Australia

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Chapter 1: Introduction

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Australia is a stable parliamentary democracy, offering international investors a cost-effective, low-risk and innovative business environment.

Now in its 28th year of consecutive annual economic growth, Australia's economy is underpinned by strong institutions, an exceptional services sector and the ability to respond to global changes. Australia offers significant opportunities for foreign investment in a range of growth sectors, including agribusiness, education, tourism, mining and wealth management. Investors regard Australia as an excellent place to invest because of its strategic location, population growth, highly skilled workforce, strong record of economic growth, and stable governance and regulatory environment.

Australia's economy is primarily services-based, complemented by a strong resources sector. Australia is a major global commodity producer of natural resources, such as coal, iron ore, uranium, gold and natural gas. The five biggest industries in Australia are financial and insurance services, mining, construction, manufacturing, and scientific and technical services. Other significant industries include education, agriculture, forestry and fishing.

Chapter 2: The business environment

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2.1 Government structure

The Commonwealth of Australia is a federation of six states (New South Wales (NSW), Victoria, Queensland, South Australia, Western Australia and Tasmania), two internal territories (Northern Territory and Australian Capital Territory) and a number of minor external territories.

A written constitution divides power between the central Federal Parliament, located in Canberra in the Australian Capital Territory, and the eight state and territory parliaments. The constitution gives the Federal Parliament the power to make laws relating to foreign investment, including legislation concerning corporations, taxation, trade and commerce, communications, banking, insurance, bankruptcy and insolvency, intellectual property, immigration and industrial disputes.

Each state has legislative power to make any laws it desires, except in relation to a few matters reserved to the Federal Parliament. Federal law prevails over state or territory law in the instance of any inconsistency.

Any foreign investment proposal must comply with both federal law and the law of the state or territory in which the investment is located. In some cases, local government law is also relevant, especially in relation to planning and building approvals.

2.2 Legal system

There are two primary sources of law in Australia: statute law and common law.

Statute law is the body of legislation enacted by the various levels of government, and includes subordinate legislation, such as regulations, rules and by-laws. Common law is the body of law arising out of decisions of the various federal, state and territory courts.

Each state and territory has its own court system, consisting of a Supreme Court and a number of minor courts. The Federal Government has its own court system, consisting of the High Court, Federal Court, Family Court and Federal Circuit Court. The High Court hears appeals (if leave is granted) in civil and criminal matters from the Federal Court, and the state and territory Supreme Courts. In addition, there are numerous panels and tribunals administering particular areas of law. The High Court also functions as Australia's superior constitutional court. Both the High Court and Federal Courts may hear matters requiring the interpretation of the Australian Constitution.

Australia is also a party to various international treaties and conventions. However, these do not create rights or obligations for individuals in Australia unless they are given effect by an Australian statute. International law may be used by an Australian court as an interpretative aid should the court find a statute ambiguous.

Chapter 3: Business and corporate structures

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3.1 Common forms of legal entities

The range of legal structures in Australia include:

- companies incorporated in Australia, including Australian subsidiaries of foreign companies;
- registered foreign companies;
- partnerships and limited partnerships;
- joint ventures;
- trusts;
- sole proprietors; and
- associations.

3.2 Incorporation process

3.2.1 Companies

The Corporations Act 2001 (Cth) (the 'Corporations Act') and the Corporations Regulation 2001 (Cth) are the primary sources of company regulation in Australia and are administered by the Australian Securities and Investments Commission (ASlC) in tandem with the powers granted to ASIC under the Australian Securities and Investments Commission Act 2001 (Cth).

The following sets out how business is conducted in Australia via a company structure, either incorporated in Australia or overseas. We also consider some of the alternative structures.

Companies incorporated in Australia

Companies have separate legal personalities under the law of Australia. Companies assume the rights and liabilities of their members and can also hold property. They can sue and be sued in their own name. Generally, the liability of the members is limited to the amount unpaid on their shares (if any) and any liability or obligation expressly provided for in the company's constitution or shareholders' agreement. This is in contrast to companies limited by guarantee and no liability companies, which are not as common in the Australian market as they mainly operate in the not-for-profit and mining sectors, respectively.

Actual management and control of a company is vested in the board of directors, who are usually appointed by the members but may also be appointed by the other directors of the company (subject to the company's constitution). Companies must, if they are carrying on a business or deriving income for the purposes of income tax legislation, appoint a public officer. The public officer is responsible for undertaking all activities required for income tax purposes. This person is liable for the same penalties that may be imposed on the company for any default, but is not personally liable for payment of the company's taxes. The Commissioner of Taxation may exempt a company from the requirement to appoint a public officer.

There are various types of companies, but by far the most common is a company limited by shares, being either a proprietary company (called a private company in many other countries) or a public company. A proprietary company must have at least one member, but may not have more than 50 non-employee members, whereas a public company has no limits on membership. Public companies may be listed on the Australian Securities Exchange (ASX), in which case they must also comply with the ASX Listing Rules.

Relative to public companies, proprietary companies are less stringently regulated and subject to less onerous reporting requirements. Areas in which this more relaxed regulatory approach is evident include the regulations and restrictions in relation to meetings; the appointment, qualification and removal of directors; the giving of financial benefits to directors and related parties; the power to allot shares; and the required content of annual reports.

A proprietary company is further classified under the Corporations Act as being either ‘small’ or ‘large’. Generally, large proprietary companies have more onerous reporting obligations than small proprietary companies. As of 1 July 2019, a proprietary company will be ‘large’ for the purposes of the Corporations Act if (together with its controlled entities) it satisfies any two of the following criteria:

- the consolidated revenue of the company and any entities it controls for the financial year is AU$50m or more;
- the value of the consolidated gross assets of the company and any entities it controls at the end of the financial year is AU$25m or more; and
- the company and any entities it controls have 100 or more employees at the end of the financial year.

Large proprietary companies must prepare and lodge a financial report and director’s report for each financial year. The accounts must be audited unless ASIC grants relief.

If the company does not meet at least two of the above criteria, it is considered ‘small’. In some circumstances, small proprietary companies may also have to lodge financial reports.

A company limited by shares must have the word ‘Limited’ or ‘Ltd’ at the end of its name (to indicate the limited liability of the company’s members), while a proprietary company limited by shares must also have the word ‘Proprietary’ or ‘Pty’ as the second last word in its name. In addition, all companies must state their Australian Company Number or Australian Business Number on all of their public documents.

Companies that are residents of Australia for taxation purposes will be taxed on income and gains from sources both in and outside of Australia, reduced by any allowable deductions. Conversely, companies that are non-residents of Australia will generally only be taxed on income with sources in Australia and gains arising from dealing with certain assets that have the ‘necessary connection’ with Australia.

Company groups are not regulated as groups and are treated as individual companies. However, some company groups may be treated as a single entity for income tax purposes.

Registered foreign companies

Companies that are incorporated outside of Australia that wish to carry on business in Australia must be registered with ASIC. Unincorporated bodies that do not have their head office or principal place of business in Australia must also register with ASIC if they wish to carry on doing business in Australia. A foreign company applying for registration must lodge an application accompanied by certain prescribed documentation, including a copy of its constitution or equivalent (if any) and a list of its directors, with ASIC.

A determination of whether or not a foreign company is ‘carrying on business’ in Australia requires an examination of all of the circumstances of the company’s activities in Australia in light of several provisions of the Corporations Act as well as a body of common law principles. Specific advice should be sought in each case.

A registered foreign company is given the power to hold land in Australia under the Corporations Act. Under common law, a foreign company may sue and be sued in its own name; however, a failure to register under the Corporations Act as a foreign company, when required to do so, may inhibit that company's right to sue.

Some of the more important obligations imposed upon foreign companies registered to carry on business in Australia are set out below.

3.2.2 Partnerships

A partnership consists of two or more partners (to a maximum of 20, except in the case of certain professional partnerships) carrying on business in common with a view to profit. Partners may be individuals or companies. A partnership is not a separate legal entity from the partners themselves. Partners are jointly and severally liable for all liabilities of the partnership, and this liability is unlimited. Each state and territory has its own partnership legislation which, together with the terms of any partnership agreement and the principles of equity and common law, governs the relationship of the partners.

3.2.3 Limited partnerships

Legislation in all states provides for limited partnerships, which are partnerships consisting of at least one general partner and at least one limited partner. Limited partners contribute to the capital of the partnership and share in its profits but do not take part in its management. They cannot bind the firm and their liability to contribute to the debts or obligations of the partnership is limited to their capital contributions as recorded in the relevant register for each state or territory. The obligations of general partners are similar to those in an ordinary partnership and their liability remains unlimited.

Limited partnerships are formed upon registration as a limited partnership and they are generally taxed as if they are companies. Since 1 July 2002, certain classes of non-resident investors (eg, certain tax-exempt entities and taxable foreign residents of specified jurisdictions) investing in eligible venture capital investments through a limited partnership have been able to access the existing exemption for capital gains on venture capital investments.

3.2.4 Joint ventures

In Australian commercial circles, the term 'joint venture' is a label for a variety of forms of legal association between investors. Generally speaking, a joint venture is an agreement between two or more parties for the purposes of carrying on a business or undertaking. There is no settled statutory or common law definition of what constitutes a joint venture.

Three relatively common variations exist in Australia:

1. an incorporated joint venture, where a separate legal entity is incorporated to pursue the interests of the joint venturers, who are shareholders in the company, in a specific project; the taxation implications of this form of joint venture (assuming it to be resident in Australia for tax purposes) are the same as for an Australian company;

2. a unit trust, where the beneficial interest in the trust property is divided into units that can reflect the percentage of equity held by each participant and may be independently dealt with; unit trusts normally have a corporate trustee; and

3. an unincorporated joint venture, where the investors have a contractual association that lacks both corporate form and equity capital, and may or may not be a partnership for taxation purposes or under partnership legislation. If it is not a partnership at law or for taxation purposes, no partnership tax return is required and each joint venturer must lodge a separate tax return and may adopt a differing tax treatment for the income and expenses referable to its share of the joint venture.

Joint ventures are a common form of business association, especially in the energy and resources industries. For example, unincorporated mining joint ventures have been developed by the mining and petroleum industry in which several companies contract with one another to operate a mine or well but they each separately sell their share of the resources mined.

3.2.5 Trusts

A trust is a legal relationship whereby a trustee, being the legal owner of trust property, deals with that property for the benefit of some other person or persons (the beneficiaries) or for some object permitted by law, such as a charitable object. A trust is not a separate legal entity and does not enjoy limited liability, although it is common to use a company as the trustee and thereby limit the potential liability of the trustee.

A trustee owes a high standard of care to beneficiaries, and is subject to a number of duties. These include the duty to act in good faith, to avoid conflicts of interest, to make full disclosure to beneficiaries and not to make secret profit or gain.

Trusts commonly used to carry on businesses are unit trusts or discretionary trusts. In a unit trust, the beneficial interests in the trust are divided into units, which may be transferred in a similar fashion to shares in a company. The holder of a unit is entitled to a fixed share of the profit of the trust. In a discretionary trust, however, the identity or interest of the beneficiary is not determined at the time the trust is created.

Trust income is usually taxed in the hands of beneficiaries according to their respective share of the net trust income, and the trustee is not usually taxed on it. It should be noted, however, that:

- depending on the ownership and business activities of the trust or the business activities of entities controlled by the trust, a unit trust may be taxed as if it is a company;
- the trustee can be liable for tax in a variety of situations (eg, where there are non-resident beneficiaries); and
- tax losses are generally trapped within the trust and their future use is subject to satisfying certain complicated tests.

3.2.6 Associations

When a group of people agree to act together as an organisation, club or group, they form an association. An association can either be unincorporated or incorporated. Associations are regulated at a state and territory level, with each jurisdiction having slightly different legislation. The basic principles of unincorporated associations and incorporated associations are set out below.

Unincorporated associations

An unincorporated association is not recognised as a separate legal entity to the members associated with it. It is a group of people who agree to act together as an organisation and form an association. The group can remain informal and its members make their own rules on how the group is managed. The rules may also be referred to as a constitution. An unincorporated association is, however, an entity under tax law and treated as a company for income tax purposes.

Incorporated associations

An incorporated association is a legal entity separate from its individual members. Associations are incorporated under the state or territory legislation in which they operate. An incorporated association may operate outside the state and territory in which it is incorporated if the entity is registered as a registrable Australian body under the Corporations Act.

An incorporated association may continue operating regardless of changes to its membership. It also provides financial protection usually by limiting personal liability to outstanding membership and subscription fees, or to a guarantee.

3.3 Ongoing reporting and disclosure obligations

3.3.1 Companies

Financial reporting

All companies must keep appropriate and adequate financial records, but only some need to produce a financial report. Financial reports and directors' reports must be prepared for each financial year by all:

- disclosing entities incorporated or formed in Australia;
- public companies;
- large proprietary companies; and
- registered schemes.

Financial reports must comply with accounting standards and regulations set out in the Corporations Act; however, there are some exceptions for small proprietary companies and small companies limited by guarantee.

Continuous disclosure obligations

Continuous disclosure is the obligation imposed on companies under Chapter 6CA of the Corporations Act and, in the case of listed companies, by Chapter 3 of the ASX Listing Rules. The Corporations Act imposes strict continuous reporting obligations on disclosing entities. Disclosing entities carry continuous reporting obligations, which arise when certain material events occur in relation to the company's operational or financial position. The information that must be disclosed is that which is likely to affect the price or value of the entity's securities.

The nature and scope of these obligations depend on whether the entities are listed or unlisted disclosing entities. As a general rule, listed disclosing entities must disclose price-sensitive information 'immediately' once the entity becomes aware of it, whereas unlisted disclosing entities must disclose the information 'as soon as practicable'.

Registered foreign companies

Subject to certain exemptions, registered foreign companies must annually lodge with ASIC a copy of their balance sheet, profit and loss statement, and cashflow statement for the previous financial year, which must be prepared in accordance with the laws of the company's place of incorporation. These financial reports must be accompanied by any other documents that the company is required to prepare under the laws applicable in its place of incorporation.

ASIC may require registered foreign companies to provide further information if the accounts provided do not sufficiently disclose the company's financial position.

A small proprietary company controlled by a foreign company must prepare a financial report and directors' report only if it was controlled by a foreign company for all or part of the year and it was not consolidated for that period in the financial statements for that year lodged with ASIC by a registered foreign company.

3.3.2 Partnerships

Partnerships are not required to file any financial information concerning the partnership on any public register. Accordingly, partnerships and partners (except corporate partners) are able to keep their financial performance confidential. A partnership need not be audited, but partners are bound to render true accounts and full information regarding all things affecting the partnership to all other partners or their legal representatives.

3.4 Management structures

3.4.1 Company directors

Directors are elected to guide and monitor the management of a company. A public company must have at least three directors. At least two directors of a public company must ordinarily reside in Australia. A proprietary company must have at least one director. At least one director of a proprietary company must ordinarily reside in Australia.

Only an individual (ie, a natural person) who is at least 18 years of age may be appointed as a director. A person must give written consent to act as a director of a company before being appointed.

Directors are usually appointed by the members of the company in a general meeting or by the other directors. Directors leave office if they resign, retire, are removed in accordance with the Corporations Act or the company's constitution, or are disqualified from managing companies.

3.5 Director, officer and shareholder liability

3.5.1 Directors and officers

In performing their role, directors are subject to a range of duties and obligations under the Corporations Act, the common law and the company's constitution (if it has one).

The key duties of directors are to:

- act in good faith in the best interests of the company;
- exercise their powers for the purposes for which they were conferred;
- act with reasonable care and diligence;
- avoid conflicts of interest; and
- not improperly use company information or their position to gain an advantage for themselves or someone else or to cause detriment to the company.

Similar duties (except for the duty to avoid conflicts of interest) apply to all company officers, including secretaries.

A director may rely on certain information or advice given by certain people, provided the reliance was made in good faith and after making an independent assessment of the information or advice.

Unless the company's constitution provides otherwise, the directors may delegate any of their powers to others, and are in the first instance responsible for the exercise of the power by the delegate as if the power had been exercised by the director itself, unless the director satisfies a test of reasonableness, in which case the director will not be responsible for the delegate's exercise of power.

A director who breaches any of its duties is liable to civil penalties. If the breach is reckless or dishonest the director may also incur criminal penalties.

Liabilities of a trustee company

If a company that acts as trustee:

(1) incurs a liability that it cannot discharge; and

(ii) is not entitled to be indemnified by the trust against that liability due to the terms of the trust or because the company committed a breach of trust or acted outside the scope of the trust, the directors are jointly and severally liable to discharge the trustee company's liability (unless any particular director is held responsible).

3.5.2 Member liability

Members are not liable (in their capacity as members) for the company's debts. Their only financial obligation, subject to the company's constitution and shareholders' agreement (if any), is to pay the company any amount unpaid on their shares if called upon to do so. If the company is not a company limited by shares, in some circumstances, members may have to contribute to the costs of winding up the company (and any incidental costs).

Chapter 4: Takeovers (friendly M&A)

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4.1 Takeovers and schemes of arrangement

Takeovers in Australia are highly regulated and based on a broad prohibition against increasing a bidder's voting power in public entities above 20 per cent. The takeovers rules are outlined in the Corporations Act and specifically regulate acquisitions of substantial interests in companies or trusts listed on the ASX and unlisted Australian companies with more than 50 members.

4.1.1 The 20 per cent rule

The takeovers rules limit a person from acquiring a 'relevant interest' in voting shares of a regulated entity where a person's voting power increases from:

- 20 per cent or below to more than 20 per cent; or
- a starting point that is above 20 per cent and below 90 per cent.

Where the listed entity is not the subject of a takeover bid, disclosure is required within two business days of a party acquiring a five per cent interest and every increase or decrease of one per cent or more above this five per cent level. Disclosure must be made in a prescribed format that includes details of the number of shares and all parties with a relevant interest in the shares, including 'associates', and details of any 'relevant agreement' (formal or informal, in writing or oral, and whether or not it has legal or equitable force) through which the relevant interest arises.

The Takeovers Panel expects that where there is a control transaction and a bidder holds or acquires a long equity derivative position (eg, a holding in cash settled derivatives), it should be disclosed to the ASX unless it is under the notional five per cent level.

4.1.2 Off-market bids

There are a number of ways in which relevant interests in voting shares exceeding 20 per cent may be acquired, but an off-market bid is the most commonly used takeover method.

In an off-market bid, the bidder prepares an offer document or bidder's statement, which is sent to the target for two weeks and then to shareholders by mail (unless the target consents to early despatch). Shareholders have at least a month to consider the offer.

The target prepares a target's statement, which is also mailed to shareholders and includes the target directors' recommendation. If the directors do not recommend the bid, the bid is considered hostile. The offers are accepted by shareholders completing and returning acceptance forms prior to the offer expiry date.

Once a bidder decides to make an off-market bid, the bidder must serve a bidder's statement on ASIC and the target, and dispatch it to shareholders between 14 and 28 days later (in a friendly bid, early dispatch is often granted by the target).

Where an offer includes scrip (ie, consideration by way of an issue of shares), the bidder's statement must comply with the prospectus requirements of the Corporations Act, which requires inclusion of all the information that investors and their professional advisers would reasonably expect to enable them to make an informed assessment of the rights and liabilities of the securities being offered as well as the assets and liabilities, financial position and performance, profits, losses and prospects of the company issuing the securities. The position is somewhat more fluid when the issue of scrip is in a proprietary company; however, ASIC has released guidance to the effect that the prospectus requirements should nevertheless apply in these instances. Reduced disclosure rules may apply if the shares offered have been continuously quoted on ASX during the previous 12 months.

An off-market bid may be subject to a wide variety of 'defeating conditions' that prevent a binding contract from being formed if not satisfied or waived. Common conditions include:

- a minimum acceptance condition, often set at 90 per cent, allowing offers to be withdrawn unless the bidder can proceed to compulsory acquisition and outright control. The condition may be fixed at 50 per cent or less if the bidder is satisfied with less than complete control;
- regulatory considerations, including the Foreign Investment Review Board (FIRB), where the bidder is a foreign person, and the Australian Competition and Consumer Commission (ACCC), where there are competition (antitrust) concerns; and
- negative conditions relating to certain events not occurring during the bid period, such as the target altering its share capital, disposing of all or a substantial part of its business or assets, or an insolvency event.

4.1.3 Market bids

A market bid must be an unconditional cash offer for securities quoted on ASX and is carried out by purchasing the target's securities at market. Because of the unconditional nature of this bid (among other considerations), this is a far less common method of takeover than an off-market bid.

The major steps of a market bid are as follows:

- the bidder arranges a broker to make an announcement to stand in the market and purchase all shares offered at the offer price for a minimum of one month; the market bid commences 14 days later, although the bidder may start acquiring shares shortly after the announcement;
- the bidder gives its bidder's statement to the target, ASX and ASIC on the day of the announcement and to target shareholders within 14 days. Disclosure requirements are similar to an off-market bid; and
- to accept, each shareholder must arrange for the sale of its shares on the stock market. The sale is subject to the normal three-day trade settlement process.

4.1.4 Schemes of arrangement

Schemes are commonly used as an alternative to 'friendly' off-market takeovers, but are mainly used in complex, large-scale mergers that would be difficult to arrange through a takeover bid. The notice of scheme meeting sent to shareholders must be accompanied by a detailed explanatory memorandom. An independent expert's report advising whether the offer terms are fair and reasonable for shareholders may also be required. Unlike takeover bids, schemes require the involvement of the court.

Shareholders' meetings are convened by court order. After shareholders approve the scheme by the requisite majorities (75 per cent of the votes cast on the scheme resolution, and over 50 per cent of the shareholders present and voting at the scheme meeting), the court is asked to grant orders to implement the scheme. As part of the approval process, ASIC reviews the scheme documents and, if satisfied with them, gives a no objection statement to the court.

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

Chapter 5: Foreign investment

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5.1 Foreign investment control/restriction

5.1.1 Background

In Australia, foreign investment is generally encouraged, but notification and approval is required for certain types of investments.

Foreign investment in Australia is regulated by a framework that includes:

- Foreign Acquisitions and Takeovers Act, 1975 (Cth);
- Foreign Acquisitions and Takeovers Regulation, 2015 (Cth) and;
- Federal Government's Foreign Investment Policy.

Foreign investors in certain industries may also be subject to requirements under the recently enacted Security of Critical Infrastructure Act, 2018 (Cth). The Australian Tax Office also keeps a record of all foreign persons who hold agricultural land and registrable water entitlements in accordance with the Register of Foreign Ownership of Water or Agricultural Land Act, 2015 (Cth).

FIRB examines foreign investment proposals and makes recommendations to the Australian Government on those proposals.[1] The Australian Government minister responsible for foreign investment decisions is the Australian Treasurer.

5.1.2 National interest considerations

The Treasurer (or its delegate) reviews foreign investment proposals against the 'national interest' on a case-by-case basis. The national interest is not defined and is given a flexible meaning having regard to all relevant circumstances, but the Treasurer will typically consider national security, impact on competition, Australian Government policies (including tax revenue and environmental objectives), impact on the Australian economy and community, and the character of the investor. Additional considerations apply to investments in the agriculture sector and those made by foreign governments and foreign government investors.

For significant decisions, the Treasurer consults broadly with its consult agencies, which include the Australian Government and its instrumentalities, state and territory governments and their instrumentalities, national security agencies and authorities with responsibilities relevant to the proposed action.

The Treasurer can block foreign investment proposals that are contrary to the national interest or apply conditions to the way these proposals are implemented to ensure that they are not contrary to the national interest.

5.1.3 Foreign persons

Australia's foreign investment legislation applies to investment proposals by foreign persons. A foreign person is defined to mean:

- an individual who is not ordinarily resident in Australia;
- a foreign government or foreign government investor;[2] or

1 Further information about FIRB and Australia's foreign investment framework is available at FIRB's website https://firb.gov.au accessed 13 May 2020.

2 Foreign government investors include not only a foreign government but also any corporation, trustee of a trust or a limited partnership (the general partner of which is treated as a foreign person) in which a foreign government has a 20 per cent or more interest or in which two or more foreign governments have a 40 per cent or more interest in aggregate.

- any corporation, trustee of a trust or general partner of a limited partnership in which:
  - a foreigner (ie, an individual not ordinarily resident in Australia, a foreign corporation or a foreign government) has a 20 per cent or more interest; or
  - two or more foreigners have a 40 per cent or more interest in aggregate.

5.1.4 Notification of transactions to the Foreign Investment Review Board

Whether notification of an investment by a foreign person is required is determined by reference to the type of investor and the type of investment, the industry sector in which the investment will be made; and the value of the proposed investment.

The Treasurer must be notified of any proposed investment by a foreign person before that action can be taken. This is known as a 'Notifiable Action'. An offence may be committed and civil penalties may apply if notice is not given. An action is only notifiable if it meets certain threshold tests.

Certain other transactions, referred to as 'Significant Actions', do not require prior notification or approval from the Treasurer, but as the Treasurer holds the power to make a variety of orders in relation to a Significant Action, including prohibiting the transaction because it is contrary to Australia's national interest, it is common voluntarily to notify the Treasurer that a Significant Action is proposed.

Parties may enter into agreements relating to a Significant Action or a Notifiable Action prior to the Treasurer's decision; however, such agreements must be conditional upon the Treasurer granting the transaction.

Foreign investment applications involve submitting an online form and certain additional information via the FIRB Application Portal. Application fees are due to the Australian Government in respect of foreign investment notifications.

Civil and criminal penalties may be imposed on foreign persons for failing to give notice regarding an investment that is subject to Australia's foreign investment laws and for other breaches of these laws.

5.1.5 Monetary thresholds

In most cases, a foreign person need only notify the Treasurer of its investment if the investment meets certain monetary thresholds. The thresholds depend on the type of investor and the actions proposed by that investor. The FIRB website holds the most up-to-date information rergarding the thresholds, which are subject to change.[3]

5.1.6 Special industry sectors

Specific additional restrictions on foreign investment apply to the industry sectors of media, telecommunications, transport, defence and military-related industries and activities, encryption and

3 See https://firb.gov.au/exemptions-thresholds/monetary-thresholds accessed 13 May 2020.

securities technologies and communications systems, and the extraction of uranium or plutonium, or the operation of nuclear facilities.

Where a transaction involves a foreign person acquiring an interest in agricultural land that will be used for a primary production business or residential development, the applicant is required to demonstrate that Australian investors had an opportunity to acquire the land in question. Advertising widely and providing equal opportunity for bids will generally suffice.

5.1.7 Exemption certificates

Exemption certificates may be applied for certain acquisitions in relation to Australian land, or in relation to acquisitions of interests in either, or both of, the assets of an Australian business and the securities in an Australian entity (including interests acquired through the business of underwriting).[4]

An exemption certificate is usually granted to foreign persons (although not usually individuals) with a high volume of acquisitions in relation to land, where the administrative burden of a number of applications outweighs the granting of the exemption certificate. A certificate will generally specify the maximum value of interests that can be acquired and also the period during which acquisitions can be made.

5.1.8 Timeframe for decisions

Under the Foreign Acquisitions and Takeovers Act, the Treasurer has 30 days to consider a formal notification and make a decision for both voluntary Significant Actions and compulsory 'Notifiable Actions'. The 30-day period starts when the Australian Government receives the correct filing fee (the 'Statutory Deadline').[5]

In routine cases, a decision is usually made within 30 days of lodgement of a notification. In circumstances where notifications relate to sensitive sectors or involve investors with broader political or strategic objectives that may be contrary to Australia's national interest, then the timeframe to obtain a decision is likely to exceed 30 days. In such circumstances FIRB will invite the applicant to request an extension to the Statutory Deadline. It is common practice that an applicant will voluntarily make such an extension request if FIRB indicates that it will not be able to meet the 30-day Statutory Deadline, as the alternative would be the imposition of an interim order, which is not desirable.

On 29 March 2020 the Treasurer of Australia announced that the timeframes had been extended with immediate effect to six months to accommodate the reduction in all thresholds to AU$0.00 as a consequence of the Covid-19 outbreak.

5.1.9 Conditions placed on foreign investment

Approval of the transaction may be subject to conditions imposed to satisfy the Treasurer that the transaction is not contrary to the national interest. Compliance with these conditions is compulsory.

4 Further details in relation to exemption certificates and other exemptions are available on the following FIRB webpages: https://firb.gov.au/investment/land-exemption-certificates, https://firb.gov.au/guidance-resources/guidance-notes/gn26 and https://firb.gov.au/exemptions-thresholds/exemptions accessed 13 May 2020.

5 The Treasurer may make an interim order if a proposal is complicated or further information is required, which extends the timeframe for the making of a decision by a maximum of 90 days. Once it does so, no further voluntary extensions are permitted.

Standard tax conditions are now routinely imposed for most transactions. Examples of the standard conditions include providing documents or information to the Australian Tax Office, and the payment of outstanding tax debts.

Conditions also apply to transactions involving vacant non-agricultural land, with approval generally conditional on the foreign investor commencing construction of a proposed development within five years of approval, and retaining the land until construction is complete.

5.2 Foreign exchange control

There are various anti-money laundering and counterterrorism financing reporting requirements associated with bringing physical currency into and out of Australia, as well as international electronic funds transfers. However, Australia does not have foreign exchange controls that restrict currency inflows or outflows

5.3 Applicable tax incentive or grant

The Australian Government offers a range of tax incentives to encourage investment in Australia. Some common incentives include:

- a research and development (R&D) tax incentive, which provides eligible entities with an aggregated turnover of less than AU$20m per annum a 43.5 per cent refundable tax offset for expenditure on eligible R&D activities. A 38.5 per cent non-refundable tax offset is available for all other eligible entities on eligible R&D activities;
- an early stage innovation company (ESIC) tax incentive, which provides eligible investors who purchase shares in an ESIC with a non-refundable carry forward tax offset equal to 20 per cent of the amount paid for their newly issued shares in the ESIC and a concessional capital gains tax (CGT) treatment for all interest in the Australian ESIC in certain circumstances; and
- a range of venture capital tax concessions.

In addition, the Federal Government has various grant programmes, and the state and territory governments also offer various incentives and grants to local and foreign companies.

Australia's tax system is highly complex and continually evolving. It is important to stay updated on the latest tax policies as incentives and grant programmes are amended frequently.

Chapter 6: Restructuring and insolvency

Stephanie Daveson, Clayton Utz, Brisbane

6.1 The significance of insolvency in Australia

A company is considered insolvent in Australia if it is unable to pay all of its debts as and when they fall due. Solvency is assessed primarily on a cashflow basis, but the company's balance sheet may also be considered. Australian law seeks to protect creditors and third parties dealing with insolvent companies.

Directors and officers who trade a company while it is insolvent potentially expose themselves to civil and criminal liability under Australian law. Civil liability is more common and, if established, typically requires the directors to compensate the company (by then in liquidation) for the trading debts incurred during the period of insolvency. However, insolvent trading laws have recently been reformed to include a 'safe harbour' carve-out for directors from personal liability.

Under Australian law, insolvent companies may be subject to one of several forms of external administration, which aim to protect and maximise value for creditors. In all of these forms of external administration, the administrator appointed to the company or its assets will be an independent third party, typically a specialised insolvency accountant with official accreditation. The external administrator's remuneration, costs and expenses will usually be a first-ranking priority from the company's assets protected by a lien.

If a company is under external administration, that status will appear in company records maintained by ASIC. The Corporations Act also requires that the company include this status after its name in all communications.

6.2 Restructuring

Most modern international restructuring techniques used in the United Kingdom and the United States are available in a similar form under Australian law. Although there is no Australian equivalent of Chapter 11 of the US Bankruptcy Code, which involves the proposal and adoption of a plan of reorganisation, many of the benefits of that system can be achieved in Australia (including via creditor enforcement moratoriums and priority lending).

Restructuring can occur as part of, or separate to, external administration in Australia. Certain forms of external administration may be required to implement a restructuring plan. This will depend on the company's solvency and whether the company wishes to take advantage of statutory protections or rights available in certain forms of external administration to implement the restructure. Examples of protections or rights include a moratorium on creditor enforcement, a mechanism to extinguish creditor claims, and the suspension of the powers of directors in favour of an external administrator.

A company may also engage a chief restructuring officer or turnaround manager to assist with, manage or implement a restructuring plan. External legal and accounting advisers will typically be engaged to advise on the preparation and implementation of the restructuring plan.

6.3 Types of external administration

6.3.1 Receivership

A receivership is a form of external administration in which a receiver, or a receiver and manager (also referred to as a controller), is appointed by a secured creditor or the court to administer certain or all of a company's property.

The most common form of appointment is made by a secured creditor pursuant to a contractual right within a security instrument granted in its favour by the company. The court may also appoint a receiver where it considers it appropriate (typically where the security instrument does not contain a power to appoint a receiver), but this is not common.

The role of the receiver is to take possession of and sell the company's property subject to the security and to apply sale proceeds to the amount owed to the secured creditor. The receiver is required by law to take all reasonable care to sell the property for its market value or the best price obtainable in the circumstances.

The powers of a company's directors are limited during a receivership. A receiver has all the rights and powers to deal with the assets that are the subject of their appointment, to the exclusion of the directors.

A receivership ends when the appointing secured creditor is paid in full or all of the secured assets have been realised, or by order of the court.

6.3.2 Voluntary administration

Voluntary administration is a form of external administration in which a qualified insolvency accountant is appointed to take control of a company to investigate its financial affairs and report to creditors. The voluntary administrator has a statutory timeframe for investigations, reporting to creditors, as well as convening and holding meetings of creditors. The whole process typically takes 25–30 days unless extended by court order (which, in the case of complex corporate structures, is common).

To assist in this process, the administrator has all the powers of the company's directors (which are suspended during this period) and the benefit of a statutory moratorium preventing creditors or third parties taking action against the company or its property without the consent of the administrator or the leave of the court.

The administrator must ultimately recommend to, and have creditors vote on, the future direction of the company, namely whether the company should:

- be returned to its directors;
- enter into a deed of company arrangement (DOCA) (see below); or
- be placed in liquidation.

A secured creditor, with security over the whole (or substantially the whole) of a company's assets, may appoint a receiver or controller to the company's property within 13 business days of the appointment of a voluntary administrator (or otherwise with the consent of the administrator or by court order). The receiver's rights and powers in relation to that property will be superior to those of the voluntary administrator.

6.3.3 Deed of company arrangement

A DOCA is a form of external administration in which a deed administrator manages a contractual compromise between a company and its creditors. As noted above, a DOCA is one the potential outcomes of a voluntary administration.

A voluntary administrator will seek DOCA proposals prior to convening the second meeting of creditors in the administration, with the aim of tabling a proposal for creditors to vote on at that meeting. For a DOCA proposal to succeed, it usually needs to demonstrate to creditors that they will receive a greater return under the DOCA than they would in a liquidation scenario.

The typical objective of a DOCA is for the deed administrator to generate a monetary fund from the company's assets or through a contribution from a third party (often the directors or their associates) to be distributed to admitted creditors in full and final satisfaction of their claims (which will then be extinguished). The company would then be returned to its existing or new directors free from debt.

There is no standard form of DOCA. The Corporations Act provides significant flexibility for a DOCA to be tailored to suit most restructuring situations. These may involve selling or transferring assets, issuing shares, compromising debts and agreeing priority payments to creditors outside of the usual statutory order in a liquidation scenario.

6.3.4 Liquidation

Liquidation is a terminal process by which an appointed specialist insolvency accountant winds up a company's affairs, realises its assets, distributes the proceeds to admitted creditors in accordance with statutory priorities under the Corporations Act and ultimately deregisters the company. A company can be placed in liquidation in one of three ways:

1. by resolution of its members;
2. by resolution of its creditors; or
3. by order of the court.

Liquidation most commonly occurs where the company is insolvent. The liquidator will control the company during liquidation, and the powers of the directors and other office holders will cease.

In producing a fund for distributing to admitted creditors, a liquidator is also empowered to apply to the court to seek orders:

- requiring a director to compensate the company where that director has traded the company while it was insolvent; and

- to have certain company transactions declared void, such as unfair preferences, uncommercial transactions, unfair loans and unreasonable director-related transactions.

A liquidator will call for proofs of debt from potential creditors, and formally adjudicate each proof to determine whether each party is a creditor. The liquidator also determines if creditors should be afforded any priority for payment under the Corporations Act, and the total amount of each creditor's admitted debt. There will be no return to shareholders unless all claims of admitted creditors are satisfied in full.

A secured creditor may appoint a receiver or controller to all or some of a company's property during a liquidation. The receiver's rights and powers to that property will be superior to those of the liquidator.

6.4 Recent reforms in Australian insolvency law

6.4.1 Safe harbour

Often, directors prematurely appoint a voluntary administrator to viable companies due to the risk of personal liability for potential insolvent trading and the uncertainty associated with determining whether a company is insolvent. In 2017 the Corporations Act was amended to introduce safe harbour provisions to encourage directors to remain in control of the company and to take steps to restructure and turn the company around in circumstances where directors would otherwise appoint a voluntary administrator.

To take advantage of the safe harbour carve-out, a director must, at the time the debts are incurred, suspect that the company is or may become insolvent, and must be developing or implementing one or more courses of action that are reasonably likely to lead to a better outcome for the company than an immediate voluntary administration or liquidation. A director seeking safe harbour protection must also ensure that financial records are adequately maintained and payments for employee entitlements and tax liabilities are up to date.

6.4.2 Ipso facto

An *ipso facto* clause in a contract allows one party to terminate the contract or exercise other rights as a result of certain events, including the insolvency of the counterparty. Such a clause allows termination or other steps despite the counterparty otherwise not being in default and able to perform all obligations under the contract. These provisions are 'grandfathered' so that a party to a contract entered into after 1 July 2018 is prohibited from enforcing any rights in a contract that are enlivened due to a voluntary administrator or a managing controller being appointed or the company being subject to a scheme of arrangement (proposed to avoid an insolvent winding-up). If one of these appointments occurs, the *ipso facto* stay will also apply if a counterparty enforces a right for a reason that:

- relates to the financial position of the company;
- is prescribed by the regulations; or
- is in substance contrary to *ipso facto* provisions of the Corporations Act.

Amendments to the Corporation Regulations and Ministerial Regulations exclude a significant number of contracts and types of rights from the operation of the *ipso facto* stay. Excluded contracts include certain debt capital markets arrangements, government licences and permits.

6.4.3 Covid-19 temporary relief

On 25 March 2020, a new temporary safe harbour from liability for insolvent trading was introduced in the context of the Covid-19 outbreak for debts incurred by the company in the ordinary course of its business on or after 25 March 2020 and for a period of at least six months.

Chapter 7: Employment, industrial relations, and work health and safety

Stephanie Daveson, Clayton Utz, Brisbane

7.1 Employees' rights and protection

Australia's industrial relations system is regulated by the Fair Work Act, 2009 (Cth). Most employers in Australia are subject to its requirements. This is regardless of whether its employees are employed in accordance with an award set by an industrial body, a collective agreement or an individual employment contract. The Fair Work Act covers basic minimum conditions of employment and also specifies the right to claim against an employer for unfair dismissal.

Employers must also comply with legal requirements regarding taxation, superannuation, and work health and safety.

7.1.1 Basic minimum conditions

Qualifying employees are entitled to the minimum conditions of the National Employment Standards set out in the Fair Work Act.

These include:

- a maximum of 38 ordinary hours per week plus 'reasonable additional hours';
- four weeks of paid annual leave per year (while an employee classified as a shift worker is entitled to five weeks of paid annual leave per year);
- ten days of paid personal/carer's leave (including sick leave) per year, together with an additional two days of unpaid carer's leave and a further two days of paid compassionate leave;
- 52 weeks of unpaid parental leave for both parents at the time of birth or adoption of a child, with the option for one parent to request an additional 52 weeks;

- the ability to request flexible working arrangements as parents or carers of children under school age or under 18 with a disability; the employee must have at least 12 months' continuous service and the request may be refused on reasonable business grounds;
- long service leave based on relevant federal or state law;
- unpaid community service leave of a reasonable period for an employee engaged in an 'eligible community service activity', such as jury service or voluntary emergency management; and
- severance pay where termination of employment is for redundancy and the employee has at least 12 months' continuous service.

These rights and entitlements can be supplemented, but cannot be undercut, by a contract of employment, modern award or enterprise agreement.

Employers and employees can enter into negotiations for an enterprise agreement and can take protected industrial action in support of the bargaining claims. Industrial action taken other than in support of bargaining will not be protected under the law.

7.1.2 Unfair dismissal and the general protections

The Fair Work Act gives eligible employees the right to make a claim against their employer for unfair dismissal if a termination can be demonstrated to be harsh, unjust or unreasonable.

Small businesses that employ 15 or fewer employees and comply with a code for dismissals are also exempt from unfair dismissal laws. Moreover, an employee is not protected if they have:

- not served the 'minimum employment period' (12 months for a small business employer or six months otherwise);
- been engaged on a fixed-term contract or for a specified task;
- been engaged on a short-term, casual basis;
- been engaged as a trainee for a specified time period; or
- been engaged as a seasonal employee.

Employees are also not protected if their dismissal was due to a 'genuine redundancy' or if they earn more than the high-income threshold (which is AU$148,700 after 1 July 2019), unless they are covered by an award or enterprise agreement. This threshold is adjusted every year on 1 July.

The Fair Work Act also contains protections for persons against certain 'adverse action'. The 'general protections' protect a person from adverse action resulting from attributes such as race, religion, sexual preference, pregnancy or age, or because an employee sought to exercise their legal rights.

7.1.3 Work health and safety

Work health and safety is governed by legislation at the state level, which imposes obligations on all employers to ensure the safety of their employees while at work. Laws have largely been harmonised in most jurisdictions, apart from Victoria and Western Australia (although there are a number of state-based differences).

7.2 Statutory contributions and minimum wage

7.2.1 Minimum wages

Basic rates of pay, loadings, penalty rates and other entitlements are set by the national minimum wage and modern awards. Minimum wages, penalties and allowances can be supplemented by enterprise agreements and contracts of employment, but they cannot be undercut.

While there is a single national minimum wage, the actual minimum wage applicable to a particular employee will vary depending upon its industry and occupation, and whether one of the industrial instruments set out above applies.

7.2.2 Superannuation

Federal legislation requires employers to contribute a prescribed minimum level of superannuation for each employee. This is currently set at 9.5 per cent of an employee's ordinary time earnings, generally what the employee earns in normal working hours. This rate is set to rise incrementally each financial year, reaching 12 per cent by the 2025/2026 financial year. There are limited exceptions to this requirement.

Employers that provide less than that statutory minimum are liable to pay a non-deductible charge called the Superannuation Guarantee Charge. There are also limits on the maximum amount of superannuation contributions made for the benefit of an employee that an employer can claim as a tax deduction.

7.3 Work permits

There are a number of temporary and permanent visa options available for people who are considering working in Australia.

The permanent arrangements offer longer term options and include:

- employer-sponsored work visas, which gives the employee access to permanent residency; and
- skilled independent visas, which do not require sponsorship, but are governed by the particular occupation and a number of other requirements.

In all cases there are strict requirements regarding working visas that will need to be closely considered in an application. Obtaining specialist advice from a migration agent is recommended.

Chapter 8: Tax law

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8.1 Taxes applicable to individuals

8.1.1 Income tax

Australian residents are taxed on their income and capital gains on a worldwide basis. Non-residents are generally only taxed on their Australian-sourced income, excluding dividends, royalties and interest, which are subject to withholding tax (WHT). Similar treatment applies to temporary residents.

8.1.2 Capital gains tax

Assets acquired after 20 September 1985 are subject to CGT on the occurence of certain events. Examples of such events include the disposal of CGT assets, as well as the ending (loss, destruction, cancellation, surrender, expiry, etc) of CGT assets. Capital gains are offset against any capital losses (current or prior year) and the net capital gain for the year is included in assessable income subject to any available CGT discount.

Capital gains (and losses) of foreign and temporary residents are only recognised for certain Australian assets, including real property, indirect interests in Australian real property, the business assets of an Australian permanent establishment and any options or rights to acquire such assets.

8.1.3 Dividends paid by a company

Under the imputation system of taxation, dividends that are paid to shareholders by an Australian resident company may be franked with an imputation credit that reflects the amount of corporate tax already paid on the company's profits. Individual shareholders who receive franked dividends are entitled to a tax offset equal to the franking credit that reduces or eliminates the tax payable by them on the dividend. Non-resident shareholders are unable to use these credits to offset any tax liability. WHT is imposed at a rate of 30 per cent on the gross amount of the unfranked dividend, but this may be less for double tax treaty countries.

8.2 Taxes applicable to businesses

8.2.1 Income tax

Companies are generally taxed on their income and capital gains at a rate of 30 per cent. A lower rate is available (currently, 27.5 per cent) for small businesses that meet certain requirements. Where a foreign enterprise has a permanent establishment in Australia and a double taxation agreement applies, the foreign enterprise is taxed in relation to the profits of its permanent establishment at the general corporate rate.

Australia's tax consolidation regime allows companies, partnerships and trusts that are 100 per cent Australian-owned to choose to be taxed as a single consolidated entity. Consolidation is available for groups that are wholly owned by foreign parents where there is no single Australian resident holding company (known as multiple entry consolidated groups). Where an election is made, all wholly owned entities must be included in the consolidated group and the head company becomes liable for all group tax liabilities.

8.2.2 Interest withholding tax

Interest withholding tax is imposed on interest paid by an Australian resident as an expense of an Australian business to a non-resident lender. It also applies to interest paid by a non-resident borrower where it is an expense of their Australian branch. A flat rate of ten per cent applies on the gross amount of the interest paid.

8.2.3 Goods and services tax

Goods and services tax (GST) is a broad-based consumption tax imposed at the standard rate of ten per cent on most supplies that are made for consideration and that have a relevant connection with the indirect tax zone (ITZ). It is similar to Value Added Tax (VAT) in other jurisdictions. Supplies include goods, services, information, rights and real property. Special rules extend the application of GST to digital products or other intangible supplies made by foreign suppliers to Australian consumers, as well as to the supply of low-value goods from offshore.

No GST is payable on GST-free supplies, including certain health, food and education supplies, exports and sales of businesses as going concerns. GST is not payable on input taxed supplies, such as those relating to financial services and the sale or leasing of existing residential property. Finally, an entity will make a taxable importation and be liable to pay GST where it imports goods into the ITZ for home consumption.

GST will only be payable on supplies where the entity making the 'taxable supply' is registered or required to be registered for GST purposes. Generally, this applies if the entity's annual turnover for the previous 12 months or projected annual turnover for the next 12 months in relation to supplies that are connected with the ITZ exceeds AU$75,000 (AU$150,000 for non-profit entities). GST liability on a taxable supply generally falls on the supplier. Exceptions include supplies that are reverse charged (including voluntary reverse charging) and supplies made by non-residents through resident agents.

In certain cases, a GST-registered entity that acquires a taxable supply may be entitled to an input tax credit for the GST included in the price of that acquisition. A GST-registered entity may also be entitled to claim an input tax credit where it makes a taxable importation.

8.2.4 Payroll tax

Payroll tax is a state or territory tax that is levied at specified rates by reference to wages and salaries (and other benefits) provided to employees that exceed prescribed threshold amounts in each state or territory. Top rates in each jurisdiction vary and currently range from 4.85 per cent to 6.85 per cent.

Broad rules apply to payments to contractors and the grouping of employers for aggregating wages and salaries.

8.2.5 Fringe benefits tax

Fringe benefits tax (FBT) is imposed on employers on the taxable amount of certain benefits, which is grossed-up under a formula to produce a level of tax that equates with the cash equivalent of the fringe benefit. The FBT rate is currently 47 per cent. Employers are generally entitled to income tax deductions for the cost of providing fringe benefits and FBT paid. The FBT year is from 1 April to 31 March of the following calendar year.

8.3 Other taxes

8.3.1 Taxation of trusts

Trust income normally forms part of the assessable income of the beneficiary to the extent that they have been made 'presently entitled' to such amounts. Where there is some amount to which a beneficiary is not so entitled, that income is taxed at a rate of 45 per cent. Although a trust income tax return is required, distributions of trust income are taxed in the hands of the respective beneficiary at their individual tax rate. The tax laws also have specialised taxing regimes in respect of specialised investment vehicles, such as Managed Investment Trusts and Attribution Managed Investment Trusts.

8.3.2 Taxation of partnerships

Partnerships are subject to pass-through taxation treatment (the shares of partnership profit or loss are taxed at the rate of each respective partner). Capital gains and losses relating to partnership interests and CGT assets of a partnership are made by the partners individually. Certain partnerships, such as the corporate limited partnership, are not subject to pass-through taxation and are instead taxed as companies.

8.3.3 Stamp duty

Stamp duty is charged in all Australian states and territories on the transfer of real property and other types of property. The rates vary by jurisdiction and are applied on a sliding scale to the greater of the consideration paid for the property and the value of the property. As of 1 January 2020, the maximum rate varies from 4.5 per cent to seven per cent, depending on the jurisdiction. Further duty (as of 1 January 2020, at a rate ranging from 0.5 per cent to eight per cent) applies to foreign purchasers of certain property in certain jurisdictions.

8.3.4 Land tax

Land tax is a tax levied annually in all states and territories (other than the Northern Territory) on the unimproved value of taxable property that is above the relevant land tax threshold. Rates (as of 1 January 2020, generally a top rate ranging from 1.1 per cent to 3.7 per cent) and thresholds vary in each jurisdiction. Surcharge land tax (as of 1 January 2020, ranging from 0.75 per cent to 4.25 per cent) can also be imposed on foreign owners of certain land in some jurisdictions. Exemptions and concessions may be available for certain types of land in certain jurisdictions (eg, primary production land).

8.3.5 Other specific taxes

Customs duty is payable at the time goods enter Australia and generally levied on the customs value of those goods as determined in accordance with Australian law.

Excise duty is imposed on certain goods (eg, alcohol, tobacco, fuel and petroleum products) that are produced or manufactured in Australia. If these products are imported into Australia rather than produced or manufactured in Australia, customs duty applies.

Chapter 9: Intellectual property

Alberto Colla, MinterEllison, Melbourne

9.1 Patents

A standard patent confers on the patentee the exclusive right to exploit commercially the patented invention for a term of 20 years. Australia's criteria of patentability for standard patents is closely aligned with international standards.

Alternatively, a patentee may apply for an innovation patent, which provides protection for eight years. An innovating patent is designed to protect inventions that do not meet the inventive threshold required for standard patents. Following an inquiry into intellectual property, the Australian Government has begun phasing out this type of patent. This means:

- the last day you can file a new innovation patent will be 25 August 2021; and
- existing innovation patents that were filed on or before 25 August 2021 will continue in force until their expiry. This will ensure current rights holders are not disadvantaged.

For both types of patents, the invention must be detailed in a specification (which may be provisional, later followed by a complete specification) describing the invention and concluding with claims that determine the ambit of the monopoly afforded by the patent.

The invention must be novel and amount to a manner of manufacture as that phrase is understood. The invention must also involve either an inventive step (for a standard patent) or an innovative step (for an innovation patent). The specification must be clear and unambiguous, and the claims fully supported by the information disclosed in the specification.

9.2 Trademarks

Australia protects reputation and goodwill in names through passing off law and consumer protection laws that prohibit misleading commercial conduct.

In addition, Australia has a registered trademark system for names, logos, devices, sounds, smells, colours and shapes that distinguish the goods or services of one owner from those of other owners. Registering a trademark provides the owner with the exclusive right to use and commercialise that mark in relation to specified classes of goods and services.

Trademark registration usually lasts for an initial term of ten years and can be renewed on an ongoing basis. If the owner of a registered trademark does not use its mark, it may be removed from the register for non-use.

Australia follows the international system of classification of goods and services. Early trademark registration is desirable for those seeking to enter the Australian market. Australia also has a federal system for registering business names for persons conducting business under a name other than their own name or company name.

9.3 Copyright

Copyright is the exclusive right to reproduce, publish, perform, communicate and adapt original literary (including computer programs), artistic, dramatic and musical works, together with other protected subject matter, such as films and sound recordings. Australia's copyright laws also provide for the protection of moral rights, which give authors the right of attribution, the right to prevent false attribution and the right to have copyrighted works treated with integrity.

Copyright arises automatically on the creation of a work and generally continues for 70 years after the death of the author. Australia is a member of the various international conventions on copyright and so affords reciprocal protection for copyright recognised in other member countries.

The Copyright Act, 1968 (Cth) has been through a number of reforms to address copyright issues arising in the 'internet age' and as a result:

- protects copyright owners from the unauthorised digitisation of their works and unauthorised communication of their works over the internet and other electronic means;
- limits the liability of internet service providers and software manufacturers for copyright infringement by users of their facilities and software; and
- prohibits the making, sale, distribution and use of circumvention devices for the purpose of circumventing a technological protection measure.

Prohibition of unauthorised imports is subject to significant exceptions. The Copyright Act permits the parallel importation of overseas published books and sound recordings, as well as, more recently, electronic literary and music items, and computer software.

9.4 Designs

The Designs Act, 2003 (Cth) provides for the registration and protection, for a period of up to ten years, of any design that is both 'new' and 'distinctive'. A design is the 'overall appearance of a product resulting from one or more visual features of a product', including shape, configuration, pattern and ornamentation.

Registration in Australia requires that the design be novel and not have been publicly used in Australia or published in a document anywhere in the world prior to applying for registration in Australia.

A person infringes a registered design if they deal in certain ways with a product that embodies the design or a substantially similar design. A defence applies for spare parts, allowing third parties to manufacture legitimate spare parts for complex products without infringing the registered design in the complex product.

9.5 Other

9.5.1 Domain names

Various classes of domain names ending in .au may be registered. Domain names ending in .com.au and .com are the most popular addresses for commercial entities operating in Australia. For a .com.au domain name, a substantial and close connection must exist between the commercial entity and that entity's domain name, which can be demonstrated by reference to the trademarks, 'nicknames' or acronyms of an entity, not just its company or business name.

Registration of a .com.au domain name does not create any proprietary rights in that name. Australian courts will, however, recognise rights in domain names where there is a reputation or goodwill in the name.

9.5.2 Trade secrets and confidential information

Both through contract and where information is imparted in confidential circumstances for a limited purpose, effective protection can be provided for technical know-how, customer lists and other confidential information against disclosure or use for an unauthorised purpose.

9.5.3 Plant breeder's rights

The plant breeder's rights scheme allows certain varieties of plant species to be registered, granting the breeder exclusive commercial rights with respect to that variety of plant.

Registration requires that the variety be distinct, and for propagations to be uniform and stable, and gives the breeder a series of exclusive rights, including producing, selling and exporting the plant material. Protection may last for up to 25 years depending on the plant species.

9.5.4 Circuit layouts

Circuit layouts are automatically conferred protection under the Circuit Layouts Act, 1989 (Cth), so there is no requirement to register the layout in order to be granted the exclusive right to copy, commercially exploit in Australia or make an integrated circuit of the layout. Circuit layouts may be protected for a term of up to 20 years.

Chapter 10: Financing

Alberto Colla, MinterEllison, Melbourne

10.1 Licensing requirements for banks

10.1.1 Background

The principal licensing obligations for banking in Australian arise under the Banking Act, 1959 (Cth), National Consumer Credit Protection Act, 2009 (Cth) (NCCP) and Corporations Act. A bank seeking to provide customers with the full ambit of banking services will have licensing requirements and associated obligations under each piece of legislation.

The obligations will vary depending on who is receiving the banking service (ie, retail or wholesale client) and what type of banking service is offered (eg, credit and home loans, deposit or investments products, payment products or products to manage risk, such as derivatives).

10.1.2 Banking business: authorised deposit-taking institution licence

An entity must be authorised as an authorised deposit-taking institution (ADI) by the Australian Prudential Regulation Authority (APRA) before it can carry out banking business in Australia. A 'banking business' includes the taking of money on deposit, the making of advances of money or any other financial activities prescribed under the Banking Act. It is an offence to conduct banking business without a proper authority.

Only corporations can obtain an ADI licence. APRA will not consider applications from partnerships, associations or other types of unincorporated entities. APRA expects that all applicants will be able to comply with the various prudential standards from the commencement of its banking operations. Applicants must satisfy the following: capital requirements, shareholding ownership rules, governance standards, adequate risk management and internal control systems, compliance mechanisms, information and accounting systems, and have external and internal audit arrangements.

Foreign Banks which are authorised to carry on a banking business in an overseas jurisdiction can apply to APRA to conduct a banking business through an Australian branch. Deposits in foreign ADIs do not receive the benefit of Australia's financial claims scheme and foreign ADIs are usually restricted to conditions relating to the opening of a deposit account (requiring a minimum balance) that in practice effectively restrict them to the wholesale market.

Foreign banks merely opening a representative office in Australia (not a full branch) are also regulated under the Banking Act and are required to obtain the written consent of APRA. Consent is required for foreign banks to use the word ‘bank’ or its equivalent as part of the bank’s corporate name in connection with maintaining a representative office.

10.1.3 Australian financial services licence

Any entity intending to run a financial services business in Australia is required to hold an Australian financial services licence (AFSL) unless an exemption applies. Most Australian banks will hold an AFSL. Those who hold an AFSL are subject to regulation by ASIC.

Under the Corporations Act, financial services include providing advice in relation to financial products, dealing in a financial product, making a market for a financial product, operating a registered managed investment scheme, providing a custodial or depository service and providing traditional trustee company services.

Financial products broadly fall into three categories:

1. products through which a person makes an investment;
2. products through which a person manages a risk; and
3. non-cash payment products.

Banking services that are financial products include: derivatives, debentures, foreign exchange contracts and contracts of insurance (see further section 764A of the Corporations Act).

Importantly, consumer credit is not regulated under the Corporations Act.

An AFSL identifies whether the holder is authorised to provide services to retail and/or wholesale clients. There are additional protections applicable to retail clients (eg, provision of a Financial Services Guide) which do not apply to wholesale clients. Wholesale customers are customers like larger corporations, but can include high-net-worth individials (HNWIs) with an assumed level of business sophistication. The AFSL will also identify the particular products or services that the holder is authorised to provide. This may mean, for example, that when a financial institution engages in a new type of business, it must seek a variation to its licence to include new areas of business not previously covered by its AFSL.

10.1.4 Australian credit licence

Since 1 July 2010, a national licensing scheme has applied to entities that engage in credit activities (including the provision of leases) in relation to consumers under the NCCP. Most of the specific requirements are contained in the National Credit Code (schedule 1 to the Act) (NCC). ASIC is responsible for administering the NCCP.

Generally, the NCC applies to credit that is provided to a natural person or strata corporation and is wholly or predominantly for personal, household or domestic purposes, or residential property investment (see section 5 of the NCC for a full definition). Common examples of regulated products are home loans, credit cards and personal loans. Loans for business purposes are not regulated under the NCCP. Australian financiers who lend to consumers must hold an Australian credit licence and are subject to the responsible lending obligations under the NCCP. Responsible lending requires the licensee to make reasonable enquiries about the consumer's requirements and objectives, and to take reasonable steps to verify the consumer's financial situation to ensure that a loan is not unsuitable.

A bank engaged in consumer credit activities would need to hold both an AFSL and an Australian credit licence.

10.1.5 Compliance with the Anti-Money Laundering and Counter Terrorism Financing Act

The purpose of the Anti-Money Laundering and Counter Terrorism Financing Act (the 'AML/CTF' Act) regime is to identify and track money that is either the proceeds of criminal behaviour or that is to be used for the funding of terrorist activities. The current AML/CTF Act, 2006 (Cth) and the AML/CTF Rules Instrument, 2007 (No 1) (Cth) was passed by Parliament in 2006 and replaced the earlier regime, known as the Financial Transactions Reports Act, which dated back to 1988.

An organisation may be caught by the AML/CTF regime if it provides a 'designated service' that falls within one of three broad categories: financial services, bullion services or gambling services. Banking services, such as the provision of deposit accounts, loans and remittance services, are included in the definition of designated services. If an entity provides a 'designated service', then it will be considered a 'reporting entity' under the AML/CTF and will have to register with the Australian Transaction Reports and Analysis Centre. Reporting entities must have an AML/CTF Compliance Programme and, among other obligations, are expected to verify the identity of each customer (ie, Know Your Customer requirements), conduct ongoing monitoring obligations and observe mandatory reporting obligations (triggered by cash transactions above a specified threshold, and international funds transfer and suspicious matters).

10.1.6 Unfair contract terms for small business and consumer lending

The ASIC Act, 2001 (Cth) contains a number of basic protections for consumers and small businesses in relation to the provision of financial products and credit. These include protections from unfair contract terms in standard form contracts. ASIC is the relevant regulator for financial products and services offered to consumers and small businesses. Following the 2018 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, there has been significant activity by ASIC in the banking sector to ensure that banks are not imposing unfair contract terms on their consumers and small businesses.

Chapter 11: Privacy laws and data protection

Alberto Colla, MinterEllison, Melbourne

The Privacy Act, 1988 (Cth) is the primary means of privacy protection in Australia. It applies to the handling of personal information and also has specific requirements for handling credit and tax file number information. Compliance with the Privacy Act is regulated by the Australian Information Commissioner (the 'Commissioner') and its office, the Office of the Australian Information Commissioner (OAIC).

Australian privacy laws are principles-based. The Privacy Act contains 13 Australian Privacy Principles (APPs) that set out how both private sector organisations and public sector agencies must collect, use, disclose and store personal information.

The APPs also give individuals certain information privacy rights, including:

- a right to access the personal information an entity holds about them;
- a right to correct that information; and
- a right to make a complaint and have it dealt with.

There are restrictions on using personal information for direct marketing purposes and other laws will apply if direct electronic marketing (eg, emails and texts) or telemarketing is being conducted. While personal information may be disclosed overseas, certain steps must first be taken and entities generally remain accountable for the handling of the information by the overseas recipient. Employers' handling of personal information about their current or former employees is exempt from the Privacy Act.

The Privacy Act gives the Commissioner functions and powers, including the power to receive and investigate privacy complaints, make determinations (including payment of compensation), conduct own motion investigations, seek enforceable undertakings from an entity and apply to the court for civil penalties.

The Privacy Act also includes a notifiable data breach scheme, which requires regulated entities to notify eligible data breaches (ie, where a person is likely to suffer serious harm from a privacy data breach) to the Commissioner and affected individuals. Entities must also assess suspected eligible data breaches.

11.1 Consumer data right

In 2019 the Australian Government began implementing new laws that create a data right for consumers (individuals and businesses) in Australia. The purpose of the right is to:

- give consumers greater control over access to, and direct sharing of, their consumer data; and
- increase competition in a sector by making it easier for consumers to compare product offerings.

The consumer data right regime currently applies to the banking sector and will be implemented on a sector-by-sector basis with the energy sector to follow.

Chapter 12: Competition law

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The Australian Competition and Consumer Act, 2010 (Cth) (CCA) (formerly known as the Trade Practices Act) regulates competition and consumer protection law in Australia.

The competition provisions of the CCA are based on antitrust legislation in the US and are not dissimilar to the antitrust provisions of the European Community's Treaty of Rome.

The CCA prohibits:

- cartels;
- resale price maintenance;
- anti-competitive concerted practices;
- misuse of market power;
- exclusive dealing;
- anti-competitive mergers; and
- a range of unfair business practices, including when dealing with consumers and small businesses.

It also imposes obligations on businesses designed to protect consumers, provides an access regime for essential facilities, and provides a specific access and competition regime for the telecommunications industry.

The ACCC is responsible for administering and enforcing the CCA. It has the power to authorise, on public benefit grounds, conduct that may otherwise breach the CCA.

There are significant consequences for contraventions of the CCA, including potential imprisonment, fines, compensation, corrective action and other orders.

12.1 Cartels and RPM

The CCA prohibits anti-competitive behaviour, such as agreements between competitors to:

- fix, maintain or control prices;
- split up a market or customers;
- restrict or limit supply, production, capacity or acquisition;
- rig bids; or
- impose a minimum resale price or induce resellers not to sell products below a specified price.

12.2 Concerted practices and other anti-competitive agreements

The CCA also prohibits ‘concerted practices’, which include coordination between corporations that may otherwise fall short of an agreement, arrangement or understanding that has the purpose, effect or likely effect of substantially lessening competition in a market.

The CCA also prohibits agreements, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition in a market.

12.3 Misuse of market power

It is illegal for a corporation with a substantial degree of market power to engage in conduct that has the purpose, effect or likely effect of substantially lessening competition.

12.4 Exclusive dealing

Various forms of exclusive dealing (including restrictions on acquiring or supplying) are illegal if they have the purpose, effect or likely effect of substantially lessening competition in a market.

12.5 M&A

The CCA prohibits the acquisition of shares or assets of a company if the acquisition is likely to have the effect of substantially lessening competition in a market in Australia.

The acquisition of a foreign company by another foreign company may be subject to the CCA if, as a consequence, a controlling interest in a company in Australia is acquired.

The ACCC undertakes reviews of M&As that raise (or may raise) competition concerns.

Chapter 13: Dispute resolution

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13.1 Structure of the courts

Under Australia’s Constitution and the doctrine of ‘separation of powers’, the judiciary is independent from the executive and legislative arms of government.

The High Court stands atop both the federal and state courts in Australia. It has jurisdiction over constitutional matters, international law cases and all final appeals from the lower courts.

The Federal Court of Australia has jurisdiction over civil matters arising under federal laws, as well as criminal cases involving federal crimes. There are federal courts located in all states and territories. Taxation, consumer law, bankruptcy, industrial relations and corporation law are examples of the types of matters heard in the federal jurisdiction. The Federal Circuit Court of Australia sits at the bottom of the federal court hierarchy, hearing less complex disputes involving federal laws.

The state court systems are similar across all states and territories. There is generally a superior court (the Supreme Court), an intermediate court (known as the District Court in NSW, and the County Court in Victoria) and a lower court (known as the Local Court in NSW, and the Magistrates' Court in Victoria). The majority of civil and criminal offences in Australia are state offences, and the state courts hear the vast majority of cases. Courts atop the state court hierarchy hear cases with large potential financial penalties and custodial sentences, while lower courts hear smaller civil matters, less serious indictable offences and summary offences.

13.2 Use of arbitration

International commercial arbitration in Australia is governed by the International Arbitration Act, 1974 (Cth), which is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law. This provides for various matters, including the staying of court proceedings capable of settlement by arbitration and the enforcement of awards under various arbitration conventions.

By the operation of this act, arbitration is very much in use in Australia. Courts are required to refer parties to arbitration when presented with an unresolved matter covered by an arbitration agreement, and arbitration agreements are often interpreted approvingly by the courts. Australian courts have also held that arbitration awards are consensual and private, therefore not subject to challenge on the basis of constitutional invalidity.

Domestic arbitration is also frequent and consistent across states and territories, with uniform legislation across each domestic jurisdiction.

13.3 Other forms of dispute resolution

Alternative dispute resolution (ADR) is extremely common in Australia. Courts are considered a last resort and parties are often required to engage in ADR mechanisms before they may proceed with litigation in court.

The most common ADR process is mediation. This typically involves a meeting between two parties in a disagreement, moderated by a third-party mediator. The mediator has no authority to impose a settlement, and the process is strictly voluntary. However, by identifying issues and assessing options, mediation is highly successful in helping parties reach a compromise and arrive at a settlement.

The ADR process is broader than mediation alone; it extends to expert appraisals, private judgments and online dispute resolution. ADR is cheaper and faster than litigation, involves flexible settlements, enables the private resolution of disputes and can leave both parties highly satisfied.