Doing business in Australia

Gilbert + Tobin

Doing Business in Australia answers some of the most common questions an overseas investor may ask when establishing a business presence in Australia. It aims to provide an introduction to the laws of Australia for overseas legal practitioners.

Please note

Unless otherwise indicated, a reference to a "section" is a reference to a section of this guide.

A glossary at the end of this guide sets out a list of all regulatory authorities and legislation referred to in this guide.

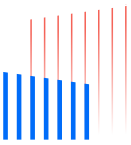
All dollar amounts are in Australian dollars.

As with other guides of this type, the information provided is of a general nature and is meant to aid the reader in identifying issues for which additional expertise must be sought. It is not a substitute for obtaining more detailed advice and it does not take into account the particular circumstances of the reader.

This guide is current as of January 2025.

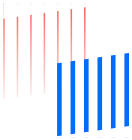
About this guide

This guide is divided into three main areas:



Section 1

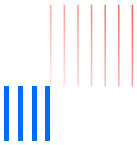
Provides an overview of Australia's government, legal system and important regulatory bodies.



Sections 2 – 4

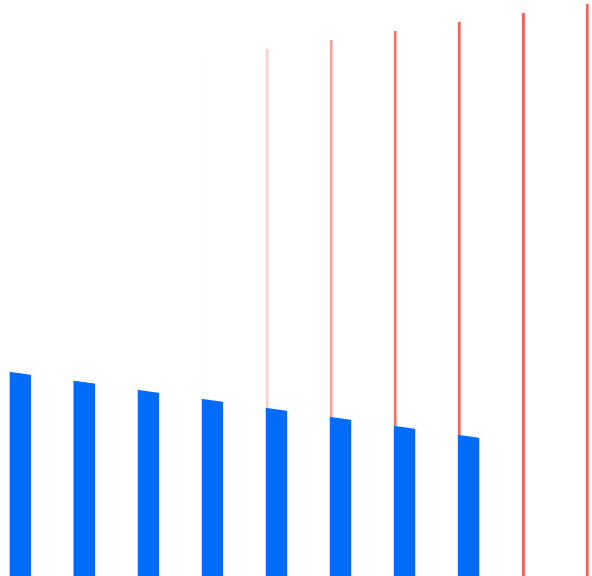
Answer some of the threshold questions an investor faces in considering how to enter the Australian market, such as:

- whether foreign investment approval is required or recommended for the particular investment;
- if the investment relates to the establishment of a new business, whether that business should be set up as a branch office or a subsidiary of the parent company; and
- if the investment relates to the acquisition of an existing business, whether takeover laws will apply.



Sections 5 – 20

Provide a summary of some of the important rules and regulations governing an investor's day-to-day business activities in Australia.



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> "The firm is widely recognised as a powerhouse in corporate, banking and dispute resolution."
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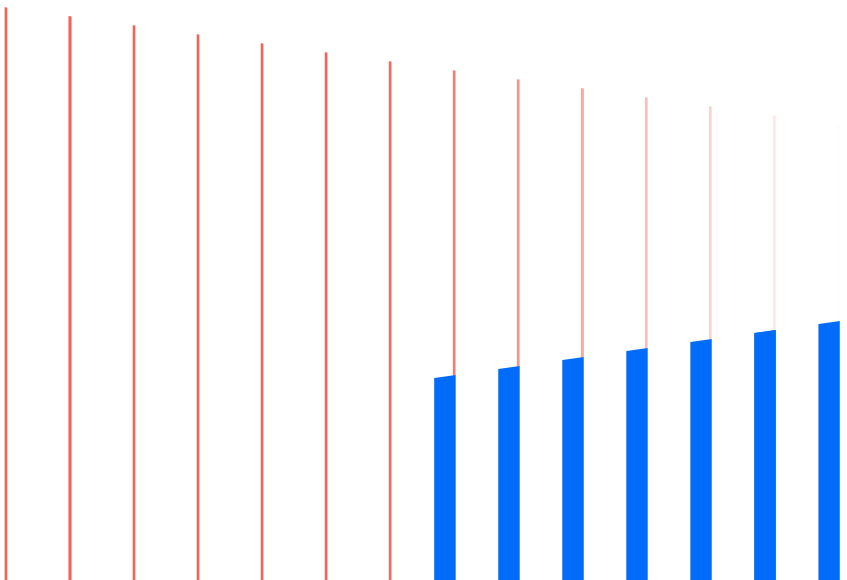
> Australian Financial Review



Gilbert + Tobin was founded in 1988 by Danny Gilbert and Tony Tobin as a small team of lawyers focused on providing excellent legal advice on high-profile, complex matters.

We have had outstanding success since those early days. We are now recognised as a leading transactions, regulatory and disputes law firm. We handle some of the most complex transactions in Australia, advising acquirers, targets and financiers. We are trusted by clients on sensitive regulatory investigations and approvals, litigation and Royal Commissions.

Our firm is also committed to outstanding citizenship. Our pro bono legal services has a proud track record and we champion important causes, such as marriage equality and reconciliation with Australia's Indigenous peoples. We have the highest proportion of women partners among major Australian law firms.

Chambers TOP RANKED Asia-Pacific 2025

The LEGAL 500 ASIA PACIFIC

Ranked tier 1 across multiple areas of law

IFLR 1000

Top tier firm 2025

"Best firm I have ever worked with – practical, commercial, innovative and cost conscious."

We are one of Australia's leading transactions, regulatory and disputes firms, committed to outstanding citizenship.

Awards and recognition

2025 Chambers Asia Pacific

G+T is ranked Band 1 in 12 areas of law, with 51 ranked partners across 24 areas of law, including 11 in Band 1.

We are ranked Band 1 in each of Corporate / M&A, Charities, Climate Change, Competition / Antitrust, Equity Capital Markets, Private Equity, Acquisition Finance, Corporate Finance, IP, Private Equity, TMT and FinTech.

2025 Legal 500 Asia Pacific

Tier 1 firm in 10 areas including: Banking and Finance, Capital Markets: Equity, Competition and Trade, Corporate and M&A, Data Protection, Fintech and Financial Services Regulation, Project Finance, IP, Insolvency and Restructuring and IT and Telecommunications.

We have 47 ranked partners across 17 areas.

2025 IFLR1000 Australia

G+T is ranked across 12 areas of law including Tier 1 Equity Capital Markets, Leverage Finance, Corporate and M&A and Private Equity.

Employer of Choice for Gender Equality

G+T has received an Employer of Choice for Gender Equality citation from the Workplace Gender Equality Agency for the last three years (2021 – 2024).

2025 Chambers Fintech

G+T ranked Band 1 for FinTech Legal.

2025 Chambers Global

34 lawyers ranked in Chambers Global, including seven in Band 1.

Ranked Band 1 in seven areas of law including Banking & Finance: Acquisition Finance, Banking & Finance: Corporate Finance, Capital Markets: Equity, Corporate / M&A, Intellectual Property, Climate Change and Legal Transformational Consulting.

2024 Financial Times Most Innovative Lawyers (Asia-Pacific) Awards

Winner – Most innovative law firm in Asia-Pacific (Headquartered in Asia-Pacific).

Winner – Partner Darren Fittler most Innovative Individual Practitioner.

Winner – Innovation in People and Skills Award for our Generative AI Bounty and related AI initiatives.

2024 Mergermarket M&A Awards

We're delighted to have won the Mergermarket M&A Private Equity Legal Adviser of the Year award in conjunction with AVCJ for the second year in a row.

2024 Beaton Client Choice Awards

G+T has been recognised as client's choicein the following categories:

- Winner – Best Law & Related Services Firm (>$200m revenue) (2022 – 2024).
- Winner – Best Provider to Power & Utilities (revenue > $30m).
- Finalist – Most Innovative Law & Related Services Firm (revenue > $30m).
- Finalist – Best Provider of ESG Services: Law & Related Services (revenue > $30m)

2023 Lexology Client Choice Awards

G+T Partners were recognised for outstanding client care at the Lexology Client Choice Awards in the following areas of law: Derivatives, Employment & Benefits, Telecommunications, Banking and Competition.

Lawyers Weekly Partner of the Year Awards

G+T received the following Lawyers Weekly Partner of the Year Awards:

- Banking & Finance (2022 – 2023).
- Capital Markets (2020 – 2021).
- IP (2021).
- Innovator of the Year (2021).

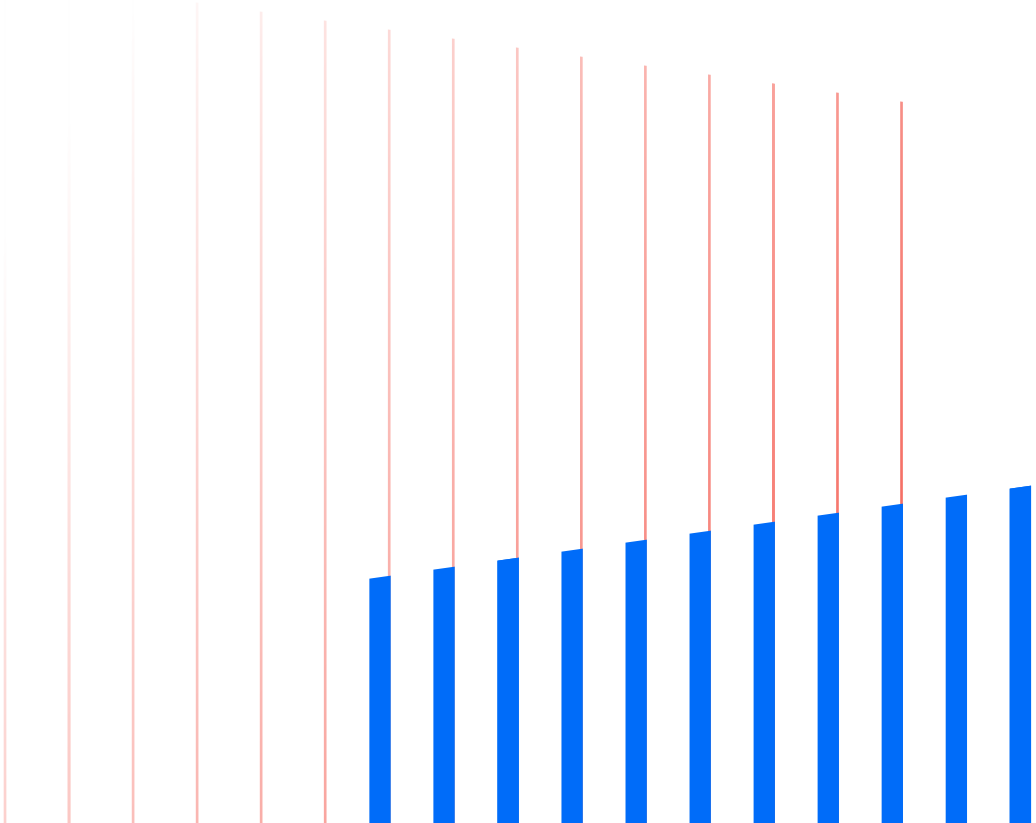
Section 1.0

Overview of Australia's governments, legal system and regulatory bodies

1.1 Australia's governments and legal system

Australia (also known as the Commonwealth of Australia) is a federation formed in 1901 with six states (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania), two territories (Northern Territory and Australian Capital Territory) and a number of small external territories. Australia inherited its system of government from England, based on the Westminster parliamentary model.

Australia has three levels of government – federal, state or territory and local (shown in the diagram on **page 11**). Foreign companies doing business in Australia must comply with laws made by all three levels of government. A business operating in a number of states and territories also needs to be aware that applicable state/territory laws can be different from each other, so the business may have to comply with different arrangements in different states or territories.



The three levels of government and their responsibilities

Federal

The Commonwealth Parliament derives its powers from the Australian Constitution. Its responsibilities are limited to specific subject areas (although these are still very broad).

Federal laws prevail over state and local laws to the extent of any inconsistency.

The Commonwealth Parliament also has the power to make laws (or override territory laws) in respect of the Northern Territory and the Australian Capital Territory.

Corporations Act

Antitrust / Competition

Income Tax

Banking

Employment

Climate / Environment

Insurance

Foreign Investment Approvals

Immigration

Infrastructure

Goods and Services Tax

Education

Financial Services

Health

Intellectual Property

State

State and territory parliaments have the power to pass laws for any purpose, except for certain purposes that have been specifically reserved for the Commonwealth Parliament under the Australian Constitution or referred by each of the states to the Commonwealth Parliament.

Although there is broad similarity among some state and territory laws covering the same subject matter, there can be important differences which affect the ease and cost of doing business across many states and territories.

Stamp Duty

Payroll Tax

Land Tax

Energy

Mining

Competitions

Planning

Health

Education

Infrastructure

Transfer of Land

Employment / OH&S

Local

Local governments are in charge of “local” issues. Their powers are usually limited and are primarily focused on providing services for local residents and businesses.

Building Approvals

Planning

Local Roads

Local Services

(parks, libraries)

1.2 Important regulatory bodies

Some of the important regulatory bodies in Australia are:

- the Australian Securities and Investments Commission (**ASIC**) which administers the *Corporations Act 2001* (Cth) (**Corporations Act**) and its regulations;
- the Australian Competition and Consumer Commission (**ACCC**) which monitors competition, fair trading and consumer protection issues. It principally administers the *Competition and Consumer Act 2010* (Cth) (**CCA**) which covers, among other things, anti-competitive practices, merger clearances, consumer protection and product safety and liability;
- the Australian Taxation Office (**ATO**) which is the statutory authority responsible for administering the Australian federal tax system. It administers the process of annual self-assessment of income tax and Goods and Services Tax (**GST**) and conducts reviews and audits. It is also responsible for the tax aspects and regulation of Australia's superannuation system;
- the Australian Securities Exchange (**ASX**) supports equities, derivatives and enterprise trading markets. It applies the ASX Listing Rules and ensures companies comply with certain disclosure and market awareness obligations; and
- the Australian Prudential Regulation Authority (**APRA**) is a statutory authority to promote prudent management of financial institutions. It regulates banks, life insurance companies, building societies, credit unions, friendly societies and superannuation funds.

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Section 2.0

Foreign investment review

2.1 Introduction

Australia generally welcomes foreign investment. The Australian government screens certain foreign investment proposals on a case-by-case basis to determine whether a particular proposal is contrary to the national interest or, in certain circumstances, national security only. This section explains some of the rules governing the screening process. However, Australia's foreign investment rules are complex, and this section is not exhaustive. Legal advice should always be sought.

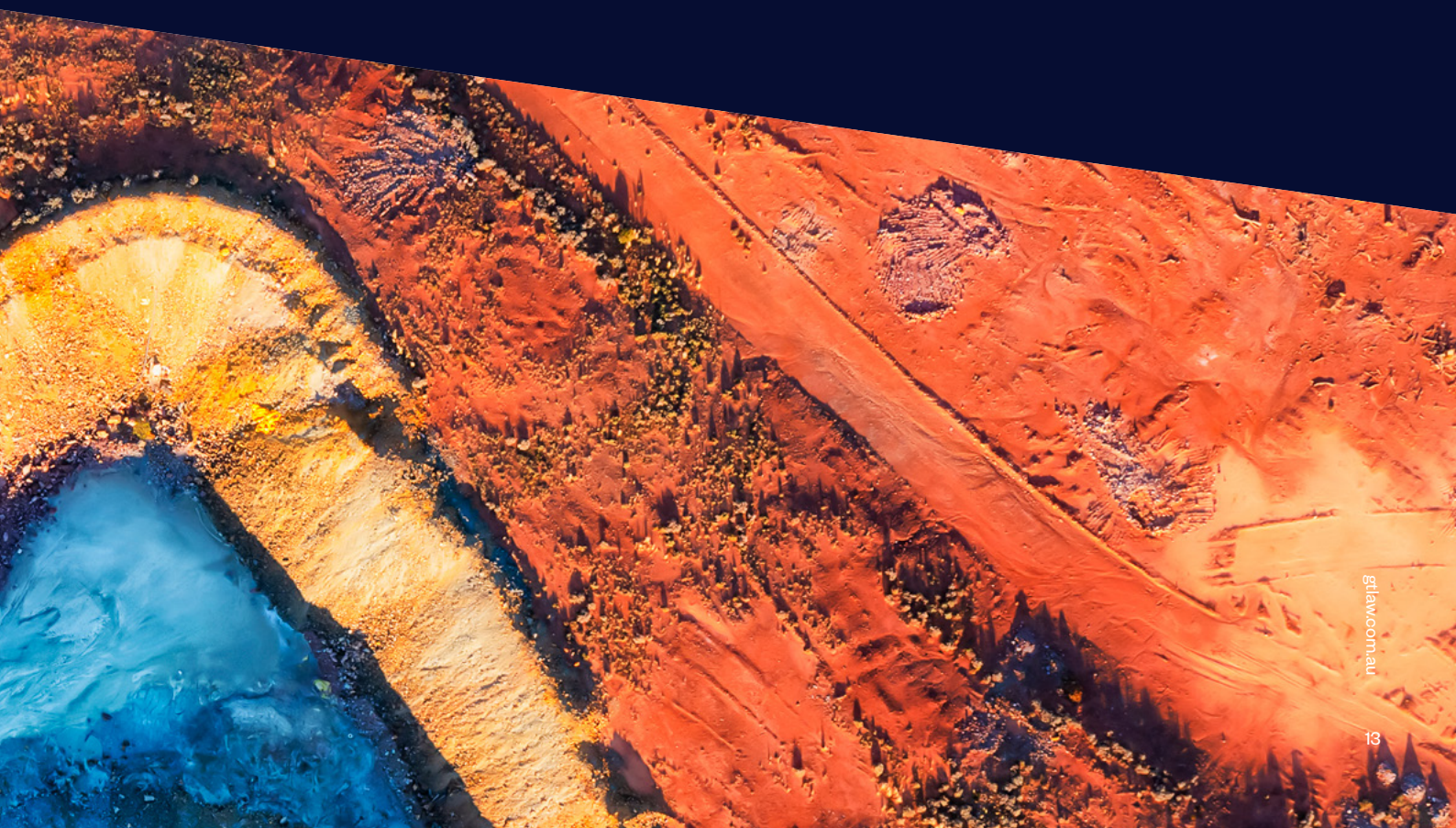
For more detailed information, please see our publication Navigating Australia's Foreign Investment Regime.

2.2 Key legislation

The main laws that regulate foreign investment in Australia are:

- the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**) and the *Foreign Acquisition and Takeovers Regulation 2015* (Cth) (**FATR**). Together these give the Australian Treasurer the power to review foreign investment proposals that meet certain criteria and to block such proposals that are contrary to the national interest (or national security, as applicable), or apply conditions to the way such proposals are implemented, to ensure they are not contrary to the national interest (or national security, as applicable); and
- the *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth) and its associated regulations. These set the fees for the various kinds of applications that may be made.

Separate legislation imposes other requirements in respect of foreign ownership in certain industries. This section does not cover these industry specific requirements.



2.3 Who is regulated

The legislation generally regulates foreign investment proposals by a 'foreign person'. A foreign person means:

An individual not ordinarily resident in Australia.

A foreign government or foreign government investor.

A corporation in which, or the trustee of a trust where in relation to the trust:

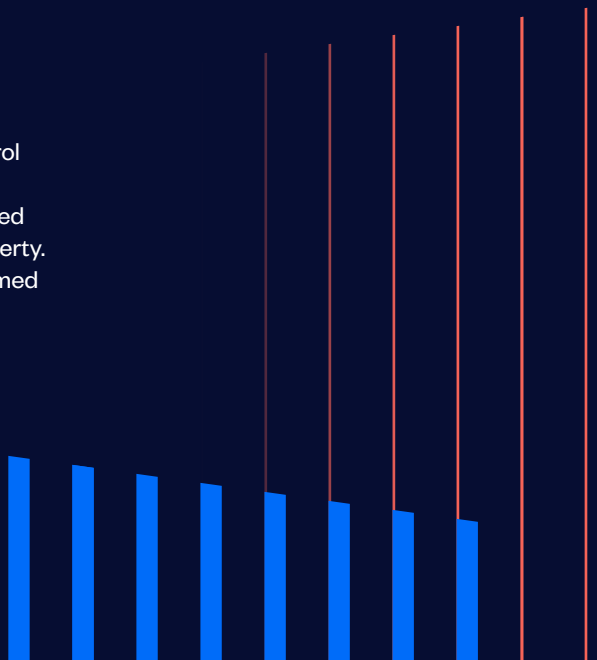
- an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
- 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest.

The general partner of a limited partnership where in relation to the limited partnership:

- an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
- 2 or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation, or a foreign government, hold an interest of 40% or more.

A substantial interest is generally an interest of 20% or more, and an aggregate substantial interest is generally an interest of 40% or more.

An interest of a specified percentage looks at ownership of shares, control of voting power and ownership or voting power that would exist if rights like options were exercised. In relation to trusts and unincorporated limited partnerships, the legislation also considers rights to distributions of property. Finally, the possession of certain veto powers can mean a person is deemed to have an interest of 20% or more.



2.4 Types of transactions that are regulated

General

There are four types of action which are regulated under FATA:

Significant actions:

The Treasurer has the power to make orders in relation to these kinds of transactions (including to block them, or to order divestments) if he considers the transaction to be contrary to the national interest. Significant actions only have to be notified if they are also notifiable actions or notifiable national security actions, but doing so and obtaining a notice of no objection cuts off the Treasurer's powers (subject to the last resort powers described below). Once notified, a significant action cannot proceed until a notice of no objection is obtained.

Notifiable actions:

These are a category of transactions which must be notified and cannot proceed until a notice of no objection is obtained. Most notifiable actions are also significant actions.

Notifiable national security actions:

The Treasurer has the power to make orders in relation to these kinds of transactions (including to block them, or to order divestments) if he considers the transaction to be contrary to national security. These actions must be notified and cannot proceed until a notice of no objection is obtained.

Reviewable national security actions:

These are transactions with an Australian nexus that are not significant actions, notifiable actions or notifiable national security actions. These transactions, together with significant actions for which approval is not sought, are subject to the Treasurer's "call in" powers, as described below, for a period of 10 years. Like significant actions, reviewable national security actions do not have to be notified, but doing so and obtaining a notice of no objection cuts off the Treasurer's powers (subject to the last resort powers described below). Once notified, a reviewable national security action cannot proceed until a notice of no objection is obtained. The Australian government encourages seeking approval for certain kinds of reviewable national security actions and significant actions.

Significant and notifiable actions

The key actions that are both significant and notifiable actions are as follows:

- the acquisition by a foreign person of a substantial interest in an Australian company or unit trust valued above the then current monetary thresholds;
- the acquisition by a foreign person of an interest in Australian land valued above the then current monetary thresholds (subject to certain exceptions);
- the acquisition by a foreign person of an interest of 10% or more (and in some cases interests below 10%) in an Australian company or unit trust or Australian business that is an agribusiness, where the value of the acquirer's existing and proposed new investments in the target exceed the then current monetary thresholds;
- the acquisition by a foreign person of an interest of 10% or more (and in some cases interests below 10%) in a company, unit trust or business that wholly or partly carries on an Australian media business, regardless of value; and
- certain acquisitions by foreign government investors, as described below.

The most common transactions that are significant actions but not notifiable actions are:

- offshore transactions by private foreign investors involving an Australian subsidiary valued above the then current monetary thresholds and that is not a land entity or media business; and
- asset deals.

Notifiable national security actions

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

- to start a national security business;
- to acquire an interest of 10% or more (and in some cases less than 10%) in a national security business;
- to acquire an interest of 10% or more (and in some cases less than 10%) in an entity that carries on a national security business;
- to acquire an interest in Australian land that, at the time of acquisition, is national security land; or
- to acquire a legal or equitable interest in an exploration tenement in respect of Australian land that, at the time of acquisition, is national security land.

Note that there are no monetary thresholds, and the tracing rules can operate to capture offshore transactions. Further, offshore entities can carry on a national security business.

A national security business is one which is carried on wholly or partly in Australia (whether or not for profit) which is publicly known, or could be known upon making reasonable enquiries, to be one or more of the following:

- it is an owner or operator of a critical infrastructure asset within the meaning of the *Security of Critical Infrastructure Act 2018* (**SOCI Act**) – note that the definition of 'critical infrastructure asset' was significantly broadened in December 2021 and includes assets across numerous categories of critical infrastructure, including ports, water, gas, energy, banking and financial markets, food and grocery, public transport, telecommunications and the like;
- it is a carrier or nominated carriage service provider to which the *Telecommunications Act 1997* applies;
- it develops, manufactures or supplies critical goods or critical technology that are, or are intended to be, for a military use, or an intelligence use, by defence and intelligence personnel, the defence force of another country, or a foreign intelligence agency;
- it provides, or intends to provide, critical services to defence and intelligence personnel, the defence force of another country, or a foreign intelligence agency;
- it stores or has access to information that has a security classification;
- it stores or maintains personal information of defence and intelligence personnel collected by the Australian Defence Force, the Defence Department or an agency in the national intelligence community which, if accessed, could compromise Australia's national security;
- it collects, as part of an arrangement with the Australian Defence Force, the Defence Department or an agency in the national intelligence community, personal information on defence and intelligence personnel which, if disclosed, could compromise Australia's national security; or
- it stores, maintains or has access to personal information on defence and intelligence personnel which, if disclosed, could compromise Australia's national security.

National security land is:

- certain defence premises; and
- land in which the Commonwealth, as represented by an agency in the national intelligence community, has an interest that is publicly known or could be known upon the making of reasonable enquiries.

Reviewable national security actions

The definition of reviewable national security action is broad and complex, but the action that will be most frequently caught is an acquisition of shares in a corporation that carries on an Australian business (or a holding entity of such a corporation), or units in an Australian unit trust (or a holding entity of such a unit trust), or assets in an Australian business, which has the result that a foreign person:

- acquires, or will acquire, an interest of 10% or more (and in some cases interests below 10%) in the entity; or
- will be in a position (or more of a position) to influence or participate in the central management and control of the entity; or
- will be in a position (or more of a position) to influence, participate in or determine the policy of the entity,

where the action is not otherwise a significant action, a notifiable action or a notifiable national security action. Importantly, this kind of action can (through operation of the tracing rules) capture foreign corporations if they carry on business in Australia.

2.5 Call in powers

In respect of any reviewable national security action, or any significant action for which approval was not sought, the Treasurer retains the power for 10 years after the action is taken to "call in" the transaction for review if she or he considers that the transaction poses national security concerns. Notifying the transaction and obtaining a notice of no objection cuts off this power (subject to the last resort powers described below).

This call in power covers a broad range of transactions. The government has identified a number of categories of businesses in respect of which it encourages investors to seek advance approval (assuming the transaction is not otherwise a notifiable action or notifiable national security action). Advice should be sought as to whether your transaction falls within this guidance.

2.6 Last resort review powers

The Treasurer can re-review actions notified after 1 January 2021 where approval has been given to determine whether a national security risk relating to the action exists, and if certain conditions are satisfied, the Treasurer may impose conditions, or vary or revoke any conditions that have been imposed, and may make orders prohibiting an action or requiring the undoing of a part or whole of an action. These review powers are subject to strict protocols and are expected to be used very rarely.

2.7 Thresholds

The system of monetary thresholds is complex – thresholds differ depending on the action being taken and the origin and characterisation (as foreign government investor or not) of the person taking the action. The thresholds also are indexed annually. For 2025, the main thresholds are:

- for acquisitions by private investors, in each case not covered by other special heads of approval – $339m;
- for acquisitions by private investors in agribusiness – $73m, taking into account all prior investments in the relevant target (private investors from Chile, New Zealand and the US are exempt from the special agribusiness rules);
- for acquisitions by private investors in developed commercial land – $339m ($73m for sensitive land);
- for acquisitions by private investors in agricultural land – $15m taking into account all priority investments in agricultural land;
- for acquisitions by foreign government investors in any land, or private investors in vacant commercial land, residential land or national security land – $0;
- for acquisition by any person of a media business or national security business – $0.

Treaty country investors are in some cases subject to a higher thresholds ($1,464m for general business acquisitions and developed commercial land), but the treaties vary in respect of carve-outs. In addition, the treaty threshold is only available if the acquirer is an operating entity incorporated in the relevant jurisdiction (or a subsidiary of such an entity incorporated in that jurisdiction).

The way that the threshold is measured also varies, depending on the type of acquisition.

2.8 Special rules for foreign government investors

A "foreign government investor" includes:

- a foreign government;
- an individual, corporation or corporation sole that is an agency or instrumentality of a foreign country but is not part of the body politic of that foreign country (referred to below as a "separate government entity");
- a corporation in which, or trustee of a trust where in relation to the trust, or general partner of a limited partnership where in relation to the limited partnership, (1) a foreign government, separate government entities or foreign government investors from one country hold a 20% or more interest, or (2) foreign governments, separate government entities or foreign government investors from multiple countries hold a 40% or more interest.

The definition of foreign government investor captures not only state-owned enterprises and sovereign wealth funds, but also things like public sector pension funds, the investment funds into which state-owned enterprises, sovereign wealth funds and public sector pension funds invest and, due to tracing rules, portfolio companies for such investment funds.

There is now a carve out for investment funds in respect of the 40% test where the investors meet specific passivity requirements.

The following transactions by foreign government investors are both significant actions and notifiable actions:

- the acquisition of an interest of 10% or more (and in some cases interests below 10%) in any Australian company, unit trust or business (including offshore businesses that have an Australian nexus), subject to limited exceptions, including where:
  - a foreign government investor is acquiring securities in an offshore entity that has an Australian subsidiary;
  - the assets of the Australian subsidiary are worth less than $73m;
  - those assets constitute less than 5% of the total assets of the target group; and
  - none of those assets are used in a sensitive business or a national security business);
- the acquisition of an interest in Australian land, regardless of value;
- the starting of an Australian business; and
- acquiring a legal or equitable interest in a tenement (including tenements that would not be classified as land) or an interest of at least 10% in securities in an entity where the value of the tenements exceeds 50% of the total asset value of the entity.

2.9 National interest test

In determining whether a foreign investment proposal is contrary to the national interest, the Australian Government is able to examine any factors that it considers appropriate. Typically, these factors include the impact of the foreign investment proposal on: national security, competition (noting that this is a different test to the test applied by the Australian Competition and Consumer Commission in examining merger clearances), the economy and the community (such as the investor's plans to restructure the business in Australia after the acquisition) and other government policies such as tax and the environment, as well as the character of the investor.

Note that notifiable national security actions and reviewable national security actions are reviewed against a narrower national security test only.

2.10 Penalties

Breaches of the act are subject to significant criminal and civil penalties. Criminal penalties include up to 10 years imprisonment or monetary penalties of up to $4,950,000 million for individuals and up to $49.5 million for corporations.

The FATA also contains significant civil penalties for certain breaches of the Act. The maximum civil penalty for breaches such as failure to give notice to the Treasurer before taking a notifiable action, taking a significant action in certain circumstances without having first obtained a no objection notification, or breaching conditions contained in a no objection notification, is the lesser of:

- $825 million; or
- the greater of:
  - $1.65 million for individuals ($16.5 million for corporations);
  - an amount determined by reference to the consideration or market value for the action.

The FATA also contains a 3-tier infringement notice regime for contraventions of FATA which applies as follows:

- Tier 1 penalties apply if the person self-discloses an alleged contravention of the FATA before the person is notified by the Commonwealth that the conduct is being investigated;
- Tier 2 applies in all other cases, except (generally) for high-value acquisitions that are captured by tier 3; and
- Tier 3 for non-compliance in relation to high-value acquisitions (ie above $5 million for acquisitions of residential land or above $275 million in other instances).

The penalties that can be issued under the infringement notice regime are set out in the table below.

Tier	Individual		Corporation	
	Penalty units	$	Penalty units	$
1	12	3,960	60	19,800
2	60	19,800	300	99,000
3	300	99,000	1,500	495,000

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Section 3.0

Establishing a business presence in Australia

3.1 Branch offices versus subsidiaries

The main ways in which a foreign company may conduct business in Australia are by:

- establishing a branch office by registering the foreign company in Australia; or
- establishing a subsidiary.

Some differences between branch offices and subsidiaries are summarised in the following table.

Issue	Branch office	Subsidiary
Corporate law issues	▪ Not a separate legal entity (liabilities are those of the foreign company). ▪ Foreign company must be registered with ASIC. ▪ Assigned Australian Registered Body Number. ▪ Annual lodgement of financial reports with ASIC, including financial accounts of foreign company unless relieved by ASIC (note: ASIC usually accepts reports prepared in accordance with laws of the foreign company's origin).	▪ Separate legal entity where liabilities remain with subsidiary unless parent / foreign company gives guarantees or subsidiary trades while insolvent. ▪ Company is registered with ASIC (third parties in Australia are more likely to deal with an Australian company). ▪ Assigned Australian Company Number. ▪ Annual lodgement of financial reports with ASIC unless relieved by ASIC (note: small proprietary companies may be relieved but control by a foreign company may exclude such relief).
Foreign investment review	▪ Approval may be required before assets/ land are acquired.	▪ Approval may be required before assets/land are acquired.
Taxation	▪ May be taxed as a separate entity in Australia. ▪ May be taxed on all income sourced from Australia at the applicable tax rate. ▪ May be subject to GST obligations and obliged to obtain Australian Business Number (**ABN**).	▪ Generally a resident for tax purposes. ▪ Taxed on all income regardless of source at the applicable tax rate. ▪ May be subject to GST obligations and obliged to obtain ABN.

3.2 Branch offices

(a) When is opening a branch office required

A foreign company is required to be registered with ASIC (which has the effect of establishing a branch office) if it "carries on business" in Australia.

For registration purposes, a foreign company "carries on business" in Australia if it:

- has a place of business in Australia;
- establishes or uses a share transfer office or share registration office in Australia;
- 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; or
- offers debentures or is a guarantor body for debentures in Australia.

The Corporations Act contains a number of exceptions which generally only apply to passive or isolated transactions. For example, a foreign company is likely to be carrying on business in Australia if it made investments in Australia that required repeated administration or management, or if it repeatedly made contracts in Australia.

Failure to register a foreign company carrying on business in Australia is a strict liability offence and could result in fines by ASIC and the courts.

(b) Reporting obligations

The registered foreign company must lodge the following financial statements (which ASIC may require to be audited) with ASIC once a year:

- balance sheet;
- profit and loss statement;
- cash flow statement; and
- any other document the company is required to prepare by the law of its place of origin.

(c) Branches and tax

For Australian income tax purposes, the mere registration of a foreign company with ASIC does not create a taxable presence in Australia. The jurisdiction of that foreign entity and the extent and nature of the operations in Australia need to be considered in determining whether the foreign company will be taxed in Australia.

3.3 Establishing a subsidiary

The following types of companies can be registered with ASIC:

- a proprietary company either limited by shares or with unlimited share capital; or
- a public company limited by shares, limited by guarantee, unlimited with share capital or with no liability (only if a mining company).

The most common type of company is a proprietary company limited by shares, followed by a public company limited by shares.

A company must have at least one member (shareholder). A company cannot have more than 50 non-employee shareholders.

A proprietary company must also have at least one director, and at least one of its directors must ordinarily reside in Australia.

A public company must have at least three directors, and at least two of its directors must ordinarily reside in Australia. The Corporations Act and case law impose specific duties on directors and secretaries.

A director must obtain a director identification number (**DIN**) prior to being appointed as a director. The procedure for obtaining a DIN for non-Australian directors can be onerous, so this should be factored into planning early on.

A proprietary company can generally be set up in Australia within one business day, provided all the relevant information regarding directors, shareholders, company type and share capital is known.

A proprietary company must appoint an Australian resident individual as its public officer within three months after commencing business in Australia and notify the ATO of the appointment or deriving income from property. The public officer of a company is responsible for doing all things required to be done by the company under Australia's federal tax law. **Section 5** examines regulation of companies in more detail.

3.4 Other Structures

Alternative options such as trusts and partnerships are available and should be considered in determining the most appropriate structure for the business.

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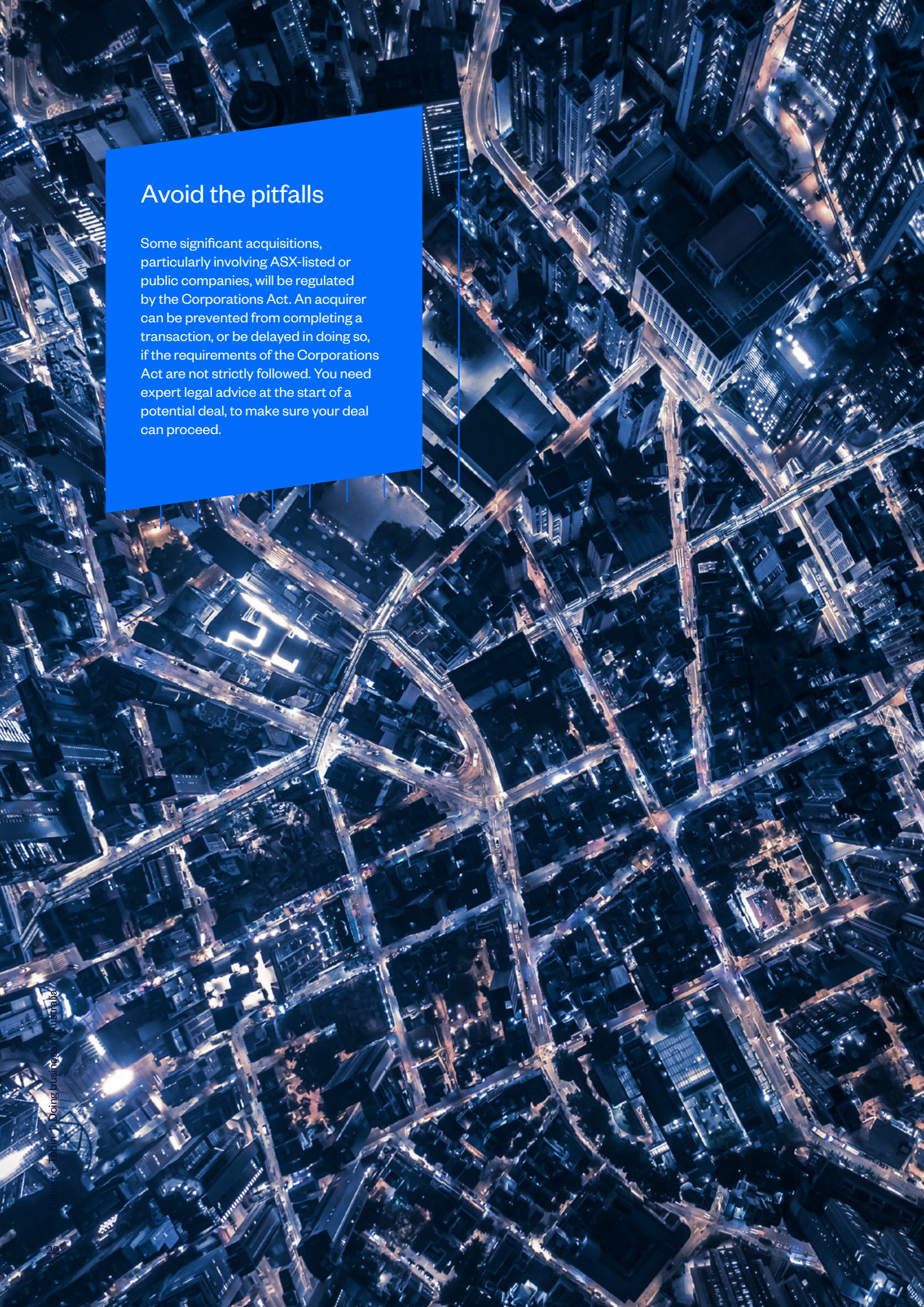
Section 4.0

Acquisitions

As part of its entry into Australia, or to expand its Australian operations, a foreign company may choose to acquire an existing business. Some significant acquisitions of Australian companies or trusts will be regulated by the Corporations Act.

Did you know?

The Takeovers Panel can make orders requiring the sale of shares or preventing the completion of a deal where "unacceptable circumstances" exist, relating to the acquisition of a 5%+ interest or the control of a company. If you are considering any substantial transaction involving a listed or public company or trust, get advice on how to manage the risk of involvement by the Takeovers Panel.



Avoid the pitfalls

Some significant acquisitions, particularly involving ASX-listed or public companies, will be regulated by the Corporations Act. An acquirer can be prevented from completing a transaction, or be delayed in doing so, if the requirements of the Corporations Act are not strictly followed. You need expert legal advice at the start of a potential deal, to make sure your deal can proceed.

4.1 Significant thresholds

There are a number of thresholds which are relevant to any foreign entity that wishes to acquire a substantial stake in a company listed on the ASX, or an unlisted company that has more than 50 shareholders.

Some of these thresholds also apply to other companies. You will also need to consider whether foreign investment approval, or any other approval, is required.

Threshold	Description
5%	A person with an interest of 5% or more in a company listed on the ASX (which has a broader meaning than simply being a registered shareholder) must file a substantial shareholder notice with the ASX and with the company. This notice is available to the public through the ASX website. Each change of 1% or more in the holding must also be notified, until the holding has fallen below 5%.
>10%	A person with a greater than 10% interest can prevent a bidder from satisfying the tests to compulsorily acquire any remaining shares.
>20%	There are limited methods by which an interest (which again has a broader meaning than simply being a registered shareholder) of more than 20% can be obtained. The two primary methods are by a takeover bid or a scheme of arrangement (see **section 4.2**).
>50%	Voting control is achieved for ordinary resolutions (eg appointment and removal of directors).
75%	A shareholder can ensure a special resolution is passed.
90%	Compulsory acquisition (squeeze out) of minority shareholders is generally permitted.
100%	Complete ownership and control of the target is achieved.

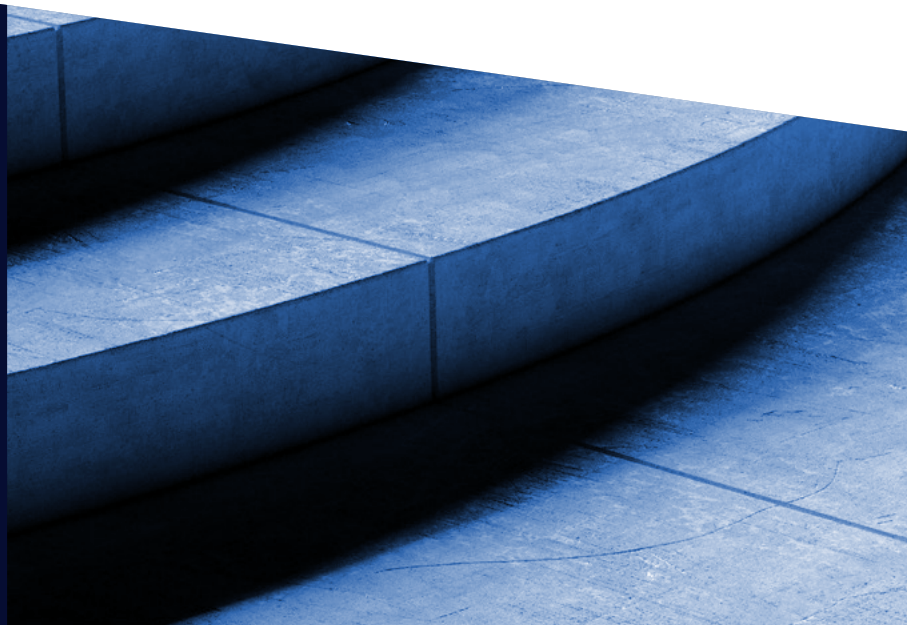
4.2 Permitted means of acquiring more than 20%

The two primary ways in which an investor can acquire a holding of more than 20% in a listed company are by a takeover bid and a scheme of arrangement. The key features are described in the following table.

Takeover bid	Issue	Scheme of arrangement
A takeover bid can be used for either friendly acquisitions or acquisitions which are contested / hostile.	Agreed or contested?	A scheme of arrangement requires the cooperation of the target company, so can only be used in a friendly transaction.
The acquirer can offer cash, shares in itself (or a related company), a combination of cash and shares, or a choice between various forms of payment.	Offer price	The acquirer can offer cash, shares in itself (or a related company), a combination of cash and shares, or a choice between various forms of payment.
The acquirer sends a bidder's statement to all target company shareholders, providing details of the offer, source of funds, intentions in relation to the target and the formal offer terms. The target company sends a target's statement to all shareholders, containing the directors' recommendation whether to accept or reject the bid. The shareholders must be given at least one month to accept the offer (although it usually takes more than one month to satisfy all conditions of the offer). The offer can be for up to 12 months to allow conditions to be satisfied. Payments to shareholders are made when all conditions are satisfied or waived.	Process	The target company prepares a notice of meeting and explanatory statement, including the directors' recommendation, for a meeting to approve the proposed scheme of arrangement. The bidder will provide information required for the notice of meeting. ASIC is given at least two weeks to review the draft, before the target company seeks court approval to convene the meeting. The meeting documents are sent to shareholders, at least 28 days before the meeting. If shareholders approve the transaction, a final court approval is obtained. Payments to shareholders are then made.

Avoid the pitfalls

There are a number of other permitted ways to exceed the 20% limit, such as by obtaining shareholder approval to acquire shares. There are strict requirements to take advantage of these exceptions, so obtain legal advice before you get near the 20% limit, to make sure you comply.



Takeover bid	Issue	Scheme of arrangement
An offer will typically be subject to conditions such as: ▪ minimum acceptances; ▪ regulatory approvals (eg foreign investment and/or merger clearance); and ▪ no material adverse change in the target's business.	Conditions	An offer will typically be subject to conditions such as: ▪ regulatory approvals (eg foreign investment and/or merger clearance); ▪ no material adverse change in the target's business; and ▪ a favourable expert's report.
Approval by shareholders at a general meeting is not required. However, to compulsorily acquire any dissenting minorities, the acquirer must have at least 90% of all shares at the end of the bid.	Shareholder approval requirements	The proposal must be approved by 75% of the votes cast (by number of shares) and 50% of the number of members who vote (by headcount).
A minimum of three months from announcement of the deal to completion.	Timing	Approximately three months from announcement of the deal to completion.
The acquirer must have at least 90% of the shares at the end of the bid, to be able to compulsorily acquire any dissenter's shares on the same terms as the bid.	Squeeze out of dissenters	Not required as the scheme binds all shareholders, whether or not they voted in favour of the scheme.

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Section 5.0

ASIC and the laws and regulations governing corporations

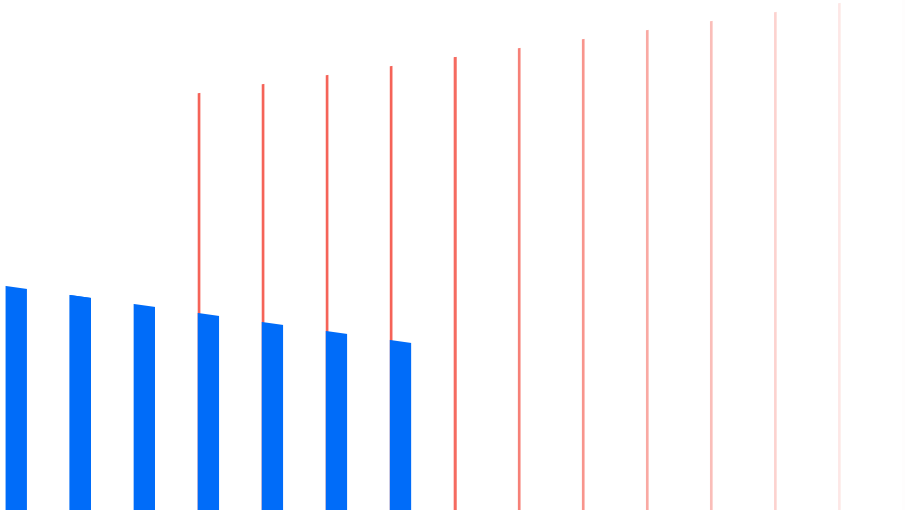
The Corporations Act, and regulations made under the Corporations Act, are the core of regulation of companies in Australia. The Corporations Act and regulations are administered by ASIC. ASIC has issued a large number of policies, or regulatory guides, to help companies, directors and their advisers interpret and comply with the Corporations Act and regulations as well as various legislative instruments which amend the operation of the Corporations Act and regulations in certain circumstances. These are available on the ASIC website.

The Corporations Act governs:

- the structures by which a foreign company can conduct business in Australia (see **section 3**);
- the procedure for acquiring a significant stake in public companies (see **section 4**);
- director duties, shareholder protections, reporting and other corporate governance matters (discussed in the remainder of this section);
- fundraising (see **section 6**) and the conduct of the financial services industry (see **section 7**); and
- insolvency.

Did you know?

The Takeovers Panel can make orders requiring the sale of shares or preventing the completion of a deal where "unacceptable circumstances" exist, relating to the acquisition of a 5%+ interest or the control of a company. If you are considering any substantial transaction involving a listed or public company or trust, get advice on how to manage the risk of involvement by the Takeovers Panel.



5.1 Director duties

Directors (and other statutory officers) in Australia have duties imposed upon them by the Corporations Act, the common law and particular statutes. Although there is overlap among these duties in some cases, the consequences of breaching a duty under the common law may be different to the consequences for breaching a statutory duty. Directors should always seek advice prior to joining the board of an Australian corporation, or any time when they are unsure as to their duties.

It is also possible to be deemed an officer or director of an Australian company even where you haven't been formally appointed as one.

The table below provides a snapshot of these duties:

Source	Duty
Common law	▪ to act in good faith; ▪ to act in the best interests of the company; ▪ to act for a proper purpose; ▪ to give adequate consideration; ▪ to not fetter discretions; and ▪ to avoid conflicts of interest.
Corporations Act	▪ to act with the care and diligence of a reasonable person; ▪ to act in good faith and for a proper purpose; ▪ to disclose any material personal interest; ▪ to not improperly use position; ▪ to not improperly use information; ▪ to prevent insolvent trading; and ▪ duties around financial reporting and disclosure.
Other statutes	Other statutes may impose personal liability on directors, notably laws governing tax, competition, occupational health and safety and protection of the environment.

5.2 Protection of minority shareholders

The Corporations Act contains some provisions to protect minority shareholders. These statutory rights include:

- being able to bring legal proceedings in the name of the company (eg against directors) with the court's permission;
- being able to inspect the company's books, with the court's permission;
- being able to seek court orders (including orders to wind up the company or for a sale of a shareholder's shares) where the company has been run in a way which is unfairly prejudicial to a member or not in the interest of all members as a whole;
- the right to approve some transactions between public companies and their related parties (such as majority shareholders and directors); and
- being able to call shareholder meetings or require the company to put a resolution (eg to appoint or remove a director) to shareholders for approval.

Did you know?

ASIC stores information about all Australian registered companies. This can be accessed (for a fee) to get basic information about companies, including details of shareholders and directors and the share structure, and copies of documents lodged with ASIC.

5.3 Financial reporting and access to information

Reporting obligations differ depending on whether a company is a small proprietary company, a large proprietary company or a public company. A large proprietary company and a public company will be subject to reporting obligations. A small proprietary company may also be subject to reporting obligations. A company will be a small proprietary company if it is a proprietary company (ie its name includes "Pty Ltd") and satisfies two of the following tests:

- its consolidated revenue for the financial year is less than $50 million;
- its consolidated gross assets are less than $25 million at the end of the financial year; and
- it and its controlled entities have less than 100 employees at the end of the financial year.

Avoid the pitfalls

The Corporations Act allows a company to return capital to its shareholders in a variety of ways. Different approval, filing and timing requirements and tax treatments apply to the different methods, so you should get advice to make sure the Australian company is returning capital in the most tax efficient and compliant way.

If a company is a "small proprietary company", it does not have to lodge accounts unless:

- the company is directed by shareholders with 5% or more of the voting shares to prepare and lodge accounts;
- ASIC directs the company to prepare and lodge accounts;
- the company is controlled by a foreign company and its financial results are not consolidated into financial statements that another company or a registered foreign company has lodged with ASIC; or
- the company has one or more crowd-sourced funding shareholders.

Once a company has lodged accounts, the accounts are available to the public through ASIC information brokers (for a fee). ASIC also makes available basic information about the shareholders, share structure, directors and company secretary. This can provide a way of getting information about counterparties to contracts or potential investors as part of a due diligence exercise.

5.4 Dividends and capital management

Australian companies are not limited by law to paying dividends from the profits of the company – they can pay any amount as a dividend, provided the company has a sufficient surplus of assets over liabilities, the payment is fair and reasonable to the shareholders as a whole and the payment does not prejudice the company's ability to pay its creditors.

Even though this provides substantial flexibility around the amount of permitted dividend payments, a company may also wish to return capital to its shareholders, which may result in a different tax outcome. Franking credits (which broadly represent corporate tax paid by the company) may be able to be passed to shareholders in certain circumstances.

5.5 Market offences

The Corporations Act creates a number of offences which are relevant to anyone offering financial products, trading in financial products or advising others on financial products (formally or informally). These include prohibitions on:

- insider trading (which includes dealing, arranging for someone else to deal or providing price-sensitive, non-public information to a third party who could be expected to deal in the relevant financial products);
- carrying out transactions which create an artificial trading price or maintain the price at an artificial level;
- causing a false or misleading appearance of active trading of financial products on a financial market or of the trading price of financial products;
- undertaking fictitious or artificial transactions which manipulate the trading price;
- making statements that are false or misleading and which may induce someone to trade or have the effect of increasing, reducing or stabilising the market price;
- inducing someone to trade by making statements
- that are misleading, false or deceptive; and
- engaging in dishonest conduct in relation to financial products or services.

There can be criminal and civil consequences of breaching these provisions.

ASIC has extensive powers to compel companies and individuals to provide information to ASIC, for the purposes of an investigation into any of these (or other) offences. Any such requests from ASIC need to be responded to carefully and thoroughly after seeking legal advice.

5.6 ASIC exemptions

ASIC has powers to grant waivers from some obligations under the Corporations Act, or modify the operation of the Corporations Act, where there are compelling reasons to do so, or to correct an anomaly in the law. Waivers or modifications can be conditional or unconditional. Waivers and modifications can be granted in respect of:

- the obligations relating to fundraising and disclosure documents;
- the provisions relating to takeovers of listed companies and trusts;
- the obligation to prepare and lodge audited accounts; and
- the regulation of the financial services industry.

If an application for a waiver or modification raises novel issues, it may take some weeks for ASIC to consider and respond to the application. This needs to be taken into account in undertaking any transaction which needs an ASIC waiver or modification to be effected.

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Section 6.0

Raising capital – disclosure to investors

Under the Corporations Act, companies – whether Australian or not – are required to provide prospective investors with a disclosure document, such as a prospectus, to allow them to make an informed decision about their investment, unless an exception to this requirement applies. The content of such documents is regulated by the Corporations Act.

Common exceptions include:

- small-scale offerings (offers that result in less than 20 investors in a 12-month period, raising less than $2 million);
- offers to sophisticated, professional or experienced investors (each term as defined in the Corporations Act);
- offers with a minimum subscription of $500,000;
- offers to existing shareholders under a dividend reinvestment plan or bonus share plan;
- some rights issues/entitlement issues made to existing shareholders in listed companies;
- offers to employees under some employee share plans;
- some offers of listed foreign securities as part of the consideration for a takeover bid; and
- some offers of listed foreign securities, to existing shareholders, under a rights issue.

Even where one of these exceptions applies, the issuer will still have obligations with which it must comply, including that any documents or other information provided must not be misleading or deceptive or contain any false statements. The issuer may also be required to lodge documents with ASIC in connection with the offer before making any offers in Australia.

There are both criminal and civil consequences of breaching the disclosure obligations in the Corporations Act.

Did you know?

Australia has a regulatory framework for crowd-sourced equity funding (**CSEF**) by public and proprietary companies from retail investors. The framework reduces the regulatory barriers to crowd-funded investments in small and start-up businesses, and creates certain licensing and disclosure obligations for CSEF intermediaries.

Did you know?

The ASIC, Australia's corporate regulator, has also released Regulatory Guides 261 and 262 to assist companies seeking to raise funds through CSEF and intermediaries seeking to provide CSEF services respectively.

Under the framework, eligible companies can raise up to $5 million from investors in any 12 month period.

For further information click here to visit our website.

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Section 7.0

Financial services

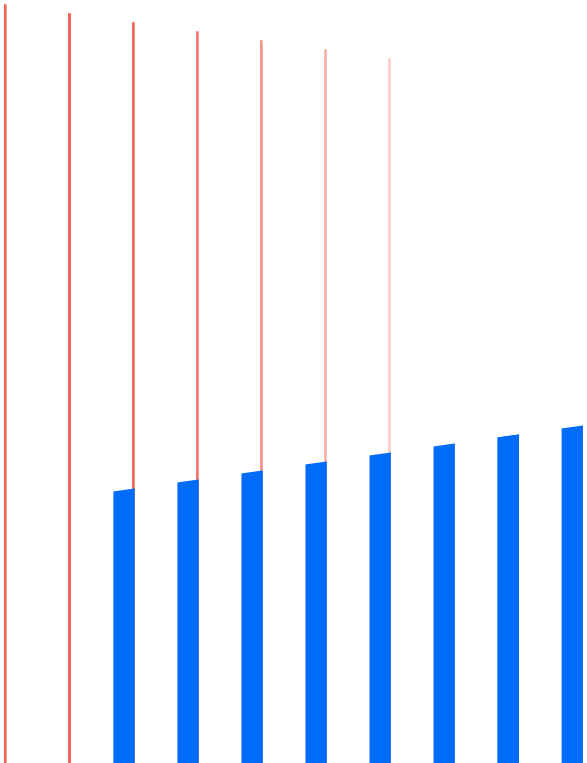
7.1 Licensing requirement

An entity carrying on a financial services business in Australia must hold an Australian financial services licence (**AFSL**), unless an exemption applies.

Statutory and common law tests are applied in order to determine whether a financial services business is being carried on in Australia and an entity may be required to hold an AFSL even though it has no physical presence in Australia.

AFSLs are issued by ASIC and licence holders are subject to a range of obligations, including in relation to capital adequacy, organisational competence, reporting and holding client assets.

Licence holders providing personal advice to retail clients are subject to a duty to act in a client's best interest, and fee disclosure requirements. Licence holders providing personal or general advice to retail clients are subject to a ban on conflicted remuneration.



7.2 Financial services and financial products

Broadly speaking, "financial services" include:

- provision of financial product advice;
- dealing in a financial product;
- making a market for a financial product;
- operating a registered scheme under the Corporations Act;
- providing a custodial or depository service;
- providing a crowd-funding service;
- providing a claims handling and settling service; or
- providing a superannuation trustee service.

A "financial product" is broadly defined and includes a facility through which, or through the acquisition of which, a person makes a financial investment, manages financial risk or makes non-cash payments.

Both the definitions of "financial service" and "financial product" are complex and subject to express inclusions, qualifications and exceptions. Examples of transactions which may be affected by the Australian financial services regulatory regime include:

- issuing securities, shares, stocks, deposits, debentures, bonds, managed investment scheme interests (typically interests in collective vehicles structured as a unit trust or partnership), or insurance to persons in Australia;
- entering into derivative transactions (such as swaps, options or forward transactions in currency) with persons in Australia through either the over the counter markets or through automated dealing systems;
- effecting secondary market trades in securities, shares, stocks, debentures, bonds or managed investment scheme interests as an agent or trustee of a person in Australia; and
- holding or managing investments in securities, shares, stocks, debentures, bonds, managed investment scheme interests, or interests in such products, on behalf of persons in Australia.

7.3 Retail vs wholesale

The Australian financial services regulatory regime differentiates between wholesale and retail clients. Additional conduct and disclosure requirements apply where financial services are provided to retail clients. Some exemptions from licensing, disclosure and conduct obligations are available to entities that provide financial services to wholesale clients only.

7.4 Foreign financial services providers

A foreign financial services provider (**FFSP**) that intends to provide financial services in Australia must hold an AFSL, a Foreign Australian Financial Services Licence (**FAFSL**) or be entitled to rely on an exemption.

At the time of publication, the regulation of FFSPs intending to provide financial services in Australia is in a state of flux. It is expected that a languishing bill with proposed exemptions for FFSPs to provide financial services in Australia will be re-introduced into parliament in early 2025. The bill will likely propose (1) an exemption for FFSPs regulated by a comparable regulator; (2) an exemption for FFSPs that provide financial services to professional investors only; and (3) an exemption for market makers that provide the service from outside of Australia.

In the interim, until 31 March 2026, ASIC will consider new applications for individual temporary licensing relief or new standard AFSL or FAFSL applications from entities that cannot rely on the transitional, limited connection relief or passport relief described below.

The Foreign AFSL regime permits entities regulated overseas by specified sufficiently equivalent regulatory regimes to be eligible to apply for a FAFSL to provide certain financial services to wholesale clients in Australia. The FAFSL regime recognises a greater number of regulatory regimes than passport relief as being sufficiently equivalent, being regulatory regimes in Denmark, Germany, Hong Kong, France, Luxembourg, Ontario in Canada, Singapore, Sweden, the United Kingdom and the United States. FFSPs from other jurisdictions can also apply to extend the FAFSL regime to other regulatory regimes.

Limited connection relief is available until 31 March 2026 to an FFSP that is carrying on a business in Australia only because it is inducing, or intending to induce, wholesale clients in Australia to use its financial services.

Entities currently relying on "passport" relief under the prior FFSP regime can continue to do so until 31 March 2026. Passport relief was available to certain FFSPs providing financial services to wholesale clients only, where such FFSPs are regulated by certain foreign regimes considered by ASIC to be sufficiently equivalent to the Australian regime.

Funds management relief is slated to commence 1 April 2026 and provides licensing relief to some providers of funds management financial services to certain categories of Australian professional investors.

Australia is also a participating economy to the Asia Region Funds Passport (**ARFP**), which is an initiative designed to facilitate the offer of interests in eligible funds to investors across other participating economies in the region, with reduced regulatory requirements. Broadly, the ARFP requires an eligible fund to apply to its home regulator for a passport and comply with home economy requirements in order to be registered (for Australian funds, this effectively requires registration as a managed investment scheme with ASIC). Once registered, the fund must notify the host regulator and meet host economy requirements relating to disclosure, distribution and complaints handling (for offshore funds wishing to be offered in Australia, this effectively requires compliance with the corresponding obligations for registered managed investment schemes).

7.5 Fintech and Web3

Australia has one of the most successful and fastest growing fintech and web3 sectors in the world. Key to the success of the sector includes a stable and technology-neutral regulatory environment; sector participation in driving reform; close business and cultural ties with Asia; and a diverse and active talent pool. However, as pressure is mounting in capital raising and sector investment, fintechs and web3 businesses are needing to focus on sustainable growth and with an eye on the direction of regulatory reforms.

Legal and regulatory priority areas for fintech and web3

Most of the chapters in this guide will be relevant to fintech and web3 businesses operating in Australia. In particular:

Financial services regulation:

For example, payment solution providers, market place lenders, micro-investing, cryptoasset businesses and service providers may be carrying on a financial services business and be regulated under financial services laws.

Consumer protection:

Fintech and web3 business that are not regulated under the financial services laws will be regulated under the consumer protection laws including in relation to misleading and deceptive conduct and unfair contract terms.

Intellectual property:

Copyright, domain names and confidentiality are common legal and regulatory priorities for fintech and web3 businesses.

Privacy and data protection:

Laws relating to the collection, storage, use and destruction of personal information obtained by fintech and web3 clients, and data protection in a decentralised ecosystem.

Proposals for fintech and web3 regulation

Over the past ~4 years, there have been many proposals for reforming how fintech and web3 is regulated in Australia, however very few have progressed into law or regulator policy.

These proposals are informative as to the direction of future laws and regulation. For example:

- The 2022 Crypto Asset Secondary Service Providers: Licensing and Custody Requirements proposed a regime for introducing licensing (similar to an AFSL) and custody obligations for crypto asset holders.
- In February 2023, the government released its Token Mapping consultation paper seeking feedback to assist in building a shared understanding of cryptoassets in the Australian financial services regulatory context. The purpose of the paper is to explore how existing regulation applies in the crypto sector and to inform future policy choices.
- In November 2024, the Australian Senate passed reforms to Australia's Anti-Money laundering laws that will regulate a wider range of digital asset service providers.
- In November 2024, the Treasury released a consultation paper on a proposed Crypto Asset Reporting Framework, exploring options for adding crypto asset reporting into Australian tax law and a common reporting standard.

Future themes for fintech and web3

Data is currently and will continue to be a major theme in fintech. Data security, and opportunities to use data to provide better consumer experience and outcomes (eg digital identity), will be a focus for fintech and web3 businesses as well as government, regulators and legislators. Similarly, as artificial intelligence capabilities mature the many and varied use cases for this technology is growing.

A consistent and sensible approach to regulating crypto and web3 is needed to provide trust and stability, and encourage mainstream adoption. Australian crypto businesses are currently navigating "regulation by enforcement" initiated by ASIC and the ACCC. Consultation papers, draft legislation and substantial reforms to payments and crypto regulation are all on the horizon. There is work that businesses can be doing in readiness for reform.

Most regulators have expressed the importance of good consumer outcomes as a key regulatory priority. This is reflected in new laws regulating the design and distribution of financial products and guidance regarding better disclosure and marketing practices. The fintech and web3 sector – which is built on disruption, innovation and capturing market share from incumbents with sticky customer bases – will be ahead of the market in adopting a consumer-centric approach to product and service design and delivery.

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Section 8.0

Banking

8.1 Australia's banking system

The key lending institutions in the Australian financial system consist of commercial banks, retail banks and investment banks (including branches and subsidiaries of foreign banks). Non-bank financial institutions also operate within the system.

The key regulator of the banking system is APRA which ensures that organisations in the Australian financial sector manage their risk appropriately and that the stability of the financial system is not jeopardised.

APRA is also the body which determines whether to authorise an entity to conduct banking business and grants authorities under the *Banking Act 1959* (Cth) for authorised deposit-taking institutions. Once authorised, it is possible for a foreign bank to conduct business in Australia either through an authorised branch or an authorised locally incorporated subsidiary which can engage in the full spectrum of banking activities. However, authorised foreign bank branches in Australia are prohibited from engaging in retail banking (taking deposits of less than $250,000 from the public).

8.2 Direct lending in Australia

There are a number of issues that a foreign company engaged in, or considering engaging in, direct lending in Australia should consider:

(a) Australian financial services licences (**AFSLs**)

As noted in **section 7**, all persons who carry on a financial services business in Australia are required to have an AFSL or have the benefit of an exemption from this requirement. Lenders are, generally speaking, not covered by this licensing regime, but most other types of financial services are covered by it.

(b) *Financial Sector (Collection of Data) Act 2001* (Cth)

This Act requires a corporation to register and provide periodic reports if, among other things, 50% or more of its assets situated in Australia consist of debts owed to the corporation as a result of transactions entered into in the course of providing finance. A debt owed by an Australian borrower is likely to be regarded as being situated in Australia for such purposes.

(c) *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)

As noted in **section 17**, this Act regulates designated services carried on through a permanent establishment in Australia, which includes a place in Australia where the entity carries on business through an agent.

(d) Foreign investments

As outlined in **section 2**, foreign investment in Australia is regulated. The restrictions on foreign investment extend to the acquisition of interests in securities, businesses and land and so can, in theory, capture the taking and enforcement of security interests. Recent legislative amendments have broadened the exemptions available to both bank and non-bank lenders and domestic security trustees so that in practice, most of these activities will now no longer be caught within Australia's foreign investment net, so long as the assets acquired on enforcement are disposed of within the prescribed period of time.

(e) Business conduct

Australian legislation sets out prohibitions on misleading and deceptive conduct in respect of a broad range of financial services and unconscionable conduct in respect of business transactions. There is also specific legislation in each state and territory which deals with the review of unjust contracts.

A range of legislation exists in respect of lending to consumers, which is discussed in **section 11**.

(f) Security

Security can be taken over most assets such as land, shares, bank accounts, receivables, insurances, intellectual property rights, motor vehicles, watercraft, aircraft, goods and equipment. Separate legislative regimes apply to security interests in real property, and security interests in other assets.

The most common form of security interest over real property is a real property mortgage (or a mortgage of lease in the case of a security interest over a leasehold interest in real property). Security interests in real property are governed by the laws of the particular state or territory of Australia in which that real property is located, and are typically registered on the land titles register maintained by the land registrar for the relevant state or territory.

Without registration on the title for the real property, a security interest in real property is not protected by indefeasibility of title (being the legal concept under the laws of each State and Territory that a party with a registered interest in real property holds that interest free from challenges from any unregistered interests in the same real property, irrespective of the time in which each of those interests was created) and hence a failure to properly register a mortgage over real property (or a lease) on the applicable register may adversely impact upon the mortgagee's interest in that real property with respect to any other party or parties claiming to have a competing interest in that real property.

Security interests over assets other than real property are subject to the *Personal Property Securities Act 2009* (Cth) (**PPSA**). The PPSA sets out a single national system for the creation, priority and enforcement of security interests in personal property (being, in general, all property and assets other than real property). It adopts a "substance over form" approach to determining whether a security interest arises in a particular context – that is, the PPSA looks to see whether a particular transaction, in substance, creates an interest in personal property that secures payment of performance of an obligation (without regard to the form of the transaction). The effect of this is that the concept of security interest in personal property under the PPSA is considerably broader than just "orthodox" security interests (such as charges and mortgages). Arrangements not traditionally thought of as security interests but which may constitute a security interest under the definition in the PPSA include step-in rights (under a construction contract, for example) and flawed-asset arrangements.

In addition, the PPSA provides that certain transactions give rise to a security interest for the purposes of the Act whether or not that transaction, in substance, secures a payment or performance obligation. Such security interests are defined as "deemed" security interests under the PPSA. These deemed security interests include the interest of a transferee under a transfer of an account receivable or book debt, a commercial consignment, or a "PPS Lease". As currently defined in the PPSA, PPS Leases are leases or bailments of goods which have a term of more than 2 years.

The PPSA established a single national and publicly accessible register for the registration of security interests in personal property and the retrieval of information of those security interests from the register. There are strict time limits within which a secured party is required to register their security interest on the PPSA register in order to ensure, so far as the PPSA and related legislation provides, the priority position of the secured creditor with respect to the secured asset and the enforcement rights of that secured creditor with respect to the security interest (amongst other reasons). This process of registering the security interest on the register within the required timeframe is known as "perfecting" the security interest through registration.

A failure to properly perfect a security interest in personal property may mean that the security interest is void as against a liquidator. In addition, a failure to register a security interest correctly or at all may cause the relevant security interest to be "unperfected". An unperfected security interest will "vest" in the grantor on its winding-up, which means that the relevant secured party will lose any interest they have in the relevant collateral the subject of the unperfected security interest.

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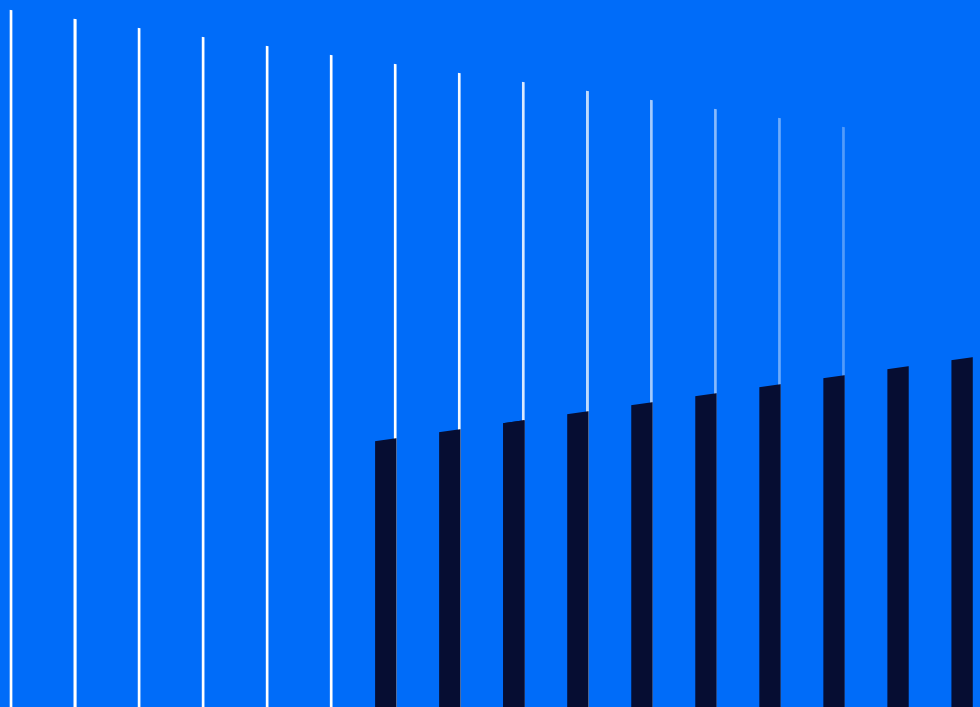
Section 9.0

Taxation

The Australian tax system is known to be one of the most complex in the world.

We have set out a basic description of the more significant taxes that may affect your business. These are not detailed accounts of each tax law and you should seek professional advice taking account of your specific circumstances.



9.1 Income tax

(a) Taxable entities

Income tax is imposed on the taxable income of "taxable entities". Taxable entities generally include individuals, companies and limited partnerships (except certain venture capital limited partnerships). "Look-through" entities that are not taxable entities generally include trusts and general law partnerships. Despite its name, taxable income is broadly accounting profits of the taxpayer that are subject to various modifications required by the tax law.

(b) Tax year

The standard tax year is 1 July to 30 June (which may be substituted with the approval of the Commissioner of Taxation).

(c) Income tax rate

Companies:

The income tax rate for companies is 30%, except that companies that have less than $50 million of "aggregated turnover" (which includes the turnover of affiliated and connected entities) and derive no more than 80% of their income in passive forms are taxed at 25% .

Individuals:

Individuals are taxed on a scale of marginal rates. The maximum rate in Australia is currently 45% plus additional levies (such as the Medicare Levy, if applicable) for individuals who earn more than $190,000. Employers must withhold income tax on wages paid to employees.

(d) Grouping

Groups of qualifying entities may, in certain circumstances, choose to consolidate (ie to be grouped) for income tax purposes. Entities often elect to form a consolidated group as:

- only one income tax return is required each year for each consolidated group;
- intragroup transactions are generally ignored for income tax purposes; and
- tax losses from one group member can offset income from another.

Careful consideration needs to be given to the pros and cons of any consolidation decision, as it will usually result in a resetting of the tax cost bases in the underlying assets of the group, and can in certain circumstances result in taxable gains arising.

(e) Capital gains tax

Capital gains tax (**CGT**) is not a separate tax but is broadly the income tax that applies to gains or losses calculated under the CGT rules in respect of "CGT events" (being broadly disposals and certain other events).

A sale of corporate groups acquired in a leveraged buyout or by a private equity entity will generally be on revenue account (and not be subject to CGT concessions).

Individuals and superannuation entities:

Resident individuals and superannuation entities are typically entitled to a discount of 50% for individuals, and 33⅓% for complying superannuation entities on capital gains in respect of CGT assets held for at least 12 months before the time of the CGT event.

Non-residents:

Non-residents are generally not subject to CGT except where the gain relates to Australian land, interests in Australian land or shares or rights in Australian land-rich entities. Purchasers of Australian land, interests in Australian land or shares or rights to acquire interests in Australian land-rich entities, are required to pay 15% (from 1 January 2025) of the consideration payable to foreign resident sellers to the ATO (subject to certain exclusions and exemptions). This amount is usually collected by way of a deduction from the consideration otherwise payable.

(f) Double tax agreements (**DTAs**)

Generally, resident entities are assessed on their worldwide income, while non-resident entities are only taxed on income derived from Australian sources. Australia has a highly developed network of DTAs, the main function of which is to avoid the double taxation of income for enterprises.

(g) Non-resident withholding taxes

Australia imposes dividend (30%), royalty (30%) and interest (10%) withholding taxes on payments to non-residents. The withholding tax rates may be reduced under a DTA or as a consequence of exceptions under the domestic law.

In the case of dividends, distributions that are "franked" (ie paid from after tax profits) or represent income derived from foreign business operations (ie "conduit foreign income") are generally not subject to withholding.

A reduced withholding tax rate of 15% (rather than 30%) applies to certain trust distributions (ie "fund payments") made by qualifying managed investment trusts or attribution managed investment trusts (**withholding MITs**) to residents of information exchange countries. This rate is reduced to 10% where the withholding MIT holds interests in certain energy efficient buildings. Fund payments exclude distributions of dividends, interest and royalties (which are subject to the standard withholding regime).

9.2 Indirect taxes

(a) Goods and services tax (**GST**)

GST is a federal value-added tax on the supply of goods, services and any other things, and the importation of goods. In general, an entity must be registered for GST if it carries on an enterprise in Australia and the value of its annual turnover is or exceeds $75,000. Registered entities must pay GST of 10% on the consideration received for its taxable supplies and importations (but it is usual commercial practice to contractually pass on the GST liability to recipients), and may claim input tax credits (ie refunds of GST) for the GST cost of its business acquisitions.

In addition, foreign entities may be liable to pay GST on supplies of digital products and other services to Australian private consumers.

(b) Stamp duty

Stamp duty, levied by each state and territory government, applies to a wide range of transactions. The party liable to pay the stamp duty depends on the type of stamp duty.

Stamp Duty may be applied upon the following transactions:

- transfers and other transactions concerning "dutiable property";
- transactions involving 'land holder' entities;
- lease instruments granted for a premium or other consideration; and
- insurance.

Additional stamp duty applies to 'foreign persons' (defined broadly to include foreign corporations and trusts) that purchase residential land either directly or indirectly through a land holder entity, in New South Wales, Victoria, Queensland, South Australia, Tasmania and Western Australia.

(c) Land tax

Land tax, like stamp duty, is a state and territory-based tax which imposes a tax on investment land ownership.

Increased land tax rates apply to non-residents who own land in certain jurisdictions.

9.3 Other taxes/charges

Some other taxes and charges include:

(a) Fringe benefits tax

There is a fringe benefits tax (**FBT**), which is levied by the Commonwealth Government on the taxable value of "fringe benefits" provided to employees. This is charged at a flat rate of 47% after adjusting for GST credits on the grossed up value of the benefit.

(b) Payroll tax

Each state and territory government levies payroll tax, which varies across each state and territory subject to differing exemptions and rates. For example, in New South Wales, from 1 July 2022, payroll tax is imposed at the rate of 5.45% of taxable wages above the annual tax-exempt threshold of $1,200,000.

(c) Death and gift duties

There are no death or gift duties in Australia.

(d) Customs, excise and other taxes

The Australian Government also levies customs duties and excise duties (on goods such as petroleum, alcohol and tobacco). The state and territory governments also levy further taxes, including taxes with respect to gambling and motor vehicles.

9.4 Attracting overseas investors

In order to increase the attractiveness of Australia for foreign investors, the Australian Government has a number of attractive tax measures in place. These include:

(a) CGT exemption for non-residents

Non-residents are generally not subject to Australian tax on the disposal of shares in a company (that are held on capital account) unless the company's value is principally derived from Australian real property.

(b) Managed investment trusts regime

Subject to integrity rules, non-residents who hold interests in a qualifying withholding MIT and who are residents of countries that have an exchange of information agreement with Australia may be subject to a final withholding tax of 15% (or 10% where the withholding MIT holds an interest in certain energy efficient buildings) on distributions of specified income. Residents of countries without exchange of information agreements with Australia are subject to withholding at a rate of 30%. From 1 January 2025, a reduced withholding tax rate of 15% (rather than 30%) also applies to certain fund payments from eligible MITs for investments in eligible build-to-rent developments (distributions of rental income and capital gains).

(c) Conduit foreign income rules

Subject to integrity rules, no Australian tax (including withholding tax) is payable in respect of certain foreign sourced income that is ultimately received by a non-resident through one or more interposed Australian corporate tax entities.

(d) Research and development (**R&D**) tax incentive

Australia provides an incentive programme for entities incurring eligible expenditure on R&D activities. Depending on the size of a business, claimants under the R&D programme may be eligible for one of the following incentives:

(a) For small businesses (aggregated turnover less than $20 million): a refundable offset of 18.5% above the claimant's corporate tax rate, which, will be 25% (if the claimant is eligible for the lower corporate tax rate), providing a total 43.5% refundable tax offset (ie cash in hand).

(b) For other businesses: a non-refundable tax offset of the claimant's corporate tax rate, plus an incremental premium of up to 16.5%. The incremental premium is based on the claimant's R&D intensity, which is based on the proportion of the claimant's eligible R&D expenditure as a percentage of total business expenditure.

(e) Venture capital investments

Australian venture capital investment vehicles may be structured as venture capital limited partnerships (**VCLPs**) or early stage venture capital limited partnerships (**ESVCLPs**), and receive favourable tax treatment for eligible venture capital investments. For VCLPs, benefits include tax exemptions for foreign investors (limited partners) on their share of any revenue or capital gains made on disposal of the investment by the VCLP, and concessional treatment of the fund manager's carried interest in the VCLP. For ESVCLPs, the income tax exemption for VCLPs is extended to both resident and non-resident investors, plus investors can obtain a 10% non-refundable tax offset for new capital invested in the ESVCLP.

Incentives are available for eligible investments made in start-ups known as Early Stage Innovation Companies (**ESICs**), which are generally newly incorporated entities with low income and expenses. Investments of less than 30% of the equity in an ESIC would generally qualify for a 20% non-refundable tax offset (capped at $200,000 per investor including any offsets carried forward from the prior year's investment) and a 10-year tax exemption on any capital gains arising on disposal of the investment.

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Section 10.0

Competition law

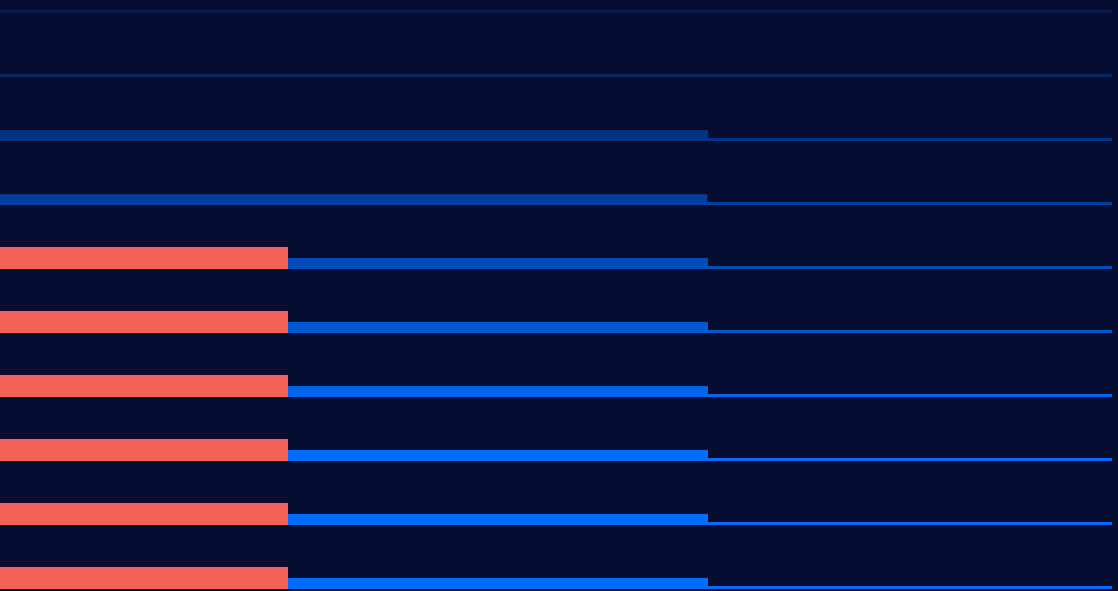
The *Competition and Consumer Act 2010* (Cth) (**CCA**) is made up of several parts and schedules, each dealing with particular issues or types of conduct relevant to competition or consumer protection law (for consumer protection law, see **section 11**).

The key competition law provisions of the CCA are contained in Part IV which regulates cartels, restrictive trade practices and mergers. Its aim is to prevent anti- competitive activity by companies and individuals.

The CCA also deals with obtaining access (by third parties) to services provided by major facilities of national significance (eg rail facilities, port facilities, gas, electricity, water, waste water, airports) (Part IIIA), the prescription of various industry codes (Part IVB), enforcement and remedies provisions (Part VI), and procedures for authorisation or notification of certain conduct which might otherwise be illegal (Part VII). The CCA also contains special provisions which apply to the telecommunications industry, the international shipping industry and to export agreements.

Did you know?

The CCA includes a variety of potential penalties for different offences. For example, the ACCC can seek penalties of up to $50 million for some breaches of the competition provisions of the CCA. The CCA also includes criminal penalties (including jail) for some offences, and an individual who has breached or been involved in a restrictive trade practice may be disqualified from being a director or being involved in the management of a corporation.



Conduct engaged outside Australia by a body corporate will also be caught by the CCA if the corporation is either incorporated in Australia or carrying on business within Australia.

Conduct that is engaged outside Australia by individuals will be caught by the CCA if the individual is an Australian citizen or ordinarily resident within Australia.

It is possible that a corporation outside Australia that engages in conduct in contravention of the CCA can be considered to be acting in Australia through a subsidiary. This can occur where:

- the corporation engages in communications (including phone calls and emails) from places outside Australia to its subsidiary in Australia; and
- the corporation's Australian subsidiary acts in a way that gives effect to the agreement reached outside Australia as a result of the direction or control of the parent.

10.1 Part IV – key competition law provisions

Part IV of the CCA was originally modelled on the antitrust legislation and case law in the United States, but also includes many features in common with the antitrust provisions of the European Community's Treaty of Rome and China's Anti- Monopoly Law. It seeks to protect competition by prohibiting conduct that threatens the competitive process. The prohibited conduct, discussed at greater length below, includes cartel conduct, entering into contracts, arrangements or understandings that restrict dealings or affect competition, engaging in a concerted practice, misusing market power, anti-competitive exclusive dealing arrangements, resale price maintenance and mergers which would affect competition.

(a) Cartel conduct (sections 45AD, 45AF, 45AG,s45AJ, s45AK)

Cartel conduct involves the making or giving effect to a contract, arrangement or understanding that contains a "cartel provision".

A cartel provision is a provision of an agreement between competitors comprising:

Price fixing:

That is, a provision of an agreement which has the purpose or effect of fixing, controlling or maintaining prices.

Output restrictions:

For example, restrictions on production, capacity or supply.

Market sharing:

For example, sharing of customers or sharing of geographic areas of supply.

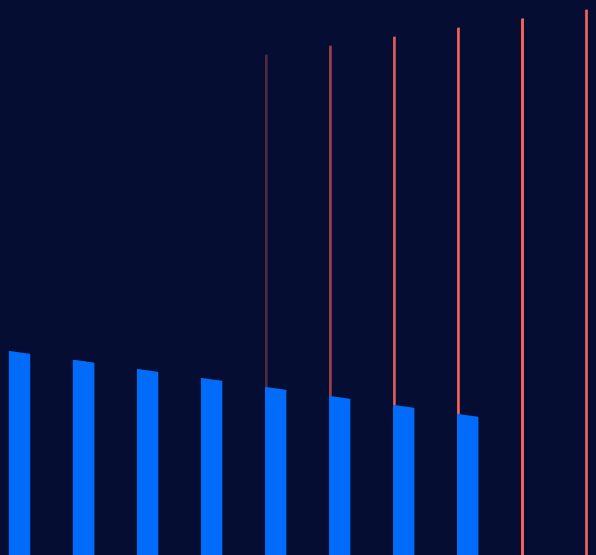
Bid rigging :

For example, a provision that has the purpose of ensuring that in the event of a request for bids, two or more parties to an agreement bid, but a material component of at least one of those bids is worked out in accordance with the agreement.

Contracts, arrangements and understandings include "meetings of the minds" whether or not in writing and whether express or implied. Understandings such as moral obligations and even a "nod and a wink" are also caught.

The CCA provides for parallel civil prohibitions and criminal offences for cartel conduct.

There are certain exceptions to both the civil cartel prohibitions and the criminal cartel offences, however their operation can be quite complex and specific advice should always be sought on their application.



(b) Concerted practices (section 45(1)(c))

A concerted practice is not defined in the CCA, but has been described as involving any form of cooperation that substitutes the uncertainty of competition. The prohibition is aimed at businesses that publicly or privately disclose competitively significant information or take other coordinated action that is intended or likely to substantially lessen competition.

Conduct that does not meet the requirements of a contract, arrangement or understanding under the cartel provisions may fall within the wider scope of a concerted practice. For conduct to constitute a concerted practice, the ACCC has said that reciprocity is not required, meaning that even 'one way' communications with a competitor could potentially be a concerted practice.

The concerted practices prohibition captures horizontal as well as vertical arrangements, meaning that conduct involving suppliers, distributors, industry associations and consultants could also be caught. It is important to remember however, that the prohibition requires that there be an actual or likely substantial lessening of competition.

(c) Anti-competitive agreements (sections 45(1)(a) & (b))

Contracts, arrangements or understandings which have the purpose, effect or likely effect of substantially lessening competition in a market (anti-competitive agreements) are also prohibited.

The ban on anti-competitive agreements applies to so-called horizontal agreements and vertical agreements.

A horizontal agreement is one between firms at the same level in the market (eg an agreement between two suppliers of components to share production facilities).

A vertical agreement is one between firms at different levels of the market (eg an agreement between a manufacturer and a distributor).

Determining what the "market" is and/or whether there has been a "substantial lessening of competition" is not straightforward and requires considered and detailed analysis.

(d) Misuse of market power (section 46)

The misuse of market power prohibition applies to any conduct by a corporation with substantial market power that has the purpose, effect or likely effect of substantially lessening competition in a market.

If the corporation's conduct does not have the purpose of lessening competition, it may still breach section 46 if it would have the effect or likely effect of substantially lessening competition.

The misuse of market power prohibition may apply to conduct such as bundling, pricing below cost, cross-subsidisation, price discrimination, loyalty rebates, or refusal to supply.

Market power is the ability to act unconstrained by competitors. A "substantial" degree of market power is a degree that is "large or weighty" or "considerable, solid or big". A company may have market power even with a low market share.

Corporations whose conduct may otherwise be prohibited under the misuse of market power provisions can apply to the ACCC for authorisation to undertake the conduct.

Authorisation may be granted where the public benefits of the proposed conduct would outweigh any public detriments.

(e) Exclusive dealing (section 47)

Exclusive dealing consists of supplying (or acquiring) goods or services on the condition that the purchaser (or supplier) accepts a restriction on its ability to deal with others.

Exclusive dealing can take many forms, including:

- supply of goods or services on the condition that the acquirer will not (at all, or except to a limited extent):
  - acquire goods or services from a competitor;
  - re-supply a competitor's goods or services; or
  - re-supply those goods or services to particular persons;
- refusal to supply goods or services on the basis that a person has not fulfilled the above conditions;
- acquisition of goods or services (at all, or at a particular price) on the condition that the supplier will not (at all, or except to a limited extent) supply the goods or services to particular persons; or
- refusal to acquire goods or services on the basis that a person has not fulfilled the above conditions.

However, exclusive dealing is generally only illegal if it has the purpose or likely effect of substantially lessening competition in a market.

(f) Third line forcing (sections 47(6) and 47(7))

Third line forcing is a type of exclusive dealing. It involves supplying products or services on the condition that the buyer will acquire products or services from a third party.

Third line forcing is only illegal if it has the purpose, effect or likely effect of substantially lessening competition in a market. A party may engage in third line forcing so long as the conduct does not have the purpose, effect or likely effect of substantially lessening competition.

Parties have two options to seek approval for their mergers.

(g) Resale price maintenance (section 48)

Resale price maintenance involves imposing a minimum resale price on a reseller. It is illegal for a company to set the minimum price at which dealers or distributors may sell or advertise products or services supplied to them by the company (although it is not illegal to recommend a retail price (**RRP**) provided it is just a recommendation).

A price includes any formula for calculating a price. Setting a minimum price includes inducing or attempting to induce a person not to sell below that price. This is prohibited absolutely. This means it is illegal regardless of any actual or likely effect on competition.

Some commercial arrangements can be structured to avoid resale price maintenance. Companies proposing to engage in resale price maintenance may lodge a formal "notification" with the ACCC to obtain immunity. If the ACCC does not object (by issuing a draft notice objecting to the notification) within 14 days of the notification being validly lodged, the conduct will be protected from legal action.

(h) Mergers and acquisitions (section 50)

The CCA prohibits a corporation from directly or indirectly acquiring shares or assets where the likely effect of the acquisition would be a substantial lessening of competition in a market. Mergers and acquisitions are subject to a competition test under the CCA.

The ACCC investigates and reviews transactions that may raise concerns under the CCA. The ACCC will approve a merger or acquisition if it does not substantially lessen competition or (depending on the type of clearance sought) if the public benefits outweigh any detriment to the public.

Following changes to the merger provisions in November 2017, parties now have two options to seek approval for their mergers:

- informal clearance from the ACCC, which involves the parties requesting that the ACCC provide a "letter of comfort" that states it does not intend to oppose the proposed transaction. A party may initially approach the ACCC on a confidential basis, but the ACCC will in most cases wish to conduct a public review before providing a firm view about whether or not it will oppose the proposed merger. A clearance by the ACCC does not preclude third-party action (such as by customers, distributors or competitors – although this is uncommon); or
- merger authorisation from the ACCC, as the ACCC now has power to authorise a proposed merger or acquisition if it is satisfied that it will not substantially lessen competition, or it is likely to result in a net public benefit. There is a 90 day statutory time frame for the ACCC to determine a merger authorisation, which may be extended with agreement from the applicant. If the applicant is unhappy with the ACCC's authorisation decision, they can apply for a review of the decision by the Australian Competition Tribunal.

If none of these steps are taken and the ACCC seeks to challenge a merger, it may commence court proceedings seeking:

- injunctions preventing companies completing transactions or preventing business reconstruction following acquisitions;
- forced divestiture following a merger;
- compensation for customers or competitors; and
- penalties of up to $50 million for companies and up to $2,500,000 for the key employees of the company concerned.

10.2 The role of the ACCC under the CCA

The ACCC has broad powers under the CCA to assist in the investigation of suspected breaches of the competition provisions of the CCA. In some cases, these powers are broader than police powers of investigation. As a first step in its investigation, the ACCC will usually seek voluntary interviews with anyone it suspects of contravening the CCA.

Section 155 of the CCA gives the ACCC the power to force a company or individuals to disclose information, to attend hearings and answer questions, or to provide documents, and the ACCC can obtain warrants for "dawn raids" and other seizures.

The ACCC has the power to compel witnesses to submit to an investigation. A person may be compelled to furnish written information, produce documents or give evidence relating to a matter that may constitute a contravention.

The ACCC also has power to access telecommunications records of telephone calls, mobile telephone calls and faxes.

The ACCC also finds out about breaches of the CCA without having to rely on its statutory powers of investigation. The ACCC often receives complaints from unhappy customers, employees, competitors or consumer associations. It also reviews advertisements in the media on a regular basis.

The ACCC shares information extensively with competition agencies in other countries throughout the world.

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Section 11.0

Fair dealing and consumer protection

Australia has a single, national consumer law known as the Australian Consumer Law (**ACL**). It applies nationally and in all states and territories. The ACL is incorporated in a Schedule of the CCA. The ACL includes:

- general protections against misleading and deceptive conduct and unconscionable conduct;
- specific protections against unfair practices, including prohibitions against false and misleading representations;
- an unfair contracts regime covering standard form contracts;
- laws relating to consumer guarantees;
- product safety laws and enforcement systems;
- laws regulating unsolicited consumer agreements (ie door-to-door sales and other direct marketing); and
- penalties, enforcement powers and consumer redress options.

11.1 Misleading or deceptive conduct and unconscionable conduct

The ACL prohibits a person, in trade or commerce, from engaging in misleading or deceptive conduct. This prohibition is not limited to the supply of goods or services and creates a broad, economy-wide norm of conduct.

The ACL also prohibits:

- conduct which is unconscionable under the general law;
- unconscionable conduct in connection with the supply or possible supply of goods or services in consumer transactions; and
- unconscionable conduct in some business transactions.

11.2 Unfair practices

The ACL contains specific prohibitions against certain false or misleading representations, such as:

- false or misleading representations about goods and services;
- certain types of false or misleading representations made, in trade or commerce, in connection with the sale or grant of an interest in land;
- false or misleading representations concerning the profitability, risk or any other material aspect of certain business activities;
- conduct that is liable to mislead a person seeking employment as to the availability, nature, terms or conditions of the employment or another matter relating to the employment;
- conduct, in trade or commerce, that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, suitability for purpose or quantity of any goods; and
- false or misleading representations regarding the "country of origin."

The ACL also prohibits other unfair practices, including:

- offering gifts, prizes or other free items with the intention of not providing them;
- bait advertising – advertising goods or services for supply at a specified price where there are reasonable grounds for believing that the person will not be able to offer reasonable quantities of goods or services at that price for a reasonable period, having regard to the nature of the market and the advertisement; and
- wrongly accepting payment – accepting payment for goods or services if the person does not intend to supply them, is aware they can't supply them or can't supply them within a reasonable time.

11.3 Unfair contract terms

Under the ACL, a term in a standard form "consumer contract" or a standard form "small business contract" will be void if that term is unfair. A "small business contract" is a contract for the supply of goods, services (including financial services and financial products as defined in the ASIC Act) or a sale or grant of an interest in land where at the time the contract was entered into, at least one party to the contract is a business that employs fewer than 100 persons or has an annual turnover of not more than $10 million.

While the term "standard form contract" is undefined, in broad terms it is a contract that is not subject to negotiation between the parties. Recent amendments have provided additional guidance on this point by requiring that the Court take into consideration whether a party has used the same or a similar contract before, and the number of times this has been done. Furthermore, a contract may still be considered "standard form" even if some negotiation between the parties has occurred if that negotiation was limited to minor clauses or related to other insubstantial aspects of the contract.

The unfair terms regime does not apply to terms in standard form contracts which define the subject-matter of the contract; establish the upfront price payable; or are required, permitted or taken to be included by law. The unfair contract term regime also does not cover terms in negotiated (as opposed to standard form) contracts, as well as contracts for the carriage of goods by ship, a charter party of a ship and contracts for marine salvage or towage.

A term of a standard form consumer contract or small business contract is void if the term is unfair.

In addition, proposing or relying on unfair contract terms is illegal and subject to potentially significant civil penalties.

A term will be unfair if it:

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

11.4 Consumer guarantees

The ACL also imposes consumer guarantees which provide consumers with a statutory basis for seeking remedies where the guarantees are not met.

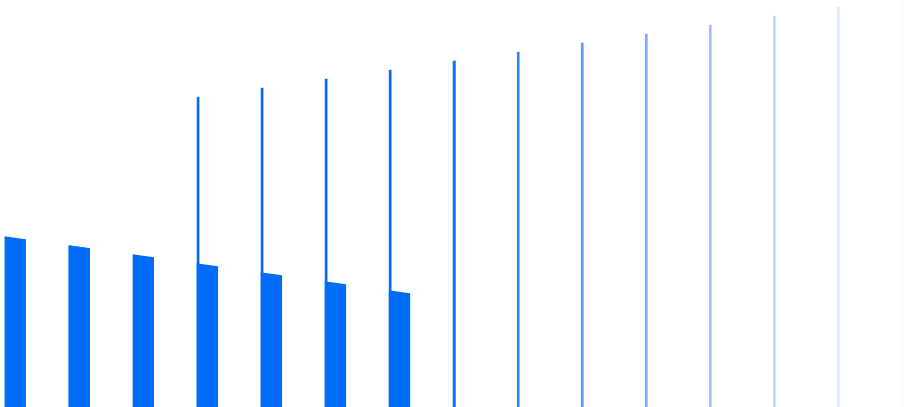
A "consumer" means a person who acquires goods or services:

- of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- for $100,000 or less.

However, a "consumer" does not include a person acquiring goods for the purpose of re-supply.

It is important to note that this definition is different from the definition of "consumer contract" which defines when the unfair terms regime applies.

In applying the monetary threshold referred to above, there are "unbundling" provisions which apply. Generally speaking, individual items may be considered separately in determining whether they fall under the monetary threshold, if they are available for sale separately.



Avoid the pitfalls

The ACL contains some examples of unfair contract terms. However, reviewing contract terms to establish if they are unfair is not a straightforward exercise, especially given the principles-based nature of the legislation and the need to be across the growing body of case law in this area. Persons dealing in standard form consumer contracts or small business contracts (as defined above) should seek advice when developing their contracts, or using contracts in Australia that were developed for other jurisdictions.

The following table summarises the consumer guarantees:

Goods	Services
Title: Guarantee that the supplier has the right to dispose of the property in the goods.	**Due care and skill:** Guarantee that the services will be rendered with due care and skill.
Undisturbed possession: Guarantee that the consumer's possession of the goods will not be disturbed (except for disclosed securities, charges or encumbrances).	**Fitness for purpose:** Guarantee that the services will be fit for their intended purpose or result (except where unreasonable or no reliance on the skill or judgment of the supplier).
Undisclosed securities: Guarantee that the goods are free of undisclosed securities.	**Reasonable time for supply:** Guarantee that the services will be provided in a reasonable time (except where the time of performance is stated in the contract or to be determined).
Acceptable quality: Guarantee that the goods will be of acceptable quality (except where prior disclosure of defects, defects caused by the consumer, or prior examination ought to have revealed the defects).	
Fitness for purpose: Guarantee that the goods will be fit for any purpose disclosed by the consumer, or represented by the supplier (except where unreasonable or no reliance on the skill or judgment of the supplier).	
Match description: Guarantee that the goods will match their description.	
Match sample: Guarantee that the goods will match a sample or demonstration model, the consumer will have a reasonable opportunity to compare the goods with the sample, and the goods are free from any defect that (i) would not be apparent on reasonable examination, and (ii) would cause the goods not to be of acceptable quality.	
Repairs and spare parts: Manufacturer only guarantee that repairs and spare parts will be available for a reasonable time (except where unavailability is disclosed).	
Express warranties: Guarantee that any express warranty given by a manufacturer or supplier is complied with.	

The ACL guarantees cannot be excluded, restricted or modified. However, where the goods are less than the monetary threshold and are not goods for domestic use, a supplier may limit its liability under the guarantees to: the replacement of the goods or the supply of equivalent goods; the repair of the goods; or the payment of the costs of doing those things (unless it is not fair or reasonable to do so).

As noted above, the ACL includes a guarantee that a supplier will comply with any "express warranty". This guarantee is far-reaching and it is worth noting that it:

- applies to suppliers as well as manufacturers;
- is not limited to provisions stated to be "warranties", and could include pre-contractual representations and product descriptions or specifications; and
- most notably, will override any exclusive remedy provisions applicable to existing warranties, or exclusions or limitations of liability (given that a supplier cannot exclude, restrict or modify the guarantee except where permitted under the ACL).

Rather than a consumer seeking a remedy by bringing an action for breach of condition or warranty under normal contractual principles, the ACL provides specific remedies to consumers depending on the severity of a supplier's failure to comply with a guarantee. In certain circumstances, this includes the right to reject the goods and request a refund or replacement goods.

The ACL prohibits the making of false or misleading representations concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy that may be available to a consumer under the ACL. This might include exclusions and limitations of liability which do not acknowledge the existence of statutory entitlements such as the ACL.

Most of the consumer guarantees apply to conduct "in trade or commerce". This is defined as trade or commerce within Australia or trade or commerce between Australia and places outside Australia. The ACCC has interpreted this phrase broadly in recent years and has initiated proceedings against a number of foreign corporations which are domiciled overseas, on the basis that they engaged in "trade of commerce" by supplying goods and services to Australian consumers (usually via internet sales).

11.5 Warranties against defects

Many suppliers and manufacturers choose to offer voluntary warranties in relation to their goods or services. The ACL regulates these as "warranties against defects", and prescribes certain requirements regarding their form and content. For example, any such warranties must be in a document that is transparent, sets out the procedures for the consumer to claim the warranty, includes a prescribed form of words which clarify that the warranty against defect is in addition to (and not a substitute for) the consumer's statutory rights under the ACL, and includes other specified details. Additionally, because the ACL requires that the document complying with these requirements is provided at the same time as the warranty, it is not sufficient to simply provide details of a website or telephone number that consumers can visit or call to obtain the necessary information.

11.6 Unsolicited consumer agreements

The ACL also includes a regime governing unsolicited consumer agreements (ie door-to-door and telemarketing sales), imposing various obligations for the benefit of consumers.

An agreement is an unsolicited consumer agreement if:

- it is for the supply, in trade or commerce, of goods or services to a consumer;
- it is made as a result of negotiations between a dealer (not necessarily a supplier) and a consumer either in person (not at the supplier's premises) or by telephone;
- the consumer did not instigate the negotiations for the supply; and
- the total price is over $100 or cannot be determined at the time of the agreement.

Where the negotiations for the supply of goods or services take place in person, the ACL imposes various conditions with respect to such negotiations, including: the permitted hours when a dealer may call on the consumer; the obligation to notify the consumer of their identity and the purpose of negotiations; the obligation to leave on request and not contact the consumer for at least 30 days; and the obligation to notify the consumer of their right to terminate and how to do so.

The ACL also imposes obligations on the supplier to disclose to the consumer a copy of the agreement and that such agreement must contain the full terms of the supply including consideration, delivery charges, termination rights and the supplier's details. Also, the agreement must be signed by the consumer (unless negotiated by telephone) and any amendments to it must be signed by both parties.

The ACL provides that consumers may terminate the agreement within a 10-day cooling-off period after it is made, and that during this period the supplier must not supply the goods or services or accept or request any payment for them. Consumers may also terminate the agreement within a specified time period where a supplier breaches one of the above obligations.

11.7 Enforcement powers

The CCA contains the following enforcement powers which are available to the ACCC or the state and territory consumer protection agencies:

Undertakings:

A regulator can accept court-enforceable undertakings in connection with a breach of a matter for which the regulator has a power or function under the ACL.

Substantiation notices:

These are notices issued by the regulator to a business requesting information relevant to substantiating claims made in the marketplace that the regulator considers may contravene the ACL. The power is intended as a preliminary investigative tool where the ACCC suspects a representation may not be able to be substantiated.

Infringement notices:

If the ACCC has reasonable grounds to believe that a person has contravened one of the provisions of the CCA or the *Australian Securities and Investments Commission Act 2001* (Cth) that is subject to civil pecuniary penalties (known as "infringement notice provisions"), the ACCC or ASIC may issue an infringement notice for the suspected contravention.

Public warning notices:

These are notices issued by the regulator which inform the public of a suspected breach of certain provisions of the ACL.

Information gathering notices:

If the ACCC or ASIC (in respect of financial products or services) suspect an unfair contract term, they can issue information gathering notices and investigate.

Disclosure notices:

The ACCC and the Commonwealth can issue disclosure notices to parties who may possess relevant information, documents or evidence about the safety of goods or services (including relevant third parties).

11.8 Remedies

Chapter 5 of the ACL makes a number of remedies available to a regulator, and/or to private litigants for breaches of the consumer protection provisions.

Remedies available to a regulator and private litigants include:

- injunctions – the ACL clarifies the types of restraining and performance orders that can be made; and
- a declaration in certain circumstances.

Remedies available to private litigants include:

- damages; and
- a compensation order if they have suffered or are likely to suffer loss or damage because of a contravention of Chapter/s 2, 3 or 4 of the ACL.

Remedies available to a regulator include:

- a redress order (other than for damages) in favour of a non-party consumer;
- non-punitive orders, eg community service, establish a compliance program, establish a training program, engage in corrective advertising;
- an adverse publicity order; and
- an order disqualifying a person from managing a corporation.

11.9 Penalties

In addition to enforcement powers and remedies, a regulator may apply to the court for civil pecuniary penalties or criminal penalties for contraventions of a number of the provisions of the ACL.

For individuals, the maximum penalty is $2,500,000 per contravention. For bodies corporate, the maximum penalty per contravention is the greater of $50 million, three times the value of the benefit obtained (if that can be determined), or 30% of adjusted turnover during the breach turnover period (ie over the period the breach occurred, with a minimum of 12 months).

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Section 12.0

Employment law

Australia's national employment legislation is known as the *Fair Work Act 2009* (Cth) (**FW Act**). The FW Act applies to all private sector employers (including unincorporated employers) and their employees in all Australian states (other than Western Australia) and the territories. In Western Australia, the FW Act applies to private sector employers which are trading or financial corporations and their employees.

12.1 Fair Work Commission (**FWC**)

FWC is the tribunal responsible for administering the FW Act. FWC's functions include approving enterprise agreements, ensuring good faith bargaining of enterprise agreement, varying modern awards, conciliating and arbitrating various disputes and hearing unfair dismissal claims.

The Fair Work Ombudsman is responsible for promoting compliance with modern awards, enterprise agreements and other statutory obligations through various means including investigation and prosecution.

12.2 Modern awards

The minimum terms and conditions of some employees are governed by "modern awards". These terms and conditions include minimum rates of pay, overtime and consultation regarding workplace change. All modern awards must include a flexibility term which allows for negotiated arrangements between an employer and individual employees.

Modern awards do not apply to employees earning over $175,000 (from 1 July 2024), provided their earnings are guaranteed by agreement with their employer. This threshold is indexed from 1 July annually.

12.3 Collective bargaining and enterprise

The FW Act provides for collective, as opposed to individual, bargaining of instruments known as enterprise agreements. In order for an enterprise agreement to be approved by the FWC, each employee or prospective employee must be better off overall under the agreement compared with an applicable modern award.

The FW Act also requires employers and other bargaining representatives to negotiate an enterprise agreement in good faith. This involves the parties complying with specified procedural and behavioural rules in relation to a negotiation known as the good faith bargaining requirements, examples of which include attendance and participation at meetings, genuinely considering proposals by other representatives, not engaging in capricious or unfair conduct, and recognising other bargaining representatives.

FWC may make various orders in relation to bargaining, including the ability to compel bargaining representatives to comply with the good faith bargaining requirements.

12.4 National Employment Standards (**NES**)

The FW Act sets out the following minimum statutory conditions of employment, known as the NES: maximum weekly hours of work, a right to request flexible work arrangements, right to casual conversion, parental leave, annual leave, personal/carer's leave, paid family and domestic violence leave, community service leave, long service leave, public holidays, superannuation contributions, notice of termination and redundancy pay, and a right for employees to receive an information statement explaining their rights under the FW Act. A separate information statement also exists for casual employees. These conditions cannot be modified to an employee's detriment by an employment contract, modern award or enterprise agreement.

12.5 General protections

The FW Act contains "general protection" provisions which are intended to protect:

- a person's "workplace rights";
- freedom of association (including the right to join, or be represented or not represented by industrial associations; or to engage in lawful "industrial activities"); and
- a person from workplace discrimination.

The FW Act provides remedies where the protections have been contravened.

Other protections include that an employer must not dismiss an employee who is temporarily absent from work due to illness or injury. A person may make an application to FWC claiming a breach of the general protections provisions.

12.6 Termination of employment

All employers, regardless of their size, may be subject to a claim to FWC for unfair dismissal once an employee's probationary period is completed, assuming no other jurisdictional objection applies. Some employees are not eligible to make claims for unfair dismissal, including casual employees and employees not covered by any modern award or enterprise agreement who earn at least $175,000 per annum (as indexed). However, these employees may have other kinds of claims (such as claims regarding workplace rights).

A dismissal is not unfair when it occurs because of a "genuine redundancy".

A genuine redundancy occurs if an employer no longer requires an employee's job to be performed because of operational requirements, such as an operational restructure, or, head count reduction and the employer complies with consultation obligations in an applicable industrial instrument.

A dismissal is not a genuine redundancy if in all of the circumstances the employee should have been redeployed within the employer's enterprise or the enterprise of an associated entity of the employer.

In addition, under the FW Act, it is unlawful for any employer to terminate employees for certain reasons, such as temporary absence due to illness or injury; membership of a trade union; commencing certain legal proceedings against the employer; and certain kinds of discrimination.

All employers must provide notice of termination in accordance with the FW Act.

12.7 Contractual terms

A contract of employment may be entered into with the minimum of formality. There is no requirement for a contract to be in writing to be enforceable. An employment contract may therefore be valid even if made entirely orally. However, a prudent employer will enter into a written employment contract with an employee upon commencement of the employment and ensure the contract continues to reflect the employee's position during the course of their employment.

The terms and conditions of an employee's contract come from various sources. First, some terms are expressly agreed by the parties orally or in writing. Second, there are terms implied into the contract by law, from facts or custom and practice.

12.8 Superannuation

The Commonwealth superannuation guarantee legislation currently requires employers to pay a percentage of their employee's ordinary time earnings (currently 11.5%) to an approved superannuation fund which is independently administered and generally unrelated to the employer. The rate of superannuation contributions increases to 12% on 1 July 2025.

The maximum contribution base (**MCB**) is currently $65,070 per quarter and is indexed annually. An employer is not required by the legislation to make superannuation contributions on an employee's earning which exceed the MCB during a quarter.

12.9 Work health and safety

Most Australian jurisdictions (the Commonwealth, New South Wales, Queensland, South Australia, Tasmania, Western Australia and both Territories) have uniform legislation dealing with work health and safety legislation. The various Australian laws reflect the following general themes:

- ensuring that the premises controlled by the employer are safe and without risk to health;
- ensuring that any plant or substance provided for use by the employees is safe and without risk to health;
- ensuring that the systems of work and the working environment are safe and without risk to health;
- providing information, instruction, training and supervision as necessary to employees;
- providing adequate facilities for the welfare of employees at work; and
- consulting with employees in relation to occupational health and safety issues.

Employers are also required to obtain workers compensation insurance for their employees which covers them for workplace injuries.

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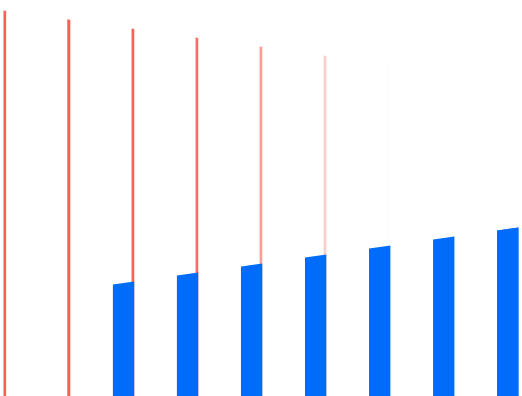
Section 13.0

Intellectual property

In Australia, intellectual property rights are protected by federal legislation and the common law. Australia is also a signatory to the World Trade Organization Agreement on Trade-related aspects of Intellectual Property Rights (**TRIPS**) which sets minimum standards for intellectual property protection and enforcement.

13.1 Copyright

The *Copyright Act 1968* (Cth) (**Copyright Act**) protects all original literary works, dramatic works, musical works, artistic works, sound recordings and films broadcast or published by an Australian or first published in Australia. Under the Copyright Act, copyright protection is automatic and does not require registration. Because of its history, the Copyright Act refers to creators generally as 'authors'; literary, dramatic, musical and artistic works are protected for the life of the author plus 70 years. If the works are published after the death of the author, they are protected for 70 years after first publication. As of early 2019, 'orphan works' (works by unknown authors), and sound recordings and films, are protected for 70 years from first publication, or 70 years from creation if they have not been made public. Australia is also a signatory to the Berne Convention for the Protection of Literary and Artistic Works which provides for 'national treatment' (works of Australian authors must be treated in the same way as other signatory country's author's works), and sets minimum rights to works first published in or created by citizens of other member countries, including moral rights (to attribution and non-derogatory treatment of a work).



13.2 Trade marks

The *Trade Marks Act 1995* (Cth) enables any owner to register a mark or sign used in connection with their goods or services. The owner of a registered trade mark has the exclusive right to use, and authorise others to use, the trade mark for 10 years (which is renewable, potentially indefinitely). Unregistered trade marks may be protected by the tort of passing off and the misleading and deceptive conduct provisions of the *Competition and Consumer Act 2010* (**CCA**) discussed below. These are akin to unfair competition law or antitrust principles in other jurisdictions. Whereas previously, trade marks had to be registered for at least 5 years before being susceptible to removal for non-use, on 24 February 2019, the law changed so that unused trade marks may be removed after 3 years of registration. Foreign companies planning to register a trade mark in Australia should seek legal advice about the impact of these changes. Australia is one of the 115 members of the Madrid Protocol which establishes an international system for the registration of trade marks. Under the Madrid Protocol, an applicant for a trade mark may designate Australia as a country in which protection is sought; following successful local examination, the trade mark is registered in Australia.

A foreign company should check whether its trade marks have already been registered in Australia by virtue of a Madrid Protocol registration before exploring registration here. Under the Paris Convention for the Protection of Industrial Property, it may be possible to claim the same priority date as overseas applications if filed in Australia within 6 months. Foreign companies should consider acquiring registration for their trade marks in Australia prior to the commencement of any dealings.

13.3 Patents

The *Patents Act 1990* (Cth) enables an inventor, or a person entitled to be assigned the invention, to apply for a patent for a device, substance, method or process which is novel and involves an inventive or innovative step. Like the trade marks system, patents is a registration-based form of rights protection, in which applicants may be granted a standard patent for up to 20 years (or up to 25 years for a pharmaceutical patent), with annual renewal fees payable. Following recommendations by the Productivity Commission in 2016, the innovation patent system in which applicants could be granted patent protection for "second tier" inventions (for a maximum of 8 years) are being phased out. The last day new innovation patents can be filed will be 25 August 2021. Any existing innovation patents filed on or before this date will continue until their expiry. This means that the last innovation patent in Australia will expire on 25 August 2029. Australia is one of 158 members to the Patent Cooperation Treaty, which establishes a streamlined, international system for obtaining patent protection in member states.

13.4 Registered designs

The *Designs Act 2003* (Cth) (**Designs Act**) enables the owner of a "new and distinctive" design to apply for the exclusive right to use or authorise the use of the design through a registration system. "New and distinctive" means a design that looks different in comparison to other products available on the market, and that has not been publicly disclosed or advertised before the application is filed, except at an internationally recognised industry exhibition. The Designs Act protects the visual appearance (not the function) of the design for up to 10 years.

Australia is also a party to the Paris Convention for the Protection of Industrial Property (**Paris Convention**), which applies to design registration overseas. Under the Paris Convention, the filing date for an Australian design application may establish priority for corresponding design applications made overseas if pursued within six months of filing the Australian application.

There is no unregistered design right in Australia and copyright does not protect designs that should have been registered under the Designs Act. Australian courts have held that only very limited protection of designs is available under our equivalent of unfair competition laws. Foreign companies wishing to protect their designs should apply for a design registration before the designs are published or released elsewhere or within six months of applying to register their designs in their home markets.

13.5 Confidential information

There is no Australian legislation that specifically protects confidential information. Rather, protection comes from a common law doctrine that recognises an obligation to keep information secret in circumstances where a person communicates information to another on the express or implied understanding that the information is for a restricted purpose. Legal remedies are available where an unauthorised disclosure of confidential information causes detriment to the original discloser. A combination of contractual and where applicable, physical and technological mechanisms, to maintain secrecy is often recommended to bolster companies' safeguarding of their confidential information (and better their chances at achieving legal remedies if things do go awry). It is important to seek legal advice to ensure that appropriate written agreements are in place to protect such information.

13.6 Domain names

The most relevant domain names to Australian businesses are .com.au domain names. These are licensed by a small number of accredited Australian registrars on a "first come, first served" basis. However, applicants must also satisfy eligibility and allocation requirements. They must:

- have an Australian connection (which includes either (i) being an Australian registered company, (ii) being a registered foreign trader in Australia, or (iii) owning an Australian registered trade mark);
- seek the domain name for an appropriate commercial purpose; and
- have a genuine intention to use it.

There must also be a "close and substantial" connection between the domain name and the name or business activities of the applicant.

The .au domain space is regulated by .au Domain Administration Limited (**auDA**) on behalf of the Australian Government. auDA has imposed stiff regulations on the use of .com.au domain names to limit the problem of cyber-squatting and to better protect the rights of business name and trade mark owners. It has also established a specialised dispute resolution procedure for conflicts over .com.au domain names.

The auDA has recently announced that second level, .au direct domain names (for example, gtlaw.au) will launch on 24 March 2022. From this date, potential and existing registrants will be able to apply for .au direct domain names through auDA accredited registrars.

From 24 March 2022, second level, .au domain names have been available for registration through auDA accredited registrars.

The .au direct domain names will be licensed in substantially the same way as other .au domain names such as the com.au and .org.au domains, with the following key changes.

(a) A person applying for a .au direct domain name must have an 'Australian presence' in order to be able to register a .au direct domain name. 'Australian presence' is a new expansive concept that consists of 17 different eligibility criterion including being an Australian citizen or registered Australian company. For foreign entities, the easiest eligibility criterion to satisfy in order to establish an 'Australian presence' is to hold an Australian trade mark registration or application which satisfies the requirements set out below.

(b) If the registrant is relying on an Australian trade mark registration or application, the domain name must be an exact match of the word(s) that are the subject of the Australian trade mark application or registration. This means that the domain name must include all of the words in the same order as in the trade mark the subject of the registration or application (excluding punctuation marks, ampersands (&), articles such as 'a', 'the' and 'of', and domain name identifiers such as .com.au).

(c) If the registrant relies on trade mark rights to satisfy the 'Australian presence' eligibility criterion, then the trade mark must be a word mark or incorporate words and remain pending / validly registered throughout the domain name licence period. This means that registrants will not be able to rely on logo marks without any verbal elements to establish their eligibility to hold the .au direct domain name.

Unlike existing .au domain extensions (.com.au, net.au, etc) which are subject to strict allocation criteria, the new .au domain extension does not need to match the applicant's name, trade mark or a service, goods, event, activity or premises provided by the applicant.

Other domains available in Australia include: .asn.au; .net.au; and .org.au.

13.7 *Competition and Consumer Act 2010* (Cth) (**CCA**)

In addition to specific legislation enacted in relation to intellectual property rights, the CCA contains the Australian Consumer Law (**ACL**), which provides additional grounds upon which to protect such rights. Certain provisions can be utilised by intellectual property rights owners to prevent misleading or deceptive conduct and/or false representations by a third party. These provisions are often likened to the common law tort of passing off and unfair competition / antitrust legislation in other jurisdictions.

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Section 14.0

Environmental and planning law

In Australia, environmental, planning and climate change laws are principally regulated through State and Territory enacted legislation.

Each legal framework is generally divided into two main categories:

Environmental protection laws

Including management of contaminated land, protection of threatened species, water rights, pollution and waste disposal, protection of Aboriginal and European heritage and native title rights.

Planning laws

Regulating land use and development.

At the federal level, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) regulates development that is likely to have a significant impact on 'matters of national environmental significance', through the implementation of an additional approval pathway. For example, a proposed development that is likely to have a significant impact on a nationally listed threatened species and/or ecological community, will require approval from the Federal Government, in conjunction with the standard approvals required at the State or Territory level.

In recent years, we have witnessed a growing trend by both state and federal governments to introduce complex pieces of legislation, policies and mechanisms, including increases to penalties, to regulate industry sectors and activities that have the potential to adversely affect the environment.

Companies looking to invest in Australia need to be informed about the everchanging complexities that underpin the planning and environmental legal framework, but also look at industry opportunities, government policies and programs that can create benefits to business and the environment. State and federal governments are planning for more growth and development. We are seeing implementation of long term metropolitan and regional strategies as well as reforms to state planning laws.

Investments in infrastructure are encouraged and are creating world class service sectors and transport networks for Australian cities.

Investment opportunities in renewable energy sectors and low-emissions technologies are also on the rise. The Australian federal government has introduced a range of regulatory reforms aimed at reducing Australia's carbon emissions and facilitating investment in renewable energy projects, including:

- direct action policies on climate change, including the Emissions Reduction Fund, which provide financial incentives to business for emissions reduction activities;
- the Large Scale Renewable Energy Target Scheme, requiring high-end energy users (typically wholesale electricity retailers) to acquire fixed amounts of electricity from renewable energy sources – scheduled to run until 2030; and
- targets to reduce Australia's emissions to 26 – 28% on 2005 levels by 2030 (based on Australia's commitments under the Paris Agreement).

Importantly, the above regulatory measures are subject to change, being under constant review and scrutiny from policy makers and the wider public, highlighting the importance of needing to be informed and up to date on the latest developments and opportunities in this area of law in Australia.

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Section 15.0

Environmental, Social, and Governance (**ESG**) Matters

15.1 What is ESG and how is it important to investors?

At its core, ESG refers to the way in which a company operates its business in a socially responsible and sustainable way. Distinct from Corporate Social Responsibility (**CSR**), ESG shifts the focus to measurable metrics, effectively translating the outcomes of a company's environmental, social and governance initiatives to a language more familiar to business – quantitative results.

Although what defines ESG depends on a company's industry, stakeholders and profile, common factors utilised are classified into three categories:

- Environmental factors consider the impact a company has on the natural environment, including measures such as carbon footprint, production of waste and effect on biodiversity.
- Social factors consider how a company treats the people it interacts with, including measures such as performance on human rights, labour standards, community engagement and diversity, equity, and inclusion.
- Governance factors consider the ethics and culture of a company, including measures such as board diversity, shareholder rights and conducting of audits.

Companies with a strong commitment to and performance on ESG place themselves at an advantage in terms of brand reputation, access to capital and long-term value propositions. As the risks and negative externalities of poor ESG performance have become more apparent, stakeholders such as investors, consumers and regulatory bodies have focused their attention on directing capital towards companies which actively address ESG issues. The ESG considerations that will be most important for an organisation will differ, depending on its sector, operational footprint, supply chains, scale and point in the business development cycle. It is important for companies to be actively engaged in areas of policy development that will shape future trends related to ESG in Australia. Below we discuss some of the key ESG issues, and how companies are required to address them.

> Other key ESG issues related to environment, workplace relations and governance are addressed in **sections 12**, **14** and **18** of this guide.

15.2 Mandatory climate-related financial disclosure

In September 2024, Australia introduced its highly-anticipated mandatory climate-related financial disclosure regime, requiring companies to prepare annual sustainability reports containing climate-related financial disclosures. For the largest entities, reporting obligations commence from 1 January 2025, with the other reporting entities progressively phased in up to 2027. The reporting regime is intended to increase transparency around climate-related financial risks and strategies, enabling investors and the public to make more informed decisions.

The Australian Accounting Standards Board has since released sustainability standards detailing the information that entities will be required to include in the climate statements of their sustainability reports. Based on the International Sustainability Standards Boards' four pillar approach of governance, risk, strategy and metrics, this includes information on the key climate governance personnel, the climate-related risks and opportunities expected to affect the entity, the risk management processes the entity has in place and details of the entity's climate-related metrics and targets. The Auditing and Assurance Standards Board is also developing complementary assurance and auditing standards for the sustainability reports.

ASIC, the regulator responsible for administering the new regime, has published draft regulatory guidance on mandatory sustainability reporting for consultation. The draft ASIC guidance is intended to assist entities with preparing valuable, high-quality climate-related financial disclosures that comply with the mandatory sustainability reporting requirements.

Australian regulators have also released guidance that incorporates climate-related disclosures. ASIC has published the *Regulatory Guide 228 Prospectuses: Effective disclosure for retail investors, and Regulatory Guide 247: Effective disclosure in an operating and financial review*. This ASIC guidance incorporates physical and transitional climate-related risks into the list of examples of common risks that may need to be disclosed in a prospectus. The *ASX Corporate Governance Principles and Recommendations* provide that ASX-listed entities should consider whether they have a material exposure to climate change risk, and if they do, to consider making climate-risk related disclosures. APRA has released the *Prudential Practice Guide: CPG 229 Climate Change Financial Risks*, which details prudent practices regarding climate- related financial risk management.

15.3 Greenwashing

With focus on the clean energy transition increasing, companies are eager to promote their operations and products as clean and green. Environmentally friendly products are more attractive to customers and investors and making green claims can improve a company's market position relative to competitors that are making weaker or no comparable environmental claims. In this environment, regulators are alive to the risk of parties engaging in "greenwashing", which is the practice of providing misleading information about a product or an entity's ESG credentials, which may influence the market and thereby impact upon an investor's ability to make informed investment decisions.

Entities are subject to certain requirements when promoting or offering sustainability-related products, such as prohibitions against misleading and / or deceptive conduct under the *Corporations Act 2001* (Cth) and *Australian Securities and Investments Commission Act 2001* (Cth), as well as disclosure obligations under the *Corporations Act 2001*, *ASIC Regulatory Guide 65 and the Corporations Regulations 2001*.

ASIC has brought several successful claims against large superannuation and investment entities for making misleading statements and engaging in deceptive conduct with respect to the representation of the sustainability-related characteristics of their products or services. The Australian Consumer and Competition Commission has also brought its first proceedings against a large manufacturing business for sustainability-related claims about its products. The ACCC has released guidance on making environmental claims for business and draft guidance for consultation on sustainability collaborations.

15.4 Director's duties and governance

Section 5.1 of this guide provides an overview of director duties in Australia. Some directors' duties under the *Corporations Act 2001* (Cth) have been interpreted by leading barristers in Australia in light of the shift in the way regulators and the public perceive climate change, and in turn, the shift in what is expected of regulators and companies when they respond to and address climate change issues.

The landmark 2016 Noel Hutley and Sebastian Hartford-Davis found that directors who do not properly manage climate risks could be held liable for breaching their legal duty of due care and diligence. In 2019 and 2021, Hutley and Hartford-Davis released subsequent Opinions, elaborating on the standard of care expected of directors in addressing climate risks and the risk of engaging in misleading or deceptive conduct by not having reasonable grounds to support net zero commitments.

In July 2022, the legal opinion of Bret Walker AO SC and Gerald Ng MAICD regarding directors' "best interest" duty was released. The "best interest" duty is that, under Australian law, directors must exercise their powers and discharge their duties in good faith in the best interests of the company and for a proper purpose. The Walker and Ng Opinion provides that directors have considerable discretion in identifying the best interests of a company and its shareholders. However, the law does not assume that shareholder interests are best served by having no regard to other stakeholders, such as employees, customers, suppliers, creditors, Traditional Owners, the environment and broader community, particularly over the longer term. Though there is no duty owed specifically to stakeholders, their interests should be legitimate concerns of company directors.

In October 2023, a nature-related opinion was also released by Sebastian Hartford-Davis and Zoe Bush, emphasising that nature-related financial risks have the potential to cause harm to the interests of Australian companies and that directors who fail to consider nature-related risks could be found liable for breaching their duty of care and diligence under the Corporations Act.

15.5 Modern slavery compliance

When the *Modern Slavery Act 2018* (Cth) was passed it established a national modern slavery reporting requirement which requires entities carrying on business in Australia with annual consolidated revenue of at least $100 million (**Reporting Entities**) to report on how they are addressing and preventing modern slavery risks in their operations and supply chains. Reporting Entities comply with the Act by preparing annual modern slavery statements. Details that must be included in modern slavery statements include the Reporting Entity's identity, operations, structure supply chains and actions taken to address risks including remediation processes and due diligence.

Five years after its enactment, a review of the Modern Slavery Act was undertaken to consider the operation of the Act and additional measures necessary to improve its operation and enforcement. On 2 December 2024, the Federal Government published its response to the review, agreeing or agree in principle to implement 25 of the 30 recommendations, including penalties for companies that fail to submit reports and the appointment of an Anti-Slavery Commissioner who will, amongst other things, publish lists of locations, sectors and products with a high-risk of modern slavery. The implementation of the recommendations will have significant implications for Australian businesses and introduce an expectation for companies to increase the quality of their reporting under the regime.

15.6 Nature-related risk disclosure

Nature-related risk encompasses both ecosystem degradation and biodiversity loss. This type of risk can cause economic impacts. For example, demand for farming can lead to an increase in deforestation and therefore biodiversity loss, and that biodiversity loss can affect the success of agricultural methods through a loss of pollinators. It is not yet mandatory in Australia to disclose nature-related risks, however the Federal Government has indicated its support for establishing nature-related financial disclosure framework in Australia.

In 2021, the Taskforce on Nature-Related Financial Disclosures (**TNFD**) was established. The TNFD is a market-led, global initiative that aims to develop a risk management and disclosure framework for organisations to report on nature-related risks and opportunities (**Framework**). The aim of the TNFD is to support a shift in global financial flows away from nature-negative outcomes and toward nature-positive outcomes. This will in turn minimise impacts on biodiversity, which is another factor that investors are increasingly considering when choosing whether to invest in a business.

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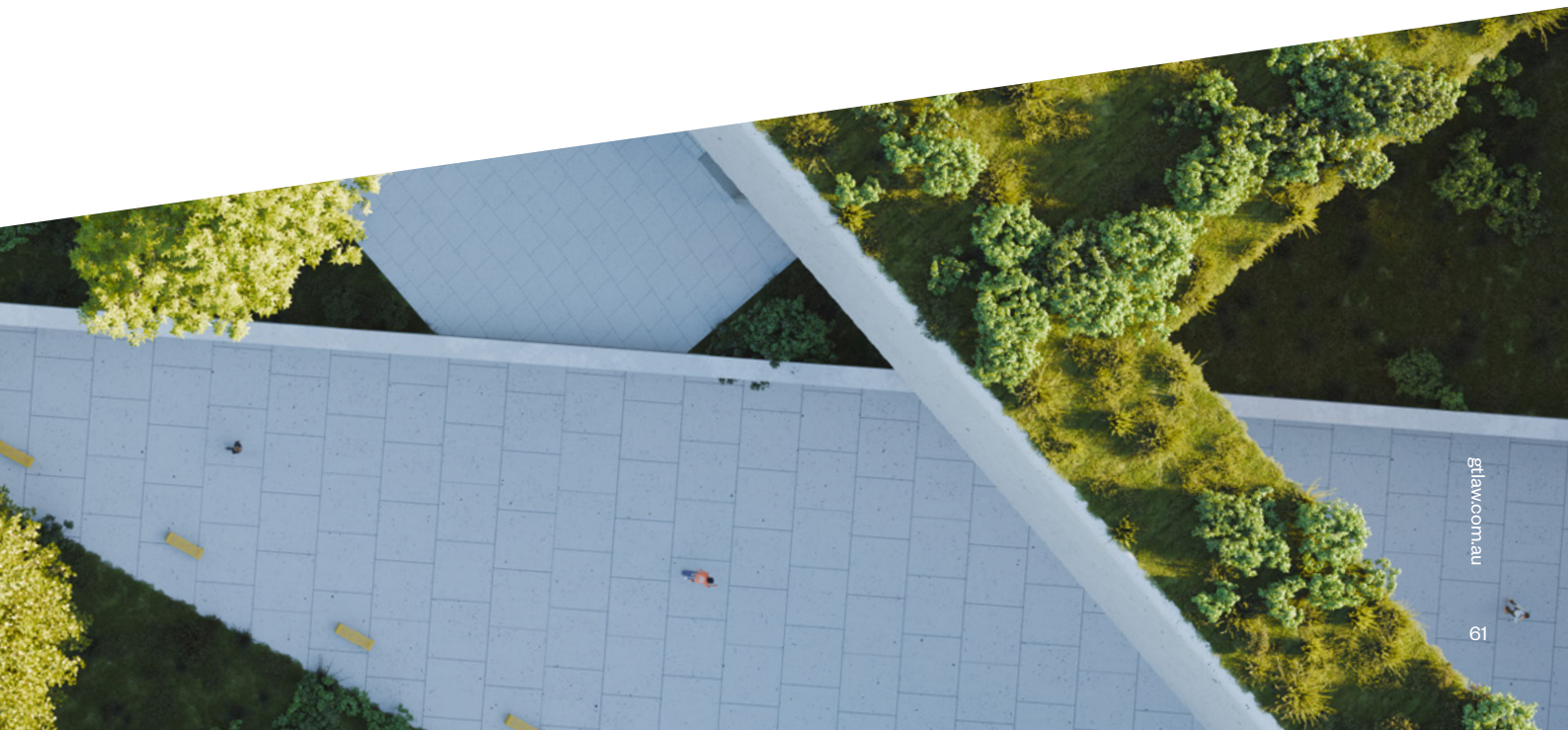

Section 16.0

Property

In Australia, each state and territory has its own legislative requirements and conventions for the transfer of real property and registration of interests in land.

The Torrens system of registering title to land exists in each state and territory. Under this system, interests in land are registered in a central State register which provides a government-guaranteed indefeasible title (subject to limited exceptions, eg obtaining title by fraud). On registration, a legal interest is created in the land subject only to the pre-existing interests registered on the title.

The interests which may be registered on title include mortgages, leases, easement and covenants.

16.1 Sale and purchase of property

If the seller is registered (or required to be registered) for GST, then GST is payable on the sale of commercial vacant land or new residential premises. However, no GST is payable on the sale of commercial land which is sold subject to full tenancies, or on existing residential premises. GST payable is payable by the seller, but it is usual commercial practice for the seller to contractually pass its GST liability to the purchaser. If the purchaser is registered for GST, it may claim input tax credits (ie refunds of GST) from the ATO for the acquisition of the taxable component of the purchase price.

Certain purchasers of new residential premises or potential residential land are required to withhold the taxable component of the purchase price and remit it to the ATO, rather than paying it to the vendor.

Stamp duty on the contract and the transfer is generally payable by the purchaser, and the rate of duty and time for payment varies in each state and territory. In some States, the purchase of property by foreigners is subject to a stamp duty surcharge in addition to the standard rates of stamp duty.

Depending on the land value and the way the land is owned (eg by a trustee) or used, state and territory land tax may be payable. A person's principal place of residence is usually exempt, but most land used for commercial and investment purposes will be liable for land tax. Some states impose a land tax surcharge on foreign owners of property in addition to the standard rates of land tax.

The sale of land may give rise to a CGT or an income tax liability for the seller, depending on whether the land was 'trading stock' or held as a longer-term investment. The purchase price of the land and associated non-deductible expenses will generally establish a tax cost base for the calculation in due course of any gain or loss realised by the purchaser on the subsequent sale of the land.

Unless a seller of property has obtained a clearance certificate from the ATO, the purchaser will be required to pay 15% of the consideration payable to the ATO.

All settlements for the sale of land used to require a paper certificate of title and transfer form to be physically submitted to the land registry for registration. Australia's states and territories are currently transitioning to an electronic settlement system, though the timing of this transition varies across the states and territories. Once in place, the electronic system is intended to streamline the settlement process.

It is now required practice to carry out a verification of identity process on clients involved in most property transactions, which involves taking copies of clients' identity documents (eg passport and drivers' licence) and storing these in a secure database. The purpose of the VOI process is to avoid fraudulent transactions.

16.2 Leasing

The commercial terms and statutory requirements for leasing of retail, commercial and industrial premises are similar in all Australian jurisdictions.

In most jurisdictions, leases with a term exceeding three to five years are required to be registered on the title to the land. Registration of a lease benefits the tenant, as it goes to security of tenure against third parties with a claim adverse to the lease – for example, a mortgagee in possession wanting to sell the property with vacant possession or a third party purchaser of the freehold. Each jurisdiction has minimum lease covenants implied into leases (eg the tenant's right to quiet enjoyment), but these are usually significantly amended or excluded by the terms of the lease.

There is also specific legislation in each jurisdiction to protect retail tenants (other than large or anchor tenants, eg supermarkets and department stores). This legislation ensures that small and specialty tenants are given adequate disclosure about their obligations before entering into a lease. It also mandates or prohibits certain terms from leases (eg a minimum 5-year term, unless waived with legal advice, a limit on number of rent reviews, a prohibition on payment of key money). In most jurisdictions, if the lease terms are inconsistent with the retail lease legislation, the legislation will prevail.

16.3 Foreign investment approval

Many acquisitions of interests in land by foreign people are likely to require foreign investment approval. Please see **section 2**.

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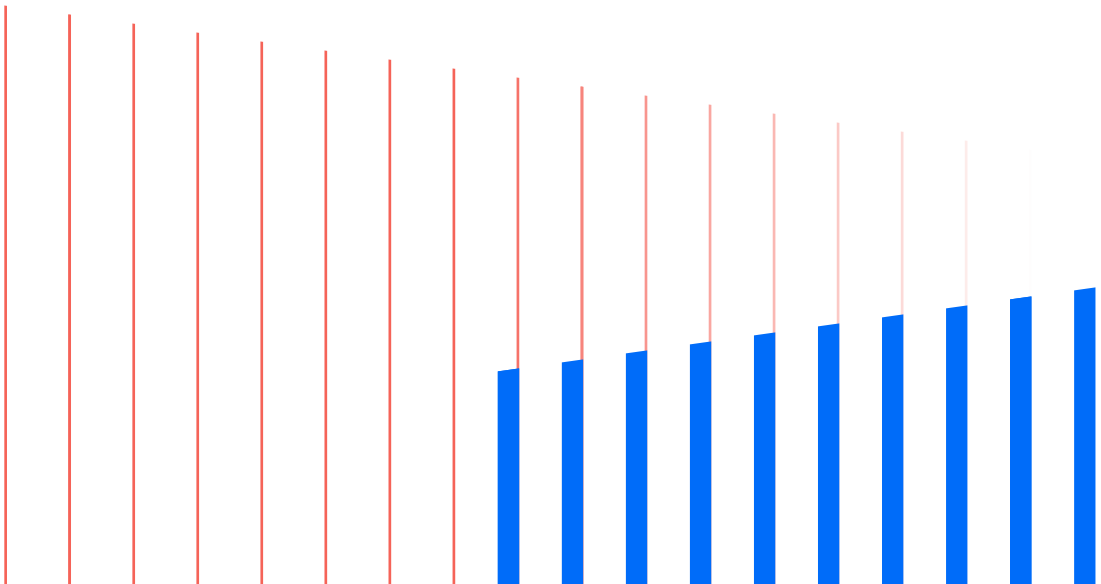

Section 17.0

Native title and indigenous heritage

Native title describes the rights and interests of Aboriginal and Torres Strait Islander people in land under their traditional laws and customs. Native title matters in Australia are governed by the *Native Title Act 1993* (Cth) (as amended) (**NTA**). Some states have also introduced complementary legislation which deals with certain aspects of native title.

The existence of native title depends on whether the group of people claiming to hold native title rights have maintained their traditional connection with the land to the satisfaction of the courts. The existence and content of native title rights are determined by the Federal Court.

The NTA distinguishes between grants of interests in land prior to, and after, 23 December 1996. All grants of interests in land before that date have generally been validated by the NTA. Grants of interests after 23 December 1996 in respect of land which either is, or may be, the subject of native title will be valid provided that the applicable "future act" procedures prescribed by the NTA have been complied with.

Where a person proposes to do something that affects native title over land which is subject to a registered native title claim or determined native title rights or interests, the native title claimants or holders must be notified. This triggers certain processes under the NTA, including:

- the "right to negotiate" process, which requires the state and the proponent to negotiate in good faith with the claimants or holders in order to obtain their agreement to the proposal (generally resulting in execution of either an Indigenous Land Use Agreement, which is then registered and has the effect of law between the parties, or a land access agreement, which is an unregistered agreement), failing which the matter can be referred to the National Native Title Tribunal for determination;
- an expedited process which can apply where the proposal has a minimal impact on the land; or
- a notification and consultation process where the rights to be granted relate to infrastructure.

If a grant of an interest in land is made without the appropriate process under the NTA being followed, this can result in the invalidity of that grant to the extent that it is inconsistent with the continued existence or enjoyment of any native title rights in the subject land.

Separate from the question of native title is the issue of protection of sites and items of significance to Indigenous people, which is dealt with through various state and Commonwealth laws. Negotiations regarding matters of Indigenous heritage are often conducted contemporaneously with the negotiation of native title issues. Consent of the relevant government minister may be required if activities on the land may damage sites or items of significance.

The NTA also specifies the procedures by which people determined to hold native title can claim compensation. Such compensation is payable by the Crown in the first instance, but depending on the circumstances the Crown might have a right of recovery against a title holder.

Compensation may also be payable by a person as a result of agreements made pursuant to the "right to negotiate" or other grant process, and depending upon the terms of the payment, this may be set off against any compensation payable to the native title party or to the Crown.

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Avoid the pitfalls

A key risk in relation to native title is the delays in obtaining the necessary approvals as a result of the future act processes. These processes can be lengthy and result in delays to commercial operations and timelines.

Section 18.0

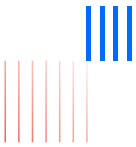
Anti-money laundering, counter-terrorism financing and corrupt practices legislation

18.1 Anti-money laundering and counter-terrorism financing legislation

The *Anti-money Laundering and Counter-terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) and its associated regulations and rules seek to reduce the risk that transactions involve money laundering or financing of terrorism. The AML/CTF Act is administered by the Australian Transaction Reports and Analysis Centre (**AUSTRAC**).

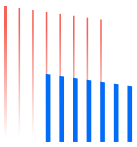
The AML/CTF Act applies to those entities that provide "designated services", which includes a wide range of activities including the provision of most financial services. The legislation imposes obligations on those entities, "reporting entities", including to adopt and maintain their own anti-money laundering and counter-terrorism financing programs.

Generally, a program is divided into two parts:



Part A: general

The purpose of which is to identify, mitigate and manage the risk that the services provided by the reporting entity involve money laundering or financing of terrorism.



Part B: customer identification

The purpose of which is to set out customer identification and verification procedures. Reporting entities are required to collect and verify information relating to the identity of customers, customer's beneficial owner(s) and customers who are identified as politically exposed persons.

A reporting entity may use an external provider to assist to satisfy its know-your-customer obligations and may rely on a third party's customer identification procedures in certain circumstances, however it should ensure obligations under the privacy law are complied with (see **section 18**). In both parts of the AML/CTF Program, the emphasis is on putting in place appropriate risk-based systems or controls, depending on the nature, size and complexity of the business.

Reporting entities are also required to report certain transactions to AUSTRAC, perform ongoing customer due diligence, keep accurate records, and lodge annual compliance reports. The compliance report relates to a reporting entity's compliance with its obligations under the AML/CTF Act.

In November 2024, the Australian Senate passed reforms to Australia's AML/CTF Act. The reforms will expand the categories of reporting entities to include law firms, real estate service providers and professional service providers. The reforms also expand and streamline continuing obligations, including introducing replacement value transfer designated services and additional designated services applicable to digital asset service providers. The reforms are likely to commence from March 2026.

Penalties for non-compliance with the AML/CTF Act can be substantial including penalties of up to $27.5 million per contravention. To date, the largest penalty for AML/CTF contraventions has been for $33 million.

18.2 Corrupt practices legislation

In Australia, providing, offering or promising to provide a benefit to another person where:

- the benefit is not legitimately due to the person; and
- the person provides the benefit with the intention of influencing a public official in order to obtain or retain business or a business advantage not legitimately due, is prohibited.

Giving or offering a benefit as an inducement or reward for doing or not doing something or for showing or not showing favour or disfavour to any person in relation to business affairs is also prohibited.

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Section 19.0

Privacy and data protection, direct marketing, spam and do not call

19.1 Overview of privacy related laws and regulators

In Australia, the use of "personal information" (**personal information**) is principally regulated by the federal *Privacy Act 1988* (**Privacy Act**). The Privacy Act applies to the handling of personal information by Australian federal government agencies and Australian Capital Territory (**ACT**) government agencies. The Privacy Act also governs the private sector, including corporations and other businesses, but in general only applies to businesses with aggregate group (global) revenue greater than $3 million (or that are related to a business that does).

The Privacy Act regulates collection and use in a "record" or generally available publication, and disclosure, of two main types of information:

- Personal information, being information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information is true or not and whether it is in a recorded form or not. Information will also be personal information where the identification or re- identification is practicable from the information itself or in combination with reference to other information. Common examples of personal information are names, addresses and telephone numbers.
- Sensitive information, being such information or an opinion about certain characteristics of an individual, including racial or ethnic origin, political opinions, membership of a professional or trade association, criminal record, health and health status, and biometrics used for the purpose of biometric verification and identification.

Sensitive information is subject to higher levels of regulatory protection. For example, generally speaking an organisation must not collect sensitive information about an individual unless the individual consents (expressly or impliedly) to the collection of the information and the information is reasonably necessary for one of the organisation's functions or activities.

The Privacy Act is currently under review, with the Privacy Act Review Report released in February 2023 containing 116 proposals for reform. The proposals seek to strengthen the protection of personal information and Australians' control over their information.

Amendments to the Privacy Act in December 2024 implemented the first tranche of these recommendations. These included:

- the introduction of a statutory tort for serious invasions of privacy;
- new doxing offences inserted into the *Criminal Code Act 1995* (Cth); and
- the introduction of two new categories of civil penalties. The existing "serious interference with privacy" civil penalty provision means companies can be subject to a penalty of up to $50 million, 3 times the value of the benefit obtained, or 30% of the turnover of the company during the breach turnover period (minimum 12 months). Alongside this provision, a new penalty for "general privacy interferences" has been introduced of up to $3,300,000 (for companies). In addition, infringement notices may now be issued for a variety of contraventions, including non-compliant privacy policies, of up to $330,000 (for companies).

Further amending legislation is expected, although it is difficult to predict the timing and details of the reforms yet to come.

The two principal regulators of privacy laws in Australia are the Australian Privacy Commissioner and the Australian Communications and Media Authority (**ACMA**).

The Australian Privacy Commissioner is responsible for enforcing compliance with the Privacy Act and reviewing proposed privacy codes. This involves investigating instances of non-compliance by agencies and organisations in relation to all commercial and public sectors.

The ACMA is responsible for administering and enforcement of the following legislative instruments which supplement the Privacy Act and deal with related privacy issues:

- the *Spam Act 2003* (Cth) (**Spam Act**), which deals with the sending of unsolicited commercial electronic messages, including emails and SMS;
- the *Do Not Call Register Act 2006* (Cth), (**Do Not Call Register Act**) regulating unsolicited commercial calling to telephone numbers listed on the national Do Not Call Register; and

Part 13 of the *Telecommunications Act 1997* (Cth), which imposes restrictions on the use and disclosure of telecommunications and communications-related data.

State and territory regulators, generally called Privacy Commissioners, regulate state and territory government agencies and in some states also health service providers and some surveillance activities. Health privacy is an area that is dually regulated under both state and federal legislation.

There are a range of other laws in Australia, at federal and state level, which indirectly impact on handling of personal information, including:

- state and territory privacy legislation, applying to personal information held by government agencies and contractors to government agencies and in some states also health service providers and some surveillance activities;
- federal laws relating to telecommunications interception;
- telecommunications sector specific laws governing access to call product, stored electronic communications and information about telecommunications customers use of telecommunications networks;
- federal and state/territory freedom of information legislation applying to information held by government agencies;
- federal laws relating to the disclosure of or data-matching of tax file numbers; and
- federal and state / territory laws governing the use of tracking devices, listening devices and workplace surveillance, and/or unauthorised optical surveillance.

The Privacy Act has extraterritorial operation and extends to an act done, or practice engaged in, outside Australia and Australian external territories by an organisation (including a small business operator), that has an "Australian link". An organisation or small business operator has an "Australian link" where it is:

- an Australian citizen, or a person whose continued presence in Australia is not subject to a legal time limitation;
- a partnership formed, or a trust created, in Australia or an external territory;
- a body corporate incorporated in Australia or an external territory; or
- an unincorporated association that has its central management and control in Australia or an external territory.

Corporations and other bodies that do not fall into the above categories, broadly, any foreign corporation or body, will have an "Australian link" where the organisation carries on business in Australia.

19.2 Australian Privacy Principles (**APPs**)

The Privacy Act principally comprises:

- the 13 Australian Privacy Principles (**APPs**) which apply to the handling of personal information by government agencies and private organisations which are in general collectively referred to as "APP entities"; and
- credit-reporting provisions which apply to the handling of personal credit information about individuals by credit reporting bodies, credit providers and some other third parties.

The APPs follow the personal information lifecycle from collection, to use, to disclosure, to retention, and finally to destruction or de-identification. They are not lengthy, but their interpretation can be complex. The Privacy Commissioner has issued detailed Guidelines as to interpretation and operation of the APPs. Some APPs draw distinctions in their coverage and operation as between organisations and agencies, while others apply alike to all APP entities (organisations and agencies together). Some APPs require different and higher standards in relation to the sub-category of personal information that is sensitive personal information.

The coverage of the APPs can be briefly summarised as follows:

APP 1: Open and transparent management of personal information

APP entities (that is, entities regulated by the Australian privacy laws) are required to have a clearly expressed and up to date APP privacy policy. From December 2026, APP entities will from be required to disclose in their privacy policies information about their use of automated decision making processes and the types of personal information used in them.

APP entities are also required to implement practices, procedures and systems to manage personal information. This has been interpreted as requiring implementation of privacy assurance practices and procedures – sometimes called "Privacy by Design" – into business processes and products. A recent decision of the Privacy Commission has indicated that this may also require the preparation of privacy impact assessments in appropriate circumstances.

APP 2: Anonymity and pseudonymity

APP entities must give individuals the option of not identifying themselves, or of using a pseudonym. Limited exceptions apply.

APP 3: Collection of solicited personal information

Outlines when an APP entity can collect personal information that is solicited by the entity. APP 3 applies higher standards to the collection of "sensitive" information, such as health information.

APP 4: Dealing with unsolicited personal information

Outlines how APP entities must deal with unsolicited personal information.

APP 5: Notification of the collection of personal information

Outlines when and in what circumstances an APP entity that collects personal information must notify an individual of certain matters.

APP 1 and APP 5 together set out quite prescriptively those things that need to be notified to an individual in relation to any collection of personal information about that individual. Read together with APP 1, APP 5 constitutes a comprehensive list of what should be covered in a collection notice, although in practice a number of these matters may instead be dealt with in a privacy policy in order to keep the collection notice to manageable length. In Australia the respective roles of privacy policies and collection notices is less defined than is the case in other comparable privacy jurisdictions.

Special requirements apply where any personal information about an individual is collected from anyone other than the affected individual: in particular, notice of that collection is required to be given to affected individuals.

APP 6: Use or disclosure of personal information

Outlines the circumstances in which an APP entity may use or disclose personal information that it holds.

APP 7: Direct marketing

An organisation may only use or disclose personal information for direct marketing purposes if certain conditions are met. Broadly, direct marketing:

- is use or disclosure of personal information to communicate directly with an individual to promote goods and services;
- may only be undertaken where an individual would reasonably expect it, such as with informed consent;
- must provide a prominent statement about a simple means to opt out; and
- must be stopped when an individual opts-out.

APP 8: Cross-border disclosure of personal information

Outlines the steps an APP entity must take to protect personal information before it is disclosed to any other entity (including related entities) outside Australia.

APP 9: Adoption, use or disclosure of government related identifiers

Outlines the limited circumstances when an organisation may adopt a government related identifier of an individual as its own identifier, or use or disclose a government related identifier of an individual. Examples of government related identifiers are drivers' licence numbers, Medicare numbers, Australian passport numbers and Centrelink reference numbers.

APP 10: Quality of personal information

An APP entity must take reasonable steps to ensure the personal information it collects is accurate, up to date and complete. An entity must also take reasonable steps to ensure the personal information it uses or discloses is accurate, up to date, complete and relevant, having regard to the purpose of the use or disclosure.

APP 11: Security of personal information

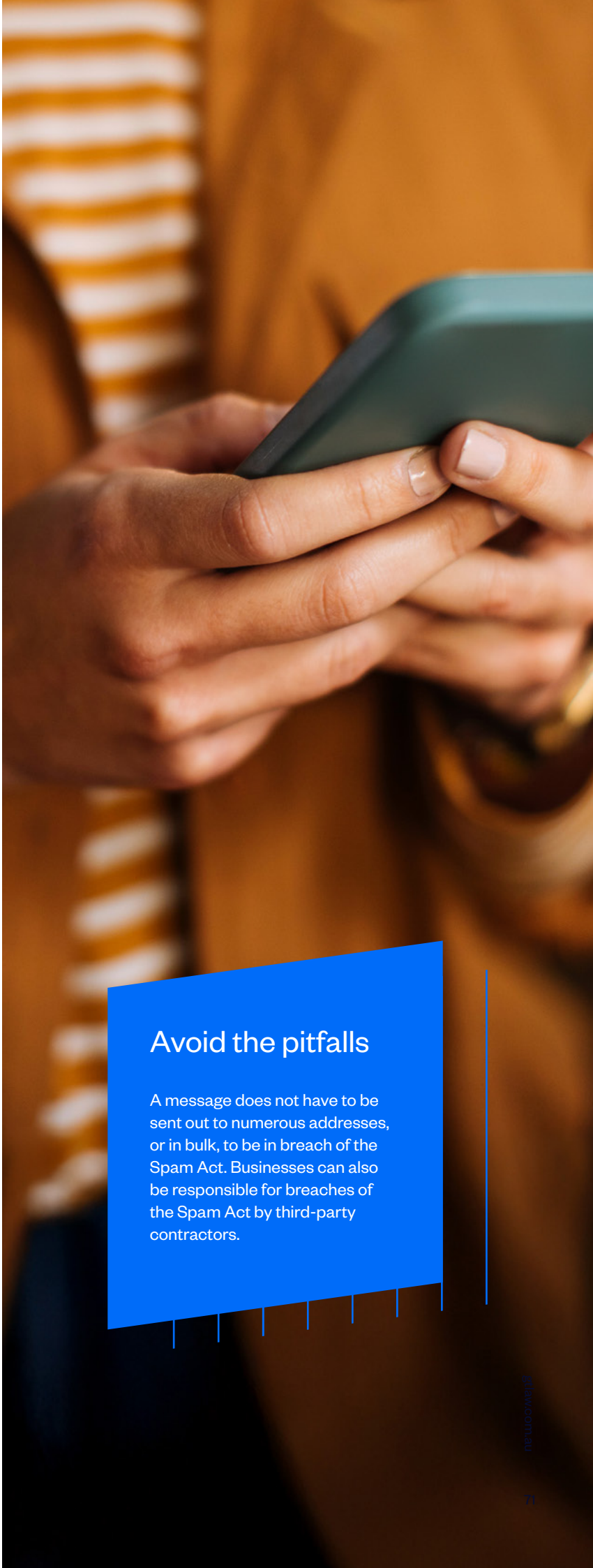
An APP entity must take reasonable steps to protect personal information it holds from misuse, interference and loss, and from unauthorised access, modification or disclosure. An entity has obligations to destroy or de-identify personal information in certain circumstances.

APP 12: Access to personal information

An APP entity must provide access when an individual requests to be given access to personal information held about them by the entity. Some limited, specific exceptions apply.

APP 13: Correction of personal information

An APP entity must correct information held by it about an individual in response to a reasonable request by an affected individual.



Avoid the pitfalls

A message does not have to be sent out to numerous addresses, or in bulk, to be in breach of the Spam Act. Businesses can also be responsible for breaches of the Spam Act by third-party contractors.

19.3 Mandatory data breach notification

The Privacy Act requires APP entities to notify the Commissioner and affected individuals if the entity experiences an 'eligible data breach' – that is, a breach that a reasonable person would conclude is likely to result in serious harm to the individual/s concerned.

Limited exceptions to the notification requirements are available, including a public interest exception of avoiding prejudicing the activities of law enforcement agencies or disclosing information where it would be inconsistent with a secrecy provision in another law.

The Australian Privacy Commissioner has the power to investigate noncompliance with the mandatory data breach notification scheme and make a determination requiring the entity to remedy such noncompliance.

19.4 Direct marketing and spam

Direct marketing is primarily regulated through the Spam Act, the Do Not Call Register Act and APP 7 of the Privacy Act.

APP 7 initially states a very broad prohibition of direct marketing: an organisation must not use or disclose the personal information that it holds about an individual for the purpose of direct marketing (APP 7.1).

APP 7 then carves-down that prohibition in a number of specified circumstances. Key factors as to whether APP 7 applies are:

- whether a particular marketing activity is "direct marketing" (and then regulated by APP 7); and
- whether the Spam Act and the Do Not Call Register Act apply to regulate the particular activity, such that APP 7 does not apply (because an exception in APP 7.8 operates).

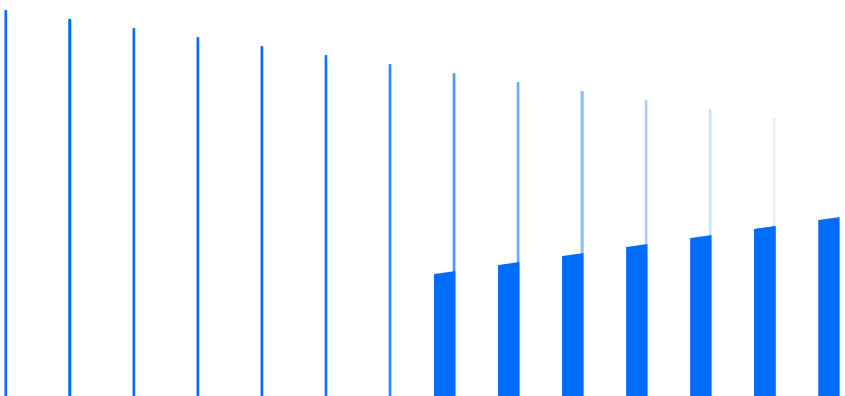
"Direct marketing" is not defined in the Privacy Act. However, the Australian Privacy Commissioner in the Australian Privacy Principles guidelines (February 2014) has expressed the view that "direct marketing involves the use and / or disclosure of personal information to communicate directly with an individual to promote goods and services. A direct marketer may communicate with an individual through a variety of channels, including telephone, SMS, mail, email and online advertising". APP 7 requires the direct marketing organisation to provide a simple way for the individual to request not to receive direct marketing communications from the organisation. There must be a visible, clear and easily understood explanation of how to opt out and a process for opting out which requires minimal time and effort that uses a straightforward communication channel accessible at no more than nominal cost.

An organisation must also, on request, provide its source for an individual's personal information, unless it is impracticable or unreasonable to do so.

In addition, in any circumstance where the individual would not reasonably expect their information to be used or disclosed for the purpose of direct marketing or personal information about them was collected from a third party, in each direct marketing communication with the individual the organisation must include a prominent statement ("opt out statement"), or otherwise draw the individual's attention to the fact that the individual may request an opt-out.

The Spam Act applies to "electronic messaging", which covers emails, instant messaging, SMS and other mobile phone messaging. The Spam Act prohibits "unsolicited commercial electronic messages" with an "Australian link" from being sent or caused to be sent. The "Australian link" concept is much broader than in the Privacy Act and includes sending of commercial electronic messages from outside Australia to any Australian email account holder.

The Spam Act defines a "commercial electronic message" as an electronic message, where, having regard to the content, presentation and access to other supplementary information it could be considered that a purpose, or one of the purposes, of the message is to (among other things) offer, advertise or promote the supply of goods, services, land or business or investment opportunities. Importantly, commerciality may be a secondary purpose and the message is still caught: for example, a message that is mainly factual or useful information, but then has some marketing or promotional content.



Commercial electronic messages, as defined, may only be sent by a company if each of the following requirements are satisfied:

"consent"

The message must be sent with the recipient's consent. The recipient may give express consent, or under certain circumstances consent may be inferred from their conduct or from an existing business or other relationship. It is up to the sender to prove that consent has been given.

"sending identification"

The message must contain accurate information about the person or organisation that authorised the sending of the message and how to contact them.

"unsubscribe"

The message must contain a "functional unsubscribe facility" to allow the recipient to opt out of receiving messages from that source in the future. Unsubscribe requests must be honoured within five business days.

If a business engages a third party to send a commercial electronic message/campaign on its behalf, the business needs to be aware of its legal obligations, as it may be found responsible for any contraventions of the Spam Act by the third party.

The Spam Act also prohibits the use, supply or acquisition of address harvesting software and any list of electronic addresses produced using such software.

19.5 Do not call

The Do Not Call Register provides consumers in Australia with the choice to "opt-out" of receiving unwanted and unsolicited telemarketing calls through a regulatory framework under which their "opt-out" is recorded on a centralised Do Not Call Register.

The Do Not Call Register Act prohibits "telemarketing calls" from being made to a number entered on the Do Not Call Register, unless:

- the recipient of the call (the account holder or their nominee) has consented to the making of the call;
- the telemarketer "washed" the number against numbers on the Do Not Call Register within the preceding 30 days and the number was not then identified as a "do not call" number (this enables a database check to be relied upon for 30 days, therefore a registration would not be fully effective for 30 days); or
- the call is otherwise exempted as a "designated telemarketing call".

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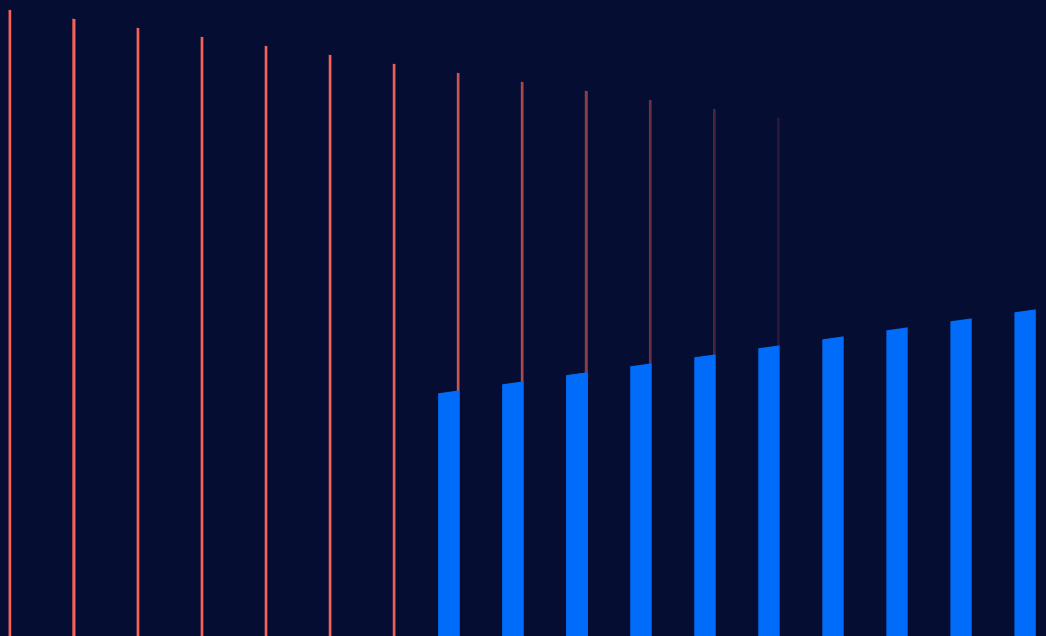
Section 20.0

Dispute resolution

20.1 Sources of law

The common law system forms the basis of Australian jurisprudence. It embodies judge-made law, whereby rules of law and precedent have been developed by the court.

Judges are bound to follow interpretations of the law made by higher courts in cases with similar facts or legal principles. Legislation or statute is the primary body of law. Even in areas which are still primarily based on the common law, important modifications have been made by statute.



20.2 Court system in Australia

The Australian court system comprises Commonwealth (or federal), state and territory courts.

The High Court of Australia is the highest court of appeal. The High Court decides cases of special significance, including challenges to the constitutional validity of legislation, and hears appeals (by special leave) from the federal, state and territory courts.

The Federal Court of Australia typically deals with corporations, competition, constitutional and administrative law, along with other matters arising under Commonwealth legislation such as certain commercial, federal crime, federal tax and migration matters. The workload in respect of companies and securities litigation is shared between the federal and state courts.

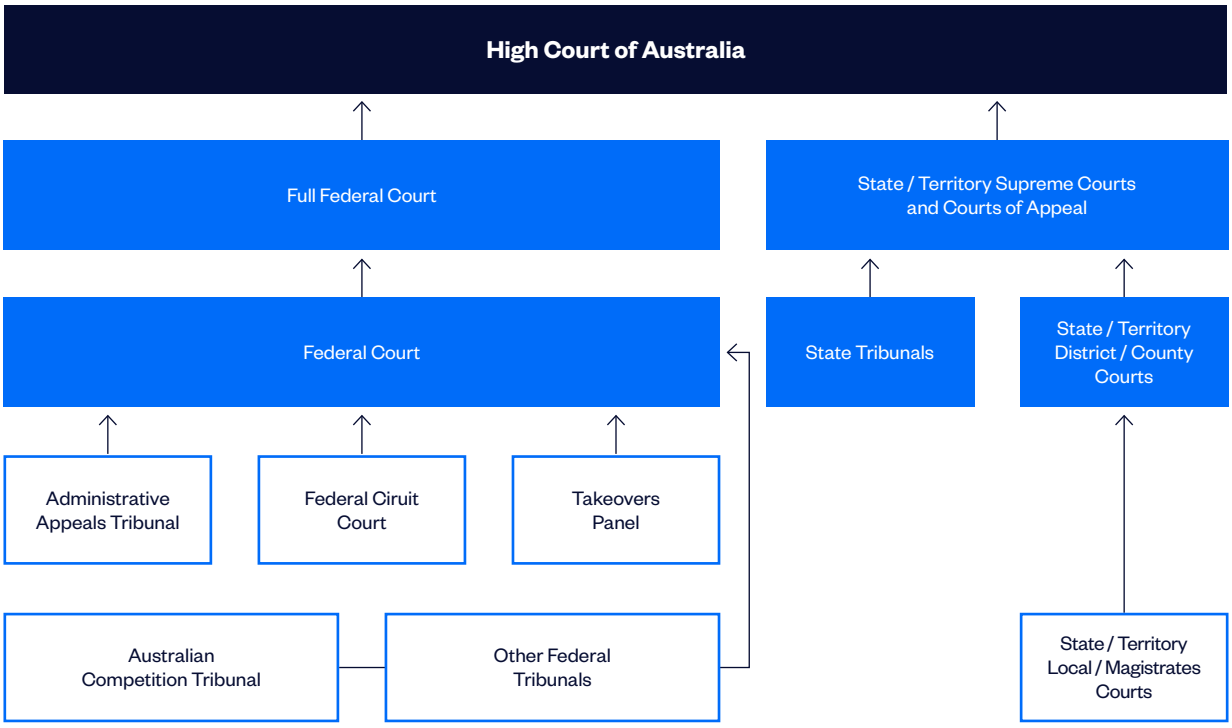
The Federal Circuit Court of Australia oversees family law, bankruptcy, unlawful discrimination, consumer protection, competition, privacy, migration, copyright and industrial law. Nearly all of its jurisdiction is shared with the Family Court or the Federal Court of Australia.

State and territory court systems operate independently. These courts have inherent jurisdiction in respect of all disputes other than those arising under Commonwealth legislation. Each state and territory has a superior court known as a Supreme Court. The Commonwealth has enacted legislation conferring federal jurisdiction on the various Supreme Courts, in all matters except in certain specialist areas such as family law and competition law.

State courts typically deal with contract, tort and criminal matters, as well as cases arising under state legislation. Lower-level courts, including district / county and local / magistrates courts, decide the majority of serious criminal offences and civil litigation up to certain monetary limits.

There are a range of specialist courts and tribunals in each state. They include the Takeovers Panel, the Australian Competition Tribunal, various administrative decision review tribunals, migration review tribunals, land and environment courts, industrial courts, the Family Court and various consumer claims tribunals.

Australian Court System



20.3 Split legal profession

The legal profession in Australia is essentially a split profession. Lawyers will generally practise as either a solicitor or a barrister. Solicitors provide legal advice directly to a client and are involved in case preparation. Solicitors, upon commencement of court proceedings, may brief a barrister on behalf of a client to appear in court and advocate during the proceeding.

20.4 Commencement of proceedings

Selecting the correct court in which to commence proceedings is important, as the court must have the requisite jurisdiction for the matter to be heard.

Limitation periods for commencing proceedings differ according to the type of action and the court in which the action is to be commenced. For example, actions founded in contract and tort must be commenced within six years running from the date the cause of action first accrues.

20.5 Court procedure

Each court and tribunal has its own procedural rules.

The superior courts in all jurisdictions have the power to make interim orders on an urgent and ex parte basis. This includes interlocutory injunctions to operate pending a final hearing and determination of a proceeding, asset preservation orders and search orders. Each court has a duty judge who is available on short notice (outside business hours) to hear urgent applications which cannot be satisfactorily accommodated within the ordinary system.

The presumption in civil proceedings is that they will be tried without a jury, unless the interests of justice otherwise require. Civil proceedings are usually determined by a judge, or magistrate, without a jury. Exceptions include defamation and certain personal injury proceedings. The burden of proof in civil proceedings is on the 'balance of probabilities.'

20.6 Costs

In all Australian jurisdictions, the courts have a discretion to award costs as they see fit. In most cases, an unsuccessful party will be required to pay the successful party's costs. There are generally two types of costs in Australia:

- solicitor / client costs are the costs incurred by the client for the work performed, pursuant to the retainer between the solicitor and the client; and
- party / party costs are the costs recoverable by the client from the other party, if a cost order is made in their favour. Party / party costs are determined under a court scale with fairly rigid principles (which in practice means the successful party will only recover around 50%–70% of the total solicitor/client costs that they have incurred).

In some cases, costs will be awarded on a solicitor / client, or "indemnity" basis, where all but unreasonably incurred costs may be recovered. Indemnity costs are discretionary and awarded upon application, where there are good reasons for doing so – for example, where the party paying the costs unreasonably refused a settlement offer that was better than the judgment ultimately awarded or where there has been inappropriate conduct during the trial resulting in delays or additional costs.

20.7 Production of documents

"Discovery" is a process often ordered by a court, whereby a party is required to produce to the other party all documents within a party's possession, custody or power that may shed light on any of the issues in the proceedings. This requires parties to discover documents in the possession of an agent or employee, which that party has a right to obtain, if it requests them.

The term "document" is broad and extends to any document, from electronic documents, emails, tape records, letters and accounts to scrap pieces of paper recording information relevant to the matters in issue. Confidential non-privileged documents are not exempt from production (but may be the subject of confidentiality undertakings given by the other party).

Each court has different rules relating to discovery.

20.8 Privilege

The rules of evidence allow privilege to be claimed on certain types of documentation. Privileged documents usually fall within the following categories:

Legal professional privilege:

Gives a client the right to refrain from producing confidential documents prepared for the dominant purpose of a lawyer, or one or more lawyers, providing legal advice to the client or for use in existing or anticipated litigation. The claim is for the client to make and may be waived. Legal professional privilege does not extend to documents created in furtherance of a crime or fraud.

Privilege against self-incrimination:

A witness is entitled to object to answering a question on the grounds that answering would have a tendency to show that they have committed an offence arising under an Australian or foreign law, or are liable to a civil penalty. This form of privilege does not extend to corporations.

Public interest immunity:

If the public interest in preserving secrecy or confidentiality over a document or information that relates to matters of state outweighs the public interest in admitting it into evidence or disposing fairly of the proceedings, a court may of its own initiative, or on application by a party, direct that document to be privileged.

20.9 Arbitration and mediation

Arbitration proceedings and mediations are common in Australia.

Arbitration involves the referral of the dispute to one or more arbitrators to determine the dispute. The requirement to attend an arbitration requires the agreement of both parties and is usually set out in an existing contract. Generally, Australian courts have enforced arbitration agreements and require parties who agreed to attend arbitration to do so.

Arbitrations are usually conducted in a manner similar to a court process, but the hearing and determination are private and confidential to the parties. An Arbitrator's determination is recorded in a "final award" which is binding on the parties and enforceable upon registration with the court.

Each of the Australian states and territories has enacted a Commercial Arbitration Act for the conduct of domestic arbitration, based on the UNCITRAL Model Arbitration Rules. The Commonwealth has enacted the *International Arbitration Act 1974* (Cth). Under each Act there is provision for the courts to enforce arbitral awards as if they were judgments of the court.

Mediation is a negotiation process which is structured and facilitated by a mediator who assists with the negotiation. The mediator may be appointed by a court or privately agreed by the parties. The mediator does not make any binding determinations but may express views to facilitate the negotiation process. Most court rules and practice notes contain procedural requirements for parties to attend compulsory mediation.

20.10 Other forms of ADR

In addition to arbitration and mediation, there are other "alternative dispute resolution" (**ADR**) processes which involve a third party who either assists the parties in dispute or conflict to reach an agreement by consent or make a decision which may be binding or non-binding on the parties. Other forms of ADR include expert determinations, referees and adjudication.

Expert determinations are carried out by persons with specialised knowledge who actively gather information relevant to the dispute, rather than hear arguments from the parties. In the absence of factors such as fraud or collusion, expert determinations are binding in Australia if accompanied by an enabling contract. Referees are usually appointed by courts and tribunals on specific issues which are deferred to them. Referrals to referees usually involve complex technical issues such as building cases which involve determination by a technical expert. In the building and construction industry, adjudication is used to make timely and cost-effective interim determinations as to a party's rights to payment under security of payment legislation.

20.11 Foreign judgments

The *Foreign Judgments Act 1991* (Cth) (**Foreign Judgments Act**) establishes a statutory scheme under which judgments of specified foreign courts are recognised and enforced in Australia. It includes enforceable monetary judgments which are final and conclusive as between the parties. Notably, the Schedule excludes any courts of the United States. Where a statutory regime does not exist, it is also possible to apply for foreign judgments to be recognised and enforced applying common law principles.

To enforce a judgment, the judgment creditor must apply to the appropriate Australian court for registration within six years of the date of the judgment. For the purpose of enforcement, a registered foreign judgment has the same force and effect as a judgment given in the court in which it is registered, including the accumulation of interest on the judgment debt. A judgment debtor can apply to have the judgment set aside on a number of specified grounds.

Australia has enacted the Model Law on Cross-Border Insolvency, which allows a foreign representative, such as a foreign liquidator, to apply to an Australian court for recognition of the appointment in Australia. Upon recognition, at the request of the foreign representative an Australian court may grant relief to assist with the reorganisation or liquidation of a company or individual with assets, rights, obligations or liabilities in Australia.

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Glossary

Regulatory authorities, tribunals, advisory bodies and legislation

Name	Abbreviation used in this guide	Section references
Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)	AML/CTF Act	8, 17
Australian Communications and Media Authority	ACMA	18
Australian Competition and Consumer Commission	ACCC	1, 10, 11
Australian Consumer Law	ACL	11, 13, 18
Australian Foreign Investment Policy		2
Australian Law Reform Commission	ALRC	18
Australian Privacy Commissioner		18
Australian Prudential Regulation Authority	APRA	1, 8
Australian Securities and Investments Commission	ASIC	1, 3, 4, 5, 6, 7, 11
Australian Securities and Investment Commission Act 2001 (Cth)		11
Australian Securities Exchange	ASX	1, 4
Australian Taxation Office	ATO	1, 3, 5, 9, 16
Australian Transaction Reports and Analysis Centre	AUSTRAC	17
Banking Act 1959 (Cth)		8
Competition and Consumer Act 2010 (Cth)	CCA	1, 10, 11, 13
Copyright Act 1968 (Cth)	Copyright Act	13
Corporations Act 2001 (Cth)	Corporations Act	1, 3, 4, 5, 6, 7, 8

Name	Abbreviation used in this guide	Section references
Designs Act 2003 (Cth)	Designs Act	13
Do Not Call Register Act 2006 (Cth)	DNCR Act	18
Environment Protection and Biodiversity Conservation Act 1999 (Cth)		14
Fair Work Act 2009 (Cth)	FW Act	12
Fair Work Commission		12
Fair Work Ombudsman		12
Financial Sector (Collection of Data) Act 2001 (Cth)		8
Foreign Acquisitions and Takeovers Act 1975 (Cth)	FATA	2, 4
Foreign Investment Review Board	FIRB	2
Foreign Judgments Act 1991 (Cth)	Foreign Judgments Act	19
International Arbitration Act 1974 (Cth)		19
National Native Title Tribunal		16
Native Title Act 1993 (Cth)	NTA	16
Patents Act 1990 (Cth)		13
Personal Property Securities Act 2009 (Cth)	PPSA	8
Privacy Act 1988 (Cth)	Privacy Act	18
Spam Act 2003 (Cth)	Spam Act	18
Telecommunications Act 1997 (Cth)		18
Trade Marks Act 1995 (Cth)		13
Treasurer		2