benefit' in certain circumstances. The rules may apply to the provision or supply of goods and services, property, technology and the lending of money, between either, members of the same group of corporations or, alternatively, other parties not dealing at arm's length.

Anti-avoidance

The Australian tax laws (both at the Federal and the State/Territory level) contain various anti-avoidance rules which purport to cancel certain tax benefits or alter the way a tax law is applied to a particular taxpayer in certain circumstances.

The Australian tax legislation contains a number of specific anti-avoidance rules as well as a general anti-avoidance law.

OTHER AUSTRALIAN TAXES

Goods and Services Tax

Transactions in Australia will generally be subject to Goods and Services Tax (GST), a broad-based tax conceptually similar to the value added taxes operating in many OECD countries. GST is currently calculated at the rate of 10% on the value of the supply of a range of goods, services, rights and other things acquired in, or in connection with, Australia.

The liability to remit GST is usually on the supplier of the GST item, in which case the supplier will, as a matter of commercial practice, gross up the purchase price to recover its GST liability from the buyer. If the buyer is carrying on an enterprise and registered (or required to be registered) for GST, in most cases it will be able to claim an input tax credit equal to the GST included in the purchase price. Accordingly, it is intended that the GST liability will flow through the supply chain to the end consumers who will ultimately bear the cost of the GST (because they cannot claim input tax credits).

Certain items, known as 'GST-free' supplies and 'input taxed' supplies, are not subject to GST. GST-free supplies include certain foods, exports, health services, educational services and the supply of a going concern. Input taxed supplies include supplies of certain residential premises and financial supplies, such as transfers of units in a trust or shares in a company. Input tax credits can generally be claimed for GST items acquired for the purposes of making GST-free supplies, but not for GST items acquired for the purposes of making input taxed supplies.

Stamp duty

Each Australian State and Territory has its own stamp duty regime applicable to a range of different transactions at varying rates.

All States and Territories levy 'transfer duty' on the transfer of land or any interest in land in the State or Territory in which the land is located.

The indirect acquisition of land, on the other hand, may give rise to 'landholder duty' where:

- the acquisition of itself entitles the acquirer to an interest in a landholder at or above the applicable acquisition threshold; or
- when aggregated with other interests held by the acquirer, or together with its associates, the acquisition results in an aggregated interest in the landholder at or above the applicable acquisition threshold.

Broadly speaking, the acquisition thresholds in each State and Territory depend on whether the landholder is a company or trust and whether or not that entity is listed on the ASX or another recognised securities exchange. A 'landholder' is any entity that holds land above a certain value, which differs across the States and Territories. In business or asset transfers, the liability to pay stamp duty (if any) depends on the assets being transferred and the jurisdiction involved.

A stamp duty surcharge may be levied where foreign persons acquire direct or indirect interests in land in New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania. The surcharge ranges between 1.5% and 8%.

Fringe benefits tax (FBT)

This is a tax paid by employers on the value of benefits provided to employees (or their associates) in relation to their employment, such as motor vehicles, schooling, health care or loans at discounted rates of interest.

The current rate of FBT is 47% and is levied by the Australian Government.

Payroll tax

This tax is paid by employers on the value of wages paid to employees.

Each State and Territory imposes payroll tax in its respective jurisdiction. The current rates of payroll tax vary between jurisdictions but are generally around 5%.

8. EMPLOYMENT AND WORKPLACE HEALTH AND SAFETY

AUSTRALIAN EMPLOYMENT REGULATION

ANGELA WEBER

PARTNER
SYDNEY

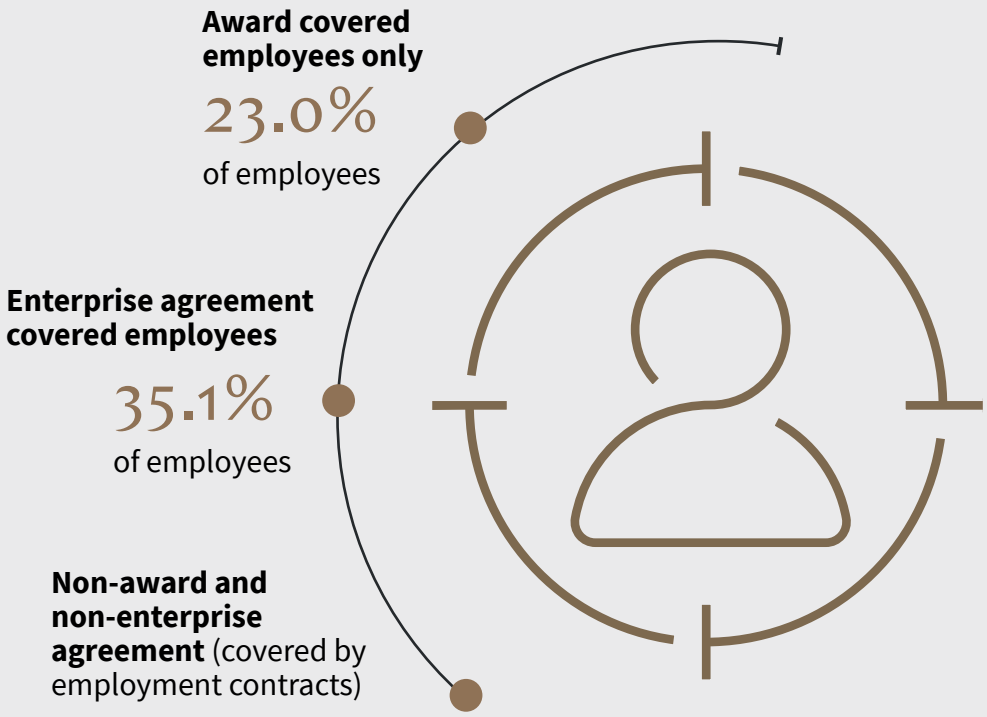
ANNAMARIE ROODING

PARTNER
MELBOURNE

HOW ARE EMPLOYMENT TERMS AND CONDITIONS REGULATED IN AUSTRALIA?

The terms of employment of workers in Australia are primarily regulated by legislation and, for certain classes of workers, by industrial awards or workplace agreements. The common law of employment also has an important role.

Australian employees' salary and conditions are determined by the following sources:



Award covered employees only

23.0%

of employees

Enterprise agreement covered employees

35.1%

of employees

Non-award and non-enterprise agreement (covered by employment contracts)

37.8%

of employees

Sole executive director/owner

4.1%

of employees

* as at 2022

Federal legislation

The *Fair Work Act 2009* (Cth) (FWA) is the key piece of legislation governing workplace relations in Australia. It applies to the vast majority of Australian employers, including all trading corporations. It includes rules relating to:

- unfair dismissal;
- protections from 'adverse action';
- industrial instruments (industrial awards and enterprise agreements);
- collective bargaining;
- industrial action;
- industrial unions;
- transmission of business (which covers a range of scenarios including outsourcing, insourcing and business transactions);
- fixed term contracts, including limitations on their use;
- sham contracting;
- pay secrecy; and
- the Federal industrial tribunal known as the Fair Work Commission.

The FWA contains minimum entitlements relating to:

- wages;
- annual leave;
- personal and carer's leave;
- parental leave and related entitlements;
- family and domestic violence leave;
- long service leave*;
- maximum weekly hours of work;
- public holidays;
- notice of termination of employment;
- severance pay where employment is terminated due to redundancy;
- community service leave;
- superannuation contributions;
- enhanced parental leave;
- provision of a Fair Work Information Statement and Casual Information Statement;
- requests to convert from casual to permanent employment; and
- a right to request flexible working arrangements.

* We note employees are entitled to long service leave entitlements under separate State and Territory laws that sit outside the FWA.

Most of the matters mentioned above form part of the 'National Employment Standards' in the FWA.

In addition to the above, a "right to disconnect" in the FWA will take effect later in 2024. This will protect the ability of employees to refuse out-of-hours contact related to their work unless the refusal is unreasonable.

Industrial awards and workplace agreements

Awards are industrial instruments which have been created by an industrial tribunal. Under the Federal system there are around 120 awards which cover certain employees working in particular industries (eg the Banking, Finance and Insurance Award covers employees in the Banking, Finance and Insurance industry), or particular occupations (eg the Clerks - Private Sector Award covers clerical and administrative staff). The awards specify minimum terms and conditions of employment for certain classes of workers. An employer cannot generally contract out of those minimum conditions of employment, which usually include:

- minimum rates of pay, including overtime and penalty rates;
- hours of work;
- types of leave; and
- the regulation of termination of employment (eg notice and redundancy pay entitlements).

Awards may be supplemented or overridden by collectively negotiated enterprise bargaining agreements. These agreements enable employers to set appropriate terms and conditions of employment tailored to their particular enterprise. The FWA permits employers to negotiate collective enterprise bargaining agreements and requires parties to bargain in good faith when negotiating such agreements.

Employers can also be named in an application for multi-enterprise bargaining which involves the negotiation of terms and conditions of pay with a union or employee group, alongside other industry participants.

In recent years, a large number of employers, including sophisticated and long-established companies, have detected significant wage underpayments and other liabilities arising from non-compliance with industrial instruments. This has led to an increased focus from the regulator (the Fair Work, Ombudsman) on compliance and enforcement. This is typically managed through routine internal and external legal and payroll compliance reviews, and robust drafting in contractual terms, including through the use of "set-off" clauses.

Common law

All employees, regardless of whether or not they are covered by an award or enterprise agreement, will have a common law contract of employment (whether written or unwritten). For employees not covered by awards, the contract of employment is the principal source of obligations between the employer and the employee. A contract of employment can and often does provide for benefits in excess of the minimum standards required by labour laws.

A documented employment agreement should cover a range of key terms, including:

- commencement date;
- employment status;
- remuneration (including whether or not superannuation contributions are included in the salary package);
- the way in which the contract can be terminated; and
- confidentiality, intellectual property and post-employment restraints as appropriate.

Compulsory superannuation

Under Federal legislation, employers are required to make compulsory superannuation contributions to complying superannuation funds on behalf of their employees. The minimum contribution rate is currently 11% of the employee's salary or wages (capped to a maximum contribution in respect of high-earning employees) and is set to incrementally increase each July until it reaches 12% on 1 July 2025.

Workers' compensation

State and Territory laws also regulate the obligations of an employer to provide workers' compensation payments to employees suffering from work related injuries or diseases.

Depending on the system applicable in the relevant State or Territory, employers are either required to contribute a levy to the State or to keep and maintain insurance cover for the full amount of the employer's statutory liability.

Work health and safety

State and Territory laws impose strict obligations on employers to ensure the health, safety and welfare of employees and other people in the workplace affected by the employer's undertaking. A breach of these obligations means that the employer and its managers and directors are exposed to prosecutions and significant monetary penalties.

Health and safety laws have been harmonised in recent years so that the legislation is essentially the same in each State and Territory except for Victoria which has not adopted the harmonised laws.

The laws impose a positive obligation on officers (ie directors and senior managers) of a business to exercise due diligence to ensure the business is complying with its obligations under the health and safety legislation.

Industrial manslaughter is an offence under several State and Territory health and safety laws and has been criminalised at a national level. The offence applies to officers and persons conducting a business or undertaking (PCBUs) who intentionally engage in conduct that breaches their health and safety duty, causes the death of an individual, and where they were reckless or negligent as to whether their conduct would cause that death.

Equal employment opportunity

Equal employment opportunity Federal and State laws also:

- prohibit discrimination against employees and job applicants on certain grounds including race, sex, pregnancy, breastfeeding, gender identity, intersex status, age, sexual preference, politics, religion, trade union membership, experiencing family and domestic violence or disability;
- make provision for equal opportunity and affirmative action in respect of the employment of women, and impose reporting requirements on workforce gender ratios (but do not impose quota requirements); and
- prohibit sexual harassment and vilification in the workplace and render employers vicariously liable for the unlawful conduct of employees. It is also unlawful to subject another person to a workplace environment that is hostile on the ground of sex.

There is also a positive duty on employers and "persons conducting a business or undertaking" to take reasonable and proportionate measures to eliminate sex discrimination, sexual and sex-based harassment, hostile work environments and victimisation as far as possible.

Industrial disputes and union coverage

Labour laws provide for limited conciliation and arbitration of industrial disputes by the Fair Work Commission. Industrial action which is protected by law is permissible in certain limited circumstances in support of bargaining for a new enterprise agreement. Employee membership of trade unions is not compulsory but is very common in particular industries. Recent changes to the FWA have strengthened the protections afforded to union delegates in the workplace and increased the ability for union officials to enter workplaces to investigate suspected non-compliance with employment laws.

Australia's Fair Work Ombudsman
www.fairwork.gov.au

FOREIGN EMPLOYEES

Can foreign workers be employed in Australia?

Australia's migration system is geared towards enabling individuals with highly valued skills to work in Australia.

There are a number of pathways available to ensure that businesses have the right expertise from around the world. These pathways fit into 3 different visa classes.

Short stay visas

A range of short stay visas enable individuals to come to Australia for limited work related purposes. Depending on certain criteria, individuals can obtain short term visas to attend business visitor activities in Australia. It is important to note that business visitor activities generally only permit a person to make general business enquiries, and investigate, negotiate, sign or review a business contract. They do not permit a person to 'work' in any other sense or be employed in Australia. There are also visas that assist individuals performing temporary activities in Australia (work or culturally related).

Temporary working visas

An array of temporary work visas exist to assist skilled individuals to work in Australia. Skilled individuals may obtain a temporary working visa either as a sponsored employee or on an independent skilled basis. One of the most popular visa classes (the 482 visa or temporary skills shortage visa) requires a valid employer sponsor to nominate a position which is on the list of skilled occupations, to be filled by a specific skilled individual.

Permanent residency working visas

Australia's permanent residency visas linked to work can be divided into 2 types:

- skilled permanent work visas which flow from skilled individuals having first held temporary working visas; and
- visas that have been specifically designed to attract distinguished skilled individuals and investors to Australia.

Australian Government Department of Home Affairs
https://immi.homeaffairs.gov.au/

9. INTERNATIONAL TRADE LAW

FREE TRADE AGREEMENTS

RACHAEL LEWIS

PARTNER
CANBERRA

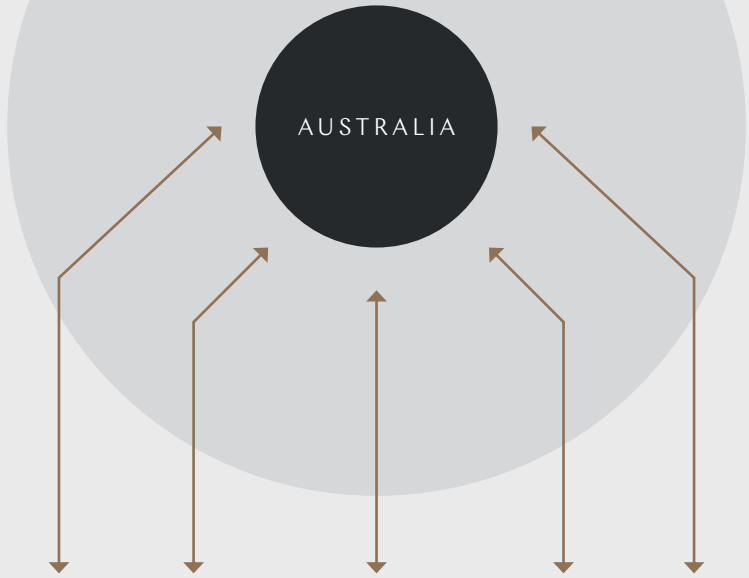
GREG PROTEKTOR

PARTNER
MELBOURNE

HOW DOES AUSTRALIA REGULATE INTERNATIONAL TRADE?

Australia, a signatory to various free trade agreements, strictly regulates international trade, including the importation and exportation of goods and services into and out of Australia.

Australia and its free trade partners



FREE TRADE PARTNERS

Brunei	Hong Kong SAR	Malaysia	Philippines	Tonga
Cambodia	India	Mexico	Samoa	Tuvalu
Canada	Indonesia	Myanmar	Singapore	United Kingdom
Chile	Japan	New Zealand	Solomon Islands	United States
China	Kiribati	Niue	South Korea	Vanuatu
Cook Islands	Laos	Peru	Thailand	Vietnam

Free trade agreements

Free trade agreements aim to promote trade, reduce tariff barriers, simplify customs administration and grant access to government procurement opportunities. Australia is party to a number of free trade agreements with various parties including Malaysia, Thailand, Singapore, South Korea, Japan, the United States of America, the United Kingdom, Chile, New Zealand, China, Indonesia and ASEAN (Association of South East Asian Nations). A full list of agreements and their current status can be found on the Department of Foreign Affairs and Trade website.

Department of Foreign Affairs and Trade
https://www.dfat.gov.au/trade/agreements/trade-agreements

The World Trade Organization and other trade agreements

Australia is a member of the World Trade Organization, which administers multilateral trade agreements that may impact on businesses operating in Australia. Other independent agreements also exist. For example, the Australia-European Union bilateral wine agreement governs, among other things, the use of geographical indications between these bodies. Australia is also a member of the Asia Pacific Economic Cooperation (APEC) which is the premier forum for facilitating economic growth, cooperation, trade and investment in the Asia Pacific region.

Procurement by governments

Each jurisdiction has implemented certain rules that apply to the purchase of goods and services by government bodies. At the Federal level , the ‘Commonwealth Procurement Rules’ reflect closely negotiated wording in free trade agreements (eg government officials can determine that a contract may be required to protect human health, even if it does not comply with all the rules). The rules differ between States and Territories – if you’re selling to an Australian government, it may be helpful to check out the rules that apply to the relevant government body.

IMPORT AND EXPORT EXCISES

GREG PROTEKTOR

PARTNER
MELBOURNE

RACHAEL LEWIS

PARTNER
CANBERRA

Australia's import and export regulation includes a number of items which must be considered:

Imports

- Import restrictions
- Customs declaration
- GST
- Customs duty
- Tariff concessions
- Wine equalisation tax
- Luxury car tax
- Anti-dumping laws

Exports

- Declare for export
- Authority to deal
- Government approvals
- GST (but in many cases GST does not apply)

Both

- Australian Trusted Trader program
- Record retention
- Reporting requirements

IMPORTS

Import restrictions

There is no requirement for importers to hold an import licence to import goods into Australia. However, the import of certain classes of goods, such as drugs, animal products and weapons, may be prohibited or restricted unless a permit to import is obtained. In certain circumstances, it is also possible to obtain post importation permissions, licences or other documents. Australian businesses can join the Australian Trusted Trader program, an initiative of the Australian Border Force, to reduce regulatory red tape and expedite flow of cargo into and out of Australia.

Customs declaration

Import cargo reporting requirements require all air and sea cargo to be declared to the Australian Border Force at or before the time the goods arrive in Australia. Importers do so through an import declaration, which requires details of all goods being imported. However, if the customs value of imported goods is A$1,000 or less, only a self-assessed clearance declaration needs to be completed. From the time of importation until the time of the payment of duty (and, in some cases, goods and service tax (GST)), goods generally remain under the control of the customs authorities.

GST

Imported goods will normally be subject to GST on importation (at a rate of 10%). In some circumstances, however, eligible importers may register for the Deferred GST Scheme and defer the payment of GST on imported goods.

Services which are 'imported' into Australia will generally be subject to GST where they are performed through an Australian place of business. Furthermore, the supply of services will be subject to GST where they are provided by overseas suppliers to entities in Australia which are not entitled to full input tax credits (such as banks). In these cases, the GST liability will generally fall on the Australian recipient.

Since 1 July 2017, GST has also been extended to certain cross-border supplies of digital products (eg video streaming services) and other services (eg architectural or legal services) imported by Australian consumers. GST will apply in these cases even where the supplier does not provide the services through an Australian place of business.

Since 1 July 2018, GST also applies to the supply of low value goods (generally goods with a value of A$1,000 or less) where the supplier arranges for the goods to be imported into Australia and the recipient is not registered for GST in Australia (ie end consumers). Where this applies, the overseas supplier would generally be required to register for GST in Australia.

Customs duty and tariff concessions

Where goods are not exempt from duty under any concession, an amount of customs (import) duty will generally be payable. In general, a percentage of the customs value of the goods is charged, as assessed based on the total amount paid for the goods, packaged and in export condition, at their place of export.

The point at which the duty is payable depends primarily on the nature of the storage and movement of the goods once imported into Australia. For instance, if certain goods are temporarily stored in a licensed warehouse, the payment of customs duty in relation to the goods can be deferred up until clearance of the goods from the warehouse. Alternatively, the importer can apply for 'periodic settlement permission' which allows the importer to move the goods out of the warehouse and defer payment of customs duty until the period specified in the permission.

A range of concessions relating to customs duty may be available in certain circumstances. For example, a Tariff Concession Order (TCO) can be sought. If provided, a TCO means that goods are subject to a lower rate of duty. TCOs may be issued with respect to specific goods where there are no equivalent goods already produced in Australia. In determining whether equivalent goods are available or produced in Australia, the assessment does not consider whether the Australian goods compete with the imported goods in any market.

The concession is available to all importers of goods which are subject to a TCO and meet the description set out in the TCO. An intending importer should check if the goods they are importing are the subject of such an order or if an order can be obtained. There are approximately 15,000 existing TCOs.

The importation of certain goods under a Free Trade Agreement may also be subject to duty concessions. For example, Australia's Free Trade Agreement with the United States allows goods originating in the US to benefit from a customs duty exemption upon importation into Australia.

Other concessions are available with respect to specific goods (eg raw materials, chemicals and certain textiles).

Wine equalisation tax

Certain beverages imported to Australia may be subject to the wine equalisation tax (WET). WET applies to imports of grape wines, sake, mead and some types of cider and perry where those beverages contain more than 1.15% by volume of ethyl alcohol.

In some circumstances, eligible importers may be exempt from WET.

Luxury car tax

Imports of luxury cars are generally subject to a type of tax known as luxury car tax. Cars with a GST inclusive luxury car tax value that exceeds the luxury car tax threshold are considered to be luxury cars for this purpose. The threshold for the 2023/24 financial year is A$89,322 (in relation to fuel efficient cars) and A$76,950 (for other vehicles).

Some types of cars are exempt from this tax. They include emergency vehicles, motor homes and commercial cars designed mainly for carrying goods and not passengers.

Anti-dumping laws

Competition from imports can be considered by the Australian Government to be unfair in certain circumstances. Under the Australian anti-dumping legislation, local industries are entitled to protection where dumped imports, or imports which are subsidised by foreign governments (ie a countervailable subsidy), are found to cause or threaten material injury to Australian industry.

Dumping is taken to occur when the export price of products of one country is less than their normal value in the domestic market of the exporter. If these criteria are met, the Australian Government may impose a dumping duty, which in effect is the difference between the export price of the goods and their normal value.

A good is taken to be subsidised for the purposes of countervailing duty in a number of circumstances. This includes where the subsidy favours particular enterprises and where eligibility for the subsidy is not based on objective criteria.

EXPORTS

There are few regulations on exports from Australia. Generally, goods to be exported must be declared for export with the Australian Border Force and an authority to deal with the goods must be granted. However, certain goods, such as wildlife, heritage and hazardous materials, may be subject to additional requirements, which may include Australian Government approval, or even total prohibition. The Federal Government is currently reforming the arrangements for export of Defence sensitive goods and items, involving a comprehensive adjustment to the export controls arrangements for goods, services and information on the Defence Strategic Goods List (DSGL). A Bill currently in front of Parliament proposes to amend the *Defence Trade Controls Act 2012* (Cth) (the Act) by expanding the scope of items captured under the Act, introducing new offences (including disclosures to foreigners), and exempting AUKUS partners from the existing licencing regime.

GST

Exports of most goods will be GST-free if they are exported within a specified time of receiving payment or issuing an invoice. Exports of services are also GST-free in many cases, provided that relevant requirements in the GST legislation are met.

Excisable goods

Duty is not payable on the export of excisable goods (eg alcohol, fuel and tobacco) from licensed premises in Australia. However, specific permission is required from the Australian Tax Office to move such goods from licensed premises in Australia or to a place of export where excise duty has not been paid on the production, storage or manufacturing of the goods in Australia. An export declaration must also be lodged with the Australian Border Force to export these goods.

For further information on importing into, and exporting out of, Australia
www.business.gov.au

10. ESG AND RESPONSIBLE BUSINESS

GOVERNANCE OVERVIEW

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PARTNER
SYDNEY

CLAIRE ROGERS

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SYDNEY

WHAT GOVERNANCE REQUIREMENTS NEED TO BE OBSERVED IN AUSTRALIA?

Investors need to be aware of the governance rules that apply to entities in Australia

In Australia, companies and trusts, particularly those listed on the Australian Stock Exchange (ASX), are subject to a large range of corporate governance requirements, which arise from various sources including:

- the *Corporations Act 2001* (Cth) (Corporations Act);
- the ASX Listing Rules for listed entities;
- the ASX Corporate Governance Council's 'Corporate Governance Principles and Recommendations' dated February 2019 (ASX Recommendations) for listed entities (noting that a new edition was released for consultation in February 2024);
- prudential standards issued by the Australian Prudential Regulation Authority (APRA) for regulated financial and superannuation institutions, including banks, building societies and insurers, including standards for governance, risk management and remuneration; and
- other industry standards which are adopted voluntarily, often in line with those adopted in the United States and the United Kingdom.

The board of directors

Most listed entities in Australia have boards of directors which comprise more non-executive, independent directors than executive non- independent directors. The ASX Recommendations make various recommendations regarding director selection, appointment and independence of directors and also the role of the chairperson. In Australia, it is rare for the chairperson of a listed entity to hold an executive position with the entity.

Larger listed entities usually establish board committees to address oversight of audit, risk, nomination, remuneration and, increasingly, sustainability issues.

Generally, directors of both listed and unlisted entities may delegate any of their powers to another director, a committee of directors, an employee of the company or any other person.

KWM's Compliance & Governance Risk Advisory offering focused on the Financial Services Sector
https://www.owladvisory.com/

Directors' duties

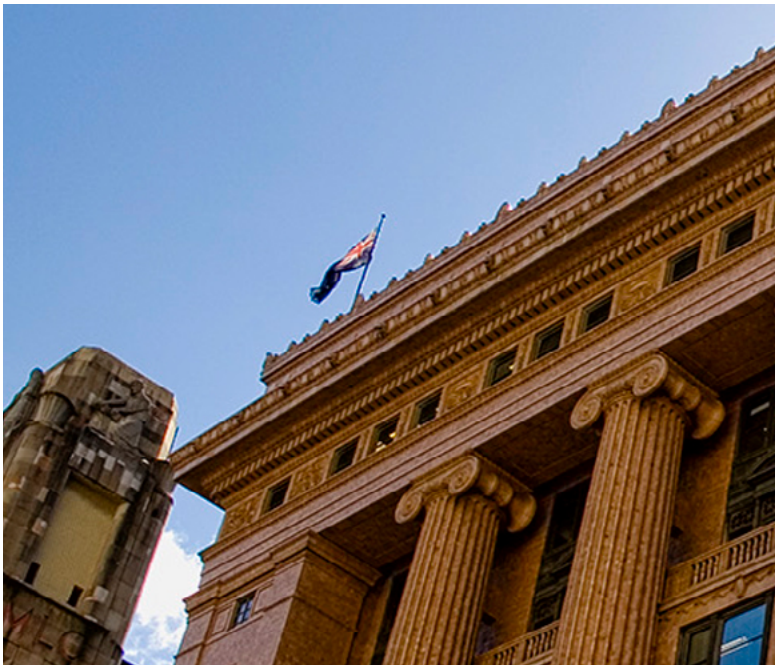
Directors' duties in Australia are prescribed by legislation, in particular the Corporations Act, and an extensive body of case law (common law). Directors owe stringent duties:

- to exercise care and diligence;
- to act in good faith in the best interests of the company and for a proper purpose;
- not to improperly use their position or company information; and
- to disclose their material personal interests and avoid conflicts of interest.

A breach of these duties involving dishonesty may be a criminal offence.

Directors have duties regarding financial reporting and other forms of reporting and disclosure and can be liable under various laws. If the company they manage is in financial distress, there are additional duties and issues that arise for them. Breaches of directors' duties carry a range of fines or terms of imprisonment, or both. Some defences are available to directors under the Corporations Act.

Directors may be indemnified against liability that arises in the performance of their office, by the subject company or its parent (subject to the law, which prohibits indemnities against liability to the company or liability arising from conduct not in good faith). Companies often take out D&O (directors' and officers') insurance to cover directors' liabilities to the extent permissible.



Auditors

With exceptions for small proprietary companies and small companies limited by guarantee, all companies must appoint an independent auditor. The ASX Recommendations suggest that listed entities in Australia have audit committees comprising only non-executive directors, a majority of whom are independent directors. This is obligatory under the ASX Listing Rules for entities in the top 300 of the S&P/ASX All Ordinaries Index.

WHAT ARE THE RELEVANT DISCLOSURE OBLIGATIONS?

Financial and other reporting

All listed entities must prepare and lodge an annual audited financial report and an audited or audit reviewed half year financial report. These reports must comply with Australian accounting standards or equivalent local requirements. All directors (executive and non-executive) are responsible for the entity's financial reports being accurate and complying with accounting standards.

Listed entities must describe their corporate governance practices in detail in their annual reports (or in a separate corporate governance statement). They must report on whether they comply with the ASX Recommendations and if not, why not.

Unlisted companies and registered schemes are generally also required to prepare annual financial reports and directors' reports each financial year. There is an exception for small companies limited by guarantee and small proprietary companies unless they have been controlled by a foreign company for all or part of a year.

Continuous disclosure

Listed entities and the responsible entities of listed MISs must fully disclose price sensitive information to the market (via communications made to the ASX) as soon as they become aware of the information, subject to limited carve outs. Non-compliance with the requirement results in civil penalties (fines imposed by ASIC), criminal penalties or private actions (such as shareholder class actions). Unlisted 'disclosing entities' must provide similar information to ASIC.

WHAT CORPORATE CONDUCT IS PROHIBITED?

Anti-bribery and anti-corruption

Australia's foreign anti-bribery and anti-corruption laws make it a crime for companies and individuals to bribe foreign government officials to obtain or retain business. Corporations are deemed to be at fault if they expressly, tacitly or impliedly authorised or permitted the conduct. This includes failing to create and maintain a corporate culture of compliance with these laws.

It is also a criminal offence for a person to make, alter, destroy or conceal an 'accounting document':

- intending to conceal the giving or receiving of a bribe; or
- reckless as to whether the giving or receiving of a bribe is concealed.

A director may be in breach of their duties under the Corporations Act if the bribery is found to have occurred within their organisation. In addition to regulatory investigations, companies and their directors are increasingly exposed to private actions from shareholders for failing to prevent and disclose bribery and corruption.

INSIDER TRADING AND TRADING POLICIES

Insider trading in securities and other financial and investment products is prohibited.

Insider trading laws in Australia apply in a broader range of circumstances than laws in most other jurisdictions. The laws apply to all financial products, not just equity securities. Relevant information includes intentions, matters of supposition, and information that is not sufficiently definite to be published.

Listed entities must have trading policies which comply with minimum content requirements of the ASX Listing Rules, including specifying that key management personnel cannot trade in the entity's securities or in financial products issued or created over or in respect of the entity's securities during prohibited periods (generally the periods before the release of annual and half yearly financial statements, and before the AGM). The Corporations Act prohibits key management personnel hedging their incentive remuneration.

Directors of listed entities must disclose to the ASX full details of trading in securities of those entities.

Market misconduct

Manipulation of securities and financial markets is prohibited. The operators of those markets are also required to actively monitor transactions in their markets and report any suspicious trading to the corporate regulator.

Further, Australia's laws include an overriding requirement that extends to financial transactions, which prohibits any person from engaging in misleading or deceptive conduct.

Insolvent trading

A director will contravene the insolvent trading prohibition of the Corporations Act (and may be personally liable for debts of the company) if:

- the company incurs a debt while it is insolvent or becomes insolvent by incurring the debt; and
- at the time the company incurs the debt, there are reasonable grounds for suspecting that the company is insolvent or will become insolvent.

To monitor against the risk of insolvent trading, directors should keep themselves informed about the company's financial position, regularly assess the company's solvency and obtain professional advice if necessary.

Related party transactions

Australia has strict rules about related party transactions, particularly for public entities. In general, shareholder approval is required unless the transactions are entered into on arm's length terms. Listed entities are subject to additional rules for related party dealings.

RECENT GOVERNANCE DEVELOPMENTS

Electronic signing of contracts

While Australian courts have broadly recognised that electronic contracts and electronic signatures are valid, there are, or have been, difficulties with:

- electronic execution of deeds and agreements by companies under s 127 of the Corporations Act 2001 (Cth) (Corporations Act);
- electronic execution of deeds by individuals and corporations that are not companies registered under the Corporations Act; and
- remote witnessing and attestation by electronic means.

In the wake of the COVID-19 pandemic, legislation has been passed by the Commonwealth and some States to facilitate the execution of deeds and agreements using electronic signatures and audio-visual witnessing.

As a result of these changes:

- a company registered under the Corporations Act can electronically sign a deed under s 126 and s 127 of the Corporations Act;
- an individual can electronically sign a deed governed by the law of New South Wales, Queensland and Victoria — this includes an individual who is signing as an agent or attorney for a corporation;
- a foreign corporation and statutory corporation can in certain circumstances electronically sign deeds governed by the law of New South Wales, Queensland and Victoria; and
- signatures on deeds and agreements governed by the law of New South Wales and Victoria can be witnessed remotely by audio visual link.

KWM's Alert on E signing by companies under the Corporations Act here to stay
https://www.kwm.com/au/en/insights/latest-thinking/e-signing-by-companies-under-the-corporations-act-here-to-stay.html

Virtual meetings and electronic signing and distribution of meeting related documents

The COVID-19 pandemic prompted various corporate law reforms, including to facilitate virtual annual general meetings (AGMs) and enable the electronic signing and distribution of meeting related documents.

KWM's Alert on the Corporations Amendment (Meetings and Documents) Act
https://www.kwm.com/au/en/insights/latest-thinking/corporations-amendment-meetings-and-documents-bill-2021-received-royal-assent-and-has-now-commenced.html

Whistleblower protections

Enhanced whistleblower protections in the Corporations Act require public and large proprietary companies to have compliant whistleblower policies, which should be disclosed on the company's public website.

KWM's Alert on Corporate Whistleblower Programs
https://www.kwm.com/au/en/insights/latest-thinking/corporate-whistleblower-programs-increased-focus-for-asic-and-boards.html

Sustainability/ESG reporting

Listed entities are increasingly focused on governance of sustainability and ESG risks and are voluntarily reporting against international sustainability reporting frameworks and standards, such as the recommendations of the Task Force on Climate related Financial Disclosures (see the *Climate Change/ Green Business* section of this Guide).

The Australian Government proposes to introduce mandatory sustainability reporting commencing for large entities in the 2025 financial year.

KWM's Report on Climate-related Disclosure and Governance Trends of the ASX50 in 2022
https://www.kwm.com/au/en/insights/latest-thinking/publication/climate-related-disclosure-and-governance-trends-of-the-asx50-in-2022.html

Diversity

The ASX Recommendations suggest S&P/ASX 300 entities target 30% of each gender on their boards. However, a target of 40:40:20 is generally considered more appropriate (ie 40% women, 40% men and 20% of any gender). As at 30 November 2021, the percentage of women on S&P/ASX 200 boards was 34.2%.

The impact of recent Royal Commissions and inquiries

Recent Royal Commissions and inquiries into casino giants and the financial services sector have led to an increased focus on governance in Australia. While no mandatory changes in governance practices or standards have yet been introduced as a result, there has been an increasing focus on culture, community expectations, and remuneration practices.

KWM's Alert on the Victorian Royal Commission into Crown
https://www.kwm.com/au/en/insights/latest-thinking/key-governance-outcomes-from-the-victorian-royal-commission-into-crown.html

KWM's Alert on the New South Wales Casino Inquiry
https://www.kwm.com/au/en/insights/latest-thinking/the-crown-inquiry.html

MODERN SLAVERY

JASMINE FORDE

PARTNER
BRISBANE

SALLY AUDEYEV

PARTNER
PERTH

WHAT IS MODERN SLAVERY?

Modern slavery refers to conduct that involves coercion, threats or deception to exploit victims and undermine or deprive them of their freedom to choose whether they work or not. This can include practices such as human trafficking, slavery, servitude, forced labour, debt bondage, deceptive recruiting and the worst forms of child labour. Practices such as substandard working conditions or underpayment of workers do not constitute modern slavery, although these practices are also illegal and harmful.

Modern slavery is not confined to certain industries or to the Global South, although some industries or regions are considered higher risk. It continues to exist in Australia and possibly affects the supply chains of every client which the firm works with.

In Australia the *Modern Slavery Act 2018* (Cth) (Modern Slavery Act) identifies certain businesses as 'reporting entities' that are required to report annually on the risks of modern slavery in their operations and supply chains and actions to address those risks.

KWM's Refresher on Managing Modern Slavery Risks
https://www.kwm.com/au/en/insights/latest-thinking/managing-modern-slavery-risks-in-the-age-of-covid-19-and-beyond.html

WHO IS REQUIRED TO REPORT?

Companies that carry on business in Australia, and that have an annual global consolidated revenue of at least A$100 million are required to prepare modern slavery statements for each financial year. The assessment for 'carrying on business in Australia' is considered in the Carrying on Business in Australia section of this Guide. The assessment of consolidated revenue is made on a case-by-case basis, with reference to accounting standards.

The Modern Slavery Act permits joint modern slavery statements to be given by related entities that are required to report. It also permits other entities that are based or operating in Australia to report voluntarily.

Statements are publicly available on an online register.

KWM's update on the online register of modern slavery statements
https://www.kwm.com/au/en/insights/latest-thinking/amendment-and-entry-into-force-of-the-nsw-modern-slavery-act.html

WHAT ARE THE REPORTING REQUIREMENTS?

The Modern Slavery Act requires modern slavery statements to report against 7 mandatory criteria:

- identity of the reporting entity;
- structure, operations and supply chains of the reporting entity;
- risks of modern slavery practices in the operations and supply chain of the reporting entity, and any entities it owns or controls;
- actions taken by the reporting entity, and any entities it owns or controls, to assess and address those risks, including due diligence and remediation processes;
- how the reporting entity assesses the effectiveness of such actions;
- process of consultation with entities it owns or controls, and any entity with which a joint modern slavery statement is issued; and
- any other information that the reporting entity, or the entity giving the statement, considers relevant.

KWM's Refresher on Modern Slavery Reporting Obligations
https://www.kwm.com/au/en/insights/latest-thinking/modern-slavery-act-guidance-what-you-need-to-know.html

The NSW Modern Slavery Act

The *NSW Modern Slavery Act 2018* (NSW) (NSW Modern Slavery Act) was passed in 2018 but did not come into force at that time. Its requirements overlapped with the federal Modern Slavery Act and included reporting obligations for businesses with over A$50M annual turnover.

Amendments in 2021 to the NSW Modern Slavery Act removed the duplicative reporting obligations, and the NSW Modern Slavery Act came into force in January 2022. This means that the only modern slavery reporting obligations in NSW are under the federal Modern Slavery Act.

KWM's note on the amended NSW Act and business considerations
https://www.kwm.com/au/en/insights/latest-thinking/amendment-and-entry-into-force-of-the-nsw-modern-slavery-act.html

Reporting regimes in other jurisdictions within Australia?

There are modern slavery reporting regimes in several other jurisdictions, such that businesses may be faced with multiple reporting obligations, depending on their nature and structure.

WHAT ARE THE UPCOMING DEVELOPMENTS?

A review of the Modern Slavery Act which considered the first 3 years of the Modern Slavery Act's operations and reporting entities' compliance was completed in 2023. A report comprising that review was released on 25 May 2023, the key recommendations of which concerned:

- introducing civil penalties for reporting entities that fail to comply with the reporting requirements;
- introducing a due diligence obligation;
- expanding application of the regime to entities with a lower annual consolidated revenue of A$50 million;
- requiring organisations to report on their modern slavery incidents or risks, grievance and compliance mechanisms, and external, as well as internal, consultation or modern slavery risk management; and
- the establishment of an independent statutory office and functions for an Anti-Slavery Commissioner, who would oversee the implementation and enforcement of the Modern Slavery Act.

KWM's Alert on Proposed Reforms to the Modern Slavery Act
https://www.kwm.com/au/en/insights/latest-thinking/australias-modern-slavery-act-review-reforms-on-the-horizon.html

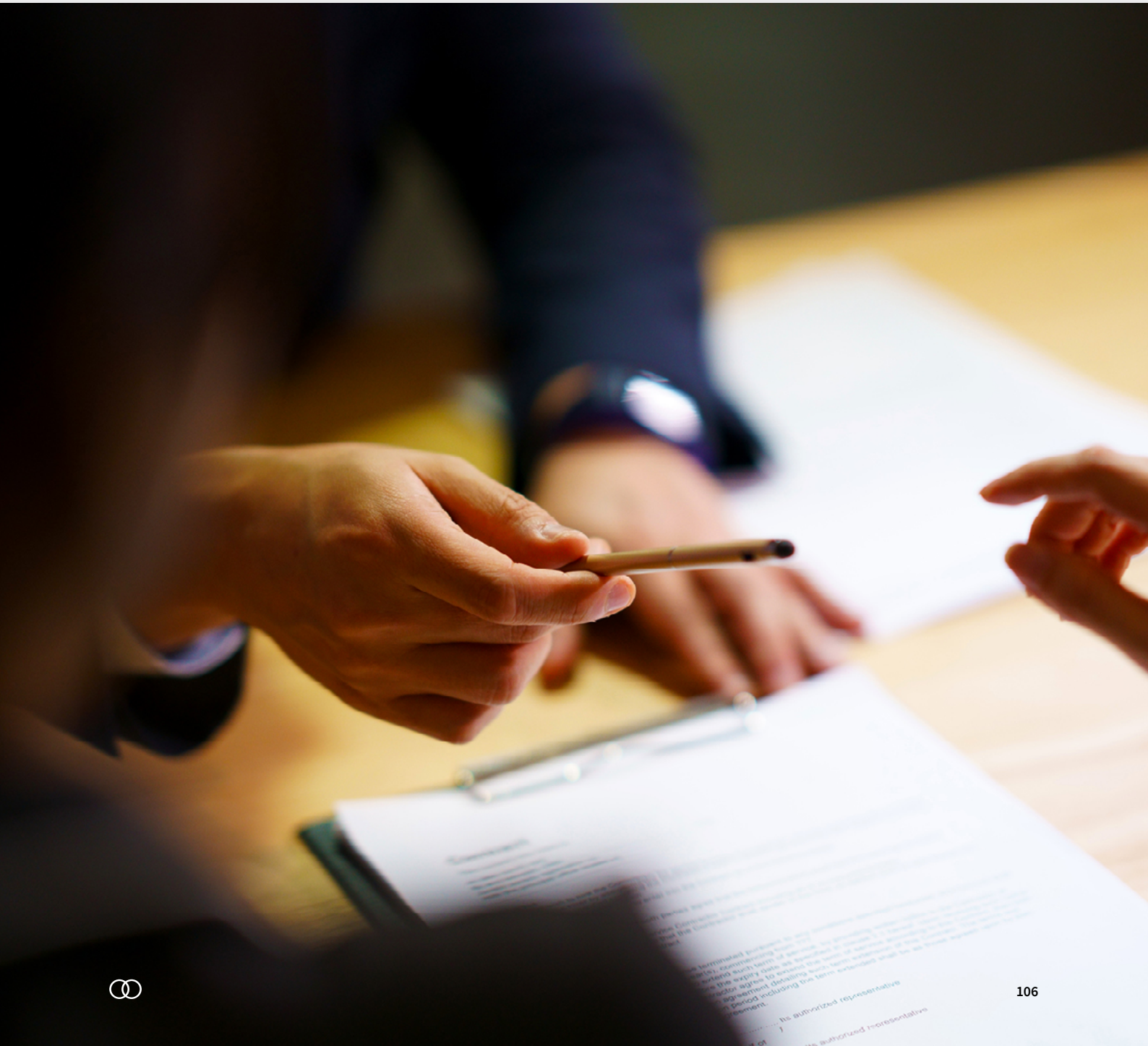
Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023

Introduced into the House of Representatives on 30 November 2023, the *Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023* (Cth) proposes to amend the Modern Slavery Act by establishing an Anti-Slavery Commissioner as an independent statutory officer holder. This was both an election commitment in 2023 and key recommendation from the above report.

The function of the Commissioner is presently intended to be complementary and a support mechanism for business. It is proposed that the Anti-Slavery Commissioner will conduct and encourage education and awareness for modern slavery, support compliance with legislative requirements, and advocate for continuous improvement both in policy and in practice.

On 8 February 2024 the Bill passed the House of Representatives and progressed to the Senate, where it awaits its Second Reading. Although it is unclear when the Bill will be further progressed, we anticipate an outcome in the coming months.

The Federal Government has yet to formally respond to the proposed reforms to the Modern Slavery Act. We anticipate developments in the months ahead.



CLIMATE CHANGE/ GREEN BUSINESS

CLAIRE ROGERS

PARTNER
SYDNEY

EMMA NEWNHAM

SENIOR ASSOCIATE
MELBOURNE

Climate Change/Green Business is a rapidly developing area in Australia and is an increasing focus for companies and their stakeholders. The government is developing a Net Zero 2050 plan, while reducing annual emissions limits for facilities covered by the Safeguard Mechanism mandating reporting on greenhouse gas emissions and encouraging companies to reduce emissions in a number of other ways.

WHAT IS DRIVING CLIMATE CHANGE/ GREEN BUSINESS DEVELOPMENTS?

For those meeting the relevant thresholds, there are emissions limits under the Safeguard Mechanism and mandatory reporting requirements under the National Greenhouse and Energy Reporting scheme.

For other companies, developments have been driven by the climate litigation landscape including greenwashing action by regulators, the upcoming mandatory climate-related financial reporting regime, an increasing understanding of what directors' duties require and stakeholder (including regulator) pressure.

In addition, many Australian companies view climate change as an opportunity, not just a risk. They have developed innovative products, financing and other solutions to deliver on customer needs and bolster their responsible business credentials. A snapshot of some of the opportunities are set out below.

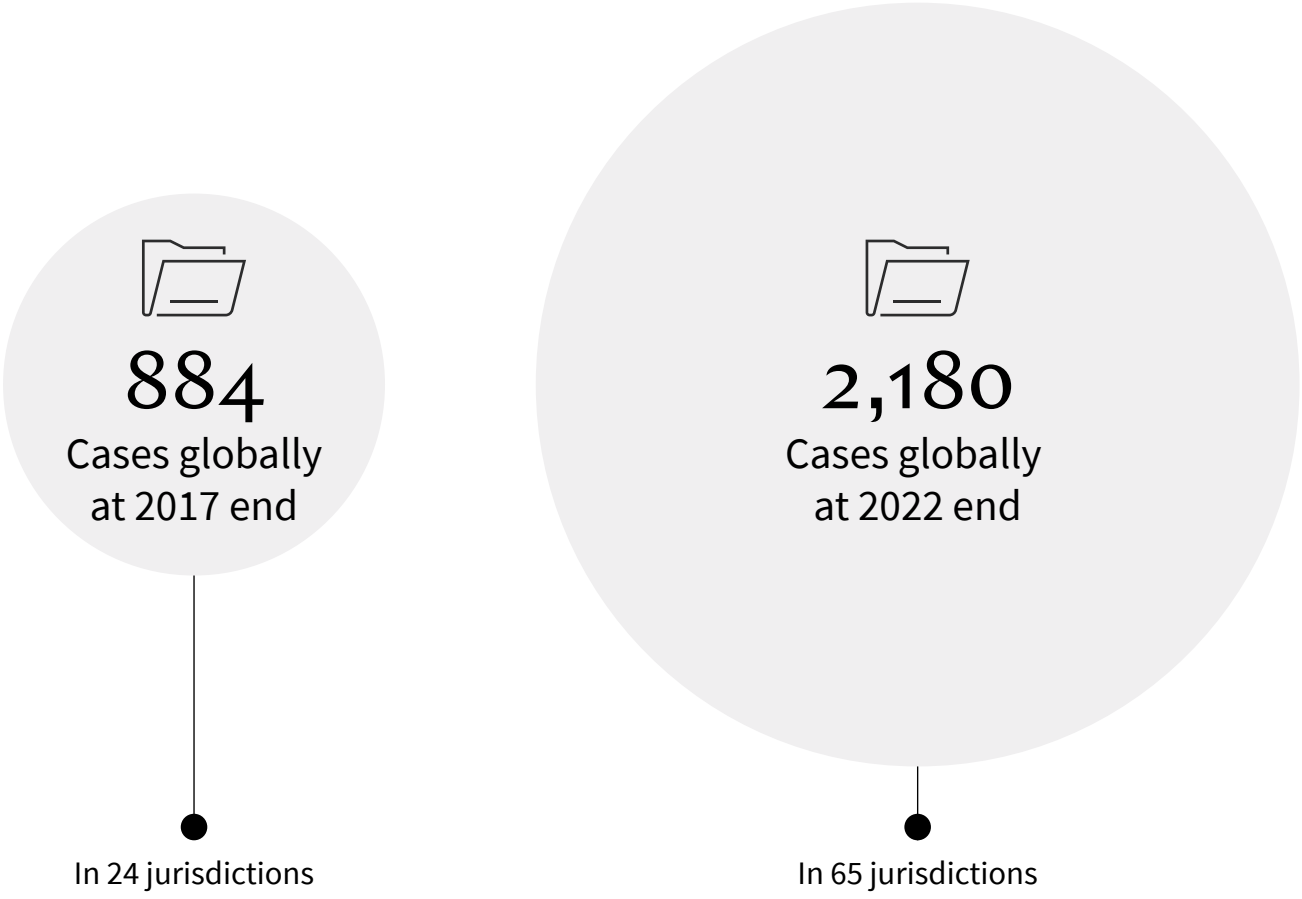
While the Government develops comprehensive plans for economic sectors through the Net Zero 2050 plan, it is pushing ahead with its 'Powering Australia' agenda. 'Powering Australia' aims to support new initiatives and opportunities, outlining a number of strategies to get Australia to a 43% reduction in emissions by 2030, based on 2005 levels. As well as gradually tightening the emissions limits under the Safeguard Mechanism, these include ensuring the integrity of, and co-benefits from, carbon credits and improving carbon farming opportunities, unlocking investment in the electricity grid and installing community batteries, rolling out a national electric vehicle strategy to increase the uptake of electric vehicles and restoring the role of the Climate Change Authority as an independent adviser to Government on climate change policy. See the *Energy and Resources* section of this Guide.

Greenwashing

Greenwashing is misleading and deceptive conduct in relation to sustainability matters. It includes the practice of companies overstating the 'green credentials' of a product or investment. It also includes companies setting emissions targets when they do not have a reasonable ability to meet them. In Australia it is illegal for a business to engage in conduct that misleads or deceives or is likely to mislead or deceive consumers or other businesses.

The climate litigation landscape

The United Nations Environmental Programme's (UNEP) 2023 Global Climate Change Litigation Report found that the total number of climate change disputes grew 2.5 times in the five years from 2017. The United States continues to have the largest number of climate disputes (1,522 or 70% of all disputes observed), with Australia a stand-out second place (127 disputes) ahead of the United Kingdom (79 cases). However, Australia is recognised as having more climate change litigation per capita than any other country in the world.



Source: UNEP 2023 Global Climate Change Litigation Report

Climate change disputes are spread across multiple areas of law, including administrative, corporate and consumer law. The following key cases demonstrate some of the legal avenues being pursued in Australia:

Australian Centre for Corporate Responsibility v Santos

The Australian Centre for Corporate Responsibility (ACCR), in September 2021, filed claims against Australian oil and gas company Santos. The ACCR alleges that Santos' claims that the natural gas it produces is a 'clean fuel' and that it plans to reach net zero emissions by 2040 are untrue. The ACCR alleges that Santos' conduct is contrary to the Australian Consumer Law (under misleading and deceptive conduct provisions) and the Corporations Act.

This is the first greenwashing case in the world to challenge a company's net zero emissions target for being misleading (rather than merely inadequate, as in the landmark Shell case in the Netherlands).

The case is ongoing as at February 2024. However, if the ACCR is successful, it will set a new precedent which will only add to the pressure on companies to accurately assess, disclose and report climate risks.

KWM's Alert on Santos Greenwashing Case
https://www.kwm.com/au/en/insights/latest-thinking/greenwashing-hits-global-courtrooms.html

ASIC v Mercer

In February 2023, ASIC commenced its first civil penalty proceedings in relation to alleged greenwashing conduct against Mercer Superannuation. ASIC alleges Mercer made misleading statements about the sustainability of one of its superannuation products, including that it excluded investments in companies involved in carbon intensive fuels, alcohol and gambling. The court is considering whether it will approve an AU$11.3m settlement offer made in December 2023.

This is one of several proceedings ASIC has initiated for greenwashing, in addition to issuing a series of infringement notices. Greenwashing remains an enforcement priority for ASIC.

A climate duty of care

Minister for the Environment v Sharma [2022] FCAFC 35

Brought by a group of teenagers from across Australia, the Sharma case considered whether the federal Minister for the Environment owes Australian children a duty of care when approving a coal mine project under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

The applicants alleged a novel duty of care owed by the Minister to young people in exercising these approval powers. They asserted that digging up and burning coal will exacerbate climate change and harm young people in the future. The judge of first instance of the Federal Court of Australia ruled in favour of the teenagers and established a new duty of care to avoid causing personal harm to children. However, this was overturned on appeal by the Full Court of the Federal Court of Australia.

Pabai Pabai & Anor v Commonwealth of Australia

The climate change duty of care may ride again soon. P*abai Pabai & Anor* is a pending claim brought in the Federal Court by First Nations' leaders alleging that the federal government owes a duty of care to Torres Strait Islanders to take reasonable steps to protect them, their traditional way of life, and the marine environment of the Torres Strait Islands from the current and projected impacts of climate change.

This claim sits on a very different factual matrix to Sharma. It is founded on various international treaties, plans and programs that Australia has entered into specifically concerning the Torres Straight Islands and the Torres Straight Islanders. Grounded in the existing obligations and responsibilities of the Australian government, this claim is similar to the landmark Urgenda decision against the Dutch government.

The future of climate litigation in Australia

Climate change disputes have the potential to affect clients across multiple sectors and industries, not merely those directly involved in fossil fuels. As Justice Bromberg noted in Sharma (at first instance) there is a role for the common law to 'respond to altering social conditions', and in the current climate where the appetite for action and enforcing responsibility is on the rise, we can only expect to see more litigation in this area. Further, it is likely we will see more successful litigation as new precedents are set and arguments are refined even on the basis of preceding unsuccessful cases.

KWM's Alert on Climate Change Disputes – Trends from Australia
https://pulse.kwm.com/dispute-resolution/climate-change-disputes-trends-from-australia/

DIRECTORS' DUTIES AND CLIMATE REPORTING

While there has not yet been an Australian judgment on directors' duties in the climate change context, leading commentary (including by a former Justice of the High Court of Australia) indicates that directors must consider, report on and respond to relevant climate-related risks.

The standard of care expected of directors with respect to climate-related risks has risen and is continuing to rise. Developments which bear upon this standard include the increasing regulatory focus and guidance (including by APRA, ASIC and the ACCC), widespread acceptance of the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and the release of international sustainability standards, more acute investor and community pressure concerning climate risk, developments in the state of scientific knowledge regarding climate risk, an increasing number of industry-based initiatives working to address climate risks and increasing climate litigation.

Climate-related disclosure and governance trends of the ASX50 in 2022
https://www.kwm.com/au/en/insights/latest-thinking/publication/climate-related-disclosure-and-governance-trends-of-the-asx50-in-2022.html

As at February 2024, legislation and standards are being finalised for a mandatory climate-related financial disclosure regime expected to commence from 1 July 2024 (or possibly, 1 January 2025). The regime is expected to capture a very wide range of entities, expanding beyond listed entities and large financial institutions. Reporting requirements under the regime are expected to be based on the standards set by the International Sustainability Standards Boards, with modifications for Australia.

KWM Alert on Draft Sustainability Reporting Legislation Released for Consultation
https://www.kwm.com/au/en/insights/latest-thinking/draft-sustainability-reporting-legislation-released-for-consulta.html

As part of responding to climate risks, some companies are looking to strengthen their capital and technical capabilities. Increasingly, climate is a driving factor in mergers and acquisitions. As part of this trend, we are seeing more companies include climate and sustainability considerations in their due diligence processes, and in their public disclosures.

The Climate Challenge: Opportunities from collaboration between Australia and China
https://www.kwm.com/au/en/insights/latest-thinking/the-climate-challenge-opportunities-from-collaboration-between-australia-and-china.html

KWM Assists with the Completion of Woodside's Transformation into Global Top 10 Independent Energy Producer
https://www.kwm.com/au/en/about-us/media-center/kwm-assists-with-the-completion-of-woodsides-transformation.html

OPPORTUNITIES ABOUND

Sustainable finance

Sustainable (or green) finance is no longer just a public relations matter for companies. Investors are shifting their focus from financial returns to broader investment considerations, including environmental and societal impacts as a means of creating and protecting long-term value. Companies without clear and credible transition strategies in line with the Paris Agreement are beginning to experience an adverse impact on access to and cost of funding.

There has been a substantial increase in sustainable investment in Australia in recent years and this trend is expected to continue. Australia's market trajectory is in line with global developments. By the end of Q3 2023, the Climate Bonds Initiative had recorded cumulative volume of US$4.2 trillion of green, social, sustainability and sustainability linked debt. The Australian government has also announced the nation's first sovereign green bond set to launch in mid-2024 in a bid to boost institutional investment in the transition to net zero.

KWM Alert on Sustainable Finance: Exponential Growth Continues
https://www.kwm.com/au/en/insights/latest-thinking/sustainable-finance-exponential-growth-continues.html

Carbon markets

In Australia, the Clean Energy Regulator is responsible for administering the Australian Carbon Credit Unit (ACCU) Scheme (formerly known as the Emissions Reduction Fund), under which businesses can earn ACCUs. ACCUs represent one tonne of carbon dioxide equivalent stored or avoided by a carbon reduction project. The Clean Energy Regulator is also in the process of developing an Australian Carbon Exchange, which will operate in a similar manner to an online stock exchange, to facilitate the trading of ACCUs and potentially other carbon units, and the growth of the Australian carbon market.

This growth is also being recognised, and driven by companies, with National Australia Bank joining forces with international financial institutions to develop a new trading platform for the voluntary carbon markets.

Carbon capture and storage projects

Australia's potential for developing carbon capture and storage (CCS) projects has been touted for some time — legislation for CCS projects has been in place in Victoria and Queensland for over a decade. As at October 2023 there were 18 CCS projects at various stages of progress in Australia (including 2 test facilities), with current planned projects forecast to sequester 20 million tonnes of CO2 a year by 2035.

There is general federal and state government support for CCS. In particular, the government has launched the Carbon Capture Technologies program which is intended to help support the research and development of new and novel ways to capture and use carbon dioxide, especially in hard to abate sectors such as cement manufacturing.

KWM Alert on CCS in Australia – a legal guide
https://www.kwm.com/au/en/insights/latest-thinking/ccs-in-australia-a-legal-guide.html

Natural Capital

In Australia, the federal government has committed to protecting 30% of Australia's land and water by 2030. To give effect to this commitment the federal government has now passed Nature Repair Market legislation in the form of the *Nature Repair Act 2023* (Cth).

The development of the Nature Repair Market is intended to allow landholders to register and carry out nature restoration projects which would enable them to create biodiversity certificates which can be subsequently traded (in a similar way to ACCUs). This will enable entities to invest in nature repair projects through the purchase of biodiversity certificates.

In 2024, the Department of Climate Change, Energy, the Environment and Water and the Clean Energy Regulator plan to release details of the processes and systems to regulate the Nature Repair Market.

https://www.kwm.com/au/en/insights/latest-thinking/a-christmas-miracle-last-minute-horse-trading-gets-the-nature-repair-market-over-the-line.html

Offshore wind

Australia has significant offshore wind capacity that can assist Australia's transition to more reliable, affordable and clean energy use.

The Minister for Climate Change and Energy announced the identification of 6 priority areas in Australia for offshore wind in August 2022 and in December 2023, the Energy Department announced that preliminary decisions had been made for the granting of feasibility licenses for offshore wind in Gippsland, the first of the 6 priority areas.

The wind resource off the Victorian coast is said to be "world-class" by the federal and state governments, with average speeds on par with winds in the North Sea. With relatively shallow water, wind turbines can be based on the sea-bed, making them lower cost than floating turbines, while the region also has suitable ports and nearby access to transmission connection points in the Latrobe Valley coal power generation hub. The Victorian government has also announced targets for offshore wind, including 2GW of capacity by 2032, rising to 9GW by 2040, which is also driving investor interest.

https://www.kwm.com/au/en/insights/latest-thinking/victorian-government-releases-second-of-three-planned-offshore-w.html

ENVIRONMENTAL

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PARTNER
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WHAT ENVIRONMENTAL ISSUES NEED TO BE CONSIDERED?

Environmental considerations are a priority for proposed developments, continuing operations and project closure. Challenges to projects and project approvals are more prominent and delivering ecologically and socially sustainable outcomes is a priority.

In Australia, the impact projects have on the environment is holistically, substantially and closely regulated. There is emphasis on up-front environmental impact assessment, conditions requiring objective outcomes and ongoing monitoring, reporting and transparency. The system is integrated with land access and First Nations' agreements and across a range of regulatory regimes. Public scrutiny and challenges are becoming more uncommon, particularly for major projects releasing greenhouse gases and those with significant impact on biodiversity or Aboriginal cultural heritage.

Land use and development

Once access rights to land are obtained, project planners need to consider land use restrictions, planning, building and environmental approvals.

In built up areas of Australia, land use is controlled by zoning, which groups land parcels together so that land is used in a way that is compatible with the way nearby land is used. Common zonings are residential, commercial, light industrial, general industrial, rural and public purposes/special uses. Use in a particular zone is either permitted with planning approval, prohibited, exempted or subject to assessment.

Many developments will need to obtain planning approvals. Planning approvals are usually controlled by local governments (there are over 500 across Australia), but larger developments may need the approval of State Ministers or planning bodies. Whether a development is approved is informed by policy guidelines but may also involve discretionary judgments by decision makers. Planning approvals can be very detailed. Conditions may, eg, govern the time within which the building or parts of the building are to be completed or impose requirements in relation to the built form of the development or hours of operation.

The erection of buildings is primarily regulated by State laws relating to the building code which deals with issues such as fire safety and disabled access. Generally, a technical permit, certificate or licence will be required to be issued before the erection and then occupation of any building.

Developments will generally require both a planning approval and a building approval before construction may commence.

Environmental impact assessment

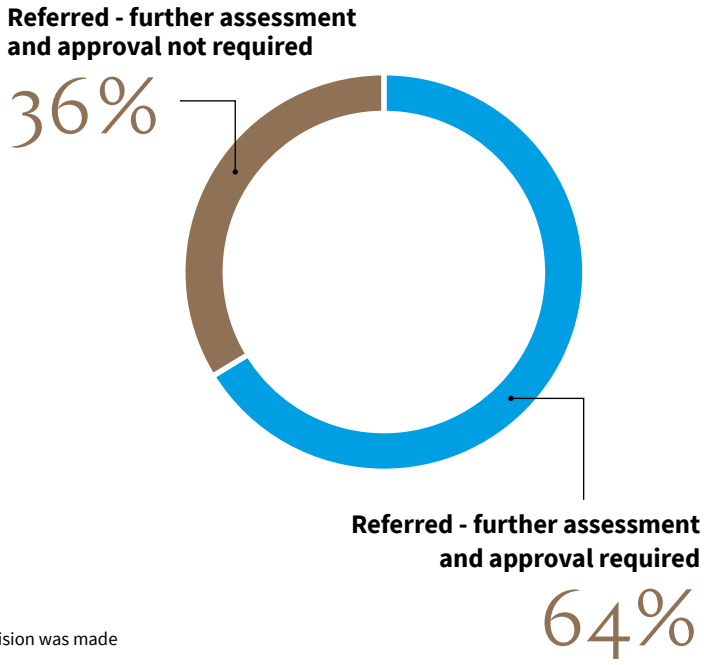
Both Federal and State legislation may require an environmental impact assessment and approval of a new development or expansion of an existing development which might have a significant impact on the environment, wherever it is located. Approval usually needs to occur before any on ground element of the project can commence. The level and complexity of assessment varies based on how significant the impact is likely to be and can take 3 months to 3 years or more.

Assessments commonly involve assessing the impact against environmental objectives for the area, detailed descriptions of the project and its impacts, adaptive plans for proposed environmental management and public consultation. Approvals are commonly granted subject to conditions relating to the management of environmental impacts to outcomes-based criteria (including requiring extensive management and monitoring plans, which then need to be approved in their own right), and environmental offsets to ensure net environmental objectives can be maintained or improved.

Depending on the jurisdiction and nature of the impact assessment required, third party objectors may be able to challenge approvals during and following assessment. This is becoming more common.

OUTCOMES OF COMMONWEALTH ENVIRONMENTAL IMPACT REFERRALS

FROM 2022-2023*



*Does not include referrals that were clearly unacceptable or where no decision was made

Pollution, contamination and environmental harm

All States and Territories in Australia have environmental legislation managing the pollution of air, land and water. The nature of the controls varies. Site specific licences are often required, which generally set limits for pollutants and require monitoring and reporting.

Most jurisdictions also specifically regulate land clearing, environmental harm and biodiversity impacts.

The penalties for offences are significant and include fines, jail sentences or both. Some offences have defences where appropriate due diligence is exercised in relation environmental management. Other offences are 'strict liability' offences, without a defence. Directors and managers can also be held personally responsible.

THERE ARE

HUNDREDS

OF RULES AND REGULATIONS IN AUSTRALIA ABOUT ENVIRONMENTAL MATTERS

Retrospective liability for the clean-up of contaminated land

Most of the clean-up provisions under State legislation for contaminated land or waters operate retrospectively as well as currently. Liability can be imposed, regardless of fault, for conduct on sites and facilities which are currently occupied, and for past operations which may have been transferred many years ago. Liability may exist even though the operations were lawful at the relevant time, state-of-the-art technology was used, harmful effects were not recognised and operations had the approval of environmental authorities.

Liability is generally imposed on the polluter, but most jurisdictions also authorise the service of clean-up notices on owners, occupiers and even notional owners. For example, in circumstances where a polluter is unknown or cannot be located, a current landowner or occupier may be held liable for historical contamination.

Water licensing

All States and Territories in Australia have regulatory schemes dealing with surface and ground water use and allocation in water quality or quantity constrained areas. In some circumstances, licences are needed for water supply and dewatering. While many land users located in major cities and towns do not need to engage directly with these regulatory regimes, they may be an issue for large water users and users in regional and rural Australia.

Reporting on environmental regulation of an entity's operations

If an entity's operations are subject to any particular and significant environmental regulation, the annual directors' report for a financial year must give details of the entity's performance in relation to environmental regulation. Most jurisdictions also have laws requiring public disclosure of the environmental impacts of projects, for example, by way of environmental approvals requiring publication of annual air emission monitoring results.

Implications

Given the potential for significant environmental liability and the heightened importance of environment, social and governance matters (see the *Climate Change/Green Business* section of this Guide for further information), corporations in Australia pursue various risk management strategies, environmental management programs and projects that deliver broader value to the environment and the community.

Australian Government Department of Agriculture, Fisheries and Forestry
https://www.agriculture.gov.au/

Australian Government Department of Climate Change, Energy, the Environment, and Water
https://www.dcceew.gov.au/

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11. AUSTRALIA'S FIRST NATIONS

NATIVE TITLE

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WHAT ASPECTS OF NATIVE TITLE AND INDIGENOUS HERITAGE DO YOU NEED TO CONSIDER?

Establishing and maintaining strong relationships with Australia's First Nations is critical for project success.

Native title is the recognition that some Australian Indigenous people continue to hold rights and interests in their traditional lands and waters which are exercised in accordance with their traditional laws and customs. The *Native Title Act 1993* (Cth) (NTA) provides for the recognition and protection of native title rights and interests of Australian Indigenous peoples. Australian law also separately protects Aboriginal and Torres Strait Islander peoples' archaeological and ethnographic heritage.

Both typically require agreement with traditional owners to be reached before a project can begin, particularly in remote areas.

NATIVE TITLE

Many projects in regional Australia affect Native Title, with 3 key consequences:

Valid tenure, consultation and negotiation

Project owners need to negotiate or consult with Native Title holders or claimants to obtain new or extended project tenure, eg, the grant and renewal of mining tenements and pastoral leases. Native Title parties usually have a right to object, be consulted or to negotiate about (and receive compensation for) the impacts of the tenure on the Native Title holders or claimants. If these processes are not followed, there is a risk that project tenure will not be valid against Native Title rights.

Native Title Agreements

The project owner will need to comply with existing agreements made with Native Title holders or claimants in respect of past grants of tenure. Agreements typically deal with matters such as compensation, benefits (eg employment opportunities for Indigenous peoples), access to traditional lands and waters, protection of Aboriginal heritage and ongoing consultation.

Compensation Risk

The project owner may be liable to pay compensation to Native Title holders. The Federal Court of Australia handed down its first assessment of Native Title compensation in 2019 where it found that the assessment of just compensation requires the Court to determine the economic value of extinguished Native Title rights and interests and the estimated value of non-economic or cultural loss occasioned by the diminution in the group's connection to country. This is a developing area of law and, pending further judicial consideration including how cultural and economic loss is to be calculated, the full scope of its implications for project owners remains unclear.

Native Title exists over

~45%

of Australia

Exclusive Native Title exists over

~15%

of Australia

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compensation claim applications to date, with many more expected

INDIGENOUS HERITAGE

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Indigenous heritage

The protection of Aboriginal cultural heritage is related to Native Title but has additional and bespoke Commonwealth and State laws. Aboriginal cultural heritage legislation protects sites, objects and places or landscapes of significance to Aboriginal and Torres Strait Islander people.

Aboriginal cultural heritage may exist on land, whether or not Native Title exists. Heritage protection often requires additional measures that may not be addressed through Native Title agreements, particularly if the agreement were entered before 2020.

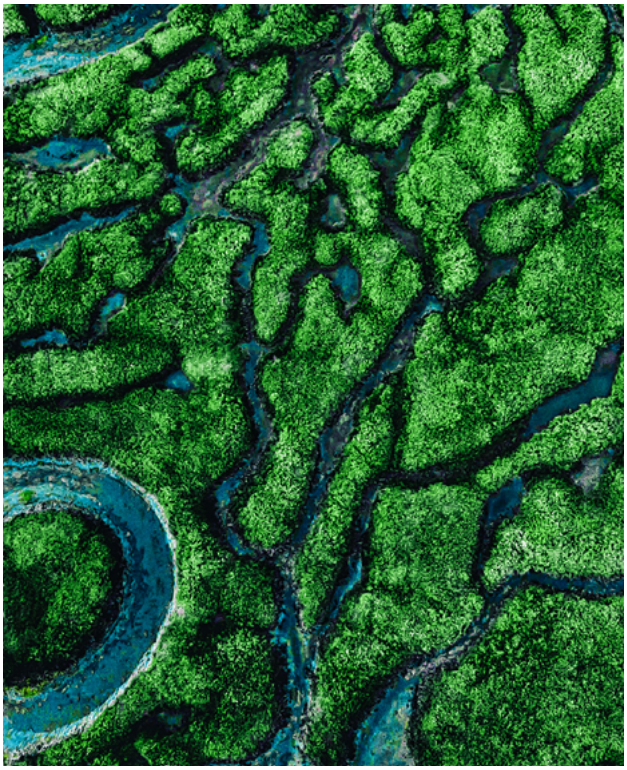
It is an offence to disturb or interfere with Aboriginal cultural heritage. A proponent who intends to carry out activities that may harm Aboriginal cultural heritage should undertake duly diligent heritage assessment, often including surveys with traditional owners, and may be required to seek authorisations to undertake the activity. The Commonwealth legislation provides for emergency (and permanent) declarations if State legislation fails to protect a significant Indigenous site.

The various registers kept by Government agencies are generally not a complete record of all heritage and are not a reliable source of information for avoiding harm to heritage.

ABORIGINAL AND TORRES STRAIT ISLANDER CULTURE IN AUSTRALIA DATES BACK OVER

65,000 YEARS

IT IS THE OLDEST CONTINUING CULTURE IN THE WORLD



Following the Juukan Gorge incident in May 2020, where rock shelters of exceptional significance were destroyed, there has been a heightened focus on the importance of protecting Aboriginal cultural heritage and collaborating with Traditional Owners to ensure projects avoid or mitigate harm to Aboriginal cultural heritage. International standards and new legislation in Australia encourage project proponents to reach fully informed agreements with traditional owners about how activities proceed and how to manage impact to indigenous cultural heritage, eg, via an agreed cultural heritage management plan.

National Native Title Tribunal
www.nntt.gov.au

Native Title Summary – Attorney-General
https://www.ag.gov.au/legal-system/native-title

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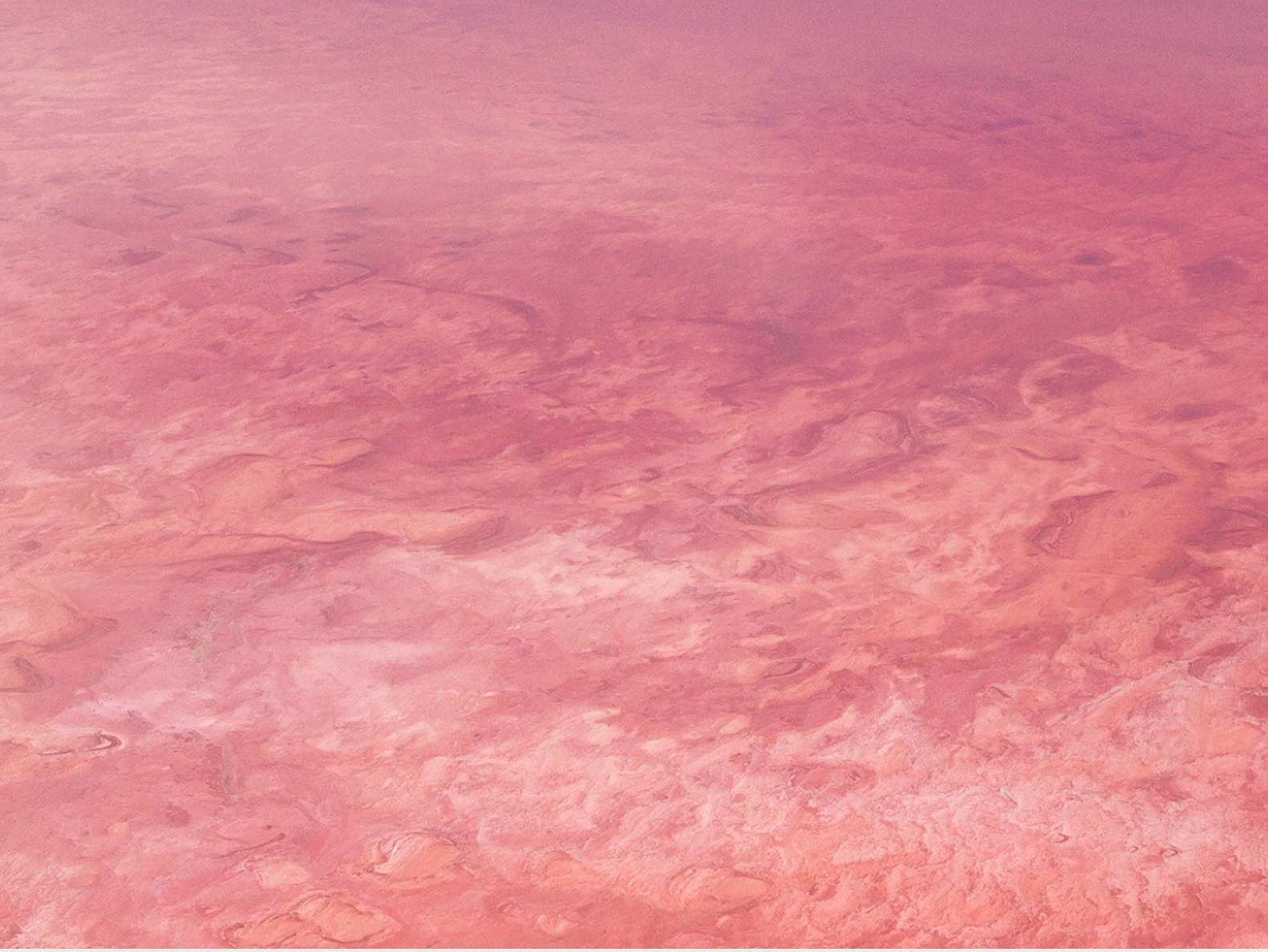

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