



Doing business and investing in Australia

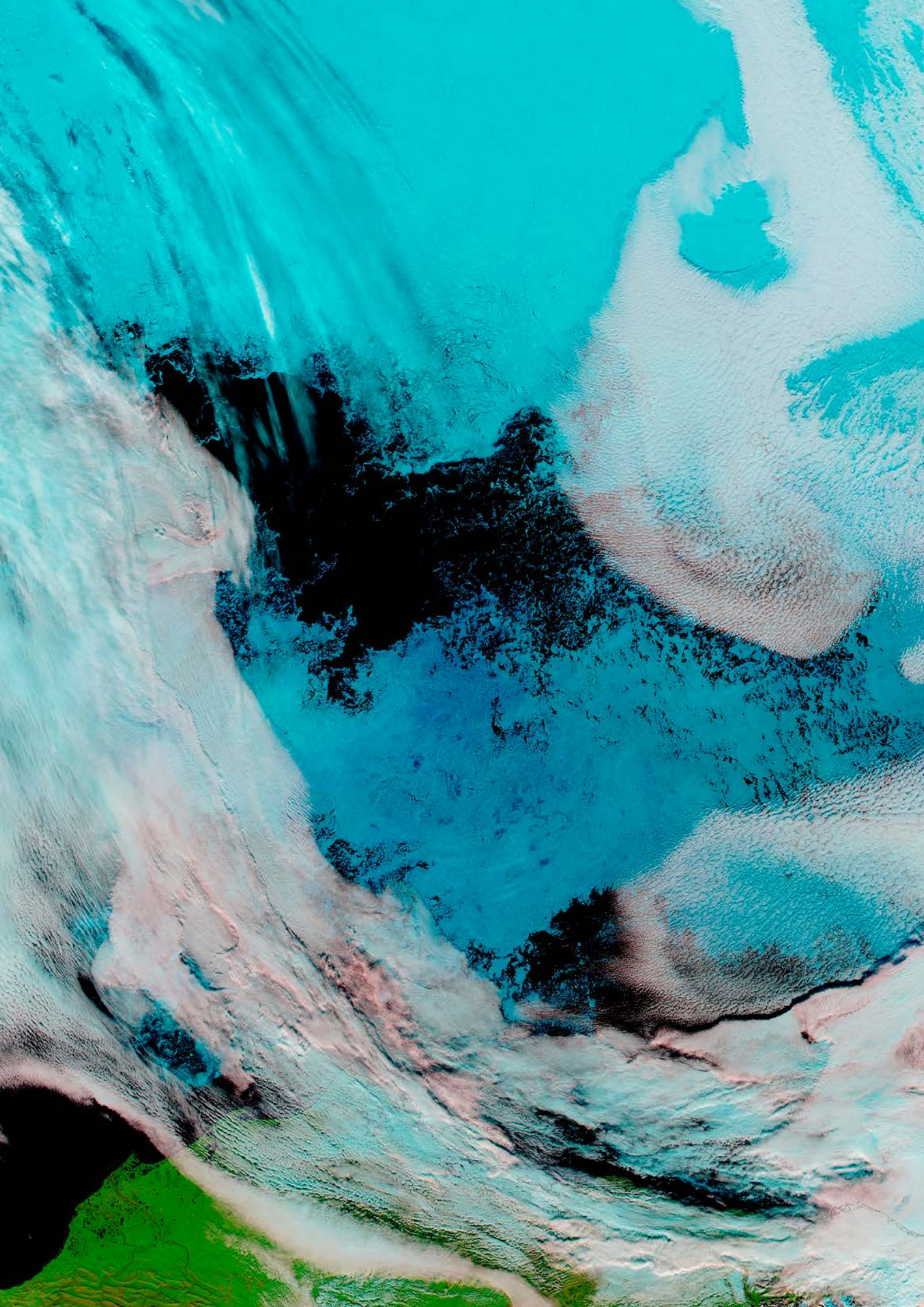
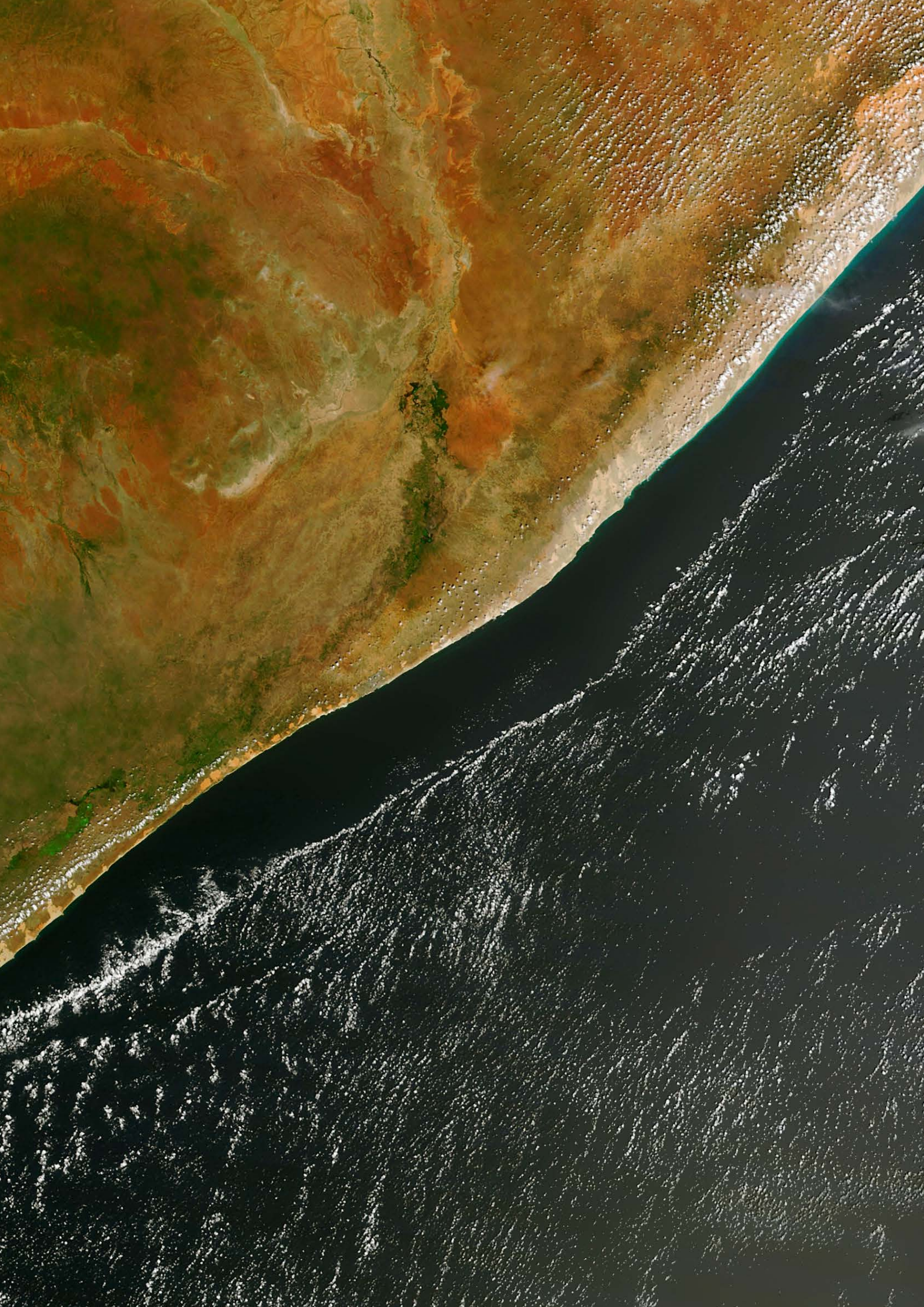


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A world of opportunity

Allens is delighted to present *Doing Business and Investing in Australia*, a guide aiming to identify and unravel many of the legal and regulatory issues that foreign investors face when considering an investment opportunity in Australia.

Australia has been, and will continue to be, an attractive location for foreign investors to find and capitalise on investment opportunities. The Australian Government welcomes foreign investment, and has an open foreign investment policy, making it easy for foreign investors to enter the Australian market. This has recently been made even easier for a number of countries, with the signing of new trade agreements.

Australia has a flexible market-driven economy that encourages new and expanding enterprises. Australia has political, economic, legal and social systems that are robust and transparent, ensuring stability and surety for investors. Australia's location and its strong ties with the countries in the region, as well as Europe and the Americas, place the country in a unique position for global and regional businesses.

Allens is a leading law firm with partners, lawyers and corporate services staff across Australia and Asia, and a global network spanning 41 offices across 26 countries, through our global alliance with Linklaters.

As Australia's oldest law firm, we've been there for the nation-building projects, major transactions and reforms that have changed the face of Australia and the region. We've worked alongside industry pioneers, innovators, and champions of justice and reform who have shaped the course of our economy and society.

Our clients are some of the world's leading companies, including more than 75 of Australia's top 100 public companies. They benefit from our innovative approach to complex work, technical expertise, commercial acumen and integrity.

Allens and Linklaters have a global alliance through which we deliver an integrated service, providing our clients with one point of contact and a unified team comprising the best resources of each firm in Africa, Australia, Asia, Europe, the Middle East, South America and the US.

Allens has consistently been recognised as one of the leading law firms in the region and we are often called on to assist foreign clients of all sizes, and in a range of industries, in establishing new businesses or acquiring existing businesses in Australia.

This guide aims to make investing in Australia easier to understand, and discusses the legal and regulatory environment that investors will face in Australia. At the end of this guide, there are also some practical tips for successfully implementing your investment strategy. Of course, each investment decision is different and the laws and regulations in Australia change from time to time. Accordingly, this guide is intended only as a summary of the issues, and is not a legal opinion. If you require more information or advice about your particular circumstances, please do not hesitate to contact any of our partners listed at the end of this booklet.

This guide is current as of March 2023.



Disclaimer: The information in this guide does not take into account temporary legislation and other measures that have been taken by State and Federal governments, or other regulatory bodies, in response to the COVID-19 crisis.

Global recognition

International and independent surveys have consistently rated us as leaders. For example:

- **Best Law & Related Services Firm (>\$200m)**
Beaton Client Choice Award 2021
- **Ranked as a Band One firm in 19 practice areas**
Chambers Asia Pacific 2023
- **Ranked as Tier One firm in 16 practice areas**
The Legal500 Asia Pacific 2023
- **M&A Legal Adviser of the Year 2022**
Pharmaceuticals, Medical and Biotech M&A Legal Adviser of the Year
Private Equity Legal Adviser of the Year
Cross-border M&A Legal Adviser of the Year
Mergermarket Australia M&A Awards 2022
- **Australasian Law Awards 2022**
M&A deal of the year – Santos merger with Oil Search
Debt market deal of the year – Global Infrastructure Partners acquisition of stake in Queensland Curtis LNG project
Infrastructure & Projects deal of the year – North East Link PPP
- **Australasian Law Awards 2021**
M&A deal of the year – Vodafone Hutchison Australia acquisition of TPG Corporation
Debt market deal of the year – National Broadband Network medium-term notes issuance
Equity market deal of the year – IOOF combined COVID super-sized placement and accelerated non-renounceable entitlement offer
Mid-market deal of the year – BGH Capital acquisition of Healius Primary Care
Excellence in employee health & wellbeing
- **Topped infrastructure league tables 2021**
Ranked first in Australia and New Zealand for deals by volume and value across:
 - Infrastructure (legal and financial advisers)
 - Transport (legal advisers)
 - Social Infrastructure (legal advisers)
 - Public Private Partnerships (legal advisers)*InfraLogic's infrastructure league tables 2021*
- **Ranked in Most Innovative Companies list 2018 - 2022**
Highest ranked law firm on the list for Australia and New Zealand 2019, 2020, 2021
The Australian Financial Review and Boss Magazine
- **Law firm of the year (>500 lawyers) 2019 and 2020**
Australasian Law Awards
- **Innovation & Excellence Awards, 2018 winner**
Equiem award for project innovation – REDDA, Real Estate Due Diligence App
Property Council of Australia
- **The Employer of Choice for Gender Equality**
(18th consecutive time we have been awarded this citation)
Workplace Gender Equality Agency 2022
- **A certified carbon neutral firm – First major Australian law firm to achieve this**
Carbon Neutral Program



Australia at a glance

An attractive Australia

Australia is a unique country with a long and rich history and a multicultural society, all of which have led to the development of an enterprising, dynamic and innovative nation.

Australia has a large landmass and is the sixth largest nation in the world by area. An island continent, Australia has a land area of about 7.6 million square kilometres and a population of approximately 26 million. The vast majority of this population (about 70%) resides in the coastal cities of Sydney, Melbourne, Brisbane, Perth and Adelaide, with much of the centre and western parts of the nation comprising desert areas.

An ideal investment destination

Australia has a robust, market-driven economy, a high quality of life and a stable regulatory environment. The Australian Government maintains an open and flexible foreign investment policy and has traditionally encouraged foreign investment in all sectors of the Australian economy. All of this, coupled with the availability of a hard-working skilled labour force, has made Australia an attractive investment option for foreign investors and will ensure that this will continue in the years ahead.

A strategic location

Australia has a multicultural population and workforce, with one in three Australians having been born overseas and about five million Australians speaking a language other than English.¹

Australia's unique time zone position in between Europe and the Americas makes it a prime location to conduct business, both regionally and globally. Close relations between the Australian Government and European and American nations, as well as cultural and geographic affinities with Asian Pacific nations, also ensure that Australia is a strategic location for companies to be based or to establish their Asian offices.

Growing sectors

Australia's economy is primarily services-based, although in recent years it has been buoyed by a strong resources sector. Australia is a major exporter of natural resources such as coal, iron ore, gold and natural gas. Australia also has a well-developed financial services sector and strong technology and research and development industries.

¹ Australian Bureau of Statistics, 2016 Census: Multicultural (2016).

Government and legal system

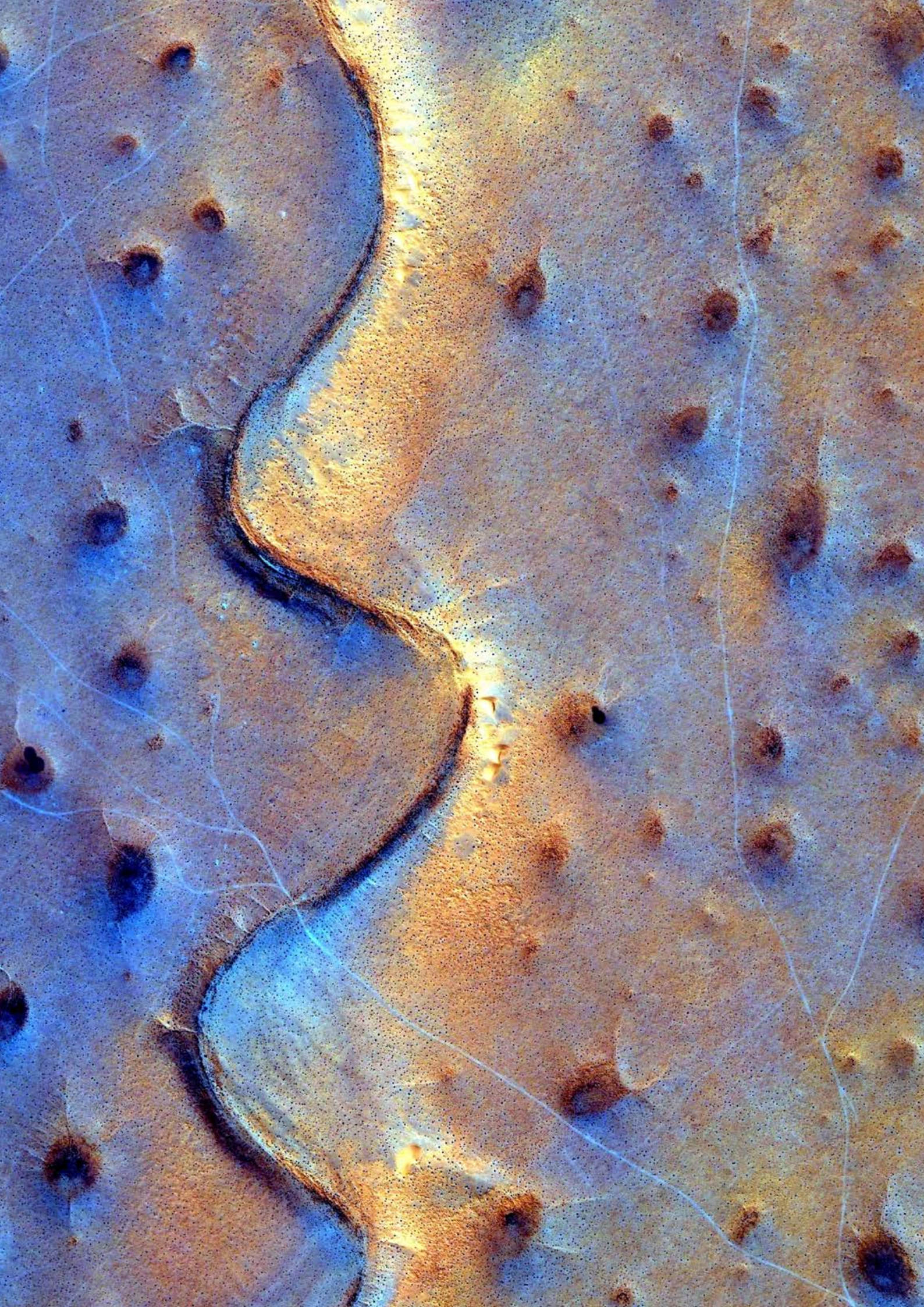
Australia boasts a robust and stable democracy with a federal system of government based on the United Kingdom's Westminster system and comprising three tiers of government:

- **Federal government:** The Commonwealth of Australia bears responsibility for national matters, including trade, foreign policy and taxation.
- **State/Territory governments:** The Commonwealth of Australia comprises six States (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and two Territories (the Northern Territory and Australian Capital Territory), each of which have certain powers to make laws applicable to that State or Territory.
- **Local government:** Local councils have responsibility for local planning and development processes and for the provision of certain services to the local community.

The major political parties, all of which are broadly pro-business, are the Australian Labor Party and the Liberal Party of Australia (in a long-standing coalition with the National Party of Australia).

Australia has a written constitution that establishes a separation of power between the legislative, executive and judicial arms of government. The legislature has the power to propose and make laws. The executive, the members of which are drawn from the legislature, administers the laws that the legislature makes. The judiciary applies and interprets the law and has the power to make precedents and develop the common law. Members of the judiciary are appointed by the executive.

When doing business in Australia, it is important to recognise the existence of, and interrelation between, Commonwealth, State and Territory and local government laws and regulations, as well as the common law as developed by the courts.



Setting up a business in Australia

A number of different business structures can be used to conduct business in Australia. These include a company, sole trader, joint venture, partnership or trading trust. Each business structure has its own legal characteristics, obligations and tax implications. So, a foreign investor wanting to set up a business structure in Australia to conduct business will need to consider carefully which structure is appropriate for their objectives and needs. This section provides a general overview of these business structures and outlines some approvals that may need to be obtained.

Australian companies

Companies are an attractive option for many wishing to conduct business because they provide limited liability for their shareholders. This means that, in general, shareholders are only liable to the extent of their investment in the company. Once formed, a company is a separate legal entity with the same powers as an individual. The principal regulator of companies in Australia is the Australian Securities and Investments Commission (**ASIC**).

While there are a number of different types of Australian companies, the most common is a company limited by shares. A company limited by shares can be either a proprietary company or a public company. A proprietary company must have no more than 50 non-employee shareholders and at least one director who is ordinarily resident in Australia. A public company, on the other hand, can have an unlimited number of shareholders. A public company must also have at least three directors (at least two of whom need to be ordinarily resident in Australia) and at least one company secretary who is ordinarily resident in Australia. Both proprietary and public companies must have at least one shareholder and a registered office in Australia. Generally, there are no minimum capital requirements for establishing a company in Australia or specific limitations on the scope of its business. However, certain industries, such as banking, have specific licensing requirements.

A foreign investor who decides to conduct business in Australia using the company structure could consider establishing a new Australian company (ie, a subsidiary) or acquiring an already established Australian company (see the section on [Acquiring a business in Australia](#)).

Establishing a new Australian subsidiary

This involves completing and submitting to ASIC the required application form and paying the prescribed registration fee. Alternatively, a foreign investor could purchase a 'shelf company' (a company that has been registered but is yet to trade) from businesses which set up companies for that purpose.

Sole trader

An individual can conduct business in Australia as a sole trader. A sole trader is personally liable for all debts and obligations incurred by the business. If a sole trader wants to conduct business in a name other than their own, that person will need to register the business name.

Joint venture

Foreign investors can enter joint ventures with Australian entities. Joint ventures typically involve two or more companies or individuals coming together, usually by way of a joint venture agreement, to work together on a project. A joint venture is usually used for a specific project or venture. The joint venture can either be incorporated (where the joint venturers together form a company) or unincorporated.

Partnership

Foreign investors may wish to enter into partnerships with Australian entities. A partnership involves the individuals or companies carrying on business in common as partners with a view to profit. Partnerships are formed by way of agreements or conduct. They are governed by State and Territory legislation, rather than Federal law, and usually consist of two to 20 individuals or companies, subject to certain exceptions.

Partnerships are not separate legal entities. Similar to sole traders, partners are personally liable for all debts and obligations incurred by the business but on a joint and several basis. In some States, it is possible to establish a limited liability partnership to afford limited liability to some of the partners.

Trading trust

Foreign investors may also conduct business in Australia through a trust. In a trust arrangement one or more trustees, who may be either individuals or corporations, operate a business on behalf of their beneficiaries. There are several recognised trust arrangements, the most common of which are fixed, discretionary and unit trusts. Unit trusts are the most commonly used form of trust for medium to large-scale investment purposes.

The type and particular terms of a trust will determine the arrangements for distributing income to beneficiaries.

Trusts may provide tax advantages over traditional corporations and are often used for the purchase of real estate.

Registering as a foreign company

It is possible for a foreign company to conduct business in Australia without using an Australian business structure (eg, establishing an Australian subsidiary). In that case, the foreign company will need to register as a foreign company operating in Australia. This involves completing and submitting to ASIC the required registration forms. Foreign companies registered in Australia are required to have a registered office in Australia and to appoint an agent in Australia to ensure compliance with Australian law.



Acquiring a business in Australia

Foreign investors may wish to purchase all or part of an Australian business. This can be done by either purchasing the shares in, or the assets of, the relevant company which conducts the business.

Asset v share purchases

Asset purchases are typically documented by a sale agreement between the seller and the purchaser, which will record the assets being sold and the price being paid. The assets that are commonly transferred include business premises, equipment, employees, contracts and intellectual property. In an asset purchase, the purchaser does not acquire the actual business vehicle and, as such, generally only assumes the liabilities that it contractually assumes. This means that the purchaser may need to obtain third-party consent to the transfer of relevant contracts to the purchaser. Also, it is unlikely that any government licences held by the seller will be able to be transferred to the purchaser, and the purchaser may have to apply for fresh licences.

On the other hand, acquiring a business through the purchase of the shares in a company results in the purchaser acquiring all the liabilities of the company. To mitigate this risk, the purchaser may obtain warranties and indemnities from the seller. In contrast to a purchase of assets, purchasing the shares in a company results in the purchaser acquiring the business vehicle, meaning that all contracts will be automatically acquired and there may not be a need to obtain third-party consent.

There are advantages and disadvantages associated with both asset and share purchases – including the tax treatment of each type of transaction – see the section on [Tax regime](#) – so it is important to discuss with your legal and commercial advisers what method is most suitable for your objectives.

Relevant legislation when acquiring a new company

The primary piece of legislation governing foreign investment in Australia is the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and its accompanying regulations (together, the **FATA**). See the section on [Foreign investment regulation](#).

In addition to the FATA, foreign investors should also be aware of the following:

- Certain industries, such as banking, civil aviation, shipping, media, airports and telecommunications, have additional industry-specific rules that regulate ownership.
- Section 50 of the *Competition and Consumer Act 2010* (Cth) prohibits the acquisition of assets or shares which would have the effect, or likely effect, of substantially lessening competition in a market for goods or services in Australia. If such an acquisition were to occur, the Australian Competition and Consumer Commission (the **ACCC**), the Australian competition law regulator, would have the power to bring proceedings in the Federal Court seeking divestiture orders and financial penalties.

Although seeking clearance from the ACCC for a proposed acquisition is not mandatory, a foreign investor may choose to voluntarily notify the ACCC of their intent so as to avoid later regulatory intervention.

Notification is recommended by the ACCC where the new entity would have a post-merger market share greater than 20% in the relevant market that it is trading in, and the products of the two original parties are substitutes or complements.

Further information relating to the ACCC and the Competition and Consumer Act can be found in the section on [Australian Competition and Consumer Act](#).

Takeover legislation

The Australian takeover rules in the *Corporations Act 2001* (Cth) prohibit certain acquisitions of interests in Australian companies or managed investment schemes (ie, trusts) listed on the Australian Securities Exchange (the **ASX**), and Australian companies that are not listed but have more than 50 members (each an **Australian Target Entity**). The prohibition (in Chapter 6 of the Corporations Act) prevents a person from obtaining a 'relevant interest' in the issued voting shares or voting units of an Australian Target Entity (eg, by acquiring the shares or interests, or having control over the disposal or voting of the shares or interests), through a transaction in relation to securities entered into by or on behalf of the person, if it would result in the person or someone else having 'voting power' in the Australian Target Entity greater than 20%. A person's 'voting power' is determined by aggregating the relevant interests that the person and the person's associates have in the issued voting shares or voting units of an Australian Target Entity, expressed as a percentage of all voting shares or voting units on issue. There are exceptions to the prohibition, including where acquisitions of relevant interests occur under a takeover bid or following approval by resolution of the target's shareholders or unitholders.

Takeover bids may take the form of either a market bid (purchasing securities in an Australian Target Entity through the ASX by the bidder at a stated price) or an off-market bid (made by written offer directly to the target's members). Market bids must be for cash and must be unconditional. Off-market bids are more common due to their flexible nature. They can be made for all of the target securities or a specified proportion of each target security holder's shares or units, may be subject to conditions and may comprise an offer of cash, securities or a combination of both.

The Corporations Act and the ASX Listing Rules require certain procedural requirements to be met during a takeover bid, including the submission of certain documents to ASIC and the ASX. These documents include a bidder's statement and a target's statement, which ensure that the members of the target and the market receive full disclosure of all the relevant facts from each party.

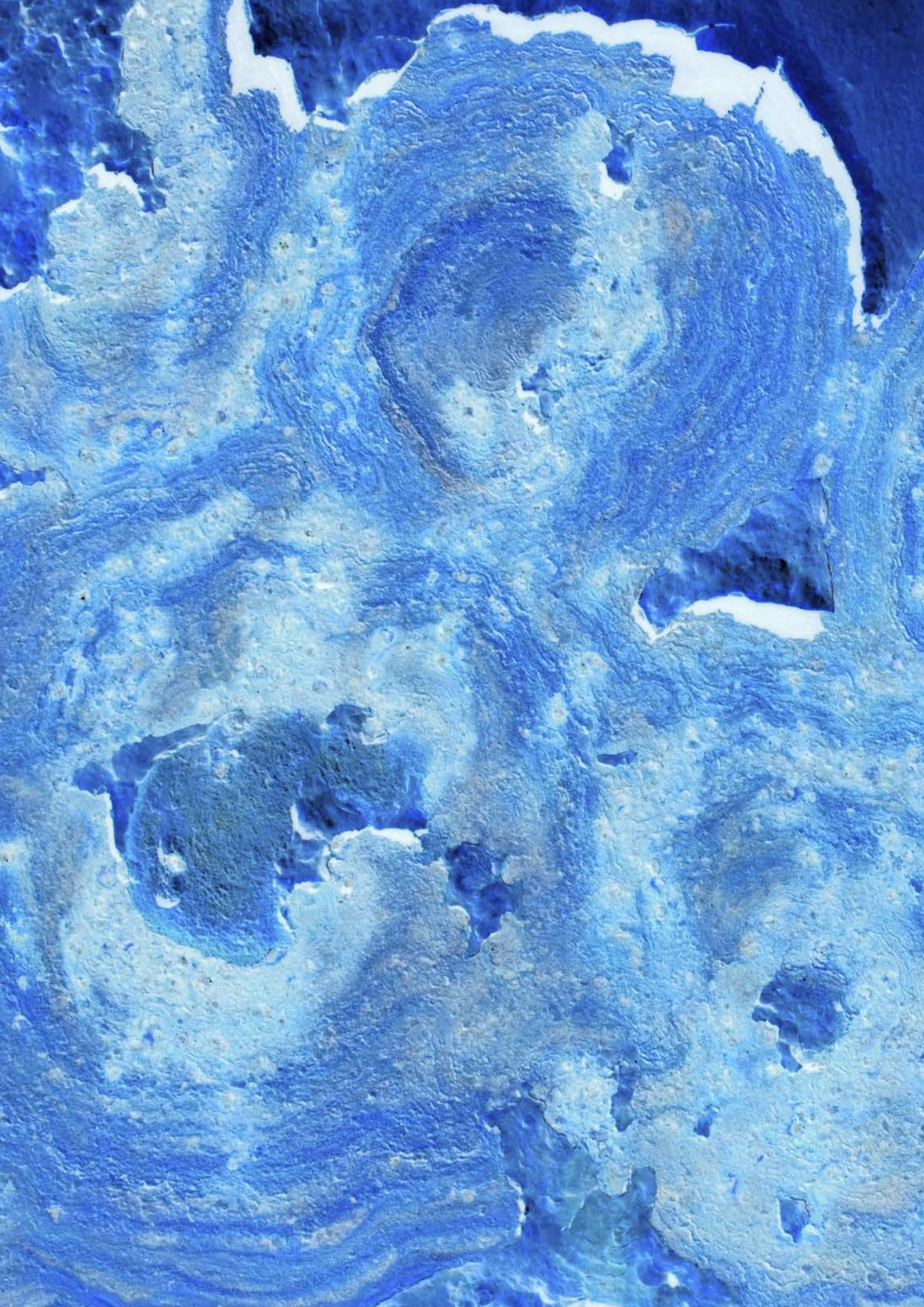
The Australian Takeovers Panel, an independent peer review body that regulates takeovers in Australia, is charged with resolving any takeover disputes that arise.

Schemes of arrangement

Schemes of arrangement are court-approved agreements by vote between a company and its members (or creditors) that become binding by statute. In general terms, schemes of arrangement can be entered into so as to reconstruct the share capital, assets or liabilities of the company and can also be used to effect a change of control in a target by either transferring all issued shares to a bidder or cancelling all shares issued to parties other than the bidder.

Schemes of arrangement are binding on all the target's shareholders (or creditors) if approved by them in a general meeting and subsequently approved by the court. As a result, schemes of arrangement provide an alternative to takeovers as a means to purchase Australian Target Entities which are companies. While schemes of arrangement are regulated by the Corporations Act, they differ from takeovers in that they require cooperation from the target company, which will need to hold a meeting of shareholders and prepare relevant documentation.

A scheme of arrangement structure cannot be used to acquire an Australian Target Entity which is a listed managed investment scheme – it can only be used where the Australian Target Entity is a company. However, a 'trust scheme' structure – which resembles a scheme of arrangement structure but does not involve mandatory court approvals – can be used as an alternative to a takeover as a means to purchase Australian Target Entities which are listed managed investment schemes.



Foreign investment regulation

Australia has a foreign investment approval regime that regulates certain types of acquisitions by 'foreign persons' of equity securities in Australian companies and unit trusts, and of interests in Australian businesses and Australian real property assets. The regime is set out in the FATA (being the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and its accompanying regulations).

Under the FATA, a 'foreign person' is generally:

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

A transaction that is subject to the FATA approval regime should not be implemented unless the Australian Treasurer has 'approved' the transaction via the issuance of a no-objection notice. Therefore, a transaction that needs approval should be conditional upon the receipt of that approval.

In deciding whether to approve a proposed transaction, the Australian Treasurer has the benefit of advice from the Foreign Investment Review Board (**FIRB**). The Australian Treasurer can block proposals by foreign persons that are contrary to the national interest or national security (as applicable depending on the type of proposal), or alternatively approve proposals on an unconditional basis or subject to conditions. Whether a proposed transaction is contrary to the national interest or national security (as applicable) is assessed on a case-by-case basis. These national interest factors are described in more detail below. National security is one of the national interest factors.

Applications for foreign investment approval are submitted to FIRB.

When approval is required

The rules regarding when approval (commonly referred to as 'FIRB approval') is required under the FATA are complex. There is a layered system of categories, exceptions and multiple thresholds.

In a situation where no special rules apply (there are many – see further below), a foreign person needs FIRB approval to acquire any of the following:

- a direct interest (generally 10% plus) in a target's securities or in the assets of a business if the target operates, or the business is, a 'national security business' (generally being a business which is 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) – in such cases a nil monetary threshold applies; or
- a substantial interest (20% plus) via the issue or transfer of securities if the target is:
 - an Australian company carrying on an Australian business;
 - an Australian unit trust; or
 - a holding entity of either of them,

where the target is valued above the following thresholds:

Investor	Threshold	How calculated
Agreement country investors – An entity that is an enterprise or national of an ‘FTA Country’ (Canada, Chile, China, Hong Kong, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, South Korea, USA and Vietnam) but excluding: <ul style="list-style-type: none"> - acquisitions by their subsidiaries incorporated elsewhere, including an Australian subsidiary; - foreign government investors (who are subject to more stringent rules – see below); and - acquisitions of targets in sensitive sectors (which include media, telecommunications, transport and various military applications). 	A\$1,339 million, indexed annually	The higher of: <ul style="list-style-type: none"> • the total asset value for the entity; and • the total value of the issued securities of the entity
Agreement country investors – where the target is carrying on a sensitive business (which includes media, telecommunications, transport and various military applications) but excluding: <ul style="list-style-type: none"> - acquisitions by their subsidiaries incorporated elsewhere, including an Australian subsidiary; and - foreign government investors (who are subject to more stringent rules – see below). 	A\$310 million, indexed annually	
Foreign persons who are not agreement country investors or foreign government investors (the latter being subject to more stringent rules – see below).	A\$310 million, indexed annually	

Special rules apply in a number of situations, including as follows.

- **(Foreign government investors)** There are different rules for investments by a foreign government investor compared with private investors. Foreign government investors are subject to more rigorous screening than other investors – all foreign government investors acquiring a direct interest (which is generally 10% but may be less depending on the circumstances) in an Australian entity require FIRB approval and there is no monetary threshold that applies before FIRB approval is required. Many commercial investors that operate independently are counted as foreign government investors – not only sovereign wealth funds and state owned enterprises, but also many entities that have part government ownership upstream.
- **(Agribusiness)** All foreign persons (other than those noted below) acquiring a direct interest (which is generally 10% but may be less depending on the circumstances) in an agribusiness for consideration of A\$67 million or more (including the value of any existing investment in that agribusiness) must obtain FIRB approval before proceeding. An agribusiness entity is one that:
 - derives earnings from carrying on one or more businesses in a prescribed class of agricultural businesses that represent more than 25% of the entity’s EBIT; or
 - uses assets in carrying on one or more such businesses and the value of the assets exceeds 25% of the total asset value of the entity.

However, this A\$67 million threshold does not apply to enterprises or nationals of USA, Chile or New Zealand. They are instead subject to the usual A\$1,339 million threshold noted in the above table.

- **(Media sector)** Any acquisition by a foreign person of a direct interest (which is generally 10% but may be less depending on the circumstances) in an Australian media business requires FIRB approval.
- **(Land-rich entities)** Any acquisition by a foreign person of securities in an Australian land corporation or trust (being a corporation or trust where interests in Australian land account for more than 50% of the entity's total assets) requires FIRB approval where the applicable land monetary threshold is exceeded, except acquisitions of less than 10% in an Australian land corporation or trust where there is no influence over management or policy (and, in the case of an unlisted Australian land corporation or trust, where that corporation or trust does not carry on a business of investing in established dwellings). The applicable land monetary threshold depends on the type of land interests that the Australian land corporation or trust has. For instance, a nil monetary threshold applies if there is any interest in 'national security land' (generally land which is defence premises or where it is publicly known (or could be known upon the making of reasonable enquiries) that a national intelligence agency has an interest in the land), but a A\$310 million threshold often applies if there are interests in only developed commercial land, or another threshold could instead apply depending on the type of land in which interests are held.

The Australian Treasurer has a last resort power to make orders (such as disposal orders) on national security grounds in respect of a transaction even after FIRB approval has been granted, provided various requirements are satisfied.

Note that even if a proposed transaction does not trigger a mandatory FIRB approval requirement, it can nonetheless be subject to the voluntary FIRB approval rules. This means that the acquirer is not obliged to seek prior FIRB approval for the proposed transaction, but failure to do so exposes the acquirer to the risk that (depending on the type of proposed transaction):

- the Australian Treasurer, at any time, considers the transaction to be contrary to the national interest and in such a case the acquirer may be subject to a prohibition order or, if the transaction has already completed, a disposal order; and/or
- the Australian Treasurer, at any time before the transaction completes and within 10 years after the transaction completes, exercises his/her call-in power to review the transaction on national security grounds and to make orders (such as a prohibition order or disposal order) if the Treasurer is satisfied that the transaction is contrary to national security.

Separate legislation (not administered by FIRB) includes other requirements and/or imposes limits on foreign investment in the following instances:

- the *Financial Sector (Shareholdings) Act 1998* (Cth) imposes a 20% limit on individual ownership (whether by an Australian or foreign person) in an Australian bank or insurance company, unless the Australian Treasurer approves the particular person owning a higher percentage;
- the *Air Navigation Act 1920* (Cth) imposes a 49% limit on aggregate foreign ownership in any Australian international airline (and the *Qantas Sale Act 1992* (Cth) imposes such a limit in respect of Qantas);
- the *Airports Act 1996* (Cth) imposes a 49% limit on aggregate foreign ownership of some airports, a 5% individual airline ownership limit and also cross-ownership limits between Sydney airport (together with Sydney West) and either Melbourne, Brisbane or Perth airports;
- the *Shipping Registration Act 1981* (Cth) requires a ship to be majority Australian-owned if it is to be registered in Australia, unless it is designated as chartered by an Australian operator; and
- the *Telstra Corporation Act 1991* (Cth) imposes a 35% limit on aggregate foreign ownership of Telstra (a telecommunications company) and individual foreign owners are only allowed to own a maximum of 5%.

Assessment of the national interest (for all foreign investors)

The FATA requires the Australian Treasurer to consider whether proposed investment transactions are contrary to Australia's national interest. Whilst the FATA does not define the concept of 'national interest', nor provide any guidelines on how it is to be assessed, the Australian Government's Foreign Investment Policy paper (the **Policy**) states that the Government typically considers five factors when assessing foreign investment proposals. In summary, these are:

- **National security:** The extent to which investments affect the Australian Government's ability to protect the strategic and security interests of Australia.
- **Competition:** Whether a proposed investment may result in an investor gaining control over market pricing or production of a good or service in Australia.
- **Other Australian government policies (including tax):** What impact the proposed investment will have on Australia's tax revenues or environment impact objectives. Depending on the circumstances surrounding the proposed investment and its potential impact on Australian tax revenue, FIRB may approve the investment subject to certain 'tax conditions' being imposed on the foreign investor. The conditions range in their degree of severity depending largely on the Government's perception of the degree of tax risk the transaction poses. For example, the conditions may vary from, broadly, requiring the foreign investor to comply, and using its best endeavours to ensure that all members of its 'control group' comply, with Australian tax law, to engaging with the ATO in good faith to resolve any tax issues in relation to the transaction and holding of the investment and providing to the ATO a forecast of tax payable in relation to the transaction or investment.
- **Impact on the economy and the community:** What level of Australian participation will remain after the proposed investment occurs, and what will be the consequences for employees, creditors and other stakeholders.
- **Character of the investor:** The extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision.

Assessment of the national interest (for foreign government investors only)

The Policy states that, where a proposal involves a foreign government investor, the Australian Government will also consider whether the investment is commercial in nature or if the investor is pursuing broader political or strategic objectives that may be contrary to Australia's national interest.

The Policy indicates that the Government will have regard to:

- the relevant foreign government investor's governance arrangements;
- where the foreign government investor is not wholly foreign government-owned, the size, nature and composition of non-foreign government interests in the foreign government investor; and
- the extent to which the foreign government investor operates on an arm's length, commercial basis.

The Policy goes on to say that mitigating factors that assist in determining that such proposals are not contrary to Australia's national interest may include:

- the existence of external partners or shareholders in the investment;
- the level of non-associated ownership interests;
- the governance arrangements for the investment;
- ongoing arrangements to protect Australian interests from non-commercial dealings; and
- whether the target will be, or will remain, listed on the ASX or another recognised exchange.

The Policy also states that the Government will also consider the size, importance and potential impact of such investments in considering whether or not the proposal is in the national interest.

Fees and timing

Applicants for FIRB approval are required to pay a fee for each application made. Fees are imposed for considering applications, not for approvals, and must be paid before an application will be considered. FIRB's time limit to consider the application does not start until the fee is paid.

The rules regarding the determining of FIRB fees are complex. The fee in any given case will depend on a range of factors, including: the type of target, the value of the transaction, the type of transaction, whether the application is for a no-objection notification or an exemption certificate, or whether the special fee adjustment rules apply. In general terms, the fee for any single application can range from A\$4,000 up to A\$1,045,000. In many cases the higher the transaction value the higher the fee subject to a fee cap of A\$1,045,000.

Once an application for FIRB approval has been lodged with FIRB (and the relevant application fee paid) there is a statutory time period for the Australian Treasurer to make a decision and, if no decision is made, then no further orders can be made (that is, the Australian Treasurer cannot prohibit or unwind a transaction if a decision is not made in time). The general rule is that the Australian Treasurer has 30 days to make a decision and a further 10 days to notify the applicant. However, there are several ways that this timeframe can be extended:

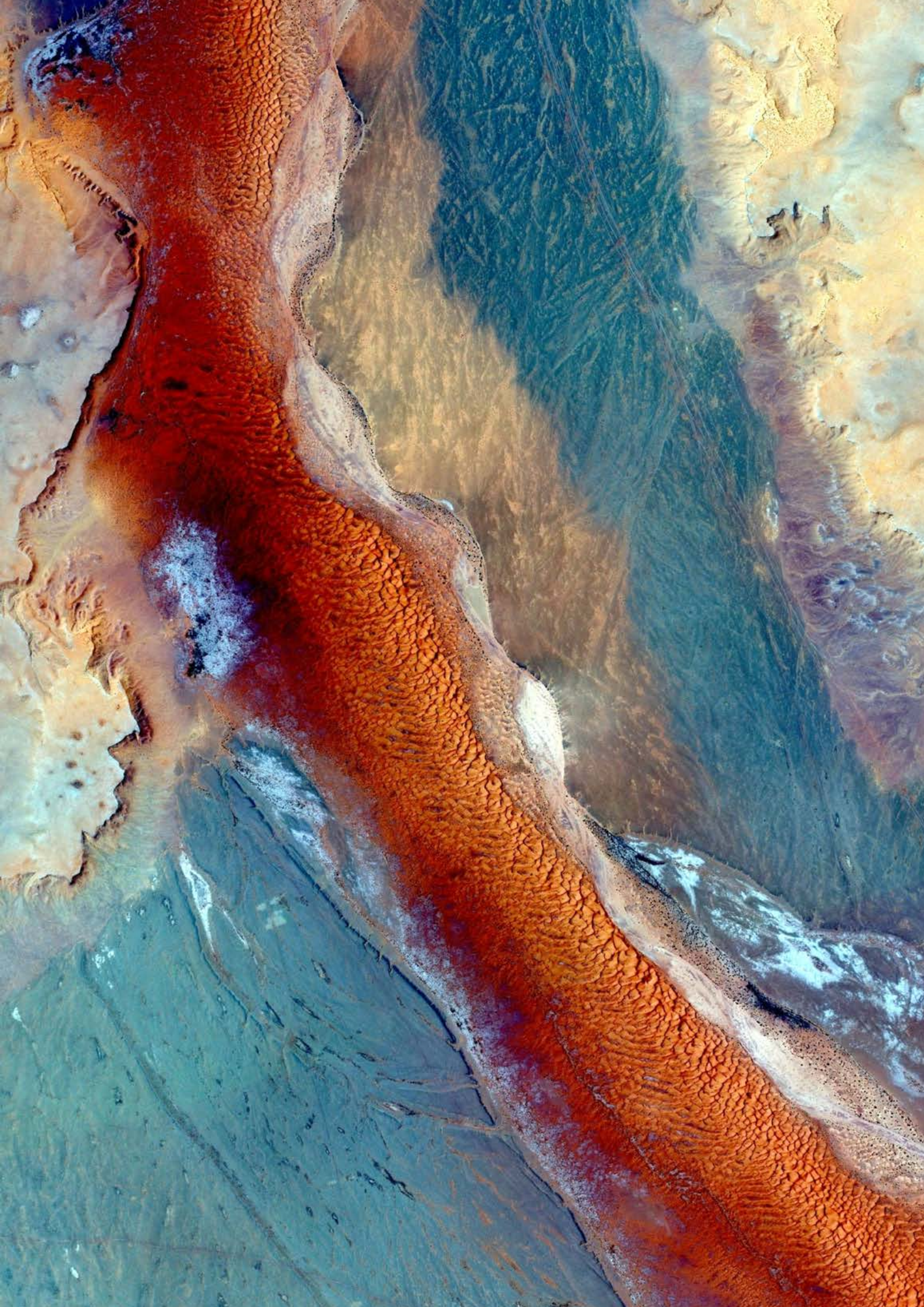
- if the Australian Treasurer requests information and documents from a person in relation to the application, the clock stops until the request has been satisfied;
- the Australian Treasurer may also make an interim order (which is publicly available), which has the effect of prohibiting a transaction on a temporary basis (up to 90 days), effectively extending the time for the Australian Treasurer to make a final decision;
- the Australian Treasurer can unilaterally extend the timeframe by up to 90 calendar days (and this is in addition to the power to make an interim order); or
- an applicant can request that the timeframe be extended (which it may wish to do to avoid a public interim order being made).

Despite the statutory time period there is no certainty that foreign investment approval will be given by a particular time given that either the Australian Treasurer or the applicant may take steps that extend that timeframe.

In the vast majority of cases, approval is not a transaction completion risk – approval is granted for the overwhelming majority of applications.

Australian Government investment policy favourable to foreign investors

In recent years, Australia has enjoyed unprecedented high rates of foreign investment. According to FIRB's 2020-2021 annual report, during the year ended 30 June 2021 a total of 7,614 applications were considered, with 6,650 approved, one rejected, 891 withdrawn and 72 exempt as not subject to the foreign investment approval requirements.



Financial system

The Australian financial system primarily operates through financial intermediaries and financial markets. The key financial intermediaries are banks, non-bank deposit-taking institutions and financial institutions that provide funds management services. The financial markets consist of exchanges and over the counter markets in which participants trade financial assets directly with each other.

In Australia, the Reserve Bank of Australia is the central bank which is the regulatory agency responsible for preserving the integrity and stability of the Australian financial system. In the private sector, there are four major domestic banks that operate nationally and provide a comprehensive range of services to customers, as well as a number of other national and regional banks and deposit-taking institutions. In addition, a number of foreign-owned banks have an active presence in the Australian market, providing a wide range of financial products and services to clients operating in Australia.

The growth in the size and sophistication of the Australian financial system has accelerated rapidly in the past two decades through factors such as financial deregulation and advances in technology. Two key features of financial deregulation from an international investment perspective are the approval of the entry of overseas banks and the elimination of most foreign exchange controls.

If an overseas bank wishes to enter the Australian market, the principal government regulators that it will require approval from are the Australian Prudential Regulation Authority (**APRA**) and ASIC. Any enterprise, whether domestic or not, that wishes to conduct a banking business in Australia, or hold itself out as a 'bank', must obtain authorisation from APRA. Enterprises that provide financial advice or deal in financial products may also require an Australia Financial Services Licence (**AFSL**) from ASIC. In addition, enterprises engaging in credit activity with consumers (including businesses that supply goods on credit) may need an Australian Credit Licence (**ACL**) from ASIC.

An overseas bank looking to conduct a banking business may do so by incorporating a subsidiary company in Australia, which would, together with the authorisations required from APRA and ASIC, allow the subsidiary to offer the full range of banking services and products that a domestic bank in Australia does. Another channel open to an overseas bank is to do business through an overseas bank branch. This option is often used by overseas banks that intend to operate at the wholesale customer level only.

APRA's policy is to impose a condition on any authority granted to an Australian branch of a foreign bank prohibiting the branch from accepting initial deposits from individuals and non-corporate institutions of less than \$250,000. An Australian branch of a foreign bank is required to disclose certain matters to depositors, or prospective depositors, in relation to the absence of certain protections available to depositors with Australian banks.

Without obtaining APRA or ASIC's authorisation to provide banking or financial services in Australia, an overseas bank may operate a representative office that uses the bank's name, with the consent of APRA and after registering with ASIC as a foreign corporation. APRA will usually require any representative office to meet minimum entry standards and comply with certain operating conditions.

Banks are not the only entities subject to financial sector regulation. Similar rules can apply to non bank entities that take deposits, provide financial advice or deal in financial products, such as life insurers, health insurers, friendly societies, building societies and superannuation funds. Further, financial advisers and brokers are also regulated in the Australian financial system.

Overseas businesses are also increasingly active in the Australian debt markets and debt capital markets. As discussed above, the elimination of most foreign exchange controls has increased the accessibility of the Australian debt market to overseas investors, as well as facilitating banking business flowing between Australia and other countries. Australia currently does not impose general exchange or foreign currency controls. Both Australian and foreign currency may be freely brought into and sent out of Australia, subject to the following.

There are requirements to report the movement of monetary instruments (including physical currency) in or out of Australia of A\$10,000 or more. In addition, financial institutions, other cash dealers and entities that provide services which are subject to anti-money laundering and counter-terrorism financing laws are required to report certain suspicious and other transactions. Sanctions, anti-bribery and anti-money laundering and counter terrorism financing laws may restrict or prohibit payments, transactions and dealings in certain cases – see the sections on Australian [Anti-bribery Laws](#) and [Imports and Exports Control](#).

The Australian financial system is subject to regular reviews and regulatory change, and foreign companies wishing to do banking or financial services business in Australia should obtain advice about the current position.



Tax regime

Foreigners who are intending to invest in Australian assets need to consider the Australian taxation consequences of such an investment. In considering what structure to adopt in relation to an investment in Australia, different considerations may apply for each investor and each investment. Consequently, the optimal structure may differ for each investor.

Income Tax

General overview

Australia imposes an income tax on the taxable income of residents and non-residents. Non-residents are subject to income tax on their Australian source income. Australian residents are subject to income tax on their worldwide income, subject to certain exceptions in respect of foreign source income derived by resident companies. The income tax rate for both resident and non-resident companies is currently 30% (although a rate of 25% may apply for certain small business entities ('base rate entities') with an aggregate turnover under the relevant threshold).

Australia has established income tax treaties with a plurality of jurisdictions and has ratified the Multilateral Convention which enables jurisdictions to modify their existing bilateral tax treaties to better address multinational anti-avoidance and more effectively resolve tax disputes.

Which entity is appropriate?

Generally, foreigners investing in Australia use a company as the vehicle through which the investment is made. In certain special circumstances, a trust or a limited partnership may be used instead of a company. Australia also recognises a number of collective investment vehicles that may be appropriate to use in certain circumstances, including managed investment trusts (**MITs**), listed investment companies and venture capital limited partnerships.

Australia has also recently passed new legislation to allow for a new type of investment vehicle, the corporate collective investment vehicle (**CCIV**), that can be registered from 1 July 2022. A CCIV is a company limited by shares that is used for funds management. The CCIV will be a single legal entity and must have at least one sub-fund. There have been significant changes to the CCIV tax regime since the release of the original exposure draft legislation with Parliament ultimately settling on a tax framework for CCIVs, and their investors, that is intended to align with the existing framework for 'attribution managed investment trusts' (**AMIT**). The tax rules create a 'statutory fiction' so that each sub-fund of a CCIV is deemed, for tax purposes, to be a separate unit trust – the CCIV is (notionally) the trustee of the sub-fund and investors in the CCIV that hold shares referable to the sub-fund are the beneficiaries under the trust. Generally speaking, investors should be taxed on an attribution 'flow through' basis for income derived by a qualifying sub-fund of a CCIV.

Companies that are resident in Australia for Australian tax purposes are liable for income tax on their Australian source taxable income and on certain foreign source income. Companies that are not tax resident in Australia are generally liable for Australian income tax only on their Australian source income.

The income tax treatment of Australian branches of foreign companies and Australian subsidiaries of foreign companies is similar in most respects and there is generally no advantage from an Australian tax perspective in using a branch rather than an Australian subsidiary.

Consolidated groups

Australian companies that constitute a wholly owned group of companies are able to form a consolidated group for tax purposes (**tax consolidated groups**). Tax consolidated groups are treated as single entities for most income tax purposes.

This means that losses incurred by one group member can be offset against profits earned by other members. It also means that transactions between group members are ignored for income tax purposes.

Therefore, assets can be transferred between group members without any income tax consequences. These benefits are not available to groups of companies that do not elect to form a tax consolidated group. For this reason, most Australian corporate groups elect to form a tax consolidated group.

One aspect of the tax consolidation rules is that the group's head company is treated, for income tax purposes, as if it owns the assets of the subsidiary members of the group. On formation of the group, the tax cost of the underlying assets of the subsidiary members of the group is generally reset to reflect the cost to the head company of acquiring the shares in the subsidiaries and their liabilities. In some (but not all) circumstances, this can be beneficial where the foreign investor is acquiring an existing group of companies. Where an existing group is being acquired, we can advise you as to the most appropriate structure for the acquisition.

If a tax consolidated group is formed, all group members are jointly and severally liable for income tax liabilities of the group that remain unpaid when due, unless a 'tax sharing agreement' is entered into by group members. If a valid tax sharing agreement is entered into, each group member is generally only liable for the portion of the group's tax liability based on its allocation made under the tax sharing agreement. We can advise foreign investors who buy a subsidiary company from a tax consolidated group on the best means of limiting the potential liability of the target to taxes of the consolidated group.

Tax losses

There are complex rules governing the use of tax losses incurred by companies. For a company's tax losses to be carried forward to a future year, it must satisfy a continuity of ownership test or, failing that, a business continuity test.

A company will satisfy the business continuity test if it either carries on the same business ('the same business test') or carries on a similar business ('the similar business test') since the tax losses were incurred. The similar business test was enacted to improve access to tax losses for companies (and certain trusts) that have changed ownership, and allows those companies and trusts to seek out opportunities to innovate and grow without losing access to tax losses. Under the similar business test, companies may be able to access tax losses where their business, while not the same, uses similar assets and generates income from similar activities and operations. The similar business test broadly applies to income years starting on or after 1 July 2015.

We can advise foreign investors who buy a company or group with existing tax losses on the likely availability of those tax losses post-acquisition.

Funding the investment

Investments in Australia are generally funded by debt, equity or a combination of the two. Tax considerations in the foreign investor's country of residence, as well as Australian tax considerations, may be relevant in determining how the investment is to be funded.

Where an Australian resident company that is controlled by non-residents borrows to finance its activities, a deduction is generally allowed for Australian income tax purposes for interest incurred in respect of the borrowing.

However, the amount of interest that is deductible may be limited under 'thin capitalisation' rules. Under those rules, if the amount of a company's debt exceeds 60% (or 93.75% for certain non-bank financial entities) of the value for thin capitalisation purposes of its assets (**safe harbour percentage**), interest deductions may be denied in respect of the excess debt. In some circumstances, it is possible to have a level of gearing higher than the safe harbour percentage if it can be demonstrated that the amount of debt represents an arm's length level of debt. The thin capitalisation rules only apply where an entity has at least A\$2m of debt deductions on an associate inclusive basis.

The Australian Government is proposing to amend the existing thin capitalisation rules with the changes intended to apply to income years commencing on or after 1 July 2023. The changes proposed include replacing the existing safe harbour debt test with a test which limits an entity's debt-related deductions to 30% of profits (EBITDA), rather than, broadly, 60% of the entity's assets. It is currently proposed that deductions denied under the new test may be carried forward and claimed in a subsequent income year (for up to 15 years).

Withholding tax

Interest paid by an Australian resident company to a non-resident lender is generally subject to interest withholding tax at a rate of 10%, unless the lender provides the loan in connection with a business carried on through an Australian branch or the Australian resident borrows in connection with a business it carries on through a foreign branch. An exemption from interest withholding tax is available in relation to certain debt that satisfies a public offer test, and some of Australia's tax treaties exempt interest paid to banks and financial institutions from interest withholding tax if certain requirements set out in the treaties are satisfied.

Dividends paid by an Australian resident company to a non-resident shareholder are generally subject to dividend withholding tax at a rate of 30%. This rate is reduced under Australia's tax treaties – in some cases to zero. Australia operates an imputation system of company taxation under which shareholders in an Australian resident company may be entitled to a credit for tax paid by the company. The way this works is that Australian resident companies that pay income tax can record credits equal to the tax paid to their 'franking accounts', and when they pay dividends they can allocate 'franking credits' to those dividends. Resident shareholders who receive dividends with franking credits allocated to them (ie, 'franked dividends') are generally entitled to a credit against their own tax liability for those franking credits. Where franked dividends are paid to a non-resident shareholder, no dividend withholding tax is payable to the extent that the dividend is franked. Also, no dividend withholding tax is payable where dividends are paid out of certain non-Australian source income.

Royalties paid by an Australian resident company to a non-resident are subject to royalty withholding tax at a rate of 30%. That rate may be reduced under Australia's tax treaties to 15% or, in some cases, to 5%.

Where foreign investors resident in a country that has an effective exchange of information agreement with Australia invest in an Australian entity that qualifies as a MIT, distributions of Australian sourced income to these foreign investors may be subject to a final withholding tax imposed at the concessional rate of 15% (except for distributions of interest, dividends or royalties, which will be subject to the interest/dividend/royalty withholding tax). Where foreign investors are resident in a country that does not have an effective exchange of information agreement with Australia, the rate of withholding is a 30% final tax. From 1 July 2019, fund payments which comprise non-concessional MIT income are subject to a higher withholding tax rate of 30% for all foreign residents.

Purchasers of direct or indirect interests in Australian real property and mining rights (**TARP**) are required to pay 12.5% of the total transaction consideration to the Commissioner of Taxation in the form of a non-final withholding tax, unless an exemption applies. This withholding tax applies to sales of TARP with a market value of A\$750,000 or more, and sales of certain 'non-portfolio' interests in entities with an underlying value principally attributable to TARP, unless an exemption applies.

Transfer pricing

Transfer Pricing Rules may apply to transactions between Australian resident companies and connected foreign entities. Australia's transfer pricing regime can apply if any of the conditions operating are not arm's length conditions. The rules apply not simply to price, but can extend also to a gross margin, net profit or the division of profit between entities, as well as other conditions. In certain circumstances, the law permits the actual transaction entered into by the taxpayer to be ignored, so that the taxpayer is taxed on a hypothetical, re-characterised arm's length arrangement.

Taxpayers must prepare and keep prescribed transfer pricing documentation in order to limit their penalty exposure. Furthermore, certain entities that have a relevant connection with Australia and that have annual income (or are members of a group that is consolidated for accounting purposes and that has total global annual income) of A\$1 billion or more must prepare and submit to the Australian Taxation Office (**ATO**) statements in an approved form reporting on the entity's (and the group's) global operations to assist the Commissioner of Taxation carry out transfer pricing risk assessments.

The ATO has also released a Practical Compliance Guide (**PCG**) on cross-border related financing arrangements. The PCG outlines the ATO's compliance approach to the taxation outcomes associated with financing arrangements or related party transactions entered into with a cross border related party. The PCG aims to assist taxpayers assess the 'risk rating' of such arrangements. If the financing arrangement falls outside the 'low risk' category, the ATO may modify, test and/or verify the taxation outcomes of the arrangement.

Multinational Anti-Avoidance Law

The Multinational Anti-Avoidance Law (**MAAL**) has applied from 1 January 2016 to foreign entities with annual group turnover of A\$1 billion or more. Broadly, the MAAL may apply where the following requirements are met:

- where the foreign entity makes supplies to customers in Australia;
- activities are undertaken in Australia directly in connection with those supplies by an Australian entity that is an associate of, or commercially dependent on, the foreign entity;
- the income derived by the foreign entity is not attributable to a permanent establishment of it in Australia; and
- the principal purpose, or one of the principal purposes of the scheme, is to obtain an Australian tax benefit or to obtain both an Australian and foreign tax benefit.

Where the MAAL applies, the Commissioner of Taxation may make a determination to tax the foreign resident as if it had a deemed permanent establishment in Australia (with income and withholding tax payable). An assessment under the MAAL would involve a calculation as to how much profit would have been attributable to the deemed permanent establishment and what interest or, more particularly, royalties the taxpayer would have paid to other non-residents through that permanent establishment. Penalties up to 100% (or higher, if there are aggravating circumstances) of the shortfall can also apply together with interest.

Diverted profits tax

The diverted profits tax (**DPT**) is aimed at significant global entities (members of groups with global annual revenue of A\$1 billion or more and Australian income of A\$25 million or more) that divert profits from Australia through transactions with associated entities in lower tax jurisdictions where the arrangements lack economic substance.

Broadly, the DPT will apply to schemes under which a relevant taxpayer obtains an Australian tax benefit where:

- having regard to certain specified matters, it would be (objectively) concluded that one of the persons who entered into or carried out the scheme or any part of it did so for a principal purpose, or for more than one principal purpose that includes a purpose, of enabling the relevant taxpayer (either alone or with others) to obtain an Australian tax benefit or to both obtain an Australian tax benefit and reduce one or more foreign tax liabilities;
- a foreign entity that is an associate of the relevant taxpayer entered into, carried out or is otherwise connected with the scheme or any part of it; and
- it is reasonable to conclude that the sufficient foreign tax or sufficient economic substance tests (described below) do not apply:
 - The sufficient foreign tax test will be satisfied where the total increases in foreign income tax that will result (or may reasonably be expected to result) from the scheme for a foreign entity (either the taxpayer or an associate) that is one of the persons who has entered into, carried out or is connected with the scheme, equals or exceeds 80% of the reduction in the amount of Australian tax payable due to the tax benefit (reduced by any amount the relevant taxpayer must withhold as a result of withholding tax applicable to the tax benefit). The focus of this test is on the foreign income tax treatment of the specific scheme, including any generally applicable or scheme-specific foreign income tax relief (eg, foreign tax losses, foreign tax credits or other foreign tax attributes). Consequently, it is the actual net foreign tax liability resulting from the scheme that is relevant. In cases where there is little or no foreign tax liability due to the application of foreign tax losses, foreign tax credits or other foreign tax attributes, taxpayers will be unable to satisfy the sufficient foreign tax test.
 - The sufficient economic substance test will be satisfied if the profit made as a result of the scheme by each entity that entered into, carried out or is otherwise connected with the scheme or part of it reasonably reflects the economic substance of its activities in connection with the scheme (provided its role is not merely minor or ancillary). This test is essentially a transfer pricing rule having regard to the OECD standards. It ensures that DPT will not be payable if there is a commercial transfer of economic activity and functions to another jurisdiction. The sufficient economic substance test requires that transfer pricing analysis be applied from both Australian and overseas perspectives. This potentially creates a higher compliance burden to ensure that there is documentation justifying the profits made by each entity involved in any cross-border transaction.

Where such arrangements are entered into, the ATO will apply a penal 40% tax on the 'DPT base amount' (as compared to Australia's current corporate tax rate of 30%). This is designed to encourage taxpayers to make transfer pricing concessions to bring amounts out of the 40% penal regime and into the 30% corporate tax regime.

The DPT base amount for each tax benefit is either:

- the amount of decrease in assessable income or an amount subject to withholding tax;
- the amount of increase in an allowable deduction or capital loss; or
- the amount of any tax offset or exploration credit divided by the 30% company tax rate.

The DPT only applies to income years commencing on or after 1 July 2017. However, it will apply to the operation of schemes after that date even if those schemes were entered into or came into existence prior to that date. The ATO has released administrative guidance on the DPT in the form of a Law Companion Ruling (**LCR**), a PCG and a Law Administration Practice Statement (**PSLA**). The LCR provides guidance on the principal purpose, sufficient foreign tax and sufficient economic substance tests. The PCG provides details on the ATO's compliance and engagement approach in relation to DPT and also contains practical examples of the application of the sufficient foreign economic substance test. The PSLA outlines the internal procedures the ATO will follow before and after issuing a DPT assessment.

Hybrid mismatch rules

Australia has enacted legislation to broadly implement the OECD BEPS Action 2 recommendations with respect to neutralising hybrid mismatches. The hybrid mismatch rules generally apply to certain payments after 1 January 2019, and to income years commencing on or after 1 January 2019 (with some exceptions applying).

Generally, the rules seek to neutralise the effects of hybrid mismatch arrangements by either disallowing a deduction or including an amount in the assessable income of an Australian taxpayer that is a party to an arrangement producing a 'hybrid mismatch' (certain integrity measures could apply even if the taxpayer is not a party to the arrangement). This can occur, for example, where cross-border payments are deductible to a payer in two jurisdictions, or are deductible in one jurisdiction but are not included in the taxable income of the recipient in the other jurisdiction. Importantly, the rules are not limited to hybrid 'financing' arrangements, but can extend to other cross-border payments (including payments for the acquisition of goods and services). The rules do not have a de minimis or materiality threshold, unlike the MAAL or DPT.

The ATO has released administrative guidance on the hybrid mismatch rules with respect to structured arrangements in the form of a LCR and PCG. In addition, the ATO has released a PCG to assist taxpayers manage their compliance risk when restructuring an existing arrangement to remove the hybrid element. The PCG provides guidance on what the Commissioner considers to be 'low risk' scenarios in which the Commissioner would not seek to apply Australia's general anti-avoidance rules to the restructure.

We can advise taxpayers on the potential application of Australia's general anti-avoidance rules on a proposed restructure of an existing hybrid arrangement.

Capital gains tax

Non-residents are taxed on capital gains arising from the disposal of Australian real property or on disposal of certain 'non-portfolio' interests in entities the assets of which, directly or indirectly, consist principally of real property in Australia. This liability can arise both where a non resident entity disposes of its interest in an Australian resident entity, and where one non-resident entity disposes of its interest in another non-resident entity if the underlying assets of that other entity directly or indirectly consist principally of real property in Australia.

Non-residents are also taxed on capital gains on the disposal of assets used by them in carrying on business through a branch in Australia.

Stamp duty

Stamp duty is a tax imposed by the States and Territories of Australia on certain documents and transactions.

Stamp duty is primarily a tax on the acquisition of certain types of property, which depending on the jurisdiction, includes land, goods acquired with land and businesses. Stamp duty is generally imposed on the purchaser.

The rates of duty on asset acquisitions differ between the various States and Territories and range from 4.5% to 7%. The duty is generally calculated by reference to the higher of the amount paid for the asset or its unencumbered market value.

In addition to imposing duty on direct acquisitions of land, each State and Territory also imposes duty on the acquisition of interests in companies and trusts that hold Australian land - this is known as 'landholder duty'. The landholder duty rules vary between the different States and Territories with the applicable regime depending on the location of the property.

Generally, landholder duty is triggered by the acquisition of a relevant 'interest' in a landholder. While shares in a company or units in a unit trust will usually constitute an interest, an interest may also be acquired through other means such as acquiring an 'economic entitlement' in a landholder or acquiring 'control' of a landholder.

Broadly speaking, landholder duty is charged on the amount calculated by multiplying the value of the landholder's land holdings in the relevant State or Territory by the percentage interest acquired in the landholder. Some States also impose duty on the value of goods held by the entity (in addition to its land). The rates of landholder duty are generally the same as those that apply to direct acquisitions of property.

Some States also impose additional duty on foreign purchasers of residential property (with the surcharge ranging up to 8%). The surcharge also applies under the landholder duty regimes.

The stamp duty laws of the States and Territories are not uniform. We can give you the specific advice you will need to navigate your way through this issue when acquiring Australian property.

Goods and services tax

Australia has a goods and services tax (**GST**) regime. It is similar to many value added tax (or VAT) and GST regimes in other jurisdictions. Irrespective of residence, an entity is liable to pay GST in Australia on 'taxable supplies'. Broadly speaking, a taxable supply is a 'supply' that:

- is made by a GST-registered person (or who is required to be registered);
- is made for consideration;
- is made by the supplier in the course of carrying on an enterprise; and
- is connected with Australia.

In addition, certain intangible supplies from outside Australia are deemed to be taxable supplies notwithstanding that the supply would not otherwise be 'connected with Australia'.

The concept of supply is very broadly defined and includes supplies of goods, services, rights and interests in land.

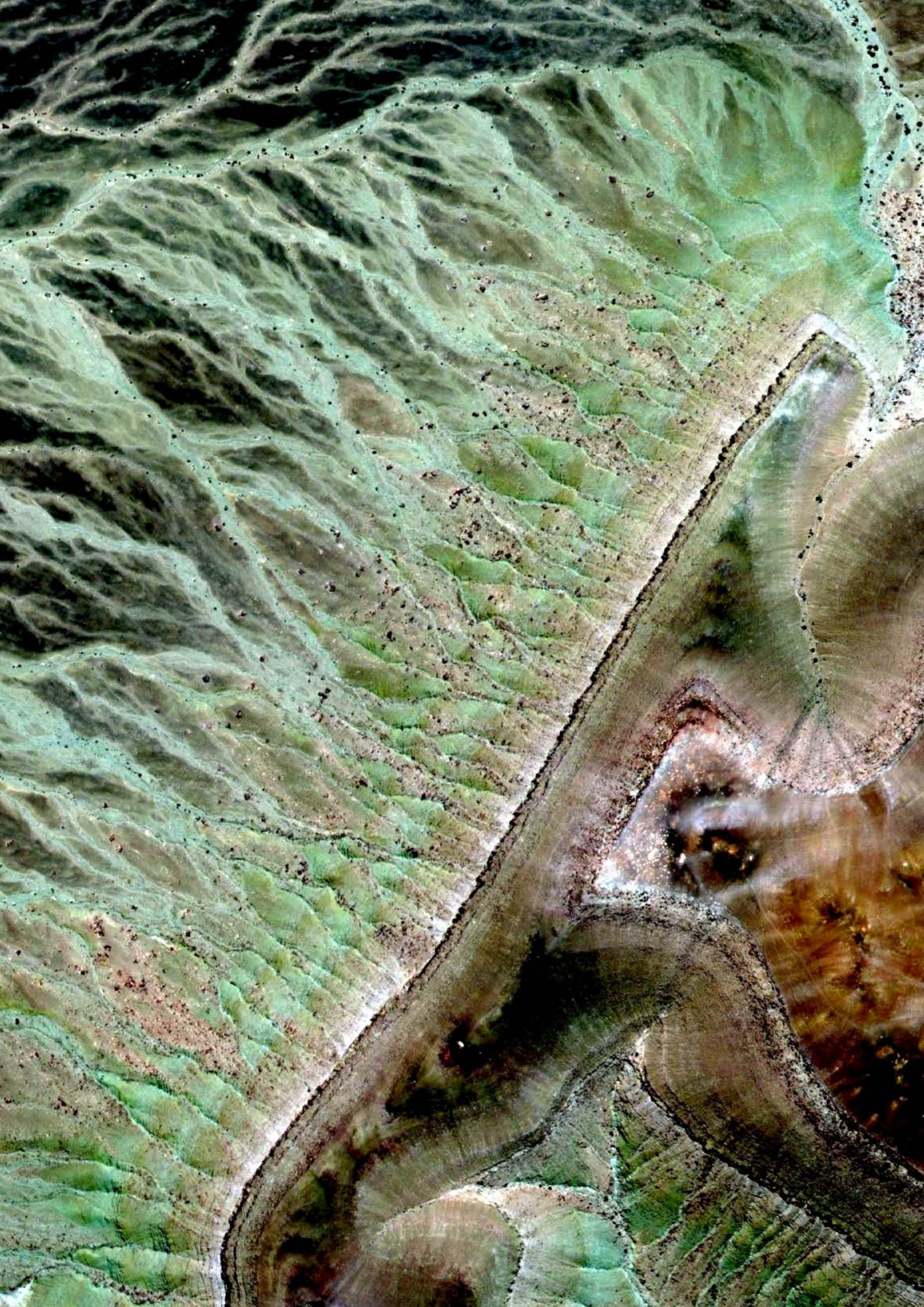
An entity can register for GST voluntarily provided that it is carrying on an enterprise, whether in Australia or elsewhere. An entity is required to be registered where it makes certain supplies connected with Australia to a value of more than A\$75,000 a year.

There are two major categories of supply that are not taxable supplies and, as a result, are not subject to GST – 'GST-free supplies' and 'input taxed supplies'. GST-free supplies include supplies of services and rights that are connected with Australia but that are 'exported' either to non-residents outside Australia or to residents that are outside Australia and that enjoy the supplies outside Australia. Input taxed supplies include 'financial supplies' and supplies of residential accommodation.

In certain circumstances, where a registered entity receives a taxable supply, it can claim an 'input tax credit' for the GST component of the cost of that supply. In this way, GST is paid and claimed back by registered entities.

There is one significant limitation on the availability of credits. An entity is not entitled to claim an input tax credit for the GST component of the cost of an acquisition if that acquisition is used in the making of input taxed supplies.

Where an entity is registered for GST, it must file regular GST returns. For each tax period an entity calculates its GST payable and deducts its entitlement to input tax credits. If the net amount is positive, a payment is made to the ATO. If it is negative, a refund is obtained.



Australian Competition and Consumer Act

All mergers in Australia are subject to the *Competition and Consumer Act 2010* (Cth) (the **CCA**), a Federal law aimed at restricting anti-competitive trade practices and protecting consumers.

What kind of mergers are caught?

Section 50 of the CCA prohibits acquisitions of shares and assets that would have the effect or be likely to have the effect of substantially lessening competition in any market in Australia.

Section 50(3) specifies a non-exhaustive list of 'merger factors' to be taken into account when assessing whether a proposed merger has the effect or likely effect of substantially lessening competition in a market:

- the actual and potential level of import competition in the market;
- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- the nature and extent of vertical integration in the market.

Who enforces the merger provisions?

The merger provisions of the CCA are enforced by the ACCC. Only the ACCC has standing to seek a Federal Court injunction to prevent a merger from proceeding. Where a merger has completed, the ACCC may seek Federal Court orders for divestiture or financial penalties or both. Other persons, including competitors, can also bring Federal Court proceedings in relation to a completed merger seeking damages or divestiture or both.

Are foreign to foreign mergers caught?

Section 50A of the CCA expressly deals with acquisitions that occur outside Australia. Where such an acquisition results in the acquirer obtaining a controlling interest in a corporation in Australia, the Attorney-General, the ACCC or any other person may apply to the Australian Competition Tribunal (the **Tribunal**) to determine the effect of the acquisition on the relevant market in Australia. If the Tribunal is satisfied that the acquisition of a controlling interest in the Australian corporation would have the effect or likely effect of substantially lessening competition in any market in Australia, and the acquisition would not result, or not be likely to result, in such a public benefit that the acquisition should be disregarded, the Tribunal may make a declaration accordingly. A declaration requires the Australian corporation, at the end of six months after a declaration is made (or up to 12 months if extended by the Tribunal), to cease carrying on business in the market to which the declaration relates.

Notwithstanding the existence of section 50A, foreign mergers are often reviewed for informal clearance by the ACCC under section 50, particularly where the transaction involves companies with Australian subsidiaries.

Is notification of mergers compulsory?

The notification of mergers and acquisitions in Australia is voluntary. However, the ACCC's Informal Merger Review Process Guidelines indicate that the ACCC expects to be notified of mergers well in advance where the products of the merger parties are either substitutes or complements and the merged firm will have a post-merger market share greater than 20% in the relevant market.

If a proposed acquisition is notified to FIRB, FIRB will, as a matter of course, notify the ACCC of the proposed acquisition. FIRB will commonly not provide its approval until the ACCC has reviewed the proposed acquisition and confirmed it has no objections. As a result, where FIRB approval is required, ACCC approval is, as a practical matter, also required in most cases.

How can parties seek merger clearance?

There are two processes by which parties can seek clearance for mergers from the ACCC.

First, an informal clearance system has developed in Australia under which parties proposing to acquire shares or assets in circumstances that may potentially raise competition issues approach the ACCC for clearance (sometimes on a confidential basis). The process followed by the ACCC in the informal review process is set out in the ACCC's Informal Merger Review Process Guidelines. It is by far the most common method of obtaining clearance in Australia.

Second, parties can make an application for authorisation of a merger to the ACCC (accompanied by a \$25,000 fee). This is a statutory process which came into effect on 6 November 2017. Under this process, the ACCC can authorise a merger if the ACCC is satisfied that the merger does not substantially lessen competition or if the public benefits of the merger outweigh the detriments. Authorisation provides the parties with statutory immunity, which means an action cannot be brought by the ACCC or third parties on the basis that the merger contravenes section 50 of the Act. While the ACCC is subject to strict statutory timeframes under this process, the requirement for pre-lodgement discussions and onerous upfront information requirements means it would be more costly and time consuming to seek authorisation for the vast majority of mergers. An acquisition that has already occurred cannot be authorised.

Are there deadlines for filing or sanctions for not filing?

As there is no mandatory filing requirement under the CCA for the parties to a proposed merger to notify the ACCC, there are no deadlines or sanctions for not filing (other than the penalties and remedies discussed above where the Federal Court finds a contravention of the merger provisions).

Mergers the subject of an authorisation application cannot be completed until a decision has been made by the ACCC as parties are required to provide a court enforceable undertaking not to proceed with the merger while the application is being considered. Although there is no requirement for the parties not to complete a transaction when seeking informal clearance from the ACCC, parties generally do not proceed with transactions that are being considered by the ACCC until they obtain clearance. In some cases, where there are preliminary competition concerns, the ACCC will request a merger party to provide it with a written undertaking not to proceed with the acquisition during the informal merger review process or to provide a certain period of notice before doing so. Applications should be filed sufficiently in advance of the proposed merger completion date to account for the likely time it will take for the ACCC to conduct its review.

What are the waiting periods?

The typical time taken for the ACCC to reach an informal clearance decision is set out in the Informal Merger Review Process Guidelines. Timelines are set to take account of commercial practicalities, subject to the need to review properly the competition issues raised. As a general guide, if the ACCC decides during an initial review that no market inquiries are required and the proposed transaction does not raise any competition issues, the parties will be advised of this conclusion within approximately four weeks. If the ACCC decides market inquiries are required it will undertake a 'phase 1 review' that will take approximately a further six to 12 weeks (with a period closer to 12 weeks than six being common). At the end of the phase 1 review, the ACCC will decide either to provide informal clearance or to publish a 'statement of issues' that outlines the basis and facts on which the ACCC has come to a preliminary view that a proposed merger may raise competition concerns that require further investigation. If a statement of issues is issued, a 'phase 2' review will be undertaken that is likely to take a further six to 12 weeks, although it may take longer in complex cases or when undertakings are negotiated. The ACCC encourages merger parties to approach it early, either on a confidential or non-confidential basis, to discuss potential competition implications.

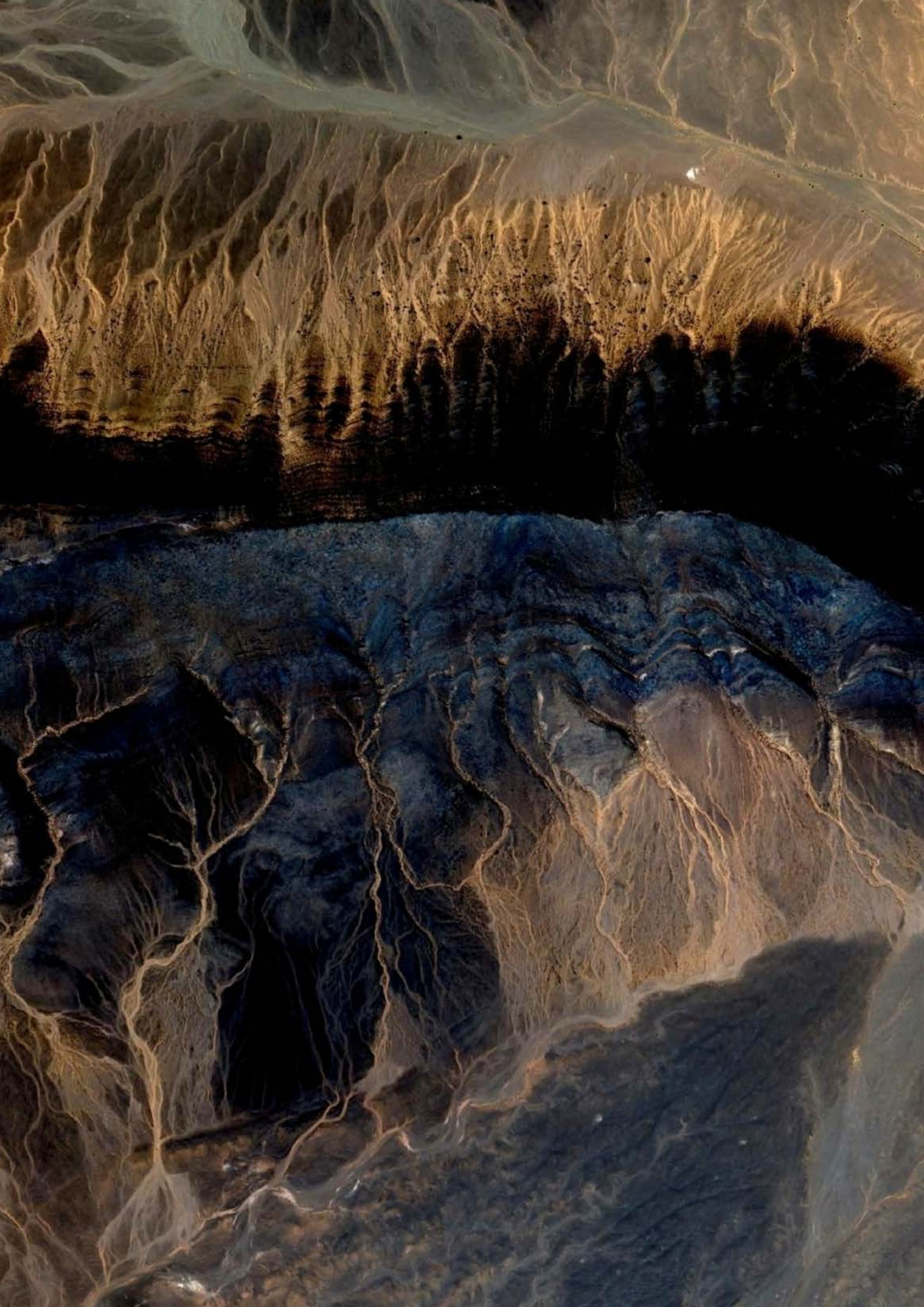
The ACCC has a 90 day time limit to consider an application for authorisation of a merger once a valid application is received. If no decision is made within this period, the ACCC is taken to have refused to grant authorisation. The period may be extended if the applicant informs the ACCC in writing before the expiration of the period and agrees to the ACCC taking a specified longer period. Extensions of the three month statutory period are common.

Are there any proposed changes to the regime?

In August 2021, the ACCC outlined a suite of proposed changes to Australia's merger laws. The proposed changes are significant, and if passed, would mean an overhaul of the current merger control regime. These changes include:

- Replacing the current channels for merger clearance with a single, formal ACCC merger review process that is mandatory for acquisitions above a certain threshold;
- Retaining the substantial lessening of competition test but introducing a deeming provision for merger parties with existing market power, and introducing separate jurisdictional notification, and legal tests for acquisitions by large digital platforms;
- Changing the appeal process such that an appeal is confined to a merits review by the Australian Competition Tribunal and with evidence limited to the evidence provided to the ACCC by the merger parties; and
- Lowering the standard of proof so that a merger would breach competition laws where there is a 'possibility that is not remote' that the transaction would substantially lessen competition.

The then Government did not adopt the ACCC's proposed reforms. The ACCC is understood to be reconsidering its merger reform proposal with a view to proposing revised reforms to the current Government.



Real estate

Jurisdictional overview

Australia is a federation of six states and territories. Although each state and territory has its own land law, there is consistency across Australia as the ownership of most land in Australia operates under the Torrens title system. This system provides for registration of title to land in a central registry in the relevant State or Territory.

Main types of property ownership

‘Freehold title’ is the most common, and the most comprehensive, title to be obtained in Australia – giving the owner of land the absolute right to use, sell, lease, mortgage or licence land (subject to compliance with applicable laws – such as planning and environmental laws). Freehold title operates in perpetuity, meaning that ownership of freehold title is ‘permanent’, until it is sold or transferred to another owner. The vast majority of urban land in Australia is held under freehold title (excepting land in the Australian Capital Territory, where all land is held under long-term leasehold title).

‘Long-term leasehold’ is less common in terms of the proportion of land to which this type of ‘ownership’ applies. However, it is particularly relevant to high-value, strategic, economically sensitive, or nationally significant assets – for example; sea-ports, airports, casinos, waterfront land, land above or adjoining railways, etc. Additionally, all land in the Australian Capital Territory and large tracts of rural farmland across the various states is also held under long-term leasehold arrangements. Long-term leasehold ownership is generally granted by a State or Territory Government for a long term (typically 99 years) or in perpetuity (in relation to rural farmland), and gives the leasehold owner or ‘tenant’ many of the rights that a freeholder landowner would enjoy – including the right to use the relevant land and to sell, sublease, mortgage or licence the leasehold interest in land.

Due diligence

Land in Australia is generally sold on an ‘as is, where is’ basis, with the buyer being expected to satisfy itself as to the property prior to purchasing it. Vendor warranties are generally of a limited nature or not readily given. This means that you, as a purchaser, need to undertake due diligence enquiries in relation to a property before acquiring it. The extent of the due diligence you need to do is determined by the nature of the property, its location, your proposed use and development plans, your funding arrangements and your tolerance of risk.

The time required for your due diligence should be factored into your acquisition timetable. For most properties, due diligence will include physical, taxation and legal assessment and analysis.

Legal due diligence generally includes:

- conducting a title search at the land registry, to determine the owner and any registered encumbrances (eg easements, mortgages, restrictions on use and agreements with government bodies about works or the property’s use);
- applying for searches from various statutory authorities, to determine the government rates and taxes that apply, planning issues (eg permitted and prohibited uses and any restrictions on potential development), proposed resumptions and heritage issues;
- reviewing any tenancy documents to verify income and identify capital expenditure and tenure risks; and
- considering any planning or other approvals or licences required to hold, develop or operate the property.

You may engage other consultants to value, inspect or assess the property and its services and equipment, in order to identify future capital expenditure and the level of compliance with building codes and environmental legislation. Financial institutions lending money will often do their own due diligence as a precondition of funding.

Planning consents and environmental approvals

Each Australian state and territory has its own planning law and system for the approval of the use and development of land. Depending upon the zone in which the land is located, different approval requirements will apply for the use of land, the development of buildings and works on that land and any subdivision of the land parcel.

When acquiring Australian real estate, it will be important to evaluate your investment strategy and to consider whether, from a planning approval perspective, to acquire:

- **existing developed assets** – property which has already been developed and is operating for the intended purpose (eg; existing commercial offices, industrial facilities, retail shopping centre) without the need for further development approval, and without the intention of acquiring the property for redevelopment;
- **fully approved projects** – property on which development has been approved, but constructions of the approved project has not commenced or completed, enabling the purchaser to carry out the development at its own cost and risk;
- **subject to obtaining approval** – property which has not currently been approved for a particular project, but where the sale is conditional on development approval being issued for a project; or
- **without any development approval** – property which has not currently been approved for any projects, or which may not be zoned for a particular use. This approach carries the greatest regulatory risk, but is also potentially a greater value proposition if lower value land can be rezoned for the desired purposes and an approval obtained for the proposed project.

Refer to the section on [Environmental and planning approvals](#) for more information about environmental approvals.

Holding costs and periodic taxes

Real estate owners in Australia incur annual rates and taxes, levied by State, Territory or local government authorities. The main types are:

- **council rates** – generally based on the capital improved value (value of land and buildings) or unimproved value (land only) of the property, the rates contribute towards the cost of running the council and community services (eg garbage collection and disposal, development, repair and maintenance of community centres, libraries, parks and gardens and local roads). Each council imposes a different rate for calculating the rates payable;
- **water rates** – relating to the installation, repair and maintenance of water assets (but excluding water consumption charges – which are typically paid by the occupier of the property); and
- **land tax** – calculated by reference to the taxable value of a property (being the unimproved or site value of the land). The taxable value of all property of an owner within a State is aggregated to determine the rate of land tax payable. Certain jurisdictions also levy land tax surcharges for foreign persons. In NSW, from the 2023 land tax year onwards, foreign owners of residential property will pay an additional land tax surcharge of 4% (this surcharge does not apply to foreign owners of commercial land). In Victoria, ‘absent’ owners are subject to an additional land tax surcharge of 2%. For the purposes of the Victorian land tax regime, ‘absent’ owners are owners of property (either residential or commercial) who are not Australian citizens or permanent residents, who do not ordinarily reside in Australia and who have been absent from Australia for more than six months in the previous land tax year.

Stamp duty and GST in Australian real estate transactions

Duty (also known as stamp duty) is payable by a purchaser on a transfer of land (with some exemptions and concessions) with the dutiable value generally calculated on the greater of:

- (a) the market value of the property; and
- (b) the GST-inclusive consideration (the price paid).

Each Australian State and Territory administers its own duty system, with varying rates, exemptions, concessions and timing for payment. The location of the property will determine the applicable regime. The following table sets out the maximum rate of duty for a transfer of real estate in each State or Territory.

In addition to imposing duty on direct acquisitions of land, each State and Territory also imposes duty on the acquisition of interests in companies and trusts which hold Australian land – this is generally known as ‘landholder duty’. The landholder duty rules, again, vary between the different States and Territories with the applicable regime depending on the location of the property.

Generally, the rules are triggered by the acquisition of a relevant ‘interest’ in a landholder. While shares in a company or units in a unit trust will usually constitute an interest, in some jurisdictions an interest may also be acquired through other means such as acquiring an ‘economic entitlement’ in a landholder or acquiring ‘control’ of a landholder.

If the landholder is a private (i.e. unlisted) entity, duty is generally triggered by the acquisition of a >50% interest or, where a >50% interest is already held, an increase in that interest.² Where the landholder is a listed entity, duty is typically not triggered unless there is an acquisition of at least a 90% interest.

The entity being acquired will be a ‘landholder’ if it has landholdings in the relevant State or Territory with a value equal to or exceeding the applicable threshold value. The applicable threshold values are stated in the table below.

² The threshold for private trusts in Victoria is 20%. The acquisition of any interest in an unlisted trust that holds property in Queensland or South Australia could trigger duty.

Jurisdiction	Stamp duty rates and landholder threshold	Additional surcharges and premiums
New South Wales	General stamp duty rate: 5.5% (for properties in excess of \$1,089,000, with tiered concessional rates applying up to \$1,089,000) Listed landholder duty rate*: 0.55% Landholder threshold: \$2,000,000	Additional 8% surcharge applies to foreign purchasers of residential property (no surcharge on listed landholder acquisitions) Premium rate of 7% applies to the transfer of residential property if the value exceeds \$3,268,000
Victoria	General stamp duty rate: 6.5% (for properties in excess of \$2,000,000, with tiered concessional rates applying up to \$2,000,000) Listed landholder duty rate*: 0.65% Landholder threshold: \$1,000,000	Additional 8% surcharge applies to foreign purchasers of residential property (including listed landholder acquisitions)
Queensland	General duty rate: 5.75% (for properties in excess of \$1,000,000, with tiered concessional rates applying up to \$1,000,000) Listed landholder duty rate*: 0.55% Landholder threshold: \$2,000,000	Additional 7% surcharge applies to foreign purchasers of residential property (concessional 0.7% for listed landholder acquisitions)
South Australia	General stamp duty rate: 5.5% Listed landholder duty rate*: 0.55% Landholder threshold: \$0 (i.e.; any property ownership will result in an entity being considered a landholder) The general rate (above) applies to residential and primary production land only	Additional 7% surcharge applies to foreign purchasers of residential property (including listed landholder acquisitions)
Western Australia	General stamp duty rate: 5.15% Listed landholder duty rate*: N/A Landholder threshold: \$2,000,000	Additional 7% surcharge applies to foreign purchasers of residential property (including listed landholder acquisitions)
Tasmania	General stamp duty rate: 4.5% Listed landholder duty rate*: 0.45% Landholder threshold: \$500,000	Additional 8% surcharge applies to foreign purchasers of residential property Additional 1.5% surcharge applies to foreign purchasers of primary production property (including listed landholder acquisitions) (excluding commercial residential properties)
Northern Territory	General stamp duty rate: 5.95% Listed landholder duty rate*: N/A Landholder threshold: \$500,000	No additional surcharges or premiums apply
Australian Capital Territory	General duty rate: 5.0% Listed landholder duty rate*: N/A Landholder threshold: \$1,600,000 The general rate (above) applies to commercial land transactions. Different rates apply to non-commercial land transactions (e.g. residential, primary production and home business properties)	No additional surcharges or premiums apply

* Concessional 'listed landholder duty rates' apply where the landholder is a listed entity

Australia has a GST regime that is broadly similar to many value-added tax (or VAT) and GST regimes in other jurisdictions. The statutory liability for paying GST to the Australian taxation authority is on the vendor. However, the vendor generally passes this cost on to the purchaser as part of the purchase price.

Refer to the section on [Tax regime](#) for further details on taxes and duties.

Foreign Investment Approval

The acquisition of Australian real estate by foreign persons is subject to approval requirements under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (**FATA**). Applications are required to be made to the Foreign Investment Review Board (**FIRB**) for approval by the Australian Treasurer or a delegate.

Land type	Approval required?
Agricultural land	<p>Yes, if the total value of the interests in any Australian agricultural land held by the foreign person and their associates exceeds \$15 million, subject to the following qualifications:</p> <ul style="list-style-type: none"> if the foreign person is a US, Chile or New Zealand entity, FIRB approval is only required if the value of the land exceeds \$1,339 million; and if the foreign person is a Thai entity, FIRB approval is only required if the value of the land exceeds \$50 million and is wholly and exclusively used for a primary production business. <p>In addition, foreign persons are required to notify the Australian Taxation Office Register of certain types of interests they hold in Australian agricultural land (including freehold interests).</p>
Mining or production tenement	Yes, regardless of value. ³
Residential land	
(a) Established dwellings	(a) Yes, regardless of value.
(b) New dwelling	(b) Yes, regardless of value. Owners of new residential developments may apply for a new dwelling exemption certificate which enables foreign persons to acquire new dwellings in the development without the need to obtain separate FIRB approval. Such exemption certificates are often granted to residential property developers.
(c) For redevelopment of established dwellings	(c) Yes, regardless of value. Approvals, if granted, will often be subject to conditions such as a requirement to build within a certain timeframe and to increase the housing stock.
Commercial land	
(a) Vacant commercial land	(a) Yes, regardless of value.
(b) Non-sensitive developed land	(b) Yes, if the value of the land exceeds \$310 million. ^{4 5}
(c) Sensitive developed land (eg, defence, telecommunications, nuclear, airport land)	(c) Yes, if the value of the land exceeds \$67 million.

Refer to the section on [Foreign investment regulation](#) for further details on foreign investment regulation.

³ If the foreign person is a US, Chile or New Zealand entity, FIRB approval is only required if the value of the land exceeds \$1,339 million.

⁴ If the foreign person is a US, Chile or New Zealand entity, FIRB approval is only required if the value of the land exceeds \$1,339 million.

⁵ If the foreign person is an Indian entity seeking to acquire non-sensitive land for the supply of services, FIRB approval is only required if the value of the land exceeds \$500 million.

Sustainability and ESG in the Australian real estate market

Australian real estate assets are amongst the most sustainable in the world, and Australian owners and asset managers are deploying increasingly detailed ESG provisions within their sale and operating agreements, to drive better ESG outcomes in response to investor and occupier demands.

Sustainability and ESG performance is a significant value consideration for most sophisticated real estate investors and occupiers alike in the Australian real estate market. Most State and Territory governments have sustainability standards which should be achieved in order for the State / Territory to lease a property, and this practice is becoming increasingly common for large commercial institutions including banks and major companies.

Whether to maximise value, or to ensure proper integration with your existing sustainability and ESG framework, we can provide market-leading expertise and advice on sustainability systems and ESG implementation / compliance, from project delivery through to portfolio management of any real estate enterprise.

Structuring the acquisition of real estate in Australia

There are various ways to acquire real estate in Australia:

- a direct transfer of real estate from one entity to another;
- an acquisition of the shares or units held by the owner of real estate;
- a call option or put and call option agreement; or
- a long-term lease.

There are legal, regulatory and tax consequences for each method, which will influence what is the most appropriate method for you to choose. For example, the use of a Managed Investment Trust, or of leases and subleases of a property, may have advantages for flow through or withholding tax exemptions.

We can provide guidance on:

- ways in which investors gain 'direct' exposure to real estate, focusing on both trust holding structures (particularly tax-efficient trust holding structures known as a 'Managed Investment Trust') and company holding structures; and
- the different types of collective investment vehicles through which investors gain an 'indirect' exposure to a portfolio of real estate assets.

Environmental and planning approvals

Development in Australia is regulated by environmental and planning laws at the Commonwealth, State/Territory and local levels

In this part, we address the following topics:

- (a) the requirement to obtain environmental approvals at both the Commonwealth and State/Territory levels for development, in certain circumstances;
- (b) the requirement to obtain planning approvals at the State and local levels, in certain circumstances, for the use and development of land;
- (c) the requirement to obtain subsidiary environmental and planning permits, licences or approvals at the State and local levels in certain circumstances relating to, for example, native vegetation removal, dangerous goods or water resources;
- (d) regulation and remediation of contaminated land; and
- (e) greenhouse gas and energy reporting.

Each of these topics is addressed in turn.

Environmental Approvals

Commonwealth

The Environment Protection and Biodiversity Conservation Act 1999 (Cth) (**EPBC Act**) applies generally to projects, developments, undertakings and activities carried out in Australia.

Under the EPBC Act, it is an offence for a person to take an action that has, will have or is likely to have a significant impact on matters of national environmental significance (**MNES**) without an approval from the Commonwealth Environment Minister. Examples of MNES include listed threatened species and ecological communities, and water resources (but only in relation to coal seam gas development and large coal mining development).

The environment generally is also protected in circumstances where actions proposed are on, or will affect, Commonwealth land and the environment.

‘Impact’ is defined in the EPBC Act to include both direct and indirect impacts. However, whether there will be, or is likely to be, a significant impact depends on a technical assessment of the potential impacts.

It is mandatory for a person to refer an action to the Commonwealth Environment Minister for a ‘controlled action decision’ if the person thinks that the action will have, or is likely to have, a significant impact on protected matters.

If the Commonwealth Environment Minister determines that an action is a controlled action, the relevant impacts will be assessed by means of an environmental impact assessment or other method. Then a decision will be made about whether or not the action will be approved, including whether conditions will be imposed on any approval.

Conditions imposed may require significant capital and operational expenditure, for example certain environmental offset conditions.

While the EPBC Act (as a Commonwealth law) operates concurrently with State/Territory and local laws, there may be opportunities to streamline the environmental impact assessment processes under the Commonwealth and State/Territory laws.

Bilateral agreements between the Commonwealth and each State/Territory government make it the responsibility of the relevant State/Territory government to undertake the environmental assessment of an action in certain circumstances.

This streamlining will not, however, avoid a requirement for the approvals from both the Commonwealth and the applicable State/Territory government to be implemented.

State/Territory

As indicated above, State and Territory governments will also frequently require the assessment and approval of development proposals under their environmental laws.

Most States and Territories require a proponent of a project or development to obtain a licence if it wants to cause environmental harm and/or emit pollution on or from the subject land. Pollution in this sense includes air and noise emissions and water discharges.

Approvals are issued subject to conditions, for example by limiting the manner in which different types and volumes of waste may be disposed of.

Failure to obtain an approval where one is required is an offence. The penalties for environmental offences are significant and include fines, terms of imprisonment or both. Executive officers can also be held liable for offences committed by a corporation, unless certain exemptions apply. The most common exemption is the 'due diligence' defence, which means a director or manager has a defence to a prosecution if they exercised due diligence and took all reasonable steps in managing the company's environmental risks.

Planning / Land Use Approvals

Separately to their environmental laws, each State and Territory in Australia has planning laws that regulate the use and development of land.

Depending on the zone in which the subject land is located, different approval requirements will apply for the use of land, the development of buildings and works on that land, and any subdivision of the land parcel.

Zoning of different areas of land is set out in planning scheme maps for each local government area. Zones in most States/Territories include residential, industrial, commercial and public use zones. The planning scheme for the local government area will usually include (for each zone) a purposes or objectives section, which sets out the expectations for that zone and helps to guide decision-makers about the appropriate types of development in that zone.

Each zone then sets out the types of uses that:

- are permitted without a planning approval;
- require a permit; or
- are prohibited.

While most planning approvals will be issued by the local council, most States and Territories also have a 'fast-track' process whereby the State or Territory Minister responsible for planning, or the relevant State or Territory Department of Planning, can issue approvals directly for significant projects.

Most planning schemes also have additional layers of control for certain areas within the local government boundaries, for example, for the additional protection of heritage sites or precincts, native vegetation or environmentally sensitive areas of land.

Subsidiary Approvals

It is possible that a range of subsidiary planning and environmental permits, licences or approvals may be required at the State/Territory or local level, for example in relation to vegetation clearing, handling dangerous goods, carrying out activities in road reserves, erecting signage, and using or interfering with water resources such as rivers and aquifers.

Contaminated Land

Land contamination is regulated at the State/Territory level.

Although each Australian State and Territory has its own laws relating to land contamination, generally the ‘polluter pays’ principle applies, which means the person who caused the contamination is responsible for any required remediation.

However, the various State and Territory authorities responsible for the enforcement of environmental laws may also have recourse against the owner (or a previous owner), occupier or mortgagee of land in certain circumstances (e.g. where the polluter no longer exists or cannot be found).

Greenhouse Gas and Energy Reporting

The National Greenhouse and Energy Reporting (**NGER**) scheme is a uniform national framework for the reporting of emissions and energy consumption and production by Australian corporations. Established under the *National Greenhouse and Energy Reporting Act 2007* (Cth), NGER requires corporations that meet prescribed emissions and energy thresholds to submit reports with this data to the Clean Energy Regulator on an annual basis. These reports are used to inform government policy and assist Australia in meeting its international reporting obligations.

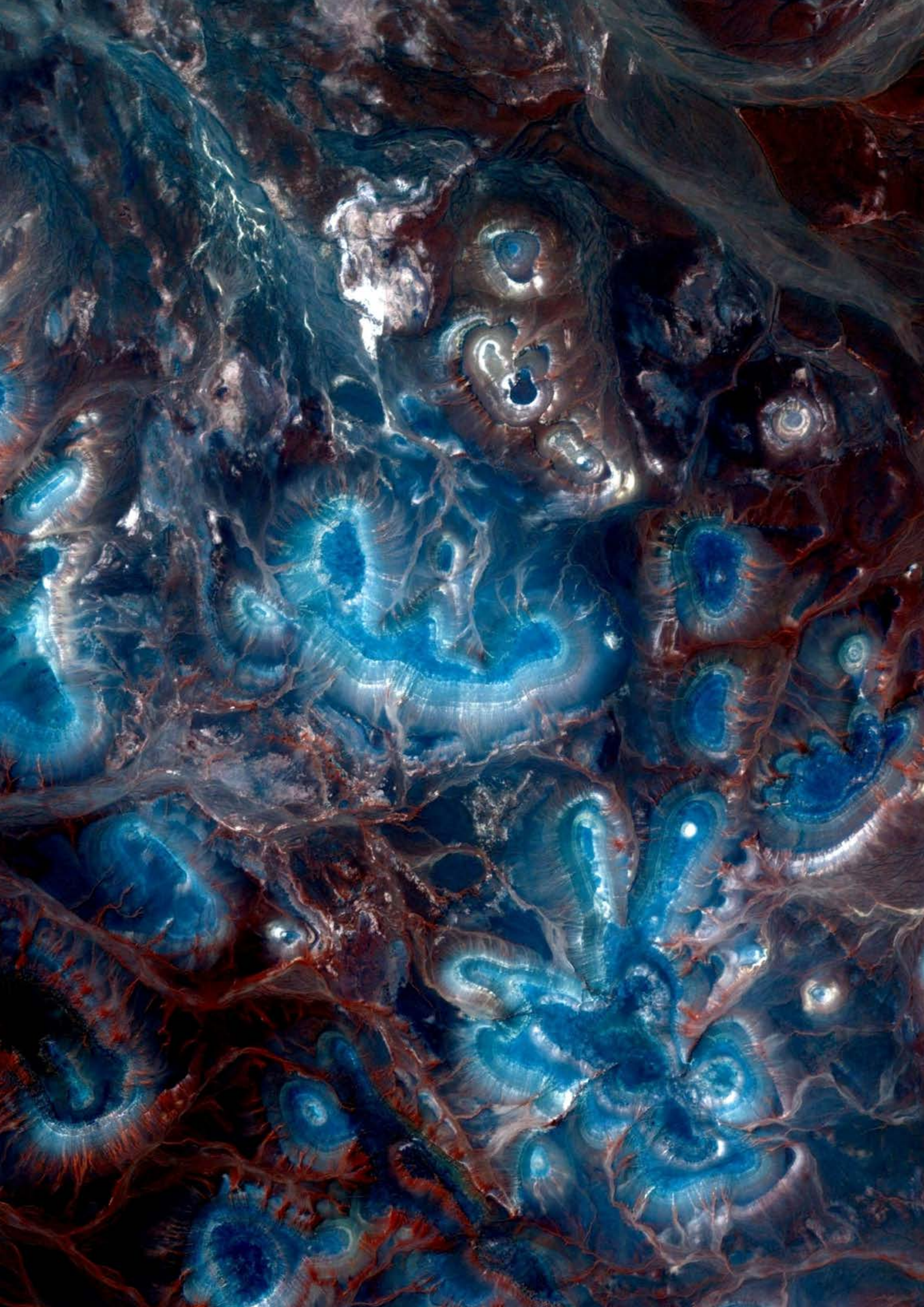
Closely aligned with the reporting obligations under the NGER scheme, is the ‘safeguard mechanism’, which is given effect by the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (**Safeguard Mechanism**). The Safeguard Mechanism applies to facilities with annual scope 1 emissions greater than 100,000 tonnes of CO₂ equivalent, and requires responsible emitters to apply for, and comply with an annualised emissions limit at their facility (ie, a ‘baseline’).

A responsible emitter who exceeds the baseline for their facility is required to manage excess emissions in accordance with the Safeguard Mechanism, for example by surrendering Australian carbon credit units (ACCUs), seeking an alternative baseline, or applying for a multi-year monitoring period.

As at February 2023, the Commonwealth government is proposing a suite of amendments to the Safeguard Mechanism which is intended to:

- slowly reduce prescribed baselines each year in order to help Australia reach National emissions targets;
- introduce a safeguard credit mechanism for facilities that achieve emissions lower than their prescribed baseline; and
- provide industry-specific baselines for certain facilities in order to not unduly disadvantage certain emitters.

If passed, it is intended the amendments will come into effect 1 July 2023.



Resources Sector

Australia has significant and diverse energy and mineral resources that support domestic consumption and substantial exports around the world. As a result, the mining and energy sectors are key drivers of the Australian economy, with investors benefiting from Australia's stable economic environment, well-established regulatory framework, mining expertise, relatively low sovereign risk and skilled workforce. With some of the world's largest identified reserves of coal, iron ore, lead, nickel, uranium, zinc, bauxite, gold, copper, silver and critical minerals such as lithium and rare earths, Australia is an attractive location for mining investment across many major commodities. Australia also holds substantial conventional and unconventional gas resources. Following a significant period of capital investment, and the development of conventional gas resources, Australia is one of the world's leading producers and exporters of LNG.

Sector regulation

Mining sector

Australia's mining industry is largely regulated at a State and Territory level, with limited overlapping Commonwealth regulation. At law, minerals are, with few exceptions, owned by the State, and State and Territory governments authorise companies and individuals to undertake specific mining activities in respect of designated areas. Exploration tenements authorise exploration activities and typically entitle their owner to a preferential right to apply for a mining tenement, which covers extraction and production. Some jurisdictions also grant retention tenements where a significant resource has been identified but is currently uneconomic to develop. Retention tenements protect investors in these circumstances from the 'use it or lose it' policy that underpins Australia's resources regulation regime.

Mining tenements may be granted for specific minerals or minerals generally. They may be granted over public and private land, and each jurisdiction specifies a procedure for negotiating or determining access and landowner compensation. Ministerial consent is required to transfer most types of tenements, which is a factor to consider when the sale and purchase of a mining business is structured as an asset sale rather than a share sale.

Uranium is treated as a special case and each jurisdiction has a different policy position as to whether to allow its exploration and development. Uranium is currently mined in South Australia and the Northern Territory, and Western Australia approved its first uranium mine in 2013 although its policy since 2017 has been not to approve new uranium projects. Finally, New South Wales permits exploration although mining remains prohibited, as it is in Queensland and Victoria.

In addition to relevant exploration, retention and/or mining tenements, projects proponents must also comply with all other regulations relevant to the project, which can range from planning and environmental protection legislation to water licences and explosives licences.

Oil and gas sector

The regulatory regime applicable to the oil and gas sector is broadly similar to the regime applicable to the mining sector. Ownership of petroleum in situ is vested in the Crown (ie, the Commonwealth, State or Territory governments). Commonwealth, State and Territory governments therefore all play a role in administering and regulating the exploration, development and production of petroleum in Australia, depending on the location of the resource. State and Territory governments allocate and administer petroleum titles up to three nautical miles from the shoreline, while the Commonwealth Government regulates offshore operations beyond the three nautical mile mark.

The relevant government releases exploration acreage and invites interested parties to submit competitive work program bids or, for selected acreage known to contain petroleum accumulations, a cash-bidding system is sometimes implemented. Exploration permits are then granted subject to minimum work or expenditure programs for drilling and seismic activities. Production licences are required to extract petroleum once it is discovered and pipeline licences are needed for the construction and operation of a pipeline between the project and the relevant processing facility. Retention leases may also be granted in certain circumstances. A retention lease allows the holder to retain rights over an area containing petroleum until recovery becomes commercially viable.

Key issues

Project structuring

Resources projects in Australia which are owned by two or more parties are commonly structured as unincorporated joint ventures. Participants hold their interest and entitlements in the project assets separately as tenants in common in proportion to their agreed ownership shares, and a joint venture agreement between the participants governs the project and the participants' obligations to each other. Although much less common, jointly-owned projects may also be set up as incorporated joint ventures, in which case a special purpose company is typically incorporated under the Australian Corporations Act to own the project assets. Farm-in arrangements are also frequently used in Australia where a new participant wishes to become involved in a project during the exploration stage. Each structure has its own unique legal and taxation implications that need to be fully understood by participants.

Foreign investment approval

Many, if not most, investments by foreign entities (public or private) in the Australian mining and oil and gas sector are likely to require clearance from the Commonwealth Treasurer acting through FIRB. This is primarily because many types of mining and oil and gas tenements and licences are capable of being considered interests in Australian land, investment in which is regulated by the Australian foreign investment legislation (see the section on [Foreign investment regulation](#)).

Taxes and royalties

Royalties are generally payable to the relevant State or Territory government on the extraction of minerals or the production of petroleum. The methods of calculation and rates differ between jurisdictions and commodities. Petroleum projects are also subject to industry specific taxes. These taxes and royalties operate alongside the general companies taxation regime and liability for one tax may sometimes be offset or deductible against another.

We regularly monitor developments and are well positioned to help our clients understand any upcoming changes in this area.

Environment, native title and cultural heritage

Environmental approvals for resources projects are regulated at State/Territory level. In addition, the *Environment Protection and Biodiversity Act 1999* (Cth) applies where a project will have or is likely to have a significant impact on a matter of national environmental significance. As many major mining projects fall within this category, both State/Territory and Commonwealth approvals are often required. However, owing to Bilateral Agreements in place between State/Territory and the Commonwealth Governments, there are opportunities to streamline these environmental assessment processes to minimise procedural duplication (eg, preparation of a single environmental impact assessment report to satisfy both State/Territory and Commonwealth regulatory requirements). The availability of streamlining processes for a project will depend on the nature of the impacts and location of the project. Please refer to the section on [Environmental and planning approvals](#) for more information about environmental approvals.

Native title describes the land rights of Aboriginal and Torres Strait Islander peoples under traditional laws and customs. Where a resources project takes place on land affected by native title, project participants must follow the procedures of the *Native Title Act 1993* (Cth). This may involve compliance with the ‘future acts’ regime, negotiations with native title holders or claimants and, in some cases, a project may require a more broad ranging Indigenous Land Use Agreement before it can proceed. In addition, projects affecting sites of cultural heritage must follow certain requirements. There is the risk of delays if significant areas of cultural heritage are identified, so it is important to assess this early in any project. Notably, in Western Australia, the cultural heritage legislation has recently been substantially reformed. The new framework for protecting cultural heritage is expected to be fully operational by approximately mid-2023. The transition to the new framework should be monitored closely by investors.

Infrastructure

Resources projects often involve significant infrastructure investment, including in respect of railways, ports and pipelines.

Australia’s access regime allows for the possibility of shared access of nationally significant privately owned infrastructure, providing opportunities for new entrants. However, where infrastructure owners are required to share access, this may affect profitability, impose regulatory costs and result in costly disputes with regulators or third parties. Project participants therefore need to fully understand their rights and obligations in this area and should appreciate the benefits and risks of this regime to their project.

Industry specific reporting obligations

The grant of tenements and other permits to project participants is usually linked to compliance with reporting obligations to relevant State/Territory governments. Furthermore, depending on the structure of the project, specific forms of reporting may be required under the Australian Corporations Act 2001 (Cth) and other Commonwealth legislation.

There are also industry specific guidelines for the public reporting of mining-related information in Australia, such as the ‘Australasian Code for Reporting of Exploration Results, Mineral Reserves and Ore Reserves’, which is also known as the ‘JORC Code’.



Anti-bribery laws

Investors need to consider the risk of bribery and similar criminal offences in connection with their business' operations and activities in Australia and overseas.

Prohibited conduct

Bribery of a foreign public official

Under the Commonwealth *Criminal Code Act 1995 (Code)*, it is a criminal offence to provide, offer or promise a benefit (monetary or non-monetary) to another person (or to cause a benefit to be promised, offered or provided), where the benefit is not legitimately due to the person, with the intention of influencing a foreign public official (**FPO**) in the exercise of their duties in order to obtain or retain business or an undue business advantage.

An offence is committed if the benefit is provided directly to the FPO or indirectly, for instance by providing the benefit to the FPO's relative or business partner, or by causing an agent or other third party to provide the benefit to the FPO. The definition of a FPO is broad and includes officials, employees and contractors of a foreign government body, and officers, employees and contractors of a public international organisation (eg, the United Nations) or state-controlled enterprise.

Bribery of an Australian public official

Under the Code, it is an offence to dishonestly provide, offer or promise a benefit to another person, either with the intention of influencing a Commonwealth public official (**CPO**) in the exercise of their duties, or with the result that the receipt (or expected receipt) of the benefit would tend to influence a CPO in the exercise of their duties.

Bribery of State or Territory public officials is also prohibited by relevant State or Territory laws.

Conduct related to bribery

In almost every State and Territory, bribery in the private sector is also prohibited by criminal legislation concerning 'secret commissions'. Secret commissions arise where an agent or representative receives or solicits a commission from a third party, without disclosing that commission to their principal, as an inducement to influence their principal's decision-making.

Further, an individual or company that is found to have kept inaccurate or misleading books and records (eg, by not fully and accurately recording certain payments) may be exposed to criminal prosecution. Australia's false accounting laws make it a criminal offence to intentionally or recklessly make, alter, destroy or conceal accounting documents. The offences apply to Australian residents, citizens and corporations as well as any employees or persons engaged to do work for the corporation, whether within Australia or outside Australia.

In addition, an individual or company that intentionally or recklessly deals with money or property that might be used to bribe someone, or that has been obtained as a result of bribery may be exposed to criminal prosecution.

Finally, several common law bribery offences exist, including 'bribery of a public official'. However, common law bribery offences have been largely subsumed by statutory offences in all states except Victoria.

Extraterritorial application of Australian anti-bribery laws

Individuals and companies can be prosecuted for bribery of an FPO if all or some of the relevant conduct occurs in Australia. Additionally, Australian incorporated companies and Australian citizens and residents can be prosecuted for the offence, regardless of where in the world the conduct occurs.

Australian laws prohibiting secret commissions and bribery of a CPO or State/Territory public official also capture conduct that occurs overseas.

Application of anti-bribery laws to companies

Liability can be attributed to a company where a company employee, agent or officer, acting within the scope of their employment or authority, commits the offence. For a company to be liable, it must also be established that:

- the board of directors or a senior manager carried out the relevant conduct or expressly or impliedly permitted or authorised the commission of the offence; or
- the company had a deficient 'corporate culture'. This requires proof that the company either had a corporate culture that directed, encouraged or led to non-compliance with anti-bribery laws, or did not have a corporate culture that required compliance with such laws.

Available defences for breaches of anti-bribery laws

No statutory defences are available to allegations of secret commissions or bribery of a CPO or State/Territory public official.

The Code currently provides a defence to allegations of bribery of an FPO in the following two circumstances:

- where the conduct is required or permitted under the written law of the FPO's country; or
- where the benefit was of a minor nature and was provided to expedite or secure the performance of routine government action (a facilitation payment), and the person complied with the record-keeping obligations as set out in the Code.

Legal consequences for breaches of anti-bribery laws

The Code imposes the following penalties for bribery of an FPO or CPO:

- for an individual, the maximum penalty is 10 years' imprisonment, a fine of A\$2.75 million, or both (per offence); and
- for a company, the maximum penalty is the greater of A\$27.5 million, three times the value of the benefit attributable to the offence, or, if the court cannot determine the value of that benefit, 10% of the company's annual turnover (and any body corporate related to the company), for the previous 12 months.

Bribery of State or Territory public officials and secret commissions also result in fines and imprisonment.

The enforcement culture for anti-bribery laws

Transparency International characterises Australia as a 'moderate' foreign bribery enforcement jurisdiction. Transparency International's 2022 Corruption Perceptions Index (the **2022 CPI**) ranks Australia 13th of 180 countries. Australia has moved up two places since last year's index. However, the 2022 CPI reports that high-scoring countries, including Australia, need to do more to address transnational forms of corruption.

The OECD facilitates a peer review process to assess states' implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In 2017, the OECD welcomed a marked increase in Australia's foreign bribery enforcement (**OECD December 2017 Report**), but recommended that Australia proactively pursue foreign bribery criminal charges where appropriate. A follow-up report (**OECD Follow-Up Report**) released in 2019 recorded concern about 'continued low levels' of foreign bribery enforcement in Australia. However, since the publication of the OECD Follow-Up Report, there have been several high-profile arrests of senior corporate officers in relation to foreign bribery investigations (both at state and federal level). As a result, in 2021, the OECD's further follow-up report considered that Australia had partially implemented its recommendation that the Commonwealth Director of Public Prosecutions (**CDPP**) engage in proactive enforcement of foreign bribery offences. A further OECD periodic review is currently underway and may trigger increased enforcement action.

At the Commonwealth level, a number of steps have been taken to build the foreign bribery enforcement capabilities of the Australian Federal Police (**AFP**). For instance, in 2019, the AFP received significant additional funding to increase its effective investigation of suspected foreign bribery offences and launched Operation Integra, a multi-agency taskforce focused on foreign bribery and transnational corruption. Whilst this funding will cease in June 2023, the AFP retains its dedicated Fraud and Anti-Corruption business area. The CDPP has an increased enforcement appetite and its practice group restructure, which took place in 2022, has created a distinct practice group to prosecute serious financial and corporate crime, including bribery. Cumulatively, these developments indicate that the AFP and the CDPP have been increasingly willing and able to devote significant resources to the investigation and prosecution of bribery offences, including those committed by companies.

ASIC has also indicated that it may investigate an accusation of foreign bribery against a company where the accusation involves a possible contravention of the Corporations Act (for example, a breach of directors' duties).

The passage of the *National Anti-Corruption Commission Act 2022* (Cth) extends protections for public and private sector employees established through the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth). Public and large proprietary companies have now been required to have a compliant whistleblower policy for a number of years, and it is hoped that increased awareness around whistleblower protections will encourage whistleblowers to report misconduct (including reports relating to bribery and corruption). Similarly, the AFP hopes judicial commentary around the benefits of self-reporting in the recent foreign bribery prosecutions involving Jacobs Group will encourage companies to report instances of bribery within their operations.

At the State and Territory level, all jurisdictions have now established anti-corruption commissions. At the Federal level, the passage of the *National Anti-Corruption Commission Act 2022* (Cth) in November 2022 means a Federal National Anti-Corruption Commission (**NACC**) is expected to commence operation in mid-2023. The NACC will be empowered to investigate companies if they engage in conduct that (either directly or indirectly) does or could adversely affect the honest or impartial exercise of any public official's powers or the performance of their duties or functions.

Changes to Australia's foreign bribery laws

On 2 December 2019, the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2019 was introduced into the Senate. The bill would introduce three significant changes to Australian foreign bribery laws.

- First, and most notably, the Bill would create a corporate offence for 'failure to prevent' foreign bribery, which would hold a company criminally liable where an 'associate' of the company commits a foreign bribery offence for the profit or gain of the company, unless the company can prove it had 'adequate procedures' in place to prevent such conduct. The Minister would be obliged to publish guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials. The Attorney General's Department has published draft guidance on what constitutes adequate procedures to prevent an associate of a company from committing a foreign bribery offence.
- Second, the Bill would make a series of amendments to the foreign bribery offence, which are designed to remove 'undue impediments' to prosecution.
- Third, the Bill would introduce a deferred prosecution agreement (**DPA**) scheme (akin to the scheme operating in the US and UK), whereby a company can avoid prosecution by entering into an agreement on negotiated terms with a prosecutor, in circumstances where the prosecutor considers it to be in the public interest to do so.

At the time of publication, the Bill has lapsed a second time following the dissolution of the 46th Parliament in April 2022. Whilst bipartisan support has been expressed for the Bill, there has been no indication of whether the Bill will be revived.



Privacy laws

Investors should be aware of obligations to protect the information of individuals under Australia's privacy legislation, which can touch on a range of corporate activities from undertaking due diligence in M&A acquisitions to new marketing initiatives. These are summarised below, with a focus on those that apply to the private sector.

Privacy legislation

Key concepts

The *Privacy Act 1988* (Cth) (**Privacy Act**) is the key privacy legislation applicable to most private sector organisations in Australia. The legislation has some limited exemptions, including certain acts relating to employee records and, generally, the activities of organisations with an annual turnover of A\$3 million or less. The Privacy Act contains special rules for entities that handle tax file numbers and credit information. In addition, legislation in several States and Territories regulate the handling of health information by private sector organisations in addition to the requirements of the Privacy Act. Government agencies and companies that provide services to them are subject to a broader range of privacy laws.

The Privacy Act imposes 13 Australian Privacy Principles (**APPs**) as a minimum standard for handling personal information. The APPs regulate the collection, use, disclosure and handling of records of 'personal information', which is any information or opinion about an identified or reasonably identifiable individual. Special restrictions apply to the use of 'sensitive information', which includes information or an opinion about an individual's health, racial or ethnic origin, membership of political, professional or trade organisations or of a trade union, sexual orientation, religious and political beliefs, criminal records, genetic information and biometric information and templates.

The Federal Government has been undertaking a review of the Privacy Act for the last two years. During this time, the Attorney-General's Department has engaged in stakeholder feedback and consultation, namely through the release of an issues paper in late 2020 and a discussion paper in late October 2021 (**AG Discussion Paper**). The review has culminated in the Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022 being passed in December 2022 (**2022 Privacy Act Amendment**) and the recent release of the Privacy Act Review Report 2022 on 16 February 2023 (**Privacy Act Review Report**).

The 2022 Privacy Act Amendment enacted the first tranche of changes to the Privacy Act, which included the:

- increase of penalties under the Privacy Act (see below for more details);
- broadening of the extraterritorial application of the Privacy Act (see below for more details); and
- provision of further powers to the OAIC, including enhanced information gathering powers, the ability to share information for enforcement purposes and publicly if it is in the public interest to do so, expanded determination making powers, and ability to give infringement notices for failure to provide the OAIC with requested information.

The recently released Privacy Act Review Report includes a further 116 proposals which are intended to further strengthen and modernise Australian privacy law, including to bring it more closely in line with the GDPR.⁶

The proposed changes include:

- providing consumers (including children and people experiencing vulnerability) with greater transparency, control and protections in relation to their personal information, such as improved quality of information available to individuals about how information is collected and used, improving individuals' control over personal information including a right of erasure of personal information, and additional obligations placed on entities, such as a new fair and reasonable test to underpin the handling of personal information;

⁶ For the avoidance of doubt, we note that the proposals contained in the Privacy Act Review Report have not been implemented at law as at the date of publication of this guide. The overview in this section of this guide may be outdated to the extent the Privacy Act is further amended to take into account the proposals in the Privacy Act Review Report, including in relation to privacy policies and collection notices, collection / use / storage / disclosure of certain data, direct marketing and other areas not currently contemplated by the Privacy Act.

- including greater certainty with respect to the scope of personal information that should be protected to respond to a broader range of circumstances, including de-identified information and targeting of individuals based on information that relates to them but may not uniquely identify them, and the recalibration of current exemptions from the Privacy Act (including the small business, employee records, political and journalism exemptions); and
- strengthening of the enforcement of privacy obligations, including by granting the OAIC additional powers and expanded enforcement powers, establishing a new tort for serious invasions of privacy and enhanced court powers, and reducing reporting and regulatory complexity.

These proposals are expected to be considered further during the first half of 2023, with legislation to follow. Assuming most, or all, of the proposals are implemented in legislation, it is anticipated that there would be a reasonable implementation period for organisations to uplift their compliance processes.

The following paragraphs set out the current position under the existing Australian Privacy Act.

Privacy policy

Entities are required to have a clearly expressed and up-to-date privacy policy, which is to be made available free of charge. The privacy policy must address certain matters set out in APP 1, including whether personal information is likely to be disclosed to overseas recipients (and, if so, in which countries those recipients are located) and information regarding how an individual may access and correct personal information held by the entity and make a complaint about a breach of the APPs by the entity.

Collection

An entity ‘collects’ personal information only if the entity collects the personal information for inclusion in a record or generally available publication. An entity collecting personal information about an individual is required to take reasonable steps to provide notice to the individual before, at or as soon as practicable after the time of collection of personal information. The notice must address a number of matters, including the purposes of collection, typical disclosures, and whether the information will be disclosed outside Australia. Individuals must also be told that they can find information about accessing, correcting data and making a complaint in the entity’s privacy policy. This requirement applies even if personal information is collected indirectly from another entity rather than from the individual concerned.

Entities are only permitted to collect information if the information is reasonably necessary for one or more of the entity’s functions or activities. In addition, an entity collecting sensitive information about an individual is generally required to obtain the individual’s consent to that collection.

Use and disclosure

Although the Privacy Act does not define ‘use’ and ‘disclosure’ of personal information, it is generally accepted that an entity uses personal information when it handles and manages that information within its effective control and that it discloses personal information when it makes it accessible to others outside the entity and releases the subsequent handling of that information from its effective control. Unlike some other countries, in Australia no distinction is made between controllers and processors of personal information.

Generally, personal information may be used and disclosed without consent for the primary purpose for which the information was collected and, with consent, for a secondary purpose. Personal information may also be used and disclosed for a secondary purpose that is related (directly related in the case of sensitive personal information) to the primary purpose and for which the individual would reasonably expect the information to be used or disclosed. There are certain other limited circumstances (such as where use is required or authorised by law) in which personal information may be used and disclosed for a purpose other than the purpose for which it was initially collected.

Direct marketing

Use of personal information for direct marketing (other than email or telemarketing, which is regulated separately under different legislation see further below) is prohibited unless an exception is satisfied. The exceptions depend on the circumstances in which the information was collected, but in all cases require a simple opt-out mechanism to be provided to the individual. If the individual may not reasonably expect their personal information to be used for direct marketing, or the information was collected indirectly rather than from the individual, consent to the direct marketing must be obtained unless it is impracticable to do so.

Use of sensitive information for direct marketing is prohibited unless consent has been obtained.

Cross-border disclosure

Subject to certain narrow exceptions, when disclosing personal data outside Australia, entities are required to take reasonable steps to ensure that the overseas recipient complies with the APPs under the Privacy Act, and may be deemed liable for any breaches of the Privacy Act by that overseas recipient.

Consent

Where consent is required, it must be informed, voluntary, current, specific. The Privacy Commissioner has also emphasised (both in its guidance and determinations) that consents should generally be obtained on an unbundled basis. The person whose consent is required must also have the capacity to understand and communicate their consent. Consent can generally be express or implied.

Open and transparent management of personal information

Entities must take reasonable steps to ensure that the personal information they collect is accurate, up-to-date and complete and to protect personal information from misuse, interference, loss and from unauthorised access, modification or disclosure. Personal information must be destroyed or de-identified when it is no longer needed. With some exceptions, entities must provide individuals with access to the information held about them and correct information that is inaccurate, out-of-date, incomplete, irrelevant or misleading. If entities refuse to give access or correct information, they must usually provide written notice of the reasons for such refusal.

Exemptions

There are various exemptions under the Privacy Act, including most significantly for sharing of information between related bodies corporate and, as noted above, in relation to certain handling of employees' information.

As a general rule, related bodies corporate may share personal information (but not sensitive information) without breaching the collection and disclosure restrictions under the APPs. However, each group member is required to comply with the APPs in all other respects, including in relation to any subsequent use of that personal information.

An entity's handling of employee records in a way that is directly related to a current or former employment relationship will be exempt from the Privacy Act. 'Employee records' are records of personal information relating to an individual's employment and include information about personal and emergency contact details, terms of employment, performance, disciplinary records and banking details. This exemption does not apply to contractors or prospective employees. It is also generally considered that this exemption should not be relied upon in respect of the collection of personal information from employees (noting that this principle was reflected in the outcome of an employment case at the Fair Work Tribunal).

Extra-territorial operation of the Privacy Act

The Privacy Act (as amended by the 2022 Privacy Act Amendment) extends to acts and practices of entities outside Australia where:

- the entity is incorporated or otherwise established in Australia; or
- the entity carries on business in Australia.

- Prior to the 2022 Privacy Act Amendment, the Privacy Act would only apply to entities carrying on a business in Australia if the information was collected or held by the entity in Australia before or at the time of the act or practice. Changes to the Privacy Act mean that all acts or practices of organisations that carry on business in Australia will be subject to the Privacy Act, even if the organisation does not collect or hold information in Australia, and even if those acts or practices relate to data subjects outside of Australia.
- The Attorney General's Department has acknowledged in the recent Privacy Act Review Report that this new extra-territorial provision is very broad and has noted that an additional provision (to be introduced by further reforms) is required to clarify that extra-territorial operation is dependent on some form of 'Australian link'.

Government-related identifiers

An entity must not adopt a government-related identifier as its own identifier unless required or authorised by an Australian law. In addition, entities must not use or disclose a government identifier unless an exception is satisfied, including where the use or disclosure is required or authorised by an Australian law or where it is reasonably necessary to verify identity.

Credit reporting

Part IIIA of the Privacy Act (supported by the *Privacy Regulation 2013* (Cth) and the Privacy (Credit Reporting) Code 2014) regulates the collection, use and disclosure of personal information relating to individuals' activities in connection with the receipt of consumer credit. Credit reporting bodies and credit providers must comply with a range of requirements in relation to their collection, use and disclosure of credit information.

Email and telephone marketing

The *Spam Act 2003* (Cth) governs the sending of commercial electronic messages that originate in Australia or have another 'Australian link' (as defined in the legislation). The Spam Act provides for an opt-in regime (based on express or inferred consent) for commercial electronic messaging. It requires that commercial electronic messages contain a functional 'unsubscribe' facility as well as information about the person who authorised the sending of the messages. It also prohibits electronic address-harvesting software and address lists generated using such software.

The *Do Not Call Register Act 2006* (Cth) prohibits unsolicited telemarketing calls from being made to fixed line home phone numbers registered on the Do Not Call Register.

Notifications of data breaches

The Privacy Act imposes an express obligation on entities to notify the Office of the Australian Information Commissioner (**OAIC**), affected individuals and at risk individuals in the event of an 'eligible data breach'. An 'eligible data breach' refers to any unauthorised access, disclosure or loss of information that a 'reasonable person' would 'likely' conclude to result in serious harm to an individual. In the event an entity becomes aware that an eligible data breach may have occurred, it must as soon as is practicable, provide a copy of a statement to the OAIC setting out the details of the breach. It must subsequently notify any individuals affected by or at risk of being affected by the eligible data breach.

Legal consequences for breaches of privacy laws

The Privacy Commissioner has the power to undertake investigations (either in response to complaints made by individuals or on its own initiative), to make determinations, to audit organisations, to accept enforceable undertakings, to develop and register binding privacy codes. The Privacy Commissioner may also apply to the Federal Court or Federal Circuit Court for civil penalties (as detailed below) for corporations, for an order to enforce a determination or an enforceable undertaking, for injunctions and orders for compensation and other practical measures to redress loss and damage. Individuals may complain to the Privacy Commissioner and commence proceedings for injunctions only.



The 2022 Privacy Act Amendment (enacted in December 2022) increased penalties under the Privacy Act for body corporates from A\$2.22 million to a maximum of the greater of:

- A\$50 million;
- three times the value of any benefit obtained that is attributable to the breach; or
- if the value cannot be determined, 30% of a company's adjusted turnover during the breach turnover period for the contravention.

These new penalties mirror the recent increased penalties introduced for breach of Australian Consumer Law.

Under the Spam Act and Do Not Call Register Act, a flexible range of civil sanctions, including warnings, infringement notices and court-ordered penalties of up to A\$2.22 million for corporations, is available to the regulator, the Australian Communications and Media Authority.

The enforcement culture for privacy laws

Until 2019-2020, the Privacy Commissioner had historically taken a conciliatory approach to enforcing the Privacy Act. That position has now altered and the Privacy Commissioner has adopted a more robust enforcement posture, with the OAIC stating that it is taking 'an ongoing pivot into a stronger enforcement stance'. This aligns with the Federal's Government's focus on reviewing and reforming the Privacy Act in recent years (discussed above and below).

In determinations issued in respect of interferences with privacy, the Privacy Commissioner has, among other things, declared that the respondent must apologise in writing to the complainant, assess its compliance with the Privacy Act through an independent reviewer experienced in privacy matters or an auditor, advise the Privacy Commissioner on the outcome of the review or audit, and pay the complainant compensation.

As noted above, the 2022 Privacy Act Amendment proposed major changes to the penalties regime under the Privacy Act, in the wake of increased scrutiny of organisations' privacy practices and a growing consensus that Australia's privacy legislation has fallen behind global norms. The Privacy Act Review Report also proposes a number of additional regulatory and enforcement powers, such as enhanced enforcement powers and ability to proactively identify and address privacy breaches, establishing a new tort for serious invasions of privacy and enhanced court powers, and reducing reporting and regulatory complexity. The implementation of the 2022 Privacy Act Amendment, along with proposed changes in the Privacy Act Review Report, indicate that the Privacy Act will be enforced more strictly going forward and into the future.

According to the OAIC's 2021-22 Annual Report, the Office received 2,544 complaints (of which 2,203 privacy complaints were closed) and responded to 10,931 privacy enquiries in the year ending 30 June 2022.

The OAIC issued 14 privacy determinations in 2021-22. Where it found interferences with privacy, the remedies included declarations of interferences of privacy, requiring the respondent to take specified steps to not repeat or continue interferences of privacy, requiring the respondent to destroy personal information, providing access to personal information, requiring the respondent to assess and report on compliance with the Privacy Act through an independent reviewer experienced in privacy matters or an auditor as well as compensation (ranging from A\$2,500 to A\$5,000).

During the same period, the OAIC commenced seven Privacy Commissioner-initiated investigations, closed eight privacy assessments and received 860 notifications of data breaches from organisations.

Consistent with the 2019-2020 and 2020-2021 years, no enforceable undertakings were entered into by organisations in the 2021-2022 year. This contrasts to the years preceding that: two enforceable undertakings were entered into in the 2018-19 year, three in 2017-18, one in 2016-2017 and two in 2015-16. This relatively low overall level of enforceable undertakings is reflective of the OAIC's preference to issue determinations but contrasts with the higher level of undertakings accepted by the ACCC in relation to competition and consumer law issues. Among other things, enforceable undertakings typically require organisations to implement recommendations and rectify deficiencies identified in relation to whether their practices, procedures and systems are reasonable to protect the personal information they hold.

Employment law

Investors intending to set up a business that employs people in Australia will need to have an understanding of the minimum terms and conditions of employment prescribed by legislation and the other obligations imposed upon them as employers.

Minimum employment terms and conditions

The *Fair Work Act 2009* (Cth) sets out 11 National Employment Standards (**NES**) that apply to all employees (with very limited exceptions and varied application depending on whether the employee is full-time, part-time or casual):

- 38 working hours per week (plus additional hours that are reasonable for the individual and business in question);
- 4 weeks' annual leave per year (not available for casual employees and, for part-time employees, four weeks' of their ordinary part-time work arrangement);
- 10 days' personal leave (comprising sick leave and carer's leave) per year (not available for casual employees and at pro-rated rates for part-time employees), two days' unpaid carer's leave per year (if no paid sick leave or carer's leave is left), two days' compassionate leave per year and 10 days' paid family and domestic violence leave per year;
- 52 weeks' unpaid parental leave;
- long service leave;
- community service leave (allowing employees to attend jury service, or community activities such as firefighting);
- minimum notice period on termination and redundancy pay (not available for casual employees and calculated by reference to length of service);
- public holidays;
- the right to request flexible working arrangements;
- the right to be provided with a Fair Work Information Statement or Casual Employment Information Statement; and
- the right for casual employees to be offered or request conversion from casual to permanent employment.

Modern awards

Employers should also consider whether any of their potential workforce would be covered by a modern award. A modern award is an instrument that contains minimum employment terms and conditions applicable to specified classifications of employees in a particular industry or occupation (eg, wage rates, overtime and penalties). A modern award cannot exclude the NES but may include provisions that are ancillary to or that supplement the NES.

Modern awards do not apply to employees who are covered by an enterprise agreement (see below) and generally do not apply to management level employees.

Significant changes have been introduced to a number of modern awards in recent times, including annualised wage arrangement obligations that came into operation on 1 March 2020. The annualised wage arrangement obligations impose on employers more prescriptive record keeping obligations, including by recording the starting and finishing times worked by a full-time employee in each pay period and identifying the outer limit of overtime hours that may be worked in each pay period.

Employment contracts

An employment contract governs the individual relationship between an employer and an employee. Employment contracts can be written or unwritten, but it is good practice to have the terms of employment recorded in a written agreement. Employers often choose to include terms in employment contracts that protect its business, intellectual property and confidential information from departing employees.

While employers and employees are free to agree on the terms of an employment contract, the employment contract cannot exclude the NES. In addition, if a modern award applies to the employee, the employment contract cannot provide for terms and conditions that are less favourable than the minimum terms and conditions under the modern award.

Enterprise agreements

An employer may choose to enter into an agreement with a group of its employees, known as an enterprise agreement. This is negotiated between the employer and employees, usually through the agency of a trade union. The employer cannot refuse to bargain with a trade union, which is entitled to represent one or more of the employees in these negotiations.

An enterprise agreement allows the employer and employees to agree to depart from the standard provisions contained in the modern awards that would otherwise apply to them. An enterprise agreement must be approved by the Fair Work Commission (**FWC**), which is the principal regulator in the employment area. The FWC must be satisfied that the employees will be better off overall under the enterprise agreement than they would be under the modern award that would otherwise apply to the employees. The enterprise agreement, once approved by the FWC, operates to the exclusion of the relevant modern award until the agreement is terminated.

Labour hire licensing

Labour hire licensing schemes have been introduced in Queensland, Victoria, South Australia and the Australian Capital Territory.

In general, the schemes require that labour hire providers be licensed and ban businesses from hiring labour from unlicensed providers. Businesses must satisfy certain criteria in order to obtain a licence, and licensed providers must submit reports on their labour hire activities and compliance with relevant laws. In addition, each state has established an inspectorate that has broad powers to monitor and inspect provider businesses and their records.

Strong penalties apply for breaches of the scheme and businesses who may be providing labour hire should seek legal advice to ensure they are compliant.

Flexible work arrangements

Modern awards and the NES include rules about requests for flexible work arrangements. In certain specified circumstances, an employer who receives a request from an eligible employee for flexible work arrangements must first discuss the request with the employee to try to reach an agreement. The employer must then provide a written response within 21 days which outlines whether the request is approved or refused. Requests can only be refused on reasonable business grounds.

Protection of Vulnerable Workers

Franchisors and holding companies may be liable for contraventions of the Fair Work Act

Franchisors and holding companies can be held responsible under the *Fair Work Act 2009* (Cth) if their franchisee or subsidiary contravenes workplace laws regarding minimum entitlements, the NES, awards, sham contracting, record-keeping and pay slips. To be a 'responsible franchisor entity', the franchisor must have a significant degree of influence or control over the franchisee's affairs. Broadly speaking, if the franchisor or holding company knew (or could have reasonably known) that their franchisee or subsidiary was not complying with workplace laws, and did not take reasonable steps to prevent this non-compliance, they will be liable for breaches or underpayments. The legislation sets out a list of items which a court may consider when determining whether or not such reasonable steps have been undertaken by the franchisor or holding company, including the size and resources of the franchisor or holding company, and the extent and control it has over the contravening employer's conduct.

Accessorial liability

In addition to the liability risk for franchisors and holding companies, the Fair Work Act 2009 (Cth) also provides that a person may have accessorial liability for a contravention of the Fair Work Act, if the person has, for example, aided, abetted, conspired or has been knowingly involved in the contravention. Accordingly, directors, HR and payroll officers and line managers can be held personally liable for the actions of their companies.

Provision for accessorial liability is also made under federal and state anti-discrimination legislation. Specifically, a person who causes, instructs, aids, permits or incites another person to do an unlawful act under anti-discrimination legislation will be liable as an accessory.

Casual employees

Casual employees have the right to request part-time or full-time employment after working casually for one employer continuously for 12 months. An employer can refuse, but must have reasonable business grounds.

Additionally, concerns of 'double-dipping' created by a Federal Court decision in which a casual employee was held to be entitled to annual leave because of his long-term regular pattern of work have been addressed by the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* (Cth). If certain conditions are satisfied, the regulations allow an employer to make a claim to have casual loading payments made to the employee taken into account when working out the entitlements owing to the employee under the NES.

Since 22 March 2021, the Fair Work has included:

- a definition of 'casual employee'; and
- an entitlement for certain casual employees to request that they be converted to permanent employment (see NES entitlements above).

Superannuation

All employers must make regular payments, on at least a quarterly basis, into a pension plan (which in Australia is referred to as a 'superannuation fund') chosen by the employee. The employer must have a 'default' superannuation fund to which superannuation contributions can be made for employees who do not choose a particular fund. If an employee who starts work on or after 1 November 2021 does not choose a particular fund, the employer must request the employee's stapled superannuation fund details and contribute to that fund before contributing to the employer's 'default' fund.

Superannuation contributions are to be made at the rate of 10.5% of their 'ordinary time earnings', which is the remuneration that the employee regularly receives and includes performance bonuses that are referable to the results achieved in the employee's ordinary hours of work.

Superannuation contributions are capped at the 'maximum contribution base'. The maximum contribution base (which is set by the legislation) is the maximum ordinary time earnings per quarter on which employers must make contributions. For the financial year ending 30 June 2023, the maximum contribution base is A\$60,220 per quarter.

If an employer does not make a contribution at the rate set out in the legislation, and before the set time period with respect to each quarter, the employer must report this to the ATO and pay a 'superannuation guarantee charge' that is equal to the level of contribution that the company would have made, together with an interest component and an administration charge.

The compulsory superannuation contribution rate is set to increase to 11% of ordinary time earnings on 1 July 2023.

Work health and safety

Employers, their directors, officers and managers, must comply with Work Health and Safety (**WHS**) legislation. While the legislation is State-based, it was modelled on the national Work Health and Safety legislation, with the exception of Victoria. The national Work Health and Safety legislation (and the NSW State legislation) commenced operation on 1 January 2012.

WHS law requires employers, or persons conducting a business or undertaking, to do everything reasonably practicable to ensure the health and safety of workers and other persons at their workplace and any other place that is connected with their business or undertaking.

Directors, officers and managers also have an ongoing due diligence duty under WHS law, which requires them to take all reasonably practicable steps to eliminate and/or minimise health and safety risks in their workplace. Part of this duty requires them to monitor and assess, on an ongoing and continuous basis, all risks to health and safety that exist in their particular work place.

A breach of a WHS duty owed by either the company or its officers is considered to be a criminal offence in respect of which they may be prosecuted by the authorities.

Workers' compensation insurance

All employers must take out and maintain adequate workers' compensation insurance to cover employees in the event that an employee suffers a work-related illness or injury.

Taxation of employees

An employer is generally required to withhold tax from salary and other cash payments to an employee and remit those amounts to the ATO. For this purpose, the employing entity has to be registered with the ATO.

Payroll tax

An employer may be required to pay payroll tax to the States and Territories of Australia. Broadly speaking, this is a tax payable if an employer pays wages in a particular State or Territory and the employer's total Australian annual wages exceed the prescribed threshold for the relevant State or Territory. The amount of tax payable is subject to State and Territory specific legislation.

Discrimination

Discrimination means treating a person differently (usually less favourably) because they have a particular characteristic that is protected by anti-discrimination laws. Discrimination in the workplace is unlawful if it is based on one of the protected attributes, which include race, age, sex, disability or religion.

An employer who treats an employee or any job applicant differently for reasons that include any one of these protected attributes will be liable to pay compensation under State or Federal anti-discrimination laws.

Termination of employment

The Fair Work Act contains laws governing the termination of the employment of employees who earn less than the high income threshold (as at July 2022, this was A\$162,000) or who are covered by a modern award or an enterprise agreement. The dismissal of these 'protected' employees must be fair; that is, the dismissal must be for a valid reason, pursuant to a fair procedure, and must not be harsh, unjust or unreasonable in light of all relevant circumstances. If not, the FWC may order that the employee be reinstated and/or compensated.

Bullying

The Fair Work Act contains laws governing workplace bullying. A worker is bullied at work if an individual or a group of individuals repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member, and the behaviour creates a risk to health and safety.

A worker can generally apply to the FWC for a stop bullying order. The FWC can make any order it considers appropriate (except reinstatement, compensation or a fine) to prevent a worker from being bullied at work by an individual or group of individuals.



Sexual harassment

In addition to State-based legislation that makes sexual harassment unlawful, the Fair Work Act now contains laws governing sexual harassment at work. Similar to bullying, a worker can generally apply to the FWC for an order to stop sexual harassment and the FWC can make similar orders to those it can make for bullying, to prevent the worker from being sexually harassed at work. This jurisdiction commenced on 11 September 2021 as part of the Respect@Work legislative reforms.

Recent legislative reforms have also imposed a positive duty on employers to take reasonable and proportionate measures to eliminate as far as possible sex discrimination, sexual harassment, harassment on the grounds of sex, a hostile work environment and victimisation that relates to complaints made about these matters.

Visa requirements

Significant changes to Australia's immigration laws with respect to temporary work visas came into effect in 2018. Employers in Australia wishing to engage overseas workers to work in Australia on a temporary work visa should consult a migration law specialist regarding the relevant visa requirements and conditions.

Modern slavery

The Modern Slavery Act 2018 (Cth) (the **Act**) commenced on 1 January 2019.

The Act requires entities based, or operating, in Australia, which have an annual consolidated revenue of more than \$100 million, to report annually via a modern slavery statement on the risks of modern slavery in their operations and supply chains, and actions to address those risks. These statements must be made every reporting period (financial year) for an entity.

There are no penalties for failing to lodge a statement or lodging an incomplete statement. However, if the entity fails to comply with the Minister's requests, the Minister may publish information about the failure to comply on a public Modern Slavery Statements Register or elsewhere, including the identity of the entity.

Whistleblowing

Under Australia's whistleblowing framework, current or former employees, suppliers and contractors (including their employees), and associates of the company (and family members or dependents of all such persons) are protected when making disclosures of misconduct by or an improper state of affairs in the reporting entity. Such persons (whistleblowers) are protected from any detrimental conduct, such as victimisation, retaliation or reprisal as a result of their disclosure.

Whistleblowers are also protected from their identity being revealed without their consent.

There are significant penalties for individuals and entities for a breach of their obligations to keep confidential the identity of a whistleblower and to ensure that whistleblowers are not subjected to any detrimental treatment as a result of their disclosure.

However, the whistleblower protections may not be available where the disclosure relates to certain types of personal work-related grievances.

Reforms to employment law

A significant number of reforms have been made to employment legislation by the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth). At a high level these changes include:

- a prohibition of pay secrecy clauses in new employment contracts and a new workplace right for employees to disclose their remuneration;
- prohibitions on employers entering into fixed or maximum term contracts where the term exceeds two years or which contain a right to extend or renew the contract more than once;
- giving the FWC the power to arbitrate a dispute in relation to a flexible working arrangement; and
- extensive changes to industrial relations including expanding multi-employer bargaining and providing the FWC with increased powers to resolve bargaining disputes.

These changes come into effect on various dates from December 2022 until December 2023.

Intellectual property

Intellectual property is protected in Australia under both Federal legislative schemes and the common law. The administration of the legislative schemes relating to patents, trade marks, designs and plant breeders' rights is managed by a Federal Government office called IP Australia. IP Australia is responsible for processing applications, conducting hearings, and deciding on disputes relating to granting or denying these Australian intellectual property rights. IP Australia maintains the Registers of Patents, Trade Marks, Designs and Plant Breeders' Rights, and provides public facilities for searching and accessing information on intellectual property rights. IP Australia is also an office and searching authority for international Patent Cooperation Treaty applications filed in Australia.

Copyright is not registered in Australia, so management of copyright is outside of the responsibilities of IP Australia, but copyright is nonetheless governed by a statutory regime. Circuit layout rights are also unregistered rights that are similarly governed.

Internationally, Australia has adopted TRIPS-plus provisions with respect to intellectual property protection in its dealings with other World Trade Organization members.

Patents

In Australia, a patent gives exclusive rights for a specified period to exploit an 'invention', which may be a device, substance, method or process. Patents are governed by the Patents Act 1990 (Cth), and the monopoly provided by a standard patent is 20 years. Typically, it takes at least two years for a complete standard patent application to proceed to grant. Timing of registration depends on whether there is any opposition to grant. Standard patents for certain pharmaceutical inventions may be granted an extension of term of up to five years if a product containing the patented pharmaceutical substance has been entered on the Australian Register of Therapeutic Goods and at least five years have elapsed between the date of patent and the date of the first regulatory approval.

In order to obtain a patent, the applicant must disclose the invention, and best method known to the applicant for making the invention at the time of filing.

Further, the patented invention must be novel and inventive as against the prior art. Prior to obtaining a patent, disclosure of the invention should be avoided as the disclosure will form part of the prior art base. Whilst there is a 12-month grace period, it should only be used as a last resort measure where disclosure is inadvertent.

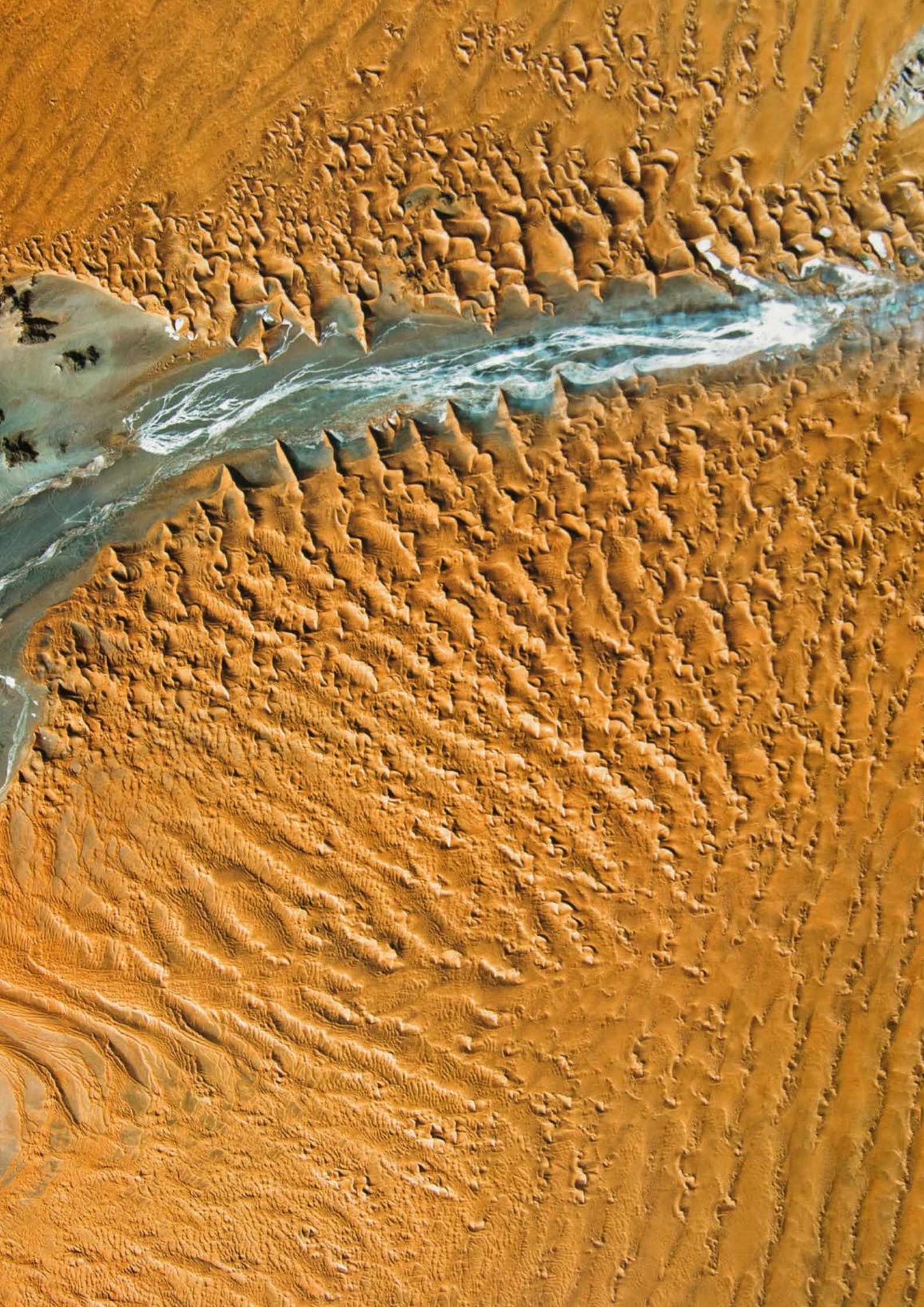
The innovation patent system which was introduced in 2001 and which protects inventions that may not meet the high threshold of inventiveness required to obtain a standard patent has now been abolished. The innovation patent system was designed for inventions with a short market life, and patent protection only lasted for eight years. Existing innovation patents filed on or before 25 August 2021 will continue to be in force, but the Australian Patent Office has not been accepting new innovation patent applications since 26 August 2021. It is still possible to file a divisional innovation patent application after 25 August 2021 provided that the parent application for the divisional was filed on or before 25 August 2021.

Inventions may also be protected at common law as confidential information. Provided that the information continues to be maintained as confidential, it can be protected indefinitely. An action for breach of confidence in Australia requires the following elements:

- the information must have been confidential at the relevant time;
- the information must have been imparted in circumstances consistent with an obligation of confidence; and
- there must be an unauthorised use of that information to the detriment of the party communicating it.

If an invention is secretly used for commercial purposes, an applicant cannot obtain a patent for that invention if a patent will result in a de facto extension of the patent term.

While limited in time, registration of an invention as a patent is generally preferable.



Trade Marks

As for patents, the exclusive rights to use a trade mark are derived from registration. The *Trade Marks Act 1995* (Cth) sets out that the fundamental requirement for a trade mark to be registered in Australia is that it is capable of distinguishing the applicant's goods or services in the course of trade from the goods or services of others. The *Trade Marks Regulations 1995* (Cth) specify that certain signs cannot be registered, such as 'Olympic Champion', 'Austrade' and 'Returned Soldier'.

Where no objections to an application for registration are filed, it may take around six months for an application to be examined. It will take at least seven and a half months, from the date of filing, for a trade mark to become registered. A trade mark registration in Australia lasts for 10 years, but it can be renewed for further 10-year periods indefinitely, upon payment of renewal fees. There are, however, provisions for the removal of a trade mark if it is not used.

Importation of trade marked product is not an infringement of registered trade mark rights if the goods being imported are similar to the goods covered by the trade mark, the parallel importer has made inquiries and, after such inquiries, a reasonable person would conclude that the trade mark had been applied with the consent of a relevant person. A relevant person includes, among others, a registered owner or authorised user.

Unregistered trade marks and other aspects of trade dress may also be protected at common law. Passing off is a common law tort in Australia that includes the unauthorised use of trade dress and company or business names that are not registered trade marks. In order to raise a successful claim of passing off in Australia, the following elements are needed:

- reputation or goodwill relating to name, mark (sign) or get-up;
- use by the defendant of the same or a deceptively similar name, mark (sign) or get-up so as to confuse or deceive; and
- damage or likely damage to the business reputation or goodwill of the plaintiff, as a result of that conduct.

Passing off is particularly relevant to importers, as Australian courts have held that foreign plaintiffs' goods might have substantial reputation without ever having been sold in Australia. However, registration as a trade mark is always preferable, as it avoids the need to prove substantial reputation in a given area.

Designs

Designs for manufactured products can be registered under the *Designs Act 2003* (Cth). They can be two-dimensional or three-dimensional. To be registrable, the product's overall appearance resulting from its visual features, including shape, configuration, pattern or ornamentation, must be new and distinctive. The *Designs Regulations 2004* (Cth) specify that certain designs cannot be registered, such as designs for medals, scandalous designs, and designs including the Australian flag.

All applications, subject to an initial formalities check, proceed to registration without any examination as to whether the design is properly registrable. The owner of the design, the relevant registrar or a third party may then request an examination of the registered design at any time during or even after its 10-year term of registration. The Designs Office then carries out a full examination as to the registrability of the design and either 'certifies' the design – if it is a valid registration – or revokes the registration.

Changes to the design legislation were implemented in 2021. These changes include the introduction of a 12 month grace period for certain publications or uses of a design that occur on or after 10 March 2022. Publications of designs by foreign and international design offices are not eligible for this grace period. The legislative changes also include a defence to design infringement for prior use which applies to designs that have a priority date on or after 10 March 2022. This new prior use defence means the grace period should only be used as a last resort measure and thus it is important that design registrations be applied for before the relevant design is published in drawings or in a relevant product bearing the design.

The Designs Act specifies the exclusive rights of registered design owners during the term of the design's registration. The exclusive rights are in respect of the particular product for which registration is granted, and include the exclusive right to make the product or import it into Australia for sale; sell, hire or otherwise dispose of the product; or authorise another to exercise any of the above exclusive rights.

The maximum term for a registered design is 10 years, and a renewal fee applies at the fifth year from filing.

Copyright

Copyright and similar rights (such as moral rights) are regulated by the *Copyright Act 1968* (Cth). The Copyright Act gives exclusive rights to do, and to authorise others to do, specified acts in relation to works and other subject-matter for the duration of copyright in Australia. Unlike patents, trade marks and designs, there is no registration system for copyright, as copyright will automatically subsist in works and other subject matter that meet certain criteria. As Australia is a signatory to the Berne Convention and the Universal Copyright Convention, the copyright recognised in other signatory countries is recognised equally in Australia, and protection for overseas works is accordingly regulated by the *Copyright (International Protection) Regulations 1969* (Cth).

Works that can form the subject matter of a copyright in Australia include literary works, dramatic works, musical works and artistic works. Subject matter other than works that also receive the protection of copyright in Australia include sound recordings, cinematograph films, television or sound broadcasts and published editions of works.

The threshold test for copyright protection in Australia is that the work must be original and that it must be in a material form. In relation to works, originality simply requires that the work originate from a human author and that some skill and labour be involved in devising or making the work. In relation to subject matter other than works, there is only a requirement that it is original in the sense that it must not have been a copy of a previous sound recording, cinematograph film, television broadcast or published edition. Once this threshold requirement is met, copyright automatically subsists in the owner. The owner can transfer their rights to other parties, with the exception of moral rights, which are personal rights and not assignable. An author's moral rights consist of the right to attribution for a work (including the right against false attribution) and the right to protect the integrity of a work from derogatory treatment.

With some exceptions, copyright in Australia subsists in a work until the end of the 70th year after the author of the work has died. In relation to television and sound broadcasts, copyright lasts until the end of the 50th year from the year of first broadcast; for sound recordings and films, copyright generally lasts until the end of the 70th year from the year of publication; and for published editions of works, copyright lasts until the end of the 25th year from the year of publication.

Plant Breeders' Rights

Plant varieties can be protected under the *Plant Breeders' Rights Act 1994* (Cth) and this form of protection is sometimes referred to as a 'Plant Patent' because it is designed to enable plant breeders to apply for and receive proprietary rights for new varieties of plants they develop. However, plant breeders' rights are protected under a unique regime, separate to the monopoly provided under the Patents Act.

Potential registrants must meet the criteria of distinctness, uniformity and stability, and once registration is granted they can exclude others from doing a variety of acts in relation to material of the registered plant variety, including production, reproduction, conditioning, sale, import, exports and stocking of the material. The term of protection is 25 years for trees and vines, and 20 years for other plant varieties.

Circuit Layout Rights

Computer technology is also protected under the *Circuit Layouts Act 1989* (Cth), which provides copyright-type protection for original layout designs for integrated circuits and computer chips. Registration is not required. A circuit layout will only be an eligible layout and therefore protected if it is original and if there is some connection with Australia (generally residence, citizenship or commercial exploitation of the circuit layout) or with a foreign country listed in the Regulations to the Act. The originality requirement for an eligible layout is higher than the standard required under copyright law but lower than that required under designs law. It requires creative contribution by the maker, and the circuit layout must not be commonplace at the time it was made.

If the circuit layout is protected by the Circuit Layouts Act, the owner is given exclusive rights to copy the layout (directly or indirectly) in material form, to make an integrated circuit in accordance with the layout or a copy of the layout, and to exploit the layout commercially in Australia. 'EL rights' (rights in relation to eligible layouts) subsist for between 10 and 20 years depending on whether or not, and when, the layout is commercially exploited.

Imports and exports control

Trade links

International trade is a vital component of Australia's robust economy, and the development of a liberal global trading system is an important aspect of the Australian Government's foreign policy agenda.

The Australian Government is a participant in, and strong supporter of, the World Trade Organisation and regional institutions such as the Asia-Pacific Economic Cooperation. The Australian Government also actively pursues free trade agreements and bilateral agreements with its trading partners.

Free trade agreements and bilateral investment treaties

Australia is a party to free trade agreements with the Association of Southeast Asian Nations, Brunei Darussalam, Cambodia, Chile, China, Cook Islands, Hong Kong, India, Indonesia, Japan, Kiribati, Laos, Malaysia, New Zealand, Niue, Peru, the Republic of Korea, Samoa, Singapore, Solomon Islands, Thailand, Tonga, the United States and Vietnam.

Additionally, the following free trade agreements have been signed but are not yet fully in force:

- (a) The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (also known as the TPP-11 or the CPTPP) has come into force between the following countries: Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, Peru, Malaysia and Chile and will enter force for Brunei Darussalam 60 days after they complete their respective ratification process.
- (b) The Australia-United Kingdom Free Trade Agreement (also known as the Australia-UK FTA) between Australia and the United Kingdom.

More broadly, negotiations continue in relation to the Pacific Alliance Free Trade Agreement, the Environmental Goods Agreement, the Australia-EU Free Trade Agreement, the Australia-Gulf Cooperation Council Free Trade Agreement and the Trade in Services Agreement. The progress of the Australia-EU Trade Agreement and the Trade in Services Agreement may well be impacted by Britain's formal departure from the European Union (**EU**), which occurred on 31 January 2020. While the terms of Britain's departure from the EU have been agreed, the consequences of Britain's split from the EU are still unfolding. In this context, Australia and Britain signed the Australia-United Kingdom Free Trade Agreement in December 2021, which Australia views as an important signal of Australia's commitment to global trade liberalisation, which will play an important role in Australia's post-COVID economic recovery.

Australia is also a party to a number of bilateral investment treaties with Argentina, China, the Czech Republic, Egypt, Hungary, Laos, Lithuania, Pakistan, Papua New Guinea, the Philippines, Poland, Romania, Sri Lanka, Turkey and Uruguay setting out the terms of private investment between the countries. Bilateral investment treaties with Hong Kong, Indonesia and Peru were terminated in 2020, and with Vietnam in 2019.

Import control

Australia offers a straightforward and undemanding platform for importation to the country. The *Customs Act 1901* (Cth) broadly regulates the import and export of goods. There is no general requirement for an importing entity to hold a licence for importation. However, under the *Customs (Prohibited Imports) Regulations 1956* (Cth), the import of certain goods may be prohibited or restricted. Prior to importing restricted goods, the importer may need to obtain an import permit from the relevant government authority. Restricted goods include weapons, toxic materials, narcotics, certain flora and fauna and protected cultural heritage items.

Duties and taxes

Customs duty is levied on most goods imported into Australia for domestic consumption. Rates are determined by the tariff classification contained in the *Customs Tariff Act 1995* (Cth). The average rate of duty is 5% of the value of the goods in Australian dollars. In general, customs duty is assessed on an *ad valorem* basis, meaning the duty is based on the value of the imported goods. It is important to be aware that classification for customs duty purposes is a difficult matter and, therefore, expert advice should be sought. The Australian Border Force (**ABF**) must clear all goods imported into Australia whether they are imported by air, sea or post. All goods imported with a value of more than A\$1,000 must be cleared by submitting a completed import declaration form and paying any duty, goods and services tax and other taxes and charges that may apply. Goods with a value equal to or less than A\$1,000 do not attract duty or tax, with certain exceptions (such as tobacco, tobacco products and alcoholic beverages).

GST also applies to most imported goods at 10% of the value of the taxable importation. From 1 July 2018, this was extended to goods valued at A\$1000 or less. The main exemptions are for certain foodstuffs, some medical aids and imports that qualify for certain duty concessions. The taxable importation is the sum of the customs value, any duty payable, the amount paid or payable to transport the goods to Australia and to insure the goods for that transport, and any Wine Equalisation Tax payable.

There is also an import processing charge that applies to all imported goods valued at more than A\$1,000. The charge ranges between A\$50 and A\$192 depending on the value of the goods and whether an electronic or documentary import declaration is made.

Certain product-specific levies exist, including:

- (a) the Wine Equalisation Tax – a 29% levy on wines and other alcoholic beverages; and
- (b) the Luxury Car Tax – a 33% levy on certain motor vehicles with a value above a specified threshold.

Refer to the section on [Tax regime](#) for further details on taxes.

Tariff Concession System

The ABF administers the Tariff Concession System (**TCS**), which allows free or concessional rates of duty to be granted pursuant to a Tariff Concession Order (**TCO**) in circumstances where there are no known Australian manufacturers of goods that are substitutable for imported goods. The TCS is designed to help industry become more internationally competitive. Importers can either rely on existing TCOs that cover the goods or services, or apply for a new TCO.

Quarantine

Imported goods will also undergo scrutiny by the Department of Agriculture, Water and the Environment to ensure control of pest and disease risk to Australia.

Anti-dumping

The Anti-Dumping Commission (**Commission**) was established by the Australian Government to administer Australia's anti-dumping and countervailing system under the *Customs Act 1901* (Cth) and the *Customs Tariff (Anti-Dumping) Act 1975* (Cth). Dumping occurs when a company exports a product into Australia at a price that is lower than the price charged in the country of manufacture. If dumping occurs in Australia, a member of an Australian industry that produces goods similar to the dumped goods may lodge a complaint with the Commission for anti-dumping or countervailing duties dumping that has (a) caused or are causing material injury to an Australian industry, (b) threatened or would or might cause material injury to an Australian industry, or (c) materially hindered the establishment of an Australian industry. The Commission has considerable discretion in imposing anti-dumping measures based on whether dumping has taken place and whether such dumping causes material injury to an Australian industry. To decide if the imports have caused material injury, the Commission examines the volume and price of the imports, and their effect on Australian producers of like goods. Many of the goods currently subject to anti-dumping measures are raw materials used in manufacturing, such as metals, plastics and compounds.

If there is a finding of dumping, the responsible Minister may impose dumping duty on imported goods to offset the effects of the material injury to industry. Typically, this duty will be calculated as the difference between the price of the relevant goods exported and the price paid for the same goods in the country of export.

Export control

There are relatively few limitations on exports from Australia and most exported goods or services will be GST-free, provided they are exported within 60 days of the supplier receiving any payment for the goods, or the supplier issuing an invoice for the goods, whichever is earlier.

In order to export goods from Australia with a value of more than A\$2,000, an exporter or its agent must lodge an export declaration with the ABF. Any goods that require a permit for export must be reported on an export declaration regardless of value. The ABF, through the online Integrated Cargo System, will then issue an Export Declaration Number for the proposed export. Ships or aircraft may not depart from Australia unless the ABF has issued a Certificate of Clearance.

The export of certain goods (such as radioactive substances, hazardous waste, certain prescription medicines and biological agents) is restricted. In these cases, the exporter must seek permission to export from the appropriate governmental authority. It is prohibited to export certain other goods, such as protected wildlife, some cultural and heritage items and selected weapons and other dangerous goods.

Exporters must also comply with quarantine and inspection requirements for certain exports such as food and other animal or plant products. In certain circumstances, exporters may be required to obtain approval and health certification from the Department of Agriculture, Water and the Environment.

Export control on dual use goods

As a signatory to several international counter-proliferation and export control regimes, Australia controls trade in items on the Defence and Strategic Goods List. These items include 'dual use goods', which are goods that have a valid commercial application, but may also be used in the development and deployment of military systems or weapons of mass destruction programs. Some examples of dual use goods include certain software and technologies, and biological, chemical and nuclear material. Exporters of such goods must apply for a permit from Defence Export Controls prior to export.

Live export

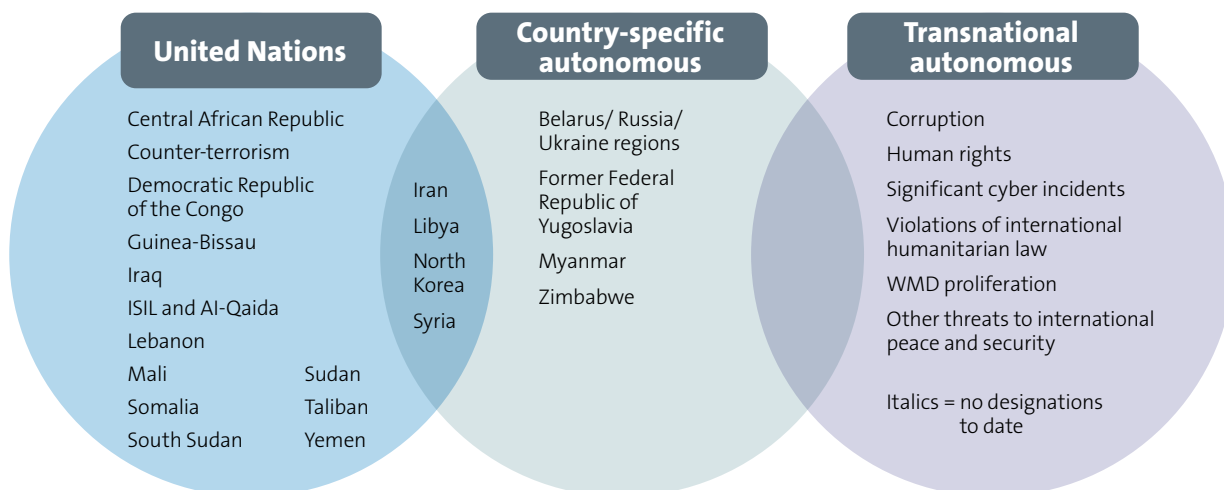
Live export from Australia is regulated by a comprehensive framework administered by the Department of Agriculture, Water and the Environment (**Department**). The framework includes the requirement to comply with the Australian Standards for the Export of Livestock (**ASEL**). The ASEL covers the sourcing of export livestock, their management in registered premises, loading of livestock onto a vessel, management on board a vessel and standards for land and air transport. Arrangements to ensure exported animals are well treated during road, sea and air transportation are an important part of the ASEL.

The live export trade has recently been a politically sensitive and fluid issue in Australia. Following the McCarthy Review into the standards for the sheep trade during the Northern Hemisphere summer, the Department prohibited sheep exports for vessels travelling to or through the Middle East from 1 June 2019 to 31 August 2019 (inclusive). Shipments in May required automated data logging equipment to record wet bulb temperatures, which was then reported to the Department. In April 2020, the Department published a regulation impact statement pursuant to the McCarthy Review that may inform future regulation of the live export trade during the Northern Hemisphere summer. The regulation impact statement recommended the implementation of a prohibition on live sheep exports from 1 June to 14 September, additional prohibition periods for Qatar and Oman, and additional conditions for the permitted periods between May to October.

Trade sanctions

Trade sanctions impose restrictions on activities that relate to particular countries, persons, goods and services that are the subject of international concern. Australia implements United Nations Security Council (**UNSC**) sanctions regimes as well as Australian autonomous sanctions regimes. Australia is obliged to implement UNSC sanctions regimes as a matter of international law.

The sanction programs Australia currently implements are set out in the following diagram.



The nature and effect of these sanction programs varies. The Australian Sanctions Office within the Department of Foreign Affairs and Trade maintains a Consolidated List of all persons and entities subject to Australian sanctions laws. The Consolidated List can be viewed by following this link.

From February 2022, Australia expanded its Belarus, Russia and Ukrainian regions sanctions programs, in response to Russia's invasion of Ukraine. These programs presently impose a wide range of restrictions including bans on:

- (a) the import, purchase or transport of:
 - (i) Russian coal, oil and gas products;
 - (ii) Russian gold;
 - (iii) all products exported or originating from Crimea, Donetsk and Luhansk;
- (b) the export to Russia of:
 - (i) arms and related material;
 - (ii) aluminium ores, alumina and related products;
 - (iii) some luxury goods; and
 - (iv) some products for use in oil exploration and production;
- (c) the provision of a range of services relating to prohibited exports and imports; and
- (d) dealing with the assets of, and making assets available to, over 700 individuals and entities, including Russian government agencies, banks and financial officials, military companies, infrastructure and transport companies, and political, military and business figures.

The Minister for Foreign Affairs may grant a sanctions permit authorising an activity that would otherwise contravene an Australian sanction law. The Minister may attach conditions to any such sanctions permit.

Please refer to the [Anti-bribery laws](#) section for information on Australia's anti-bribery regime. We note that, at the time of writing (March 2023), the Department of Foreign Affairs and Trade is conducting a wide-reaching review of Australia's autonomous sanctions framework, and it is conceivable that material changes to the framework may be made in or before April 2024, when certain relevant legislative instruments sunset.

Arbitration

Overview

Foreign investors should be cognisant of the various dispute resolution mechanisms available in Australia.

The Australian federal and state courts are available to provide judicial assistance to foreign investors and are generally considered to be unbiased and reasonably efficient.

However, as with other jurisdictions in the region and globally, arbitration is a popular means of resolving investment related disputes in Australia. It is commonplace for parties to include arbitration as the dispute resolution mechanism in contracts relating to foreign investment in Australia.

There are a number of reasons for this:

- **Enforcement:** awards or decisions delivered by an arbitral tribunal are more easily enforced across multiple jurisdictions, compared to court judgments. Australia is a signatory to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (the **New York Convention**), which has been ratified by approximately 170 countries.⁷ The streamlines the enforcement of an Australian arbitral award in those 170 countries. In contrast, while Australia has only a very limited number of arrangements with other countries to allow the enforcement of Australian Court judgments overseas. Generally speaking, the enforcement of an Australian Court judgment outside of Australia can be very difficult.
- **Confidentiality:** arbitration is conducted privately, and awards are generally confidential. In contrast the Australian Court system is founded on the principle of 'open justice' and most commercial Court disputes are open to the public. Consequently, arbitration provides a degree of confidentiality which is otherwise not available in proceedings before a court.
- **Choice of decision maker:** arbitration is a process by which an arbitral tribunal (usually consisting of one or three arbitrators) is appointed to hear the dispute and provide an award determining the rights and obligations of the parties. Unlike in the Court system the arbitrators tend to be appointed by the parties and often hold the technical expertise relevant to the substantive matters in dispute.
- **Finality:** arbitration is governed by the principles of finality, which means there are narrow grounds upon which an arbitration award (i.e., a decision) can be appealed. This is compared to court proceedings which, following a decision, can potentially have at least two stages of appeal. This means that court proceedings may not be resolved as quickly as arbitration.

Australia has International and Domestic Arbitration Frameworks

Australia's legal system distinguishes between international and domestic arbitration.

International Arbitrations

International arbitration is governed by the *International Arbitration Act 1974* (Cth) (the **IAA**). It was through the IAA that Australia enacted the New York Convention to which it acceded on 26 March 1975 (without reservations) and the UNCITRAL Model Law (as its default procedural law for international arbitrations).

The IAA applies to:

- disputes which are referred to arbitration pursuant to an arbitration agreement, generally in circumstances where the parties to the agreement have their place of business in different foreign States;
- international commercial arbitrations to which the *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985* with amendments as adopted in 2006 (the **UNCITRAL Model Law**) applies;

⁷ New York Arbitration Convention, Contracting States (Web Page) <<https://www.newyorkconvention.org/countries>>.

- investment treaty arbitrations; and
- applications seeking enforcement of ‘foreign awards’ (i.e., awards made under an arbitration agreement in a country other than Australia to which the New York Convention applies).

Domestic Arbitrations

On the other side of the arbitration coin is domestic arbitration, which is an arbitration involving parties who have their place of business in Australia.

Domestic arbitration is governed by the Commercial Arbitration Acts as applicable in each State and Territory (the *Uniform Arbitration Acts*).⁸

The Uniform Arbitration Acts are largely the same in each Australian jurisdiction and generally follow the UNCITRAL Model Law. However, there is some variation, and in some cases, they do include additional provisions which do *not* exist in the UNCITRAL Model Law.

Australian Courts are Pro-Arbitration

Australia is a ‘pro-arbitration’ jurisdiction.

The State and Federal parliaments across Australia have passed laws to enact the International and Domestic Arbitration Frameworks referred to in the previous sections.

Further Australian courts are also supportive of the arbitration process. Australian Courts have demonstrated a willingness to protect the integrity of the parties’ agreement to arbitrate, the arbitral process and arbitral awards.

There is now a well-developed body of case law in Australia that supports the arbitration process. Some examples are the decisions of Australian Courts to:

- stay court proceedings in favour of the parties’ agreement to arbitrate disputes (and in the process construed the arbitration agreement with strict reference to the parties’ intentions in accordance with the principle of party autonomy in arbitration);⁹ and
- refusing applications challenging an arbitral award or resisting the enforcement of an arbitral award unless the very narrow grounds set out under the Model Law or New York Convention are established.
- Additionally, under the IAA and the Uniform Arbitration Acts, Australian courts are provided broad powers to assist the arbitral process by making:
 - interim orders preserving the status quo until the arbitration is completed (to prevent respondents from destroying evidence or hiding assets); and
 - orders to assist in taking evidence, such as ordering subpoenas or supervising the expert evidence process.

Australia is also a particularly attractive jurisdiction because its courts (at both the national and State or Territory level) have developed a case management approach whereby a judge with arbitration expertise will often be allocated to preside over cases with an arbitration element.

⁸ See: Commercial Arbitration Act 2010 (NSW), Commercial Arbitration Act 2011 (Vic), Commercial Arbitration Act 2011 (SA), Commercial Arbitration Act 2012 (WA), Commercial Arbitration Act 2011 (Tas), Commercial Arbitration (National Uniform Legislation) Act 2011 (NT); Commercial Arbitration Act 2017 (ACT); Commercial Arbitration Act 2013 (Qld). These statutes effectively enacted the Commercial Arbitration Bill 2010 (Cth) which apply the UNCITRAL Model Law with the 2006 amendment.

⁹ See, for example, *Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82 and *Degroma Trading Inc v Viva Energy Australia Pty Ltd* [2019] FCA 649.

Arbitral Institutions

In Australia, there are a number of arbitral institutions that assist parties with ad hoc or institutional arbitration, including the Chartered Institute of Arbitrators (Australia), the Australian Centre for International Commercial Arbitration (**ACICA**) and the Resolution Institute.

Both ACICA and the Resolution Institute have developed their own procedural rules which are modern and regularly updated, to ensure that they are in line with best practice.

ACICA is Australia's pre-eminent arbitral institution, having been established in 1985, and provides services such as:

- administering arbitrations (domestic and international) under its own ACICA Rules, as well as ad hoc arbitrations under the UNCITRAL Arbitration Rules;
- acting as the default appointing authority under the *International Arbitration Act 1974* (Cth).

Additionally, because arbitration is very much a party-driven dispute resolution mechanism, it is possible for arbitration hearings to take place in Australia, but which are administered and overseen by foreign international arbitration institutions, like the Singapore International Arbitration Centre (**SIAC**), Hong Kong International Arbitration Centre (**HKIAC**) or the International Chamber of Commerce (**ICC**).

Investor-State Arbitration

From time to time, investor-state disputes can arise between a foreign investor and the state in which the investment is made where, for example, a foreign investor seeks compensation for a state's breach of its investment obligations. Currently, Australia has Investor-State Dispute Settlement (**ISDS**) provisions in:

- 10 free trade agreements (including with China, Singapore, Hong Kong, and Indonesia); and
- 15 Investment Protection & Promotion Agreements (including with China, the Philippines, Sri Lanka, and Turkey).

Australian-based companies have used ISDS to protect their investments overseas. To date, there has been just one ISDS arbitration commenced against Australia by a foreign investor.

Recent developments indicate that Australia's pro-enforcement approach to arbitral awards extends to investor-State disputes. For example, in *Eiser Infrastructure v Kingdom of Spain* [2020] FCA 157, Stewart J dismissed a challenge to the enforcement of an arbitral award against Spain. This case is significant because it confirms that Australian courts are prepared and willing to uphold awards made under the *International Convention on the Settlement of Investment Disputes* (which applies to ISDS arbitrations).

Additionally, in late 2020, Australia ratified the *United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration 2014* which itself promotes greater transparency and public accessibility to materials in ISDS arbitral proceedings.



Tips on successfully implementing your investment strategy

Investing in any foreign country is a complex and challenging process. We regularly advise clients not only on their strict legal requirements, but also on the practical steps they need to take to avoid the pitfalls and risks that arise when investing in Australia. We recommend the following:

- Work with experienced advisers to gain knowledge about the target business and the local legal environment (including regulatory approval requirements) and risks.
- Don't underestimate the importance of due diligence and avoid delegation only to junior team members – due diligence inevitably reveals business-critical issues that require senior management attention.
- Ensure your advisers have established relationships with key regulators, particularly foreign investment, competition and corporations regulators.
- Structure the transaction sufficiently in advance in order to achieve an optimal outcome and potentially avoid liabilities.
- Plan and execute your acquisition or investment strategy carefully and prepare for contingencies – consider how the other side will respond and how that might affect your strategy.
- Carefully allocate tasks between advisers and management to avoid duplication, but ensure there is sufficient sharing of information to allow fully informed decisions to be made.
- Consider your media and investor relations strategy. Don't underestimate how public perceptions can change shareholder or government sentiment.
- Prepare for the period post-completion. Integration is difficult and time consuming but can make the difference between successful and unsuccessful deals.
- Be flexible and be prepared to change the deal if necessary, but be careful of 'deal capture' and the mentality of doing the deal at any price or on any terms.
- Try to stick to a tight but realistic timetable – some delays may be inevitable, but a loss of deal momentum can be fatal.

We combine commercial insight with technical excellence

Operating in today's complex and increasingly global business environment, clients need advisers with a truly international presence and the ability to distil simplicity from complexity. With more than 600 lawyers, Allens offers clients access to the best legal minds and resources that Asia has to offer.

Our practice covers:

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- › Banking & Financial Services › Biotech & Health › Capital Markets › Climate Change
- › Competition, Consumer & Regulatory › Construction › Corporate
- › Data Governance, Data Services, Privacy & Cyber › Disputes & Investigations
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