

Doing business
in **Australia**
HWL EBSWORTH'S GUIDE

CONTENTS

FORWARD	3
INTRODUCTION	4
KEY REGULATORY BODIES	6
FOREIGN INVESTMENT IN AUSTRALIA	8
BUSINESS STRUCTURES	14
EMPLOYMENT LAW	20
REAL PROPERTY	22
TAXATION	24
COMPETITION AND CONSUMER LAWS	28
INTELLECTUAL PROPERTY	34
PRIVACY	38
IMMIGRATION	40
USEFUL WEBSITES	43
ABOUT US	44

FOREWORD

Australia is a dynamic and vibrant country which has experienced rapid growth and development over a relatively short period of time. It has a skilled workforce, broad industrial base and a stable, developed economy, underpinned by a strong constitution and legal system.

HWL Ebsworth is a national independent Australian law firm, with highly skilled legal professionals across the full range of business legal services. The firm comprises more than 1500 staff including more than 250 Partners across offices in nine locations: Adelaide, Brisbane, Canberra, Darwin, Hobart, Melbourne, Norwest (North West Sydney), Perth and Sydney. HWL Ebsworth is currently ranked in independent surveys as the largest legal partnership in Australia. Our lawyers have extensive experience in advising international clients investing and doing business in Australia. A number of our lawyers speak, read and write languages other than English and have worked in different locations around the world. While our presence is firmly within Australia, our client base spans the globe.

This guide provides an overview of some of the key legal issues likely to affect international clients doing business in Australia. The information in this guide is general in nature, so if you require advice tailored to your specific circumstances, you will need to obtain more detailed, specialist advice. We would be delighted to assist you.

INTRODUCTION

ABOUT AUSTRALIA

Australia is the sixth largest country in the world by area. Its national capital city is Canberra which is located in the Australian Capital Territory and is home to Australia's Federal Parliament. There are also capital cities in each State and Territory, being Sydney, Melbourne, Brisbane, Perth, Darwin, Adelaide and Hobart.

Australia boasts a stable economy which is due to a number of factors including:

- > a sound financial and banking system – no Australian bank collapsed or required a government bail out during the Global Financial Crisis;
- > a flexible and open trade and investment environment that is supported by economic policies that encourage business growth and innovation; and
- > successful monetary and fiscal stimulus measures that supported economic growth during both the Global Financial Crisis and the more recent COVID pandemic.

Australia is party to an increasing number of free trade agreements including those with: New Zealand, Singapore, Malaysia, Thailand, the United States, Chile, Japan, the Republic of Korea, the Association of South East Asian Nations (ASEAN), the People's Republic of China, Hong Kong, Peru, Indonesia, the United Kingdom and India. Under these agreements, countries enter into legally binding arrangements to open up access to each other's markets to enable improved trade in goods and services and increased opportunities for investment. The countries that are party to these agreements account for well over half of Australia's total international trade. Presently, Australia is negotiating further free trade agreements, including with the European Union.

GOVERNMENT STRUCTURE

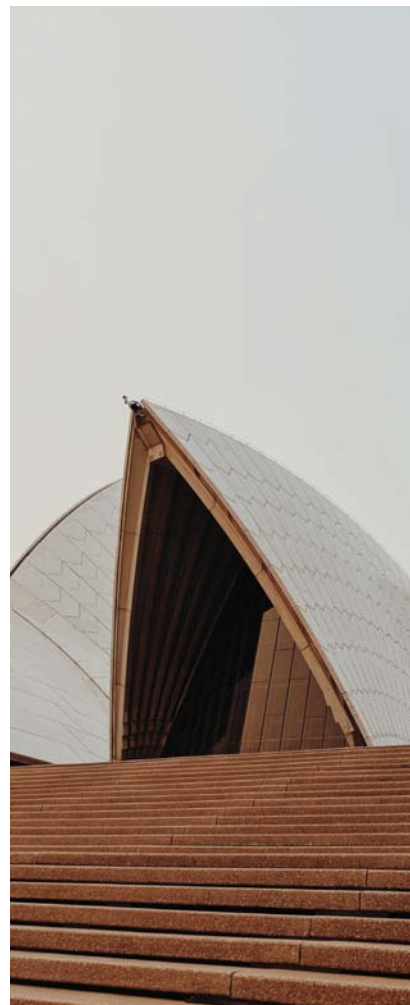
The Commonwealth of Australia is a federation that was formed in 1901 by a written constitution and consists of six States (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania), two federal territories (the Northern Territory and the Australian Capital Territory) and a number of external territories. Australia has a Westminster style system that has three tiers of government: Federal, State and Local.

FEDERAL GOVERNMENT

The federal government primarily has responsibility for taxation, defence, finance, foreign affairs and trade, immigration, industrial relations, intellectual property, administration of the national health system, aviation, post and telecommunications. The prime minister of Australia is the parliamentary and executive leader of the government at the federal level.

STATE AND TERRITORY GOVERNMENTS

Each State and Territory has a separate parliament, referred to as a State parliament in the case of the States and a legislative assembly in the case of the territories. These parliaments are responsible for all matters not



allocated to the Federal parliament by the federal constitution, including primary and secondary education, transport, roads, energy, resources, agriculture and health care. The leader of the government in each State parliament is called the premier, and the leader of the government in each legislative assembly is called the chief minister.

LOCAL GOVERNMENT

In each State and Territory, there is a third tier of government which consists of city, municipal and shire councils whose main responsibility is to plan, manage and develop services used by the local community such as water, drainage, local roads, parks, domestic waste, child care, elderly persons services and public libraries. The local government also generally has responsibility for the management and control of building and development processes, including the issuing of development consents and construction permits.

AUSTRALIA'S LEGAL SYSTEM AND THE LEGAL PROFESSION

The courts and the judiciary are an essential part of Australia's structure of government. The Australian legal system combines statutes and case law, and draws heavily from the English court system and its time-honoured tradition of the 'common law'. Courts are normally open to the public and the judiciary give detailed reasons for their decisions, which are often reported. Legal decisions made by courts can then be used to interpret similar cases in the future.

There are three main types of legal professionals in Australia: solicitors, barristers and the judiciary. Solicitors work in law firms, such as HWL Ebsworth, and may or may not attend court on a regular basis, depending on their practice area. Barristers are specialist advocates who work in legal chambers, who have specific skills in presenting and arguing cases before judges. The judiciary are normally appointed from the ranks of senior lawyers by the relevant government but the judiciary must make decisions independently based on the merits of the case before them.

KEY REGULATORY BODIES

This section briefly sets out some of the key corporate regulators in Australia.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC)

The Australian Securities and Investments Commission (**ASIC**) regulates companies, trusts with corporate trustees, managed investment schemes and the securities industry through the *Corporations Act 2001* (Cth) (**Corporations Act**). The Corporations Act includes provisions which govern:

- > the administration of companies, including directors' duties, meetings and financial reporting;
- > company mergers and acquisitions;
- > capital reductions, share buy backs and restructures;
- > corporate insolvency and forms of external administration of companies;
- > disclosure of interests by shareholders, including continuous disclosure obligations;
- > licensing of dealers, financial advisers, trustees, responsible entities, custodians, market makers, market operators and other providers of financial products or services;
- > conduct and disclosure requirements for participants in the financial services industry;
- > prohibited trading in financial products by holders of inside information about a company, and other forms of prohibited conduct relating to financial products and services;
- > fundraising by companies and other entities; and
- > secondary trading in securities.

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC)

The Australian Competition and Consumer Commission (**ACCC**) is an independent federal statutory authority responsible for ensuring compliance with the *Competition and Consumer Act 2010* (Cth) (**CCA**) as well as a range of other legislation. The ACCC's main role is to promote competition and fair trading.

AUSTRALIAN SECURITIES EXCHANGE (ASX)

The Australian Securities Exchange (**ASX**) is a licensed operator of markets, clearing and settlement facilities in Australia. Under the Corporations Act, the ASX has obligations to:

- > do all things reasonably practicable to ensure that its markets are fair, orderly and transparent;
- > do all things reasonably practicable to ensure that the services of its clearing and settlement facilities are provided in a fair and effective way; and
- > have adequate arrangements for monitoring and enforcing compliance with its listing rules and other operating rules.

AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY (APRA)

The Australian Prudential Regulatory Authority (**APRA**) is the prudential regulator of the Australian financial services industry. Its regulatory function extends to the promotion of prudential standards for banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies and most members of the superannuation industry. APRA not only has far-reaching investigatory powers but also the ability to intervene to protect the interests of depositors, policy-holders and members.

AUSTRALIAN TAXATION OFFICE (ATO)

The Australian Taxation Office (**ATO**) is responsible for administering Australia's federal taxation system. It also has responsibility for administering an excise on tobacco,

petrol and alcohol. The ATO administers the higher education loan program and the private health insurance rebate, and has responsibility for the fiscal regulation of Australia's superannuation system.

AUSTRALIAN BUSINESS REGISTRY SERVICES (ABRS)

Australian Business Registry Services (**ABRS**) was created in 2021 and when it's fully established in 2024, ABRS will bring together the Australian Business Register (**ABR**) and more than 30 ASIC registers in one place. The director identification number (**director ID**) is the first service to be delivered by ABRS. ABRS is responsible for leading the Modernising Business Register (**MBR**) program, performing statutory registry functions and exercising powers under the *Business Names Registration Act 2011*, *Commonwealth Registers Act 2020*, *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009*.

DID YOU KNOW?

The ACCC can levy substantial fines on businesses for non-compliance with competition and consumer law (see section 8 below for more detail). Our specialist competition and consumer lawyers can help guide you in these matters.

DID YOU KNOW?

Our capital markets team is noting an increased trend in Asia-based companies listing on the Australian Stock Exchange because of more favourable listing requirements here. We have considerable experience in advising off-shore companies in this position.

FOREIGN INVESTMENT IN AUSTRALIA

HOW IS FOREIGN INVESTMENT GOVERNED IN AUSTRALIA?

Foreign investment into Australia is encouraged however, there is a foreign investment approval regime under which certain acquisitions by 'foreign persons' are closely regulated. These can include acquisitions of equity interests in Australian companies and unit trusts, interests in Australian businesses, and interests in Australian real estate assets.

The following legislation implements the approval regime:

- > *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**);
- > *Foreign Acquisitions and Takeovers Regulation 2015* (Cth) (**FATR**);
- > *Foreign Acquisitions and Takeovers Fees Imposition Act 2015* (Cth); and
- > *Foreign Acquisitions and Takeovers Fees Imposition Regulations 2020* (Cth).

The Australian Treasurer has responsibility under the FATA for deciding whether or not to approve foreign investment proposals which are subject to the regime. The Foreign Investment Review Board (**FIRB**) assists the Treasurer by examining applications for approval and advising the Treasurer regarding the impacts the proposed investment may have on Australia's national interest.

To assist foreign investors to understand and comply with the regime, FIRB has published a series of detailed Guidance Notes. Treasury has also set out the policy rationale for the FATA, and the ways in which it is administered, in Australia's Foreign Investment Policy (**Policy**). Neither the Guidance Notes nor the Policy have legal force; however, they provide useful context, worked examples and background on the policy position likely to be adopted by the Treasurer when assessing applications for approval.

The FATA sets out four different categories of 'action' which are regulated under the approval regime. In broad terms, a proposal by a foreign person to invest in Australia may be captured under the FATA either:

- > within the mandatory notification and approval regime - this applies to a proposal that is both a notifiable action and a significant action, or that is a notifiable national security action; or
- > within the voluntary notification and approval regime - this applies to a proposal that is a significant action, or a reviewable national security action.

WHO IS CAPTURED BY THE REGIME?

The FATA only applies to 'foreign persons' proposing to undertake particular investments. 'Foreign person' is broadly defined under FATA to include:

- > an individual not ordinarily resident in Australia;
- > a foreign government or foreign government investor;
- > a corporation, the trustee of a trust, or a general partner of a limited partnership in which:
 - an individual not ordinarily resident in Australia, a foreign corporation or foreign government (together with any associates) holds an interest of 20% or more; or
 - two or more individuals not ordinarily resident in Australia, foreign corporations or foreign governments (together with any associates) hold an aggregate interest of 40% or more.

Foreign persons who are also 'foreign government investors' are more closely regulated, with most proposals by foreign government investors (**FGIs**) requiring approval regardless of value. FGIs include foreign governments and their departments, agencies and instrumentalities, as well as corporations, trusts and limited partnerships in which any of those foreign government bodies hold an interest of 20% or more (or an aggregate interest of 40% or more if held by multiple governments). This means that many corporate entities which may otherwise be operated as commercial enterprises (including sovereign wealth funds, state-owned enterprises and other entities with partial government ownership) are captured within the definition of 'foreign government investor' and therefore subject to the stricter screening requirements.

APPROVAL MECHANISM

As noted above, the FATA defines and regulates particular 'actions' proposed to be undertaken by foreign persons. The FATA imposes obligations on foreign persons, and confers powers on the Treasurer, depending on the type of action to be undertaken:

Action type	Notification Requirement	Penalties/Treasurer's powers
Notifiable action	Mandatory. Notifiable actions must be notified to FIRB, and approval obtained, before the proposal can complete.	Offence to proceed without notifying FIRB and obtaining approval. Potential for penalties to be imposed, and forced divestment of the asset.
Significant action	Voluntary. Significant actions which are not also notifiable actions do not have to be notified to FIRB before proceeding. However, they can be voluntarily notified and approval obtained to extinguish Treasurer's powers.	Treasurer has powers to prohibit the transaction, impose conditions or force divestment if contrary to national interest. However, if voluntarily notified and approved, the Treasurer's powers are extinguished.
Notifiable national security action	Mandatory. Notifiable national security actions must be notified to FIRB, and approval obtained, before the proposal can complete.	Offence to proceed without notifying FIRB and obtaining approval. Potential for penalties to be imposed, and forced divestment of the asset.
Reviewable national security action	Voluntary. Reviewable national security actions do not have to be notified to FIRB before proceeding. However, they can be voluntarily notified and approval obtained to extinguish Treasurer's powers.	Treasurer has powers to call in such an action for review if it raises national security concerns. (before and up to 10 years after the proposal completes). The Treasurer can then prohibit the transaction, impose conditions, or force divestment if contrary to national security interest. However, if voluntarily notified and approved, Treasurer's call-in powers extinguished. FIRB Guidance Note 8 contains useful guidance on the types of investments which raise national security concerns and in relation to which voluntary notification is encouraged.

TYPES OF INVESTMENTS THAT REQUIRE APPROVAL

Whether a proposed investment falls within one or more of the above 'actions' depends upon several factors. The legislative provisions for determining whether a proposal is captured are complex. Each proposal must be carefully considered on a case-by-case basis, having regard to the following matters:

- > the identity of the acquirer, including their nationality, Australian residency status (if an individual) and whether they are an FGI. Note that investors from countries or regions with which Australia has concluded free-trade agreements (FTA Countries) have the benefit of higher monetary screening thresholds;
- > the nature of the target asset, i.e.:
 - land (noting that an interest in Australian land can include leasehold and licence interests with a term of 5 years or more, as well as interests in Australian corporations and Australian trusts if interests in Australian land account for more than 50% of their total assets by value (Australian Land Entities)) and, if land is to be acquired, whether it is classified as national security, agricultural, commercial or residential land, and whether or not it is vacant; or
 - an entity or business (and within these, whether any special rules apply to the particular type of entity or business to be acquired).
- > the industry or sector applicable to the target asset;
- > the value of, or consideration payable for, the target asset, and whether it exceeds the relevant monetary screening threshold for that action; and
- > whether any relevant exemptions apply.

Set out below is a high-level summary of the types of investments which can be captured and the monetary screening threshold for each type of investment (which depends on the foreign person making the investment). If an investment falls into one of the criteria set out below, and exceeds the monetary screening threshold applicable to the investor, FIRB approval will be required.



Investment Type	Details	Monetary Threshold		
		FTA Country Investor	Non-FTA Country Investor	FGI
Acquiring an Australian entity or business (other than Australian Land Entities)				
Direct interest (10% or more) in an entity that operates, or a business that is, a 'national security business'	A national security business is one involved in or connected with a 'critical infrastructure asset', telecommunications, defence or a national intelligence community (of either Australia or a foreign country), or their supply chains. 'Critical infrastructure asset' has the meaning given in the <i>Security of Critical Infrastructure Act 2018</i> (Cth) (SOCI Act), which has been recently amended to expand the definition from critical assets in electricity, gas, water and ports sectors to 11 additional sectors: communications, data storage and processing, defence industry, financial services and markets, food and grocery, higher education and research, healthcare and medical, transport, energy, space technology, and water and sewerage.	Nil	Nil	Nil
Substantial interest (20% or more) in an Australian entity - sensitive business	The target is an Australian corporation, an Australian unit trust or a holding entity of either of these, and operates a 'sensitive business' (but which is not also a national security business). Sensitive businesses include those in the media sector (but which are not 'Australian media businesses', defined below), telecommunications, transport and various military applications.	A\$281m	A\$281m	Nil
Interest of 5% or more in Australian media business	The target is or operates an 'Australian media business', which captures businesses which publish daily newspapers, broadcast TV or radio, or provide news, podcast or streaming content online to Australian audiences, if certain content and daily audience criteria are met.	Nil	Nil	Nil
Direct interest (10% or more) in an entity that operates, or a business that is, an agribusiness	The target carries on business wholly or partly in particular primary production (or primary production-related) sectors, including crop growing, livestock, forestry, meat and seafood processing and dairy processing.	A\$61m ⁴	A\$61m	Nil
Substantial interest (20% or more) in an Australian entity - general	The target is an Australian corporation, an Australian unit trust or a holding entity of either of these, and no other special rules apply (e.g. not a national security business, sensitive business, Australian media business or agribusiness).	A\$1,216m	A\$281m	Nil

Investment Type	Details	Monetary Threshold		
		FTA Country Investor	Non-FTA Country Investor	FGI
Australian land and Australian Land Entities				
National security land	Land which is Defence premises, or publicly known that an Australian national intelligence agency has an interest in the land.	Nil	Nil	Nil
Residential land	Land on which there is at least one dwelling, or on which the number of dwellings that could reasonably be built is less than 10.	Nil	Nil	Nil
Agricultural land	Land in Australia that is used, or that could reasonably be used, for a primary production business. The definition of 'primary production business' comes from subsection 995-1(1) of the <i>Income Tax Assessment Act 1997</i> (Cth), and captures such businesses as growing crops, maintaining livestock, forestry and dairy production.	US, NZ, Chile only - A\$1,216m Thailand only - A\$50m	A\$15m cumulative	Nil
Commercial land - vacant	Commercial land is generally land which is not agricultural land or residential land. Vacant commercial land is commercial land which has no substantive permanent buildings that could be lawfully occupied by persons, goods or livestock.	Nil	Nil	Nil
Commercial land - sensitive, developed	Developed commercial land is commercial land that is not vacant. Sensitive developed commercial land is land use for certain purposes considered sensitive, including land that is leased to Australian government entities, which houses public infrastructure, telecommunications infrastructure or data facilities or which is used for a mining operation or certain other sensitive businesses.	A\$1,216m (ex. Peru and Hong Kong)	A\$61m	Nil
Commercial land - developed	Developed commercial land which is not otherwise used for a sensitive purposes.	A\$1,216m	A\$281m	Nil
Mining or production tenement	A mining or production tenement giving the right under an Australian law to recover minerals, oil or gas in Australia (excluding an exploration tenement).	US, NZ, Chile only - A\$1,216m	Nil	Nil
Interest in Australian Land Entity which is an agricultural land entity	An interest in a corporation or trust if the corporation or trust's interest in agricultural land account for more than 50% of the corporation or trust's total assets by value.	US, NZ, Chile only - A\$1,216m Thailand only - A\$50m	A\$15m cumulative	Nil
Interest in Australian Land Entity - particular holdings	An interest in an Australian Land Entity where 10% or more of the value of its total assets comprise residential land, vacant commercial land or mining or production tenements.	Nil	Nil	Nil
Interest in Australian Land Entity - sensitive developed holdings	An interest in an Australian Land Entity holding sensitive developed commercial land.	A\$1,216m (ex. Peru and Hong Kong)	A\$61m	Nil
Interest in Australian Land Entity - general	An interest in an Australian Land Entity where less than 10% of the value of its total assets comprise residential land, vacant commercial land or mining or production tenements.	A\$1,216m	A\$281m	Nil

¹ Currently Canada, Chile, China, Hong Kong, Japan, Mexico, New Zealand, Peru, Singapore, South Korea, the United States of America and Vietnam. Note that these higher thresholds do not apply if the investor is an FGI, or a subsidiary of an FTA Country investor incorporated elsewhere, including Australia. In addition, the higher thresholds do not apply if the target is in a sensitive sector or operates a national security business.

² This list is not exhaustive- there are other types of proposed investments captured by the FIRB regime which are not specifically listed, and there may be exemptions applicable in certain circumstances which are not considered in the table.

³ Indexed annually.

⁴ Non-FGI investors from Chile, New Zealand and the United States need to notify such an acquisition, but do not need approval to complete the acquisition.

THE APPLICATION PROCESS

Applications for FIRB approval are lodged online. Detailed information needs to be provided in support of an application for approval, including information on the investor, the target asset, the proposed transaction and the impact of the transaction on Australia's national interest. FIRB will treat any information it receives as 'commercial in confidence' and ensure that it is treated in confidence. However, if it is required as part of a consultation process, an application may be provided to government departments and agencies for consultation purposes.

Applicants must pay an application fee at the time of submitting an application. The quantum of that fee depends on the type of action for which FIRB approval is sought and the value of the consideration being paid to acquire the target. Currently, fees can range from A\$2,000 up to A\$503,000 for a single application, depending on action type and the consideration payable.

Once an application is lodged with FIRB, the Treasurer has 30 days to consider the application and a further 10 days to inform the applicant of its decision. This timeframe does not start to run until the application fee has been paid. It can also be extended if necessary to allow the Treasurer more time to consider an application.

The types of issues that FIRB and the Treasurer will consider when determining whether or not to approve an application include such matters as:

- > national security;
- > whether the proposed investment may result in an investor gaining control over market pricing, or a product or a good or service in Australia;
- > any Australian Government policies, such as its taxation policies;
- > the impact on the economy and the community; and
- > the character of the investor.

DID YOU KNOW?

HWL Ebsworth has worked with a range of international clients on past transactions involving FIRB. We can advise on the approval regime and help make applications to FIRB if needed.

BUSINESS STRUCTURES

Australia has a number of business structures, such as companies, trusts, joint ventures, managed investment schemes, partnerships and sole traders. The relevance and applicability of each of these as a preferred structure for investing in or doing business in Australia will be highly dependent upon the desired commercial requirements and objectives and the taxation implications which result from the structure chosen.

COMPANIES

Branch versus subsidiary

A foreign company may carry on business in Australia either as an Australian branch of the foreign company or by registering an Australian subsidiary company.

The key differences between a branch and a subsidiary are that:

- > a subsidiary is a separate legal entity whereas a branch is not; and
- > a subsidiary only needs to lodge its own accounts with ASIC (unless exempted) whereas a branch is generally required to lodge accounts of the foreign company.

Registering an Australian company

Most foreign companies choose to form a local subsidiary because (among other things) this generally prevents the parent company from being liable for the debts or obligations of the local business.

In Australia, the most common type of company is a company limited by shares, in which a shareholder's liability is limited to the face value of the shares. The two main types of companies limited by shares are proprietary and public companies.

To incorporate a company in Australia, the applicant must:

- > decide whether the company will be a public company or a proprietary company;
- > decide on a name for the company (which cannot be the same as that of an existing Australian company);
- > appoint officers (directors and, if required, a company secretary) who must have consented to their appointment and, in case of a director, have a director ID;
- > decide how many shares will be initially issued in the new company and for what value; and
- > notify ASIC of the new company's registered office, principal place of business and who the new company's shareholder(s) will be.

Once these steps have been completed, registration of a new company with ASIC can take place within 24 hours.

ASIC will assign an Australian Company Number (**ACN**) to Australian companies. This unique nine-digit number must be displayed on all of the company's public documents and negotiable instruments.

An Australian incorporated company is not required to state a limit on its share capital and is able to issue any number of shares it wishes unless its constitution specifically imposes a numerical limit. Companies are not required to state business objectives in their constitution and are not limited in the business activities which they can undertake.

COMPANIES

PROPRIETARY (PTY LIMITED)

- > must have at least one director who ordinarily resides in Australia;
- > must have at least one shareholder;
- > must have no more than 50 non-employee shareholders;
- > does not require a minimum share capital;
- > has lower ongoing auditing, financial and other regulatory and corporate governance costs, when compared to a public company;
- > is not required to hold an annual general meeting, although it may be required to do so by its constitution; and
- > may be classified as a large or small proprietary company. A large proprietary company must provide ASIC with copies of its audited financial report and director's report within four months of the end of each financial year. A small company is not required to lodge its audited financial reports with ASIC but more complex rules apply if it is a subsidiary of a foreign company.

PUBLIC (LIMITED)

- > must have at least three directors, two of whom must ordinarily reside in Australia;
- > must have at least one shareholder;
- > must have at least one secretary who ordinarily lives in Australia;
- > does not require a minimum share capital;
- > has higher ongoing auditing, financial and other regulatory and corporate governance costs, when compared to a proprietary company; and
- > is subject to more stringent corporate governance requirements.

PROPRIETARY V PUBLIC COMPANIES

The requirements of proprietary and public companies limited by shares are set out below.

A limited liability company will usually be required to put the word 'Limited' or the abbreviation 'Ltd' in its name. A proprietary company will also be required to put the word 'Proprietary' or the abbreviation 'Pty' in its name.

Large and small proprietary companies

Proprietary companies are further classified as being either 'large' or 'small'. A company is a 'large' proprietary company for a financial year if it satisfies at least two of the following requirements:

- > the consolidated revenue for the financial year of the company of the entities it controls (if any) is more than A\$50 million;
- > the value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is A\$25 million; and
- > the company and the entities it controls (if any) have 100 or more employees at the end of the financial year.

Large proprietary companies must prepare and lodge a financial report and a directors' report for each financial year. The company's accounts must be also audited unless ASIC grants the company relief.

Small proprietary companies are generally exempt from these requirements but there are more complex rules for subsidiaries of foreign companies.

Registering a foreign company

If a foreign company carries on business in Australia, it must register with ASIC as a foreign company (also known as a branch). It must then maintain a registered office in Australia and appoint a local agent for its Australian branch. The local agent must be an Australian resident individual or an Australian company authorised to accept notices and service of processes on behalf of the foreign company. The local agent can be liable to some extent for the actions of the foreign company in Australia.

To register a foreign company in Australia, a fee is payable to ASIC in addition to the lodgement of specific forms and additional information, such as a copy of its company constitution that has been certified by the corporate regulator in the company's place of incorporation no more than 3 months before lodgement. Documents not in English will need translation by an accredited translator. It may take a month or more for the application to be processed by ASIC once it is lodged.

Once registered, a foreign company is required to lodge its financial statements with ASIC at least once every calendar year and at intervals of no more than 15 months. The financial statements must be prepared in English and comprise the company's balance sheet, profit and loss statement, and cash flow statement. There is also generally a requirement to report changes in the directors of the foreign company, including changes to their addresses.

ASIC will assign an Australian Registered Body Number (**ARBN**) to a foreign company registered to carry on business in Australia. This number must be displayed on all of the company's public documents and negotiable instruments.

As the foreign company is the same legal entity as the branch, the foreign company has full legal responsibility for the actions of the Australian branch and is liable for any debts or obligations of the Australian branch.

A foreign company is not required to register as carrying on business in Australia merely because it does any of the following in Australia:

- > maintains a bank account;
- > effects a sale through an independent contractor;
- > solicits or procures an order that becomes a binding contract only if the order is accepted outside Australia;
- > creates evidence of a debt, or creates a charge on property;
- > secures or collects any of its debts;
- > conducts an isolated transaction that is completed within a period of 31 days and is not repeated from time to time; or
- > invests any of its funds or holds any property.

PARTNERSHIPS

A partnership is formed when two or more individuals or companies agree to enter into business together with a view to sharing profits. In addition to any written agreement, partnerships are governed by the operation of various Partnership Acts in each State and Territory of Australia. As a partnership is not a separate legal entity, the partners are jointly and separately liable for the obligations of the partnership. Generally, a partnership must not have any more than 20 partners. However, there are exceptions. A partnership of actuaries, medical practitioners, sharebrokers or stockbrokers is allowed up to 50 partners, a partnership of legal practitioners may have up to 400 partners, and a partnership of accountants is allowed up to 1,000 partners. If a partnership carries on business under any name other than the names of the partners, its business name must be registered.

Generally, each partner's liability is unlimited. However, in some Australian States, parties may form a 'limited partnership' in which the liability of some partners is limited. 'General partners' in a limited partnership have unlimited liability for the debts of the partnership, while 'limited partners' have their liability limited to the extent of their capital contribution. Limited partners are not permitted to take an active role in the management of the business.

TRUSTS

Overview

Where a business is run by means of a trust, a trustee (which may be an individual or a company) conducts the business for the benefit of the beneficiaries of the trust. A trust is not a separate legal entity – rather the trustee holds the assets on trust for the benefit of the beneficiaries of the trust.

In the same way as a company, trusts may be private or public. Public trusts must take the form of a registered managed investment scheme (see below) and may be listed on the ASX.

Trustees (subject to exemptions for small private trusts dealing solely with wholesale clients) are required to have an Australian Financial Services Licence (**AFLS**) to provide trustee, financial advisory, dealing and custodial services.

Managed investment schemes

A managed investment scheme is an arrangement whereby people pool funds for a common purpose in order to make a profit. The scheme members generally have no role in the management of the scheme.

A managed investment scheme which makes offers to retail clients is required to be managed by a responsible entity and must be registered with ASIC. The responsible entity must be a public company and has a statutory obligation to hold the scheme's assets on trust for the members. The responsible entity is therefore trustee and manager of the scheme (although it may outsource management services to a separate manager).

JOINT VENTURES

If a foreign investor wishes to undertake a specific project in Australia, it may be appropriate to enter into a joint venture arrangement. The agreement will set out the rights and obligations of each party. Parties to a joint venture will also need to decide whether they wish the joint venture to be incorporated by subscribing for shares in a company that is set up for the purposes of the joint venture (an incorporated joint venture) or whether they wish the joint venture to remain unincorporated by entering into a contract regarding the particular arrangement (an unincorporated joint venture).

A foreign company may enter into a joint venture by contracting directly as a registered foreign company or through a locally incorporated subsidiary company.

Each participant of an unincorporated joint venture is obliged to lodge a separate tax return. The participants normally agree only to be responsible for their agreed share of liabilities of the joint venture, though there can be difficulties enforcing this limitation against outside parties.



FRANCHISE SYSTEMS

Franchising is a popular way of doing business in Australia. Under a franchise agreement, a party grants another party the right to use and to sell products or provide services under its name or trade mark and using its business model and systems. Franchising has many benefits, including the ability to build on a successful business model, to share risk and to access the resources of the business. In Australia, franchisors and franchisees are required to comply with the Franchising Code of Conduct (<https://www.legislation.gov.au/Details/F2022C00126>) a mandatory industry code which has the force of law under the *Competition and Consumer Act 2010* (Cth). The Code is administered and enforced by the ACCC.

DID YOU KNOW?

Working out how to structure a business in Australia requires careful consideration, not just from the viewpoint of corporate law, but also from a range of other legal perspectives. HWL Ebsworth is a full service commercial firm, and has the proven capabilities to provide you with advice on how to structure your business. Issues such as tax, liabilities, employment and regulated industries can be very important in deciding how to structure your business. We also have a dedicated franchising team who can assist in setting up and managing a franchise system. We can guide you through the options to help you choose what is best for you.

SOLE TRADERS

A sole trader is an entity or individual owning and managing a business by itself. As there is no separation between the owner and the business, the owner of the business is personally liable for all of the businesses obligations, including its debts. Sole traders may trade under their own name or a registered business name.



EMPLOYMENT LAW

STRUCTURE OF AUSTRALIAN LAWS REGARDING EMPLOYMENT

Australian laws relating to employment fall into 2 key categories:

- > employment contracts, under which the employment relationship is established and key terms such as the employee's role, status (full-time, part-time, casual) and other matters are established; and
- > legislation regulating the employment relationship.

We address each of these below.

EMPLOYMENT CONTRACTS

The employment relationship can only be established by the employer and employee entering into an employment contract. This contract can be written, oral, implied or a combination of some or all of these. The employment contract will normally establish key features of the employment relationship, such as:

- > the employee's status (full-time, part-time, casual);
- > the role the employee will perform;
- > the location and reporting arrangements for the employment;
- > how the employee will be paid (subject to minimum standards dealt with below); and
- > the period of notice required to terminate the employment.

Employment contracts will generally include implied obligations, such as the employee's duty of good faith to the employer and an obligation to comply with reasonable and lawful directions. The employment contract may also deal with specific additional obligations, such as protection of confidential information and intellectual property, and the operation of post-employment restraints.

The terms of the contract are central to determining whether the relationship is one of employment, rather than an alternative form of relationship recognised under Australian law such as a company officer, independent contractor, partner or volunteer. For employers it is important to have a comprehensive employment agreement in place as the statutory provisions regarding employment relationships primarily protect employees only.

FAIR WORK ACT 2009 (CTH)

The key legislation regulating Australian employment relationships is the *Fair Work Act 2009* (Cth) (**FW Act**). The FW Act does a range of things, including:

- > establishing minimum conditions of employment that apply generally to employees in Australia - these are known as the 'National Employment Standards' (**NES**), and are described in the diagram below.
- > establishing the Fair Work Commission (**Commission**), which is an arbitral tribunal dealing with a range of employment matters;
- > authorising the Commission to make a series of 'modern awards' which set minimum terms and conditions (eg rates of pay, penalties and loadings, allowances, hours of work, etc) for many occupations and industries in Australia;
- > allowing employees at an enterprise (and their union, if applicable) and the employer to enter into an 'enterprise agreement' which can replace the minimum terms and conditions in an award with more suitable terms and conditions for that enterprise;
- > establishing an 'unfair dismissals' jurisdiction under which a broad range of employees can seek reinstatement or compensation if they are dismissed unfairly; and
- > regulating the role of unions in Australia.

SUPERANNUATION

Australia has a system of compulsory superannuation which requires employers to pay a percentage of their employee's ordinary time earnings (currently 10% of the employee's ordinary time earnings) to an approved superannuation fund. The minimum contribution required by employers is set to increase incrementally to 12% by 2025. The Australian Government encourages individuals to make additional contributions to their superannuation by providing tax deductions for voluntary contribution.

TERMINATION OF EMPLOYMENT

An employer must give an employee notice of the employee's dismissal in accordance with the employee's employment contract and the FW Act.

An employee may make an unfair dismissal claim to the Commission if the termination of employment was harsh, unjust or unreasonable. However, the dismissal will not be found to be unfair if it occurs because of a 'genuine redundancy'. An employee's dismissal was a genuine redundancy if:

- > the employee's job was no longer required because of changes in the operational requirements of the employer's enterprise; and
- > the employer has complied with any consultation obligations arising under a modern award or enterprise agreement.

The FW Act sets out further grounds on which it is unlawful for an employer to terminate an employee's employment. These include:

- > the exercise of a workplace right by the employee;
- > temporary absence due to illness or injury;
- > trade union membership or participation in trade union activities;

- > protected attributes, including race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin; or
- > absence during maternity leave or other parental leave.

WORKPLACE HEALTH AND SAFETY

Australian workplace health and safety legislation was previously generally State and Territory based, however the States (excluding Victoria and Western Australia), Territories and Commonwealth government have now adopted acts based on a model Act.

The purpose of the legislation is to ensure the health, safety and welfare of employees and any other people that attend workplaces. Workplace health and safety legislation imposes significant obligations on employers to take all reasonably practicable steps needed to provide a safe working environment, safe systems of work, including appropriate training, instruction and supervision.

Employers that fail to comply with the applicable legislative requirements may be faced with significant monetary and criminal penalties. Penalties (including imprisonment) may also be imposed on directors for breaches of the legislation.

Employees who suffer an illness or injury as a result of their employment will have a right to workers compensation benefits.

DISCRIMINATION

Federal and State laws also prohibit discrimination against employees on certain grounds including race, sex, age, gender identity, religion and disability.

REAL PROPERTY

Australia has a large body of law regulating real property. There are a number of different types of title to real property, including Torrens title, strata title, company title, community title and old system title.

Freehold title

The most common 'freehold' title is Torrens title. The Torrens title is a system of 'title by registration' (ie indefeasibility of a registered interest). Under the Torrens title system, the Torrens title register records all details and interests affecting that land such as:

- > easements;
- > mortgages;
- > caveats;
- > subsequent changes in ownership; and
- > registered leases.

Strata title is common and is mainly used for apartments and multiple living areas such as residential townhouses or commercial office buildings. Strata title enables the division of land and buildings.

Strata title is part of the Torrens title system and consists of 'lots' and 'common property'. The individual lots are owned by the proprietors and the building (including all shared areas such as stairs, driveways, gardens, garbage areas, exterior walls and windows, balconies and lifts) is owned by an owners' corporation (a corporate body representing the owners).

Each owner of a lot in the building has a share in the owners' corporation which is operated by an elected committee. There can be a set of rules for the management, use and operation of the shared areas.

Leasehold title

An owner of land or buildings may decide to lease all or part of its land to a third party for a period of time. A lease is a contractual relationship whereby the tenant holds an estate in land during the term of the lease.

The tenant will usually pay an annual rent (which can be increased annually by methods such as a Consumer

Price Index increase, fixed percentage increase, or a market review). The tenant will often be required to pay, in addition to the rent, a proportion of outgoings (based on the proportionate part of the area leased in relation to the whole building) to cover the owners' holding costs such as land tax, rates, repairs and management costs.

The terms of the lease are negotiated between the owner and the tenant. If the lease is of retail premises, there is legislation with which the owner must comply. It is common in Australia for tenants not to have the right to terminate a commercial lease, so care should be taken when negotiating lease terms.

Crown land

Crown land refers to the land owned by Federal and State governments. Crown land is regulated by legislation and certain requirements must be met before Crown land may be sold or leased.

DEALINGS WITH LAND

Overview

There are many 'dealings' with land, including:

- > transfer of ownership;
- > registration of encumbrances (e.g. easements, mortgages);
- > registration of leases; and
- > transfer of leases.

Each of these dealings must be in writing.

Sales of real property can be by way of private sale or auction. Once the commercial terms of a sale have been agreed between the vendor and the purchaser, a contract for the sale of land will be entered into (ie 'exchanged'). Each State and Territory has different laws with respect to buying real property. In all jurisdictions, however, agreements which deal with land, whether it is to be leased, sold or mortgaged, must be in writing to be effective.

Prior to purchasing any real property and before any contract is signed, it is recommended that the following steps are taken:

- > inspect the property;
- > obtain copies of title searches to verify the present owner;
- > review the terms of any documentation that may restrict the use of the property such as leases and any restrictions on the use of the property;
- > engage a surveyor to identify the boundaries of the land;
- > obtain an environmental audit if the land may be contaminated or if it is an industrial site; and
- > obtain a building inspection report with respect to the building on the property.

'Dealings' with land in Australia are conducted online via networks including Property Exchange Australia (PEXA).

Notification to FIRB

Foreign companies or persons may require approval from FIRB before they are able to buy real estate in Australia. Please see section 3 of this guide for further detail.

PLANNING, ENVIRONMENT AND DEVELOPMENT

State based laws and regulations govern planning and land use. However, in practice it is local governments that usually administer and enforce these planning laws. Generally, land is classified into zones. These include commercial, residential, industrial and rural or farming zones. The classification of the zone will determine how the land may be used and the types of structures that may be built on the site. Applications will need to be made to the relevant local authority for consent to use or develop land depending on the purpose and its zone classification. The local authority will then determine whether the proposed use of the land is appropriate in that area. Planning schemes for the area will also discuss the types of zones that are permitted.

Applications should also be made to the local council if any developments are to occur on a site, including any alterations to a current building. Any proposed development must also be in accordance with the local planning scheme.

Environmental protection controls are implemented by the Federal and State governments. At the Federal level, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) provides a national regime of environment and heritage protection. The EPBC Act aims to protect identified matters of national and international environmental significance, which include sites of world heritage significance, designated wetlands and threatened or endangered species.

Similarly, at the State level there are legislative controls protecting recognised matters of environmental significance and restricting the clearance of native vegetation. Each State also has an environment protection authority which regulates and licences polluting industries and other similar activities. A works approval or licence may be required for a major industrial development.

Real Estate Investment Trust

Investors may purchase a property or an interest in a property under a real estate investment trust (that is, a unit trust with a corporate trustee). Please see 'MIT' under Federal taxes in the Taxation section of this guide for further detail.

DID YOU KNOW?

In some projects, particularly in the energy and natural resources area, issues relating to native title and traditional land rights of indigenous Australians can arise. Our team includes prominent native title lawyers, and is consistently featured at the top rankings of legal publications such as Chambers & Partners and Legal 500 in the area of Native Title.

TAXATION

OVERVIEW

Tax is imposed by both the Federal and State governments. Set out below are the main taxes that may be relevant to a foreign enterprise that is considering establishing a business in Australia. Australian taxation law is complex and you should obtain independent legal advice on how it will impact on your business in Australia.

FEDERAL TAXES

Income tax

In Australia, individuals (including non-residents) and companies are taxed on their taxable income at the end of each financial year (usually 30 June). Taxable income is calculated as the difference between assessable income and allowable deductions. Importantly, assessable income will include:

- > for Australian tax residents, their worldwide ordinary income and statutory income;
- > for non-residents (those not carrying on business through an Australian permanent establishment), subject to any applicable double tax agreements between Australia and the country of residence of the non-resident (**DTAs**);
- > ordinary income derived directly or indirectly from all Australian sources;
- > statutory income from all Australian sources; and
- > other statutory income that is brought to tax by a provision on some basis other than having an Australian source.

Capital gains are an item of statutory income. Typically, foreign investors in Australia will not be subject to tax on capital gains on assets that are not 'Taxable Australian Property' (**TAP**), as defined in the *Income Tax Assessment Act 1997* (Cth). TAP includes direct real property interests (including mining, quarrying or prospecting rights), indirect real property interests, assets used in carrying on

business in Australia through a permanent establishment as well as a right to acquire any of the foregoing. However, where profits made on the sale of assets are on revenue account, the capital gains tax exemptions will not apply.

Subject to certain exceptions, a purchaser of TAP is required to pay 12.5% of the purchase consideration to the ATO in the form of a non-final withholding tax if the seller is a foreign resident or deemed to be so.

Companies are generally taxed at a fixed rate of 30% however those with turnover below A\$50 million can qualify for a rate of 25% in certain cases. Australian resident companies that pay income tax can record credits equal to the tax paid in a 'franking account', and when they pay dividends they can allocate 'franking credits' to those dividends. Resident shareholders who receive such dividends (known as franked dividends) are generally entitled to a credit against their own tax liability for those franking credits. Dividends paid to non-resident shareholders are not subject to dividend withholding tax to the extent that the dividend is franked.

As a general rule, Australia imposes withholding tax (**WHT**) on payments of interest, non-franked dividends and royalties by an Australian tax resident to a non-resident, subject to any modification by a DTA.

Generally the rates are as follows:

Payment	What rate (subject to DTAs)
Interest (includes amounts in the nature of interest and amounts deemed to be interest) ¹	10% gross amount of interest paid
Non-franked dividends ²	30% gross dividend paid (generally reduced to 15% under DTA but can vary)
Royalties	30% gross royalty (generally reduced to 15% under DTA)

- > There are certain exemptions from interest withholding tax for foreign banks and financial institutions, and for interest paid on certain publicly offered debentures, global bonds and debt interests.
- > A special 'conduit foreign income regime' applies to certain distributions by an Australian company to a foreign resident shareholder with the result that these amounts are not subject to dividend withholding tax. Conduit foreign income is confined to certain offshore income and gain amounts that would not ordinarily be taxed in Australia if the company was a non-resident.

The tax rate of an individual is calculated in accordance with the level of that person's taxable income (assessable income less allowable deductions) and whether or not that person is a resident or non-resident. The highest tax rate of 45% for individuals both residents and non-residents applies once a person's taxable income reaches A\$180,001.

Australia has a complex trust tax system. Generally, income and gains to which a resident beneficiary is entitled are taxed in the hands of the beneficiary and are not taxed separately to the trustee (known as 'flow-through treatment'). Income or gains of the trust to which no beneficiary is entitled are taxed to the trustee in its representative capacity generally at 47%. The trustee is also liable to tax in respect of any trust income to which a non-resident beneficiary becomes entitled.

Trust losses remain within in the trust (that is, losses are not available to be claimed by beneficiaries) and are subject to special rules which can prevent losses being carried forward and used if the control or ownership of the trust changes.

Certain publicly listed or otherwise widely held or offered trusts that constitute 'public trading trusts' are taxed in a similar manner to companies, and the beneficiaries are treated as if shareholders for tax purposes.

Managed investment trusts (**MITs**) currently receive beneficial tax treatment in two key respects:

- > a concessional withholding tax of 15% (reduced

from 30%) applies to distributions of rental income and realised capital gains on TAP from a MIT to an investor that is domiciled in a country with which Australia has an exchange of information agreement; and

- > MITs can elect to hold eligible assets such as shares, units and land on capital account, which provides greater certainty and can enable foreign investors an exemption from Australian tax on such assets if they are not TAP and reduce the gain otherwise taxable to Australian investors.

To qualify as a MIT and for associated tax concessions, a fund must meet a number of requirements including:

- > the trustee of the fund must be an Australian resident, or the central management and control of the fund must be in Australia;
- > the fund cannot be a 'trading trust' or control a 'trading business';
- > a substantial proportion of the investment management activities in relation to Australian assets must be carried on in Australia;
- > the fund must be a 'managed investment scheme' under the *Corporations Act 2001*;
- > the fund must satisfy certain widely-held requirements; and
- > the fund must not breach certain closely-held restrictions.

If a MIT satisfies certain criteria, the trustee may elect for it to be an Attribution Managed Investment Trust (**AMIT**). This can allow for technical aspects of its tax treatment to be modified which can be beneficial depending on the specific circumstances of the MIT. For example, under the AMIT regime, the tax liability is attributed to an investor by reference to 'clearly defined interests' in the income and capital of the trust. This may vary from the amount distributed to the investor. In such circumstances adjustments arise to the cost base of investor's units in the AMIT. That is, any excess of the distribution over the

amount attributed to an investor member may decrease the cost base of their units and/or result in a capital gain, and any excess of the amount attributed to an investor over the distribution may increase the cost base of their units.

Under the Venture Capital Limited Partnership (**VCLP**) concessions, certain foreign investors are exempt from capital gains tax on the profits of the VCLP's eligible venture capital investments. Similar concessions can apply to both Australian and foreign resident investors where requirements under the 'early stage' VCLP regime are met.

Eligible investors in shares in a qualifying Early Stage Innovation Company may receive a tax offset equal to 20% of the value of the investment capped at A\$200,000. In addition they may qualify for tax exemption for gains on sale of the shares.

The above venture capital and innovation concessions are subject to a range of conditions and other modifications to tax treatment.

Goods and Services Tax

The Goods and Services Tax (**GST**) is a broad-based value added tax on most goods, real property and other supplies (such as intangible rights and services) in Australia. It also applies to most goods and services that are imported into Australia.

GST is payable at a flat rate of 10% of the value of a 'taxable supply', which arises where:

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

An entity is required to be registered for GST if it carries

on an enterprise (including but not limited a business) that has an annual turnover in excess of A\$75,000 from supplies that are connected with Australia and its external territories.

For a taxable supply, GST is payable by the supplier although they may seek to recover the cost contractually from the recipient. The supplier is generally entitled to claim a refund for GST on expenses incurred to make a taxable supply (known as 'input tax credits'). Examples of taxable supplies include most services received in Australia and commercial rent.

No GST is payable on certain 'GST free' supplies and the supplier can claim an input tax credit for GST on expenses incurred to make such supplies. Examples include certain types of food, education courses the export of goods or the sale of a business as a 'going concern'.

GST is not payable directly on 'input taxed supplies' however the supplier is not entitled to an input tax credit for GST on expenses incurred to make such supplies. Examples include financial supplies and residential rent.

STATE TAXES

Stamp Duty

In each State and Territory, stamp duty is governed by the applicable duties legislation. Stamp duty is charged on a range of different transactions. Dutiable transactions that may be applicable to businesses include:

- > transfers of interests in land;
- > 'land holder' acquisitions (e.g. companies and trusts that directly or indirectly hold interests in land);
- > certain leasing arrangements;
- > declarations of trust; and
- > some business transfers.

The particular duties and the rates imposed vary between each State and Territory. The rate of duty charged depends on the nature of the transaction and is based on the market value of the property which is the subject of the transaction. Generally, this rate ranges from 4% up to 7%.

Additional duty (a surcharge) is payable in all States, by foreign persons who acquire residential land (broadly defined), or certain indirect interests in residential land. The surcharge rate varies, and is up to 8%. Exemptions can apply if conditions are met.

Payroll Tax

Payroll tax is governed by the applicable Payroll Tax Act in each State and Territory. The tax is calculated by reference to the wages (and deemed wages) paid or payable by an employer to its employees and in certain cases to contractors. The term 'wages' is broadly defined to include for example bonus payments, termination of employment payments, fringe benefits and payments made to an employee's superannuation fund (a form of retirement fund).

This tax is payable when an employee's total Australian wages exceed the general deduction threshold level. As this threshold level is calculated on a monthly basis it is advisable to register for payroll tax as soon as the business commences to operate where relevant thresholds are expected to be exceeded. The payroll tax rate is different in each State and Territory and ranges from 4.75% to 6.85%.

Land Tax

Land tax is an annual tax on the taxable value of the land that is payable by the owner(s) of the land. It is imposed by each of the States and Territories, with the exception of the Northern Territory. For taxation purposes the land owner may be an individual, a company or a trust and the land may be owned by a sole owner or by joint owners.

Land tax is generally imposed on the taxable value of the relevant land above a certain threshold amount (for example, A\$755,000 in New South Wales for the 2021 land tax year). The tax rate varies across jurisdictions and ownership structures and is generally between 1.5% and 2.67% per annum. Additional tax (a surcharge) is imposed in some States on foreign persons at rates of around 2%.

Exemptions from land tax can apply if conditions are met.



COMPETITION AND CONSUMER LAWS

The consumer protection laws in Australia were harmonised into a single set of laws on 1 January 2011. The Australian Consumer Law (**ACL**) can be found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The ACL applies as both a Federal law and a law of each State and Territory, and is enforced by the Australian Competition and Consumer Commission (**ACCC**) and applicable State and Territory fair trading agencies. As a national law, the ACL provides consumers with the same protections and expectations about business conduct no matter where they are in Australia. Some of the most important provisions of the ACL are discussed below.

CONSUMER GUARANTEES AND PRODUCT SAFETY

The ACL gives all consumers a set of 'consumer guarantees' when they purchase any product or service. These consumer guarantees can be enforced against the business that supplied the product to the consumer (ie a retailer). In addition, very similar rights are also available in parallel against the manufacturer or importer of that product. Businesses cannot exclude or limit their obligations under these consumer guarantees, except in limited cases where goods or services are not of a kind that would ordinarily be used for personal, domestic or household use. Consumer's rights under the consumer guarantees in the ACL are separate from, and additional to, any rights customers have under any express warranty or guarantee provided by a manufacturer.

The consumer guarantee protection provisions under the ACL apply to supplies where products are acquired as a 'consumer'. This is broadly defined to include any acquisition of a good or service that is supplied for A\$100,000 or less, or any products that are ordinarily acquired for personal, domestic or household use. This means that even supplies of commercial products to businesses will be classed as a supply to a 'consumer' where the purchase price is A\$100,000 or less.

However, the consumer guarantees do not apply to businesses that acquire products for the purposes of re-supply (e.g. a retailer) or for the purpose of using them or transforming them as part of a manufacturing process (ie manufacturing inputs).

The ACL provides a comprehensive regime for remedies available to a consumer for a breach of a statutory guarantee. Depending on the type of breach, these include the ability to return the product for a full refund or to require the replacement or repair of the goods or services. Additionally, a consumer is entitled to compensation for any reasonably foreseeable loss that has been suffered due to the failure to meet the consumer guarantee.

The ACL also contains a comprehensive product safety regime that deals with matters including:

- > mandatory safety standards for consumer goods and related services;
- > the imposition of interim and permanent bans on unsafe goods;
- > the compulsory recall of unsafe goods; and
- > mandatory injury reporting requirements.

The ACL penalties that may be awarded for contravention of these provisions are:

- > for an individual, a maximum of A\$500,000; and
- > for a body corporate, the greater of:
 - A\$10 million;
 - three times the value of the benefit received; or
 - if the value of the benefit cannot be determined, 10% of the Australian connected turnover of the relevant corporate group in the preceding 12 months.

There are 9 consumer guarantees that apply to goods, and 3 that apply to services as set out below:

Goods
The supplier has title to the goods sold to the consumer
The consumer will receive undisturbed possession of the goods
The goods are free from undisclosed securities
The goods are of acceptable quality
The goods are fit for any disclosed purpose
The goods correspond with their description
The goods correspond with any samples or demonstration models
The supplier and manufacturer will comply with any express warranty given
Repairs and spare parts will be available for a reasonable time (manufacturer only)
Services
The services will be delivered with due care and skill
The services are fit for their intended purpose
The services will be supplied in a reasonable time

CONSUMER PROTECTION

The ACL contains a number of provisions that regulate how businesses can operate. These include prohibitions on misleading or deceptive conduct, along with other unfair business practices and regulation of unfair terms in standard form contracts. The main provisions are briefly discussed below.

Misleading or deceptive conduct

The ACL prohibits misleading or deceptive conduct generally, as well as specific types of false or misleading representations made to consumers. The key point of difference between the general and specific prohibitions is the consequences for breaching the prohibitions.

A breach of the general prohibition will not give rise to a pecuniary penalty, while a breach of the specific prohibition may give rise to a pecuniary penalty of:

- > for an individual, a maximum of A\$500,000; and
- > for a body corporate, the greater of:
 - A\$10 million;
 - three times the value of the benefit received; or
 - if the value of the benefit cannot be determined, 10% of the Australian connected turnover of the relevant corporate group in the preceding 12 months.

These specific types of misrepresentations include misrepresentations about such things as a product's country of origin, specifications, quality, composition or its price, including advertised savings. There are also prohibitions against falsely claiming a sponsorship or endorsement.

The law against misleading or deceptive conduct applies to almost everything businesses produce and say in conducting their business. This covers a wide range of different types of behaviour and situations, from statements made to the public in advertising campaigns, to behaviour in one on one negotiations.

Unconscionable conduct

The ACL prohibits a person from engaging in conduct that is unconscionable. Conduct will be regarded as unconscionable if the conduct is clearly unfair or unreasonable. It generally exists in circumstances where it is unfair of the stronger party to procure or accept the consent of the weaker party to the transaction, in the circumstances in which the consent was accepted.

The onus is on the stronger party to show that the transaction was fair, just and reasonable. Conduct will usually be at greater risk of being considered to be unconscionable if the weaker party was clearly at a disadvantage. For example, if the party was not legally represented, was not provided with all the relevant information or received a lack of assistance or explanation where it was necessary.

Unfair contract terms

The ACL allows a court to determine that a term of a standard form consumer contract or small business contract is void and unenforceable if the term is 'unfair'.

- > a 'consumer contract' means a contract for the supply of goods and services to an individual who acquires it wholly or predominately for personal, domestic or household use or consumption.
- > a small business contract is a contract for the supply of goods or services where at least one party to the contract is a business that employs fewer than 20 persons and either the upfront price payable under the contract is under A\$300,000, or the contract has a term of more than 12 months and the upfront price payable under the contract is under A\$1 million.
- > A standard form contract is generally a contract that is prepared by the business and is presented on a 'take it or leave it' basis, with no genuine opportunity for negotiation.

A term of a consumer contract will be considered unfair if:

- > it would cause a significant imbalance in the parties' rights and obligations under the contract;
- > it goes beyond what is reasonably necessary to protect the legitimate interest of a party to the contract; and
- > it would cause detriment to a party to the contract if it were to be applied or relied upon.

To complement the existing laws relating to unfair contract terms, Treasury has released an exposure draft of the *Treasury Laws Amendment (Measures for a Later Sitting) Bill 2021: Unfair Contract Terms Reform (Bill)* (Cth), which proposed changes arising out of the Government's 2018 Review of Unfair Contract Terms Protections for Small Businesses. If passed in its current form, the Bill would introduce pecuniary penalties for the use of, or reliance on, unfair contract terms, and would provide courts with a wider range of powers to respond to any breaches (for example, to order injunctions, public warning notices or to disqualify a person from managing a corporation in response to a breach). As at the end of 2021, the Bill had not yet been put forward to Parliament for consideration, but further updates were expected in 2022.

COMPETITION LAWS

The Competition and Consumer Act (CCA) prohibits individuals and corporations from engaging in various anti-competitive behaviour. The competition laws in the CCA can be broken down into the following areas set out below:

Cartel Conduct

Cartel conduct is prohibited civilly and also constitutes a criminal offence punishable by up to 10 years in prison for individual offenders. The cartel provisions of the CCA prohibit making or giving effect to certain provisions (cartel provisions) of contracts, arrangements or understandings (CAUs) between competitors. Cartel provisions include provisions that:

- > have the purpose, effect or likely effect of fixing, controlling or maintaining prices at which any of the parties to the arrangement supply or acquire goods or services in competition with each other (price fixing);
- > allocate customers, suppliers, products or territories among competitors (market sharing, customer / market allocation or collective boycotts);
- > restrict the supply or output of goods or services (supply restrictions); or
- > coordinate or rig bids or tenders (bid rigging).

This conduct is prohibited where two or more of the parties to the CAU are (or would, but for the conduct, be) competitors in relation to the supply or acquisition of the goods or services affected by the agreement. In relation to price fixing, the provision must have the 'purpose or effect' of fixing, controlling or maintaining prices of the relevant goods or services; in relation to the other forms of conduct, the provision must have the requisite 'purpose'.

Cartel conduct is prohibited 'per se'; in other words it is not necessary for the conduct to have any anti-competitive effect or for it to result in any economic harm in order to contravene the CCA. It is also an offence under the CCA to attempt to arrive at a cartel arrangement, even if that attempt does not succeed.

Limited defences are available for joint venture arrangements.

Anti-competitive Agreements

The CCA prohibits arrangements or understandings that have a purpose, effect or likely effect of substantially lessening competition.

Concerted Practices

The CCA prohibits 'concerted practices' that have the purpose, effect or likely effect of substantially lessening competition. 'Concerted practice' is not defined in the CCA, but it has been described as any form of cooperation between two or more firms (or people), or conduct that would be likely to establish such cooperation, where this conduct substitutes, or would be likely to substitute, cooperation in place of the uncertainty of competition. It is possible that the Australian courts will look to European case law on the meaning of 'concerted practice'; however, this is not certain.

Establishing a concerted practices does not require proof of an arrangement or understanding between the parties. Conduct that might amount to a concerted practice includes price signalling or information exchanges that have the purpose, effect or likely effect of substantially lessening competition. For example, Competitor A sends Competitor B a copy of its new price lists whenever it intends to increase its prices. Competitor B says nothing, but follows B's price lead.

Exclusive Dealing

'Exclusive dealing' describes a vertical arrangement where one party imposes some form of restriction on the other's freedom to choose with whom, in what, or where they deal. Broadly, it captures:

- > the conditional supply or acquisition of goods or services (conditions may relate to the ability to re-supply, exclusivity, limits on ability to acquire from competitors, etc); and
- > refusing to acquire or supply for specified reasons (eg because a purchaser refuses to agree to a restriction on the supply).

Exclusive dealing is only prohibited under the CCA if it has the purpose, effect or likely effect of substantially lessen competition. To the extent that conduct constitutes exclusive dealing, it is exempt from the normal prohibitions in the CCA on cartel conduct.

Resale Price Maintenance

The CCA prohibits vertical price restraints imposed by suppliers, called 'Resale Price Maintenance' (RPM). Like cartel conduct, RPM is prohibited on a 'per se' basis, meaning that it is a breach of the CCA to engage in RPM even if the conduct cannot be shown to have any anti-competitive effect. The practice of RPM, includes:

- > a supplier changing its terms of supply to prohibit resellers from selling products below a certain price;
- > a supplier instructing or pressuring retailers not to advertise or sell products below a certain price; or
- > a supplier withholding supply as a result of failure of a customer to agree to or adhere to a RPM requirement.

It is, however, permissible for a supplier to:

- > provide for a maximum (as opposed to a minimum) price at which goods can be resold; or
- > provide a 'Recommended Retail Price' (often called an 'RRP') to resellers, provided that it made clear that it is a recommendation only.

Misuse of Market Power

The CCA prohibits a corporation with a substantial degree of power in a market from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in that market or any other market in which the corporation or any of its related bodies corporate supply or acquire goods or services. Forms of conduct that may amount to misuse of market power include various pricing and non-pricing practices, such as:

- > predatory pricing (where a corporation supplies goods or services below cost for a sustained period in order to eliminate or substantially damage a competitor);
- > refusal to supply or refusal to deal; or
- > tying or bundling goods and / or services.

Mergers and Acquisitions - competition aspects

In Australia, mergers or acquisitions of shares or assets are prohibited if they will have the effect or likely effect of substantially lessening competition in a market. However, it is possible to obtain:

- > informal merger clearance by applying to the ACCC for an informal assessment as to whether the ACCC considers that the proposed merger or acquisition is likely to substantially lessen competition; or
- > formal merger authorisation, by making formal application to the ACCC for protection from legal action under the relevant provisions of the CCA.

There is currently no mandatory notification regime in Australia. However, the ACCC generally expects to be notified of a merger or acquisition prior to completion if the products or services of the merger parties are either substitutes or compliments and the merged firm will have a post-merger market share of greater than 20% in the relevant market/s.

Authorisation and Notification

Conduct that would otherwise contravene one of the 'per se' prohibitions under the CCA, such as cartel conduct, can be 'authorised' by the ACCC if the ACCC is satisfied that the conduct is likely to give rise to public benefit that outweigh any likely public detriment.

Conduct that is subject to the 'substantial lessening of competition' test, such as exclusive dealing, can be authorised if the ACCC is satisfied that either:

- > the proposed conduct would not be likely to substantially lessen competition; or
- > the likely public benefit from the conduct outweighs the likely public detriment.

Alternatively, immunity from normal competition laws may be available for some forms of conduct, such as exclusive dealing and RPM, through a 'notification' process. This is a less involved process than authorisation where a corporation may notify the ACCC of the relevant conduct in a prescribed form. The ACCC may revoke a notification if it is satisfied that the conduct has a purpose, effect or likely effect of substantially lessening competition. Immunity comes into force if the ACCC does not do this within a prescribed period, and instead allows the notification to stand.

Class Exemptions

The ACCC has the power to declare exemptions from certain competition laws for particular classes of persons / entities, circumstances or conduct. For example, the first class exemption issued by the ACCC allows certain types of small business and franchisees to collectively bargain with suppliers, customers and franchisors, provided that the relevant parties provide a collective bargaining class exemption notice form to the ACCC.



INTELLECTUAL PROPERTY

In Australia, the owners of intellectual property are protected by Federal legislation. Australia is also a party to the Madrid Protocol and numerous other bilateral international treaties which deal with intellectual property rights.

In Australia, intellectual property rights may be protected at common law, through registration, or a combination of both. IP Australia is the government agency tasked with administering the registered regimes for patents, trade marks, designs and plant breeder's rights.

TRADE MARKS

The registration of trade marks is regulated by the *Trade Marks Act 1995* (Cth) (**Trade Marks Act**). A trade mark is a sign used or intended to be used to distinguish the goods or services of a trader from those of other traders. Trade mark protection can apply to a range of signs, including images, logos, shapes, sounds, colours and smells. Subject to prior or concurrent use of a trade mark by a third party, registration of a trade mark provides the registrant with the exclusive right to use that trade mark or to authorise other persons to use that trade mark in connection with the goods or services specified in the registration.

Unlike some other jurisdictions, the Trade Marks Act in Australia requires substantive examination on absolute and relative grounds. Other than formality and classification issues, the two most common objections to registration raised are that the trade mark:

- > lacks inherent distinctiveness and is not capable of distinguishing the applicant's goods and services from those of other traders; and
- > is substantially identical or deceptively similar to an earlier filed trade mark on the register.

In the event an examination report issues, applicants have 15 months from the issuance of the report to secure acceptance. On acceptance, the application is advertised for a two month opposition period and in the absence of opposition, the trade mark will be registered for 10 years subject to renewal.

Registered trade mark rights offer the best protection for owners in Australia. However, it may also be possible to enforce unregistered trade mark rights in Australia.

Importantly, social media handles and taglines may be subject to registered trade mark protection as long as they are a sign functioning as a badge of origin of the owner.

COPYRIGHT

Copyright is not a registrable right in Australia. Rather, copyright protection is automatic for protectable works as set out in the *Copyright Act 1968* (Cth) (**Copyright Act**).

Copyright in relation to a work is the exclusive right to copy, publish, perform in public, communicate to the public and adapt the work. The work may be a literary, dramatic, artistic or musical work; in addition, copyright can apply to sound recordings, broadcasts and cinematograph films. For a work to be protected by copyright under the Copyright Act it must be 'original' in its form and created by a human author or authors.

Under the Copyright Act, the copyright in literary, dramatic or musical or artistic works, sound recordings, films and television generally subsists until the end of the period of 70 years after the end of the calendar year in which the author of the work died, or 70 years from the date it was made public if not during the author's lifetime. With regard to published editions, the copyright in the typographical arrangement and layout of the work continues to subsist until the expiration of 25 years after the expiration of the calendar year in which the edition was first published. With regard to broadcasts, the copyright continues to subsist until the expiration of 50 years after the expiration of the calendar year in which the broadcast was made.

The Copyright Act also protects the moral rights of the author or performer of the work, being the right of attribution of authorship/performership, the right not to have authorship/performership falsely attributed and the right of integrity of authorship/performership.

PATENTS

The *Patents Act 1990* (Cth) (**Patents Act**) sets out the requirements for the registration of patents in Australia. The registration of a patent gives the patentee the exclusive rights, during the 20 year term of protection to exploit the invention and to authorise another person to exploit the invention. These exclusive rights are personal property and can be assigned to another person.

It is also possible to file a provisional application. A provisional application does not provide any patent protection, but does establish a priority date and allow the applicant further time to file an application for a standard patent.

For a patent to be registrable it must be a device, substance, method or process, that is novel and involves an inventive step. The invention must not have been previously disclosed to the public or secretly used for commercial purposes. An application to register a patent is made with IP Australia and must include sufficient information for a person skilled in the relevant art to recreate the invention.

DESIGNS

The overall appearance or look of a product can be protected in Australia as a registered design under the *Designs Act 2003* (Cth) (**Designs Act**). A design will be registrable in Australia if it is new and distinctive when compared with the prior art base.

The assessment of newness is based on whether the design is identical to anything in the prior art. Distinctiveness requires that the applied for design is not substantially similar to the prior art, where prior art includes designs publicly used in Australia, designs published in a document within or outside Australia, and designs disclosed in other design applications that have an earlier priority date than the designated design. Recent amendments to the Designs Act mean that from March 2022 a 12 month grace period will be available to applicants, bringing the designs system in line with the same grace period offered by the Australian patent system.

Once a design application has been filed, it will undergo a formalities assessment with IP Australia and in the absence of any formalities issues, will proceed to registration.

A registered Australian design right will confer on the owner the exclusive right to:

- a. make or offer to make a product, in relation to which the design is registered, which embodies the design;
- b. import such a product into Australia for sale, or for use for the purposes of any trade or business;
- c. sell, hire or otherwise dispose of, or offer to sell, hire or otherwise dispose of, such a product;
- d. use such a product in any way for the purposes of any trade or business;
- e. keep such a product for the purposes of doing the things mentioned in (c) or (d) above; and
- f. authorise a person to do any of the acts listed above.

Importantly, in order to enforce a registered design in Australia, the owner must request examination of the design. Only once the design has been examined and certified can it be enforced against third party infringers.

The term of registration of a design is five years from the filing date of the design application in which the design was first disclosed. It may also be renewed, but the maximum term of protection is 10 years from the date of filing the application. The owner may also assign the rights in the design to other people.

CIRCUIT LAYOUTS

In Australia, the *Circuit Layouts Act 1989* (Cth) (**Circuit Layouts Act**) protects the original designs of circuit layouts. Circuit layouts are layout designs or plans of integrated circuits used in computers. The Circuit Layouts Act defines a circuit layout as a representation, fixed in any material form, of the three dimensional location of the active and passive elements and interconnections making up the integrated circuit.

In order to qualify for protection under the Act, the circuit layout must be original and not common place at the time it was made. The owner of the circuit layout is not required to register and has exclusive rights to copy the layout, directly or indirectly, in a material form, to make an integrated circuit in accordance with the layout or exploit the layout commercially in Australia. The Act provides that from first commercial exploitation (which must occur within 10 years of creation of the circuit layout), circuit layout rights continue for a period of 10 years. Therefore, the maximum period of protection is 20 years from the year of making an eligible layout.

PLANT BREEDER'S RIGHTS

Plant breeder's rights are regulated by the *Plant Breeder's Rights Act 1994* (Cth) (**PBR Act**). The PBR Act grants protection to certain new varieties of plants.

The owner of a registered plant breeder's right has exclusive rights to produce, reproduce and condition the material for the purpose of propagation, selling, importing or exporting the material. To register a new variety under the PBR Act, an application needs to be filed with IP Australia. New varieties or recently exploited varieties are registrable provided that for a new variety, it has not been sold without the owner's consent. A recently exploited variety is one that has been sold with the owner's consent but for no more than 12 months. In order to be registrable as a plant breeder's right, the variety must be distinct from existing varieties and uniform across multiple generations of reproduction.

Once registered, a plant breeder's right provides the owner with a monopoly over that variety in Australia for 20 years in the case of most types of plants or 25 years for trees and vines.

DOMAIN NAMES

Domain names are not considered intellectual property under Australian law, but are licences over a web address granted for a certain period of time. Registration of a domain name is simple and inexpensive. The cost of a domain name is dependent on the type of name required (.com/.com.au/.org/.net). The .au domain name space is regulated by .au Domain Administration Ltd or .auDA.

In order to register a .com.au domain name the applicant needs to have an Australian presence. Importantly, for foreign entities relying on their Australian trade mark application or registration as demonstrating their Australian presence, this means the foreign entity needs to be the owner of an Australian trade mark application or registration for the exact words for which a domain registration is sought. Domain name licences must be

renewed, or they will automatically expire. Australian domain names can be licensed for up to five years (for example, .com.au/edu.au). The .au Dispute Resolution Policy (**auDRP**) sets out a mandatory administrative procedure to challenge registration of a domain name by a third party. The auDRP is modelled on the Uniform Dispute Resolution Policy (**UDRP**), which applies with regard to generic Top Level Domains. In order to succeed under the auDRP, the complainant must establish that:

- > the domain name is identical or confusingly similar to a name, trade mark or service mark in which the complainant has rights;
- > the registrant has no rights or legitimate interests in respect of the domain name; and
- > the domain name has been registered or subsequently used in bad faith.

The existence of a trade mark does not guarantee the right to use a domain name, nor is registration of a domain name of itself sufficient to indicate use as a trade mark. However, the use of a domain name which both directs customers to a website and serves to differentiate the goods or services of a trader may constitute use as a trade mark.

TRADE SECRETS

Unlike in some other jurisdictions, trade secrets are not protectable in Australia under a statutory regime. However, protection of trade secrets can be enforced as a breach of confidence. Trade secrets are a specific type of confidential information of a commercial nature that might also include know-how, being information as to how something may be best used. In order to be recognised as a Trade Secret, the information should be commercial in nature and the owner should take reasonable steps to ensure the secrecy of the information through the use of robust non-disclosure agreements with third parties and employees, as well as limited dissemination and access to the information within the business.

BUSINESS NAMES

Business name registration is required in Australia where a business is operated other than in the name of the owner entity. A business name registration is separate to a trade mark registration, however it does not grant any legal rights in the name itself. Whilst a trade mark registration is a property right conferring monopoly rights in the name or trade mark, a business name registration is required for consumer law purposes in order to enable consumers to determine the operator of a business if the business is not owned or operated in the name of the owner entity. Business name registration currently occurs through the Australian Securities and Investments Commission and by 2024 will be transferred to the Australian Business Registry Services. Although a business can operate in Australia without a registered trade mark, it cannot operate under a name different to its legal name without a business name registration. Any business operating in Australia should register its business name. Importantly, the business name and trade mark registers do not operate together and the availability of a business name for registration will not of itself mean that the same trade mark is available for registration, and vice versa. Both registers should be searched in order to determine the availability of a name for business name and trade mark registration.

The *Privacy Act 1988* (Cth) (**Privacy Act**) regulates the handling and processing of personal information, including credit reporting information. 'Personal Information' is information that identifies, or could be used to identify, an individual. Credit reporting information includes credit reports and other credit worthiness information about individuals by credit reporting bodies and credit providers. 'Sensitive information' is a sub-set of personal information, attracting a higher level of protection. Sensitive information includes health and biometric information, information about a person's racial or ethnic origin, and sexual orientation.



PRIVACY

The *Privacy Act 1988* (Cth) (**Privacy Act**) applies to the acts and practices of Australian and Australian Capital Territory Government agencies, as well as to 'organisations', that is, applicable entities in the private and non-government sectors. Certain entities are exempt from the operation of the Privacy Act, most significantly, small businesses, defined as businesses with an annual turnover of less than A\$3 million. Some States and Territories have separate privacy legislation applying to the government sector of that state or territory.

Privacy laws regulate the way that government and (some) non-government organisations collect, use and store information about people, including sensitive information such as health information. The core of the Privacy Act is the 13 Australian Privacy Principles (**APPs**). The key elements of the APPs are summarised below.

APP privacy policy

An organisation must have an APP privacy policy which is a document, readily available to the public, which sets out the entity's personal information handling practices. The publication of a privacy policy on the organisation's website is considered to be sufficient for this purpose.

Collection

An organisation may only collect personal information where it is reasonably necessary for the organisation's functions or activities. When collecting sensitive information, the organisation must have the individual's consent, unless an exception applies. Before, at the time of, or as soon as reasonably practical after collecting an individual's personal information, the organisation must tell the individual about certain matters in a personal information collection statement or similar document. The matters include the identity and contact details of the organisation, the purposes for collection, entities to which the organisation may disclose the collected information, and how to make a privacy complaint.

Use and disclosure

An organisation may use or disclose personal information that it holds for the purpose for which it collected it (called the 'primary purpose'), for a related purpose which the individual would reasonably expect, or with the individual's consent. An organisation may use or disclose that personal information for a secondary purpose in certain circumstances, including when authorised or required by law, or for enforcement related activities of an enforcement body.

Direct marketing

An organisation may only use or disclose personal information for direct marketing purposes if certain conditions are met, for example, where the information has been collected directly from the individual and the individual would reasonably expect their personal information to be used for the purpose of direct marketing.

Cross-border disclosure

An organisation must ensure that, before disclosing personal information to an overseas recipient, it takes such steps as are reasonable in the circumstances to ensure that the recipient does not breach the APPs in relation to that information. Reasonable steps may include the imposition of contractual obligations on the overseas recipient. If the overseas recipient breaches the APPs, the Australian discloser will usually be liable. Alternatively the organisation may seek the consent of the individual, however the organisation must expressly inform the individual that if they consent to the overseas disclosure the overseas recipient which handle the individual's information will not be accountable under the Privacy Act and the individual will not be able to seek redress under the Privacy Act.

Data security and privacy by design

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.

An organisation must take reasonable steps to implement practices, procedures and systems that will ensure it complies with the APPs and any binding registered APP code, and is able to deal with related inquiries and complaints. This obligation is called privacy by design.

Access to personal information

An organisation has certain obligations when an individual asks to be given access to personal information held about them by the organisation. This includes a requirement to provide access unless a specific exception applies.

Correction of personal information

An organisation must take reasonable steps to correct personal information to ensure that, having regard to the purpose for which it is held, it is accurate, up-to-date, complete, relevant and not misleading.

Credit-related information

There are a separate set of privacy principles, equivalent to the APPs, applying to credit-related information, and binding on credit providers and credit reporting bodies.

Mandatory data breach notification

An organisation must notify affected individuals and the Office of the Australian Information Commissioner when a data breach is likely to result in serious harm to an individual whose personal information is involved.

Relationship to General Data Protection Regulation

Overall, the Privacy Act is similar to the European Union's General Data Protection Regulation (**GDPR**), however the GDPR tends to provide a higher level of protection. If an entity is compliant with the GDPR, it will usually be compliant with the Privacy Act, although not always. It is therefore advisable for overseas organisations to have a separate privacy policy for Australia and not rely on their GDPR policies for their business operations in Australia.

FREEDOM OF INFORMATION ACT

The *Freedom of Information Act 1982* (Cth) governs the access by members of the public to information held by Commonwealth government agencies. Essentially, with some exceptions (eg national security), the Act gives members of the public a right to request access to copies of documents that are held by government agencies, and to ask for information held about them to be changed or annotated if it is incomplete, out of date, incorrect or misleading. A government agency which receives a request must provide the information unless there is an overriding public interest, based on prescribed grounds, in not providing the information.

DID YOU KNOW?

Working out how to structure a business in Australia requires careful consideration, not just from the viewpoint of corporate law, but also from a range of other legal perspectives. HWL Ebsworth is a full service commercial firm, and has the proven capabilities to provide you with advice on how to structure your business. Issues such as tax, liabilities, employment and regulated industries can be very important in deciding how to structure your business. We also have a dedicated franchising team who can assist in setting up and managing a franchise system. We can guide you through the options to help you choose what is best for you.

There is equivalent freedom of information legislation in all Australian States and Territories, which applies to State and Territory government agencies.

SPAM ACT

In addition to the obligations under the Privacy Act, the *Spam Act 2003* (Cth) (**Spam Act**) regulates the sending of commercial electronic messages. The Act prohibits the sending of 'spam', that is, unsolicited commercial electronic messages, such as emails and SMS. It also regulates various aspects of the content of commercial electronic messages which are legitimately sent. The Spam Act is administered by the Australian Communications and Media Authority (**ACMA**).

DO NOT CALL REGISTER ACT

The *Do Not Call Register Act 2006* (Cth) (**DNCRA**) is also administered by ACMA. In addition to the obligations under the Privacy Act, the DNCRA regulates telemarketing by organisations in Australia and overseas. Essentially, the Act prohibits unsolicited telemarketing and fax marketing, unless an exemption applies. It establishes the Do Not Call Register, which allows people to register their phone numbers to avoid receiving unsolicited telemarketing calls and faxes.

The DNCRA also creates national standards for the conduct of telemarketing and research calls and faxes.

IMMIGRATION

MIGRATION AND TEMPORARY ENTRY VISAS FOR EMPLOYMENT PURPOSES

Migration to and temporary entry into Australia are administered federally by the Department of Home Affairs (**DoHA**).

DoHA has a range of initiatives to assist businesses. The States and Territories also have bodies whose purpose it is to attract and assist with migration to Australia. Benefits are seen for Australia in attracting overseas business people to establish or join businesses in Australia. In tougher economic times however greater scrutiny is placed on this issue, and greater need is required to justify recruitment of foreign workers.

TEMPORARY ENTRY FOR EMPLOYMENT

Australia requires that all visitors to Australia (ie people who are not Australian citizens) hold a visa. Depending on the length of stay, and the purpose for which a visa is sought, the categories available to employees and business people include:

- > temporary work (short stay specialist) visa (subclass 400); and
- > temporary skill shortage visa (subclass 482 visa);

Temporary Work (Short Stay Specialist) Visa (subclass 400)

The Temporary Work (Short Stay Specialist) visa permits a visa holder to enter Australia for a non-ongoing, short term stay, typically to complete highly specialised work. This visa is not appropriate for intra-company transfers.

The visa has two streams:

- > a highly specialised work stream; and
- > an Australian interest stream.

The visa provides a pathway for workers (such as professionals, managers, technicians and tradespeople) with highly specialised skills, knowledge or experience that can assist Australian business and which cannot reasonably be found in the Australian labour market.

A subclass 400 visa holder may stay in Australia for a period of up to three months (in exceptional cases a visa period of six months can be approved), and applicants may apply for multiple entries into Australia during the life of the visa. The subclass 400 visa allows the visa holder to undertake short-term non-ongoing work. The frequency of entry and the duration of stays in Australia are key factors for assessment. As a general principle, a total stay in Australia of no more than six months in any 12 month period may be considered to be 'non-ongoing'.

Temporary Skill Shortage visa (subclass 482)

For Australian and overseas businesses wanting to bring foreign workers to Australia on a temporary basis, the temporary skill shortage (**TSS**) visa is the most commonly used visa subclass. The employer must sponsor the visa holder and agree to meet certain obligations in respect of the employee. There is no limit on the number of occasions on which the visa holder can travel to and from Australia, so long as such travel occurs during the life of the visa. The visa is usually granted for two or four years, depending on the occupation associated with the work which the visa holder will perform in Australia. The visa holder's dependent family members (eg spouse and children) can be included in the visa application.

The employer must:

- > apply for approval to sponsor overseas workers;
- > nominate and advertise the positions (Labour Market Testing) for which it intends to recruit those workers (from a list of approved positions);
- > pay at least the market salary rate of the position;
- > meet the requirements of any caveats which may attach to the occupation, such as having a certain number of staff or turnover;
- > cooperate with DoHA in its monitoring requirements; and
- > meet sponsorship obligations, including paying certain return travel costs, not seeking reimbursement of certain visa related costs from the employee, and notifying DoHA if the visa holder ceases to work for them.

The employee:

- > must apply for and satisfy all the criteria for their visa (including at least 2 relevant employment experience in the last 5 years post qualification and English language ability); and
- > may not work in Australia for any employer other than their sponsor.

If the occupation is on the short term skilled occupation list, the employee must be a genuine temporary entrant, which means the visa applicant must not already have held two TSS visas in the short term stream during the last five years, or have been in Australia for four years already (regardless of visa type). The employee may change to a new employer, but only after the new employer is approved as a sponsor and the position to be filled is nominated. In such cases, the visa holder does not need to apply for a new visa, but may work for the new employer for the remaining duration of their visa.

Labour agreements

Labour agreement visas require the collaboration of a sponsoring organisation (which may be an employer, industry association or group of employers) and the Australian government (through DoHA). A labour agreement can be negotiated between those parties in special circumstances not covered by the standard sponsorship provisions. For example, a labour agreement might be used where there is a proven labour shortage in a particular sector in Australia. Either temporary or permanent visas may be granted.

BUSINESS OWNERS, INVESTORS AND SENIOR EXECUTIVES

A range of visas are available for business owners and investors. The criteria for these visas vary, but the applicant will generally need to own significant assets and have invested (or be willing to invest) some of those assets in Australian businesses or investments. Temporary and permanent visas are available. In most cases, the applicant will need to hold a provisional visa for at least two years before applying for permanent residence.

PERMANENT EMPLOYMENT OR BUSINESS MIGRATION

Options available for permanent employment or business migration are:

- > permanent sponsored business visas (Employer Nomination Scheme); and
- > business and significant investor visas (temporary and permanent).

Employer Nomination Scheme and Regional Sponsored Migration Scheme visas

The Employer Nomination Scheme (**ENS**) has three different streams of entry:

- > temporary residence transition stream;
- > direct entry stream; and
- > agreement stream.

The temporary residence transition stream is designed for holders of a subclass 482 visa (**TSS visa**), where the applicant has worked in the same position for at least the previous three years, and will remain in that position or one that is closely aligned. Visa applicants must generally be less than 45 years old, unless an exemption applies.

The direct entry stream is suitable for those who do not hold a 482 visa or who are overseas, and who satisfy occupational criteria as well as age (under 45 years), English and skill assessment requirements .

The agreement stream is available to semi-skilled occupants where there is already a labour agreement in place.

Business Innovation and Investment visa (temporary and permanent)

The Business Innovation and Investment visa (subclasses 188 for the provisional and 888 for a permanent visa) is aimed at attracting successful business people to invest in Australia.

The visa has four streams:

- > the business innovation stream (for applicants who wish to own or manage a business in Australia);
- > the investor stream (for applicants who wish to make a specific investment of at least A\$1.5 million in Australia, and meet certain requirements and maintain business or investment activity in Australia);
- > the significant investor stream (for applicants who wish to make an investment of at least A\$5 million in a complying investment in Australia and maintain investment activity in Australia);
- > the entrepreneurial stream (for startup and early stage entrepreneurs who have been endorsed to develop their concepts and been nominated by a State or Territory government agency); and
- > the premium investor stream (for applicants who wish to make an investment of at least A\$15 million in a complying investment).

The business innovation and investor streams have specific point score and personal assets requirements.

For the purpose of the significant and premium investor stream, there are complex guidelines specifying the 'complying investments' which must be made.

In order to apply for these visas, the visa applicant must submit an expression of interest and be nominated by a State or Territory government or Austrade.

The Business Innovation and Investment Visa may be granted as a temporary or permanent visa. In order to be eligible to progress from a temporary visa to a permanent visa under the significant investor stream, the visa holder must spend a certain number of days in Australia over the four year period of the visa. A premium investor stream temporary visa holder can progress to a permanent visa after one year and there is no Australian residence requirement during that period.



USEFUL WEBSITES

Federal Departments

Australian Government: www.australia.gov.au

Australian Taxation Office: www.ato.gov.au

Australian Treasury: www.treasury.gov.au

Department of Foreign Affairs and Trade: www.dfat.gov.au

Department of Home Affairs: www.homeaffairs.gov.au

Foreign Investment Review Board: www.firb.gov.au

IP Australia: www.ipaustralia.gov.au

Office of the Australian Information Commissioner: www.oaic.gov.au

Reserve Bank of Australia: www.rba.gov.au

Federal Regulatory Authorities

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

Australian Competition and Consumer Commission: www.accc.gov.au

Australian Prudential Regulation Authority: www.apra.gov.au

Australian Securities and Investments Commission: www.asic.gov.au

State Governments

Australia Capital Territory Government: www.act.gov.au

New South Wales Government: www.nsw.gov.au

Northern Territory Government: www.nt.gov.au

Queensland Government: www.qld.gov.au

South Australian Government: www.sa.gov.au

Tasmanian Government: www.tas.gov.au

Victorian Government: www.vic.gov.au

Western Australian Government: www.wa.gov.au

Industry

Australian Chamber of Commerce and Industry: www.australianchamber.com.au

Australian Industry Group: www.aigroup.com.au

ABOUT US

HWL Ebsworth is the largest legal partnership in Australia according to recent Partnership Surveys in The Australian and the Australian Financial Review. We are a full service commercial law firm and provide expert legal services at competitive rates, focusing on client outcomes.

Through our combination of legal specialists and industry experience, HWL Ebsworth has established a reputation as a legal service provider of choice for organisations across Australia and internationally.

As Australia's largest legal partnership, we can provide our clients with access to a significant depth of talent, consolidated expertise and in-depth knowledge.

HWL Ebsworth offers expertise in:

- > Aged Care and Retirement Living
- > Banking and Finance
- > Building and Construction
- > Commercial Contracting
- > Competition and Consumer
- > Corporate Governance
- > Energy and Resources
- > Environment and Planning
- > Capital Markets
- > Financial Services Regulatory
- > Foreign investment
- > Government
- > Health
- > Information Technology
- > Infrastructure
- > Insolvency and Security Enforcement
- > Insurance
- > Intellectual Property
- > Litigation and Dispute Resolution
- > Media and Telecommunications
- > Mergers & Acquisitions
- > Property
- > Retail and Franchising
- > Taxation
- > Transport
- > Workplace Relations & Occupational Health Safety

OUR OFFICES

HWL Ebsworth is the only Australian firm to have coverage in every State and Territory. The firm has offices in nine locations across Australia: Adelaide, Brisbane, Canberra, Darwin, Hobart, Melbourne, Norwest (North West Sydney), Perth and Sydney.

HOW WE ARE DIFFERENT

HWL Ebsworth operates a different business model from other leading national law practices, and this allows us to offer top tier practitioners at rates which are significantly lower than those of our competitors. A fundamental principle on which our model is built, however, is that the quality and timeliness of advice provided is not negatively impacted by our desire to offer clients exceptional value.

We understand the critical importance of effectively managing costs. By focusing our internal investment on areas that will provide tangible benefits to our clients, such as quality lawyers, training, knowledge management resources and IT systems, and choosing not to invest in unnecessary activities, we are in a position to offer exceptional value for money without compromising on quality and service.



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DISCLAIMER

This guide provides only general information as to current Australian laws as at 1 January 2022. It is not legal advice and should not be relied upon for that purpose. You must obtain your own legal advice applicable to your specific circumstances in respect of any matter contained in this guide.

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