Foreign investment in Australia

2014 edition
Norton Rose Fulbright

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Introduction


This new edition bundles up our local market knowledge, our emphasis on quality and our geographic reach to provide you with a key reference source.

Australia welcomes and encourages foreign investment, particularly direct investment, which will foster export-orientated, internationally competitive industries. Joint ventures and new enterprises, which will continue to diversify the Australian economy, are especially welcome. Foreign capital plays a fundamental role in the development of Australia’s industries and resources. Foreign investors, both in partnership with local companies or on their own account, are readily able to pursue opportunities in Australia.

This publication is intended as a general introduction to the regulatory framework relating to foreign investment in Australia. It will be of particular value to inbound investors and their advisers looking for a plain speaking and comprehensive guide when undertaking business in Australia.

The topics covered in this publication include:

• an introduction to the legal and financial systems in Australia
• the available business and investment structures in Australia
• the regulation of banking, securities, trade practices, property, intellectual property, e commerce, workplace relations, OH&S, mining and the environment in Australia
• Australia’s taxation system
• foreign investment, foreign exchange and immigration law and policy in Australia.

We wish you great success in all your business dealings in Australia.

Please contact us for an in-depth discussion on how we can help you develop your business in Australia.
About Norton Rose Fulbright Australia

Norton Rose Fulbright Australia is a leading legal practice with more than 600 lawyers throughout Australia in Sydney, Melbourne, Brisbane, Perth and Canberra.

The expertise, local knowledge, connections and legal resources of our network open new doors and provide tangible business advantages for our clients. We help with the introduction of new products and services ahead of competitors, to enter new markets which may otherwise be difficult to penetrate, and ensure protection against fluctuations in business conditions and regulatory changes that can hamper success and generate undue risk.

By looking beyond the legal issues at the bigger picture, to the financial, commercial and market factors that drive our clients’ success we ensure that the advice we offer is in line with daily business realities. As a result our clients overcome obstacles quickly, get to market ahead of their competitors, and conclude transactions more profitably.

For more information about Norton Rose Fulbright, please visit our website at www.nortonrosefulbright.com

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Norton Rose Fulbright Australia

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Constitutional structure

Australia was settled as an English colony in 1788, relying on the now discredited legal fiction of terra nullius – ‘a land of no one’ – to displace the indigenous inhabitants. Through this colonial past Australia shares a common law tradition with other countries, such as Canada, Great Britain, New Zealand and the United States.

Australian constitutional law is a unique blend of English and American traditions, practices and laws as adapted for Australian conditions. Australia derived its Westminster system of government from the United Kingdom and the concepts of federalism, separation of powers and judicial review from the United States. The rule of law is central to Australian constitutional theory and has had a profound influence on the development of Australia.

Australia’s Head of State is Queen Elizabeth II, who is represented in Australia by the Governor-General. Even though the role of the Governor-General today is mostly ceremonial, Australians nevertheless continue to debate proposals for a republic.

In 1901 the various British colonies in Australia united under the Commonwealth of Australia Constitution Act 1900 (Imp) to form the Federal Commonwealth of Australia, comprising six States (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania). In 1911 two Territories – the Northern Territory and the Australian Capital Territory – were created from land ceded by South Australia and New South Wales respectively. Australia also has seven external Territories, including Norfolk Island and the Australian Antarctic Territory.

The capital of Australia is Canberra (located in the Australian Capital Territory) and is home to the Federal Parliament and the High Court. The capitals of the States are Sydney (New South Wales), Melbourne (Victoria), Brisbane (Queensland), Perth (Western Australia), Adelaide (South Australia) and Hobart (Tasmania). Darwin is the capital of the Northern Territory.

Commonwealth

Australia has a bicameral Federal Parliament (the House of Representatives and the Senate) elected by popular vote. Voting is compulsory. Members of the House of Representatives are elected on the basis of equality among voters. This results in a disparity of representatives between States, with the more populous States having more members than the less populous States. Senators are elected on the basis of equality among the States – each State is represented by the same number of Senators, regardless of the size of its population. The executive government is formed by the political party holding a majority in the House of Representatives and is led by the Prime Minister.

Legislative power under the Commonwealth Constitution is vested in the Federal Parliament. The Commonwealth Constitution expressly limits the Federal Parliament’s legislative powers to specified matters, including interstate and international trade and commerce, taxation, communications, banking, insurance and industrial disputes. In practice, the Federal Parliament has wide powers, as the specified powers of the Federal Parliament have been construed in an expansive fashion.

The Commonwealth’s executive power, which extends to the maintenance of the Commonwealth Constitution and the enforcement of federal laws, is exercised by the Governor-General. The Governor-General is advised by the Federal Executive Council, which consists of the Ministers in charge of the major departments of state. The Governor-General’s powers are extensive in principle but in practice it is the Prime Minister who wields real power through effective control of the Federal Parliament and the Executive.

The Commonwealth’s judicial power is vested in the High Court of Australia and other federal courts created by the Federal Parliament, such as the Federal Court of Australia and the Family Court of Australia. The Supreme Courts of the States and Territories are also vested with judicial power by the Commonwealth under specific cross-vesting legislation.

States

Each State has a parliament consisting of an upper house and a lower house except Queensland, which has only one house of parliament.

The parliaments of the States are not granted specific legislative powers over defined subjects, but have broad legislative power in respect of those matters where power is not specifically granted to the Federal Parliament under the Commonwealth Constitution. In some matters, the Commonwealth and State parliaments exercise concurrent jurisdiction. Where there is a conflict between Commonwealth and State statutes, the Commonwealth law prevails to the extent of the inconsistency.
Each State has a Governor and a Premier, who perform equivalent roles to the Governor-General and Prime Minister, respectively, at Federal level.

In each State there is a hierarchy of courts exercising jurisdiction in both civil and criminal matters. The jurisdiction of each court is determined according to the subject matter or monetary value in issue. Generally, the procedures in the lower courts are simpler than those in the higher courts. Special courts and tribunals have been established under various State acts to administer particular laws or rights, such as workers’ compensation, local government and planning and industrial relations.

**Territories**

Only three Territories in Australia have their own parliaments: the Australian Capital Territory, the Northern Territory and Norfolk Island. The structures of these parliaments are similar to those in the States, but they are established by Acts of Federal Parliament. In most respects, the Territories function in the same way as the States. However, the Federal Parliament has unrestricted powers to make laws for the Territories and can override any legislation of a Territory parliament, whereas the powers of the State parliaments are curtailed only to the extent of any overlap with the specific powers of the Federal Parliament. Another difference is that each State is represented in the Senate by 12 Senators, whereas the Australian Capital Territory and the Northern Territory are only represented by two Senators each.

Territories without their own parliaments are subject to the direct control of the Commonwealth government.

**Local government**

Local governments are established by State or Territory legislation and derive their powers from the statutes that create them. Therefore, the powers and responsibilities of local governments vary from State to State. Local governments typically make and enforce regulations in relation to building and development approvals, town planning, local amenities and the local environment.
Legal system

Law in the Australian legal system is derived from both statutes and the common law. The common law is based on the decisions and judgments handed down by the courts. Many of Australia's fundamental common law doctrines derive from English law. However, Australian courts have developed a distinctive Australian common law.

The Commonwealth Constitution contemplates two separate jurisdictions: Commonwealth courts and the courts of the States and Territories.

Commonwealth courts

In the Commonwealth jurisdiction there are the High Court, the Federal Court, the Federal Circuit Court and other specialist courts, such as the Family Court, as well as a number of specialist tribunals.

The High Court was established in 1901 and is the final Court of Appeal in Australia in all matters, both civil and criminal. An appeal may only be taken to the High Court if it considers there is an important question of law or public interest to be considered.

The High Court also has original jurisdiction in certain matters. These include matters arising under the Commonwealth Constitution or involving its interpretation, disputes between residents of different States or between different States themselves and cases brought against the Commonwealth Government and its officials. However, the High Court rarely hears cases other than on appeal and constitutional cases.

The Federal Court usually tries cases involving questions of federal law, such as the interpretation of Commonwealth statutes and disputes arising under them. A Federal Court constituted by three judges also hears appeals from decisions of single judges of the Federal Court. The Federal Court was established by legislation enacted by the Federal Parliament in 1976.

The Family Court was established in 1975 as a specialist court to deal with family law matters. The Family Court places great emphasis on mediation and conciliation as a means of resolving disputes.

State courts

All States (except Tasmania) have a three tier system of courts which, in general, exercise both civil and criminal jurisdiction. Tasmania has a two tier system of courts.

At the lowest level are the Local Courts or Magistrates’ Courts (the name varies from jurisdiction to jurisdiction). These courts are presided over by magistrates and deal with minor criminal matters and civil disputes between parties when the amount being claimed is relatively small. They exercise a summary jurisdiction, with no jury.

At the intermediate level are the District Courts or County Courts (the name varies from jurisdiction to jurisdiction). These courts hear civil disputes where the amount in dispute is greater than in the Local or Magistrates’ Courts, and more serious criminal matters. These courts also hear criminal appeals from decisions reached in Local or Magistrates’ Courts. Most jury trials take place in these courts. Tasmania does not have District or County Courts.

At the highest level are the various Supreme Courts. These courts hear prosecutions of the most serious crimes. A judge and a jury of 12 usually hear criminal cases. On rare occasions a judge will hear a criminal case without a jury. The Supreme Courts also have a civil jurisdiction. It is not limited by a monetary amount. It also has a declaratory and equitable jurisdiction. Civil disputes rarely involve a jury, but where the Court Rules provide for a jury, the case is usually heard by a judge sitting with a jury of four or six.

The Supreme Courts also exercise a wide appellate jurisdiction, which in a number of States is vested in a separate Court of Appeal. Courts of Appeal are usually constituted by three judges and hear appeals from decisions of the Supreme Court and lower courts.
**Dispute resolution**

Historically, litigation has been the main process by which legal disputes in Australia have been resolved. These have usually been disputes between a small number of parties, often on discreet issues. However, in recent times, a growing number of class actions have been commenced. These are representative actions in which a small number of parties bring actions on behalf of a class of claimants who have a similar interest in claiming damages. Common examples are class actions against pharmaceutical companies or medical device companies where a medication or medical device is defective. There is also a growing number of class actions being commenced where there has been a loss in value of investments due to inadequate disclosure. These actions have been against directors of the companies concerned and their professional advisors.

Often class actions are pursued for legal or strategic reasons. Although some are eventually resolved by the use of alternative dispute resolution techniques, others are determined by the courts.

As the parties present their evidence by statements and reports and witnesses can be cross-examined, arbitration is similar to litigation with the arbitrator taking the place of the judge. Unlike litigation, the rules of evidence normally do not apply and the arbitrator has flexibility in relation to which evidence is to be taken into account.

At the end of an arbitration the arbitrator makes an award which can be enforced as a judgment.

**Mediation**

Mediation involves the use of a neutral or independent third party, called the mediator, to assist the parties to resolve their dispute. It is a structured but informal negotiation process controlled by the mediator and informed by the parties. The mediator does not impose a solution or make any substantive decision for the parties, but assists the parties to isolate the issues in dispute to develop options for their resolution and to reach resolutions which accommodate the interests of all the parties. Usually resolving a dispute by mediation is a far less costly exercise than litigation.

**Alternative dispute resolution**

Alternatives to litigation have gained a high level of acceptability in Australia. The most commonly adopted alternative dispute resolution processes are arbitration and mediation which each have a number of potential benefits. Courts can encourage and order the parties to attend and resolve disputes by mediation.

**Arbitration**

Arbitration is an adversarial process in which disputing parties agree to be bound by the decision of an independent arbitrator which is based on the parties’ evidence and submissions. The arbitrator may be appointed under the terms of an agreement with the parties. Commercial contracts often provide for a dispute to be referred to arbitration. In these cases the arbitrator will be an expert usually appointed by an independent body identified within the contract.

Arbitration can be conducted confidentially and sometimes can be quicker, more flexible and less costly than litigation. This is partly because people with expertise in the subject matter of the dispute are usually appointed as arbitrators to resolve the dispute.
Foreign investment policy

Foreign investment in Australia is regulated by the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (*FATA*) and the *Foreign Acquisitions and Takeovers Regulations 1989* (*FATR*). The FATA and the FATR are administered by the Treasurer, who is assisted by the Foreign Investment Review Board (FIRB), a division of the Treasury. The Australian Government publishes policy guidelines for administration of the FATA.

The Australian Government has for many years publicised that it welcomes foreign investment acknowledging that foreign investment has helped build Australia’s economy and will continue to enhance the wellbeing of Australians by supporting economic growth and prosperity. Supporting existing jobs and creating new jobs, encouraging innovation, introducing new technologies and skills, bringing access to overseas markets, and promoting competition amongst Australian industries are some of the benefits the Australian Government claims will be derived from foreign investment.

The only basis on which the Australian Government can object to an investment proposal by a foreign person is if the proposal is contrary to the national interest. Investment proposals are reviewed by the Australian Government against the national interest on a flexible case-by-case basis, rather than applying rigid hard and fast rules. This approach allows the Australian Government to have regard to community concerns about particular proposals, and recognises the importance of Australia’s market based system, where investment decisions are driven by market forces rather than external strategic or non-commercial consideration.

The national interest test was recently reviewed by The Australian Senate Standing Committee on Rural and Regional Affairs and Transport (Committee). The focus of the review was on the application of the national interest test to acquisitions of Australian agricultural land and agribusinesses, food security and foreign sovereign funds. The final report of the Committee, which was released in June 2013, contains 29 recommendations, including recommendations to review the regulations framework for foreign investment in Australia and on scrutiny and transparency of FIRB in applying the national interest test.

### Foreign persons

The expression ‘foreign person’ has a very technical meaning under the FATA. There are complex tracing provisions, which have a broad reach.

In general terms, a *foreign person* is:

- a natural person who is not ordinarily a resident in Australia
- a foreign government or its agencies or
- any corporation or trust in which there is a ‘substantial interest’ held by a foreign person or corporation.

*A substantial interest* exists where a single foreign person or corporation (and any associates) has 15 per cent or more, or several foreign persons or corporations (and any associates) have 40 per cent or more, of the issued shares (either undiluted or diluted) or voting power (either undiluted or diluted).

### Proposals

Various proposals must be notified to FIRB and approved by the Treasurer before they can be implemented. These include:

- Acquisitions: the acquisition of a substantial interest in an Australian company, including an interest in an offshore company with Australian subsidiaries, whose assets are valued in excess of A$248 million (or A$1,078 million in the case of New Zealand or United States investors in non-sensitive sectors), or the acquisition of the assets of any Australian business, including Australian assets of an offshore company, valued in excess of A$248 million (or A$1,078 million in the case of New Zealand or United States investors in non-sensitive sectors).

These monetary thresholds apply to any foreign person acquiring an interest in a business of primary production (ie, an agricultural business) which includes the acquisition of agricultural land.

- Foreign government investors: direct investments by foreign government investors regardless of the value of the investment.
Foreign government investors also need to notify FIRB and receive prior approval to start a new business or to acquire an interest in land, including an interest in a prospecting, exploration, mining or production tenement (except when buying land for diplomatic or consular requirements).

- Australian urban land: other than for New Zealand or United States investors (whose threshold is A$1,078 million for non-sensitive sectors and A$248 million for prescribed sensitive sectors) the acquisition of an interest in Australian urban land that involves:
  - developed non-residential commercial real estate, where the property is subject to heritage listing, valued at A$5 million or more
  - developed non-residential commercial real estate, where the property is not subject to heritage listing, valued at A$54 million or more
  - vacant real estate, irrespective of value
  - residential real estate, irrespective of value or
  - share or units in Australian urban land corporations or trust estates, irrespective of value.

Australian urban land is any land that is not rural land. Rural land is land used wholly and exclusively for carrying on a business of primary production. It includes interests arising under leases, financing and profit sharing arrangements. This is discussed further in the chapter on ‘Real estate’.

- Media: portfolio investments in the media of five per cent or more and all non-portfolio investments in the media irrespective of size.

A failure to notify may result in an order for compulsory divestment. The monetary thresholds (except in relation to heritage listed land) are indexed each year.

Examination of proposals

Where it is necessary to notify FIRB, the notification should be made in advance of the investment, or the investment should be made conditional on foreign investment approval.

Once a proposal has been formally notified to FIRB, the Treasurer has 30 days to decide whether the proposal would be contrary to the national interest. That 30 day period can be extended by up to a further 90 days by publishing an interim order. An interim order is normally made where a proposal is complex or where insufficient information is provided.

Not all proposals that are notified to FIRB are examined in detail. Proposals involving prescribed sensitive sectors, such as the media, telecommunications, transport (including airports, aviation, ports, rail and shipping), defence (including defence procurement), security and nuclear (including uranium and plutonium extraction) industries, as well as proposals involving current sensitivities, such as energy and food security, will be scrutinised in greater detail than proposals that do not. However, the fact that a proposal does not involve a prescribed sensitive sector or current sensitivity does not mean that it does not need to be notified.

What is contrary to the national interest is a fluid notion and, as proposals are considered on a case by case basis, there is no precedent to be derived from prior decisions. Australia’s Foreign Investment Policy indicates that FIRB will look at a range of factors and the relative importance of these can vary depending on the nature of the investment. Investments in enterprises which are large employers or which have significant market share may raise concerns, as may investment in smaller enterprises with unique assets or in sensitive industries. The impact of an investment is also relevant – an investment that enhances economic activity is less likely to be of concern. FIRB will typically consider the following factors when assessing foreign investment proposals:

- Character of the investor: the extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision. Corporate governance policies and practices will also be considered.

- Competition: the extent to which the investment may result in an investor gaining control over market pricing and production of a good or service in Australia, as well as the impact an investment may have on the make-up of the relevant global industry.

- Government Policy: the extent to which the investment may impact on Australian Government revenue or other policies, such as environmental policies.

- National security: the extent to which the investment may impact on Australia’s ability to protect its strategic and security interests.

- Impact on the economy and community: the extent to which the investment may impact on the general
Foreign investment policy

In considering applications for foreign investment proposals involving agriculture, FIRB will also consider the quality and availability of Australia's agricultural resources, land access and use, agricultural production and productivity, Australia's capacity to remain a reliable supplier of agricultural production, biodiversity, and employment and prosperity in Australia's local and regional communities.

At the Federal Election on September 7, 2013, Australia elected a new Liberal National Party Coalition Government. In a discussion paper published by the new Government before it was elected, various proposals relating to agricultural investment were canvassed, including proposals to reduce the approval threshold for foreign investment in agricultural land and the establishment of a register of foreign ownership of rural land.

Timing

Where a proposal is within policy guidelines, FIRB will ordinarily notify the investor that the Treasurer has no objection fairly promptly and usually within the initial 30 day period. Where the proposal is outside policy guidelines and is examinable, FIRB will consult with relevant Federal and State Government departments and authorities to ascertain their views. The consultation is conducted on a confidential basis.

FIRB may impose conditions when giving approval to a proposal, which must be complied with. These conditions often relate to the time period for completion of real estate development or to environmental protection requirements.

Residential property

Statistically, the largest number of foreign investment proposals relate to the purchase of residential property. If you are not a permanent resident of Australia, and you want to buy residential property, you must get prior approval from the Australian Government. However, you do not need prior approval if you are:

- an Australian citizen living abroad or
- a foreign citizen purchasing as joint tenant with your Australian citizen spouse or
- a foreign citizen who holds a permanent resident visa or a 'special category' visa (for example, a New Zealand citizen).

Queensland foreign ownership register

Land located in Queensland is regulated by the Foreign Ownership of Land Register Act 1988 (Qld). This legislation does not restrict foreign ownership, but provides for a system of registration. Registration is not necessary for land that was acquired prior to 1998.

Industry specific restrictions

In addition to the specific restriction on investments in the media under Australia's Foreign Investment Policy, there are also separate legislative restrictions on foreign investment in the banking, insurance, airline, airports, shipping and telecommunications industries.

International trade

Australia has a liberal attitude towards international trade and has been a member of the World Trade Organisation since its inception in January 1995. Australia predominately exports minerals and fuels, such as iron ore, coal, gold, crude petroleum and natural gas. Australia also exports services, including education and tourism, manufactured goods and agricultural produce. Our major trading partners are China, Japan and the United States.

Australia is a member of the Asia Pacific Economic Cooperation (APEC) and is committed to strengthening regional trade and pursuing common trade and economic goals.

Australia currently has seven free trade agreements in force:

- Australia – United States Free Trade Agreement (AUSFTA)
- Thailand – Australia Free Trade Agreement (TAFTA)
- Singapore – Australia Free Trade Agreement (SAFTA)
• Australia – New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)

• Association of Southeast Asian Nations (ASEAN) – Australia – New Zealand Free Trade Area (AANZFTA)

• Australia – Chile Free Trade Agreement

• Malaysia – Australia Free Trade Agreement (MAFTA).

Australia has free trade agreements under discussion with, among others, China, Japan, India, Korea, Indonesia and the Gulf Cooperation Council. In addition, Australia is negotiating to join the Trans-Pacific Strategic Economic Partnership Agreement between Brunei, New Zealand, Chile and Singapore, along with Canada, Malaysia, Mexico, Peru, United States and Vietnam.

Further information
Further information about foreign investment policy can be found at:

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

www.treasury.gov.au – Australian Government, the Treasury

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

Bribery

Bribery offences

Under Australian State and Territory laws offering or giving inducements or rewards corruptly to another person for favourable treatment in relation to business can be a criminal offence. It is also an offence to encourage or assist in the commission of the offence. Asking for or accepting an inducement or reward in similar circumstances can also be a crime and a person or company can be criminally liable. There are similar offences in relation to corrupt payments or inducements to State and Territory Officials.

Commonwealth laws criminalise bribery of foreign public officials and Commonwealth Government officials.

Unless it is permitted by the written laws of the country of a foreign public official, it is an offence to offer, promise or provide a benefit to another person with the intention of influencing a foreign public official in the exercise of the official’s duty in order to obtain or retain business or a business advantage. The benefit does not need to be given to the foreign public official for an offence to be committed. It can be given to another person. In addition, a benefit is not limited to money. It can include, for example, excessive or extravagant entertainment and overseas travel or accommodation. Companies and individuals can be guilty of the offence if they are involved in the conduct directly or if they encourage or assist someone else to commit the offence.

Commonwealth laws currently permit facilitation payments to be made so long as any payment is for routine government action of a minor nature and the payment itself is relatively small. There is a requirement that a written record be kept of the facilitation payment which includes the name of the foreign government official to whom it was paid. The Commonwealth Government is currently considering whether to change the law so that making a facilitation payment would also be an offence. This is consistent with the laws of a number of other countries. However, at present, facilitation payments are permitted under Commonwealth law.

Under Commonwealth law it is an offence to dishonestly provide, promise or offer a benefit to a person with the intention that the Commonwealth public official will be influenced in the exercise of their official duties. It is also an offence for a Commonwealth public official to ask dishonestly for or receive or agree to receive a benefit for themselves or another person with the intention that they will be influenced in the exercise of their official duties.

Penalties

Bribery offences under State and Territory laws carry different penalties depending on the State or Territory in which the offence is committed. Generally individuals who are found guilty of a State or Territory bribery offence can be sentenced to a maximum of three to ten years imprisonment or be fined. Companies that are found guilty of bribery offences can be fined.

Under Commonwealth law the penalties for bribing a foreign public official and bribery in relation to a Commonwealth public official are currently:

- for individuals, a fine of up to a maximum A$17 million per offence or ten years imprisonment, or both
- for a company, it is the greater of:
  - a fine of up to A$17 million or
  - three times the value of the benefit or
  - ten per cent of the company’s turnover during a 12 month period from the month when the offence occurred.
Adoption of Anti-Corruption Compliance Systems

Many Australian companies have good anti-corruption compliance systems in place which focus on the elimination of bribery and corruption. These include codes of conduct and clear anti-bribery policies which prohibit bribery and address topics such as procurement, gifts, hospitality, facilitation payments, charitable and political contributions and donations. They are directed towards ensuring that the company’s directors, executives and employees, as well as those with whom the company deals, such as agents, intermediaries and business partners do not engage in corrupt conduct. They also provide for carrying out risks assessments of doing business in a foreign country in terms of the country, the nature of the business being undertaken and those with whom the company proposes to have a business relationship. It is well known that the corruption risk in some countries is very high.

Effective codes of conduct, anti-corruption policies and compliance systems assist in minimising the risk of breaching Australian bribery laws or similar laws in other countries. As a result a company’s exposure to prosecution for bribery offences is minimised.

It also enables a company to provide assurances to business partners that it has effective anti-bribery policies and systems in place. There is an increasing trend in business transactions for assurances of that kind to be required as a pre-condition to having a business relationship.
Business structures

There are several alternative business structures that are available for conducting business in Australia, including:

- sole traders
- partnerships
- joint ventures
- trusts
- corporations.

The choice of business structure will largely be driven by commercial and taxation considerations. Legal implications are also relevant.

As discussed in the next chapter (‘Investment Structures’), a foreign corporation may choose to conduct operations in Australia in various ways, including through a representative office, branch or a subsidiary.

Sole traders

An individual may carry on a business as a sole trader on his or her own behalf and under his or her own name. If a sole trader decides to trade under another name, that name must be registered as a business name. No special formalities are required to establish a business as a sole trader. However, a sole trader will have unlimited personal liability for all debts and liabilities incurred in connection with the conduct of the business and will be subject to progressive individual tax rates rather than the flat corporate tax rate.

The structure of a sole trader is mostly utilised by small businesses.

Partnerships

A partnership is an association between two or more individuals or companies carrying on a business in common with a view to profit. The number of partners must be less than 20, except in the case of certain professional partnerships. A partnership is not a separate legal entity and the partners have joint and several liability for all debts and liabilities of the partnership business. The rights and obligations of the partners are usually set out in a partnership contract. Certain terms are also implied by the Common Law and the Partnership Act of the relevant State or Territory. The business name under which the partners trade must be registered, unless that name is the name of the partners.

Limited partnerships may be formed in all States. In a limited partnership there are two categories of partners: general partners, who manage the business; and limited partners, who supply capital, but must not take an active part in the management of the partnership. The liability of limited partners is limited to the value of the capital or other property that they contribute. General partners are subject to unlimited liability. It is also possible to establish a limited partnership structure where a limited company is the sole general partner. In this case the funds of the general partner are at risk, but the shareholders of the general partner as well as the limited partners will enjoy limited liability.

Joint ventures

The principal characteristic of a joint venture is that co-venturers join together to participate in a single project rather than an ongoing business. Ordinarily, the co-venturers will seek to share in the output of the project rather than the profits of a business. Joint ventures are established either as an incorporated joint venture or an unincorporated joint venture.

The structure of an unincorporated joint venture is quite common in the mining and petroleum industries, usually on terms that each party will contribute funds, expertise or other property to the venture and deal with its share of the minerals, oil or gas separately. It is this aspect of an unincorporated joint venture that distinguishes it from a partnership and care should be taken that it is so distinguished if the co-venturers wish to avoid joint liability and the requirement to take a common approach to tax treatment.

There is no legislation directly governing the establishment of unincorporated joint ventures. Therefore, the terms of unincorporated joint ventures are usually set out in extensive detail in a formal agreement between the participants. Issues not covered by that agreement are governed by the common law. A core advantage of adopting a joint venture structure is that the participants can align their liabilities as between themselves with their agreed shares of the venture.

Where an incorporated joint venture structure is adopted, the participants incorporate a jointly owned company as the corporate vehicle for the venture. There is usually also a shareholders’ agreement.
Trusts

A trust is a peculiar legal relationship that was developed under English law and inherited by the Australian legal system. A trust arises as a result of the creation of an enforceable obligation on the part of one person (the trustee) to hold and deal with the property of another person (the beneficiary) for the benefit of that person. The trustee (which can be a corporation) owns the property and deals with it on behalf of the beneficiary. A trustee’s powers to deal with trust property are defined by the trust instrument and by statute. These extensive powers are counterbalanced by obligations of utmost good faith to the beneficiary.

As income from trust property can be distributed in an efficient and flexible manner, trusts are widely used in Australia for tax effective planning. Trusts are also the legal structure used by superannuation funds, which invest employees’ retirement benefits.

For commercial trading purposes, a trust will generally be structured as either a unit trust or a discretionary trust:

- Each beneficiary of a unit trust holds units which confer defined interests in the income and capital of the trust. Unit trusts are common vehicles for business arrangements due to the relative ease of transferring and mortgaging the component units. A unit trust may be private or public and, in the case of a public unit trust, may be listed on the Australian Securities Exchange. In some respects, units in a unit trust are very similar to shares in a corporation, although there are many differences. For example, a share confers on its holder no legal or equitable interest in the assets of the corporation, whereas a unit in a trust may confer a proprietary interest in the property of the trust.

- The trustee of a discretionary trust has a discretion (within the parameters of the trust deed) as to how the income and capital of the trust is distributed. In contrast to a unit trust, beneficiaries under a discretionary trust have no proprietary interest in the property of the trust. Their only interest is in the proper administration of the trust. Discretionary trusts are generally used for family-based commercial ventures or arrangements.

Corporations

The corporate form in Australia is based on the English model. It is a separate legal entity with the legal capacity and powers of a natural person, as well as the powers of a body corporate (although the authority of the directors to exercise those powers may be limited under the constitution).

An Australian company may be limited by shares or by guarantee. A company limited by shares is the most common form of business structure used in Australia, of which there are two principal types:

- proprietary companies
- public companies, which may (but need not be) listed on a financial market, such as the Australian Securities Exchange.

It is also possible to register a company with unlimited liability (extremely rare) or with no liability (fairly common with mining exploration vehicles). All Australian companies are registered with a unique Australian Company Number (ACN), which must appear on the company seal (if any) and on all public documents and negotiable instruments (other than receipts) of the company.

An Australian company must have a registered office in Australia, where communications can be sent and where the secretary or agent is present, and a public officer who is responsible for carrying out activities required under the *Income Tax Assessment Act 1936* (Cth).

An Australian company:

- need not have a constitution (in the absence of a constitution, ‘replaceable rules’ under the Corporations Act automatically apply to govern the internal management of the company)
- in the case of a company limited by shares, does not have an authorised share capital (concepts of nominal capital and par value do not exist in Australia).

Proprietary companies

The main features of a proprietary company are that it must:

- have at least one shareholder, but no more than 50 non-employee shareholders
- have at least one director who is ordinarily resident in Australia
- have the word ‘Proprietary’ or ‘Pty’ (before the word ‘Limited’ or ‘Ltd’).
A proprietary company may not raise capital in any way that would require the preparation of a disclosure document (such as a prospectus), except for an offer of shares to existing shareholders or employees.

Proprietary companies are further categorised as large and small proprietary companies. To qualify as a small proprietary company for a financial year, the company together with the entities it controls (if any) must satisfy at least two of the following three criteria:

- the consolidated revenue for the financial year must be less than A$25 million
- the value of the consolidated gross assets at the end of the financial year must be less than A$12.5 million
- the number of employees at the end of the financial year must be fewer than 50.

A key distinction between large and small proprietary companies is that a large proprietary company must appoint an auditor and lodge audited annual accounts with the Australian Securities and Investments Commission (ASIC), whereas a small proprietary company need only do so in two circumstances: first, if the small company is controlled by a foreign company that does not lodge consolidated accounts with ASIC, or second, if the small company is directed by its shareholders or ASIC to do so.

Public companies

Generally speaking, public companies are subject to more comprehensive disclosure and reporting requirements than proprietary companies. However, the restrictions on raising capital that apply to proprietary companies do not apply to public companies.

A public company:

- may be formed with a single shareholder
- must have a minimum of three directors, with at least two of them being ordinarily resident in Australia
- must have at least one secretary being ordinarily resident in Australia
- must appoint an auditor and lodge with ASIC an audited financial report for each financial year.

A public company may, if it satisfies the requirements of the listing rules of the Australian Securities Exchange, be listed on the Australian Securities Exchange.

Company and business names

Company names are registered as part of the company registration process, which is governed by the Corporations Act. A company name is effective Australia wide. Business names are registered independently of company names. A company or other form of business structure (such as a sole trader or partnership) that does not carry on business under its own name must register its business name. Business names are registered nationally using the business name registration service provided by ASIC.

Before selecting a company or business name, searches are typically undertaken to ensure that the name is available.

Corporate governance

Most powers of governance are exercised by the directors and other company officers, who essentially act as agents of the company. Depending on the terms of the constitution of the company, shareholders generally retain a limited range of powers. Shareholders are able to exercise those powers at a general meeting of the company.

Each director and other officer of a company has a number of duties and responsibilities under the Corporations Act and the general law, including a duty of care and diligence. A failure to observe these duties and responsibilities may lead to the director or officer being personally liable to compensate the company. The duties and responsibilities are broad and extend to restrictions on allowing a company to trade when it is insolvent or nearing insolvency.

When directors or officers make business decisions, the degree of care and diligence they must exercise is moderated by the statutory ‘business judgment rule’ under the Corporations Act. Under the business judgment rule, directors and other company officers who make informed business decisions in good faith for a proper purpose, rationally believing the decisions to be in the best interests of the company, will be taken to have met their duty of care and diligence in respect of those decisions.

Directors of wholly owned subsidiaries are permitted to take into account the interests of the holding company in certain circumstances.
Directors of companies listed on the Australian Securities Exchange (ASX) need to consider the ‘Corporate Governance Principles and Recommendations’ issued by the ASX Corporate Governance Council. Listed companies are required to state in their annual report the extent to which they have followed the recommendations during the reporting period. Where companies have not followed all of the recommendations, they must identify the recommendations that have not been followed and give reasons for not following them.

**Bribery and its prevention**

A number of the recommendations in the ASX Corporate Governance Principles and Recommendations refer to ethical and responsible decision making by Australian companies and are directed towards maintaining confidence in a company’s integrity. It is recommended that companies establish a code of conduct that deals with the standards of ethical conduct required of the Board, senior executives and employees. It suggests that the code describe the company’s approach to business courtesies, bribes and facilitation payments, compliance with legal obligations and reporting of unethical or unlawful behaviour. This reflects a recognised global trend requiring an increased focus on maintaining higher ethical standards in doing business and having more effective measures to combat bribery and other conduct which does not comply with the law.
Investment structures

A foreign corporation may choose to conduct operations in Australia in various ways, including through a representative office, a branch or a subsidiary.

The choice of structure will to a large extent be driven by tax considerations, such as the deductibility of an Australian branch’s expenses from the foreign company’s income, or conversely the deductibility of interest on loans used to capitalise an Australian subsidiary. Tax considerations are discussed in greater detail in the chapter on ‘Taxation’.

Other factors which may influence the choice of structure include: providing additional limited liability with respect to the foreign company’s operations in Australia, providing a vehicle by which the operations could be sold at a future time, and potentially giving greater commerciality to the operations by the registration of an Australian subsidiary.

Representative office

If a foreign corporation does not propose to carry on business in Australia, it can establish a representative office. There is, of course, a fine line in determining what amounts to carrying on business. The following conduct does not, on its own, amount to carrying on business:

- promotional activities
- procuring orders
- conducting research and collecting information
- being a party to or effecting settlement of proceedings
- maintaining a bank account
- effecting a sale through an independent contractor.

Branch

Where the activities of a foreign corporation amount to carrying on business in Australia, the foreign corporation must register with the Australian Securities and Investments Commission (ASIC) as a branch.

A foreign corporation must register with ASIC if it:

- has a place of business in Australia
- establishes or uses a share transfer office or share registration office in Australia or
- administers, manages or deals with property in Australia as an agent, legal personal representative or otherwise.

To register as a branch, a foreign corporation:

- must appoint at least one local agent (either a person ordinarily resident in Australia or an Australian company) who is authorised to accept notices and service of legal process. The agent is responsible for ensuring compliance by the foreign corporation with the Corporations Act 2001 (Cth) and may be personally liable for penalties if the foreign corporation breaches the Act
- must establish a registered office in Australia
- must lodge the following with ASIC:
  - certified copies of its current constituent documents
  - details of its officers, including the powers of any resident Australian officers
  - details of security interests over property located in Australia
  - details of its registered office in its country of origin and Australia.

Once registered, the foreign corporation will be allocated a unique Australian Registered Body Number (ARBN), which must appear on all public documents that it issues, signs or publishes in Australia.

Once registered, a foreign corporation must file its annual accounts with ASIC. It must also notify ASIC of any changes in particulars.

Subsidiary

A foreign corporation may choose to establish an Australian subsidiary and conduct operations through that subsidiary. A subsidiary may be established by registering a new company or by acquiring a ‘shelf’ company (that is, an existing company which has never traded and which was established for the purpose of on-sale) or an existing operating company. Since the process of registering a new company was streamlined, it is more usual to register a new company than to acquire a shelf company or an existing operating company.
A subsidiary is often registered as a proprietary company, which must have at least one director who is ordinarily resident in Australia. A public company must have at least three directors, two of whom are ordinarily resident in Australia.

Other investment structures

While a branch and a subsidiary are two of the more important investment structures employed by foreign corporations to undertake operations in Australia, there are some other structures that are used and which include:

- A unit trust. This structure has benefits in that it is taxed on a 'flow through basis' and so is attractive for certain types of operations. Typically there is a corporate trustee and units are issued to unit holders who will be subject to tax on the net income of the trust each year. Unit trusts are briefly described in the previous chapter ('Business structures') and there is a brief description of the taxation of trusts in the chapter on 'Taxation'.

- A partnership or limited partnership: These structures are briefly described in the previous chapter ('Business structures') and in the chapter on 'Taxation'. Partnerships have the disadvantage of joint and several liability. Limited partnerships, while having the benefit of limited liability for the limited partners, are in many cases taxed on a similar basis to companies. Australia does not have limited liability partnerships, in which the liability of all partners is limited.
Securities regulation

In Australia, the securities industry is regulated by the Australian Securities and Investments Commission (ASIC) under the Corporations Act 2001 (Cth) (Corporations Act).

The Corporations Act regulates (among other things):

• fundraising by corporations
• corporate takeovers (including schemes of arrangement).

The legislation is very complex and technical.

Fundraising

Generally, a corporation is required to prepare a disclosure document (which must be lodged with ASIC) before it may make a primary offer of securities (that is, an offer of securities for subscription by investors). The disclosure document will ordinarily be a prospectus. However, where less than A$10 million is being raised in aggregate, it may be possible to use an offer information statement (which has less onerous disclosure requirements).

A disclosure document must satisfy the applicable disclosure requirements of the Corporations Act. In particular, except for a traditional rights issue of quoted securities or where the securities being offered have been continuously quoted for at least three months, a prospectus must disclose all information that investors and their professional advisers would reasonably require to make an informed assessment of the assets and liabilities, financial position and performance, profits and losses and prospects of the corporation, and the rights and liabilities attaching to the securities. Where the securities being offered have been continuously quoted for at least three months, disclosure is limited to transaction specific information on the basis that the market at large has been kept informed of the issuer's activities through the continuous disclosure regime.

A corporation is not required to prepare a disclosure document for a traditional rights issue of quoted securities (ie, a pro-rata entitlement offer), or for an offer to existing security holders under a share purchase plan (giving each shareholder the ability to subscribe for up to A$15,000 worth of shares) so long as the corporation gives a cleansing notice disclosing, among other things, certain information excluded from continuous disclosure notices.

In the case of an offer for the sale of existing securities (a secondary offer), the offeror must prepare a disclosure document (which must be lodged with ASIC) where the person making the offer controls the corporation or where the sale amounts to an indirect issue, or an indirect sale by a person who controls the corporation.

Where securities issued without disclosure are being sold within 12 months after the date of their issue, the seller will need to prepare a disclosure document unless the issuer has given a cleansing notice at the time of issue.

The Corporations Act seeks to ensure the reliability of information disclosed in a disclosure document by imposing potential civil and criminal liability on certain persons who are involved in offering securities under a disclosure document which contains a statement that is misleading or deceptive, or which omits information that should have been disclosed. ASIC is responsible for supervising the fundraising requirements under the Corporations Act, and is given extensive powers of exemption and modification, as well as powers of intervention.

The fundraising requirements (ie, the requirement to prepare a disclosure document) do not apply in relation to certain offers. Some examples of offers that are exempt include:

• personal offers which are accepted by no more than 20 people during any 12 month period where the amount raised during that period is less than A$2 million
• offers in parcels of at least A$500,000
• offers to people who are certified by an accountant as having net assets of at least A$2.5 million or gross income in each of the two previous financial years of at least A$250,000, or a company or trust controlled by such a person
• offers to certain categories of professional investors, including a person who has or controls gross assets of at least A$10 million
• offers where no consideration is to be provided for the issue or sale of the securities
• offers made to a senior manager (or certain associates) of the corporation or any related body corporate.

If you would like more information about undertaking an initial public offering in Australia, please either phone or
email your Norton Rose Fulbright Australia contact, or get in touch directly with Tim Woodforde on +61 (0)2 9330 8303 or by email at tim.woodforde@nortonrosefulbright.com, to request a copy of Going public in Australia.

Takeovers

The Corporations Act regulates the acquisition of shares in a corporation whose shares are widely held (that is, a corporation which is listed or which has more than 50 shareholders).

The general purpose of the takeover provisions is to ensure that:

- the acquisition of control over voting shares in a widely held corporation takes place in an efficient, competitive and informed market
- the holders of the voting shares, and the directors of the corporation, know the identity of any person who proposes to acquire a substantial interest in the corporation, have a reasonable time to consider the proposal, and are given enough information to enable them to assess the merit of the proposal
- as far as practicable, the holders of the voting shares have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the corporation
- an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or other securities.

In particular, the Corporations Act restricts the ways in which substantial changes in the voting power of a corporation can occur. The takeover provisions will apply to any acquisition of a ‘relevant interest’ in issued voting shares through a transaction in relation to securities, which results in the voting power of any person increasing:

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

The legislation is negatively framed – where the takeover provisions apply, the acquisition will be prohibited unless it falls within an express exemption. The principal exemption is an acquisition under a takeover bid.

There are two categories of takeover bids – off-market bids and on-market bids. The rules are different for each category.

An off-market bid involves an offer to all shareholders to acquire all of their shares in the bid class (or a proportion of their shares in the bid class – the same proportion for each shareholder) at the offer price. An on-market bid must involve an offer to acquire all shares in the bid class and is made by a member of the Australian Securities Exchange on behalf of the acquirer.

Implementation of a takeover bid is a formal and rigid process. The rules dealing with takeover bids are technical.

The Corporations Act contains a number of compulsory acquisition provisions which apply to takeovers. Broadly speaking, the compulsory acquisition provisions apply when a controlling shareholder has 90 per cent of the voting power of a company. They are designed to balance the controlling shareholder’s need for efficiency with procedural fairness safeguards for minority shareholders. They:

- permit a bidder who has acquired a relevant interest in 90 per cent by number of the bid class, and 75 per cent by number of the securities that the bidder offered to acquire under the bid, to compulsorily acquire the remaining securities of the bid class
- require a bidder who has acquired a relevant interest in 90 per cent of the bid class to offer to buy out all securities of that class, including securities convertible into securities of the bid class (after providing an independent expert’s report)
- permit the beneficial owner of at least 90 per cent (by number) of a class of securities to compulsorily acquire the remaining securities in that class without making a takeover bid, after providing an independent expert’s report (and, if at least ten per cent of the holders object to the terms of the proposed acquisition, obtaining court approval)
- require a person who has become the beneficial owner of 100 per cent of a class of securities through compulsory acquisition to compulsorily acquire all securities convertible into that class.
The takeover provisions of the Corporations Act also extend to listed managed investment schemes, including listed unit trusts.

ASIC is responsible for supervising the takeover provisions of the Corporations Act, and is given extensive powers of exemption and modification.

The Takeovers Panel is the primary forum for resolving takeover disputes (with the exception of criminal prosecutions, and civil claims after a takeover has occurred). ASIC must comply with the rulings of the Takeovers Panel when granting exemptions from or modifications to the Corporations Act.

The Panel considers whether circumstances in relation to the affairs of a company are ‘unacceptable’ based on, amongst other things, their effect on the control or potential control of a company or having regard to the general purposes of the takeover provisions of the Corporations Act. The Panel may only respond to an application and cannot consider matters of its own volition.

Schemes of arrangement

In certain circumstances, a court approved scheme of arrangement may be used to acquire control of an entity instead of a takeover bid. In practice, a scheme of arrangement is only used where the parties agree to merge and require target shareholders and the court to approve the scheme (as opposed to a takeover, where target shareholders decide whether or not they wish to accept the bidder’s offer).

A court is precluded from approving a scheme of arrangement unless either:

- the court is satisfied that the purpose of the scheme is not to avoid the takeover provisions of the Corporations Act or

- ASIC issues a certificate stating that it has no objection to the scheme of arrangement. The practice of ASIC is to issue a letter shortly before the second court hearing to approve the scheme, stating it has no objection to the scheme. The letter is issued if, at that time, ASIC is satisfied shareholders have received all material information they need to make an informed decision, they have received reasonable and equal opportunities to share in the benefits provided under the scheme, and the shareholder meeting was properly conducted. However, ASIC will be cautious in providing this letter if a shareholder has indicated to ASIC that they propose to object to the scheme at the second court hearing.

ASIC is largely indifferent as to whether a control transaction is effected under a scheme of arrangement or a takeover bid, but it requires that parties proposing to merge using a scheme of arrangement substantively comply with the disclosure obligations and structural requirements of the takeover provisions of the Corporations Act.

The main differences between using a scheme of arrangement as opposed to a takeover bid to acquire control of an entity include:

- A scheme of arrangement allows for greater control on the part of the target entity, as approval of the target’s shareholders is necessary for success. A takeover bid gives greater control to the bidder as it is instigated by the bidder.

- A scheme of arrangement provides greater flexibility in structuring a transaction. However, this must be compared with the ease with which unexpected events during a takeover bid can be managed. In the case of a scheme of arrangement, any unforeseen events can only be managed by giving further notice to shareholders which has been approved by the Court.

- A scheme of arrangement requires shareholder approval from at least 50 per cent of shareholders (in each class) and 75 per cent of votes cast. Whether one or more classes of shareholder exist is an important preliminary question to address.

- There is no compulsory acquisition process necessary with a scheme of arrangement as there is with a takeover bid. Instead, under a scheme of arrangement, once shareholder approval of the requisite majorities is obtained, the bidder will be entitled to acquire all of the shares, including the shares of shareholders who voted against the scheme of arrangement and shareholders who did not vote at all.

- If the outcome of a takeover bid is dependent on the success of multiple interdependent bids to holders of different classes of securities, a scheme may be the best practical means to achieve the required result. Schemes of arrangement are usually used in complex, large-scale mergers that would otherwise be difficult or impossible to achieve with sufficient certainty through a takeover bid.
Other alternatives

Rather than proceeding with a takeover bid or scheme of arrangement, a change of control can be achieved by utilising one of the other exemptions, which may take the following form:

- an acquisition approved by shareholders at a general meeting at which the persons involved in the acquisition and their respective associates do not vote or

- a selective buy-back approved by shareholders – under which the shares of some shareholders are cancelled in return for the payment of cash or distribution of other assets in specie, leaving the acquirer with a controlling interest in the target company and

- the ‘three per cent creep’ exception, where a person increases their voting power by no more than three per cent in any six month period (this mechanism can be used to achieve control slowly).

There are also several sectors of the economy where there are specific takeover restrictions, such as the media, gambling, banking and insurance sectors.

If you would like more information about undertaking a takeover or scheme of arrangement in Australia, please either phone or email your Norton Rose Fulbright Australia contact, or get in touch directly with Tim Woodforde on +61 (0)2 9330 8303 or by email at tim.woodforde@nortonrosefulbright.com, to request a copy of Takeovers in Australia.

Further information
Further information about ASIC can be found at www.asic.gov.au.
The Australian Securities Exchange (ASX) is the principal stock market operating in Australia. The ASX is in fact the eighth largest equity capital market in the world with a domestic market capitalisation of A$1.5 trillion at September 30, 2013.

There are a number of licensed domestic financial markets operating in Australia which provide an alternative to the ASX. These include the National Securities Exchange of Australia and the Asia Pacific Exchange. Chi-X Australia also operates an alternative market for trading securities quoted on the ASX. There are also a variety of other financial markets that are licensed to operate in Australia, including derivatives markets, wholesale markets and overseas markets.

Entities seeking to be listed on the ASX must comply with listing rules of the ASX (ASX Listing Rules). The ASX Listing Rules govern the admission of entities to the official list of the ASX, the quotation of their securities, disclosure of information by listed entities and various aspects of conduct of a listed entity. The ASX Listing Rules operate as a contract between listed entities and the ASX, but may also be enforced against listed entities and their associates (including their directors) under the Corporations Act 2001 (Cth) (Corporations Act). The ASX has an absolute discretion as to whether it will list an entity or quote its securities. It also has a discretion whether to require compliance with the ASX Listing Rules in a particular case. The ASX is entitled to (and does) grant waivers of specific rules, which it may do on conditions. The ASX Listing Rules are interpreted by the ASX in accordance with their spirit, intention and purpose, by looking beyond form to substance, and in a way that best promotes the principles on which they are based. If a listed entity does not comply with the ASX Listing Rules it risks suspension of its securities from quotation or it may be removed from the official list. The ASX Listing Rules are under constant review. At any time, there are a variety of amendments being considered.

The ASX encourages listings by foreign entities and promotes itself on the basis of a vibrant Australian securities market and low capital raising costs. A foreign entity that does not conduct any business activities in Australia may still obtain a listing on the ASX. Subject to the terms of the offer and the issuer being able to satisfy certain conditions, US entities may quote their securities on the ASX in reliance on the safe harbour provisions of Regulation S under the US Securities Act 1933 and the no-action letter dated January 7, 2000 issued by the US Securities and Exchanges Commission.

A foreign entity may list on the ASX as either an ASX listing or an ASX foreign exempt listing and may also list debt securities on the ASX as an ASX debt listing.

### ASX listing

Except where a foreign entity satisfies the requirements for a foreign exempt listing (see below), it must satisfy the same requirements that apply to an Australian entity. Generally speaking, this is the case irrespective of whether the foreign entity is applying for a primary listing or a secondary listing (that is, irrespective of whether it is listed on another stock market).

There are a number of requirements that must be satisfied before a foreign entity will be admitted to the official list and its securities quoted by the ASX. These requirements are set out in the ASX Listing Rules. The basic requirements are that the foreign entity must satisfy the ‘profits test’ or the ‘assets test’. To satisfy the profits test, the foreign entity must (among other things):

- be a going concern or a successor of a going concern (essentially, a business that functions without the threat of liquidation for the foreseeable future)

- have been engaged in the same main business activity over the previous three full financial years through to the date it is admitted

- give the ASX any audited accounts (together with any audit report or review) for the previous three full financial years (and half year if the last full financial year ended more than eight months previously), together with a reviewed pro forma balance sheet and a statement from all directors confirming that they have made enquiries and nothing has come to their attention to suggest that the economic entity is not continuing to earn profit from continuing operations up to the date of application

- have aggregate profit before tax from continuing operations over the previous three financial years of at least A$1 million and profit before tax from continuing operations over the previous 12 months (to a date that is no more than two months before the date it applied for admission) of at least A$400,000.
To satisfy the assets test a foreign entity must (among other things):

- have net tangible assets of at least A$3 million (after deducting the costs of fund raising, or a market capitalisation of at least A$10 million)
- have less than half of the entity’s total tangible assets (after the fund raising) in cash or in a form readily convertible to cash or if more than half is in cash, commitments consistent with its business objectives to spend at least 50 per cent of that
- working capital of at least A$1.5 million (or budgeted revenue which provides for working capital of at least A$1.5 million).

In each case, the foreign entity must:

- have a structure and operations that are appropriate for a listed entity
- be registered in Australia as a foreign company, appoint an agent for service of process in Australia (which will be satisfied by registering as a foreign company), and establish in Australia an Australian securities register (or sub-register), a register of depository receipts or other appropriate facility for the registration of transfers
- have a constitution consistent both with the law of the place where it is established and with the ASX Listing Rules. It will also need to identify any differences in requirements between the requirements in its jurisdiction and Australian requirements
- issue a prospectus, product disclosure statement (or, with the agreement of the ASX, an information memorandum). The ASX will need to be satisfied that there is enough information about the entity to allow trading of its securities on a fully informed basis
- have at least 400 shareholders, each having a parcel of securities that are in the class for which it seeks quotation with a value of at least A$2,000 (350 shareholders will be sufficient if 25 per cent of the securities are held by unrelated parties and 300 shareholders will be sufficient if 50 per cent of the securities are held by unrelated parties). Although there is no requirement for a minimum number of Australian resident shareholders, the ASX encourages entities seeking listing to have a reasonable number of Australian resident shareholders with security holdings of at least A$2,000. The ASX may require as a condition to admission that the foreign entity has a minimum number of Australian resident shareholders with a minimum size or value of security holdings.

In addition, it may be necessary to impose escrow restrictions on some securities, known as ‘restricted securities’, for between 12 and 24 months. These escrow conditions prevent the transfer of effective ownership or control of the restricted securities.

It does not matter that a foreign entity applying for listing on the ASX does not conduct business in Australia. However, the ASX requires that the foreign entity has an Australian resident representative to accept responsibility for disclosure documents issued by the entity and for ongoing compliance with the ASX Listing Rules. The foreign entity must also appoint a person to give documents and reports to the ASX, make announcements, liaise with shareholders, the public and media generally, and generally represent the entity. This person should be available during ASX market hours and be able to communicate in English. The foreign entity must establish facilities for electronic lodgement of announcements with the ASX.

The ASX operates a fully computerised system for the electronic transfer of uncertificated securities, called CHESS. Every entity listing on the ASX must comply with the operating rules of the CHESS facility in relation to its quoted securities, unless it is established in a jurisdiction whose laws have such effect that CHESS cannot be used to hold legal title to its securities. In these circumstances, the entity must use CHESS depository instruments (CDIs) to facilitate clearing and settlement of transactions in its securities.

Where a foreign entity is listed on the ASX, its financial statements must comply with Australian or other accounting standards acceptable to the ASX. The ASX accepts international financial reporting standards as adopted by the EU and the accounting standards and generally accepted accounting principles applied in Hong Kong, Singapore, and the USA. Where a foreign entity seeks to use other accounting standards, the foreign entity must apply to the ASX for advice as to whether those standards are acceptable to the ASX. Similarly, the audit/review standards applied to any audited/reviewed accounts that are required to be lodged with the ASX must be Australian Auditing Standards (or other standards acceptable to the ASX). Other standards acceptable to the ASX are International Standards on Auditing or US Auditing Standards.

As the provisions of the Corporations Act dealing with the notification of substantial holdings do not apply to foreign entities, the ASX imposes measures to protect investors and
ensure that the market is properly informed. For example, the ASX requires a foreign entity to give to the ASX:

- a copy of a document it receives about substantial holdings of securities under any overseas law or the provisions of the entity’s constitution or
- a copy of a document it receives that reveals materially different information to the most current information it has received (if any) about substantial holdings under the overseas law or provisions in the entity’s constitution.

A foreign entity is also required to give to the ASX:

- information about the material terms of any notice it receives from a holder or holders of securities, calling, or requesting the calling of, or proposing to move a resolution at, a general meeting and
- information that a notice previously notified to the ASX under this requirement has been withdrawn by the holder or holders who gave it and
- details of any change of law in its home jurisdiction that materially affects the rights or obligations of security holders; for example, any material change in law in terms of the types of transactions that require security holder approval or changes in how the rights attaching to securities are regulated.

**ASX foreign exempt listing**

A foreign entity that is listed as a foreign exempt listing is exempt from many of the ongoing disclosure requirements under the ASX Listing Rules. This listing category was created in order to attract larger foreign entities to the ASX.

To be listed as a foreign exempt listing, the foreign entity must satisfy a ‘profits test’ or an ‘assets test’, including:

- under the assets test, be a going concern (or a successor to a going concern) with operating profit before income tax (derived from the entity’s ordinary activities) for each of the previous three financial years of at least A$200 million, or have net tangible assets of at least A$2 billion
- under the profits test, have at least 1,000 shareholders, each having a parcel of securities that are in the class for which it seeks quotation with a value of at least A$500.

Under both the ASX foreign exempt listing assets test and profits test, the foreign entity must:

- have as its overseas home exchange, a stock exchange or market which is a member of the World Federation of Exchanges
- be subject to the listing rules of its overseas home exchange, and the ASX must be satisfied that the foreign entity complies with those listing rules
- be registered as a foreign company under the Corporations Act if the entity is a company.

Before submitting an application for admission as an ASX Foreign Exempt Listing, ASX recommends that the applicant first discuss the matter with ASX Listings Compliance at the earlier opportunity.

After admission, a foreign entity with an exempt foreign listing will be exempt from complying with most Listing Rules, but must:

- immediately provide to the ASX, in English, all information that it provides to its overseas home exchange that is, or is to be, made public
- comply and continue to comply with the listing rules of its overseas home exchange
- comply with such of the ASX Listing Rules as are specified by the ASX.

**ASX debt listings**

A foreign entity seeking quotations of debt securities on the ASX may apply for an ASX debt listing. The requirements are the same for foreign entities and Australian entities, regardless of whether the foreign entity is already listed on another securities exchange.

A foreign entity must also satisfy additional requirements, including:

- appointing an agent for service in Australia
- being registered as a foreign company under the Corporations Act
- the ASX being satisfied that the debt securities are ‘financial products’.

The ASX will generally require a satisfactory legal opinion from a recognised law firm confirming that the applicant is recognised as a legal entity in Australia and has the capacity and authority to issue the debt securities.
Joint venture issues

Although many foreign entities choose to conduct their activities in the Australian market through joint ventures, this can pose problems if the entities choose to list:

- The ASX may not accept a commitment to invest in a joint venture as fulfilling the listing rules requirement that the entity has commitments consistent with its business objects to spend at least half of its cash or assets readily convertible to cash.

- Where the entity has a majority interest in the venture the ASX may consider this to simply be moving cash around within the group, although it may accept an express commitment for the joint venture to spend the funds that are paid to it.

- The ASX will view a venture structure that gives partners board representation that is disproportionate to their equity, or power of veto over major operational decisions as being irreconcilable with the listing rules requirement that the entity’s structure and organisation be appropriate for a listed entity.

Further information

Further information about the ASX can be found at www.asx.com.au.
Financial system

The four main regulators of Australia's financial sector regulatory regime are:

- Reserve Bank of Australia
- Australian Prudential Regulation Authority
- Australian Securities and Investments Commission
- Australian Transaction Reports and Analysis Centre.

RBA, APRA and ASIC work together to ensure a coordinated approach to the resolution of issues relating to the stability of the financial system. Together with the Commonwealth Treasury, these agencies form the Council of Financial Regulators, which provides advice to the Australian Government on the adequacy of Australia's financial regulatory arrangements.

Reserve Bank of Australia (RBA)

The RBA is Australia’s central bank, acting as banker and financial agent of the Commonwealth of Australia. The RBA has a role to maintain strong financial system stability and issues the nation's currency. As well as being a policy-making body, the RBA provides selected banking and registry services to a range of Australian government agencies and to a number of overseas central banks and official institutions. It has a central role in the regulation of payment and clearing systems and also manages Australia's gold and foreign exchange reserves.

The RBA has a function to maintain the stability of the Australian economy by formulating and implementing monetary policy. Monetary policy decisions involve setting the interest rate on overnight loans in the money market. Other interest rates in the economy are influenced by this interest rate to varying degrees, so that the behaviour of borrowers and lenders in the financial markets is affected by the monetary policy (though not only by monetary policy).

The role and functions of the RBA are underpinned by various pieces of legislation. The RBA is a statutory authority, established by the Reserve Bank Act 1959 (Cth), which gives it specific powers and obligations, and establishes two Boards: the Reserve Bank Board and the Payments System Board. The Payments System Board has a mandate to contribute to promoting efficiency and competition in the payments system, and the overall stability of the financial system. As part of its responsibility for monetary policy, the Reserve Bank Board sets a target for the cash rate. This is the rate at which banks borrow from and lend to each other on an overnight, unsecured basis.

While it is subject to certain requirements in relation to accountability and consultation, the RBA acts in an independent capacity. As an independent central bank, the Reserve Bank is accountable to the Australian Parliament for its actions.

Further information about the RBA can be found at www.rba.gov.au

Australian Prudential Regulation Authority (APRA)

APRA was formed on July 1, 1998 and replaced the RBA and the Insurance and Superannuation Commission as the prudential regulator of deposit taking institutions (banks, building societies and credit unions), friendly societies, life insurance companies, general and reinsurance companies and superannuation funds. APRA authorises corporations to carry on banking business in Australia as authorised deposit taking institutions (ADIs) under the Banking Act 1959 (Cth).

As prudential regulator of financial institutions, APRA is responsible for setting standards to ensure that these institutions remain financially sound and are able to meet their obligations to depositors and policy holders.

In its function as regulator of superannuation funds, APRA is responsible for setting standards to ensure that the funds’ trustees are aware of their obligations to members and prudently manage funds in their care.

In performing its functions, APRA liaises with various other bodies in the industry and has entered into Memoranda of Understanding with the RBA and the Australian Securities and Investments Commission providing for co-operation on such matters as information sharing and consultation arrangements for the handling of threats to the overall stability of the financial system.

A foreign bank wishing to establish a representative office in Australia must obtain the written consent of APRA. Minimum entry standards must be met and the representative office must comply with certain operating conditions, set by APRA.

APRA is also responsible for collecting financial data from
financial corporations registered under the Financial Sector (Collection of Data) Act 2001 (Cth). In general, the Act applies to:

- any corporation whose total assets exceed A$5 million and
- whose sole or principal business in Australia is borrowing money and provision of finance or
- whose assets arising from the provision of finance exceed 50 per cent of its total assets in Australia.

An ADI authorised by APRA to carry on banking business in Australia, public authorities, insurance companies and trustee companies do not need to be registered under this Act.

Further information about APRA can be found at www.apra.gov.au

Australian Securities and Investments Commission (ASIC)

ASIC enforces and regulates company and financial services laws and promotes financial market and financial sector integrity to protect consumers, investors and creditors. ASIC has power to use a combination of regulatory approaches, including the adoption of codes. ASIC is established under and administers the Australian Securities and Investment Commission Act 2001 (Cth) (ASIC Act), and carries out most of its work under the Corporations Act 2001 (Cth).

The ASIC Act requires ASIC to:

- uphold the law uniformly, effectively and quickly
- promote confident and informed participation by investors and consumers in the financial system
- make information about companies and other bodies available to the public
- improve the performance of the financial system and the entities within it.

In particular, ASIC is responsible for:

- consumer protection functions for superannuation, life insurance, deposit products, investment products and credit products
- issuing Australian Financial Services Licences for the provision of financial services, including the operation of market facilities and clearing and settlement facilities and the provision of financial intermediary services
- maintaining market integrity (by regulating matters such as insider trading and market manipulation)
- promoting confident and informed participation by investors and consumers in the financial system.

Since July 1, 2010, ASIC also administers the National Consumer Credit Protection Act 2009 (Cth), under which ASIC is:

- the national regulator for consumer credit and finance broking
- responsible for issuing Australian Credit Licences to persons who engage in relevant credit activities.

This is discussed further in the chapter on ‘Regulation of Banking and financial services’.

As part of its consumer protection role, ASIC monitors and assesses the compliance with industry codes of conduct, including the Code of Banking Practice, the Mutual Banking Code of Practice and the ePayments Code (which replaced the former Electronic Funds Transfer Code of Practice on 20 March 2013).

Further information about ASIC can be found at www.asic.gov.au

Australian Transaction Reports and Analysis Centre (AUSTRAC)

AUSTRAC is Australia’s anti-money laundering and counter-terrorism financing regulator and specialist financial intelligence unit.

AUSTRAC administered compliance with the Financial Transaction Reports Act 1988 (Cth) (FTRA) until the FTRA was repealed. It now administers compliance with the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML/CTF Act), which replaced the FTRA.

The FTRA was the principal legislation for the prevention of money laundering within financial institutions. The new statutory measures for the prevention of money laundering and terrorism financing are contained in the AML/CTF Act.

The AML/CTF Act imposes obligations on reporting entities, if designated services are provided through a
permanent establishment in Australia. There are 54 designated services which may potentially be used for money laundering or terrorist financing purposes. Examples of designated services are: provision of a deposit account, provision of a loan or lease facility, issuing a bill of exchange or promissory note, issuing a debit card or stored value card, issuing a traveller’s cheque, accepting electronic funds transfers, issuing or selling securities or derivatives, providing custodial or depository services, providing a safe deposit facility, providing remittance services, providing pensions, annuities and life policies and entering into foreign exchange contracts.

Reporting entities must enrol with AUSTRAC within 28 days of providing or commencing to provide a designated service covered under the AML/CTF Act and need to comply with provisions in relation to EFT origination instructions, registration of providers of designated services, movements of cross border currency and bearer negotiable instruments, compliance reports, correspondent banking, AML/CTF programs, customer identification, suspicious matter reporting, threshold transaction reporting, reporting of international funds transfer instructions and ongoing customer due diligence.

In addition to collecting reports and analysing information, AUSTRAC’s powers under the AML/CTF Act include:

- to authorise specified agencies to access information held by AUSTRAC
- to pass on information to governments of foreign countries or to authorise the Australian Federal Police to do so
- to pass on information to a foreign intelligence agency or to authorise the Australian Security Intelligence Organisation to do so
- to search premises for information relevant to a reporting entity’s compliance and reporting obligations under the AML/CTF Act
- to apply to the Federal Court for both prohibitory and mandatory injunctions in relation to conduct in contravention of the AML/CTF Act
- to apply for civil penalty orders
- to issue infringement notices for failing to report movements of cross-border currency and bearer negotiable instruments
- to monitor and report to the Minister on compliance by reporting entities
- to make legislative instruments by way of AML/CTF Rules and provide information to reporting entities by way of Guidelines for the interpretation and implementation of the AML/CTF Act.

Further information about AUSTRAC can be found at [www.austrac.gov.au](http://www.austrac.gov.au)
Regulation of banking and financial services

Authorised deposit-taking institutions (ADIs)

A body corporate may only carry on a banking business in Australia if it has been granted authority to do so by the Australian Prudential Regulation Authority (APRA). Authority may be granted subject to conditions and may be revoked at any time. A body corporate which has been granted authority under the Banking Act 1959 (Cth) is termed an ‘authorised deposit-taking institution’ (ADI). The Act allows only corporations to carry on banking business in Australia. APRA cannot authorise a body which is not a corporation, such as a partnership or unincorporated entity.

A body corporate or person must not, except with the express consent of APRA, assume or use a restricted word or expression, including the word ‘bank’ (and related terms), in relation to a financial business carried on by that body corporate or person.

Ownership of ADIs is governed by the Financial Sector (Shareholdings) Act 1998 (Cth). Under that Act, limits apply to the proportion of shares in a financial institution (including an ADI) which may be held by an individual shareholder or group. Treasury approval (on national interest grounds) is required for shareholdings of more than 15 per cent, or if an individual shareholder or group has ‘practical control of the company’ (where the 15 per cent shareholding limit is not exceeded). In addition, under its current ‘four pillars policy’, the Commonwealth Government will not permit mergers among Australia’s four major banks (ANZ, Commonwealth, NAB and Westpac).

A foreign corporation which wishes to carry on banking business in Australia has three options:

- to apply for an authorisation to establish a locally incorporated subsidiary to carry on banking business in Australia as an ADI or
- to apply for an authorisation as a foreign authorised deposit-taking institution (foreign ADI) for it to carry on banking business through a branch in Australia; or
- to simultaneously apply for an authorisation for it:
  - to carry on banking business in Australia as a foreign ADI with a branch in Australia and
  - to establish a locally incorporated subsidiary to carry on banking business in Australia as an ADI.

Locally incorporated banking subsidiaries of foreign corporations may be authorised to conduct banking business in the same way as locally incorporated Australian banks, whereas branches of foreign banks are subject to a special regulatory regime (see below).

Non-operating holding companies (NOHCs)

An ADI may be a subsidiary of a NOHC. A body corporate which wishes to be a NOHC of an ADI subsidiary may apply in writing to APRA for authority to do so. A body corporate may be required to hold a NOHC authority as a condition precedent to its ADI subsidiary being granted an authority to carry on banking business in Australia or for a purpose connected with the Financial Sector (Shareholdings) Act 1998 (Cth).

A NOHC may not use the word ‘bank’ (and certain other related terms) without APRA’s consent.

Conduct of ADIs and NOHCs

As prudential regulator, APRA supervises compliance by ADIs and NOHCs with relevant legislation and regulations. It is vested with power to issue directions regulating the conduct of ADIs and NOHCs. A direction in writing may be given if APRA considers that the body corporate has contravened a prudential regulation or standard, or the direction is necessary in the interests of depositors of the ADI or ADI subsidiary of the body corporate. Directions are wide ranging.

Foreign ADIs

A foreign corporation which is authorised to carry on banking business in a foreign country and which wishes to carry on banking business in Australia (via a branch office) must be granted authority by APRA to do so as a foreign ADI. APRA’s current policy on foreign ADIs will be imposed as conditions of authorisation for each foreign ADI. Foreign ADIs with branches in Australia are not permitted to engage in retail banking (they must not accept initial deposits (and other funds) from individuals and non-corporate institutions of less than A$250,000).

There is no restriction on the number of foreign ADIs able to operate in Australia.
Some of the provisions protecting depositors do not apply to foreign approved ADIs. Before accepting a deposit from any person in Australia, the foreign ADI must inform the person that the usual protective requirements do not apply.

Where a foreign ADI (whether in or outside Australia) suspends payment or becomes unable to meet its obligations, the assets of the bank in Australia must be made available to meet the liabilities of the ADI in Australia in priority to all other liabilities of the ADI.

A foreign ADI is also subject to the requirements of the Financial Sector (Shareholdings) Act 1998 (Cth).

Consent from APRA is required for a foreign ADI to use the word 'bank' or its equivalent as part of the foreign ADI's corporate name in connection with maintaining a branch office.

Foreign bank representative offices (not ADIs)

A foreign bank wishing to establish a representative office in Australia must obtain the written consent of APRA.

Consent from APRA is required for a foreign bank to use the word 'bank' or its equivalent as part of the bank's corporate name in connection with maintaining a representative office.

Minimum entry standards must be met and the representative office must comply with certain operating conditions, set by APRA.

Foreign banks (not ADIs and without physical presence in Australia)

APRA may not object to a foreign bank (not authorised by APRA as an ADI) conducting business with Australian counterparties from its offshore offices provided certain conditions set by APRA are satisfied, including:

- it does not maintain an office or permanent staff in Australia
- it does not solicit business from retail customers in Australia
- all business contracts and arrangements are clearly transacted and booked offshore;
- it does not engage in advertising or allow bank staff to physically solicit business in Australia
- where offshore staff of the foreign bank meet with clients and potential clients in Australia, it is for the limited purposes of arranging or executing documentation in relation to the business of those clients.

Provided the foreign bank conducts its business with Australian counterparties under these conditions, APRA does not consider that the foreign bank will be in breach of section 66 of the Banking Act 1959 (Cth) if it uses a restricted word such as ‘bank’, including in its corporate name, when dealing with its clients or where it uses restricted words such as ‘bank’ to register a security interest over property in Australia including on the Personal Property Securities Register.

Financial services regulation

A financial institution which carries on financial services business in Australia (for example, by issuing deposit products, non-cash payment facilities, foreign exchange contracts, derivatives, custody services, managed investments, insurance and superannuation products etc. to Australian clients) also needs to be authorised by the Australian Securities and Investments Commission (ASIC) in accordance with the financial services regulation under Chapter 7 of the Corporations Act 2001 (Cth) (Corporations Act).

Even though a foreign financial service provider may not have any physical presence in Australia, it may be regarded as carrying on financial services business in Australia if it engages in conduct that is intended to induce people located in Australia to use the financial services. A number of exemptions may be available to foreign financial service providers.

The Australian financial services regime differentiates between retail and wholesale clients. There are more disclosure and conduct requirements where financial services are provided to retail clients.

These are discussed further in the chapter on ‘Financial system’.

Consumer credit regulation

A financial institution which engages in a credit activity within the meaning of the National Consumer Credit Protection Act 2009 (Cth) in relation to consumer credit regulated by the National Credit Code (for example, by providing home loans (including for investment in residential property), consumer lease facility, credit card
facility, personal loan for personal use to Australian clients who are individuals) must be authorised by ASIC before it can engage in the credit activity.

Even though a foreign credit provider may have no physical presence in Australia, it will be regarded as engaging in a credit activity in Australia if it provides regulated credit to Australian residents who are individuals.

This is discussed further in the chapter on 'Financial system'.

Privacy

In Australia, financial institutions that are banks in the traditional sense and which are ADIs that are authorised by the APRA to carry on banking business in Australia are subject to a duty of confidentiality/secrecy at common law. In addition, the courts have indicated that the duty of confidentiality/secrecy should extend to most, if not all financial institutions (eg, investment banks).

In the contractual relationship between a bank and its customer, the bank is subject to various duties to the customer, one of the most important of which is the duty of confidentiality/secrecy.

The duty of confidentiality/secrecy applies to information relating to the customer that is acquired by the financial institution due to the customer keeping an account or arising out of the banking relationship.

A financial institution has a general duty of confidentiality/secrecy towards the customer, except in the following circumstances:

- where disclosure is compelled by law or
- where there is a duty to the public to disclose or
- where a financial institution’s interest requires disclosure or
- where disclosure is made with the customer’s express or implied consent.

Customers of the financial institution that are protected by the banker’s duty of confidentiality/secrecy include individual and corporate customers.

In addition to the banker’s common law duty of confidentiality/secrecy, financial institutions are also subject to the broader statutory obligations under the under the Privacy Act 1988 (Cth) – see below.

In Australia, the Privacy Act 1988 (Cth) regulates the collection, use, transfer and disclosure of ‘personal information’ (as defined in the Privacy Act 1988 (Cth)) of individuals in Australia, through the current National Privacy Principles (NPPs) which apply to the private sector generally.

The credit reporting provisions under Part IIIA of the Privacy Act 1988 (Cth) regulate the way ‘credit providers’ collect, utilise, exchange and dispose of personal credit information about individuals. The term ‘credit provider’ includes banks, credit unions, building societies, and other types of corporations engaged in the provision of credit. Credit providers are subject to rules governing the handling of consumer credit information and cannot generally disclose consumer credit information except in the circumstances described in the legislation. Credit reporting agencies can generally only give access to personal credit information about individuals to businesses that are credit providers. The legislation imposes heavy penalties for unauthorised access to, or improper use of, personal credit information.

The Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth) has introduced numerous changes to Australia’s privacy regime, including the replacement of the NPPs with a new set of Australian Privacy Principles (APPs) which will take effect on and from March 12, 2014.

The new laws require organisations to make changes to their privacy policies and, possibly, to their internal privacy processes to avoid fines for non-compliance. Major changes are:

- amending the definition of ‘personal information’ to mean information/opinion about an identified individual, or an individual who is reasonably identifiable, whether the information/opinion is true or not or is recorded in a material form or not
- privacy policies must contain certain additional key provisions (eg, they must now state what type of information is collected)
- export of personal information will need to comply with a new regime and specific notifications will be required to be given to individuals
- new obligations in relation to the treatment of unsolicited personal information
- a new privacy regime for organisations that use direct marketing
• more comprehensive credit reporting with improved privacy protection

• a new credit reporting code (called the CR code) which will replace the current Credit Reporting Code of Conduct.

The Privacy Act 1988 (Cth) is further discussed under the heading Privacy Act 1988 (Cth) in the chapter on 'E-commerce'.

Further information on the privacy regime in Australia is available from the Office of the Australian Information Commissioner at www.privacy.gov.au

Code of Banking Practice

The Code of Banking Practice (‘the Code’) is the banking industry’s customer charter on good banking practice. The Code establishes the banking industry’s key commitments and obligations to individual and small business customers on standards of practice, disclosure and principles of conduct for their banking services. When a bank has voluntarily adopted the Code, it will become a binding agreement between the bank and its customer.

The Code is not legislation but banks that adopt the Code are considered to be contractually bound by their obligations under the Code. The principles and obligations set out in the Code apply to the majority of banking services delivered to individuals and small businesses across Australia. The Code forms an important part of the broader national consumer protection framework and the financial services regulatory system.

The Code was recently revised and the Code of Banking Practice 2013 version will apply from February 1, 2014.

Further information is available from the Australian Bankers’ Association website at www.bankers.asn.au

ePayments Code

The ePayments Code regulates consumer electronic payment transactions, including ATM, EFTPOS and credit card transactions, online payments, internet and mobile banking, and BPAY. It was formerly known as the Electronic Funds Transfer Code of Conduct (EFT Code) which has existed since 1986. The ePayments Code replaced the EFT Code on March 20, 2013.

ASIC is responsible for the administration of the ePayments Code, including compliance monitoring and regular review.

Most banks, credit unions and building societies currently subscribe to the ePayments Code along with a number of non-banking subscribers. The ePayments Code is not legislation but is a voluntary code of practice.

The ePayments Code plays an important role in the regulation of electronic payment facilities in Australia. It complements other regulatory requirements, including financial services and consumer credit licensing, advice, training and disclosure obligations under the Corporations Act and the National Consumer Credit Protection Act 2009 (Cth).

Further information is available from ASIC’s website at www.asic.gov.au

Personal Property Securities Act

The Personal Property Securities Act 2009 (Cth) (PPSA) came into effect on January 30, 2012 replacing more than 70 existing Commonwealth, State and Territory laws administered by more than 30 different agencies to become one central registry in relation to security interests over almost all personal property. Subject to certain exceptions, personal property comprises all property except land and fixtures. The PPSA not only covers tangible personal property (like motor vehicles, plant and equipment, inventory, crops and livestock), but also intangible property (such as intellectual property, contractual rights and shares).

The Personal Property Securities Register (PPS Register) acts as a ‘noticeboard’ of security interests and unlike some of the registers it replaced, including ASIC’s Register of Company Charges, it is not a register of documents. Secured parties register online ‘Financing Statements’ setting out the required details of their security interest. To obtain proper protection registrations need to be made within tight timeframes prescribed under the PPSA.

The PPSA has fundamentally changed the law affecting security interests over personal property, and priorities between competing security interests. The PPSA takes a functional approach to security interests. A security interest is an interest in relation to personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property). It covers traditional security
interests such as charges and mortgages as well as some arrangements which were not previously considered to be security interests, for example, conditional sale agreements, retention of title clauses and leases of goods. Other transactions are also deemed to be security interests for some purposes of the PPSA, whether or not they secure debts or obligations, such as commercial consignments and assignment of accounts.

Security interests that arose prior to the PPSA coming into effect on January 30, 2012 and that were not registrable on a register that has migrated to the PPS Register are afforded temporary protection for a two year period ending on January 31, 2014. These security interests are required to be registered on the PPS Register prior to January 31, 2014 in order to continue protection beyond the temporary protection period.
Foreign exchange control

Generally, foreign currency (and indeed Australian currency) can be transferred in and out of Australia without restriction. Virtually all exchange controls in Australia have been removed and Australia has had a floating exchange rate regime since the Australian dollar was floated in 1983.

The Reserve Bank of Australia (RBA) is Australia’s central bank and it implements monetary policy, works to maintain a strong financial system and issues the nation’s currency. It also manages Australia’s gold and foreign exchange reserves. The RBA no longer authorises foreign exchange dealers. Currently, the licensing of all financial service providers (including foreign exchange dealers), when required by the Corporations Act 2001 (Cth), is the responsibility of the Australian Securities and Investments Commission (ASIC).

Reform to Australia’s sanctions regime


Prior to the introduction of the new legislation, from time to time targeted financial sanctions or restrictions were imposed on the transfer of particular currencies under the Banking (Foreign Exchange) Regulations 1959 (Cth), which are enforced by the RBA. These restrictions were usually imposed due to foreign policy rather than economic reasons. The Autonomous Sanctions Regulations give effect to a new autonomous sanctions framework in Australia and also give the Department of Foreign Affairs and Trade (DFAT) sole responsibility for the implementation and administration of Australia’s autonomous sanctions.

After the commencement of the Autonomous Sanctions Regulations DFAT and the RBA worked to transition Australia’s targeted financial sanctions from the Banking (Foreign Exchange) Regulations 1959 (Cth) to the Autonomous Sanctions. The handover of regulatory responsibility was completed in March 2012 and the new regime for autonomous financial sanctions is now administered by DFAT.

The new regime assists with the administration of and compliance with sanctions by removing distinctions between the scope and extent of autonomous sanctions and United Nations Security Council sanction enforcement law. This simplifies compliance arrangements for those entities whose business requires a regular and active engagement with the operation of such laws.

At the date of publication of this document, sanctions with respect to financial transactions exist in relation to designated persons or entities in Zimbabwe, the former Federal Republic of Yugoslavia, the Democratic People’s Republic of Korea (North Korea), Iran, Myanmar, Fiji, Libya and Syria.

In addition, sanctions currently also exist in relation to terrorists and their sponsors under the Charter of United Nations Act 1945 (Cth) (COTUNA) and Charter of United Nations (Dealing with Assets) Regulations 2008 (Cth) (COTUNA Regulations). These include measures highly targeted at persons or entities identified by the United Nations Security Council as contributing to a particular threat to, or breach of, international peace and security, including the Taliban and Al-Qaeda (wherever located), the Democratic Republic of Congo, Eritrea, Liberia, Iraq, Guinea-Bissau, Libya, Sudan, Cote d’ Ivoire, Democratic People’s Republic of Korea (North Korea), Iran, Lebanon and Somalia. These sanctions are administered by DFAT.

DFAT maintains a sanctions list (the ‘Consolidated List’) which contains proscribed persons and entities under both the autonomous sanctions regime and the COTUNA regime. The Consolidated List is updated from time to time by DFAT and the current sanctions list can be obtained from the DFAT website at www.dfat.gov.au.

Further information is available from DFAT at www.dfat.gov.au

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML/CTF Act)

Reporting of threshold transactions is regulated under the AML/CTF Act, whereby reporting entities (that is an entity that has obligations under the AML/CTF Act) are required to report threshold transactions to the regulator, Australian Transaction Reports and Analysis Centre (AUSTRAC).

A threshold transaction is defined to be a transaction where the total amount transferred is not less than $10,000 (or its foreign currency equivalent) in physical currency or in the form of e-currency. E Currency is defined in the AML/CTF Act to mean internet-based, electronic means of exchange. This definition may be subject to some inclusions or exclusions by way of regulations.
There are additional obligations under the AML/CTF Act for reporting of transfer of physical currency (foreign or Australian cash) into or out of Australia with a value of not less than A$10,000 (or its foreign currency equivalent). Subject to various exemptions, these transfers must be reported to AUSTRAC by any person. Exemptions apply for commercial passenger carriers (who are not required to report on the currency in the possession of their passengers) and commercial goods carriers (who are not required to report on the currency if it is not disclosed to them that the goods carried on behalf of another person include physical currency). Unlike the Financial Transaction Reports Act 1988 (Cth) which the AML/CTF Act in most part replaced since 2006, a bank that is an authorised deposit-taking institution (ADI) is no longer exempted under the AML/CTF Act from making a report in respect of currency transferred on behalf of the ADI by a commercial goods carrier. If required by a police officer or a customs officer, a person may also be required to report to AUSTRAC where they have a bearer negotiable instrument which they either bring into or take out of Australia.

The AML/CTF Act also requires reporting entities to report to AUSTRAC any international funds transfer within ten business days of the transfer. An international funds transfer can be funds coming into Australia or funds going out from Australia. There is no threshold amount before the obligation to report applies to transfers. The obligation applies for transfers within the one institution in addition to multiple institution transfers. There is provision within the AML/CTF Act for AUSTRAC to introduce rules to exempt certain transfers.

Further information is available from AUSTRAC at www.austrac.gov.au
Government incentives

Both State and Federal Governments provide a number of incentives to encourage investment, business growth and exports.

**Government initiatives include:**

**Research and development (R&D) tax incentives**

This program enables companies performing eligible R&D activities to claim:

- a 45 per cent refundable tax offset (equivalent to a 150 per cent tax deduction) if they have an aggregated turnover of less than A$20 million, and are not controlled by tax exempt entities or

- a 40 per cent non-refundable tax offset (equivalent to a 133 per cent tax deduction) for all other entities.

Companies incorporated in Australia, foreign companies tax resident in Australia or resident in a country with which Australia has a tax treaty and having a permanent establishment in Australia, and public trading trusts may qualify for the program. Entities must broadly also be in a position where they would, in absence of the R&D tax offset, have been entitled to at least A$20,000 in tax deductions in relation to their R&D activities in the relevant year.

The R&D tax incentive is administered jointly by the Australian Taxation Office (ATO) and Innovation Australia through AusIndustry (a division of the Department of Industry). In order to claim the R&D tax offset, the claimant must be registered with AusIndustry each year. The application for registration must be made no later than ten months after the company’s year end.

Eligible R&D activities must be either core or supporting R&D activities. Core R&D activities are experimental activities:

- whose outcome cannot be known or determined in advance on the basis of current knowledge, information or experience, but can only be determined by applying a systematic progression of work

- that are conducted for the purpose of acquiring new knowledge.

Supporting R&D activities are activities directly related to core R&D activities. Certain specified activities, for example, market research, management studies and exploration, are excluded from being core R&D activities, and may only be supporting R&D activities if they are undertaken for the dominant purpose of supporting core R&D activities.

Generally, only R&D activities conducted in Australia qualify for the R&D tax incentive. However, R&D activities conducted overseas also qualify if Innovation Australia makes a finding that the overseas activity meets certain conditions. These conditions are intended to identify activities which are not able to be conducted within Australia, but have a significant scientific link to one or more core R&D activities which are conducted in Australia.

**AusIndustry assistance**

Programs available under AusIndustry include:

- Innovation Investment Fund – the Government has established a number of managed funds to provide access for certain companies to equity finance for venture capital.

- Grants for specific industries, such as the automotive, clean technology, certain inputs to manufacture, clothing and household textile industries.

- Programs providing concessions from import and tariff duties, such as where the imported goods are to be used in Australian manufacturing, or major projects in the mining, resource processing, agriculture, food processing, food packaging, gas supply, power supply, and water supply industries.

**Australian Trade Commission (Austrade)**

Austrade promotes export related foreign investment into Australia by providing financial assistance. The Export Market Development Grant reimburses eligible Australian businesses for part of their costs associated with developing an export business. The scheme focuses on small businesses and emerging exporters. To be eligible the business must have income of not more than A$50 million in the grant year. The grant is calculated on expenditure incurred for marketing activities and provides a maximum rebate of 50 per cent on eligible export promotion expenses exceeding A$10,000 per annum provided the total expenses are at least A$20,000. To access the scheme for
the first time, businesses need to have spent A$20,000 over two years on eligible expenses. Certain other caps and limits apply, such as the amount which can be given in a single grant and the number of grants a single applicant is entitled to. All applications must be received by Austrade between July 1 and December 2.

**Venture capital reform**

Australia has a tax regime for venture capital which is designed to facilitate non-resident investment in the Australian venture capital industry by providing incentives for increased investment.

Under current rules, certain limited partnerships called Venture Capital Limited Partnerships (VCLPs) and Early Stage Venture Capital Limited Partnership (ESVCLPs) used for venture capital investments in Australia are taxed as flow-through vehicles.

The ESVCLP provides a tax exemption for both revenue and capital income received by resident and non-resident investors arising from eligible venture capital investments by the ESVCLP.

The VCLP provides a tax exemption for eligible foreign resident partners on their share of the profit or gain made on the VCLP’s disposal of an eligible venture capital investment. Foreign residents of any country are eligible for the concessional tax treatment as limited partners, but general partners must be a resident of, or established in, a country with which Australia has a double tax agreement.

Managers of VCLPs and ESVCLPs are entitled to claim their carried interest on capital account rather than revenue.

To qualify for the tax exemption, the limited partnership must be registered and satisfy a number of conditions, including:

- it must be established in Australia or in a country with which Australia has a double tax agreement
- an ESVCLP must have a fund size between A$10 million and A$100 million
- a VCLP has a maximum fund size of A$250 million.

Eligible venture capital investments must also satisfy a number of conditions including:

- the investment must be held at risk by the limited partnership for at least 12 months
- the investee businesses cannot be predominantly involved in certain activities, including property development, infrastructure or finance
- for an ESVCLP, the investee businesses cannot have total assets in excess of A$50 million immediately prior to investment, and the ESCVLP must dispose of the investment if its assets grow to over A$250 million
- for a VCLP, the investee businesses cannot have total assets in excess of A$250 million, and must have at least 50 per cent of employees and assets in Australia.

In February 2013 the Board of Taxation recommended some reforms to improve the effectiveness of the venture capital concessions and the Government was largely in agreement with them. At the time of writing, these reforms have not been implemented.

**Investment in Australian films**

Refundable tax offsets may be available to companies for, broadly:

- 40 per cent of production expenditure incurred for goods and services provided in Australia in making Australian feature films (generally, films with significant Australian content) and 20 per cent for other films
- 16.5 per cent of production expenditure incurred for goods and services provided in Australia in making certain other films or television dramas or series or
- 30 per cent of expenditure relating to post, digital and visual effects production in Australia.

**Infrastructure projects**

In 2013 legislation was passed to provide tax incentives for 'Designated Infrastructure Projects'. Under this legislation tax losses arising under those projects would:

- be exempt from the tax loss recoupment rules. In the case of a corporate entity, these rules are the continuity of ownership test and the same business test
- if carried forward, be uplifted by the long term Government bond rate each year.

To be eligible for the scheme, a project would need to be an infrastructure project of national significance in order to be ‘designated’ This would require that the project:
satisfies any requirements prescribed by the Minister or

if there are no prescribed requirements, be nationally significant with the financing arrangements for the project having been made or being imminent.

The incentives apply for the 2012-13 and later income years.
**Taxation**

**Taxation reform**

The Australian taxation system has been subject to significant reforms over the last few years, and further reforms have recently been announced or are being contemplated. Reforms proposed or otherwise implemented in recent times include the following:

- introduction of a managed investment trust (MIT) regime granting the benefit of preferential withholding tax rates to foreign investors in qualifying widely-held investment trusts
- staged implementation of Investment Manager Regime (IMR) tax reforms designed to attract investment into Australia by foreign managed funds
- a significant re-write of Australia’s general anti-avoidance and transfer pricing rules
- responses to the OECD’s report on Base Erosion and Profit Shifting (BEPS) including proposed changes to Australia’s thin capitalisation rules which relate to the use of debt in the capitalisation of foreign controlled Australian businesses and Australian controlled foreign operations.

Following the election of the Liberal/National coalition government in September 2013, a few tax changes have been announced which include the following:

- abolition of the Minerals Resource Rent Tax which was introduced by the previous Federal Government and which was charged at a rate of 30 per cent on the profits (less an extraction factor of 25 per cent) of iron ore and coal extracted in Australia as well as gas extracted as a necessary incident of coal mining, with effect from July 1, 2012
- the company tax rate to be reduced to 28.5 per cent (from 30 per cent) from July 1, 2015, however, a new levy of 1.5 per cent is being introduced for companies with annual taxable income over A$5 million; and
- abolition of the carbon pricing legislation (referred to by some commentators as a ‘carbon tax’) which had been passed by the previous Federal Government in 2011 with a fixed carbon price and which transitioned to a flexible price cap.

**Australian taxation system**

In Australia, sovereign power to levy tax exists at both Commonwealth (ie, Federal) and State levels. The Federal Government levies taxes such as income taxes, goods and services tax (GST), fringe benefit taxes (FBT), customs duty on certain imports and excise duty on certain goods. Taxes levied by State Governments include stamp duties, land taxes and payroll taxes as well as transaction taxes on certain kinds of business transactions.

At the Federal level, taxation is administered by the Australian Taxation Office (ATO), which is represented by the Commissioner of Taxation (Commissioner). At the State and Territory level, the taxation authority is the State Revenue Office of the applicable State or Territory.

The Australian fiscal year is generally from July 1 to June 30. However, a subsidiary of an overseas company which has a different fiscal year end may seek permission from the Commissioner to adopt the fiscal period of its parent company. The Commissioner will ordinarily give permission for this so long as all Australian affiliates adopt the same fiscal period.

**Self assessment**

Individuals and companies deriving income from an Australian source must apply to the ATO for an Australian tax file number (TFN) (entities which carry on an ‘enterprise’ also require an Australian Business Number or ABN), and must lodge with the ATO an annual tax return.

Australia has a system of self-assessment, which means that generally all taxpayers (individuals and corporates) are required to calculate their own tax liability and the annual tax return shows the taxable income and only limited information. Due dates for tax returns to be lodged vary according to the type of taxpayer and in some cases whether or not a tax agent is used.

The self assessment made by the taxpayer may subsequently be audited by the Commissioner. A tax audit generally refers to a process of investigation for the purpose of examining and reviewing the self assessment in order to detect areas of non-compliance. The Commissioner is empowered to amend any assessment and to impose penalties. Where, by reason of any amendment, a taxpayer’s liability is reduced, the Commissioner is required to refund the tax overpaid. The taxpayer may also be entitled to interest in relation to the amount overpaid.

Taxpayers who are registered for GST (see under the
heading ‘Goods and services tax’) are also required to lodge a ‘Business Activity Statement’ (BAS) on a monthly or quarterly basis depending on certain financial thresholds. BASs relate to an entity’s periodic obligations to pay:

- GST
- pay as you go withholding and instalment liabilities (see under the heading ‘Collection system’).

Taxpayers or their advisers may request rulings from the ATO on matters, including the exercise of discretions by the ATO, that may affect their income tax position. The ATO cannot assess a taxpayer less favourably than would follow from a relevant private binding ruling unless the taxpayer has not made appropriate disclosure to the ATO of all facts relevant to the matter the subject of the ruling request or has departed from or varied the transaction the subject of the ruling request.

**Collection system**

The ‘Pay As You Go’ tax collection system (PAYG) incorporates two separate systems – PAYG withholding and PAYG instalments.

PAYG instalments are advance instalments of the estimated income tax payable for the current year. PAYG instalments are payable by companies and superannuation funds, as well as by individuals with a certain level of investment or business income. Taxpayers with business or investment income will generally be required to pay PAYG instalments on a quarterly basis (taxpayers can pay annually under very limited circumstances). The amount of each PAYG instalment is the instalment rate given by the Commissioner (or, in certain circumstances, a rate determined by the taxpayer) multiplied by the taxpayer’s instalment income for the quarter just ended. Instalment income is, broadly, the taxpayer’s gross assessable business and investment income.

The PAYG withholding obligation applies, subject to exceptions, to:

- payments for work and services (ie, principally wages and salaries)
- eligible termination payments (ie, certain payments made in connection with an employee ceasing work)
- dividends, interest and royalty payments to non-residents
- payments for a supply made in the course of the recipient’s business or enterprise where no ABN has been quoted by the recipient of the payment
- payments made by an Australian investment body (including banks and other financial institutions) on an investment where the investor has not supplied a TFN or ABN
- certain other specified payments.

In the case of payments for a supply made in the course of the payee’s business or enterprise where no ABN has been quoted by the recipient of the payment, and payments made by an Australian investment body on an investment where the investor has not supplied a TFN or ABN, tax is required to be withhold at the top marginal rate plus Medicare levy (see under the heading ‘Corporate and individual tax rates’). This is currently 46.5 per cent. Therefore, any Australian resident who invests in an interest-bearing deposit or account with an Australian financial institution must provide a TFN or ABN to avoid the financial institution withholding for tax at that top marginal rate.

Non-resident investors are effectively exempted from the need to quote a TFN, so tax should not be withheld at the top marginal rate. However, the Australian investment body will be required to deduct withholding tax under the provisions applying to payments of interest to non-residents, unless a withholding tax exemption applies (see under the heading ‘Withholding tax’).

**Income tax**

The principal revenue raised by the Federal Government is income tax, which is assessed under the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936) and the *Income Tax Assessment Act 1997* (Cth) (ITAA 1997) (collectively ITAA). The ITAA 1936 was partially rewritten as the ITAA 1997 under the Tax Law Improvement Project which started in 1993. However, that project was later subsumed into more fundamental reform of the tax system. The effort to rewrite the remaining provisions of the ITAA 1936 into the ITAA 1997 was restarted in 2009.

Income tax is payable by individuals, trustees, superannuation funds and companies. Australian income tax is imposed on a single measurement of ‘taxable income’, which is calculated as the sum of ‘assessable income’ derived by the taxpayer during the relevant year of income less ‘allowable deductions’:

\[
\text{Taxable income} = \text{Assessable income} - \text{Allowable deductions}.
\]

Australian residents are generally liable to pay tax in
respect of their world-wide assessable income, whereas non-residents only pay tax on that part of their income that is derived from sources in Australia. However, this principle may be subject to the application of double taxation agreements that Australia has entered into with a number of other countries (see the table under the heading ‘Withholding tax’ for a current list of countries).

Residence

For income tax purposes a distinction is drawn between residents and non-residents. Generally, an individual will be a resident of Australia if he or she is domiciled in Australia, or has been in Australia for more than one-half of the year of income (that is, in excess of 183 days), unless the Commissioner is satisfied that his or her usual place of abode is outside Australia and that he or she does not intend to take up residence in Australia. A company will generally be regarded as a resident in Australia if it is incorporated in Australia or if it carries on business in Australia and either has its central management and control in Australia or is controlled by shareholders who are residents of Australia. There are other tests applicable for certain purposes in relation to dual resident entities. Double taxation agreements to which Australia is a party also frequently contain ‘tie-breaker’ rules for determining the country of residence of an individual or entity where, under the laws of each country, that individual or entity is treated as resident in both countries that are parties to the agreement.

Corporate and individual tax rates

The tax rate for public and private companies, resident and non-resident, is 30 per cent. It was announced as part of the new Federal Government’s election policy that this rate would decrease to 28.5 per cent for the tax year starting July 1, 2015. At the time of writing, legislation to implement this announced rate reduction had not been introduced. It was also announced, as part of the new Government’s election policy, that a paid parental leave scheme would be introduced and this would be funded by imposing a 1.5 per cent levy on the taxable income of companies with taxable income above A$5 million.

Taxation rates for individuals differ, depending on whether they are an Australian resident or not. The marginal rates of taxation applicable for the financial year from July 1, 2013 to June 30, 2014 are as follows:

<table>
<thead>
<tr>
<th>Taxable income</th>
<th>Resident tax rate</th>
<th>Non-resident tax rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>A$0 – A$18,200</td>
<td>0%</td>
<td>32.5%</td>
</tr>
<tr>
<td>A$18,201 to A$37,000</td>
<td>19%</td>
<td>32.5%</td>
</tr>
<tr>
<td>A$37,001 to A$80,000</td>
<td>32.5%</td>
<td>32.5%</td>
</tr>
<tr>
<td>A$80,001 to A$180,000</td>
<td>37%</td>
<td>37%</td>
</tr>
<tr>
<td>A$180,001 +</td>
<td>45%</td>
<td>45%</td>
</tr>
</tbody>
</table>

Resident individuals are also liable to pay a ‘Medicare levy’, which funds State-provided health care. The levy is calculated at the rate of 1.5 per cent of taxable income (subject to exclusions and reduction for low income earners). There is also an additional Medicare levy surcharge of up to 1.5 per cent of taxable income levied on high income taxpayers where a taxpayer, spouse and all dependants are not covered by private hospital insurance.

Concessional rates of tax (15 per cent) apply to superannuation funds which comply with applicable superannuation legislation.

Assessable income

The term ‘assessable income’ is defined in the ITAA 1997 to include income according to ordinary concepts and other statutory income. The following criteria have been developed by case law in relation to the concept of income:

- the amount must ‘flow’ or ‘come home’ to the taxpayer
- a monetary amount must be realised or realisable
- a gain which is the product of an income-earning activity will be income
- capital gains are not income at common law
- periodic receipts will often be income
- receipts which are in the nature of compensation for other amounts which would have been income are likely to themselves be income.

Items that do not comply with these criteria may nevertheless be made assessable income by specific statutory provisions. For example, the net capital gain on the disposal of a capital asset must generally be included in assessable income (see under the heading ‘Capital gains tax’). Thus it is necessary to look both to statutory provisions and common law principles in order to determine what should be included in assessable income.

The ITAA also excludes certain categories of income (labelled exempt income) from assessable income.
Allowable deductions
The ITAA permits deductions for outgoings which are necessarily incurred in gaining or producing assessable income or in carrying on a business for the purpose of gaining or producing assessable income, provided that these outgoings are not of a private, domestic or capital nature, or incurred in relation to gaining or producing exempt income.

Common deductible expenses for carrying on a business include:

- lease and rental payments for business premises
- hire or lease payments for plant and equipment
- purchases of trading stock
- employee salaries
- insurance premiums on buildings, machinery and equipment used for business purposes
- interest on money borrowed to gain or produce assessable income or in carrying on a business to produce such an income.

The expenses of establishing, replacing, enlarging or improving the structure of a business – as distinct from working or operating expenses – are capital in nature and therefore ordinarily not tax deductible (although they may be taken into account under the CGT regime). However, expenses relating to the purchase of plant and equipment can usually be claimed over a number of years in the form of deductions for depreciation. Such deductions for depreciation are referred to as ‘capital allowances’, and are granted at rates specified by statute, which may or may not accord with the depreciation appearing in the financial accounts of the taxpayer.

The ITAA also permits deductions for certain types of capital expenditure, such as certain building expenditure, research and development expenditure, mining expenditure, environmental expenditure, expenditure on the development or acquisition of intellectual property rights. Some costs which would otherwise not be deductible (typically relating to establishing a business structure, for example costs of raising equity), referred to as ‘black hole’ expenditure, are deductible over a period of five years.

Carry forward tax losses
Taxpayers can reduce assessable income by setting off revenue losses from past years against current year taxable income. In order to do this, companies and trusts must satisfy various tests (for example, the ‘same business’ test or the ‘continuity of ownership’ test).

In broad terms, a company should be able to carry forward its revenue and capital losses for as long as the company passes the ‘continuity of ownership’ test, that is, if shares carrying more than 50 per cent of all voting, dividend and capital rights are owned by the same persons from the year in which the loss arose to the end of the year in which the loss is claimed. If a company fails the ‘continuity of ownership’ test it may nevertheless be entitled to use the carried forward losses if it satisfies the ‘same business’ test, that is, if it continues to carry on exactly the same business in the year it wishes to claim the loss as it carried on immediately before it failed the continuity of ownership test. Hence, the use of carried forward tax losses by a company can be prevented by transactions such as mergers or acquisitions of new businesses, changes in corporate shareholdings or changes to rights attaching to shares in the company. Subject to satisfaction of these tests, revenue losses can be carried forward indefinitely.

Capital gains tax (CGT)

The basic CGT scheme is that net capital gains realised on disposal of assets acquired after September 19, 1985 are subject to income tax. For CGT purposes, assets are defined as being any form of property, both tangible and intangible. However, CGT is not payable on gains from the disposal of the taxpayer’s principal residence, motor vehicles and low value personal use items.

To calculate the amount of the realised capital gain, the capital proceeds from the disposal are reduced by the capital costs of acquisition, incidental costs and the costs of any improvements. Where the asset is disposed of as a gift or not at arm’s length, the market value is substituted for the sale proceeds.

A tax concession, generally known as the ‘CGT discount’, may be available to resident taxpayers that are individuals, superannuation funds and certain trusts who dispose of assets which are held for more than 12 months, such that only half (or two-thirds in the case of superannuation funds) of the realised capital gain will be assessable.

Capital losses may be deducted against capital gains (after application of any available CGT discount) and may be carried forward indefinitely, subject to satisfying certain tests for companies, until absorbed against capital gains realised in the future. However, capital losses cannot be offset against ordinary income.
Residents of Australia are liable for CGT on the disposal of assets no matter where the asset is located, whereas non-Australian residents are only liable for gains on the disposal of assets that are ‘taxable Australian property’ (see further under the heading ‘CGT and non-residents’).

An individual who ceases to be resident in Australia may be treated for CGT purposes as disposing of CGT assets that are not ‘taxable Australian property’. Such individuals may elect to disregard all capital gains or losses arising from the deemed disposal of their capital assets, but each of those capital assets will then be treated as ‘taxable Australian property’ (and hence subject to Australian CGT) until the individual ceases to own the asset (at which point a CGT gain or loss will typically be triggered and the ability to use the CGT discount will be limited) or the individual becomes Australian resident again.

The CGT rules contain various ‘rollover’ provisions that have the effect of deferring CGT on the disposal of assets in certain circumstances. One of the types of rollover used most often is for ‘scrip-for-scrip exchanges’. Broadly, scrip-for-scrip rollover relief will be available where an entity (acquirer) takes over another entity (target) by acquiring at least 80 per cent of the voting interests in the target as a result of a takeover offer made to all the holders of those interests, and the shareholders in target receive, in exchange for their shares in target, shares in the acquirer or a parent company of the acquirer. Where the scrip-for-scrip rollover relief applies, any CGT liability which would otherwise arise to the shareholders in the target as a result of the takeover will be deferred until ultimate disposal of the replacement shares.

The scrip-for-scrip rollover provisions will only apply to a non-resident if the replacement shares are ‘taxable Australian property’. That is, the rollover will not be available to a non-resident where the replacement shares are outside the scope of the CGT rules.

There are also CGT rollovers which facilitate, among other things, the incorporation of a business which has previously been held by an individual or partnership, replacement of assets which have been lost or destroyed, corporate reorganisations, or conversion of a trust into a company.

**Tax and companies**

**Consolidation regime**

Wholly-owned groups of entities (companies, trusts and partnerships) can elect to be treated as a single consolidated entity for income tax purposes. Broadly, this means that the subsidiary entities lose their individual income tax identities and are treated as part of the head entity of the consolidated group for the purpose of determining income tax liability.

Under the consolidation regime:

- the head company of the group will lodge a single consolidated income tax return, removing the need for other entities in the group to lodge their own income tax returns
- the assets and liabilities of the subsidiary members are treated as if they were assets and liabilities of the head company
- at the time of consolidation, eligible losses of subsidiary members will be transferred to the head company (although there are restrictions on the rate at which transferred losses can be recouped)
- intra-group transactions are ignored.

The consolidation regime applies primarily to groups of Australian entities that are wholly-owned by an Australian resident company. However there are rules relating to multiple entry consolidated (MEC) groups that allow foreign-owned Australian companies to take advantage of the consolidation regime notwithstanding that there is no single Australian holding company of those Australian companies. A company which is not Australian resident cannot be part of an Australian consolidated tax group, even if it pays Australian income tax in respect of operations in Australia, for example by virtue of having a permanent establishment (branch) in Australia.

The numerous benefits ensuing from consolidation have resulted in many large corporate groups and small and medium enterprises electing to consolidate. However, the legislation implementing the consolidation regime is extremely complex. Particular issues arise where entities are acquired out of consolidated groups or join consolidated groups.

Where related companies have chosen not to form a consolidated group, there are no group tax reliefs such as tax neutral asset transfers or an ability to share tax losses between group members.
Dividends and the imputation system

Dividends are generally assessable income of the recipient shareholder. To avoid the potential for double taxation of company profits first in the hands of the company itself and then in the hands of the shareholder, Australia has adopted a dividend imputation system.

Under the imputation system, Australian tax paid by an Australian company is allocated to resident shareholders by way of ‘franking credits’ (sometimes also known as ‘imputation credits’) attaching to dividends paid out of profits on which that Australian tax has been paid. A dividend to which franking credits are allocated by the company is referred to as a ‘franked dividend’. In calculating tax liability of the resident shareholder, the dividend received by the shareholder is ‘grossed up’, which means that the shareholder is treated as receiving assessable income equal to the dividend paid plus the attached franking credit. The shareholder is also treated as having paid tax equal to the amount of the franking credit. The resulting effective rate of tax on the shareholder is the difference between the shareholder’s tax rate and the tax rate of the company.

This is often referred to as the ‘gross-up and credit approach’. Excess franking credits are refundable to individual shareholders.

For example, in the case of a fully franked dividend paid to an individual and assuming the current corporate tax rate of 30 per cent:

- if the shareholder’s tax rate is 40 per cent, the shareholder will be liable for ten per cent additional tax calculated on the ‘grossed up’ dividend (40% – 30% = 10%)
- if the shareholder’s tax rate is 30 per cent there will be no further tax payable at the shareholder’s level
- if the shareholder’s tax rate is 20 per cent there will be an excess franking rebate of ten per cent of the ‘grossed up’ dividend available to offset against tax payable on other income of the shareholder, or if the shareholder has no other tax payable then he or she will receive a refund of tax.

Unfranked dividends are fully taxable in the hands of the shareholder.

The Australian company maintains a ‘franking account’, which is in the nature of a running balance of tax paid by the company less franking credits granted to its shareholders. The dividend-paying company may choose, with limitations, to what extent it franks any dividend, up to a maximum of the corporate tax rate (currently 30 per cent) applied to the grossed-up amount, and provided the company may only grant total franking credits up to the value of Australian tax that it has paid. The franking account rules for consolidated groups provide for the pooling of franking credits and the opening of a single franking account at the head company level.

New Zealand companies can elect to maintain an Australian franking account reflecting Australian tax paid, and Australian shareholders of such companies can access the franking benefits arising from the payment of Australian tax.

For non-Australian resident shareholders the following general principles apply:

- franked dividends paid to non-Australian residents are not subject to Australian tax
- unfranked dividends are subject to dividend withholding tax (and partly franked dividends are partly subject to dividend withholding tax), which must be withheld by the paying company. The withholding tax rate is 30 per cent of the gross amount of dividend where no double taxation agreement applies. For the rates of withholding tax which apply to particular countries under double taxation agreements (DTAs) refer under the heading ‘Withholding tax’ below. The DTA reduced rate may not apply if the payment of the dividend is ‘effectively connected’ with a permanent establishment of the non-resident in Australia.

There can be no amount added to an Australian company’s franking account in respect of foreign tax or foreign withholding tax paid by the Australian company in respect of its profits.

However, dividends paid by an Australian company to a non-Australian resident shareholder which are declared by the Australian company to be ‘conduit foreign income’ will be exempt from Australian dividend withholding tax. ‘Conduit foreign income’ is generally foreign income received by a non-Australian resident shareholder via an Australian company. These rules seek to prevent such amounts being taxed in Australia. Generally, conduit foreign income is made up of income either earned by a foreign permanent establishment of the Australian company, or received by the Australian company from a foreign company in which it holds at least ten per cent of the shares.
There are a number of dividend anti-avoidance measures that affect franking benefits. In particular, there is a rule known as the ‘45 day rule’ which requires that, in order to benefit from the franking credits attached to a dividend, the shareholder must have been ‘at risk’ in relation to its ownership of the relevant shares for a qualifying period. Broadly, the shareholder must have been exposed to at least 30 per cent of the risk of loss and gain in respect of the shares, for the period from the time the shares are acquired until 45 days after the ex-dividend date in relation to the first dividend. The test need only be satisfied once (ie, in respect of one dividend received) in respect of each shareholding.

Debt and equity rules
Australian income tax law treats returns to shareholders of a company differently from returns to creditors. Shareholders of a company receive dividends which may be franked (see under the heading ‘Dividends and the imputation system’ above) but which are not deductible to the company paying the dividend. Creditors, on the other hand, receive returns, such as interest, which cannot be franked but which are usually deductible to the company.

There are rules which define what constitutes equity in a company and what constitutes debt for Australian tax purposes. These rules generally apply for purposes of establishing whether payments to shareholders by a company are frankable, whether they are deductible to the company, and for application of the thin capitalisation regime. However, the debt/equity rules do not apply for all Australian tax purposes.

The test for distinguishing debt from equity focuses on whether there is an effective obligation of an issuer to return to the investor an amount at least equal to the amount invested (an arrangement satisfying this condition will usually be classified as debt). Under these rules, it is possible to have an interest in a company which is equity for corporate purposes, such as a redeemable preference share, but which is treated as debt for tax purposes. Dividends on that share may qualify as a deduction for the company but would not be able to be franked.

Foreign issues

Withholding tax
Withholding tax is imposed on dividends (see above), interest and royalties paid by an Australian resident to a non-resident. It is also imposed on payments of interest and royalties from a resident to a non-Australian permanent establishment of a resident and from an Australian permanent establishment of a non-resident to another non-resident.

Australia also imposes on Australian payers or agents an obligation to withhold amounts for tax in other more specific situations:

- income paid by an investment body on certain types of investment where the recipient has not provided the investment body with a tax file number (TFN) or, if the recipient is non-resident, the payment is not otherwise subject to interest or dividend withholding tax or specifically exempt
- payments (other than royalties) made to non-residents calculated by reference to the value or quantity of natural resources produced or recovered in Australia
- certain payments made to, or received for, non-Australian residents, in relation to casino junket tours, entertainment and sports activities, and building and construction contracts
- certain payments made by managed investment trusts.

Interest (or a payment in the nature of interest) is subject to withholding tax, which means that an Australian company or permanent establishment must withhold ten per cent of the gross amount of the interest paid to a non-resident creditor. Most of Australia’s DTAs do not affect the withholding tax rate imposed, as they allow for a rate of ten per cent or higher. A number of Australia’s DTAs provide an exemption from withholding tax for interest derived by government bodies and the central or reserve bank of each country. Of those, the DTAs that Australia has with the United States, the United Kingdom, France, Japan, Norway, New Zealand, South Africa, Finland and Switzerland (signed but not yet in force as at the date of writing), also provide an exemption for interest derived by a financial institution resident in one of those countries.

Interest paid by an Australian resident company on funds raised overseas by a public offering of debentures or interests in a syndicated loan may be exempt from interest withholding tax in certain circumstances.

The rate of interest withholding tax for foreign bank branches that borrow from their overseas head office is five per cent. In 2011 it was announced by the Government that this withholding tax was to be gradually phased out starting in 2013-14, but that proposal has been discontinued by the recently elected Government.

Royalties paid by an Australian resident company to a non-resident are subject to withholding tax. The definition
of royalties is very broad and includes any amount paid or credited as consideration for the use or supply of intellectual property, equipment or know-how. The royalty withholding tax rate is 30 per cent of the gross royalty amount, generally reduced to ten per cent if paid to a resident of a country with which Australia has a DTA. Under some DTAs, notably the DTAs that Australia has with the United States, the United Kingdom and Japan, payment for the use or supply of equipment is not classified as a royalty. Therefore payments such as rentals paid under equipment leases, where made between parties coming within the scope of those DTAs, are generally not subject to Australian withholding tax.

The following table identifies the countries that have entered into DTAs with Australia and specifies the applicable limit on Australian tax applied to dividends, interest and royalties:

<table>
<thead>
<tr>
<th>Country</th>
<th>Dividends (%)</th>
<th>Interest (%)</th>
<th>Royalties (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>10 15</td>
<td>12</td>
<td>10 15</td>
</tr>
<tr>
<td>Austria</td>
<td>15</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Belgium</td>
<td>15</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Canada</td>
<td>15 15</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Chile</td>
<td>5 15</td>
<td>5 10</td>
<td>5 10</td>
</tr>
<tr>
<td>China</td>
<td>15</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>5 15</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Denmark</td>
<td>15</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Fiji</td>
<td>20</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td>Finland</td>
<td>0 5 15</td>
<td>0 10</td>
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<tr>
<td>France</td>
<td>0 5 15</td>
<td>0 10</td>
<td>5</td>
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<tr>
<td>Germany</td>
<td>15</td>
<td>10</td>
<td>10</td>
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<tr>
<td>Hungary</td>
<td>15</td>
<td>10</td>
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<tr>
<td>India</td>
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<tr>
<td>Indonesia</td>
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<tr>
<td>Ireland</td>
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<td>10</td>
<td>10</td>
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<tr>
<td>Italy</td>
<td>15</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Japan</td>
<td>0 5 10</td>
<td>0 10</td>
<td>5</td>
</tr>
<tr>
<td>Kiribati</td>
<td>20</td>
<td>10</td>
<td>15</td>
</tr>
<tr>
<td>Korea (South)</td>
<td>15</td>
<td>15</td>
<td>15</td>
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<tr>
<td>Malaysia</td>
<td>0 15</td>
<td>15</td>
<td>15</td>
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<tr>
<td>Malta</td>
<td>15</td>
<td>15</td>
<td>10</td>
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<tr>
<td>Mexico</td>
<td>0 15</td>
<td>10 15</td>
<td>10</td>
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<tr>
<td>Netherlands</td>
<td>15</td>
<td>10</td>
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<tr>
<td>New Zealand</td>
<td>0 5 15</td>
<td>0 10</td>
<td>5</td>
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<tr>
<td>Norway</td>
<td>0 5 15</td>
<td>0 10</td>
<td>5</td>
</tr>
</tbody>
</table>

Taxation of foreign sourced income

Generally, Australian residents are taxed on their worldwide income, subject to a tax offset (or credit) for foreign taxes paid. However, some foreign sourced income may qualify as exempt income. Australian taxation of foreign sourced income may also be limited by the terms of a double taxation agreement.

The following categories of foreign sourced income are exempt under the ITAA:

- certain foreign profits of Australian resident companies derived from carrying on business at or through a permanent establishment in a country with a comparable tax system to Australia
- dividend income derived by an Australian resident company which has a voting interest of at least ten per cent in the foreign company
- dividend income received by an Australian resident where it is paid out of profits which have previously been subject to attribution under controlled foreign corporation or transferor trust regimes.
Foreign investment in Australia

Australian resident companies holding at least a ten per cent direct voting interest in a foreign company may, under the ‘participation exemption’, have any capital gain arising in respect of a disposal of shares in that foreign company reduced to the extent that foreign company has underlying active business assets. The shares disposed of must have been held for a continuous period of at least 12 months in the two years preceding the disposal.

Certain Australian shareholders may be taxed on the accruing income (that is, income earned but not distributed) in respect of interests held in certain controlled foreign corporations (CFCs). The broad purpose of the CFC rules is to tax Australian shareholders on their share of a CFC's ‘tainted income’, unless it is comparably taxed offshore or the CFC derives its income almost exclusively from active business activities. 'Tainted income' covers passive income as well as tainted sales or service income. Passive income broadly means income arising from passive investment activity, such as interest, rent and royalties. Tainted sales income arises from sales of goods to associated entities. Tainted services income arises from services provided to an Australian resident or Australian permanent establishment of a foreign resident.

More stringent rules apply to companies which are not resident in a ‘listed country’. Seven countries have been categorised as ‘listed countries’ for the purpose of the CFC rules, being the United States, the United Kingdom, New Zealand, Canada, France, Germany and Japan.

There were proposals to make significant changes to the CFC provisions. Exposure draft legislation had been released for public comment. In December 2013 the Government announced that the proposed changes to the CFC rules would not be proceeding.

There were to be provisions under which Australian residents could have been taxed on income accruing to their benefit in non-resident foreign investment funds (FIFs). The FIF provisions were repealed in 2010 and were to be replaced by new rules directed at foreign accumulation funds (FAFs). In December 2013 the Government announced that the FAF measures would not be proceeding.

Thin capitalisation

The objective of the thin capitalisation regime is to ensure that multinational entities do not allocate an excessive amount of debt to their Australian operations, to prevent them taking unfair advantage of the differential tax treatments of debt and equity to minimise their Australian tax. Interest payments are generally a tax-deductible expense of an Australian company, whereas dividends are non-deductible distributions of profits. Accordingly, the payment of interest can reduce the income of the Australian operation that is subject to tax (at the rate of 30 per cent in the case of an Australian company), while the payments of interest are subject to interest withholding tax (generally at the lower rate of only ten per cent).

A company is ‘thinly capitalised’ when the means by which the company is effectively financed are heavily weighted in favour of debt rather than equity. The thin capitalisation rules limit the amount of debt that can be used to finance Australian operations of certain investors by reducing debt deductions where an entity’s debt to equity ratio exceeds certain limits (generally 3:1). It was announced by the previous Federal Government in its May 2013 Budget that the current 3:1 safe harbour debt to equity ratio will be reduced to 1.5:1 with effect from July 1, 2014. Legislation implementing these changes has yet to be introduced.

Inward and outward investors (companies, trusts, partnerships and individuals) are subject to the thin capitalisation regime.

Inward investors are:

• foreign entities that carry on business through Australian permanent establishments or have direct investments in Australia (eg, land and buildings)

• Australian entities that are foreign controlled.

Outward investors are Australian entities that control foreign entities or carry on business through an overseas permanent establishment (or are associate entities of such Australian entities).

Transfer pricing

The ITAA and DTAs to which Australia is a party contain anti-avoidance provisions countering international profit-shifting techniques.

International agreements between an Australian company and a foreign company which have the effect of artificially decreasing the amount of Australian assessable income or increasing Australian allowable deductions may be challenged by the ATO.

Where the parties to such an international agreement have agreed upon prices or payments otherwise than at arm’s length the Commissioner is empowered to substitute an arm’s length consideration for the consideration stipulated by the parties for tax purposes.
Application of the provisions does not require establishment of a tax avoidance motive, and they are strictly enforced.

The ATO has published guidelines for selecting taxpayers for transfer pricing audits. The prospect of audit coupled with the introduction of changes to the transfer pricing rules (referred to below), make it imperative for companies with international related party dealings to prepare and maintain contemporaneous transfer pricing documentation. If this documentation is not prepared and a taxpayer is found to have contravened the rules, it will be difficult to resist the imposition of penalties after audit. As part of the annual tax return process, companies operating in Australia who have international related party transactions (including loan balances) of more than A$2 million, who hold interests in foreign entities or are subject to the thin capitalisation rules are required to lodge an ‘International Dealings Schedule 25A’. The preparation of appropriate documentation requires more than simply assembling invoices, agreements, etc. It requires economic and financial analysis sufficient to establish that inter-company prices are consistent with market determined prices.

The ATO may, at its discretion, enter into Advance Pricing Agreements in relation to transfer pricing issues. By contrast with many other jurisdictions, Australia’s Advance Pricing Agreements program has no minimum size or turnover threshold, and is available to small enterprises.

In 2013 the Government introduced amendments to the transfer pricing rules in the Australian income tax law to improve their integrity and to ensure the transfer pricing rules are interpreted in line with OECD guidance.

Capital gains tax (CGT) and non-residents

Non-Australian residents are only liable for CGT on gains on the disposal of assets that are ‘taxable Australian property’.

The two main categories of taxable Australian property are:

- taxable Australian real property (including indirect real property interests)
- an asset that has been used at any time by the non-resident in carrying on a business through a permanent establishment in Australia.

Important categories of assets not included in ‘taxable Australian property’ are shares in Australian companies, units in Australian unit trusts and interests in Australian resident trust estates.

‘Taxable Australian real property’ is defined as real property situated in Australia or a mining, quarrying or prospecting right (to the extent that it is not real property) if the minerals, petroleum or quarry materials are situated in Australia.

The inclusion of indirect real property interests is an integrity, or anti-avoidance measure, because it seeks to ensure that foreign investors cannot avoid CGT by holding assets through interposed entities – including foreign interposed entities. An ‘indirect real property interest’ exists where:

- a non-resident, together with associates, holds a ten per cent or more interest in an entity at the time of the relevant disposal, or throughout a 12 month period that began no earlier than 24 months before the disposal and ended at the time of the disposal

- more than 50 per cent of the value of the entity’s assets is attributable to taxable Australian real property.

There are safeguards to prevent the assets of the entity being artificially inflated so as to not satisfy the principal asset test. There are also complex rules for valuing membership interests held by the entity in other entities.

If a non-resident is subject to CGT, the CGT discount (see under the heading ‘Capital gains tax’) is generally not available to reduce the amount of gain subject to Australian tax.

When a non-resident becomes an Australian resident, that person’s non-Australian assets are deemed to be acquired for Australian CGT purposes at their prevailing market value. When a taxpayer ceases to be an Australian resident, there is a deemed disposal of that person’s capital assets for Australian CGT purposes. This will not be the case, however, if the person is only a temporary resident.

Double taxation agreements (DTAs)

To avoid international double taxation, bilateral DTAs have been entered into by Australia with a large number of countries, including virtually all of the OECD countries and most of Australia’s major trading partners in Asia (refer to the list of countries in the ‘withholding tax’ section of this document). These agreements seek to limit international tax avoidance and to resolve conflicts between the tax levies of the contracting countries by allocating rights to levy tax based, for example, on the residence of the taxpayer, the type of income derived, the source of the income and the taxpayer’s activities in the source country. Since they are bilateral treaties, their terms vary significantly. However, most of Australia’s recent treaties adopt the general format...
Foreign investment in Australia

of the OECD 1977 Model Convention. Some treaties provide for information sharing with overseas revenue authorities, and in recent years Australia has also entered into a number of taxation information exchange agreements with non-treaty countries, including a number of countries that may be regarded as tax havens (such as the Cayman Islands).

Australia’s DTAs are given domestic legislative effect by the International Tax Agreements Act 1953 (Cth) and generally the provisions of the DTA override domestic tax law in the event of any inconsistency between the two.

Tax Information Exchange Agreements (TIEAs)
In addition to DTAs to which Australia is a party and which contain provisions enabling the exchange of information between the countries that are parties to the DTA, Australia has also entered into a large number of TIEAs with various countries. This has been in response to a process initiated by the Organisation for Economic Cooperation and Development (OECD) so as enable certain non-OECD offshore financial centres to eliminate tax avoidance and evasion practices. Under a TIEA there is agreement between the countries party to that agreement to help each other by exchanging tax information relevant to the administration and enforcement of their respective domestic tax laws.

Australia has TIEAs in place with 35 countries (although a number of those have not yet come into force) including the British Virgin Islands, the Cayman Islands, Vanuatu, Guernsey and Jersey.

Taxation treatment of other entities

Partnerships
A partnership is not regarded as a separate legal entity. Therefore, the partnership is not taxable as a separate taxpayer, however, a partnership tax return must be lodged.

In preparing the partnership tax return, the partnership is treated as if it were a single taxpayer for purposes of calculating income and deductions, choosing the method of accounting, applying timing rules, and making elections in regard valuation of trading stock and depreciation. This means that partners must adopt a common approach to the tax treatment of income and expenses of the partnership business. The partnership’s net income, as determined by the partnership tax return, is allocated to the particular partners and taxed as part of their respective income at their individual tax rates. Losses incurred by the partnership are allocated to the particular partners and may be claimed as a deduction by those partners. The assessable income of an Australian resident partner includes the partner’s individual interest in the world-wide partnership net income. The assessable income of a non-resident partner includes that partner’s individual interest in the partnership net income that is sourced in Australia.

Under general Australian law, a partnership is, broadly, any number of persons carrying on business in common with a view to profit. For Australian tax purposes that definition is broadened to include persons in receipt of income jointly, as well as some forms of joint venture, that may not be a partnership for legal purposes.

Limited partnerships may be established under specific State (as opposed to Federal) legislation in Australia. A limited partnership must have at least one general partner (that is, a partner who has unlimited liability), and one partner with limited liability. There is no Federal or State legislation in Australia under which a limited liability partnership, (that is, a partnership in which the liability of all partners is limited), may be established. Australian limited partnerships, as well as limited partnerships or limited liability partnerships formed under any foreign law, will generally be treated as ‘corporate limited partnerships’ under the ITAA. Such corporate limited partnerships, except venture capital limited partnerships as discussed below, are treated as companies for tax purposes.

Types of limited partnership used for venture capital investments, the ‘venture capital limited partnership’ (VCLP) and the ‘early stage venture capital limited partnership’ (ESVCLP), are accorded favourable tax treatment and certain investors in such partnerships are exempt from capital gains arising in respect of venture capital investments via such partnerships (refer to the chapter on ‘Government Incentives’ for more information on VCLPs and ESVCLPs).

Joint ventures
There is no necessity to lodge a separate tax return for a joint venture, so long as it is not a partnership for tax purposes. This results in considerable flexibility for joint venture participants, as they can apply different tax treatments to the income and expenses of the joint venture. ‘Joint ventures’ are not specifically defined in Australian taxation law. If joint venturers are in receipt of income jointly under the joint venture arrangements, then the joint venture will be taxed as if it were a partnership. For this reason, many resources projects in Australia that are structured as joint ventures are organised so that the participants receive a share of the product of the joint venture, as opposed to the joint venture selling that product and distributing the proceeds of sale to the joint venturers.
**Trusts**

The current tax treatment of trusts is complex. Generally, a trust is not regarded as a separate legal entity and any income derived by the trust property will be held by the applicable trustee(s) on behalf of the beneficiaries of the trust. At the end of the financial year the trustee(s) must lodge a tax return in respect of the trust fund disclosing the income or loss of the trust and how that income is allocated among the beneficiaries. The income of the trust will be taxed in the hands of either the trustee(s) or the beneficiaries. Except in respect of certain limited classes of beneficiaries, the trustee(s) will not be taxed provided the trust income is distributed to beneficiaries in the year it is earned.

However, certain types of trusts which are stock exchange-listed or widely-held and that engage in trading activities, such as ‘public trading trusts’, will be taxed as though they are corporations.

A beneficiary who is ‘presently entitled’ to a share of the distributable income of a trust (measured according to trust law concepts) will be liable to pay income tax on that same share of the net income of the trust (measured according to tax laws). A trustee will be liable for tax on that share of the trust’s net income to which:

- the ‘presently entitled’ beneficiary is under a legal disability, for example an infant beneficiary
- a non-resident beneficiary is ‘presently entitled’, provided the share of net income has an Australian source; or
- no beneficiary is ‘presently entitled’, which may occur if there is distributable income of the trust which the trustee has neither distributed nor declared any beneficiary to be entitled to, within the year in which it is earned. Such income is subject to high rates of tax and this is the reason why the trustee will usually try to distribute all the net income of the trust each year.

A trustee will only be assessed in relation to trust income in his or her capacity as trustee. The trust income is not added to any income derived by the trustee in his or her personal capacity and does not affect his or her personal income tax rate.

Losses incurred by a trust can be carried forward and offset against future income of the trust but they cannot be distributed to the beneficiaries. However, a trust must satisfy various tests before it can claim a deduction for its prior year and current year losses and debt deductions.

The Government has proposed a major update of the law relating to the taxation of trust income and, in this regard, a Consultation Paper was released towards the end of 2011.

There is a separate body of rules for taxing certain MITs. A trust that qualifies as a MIT has benefits such as the ability to elect that certain types of its investments be treated as capital rather than revenue assets, and a reduced rate of withholding tax (15 per cent) that applies to certain income distributions by the MIT to non-resident investors that are resident in a country that has an exchange of information agreement with Australia as regards tax.

**Branches**

Instead of incorporating a subsidiary, a foreign company may conduct business in Australia through a branch. For tax purposes, such a branch is called a ‘permanent establishment’. A foreign company operating a permanent establishment in Australia is not a resident of Australia for tax purposes. This means that it is only liable for tax on income derived from an Australian source or otherwise connected with the branch. However, the foreign company should not generally be subject to any Australian withholding tax when the permanent establishment remits profits back to the head office of the foreign company.

The tax rate for a permanent establishment is currently 30 per cent. The desirability of operating in Australia through a branch rather than a subsidiary will depend on various factors, including the profitability of the Australian operation, the profitability of the foreign company and the taxation regimes that apply to the foreign company.

For example, it might be advisable to operate through a branch (as opposed to a subsidiary) where the Australian operation of a profitable foreign company is running at a loss. In this situation, the expenses of the Australian branch are potentially available as a tax deduction of the foreign company in its home jurisdiction. On the other hand, it might be preferable to capitalise an Australian subsidiary with funds borrowed offshore by the foreign company in circumstances where the foreign company can utilise the borrowing costs as a tax deduction under another tax regime. In general terms, foreign companies more frequently incorporate subsidiaries to conduct business in Australia than choose to establish branches.

Special record keeping requirements are imposed on non-resident entities that carry on a business through a permanent establishment in Australia. These entities are required to keep financial statements for their permanent establishments which have been prepared in accordance with Australian accounting standards. Their Australian tax returns must be prepared on the basis of those accounts.
Other taxes

Goods and services tax (GST)
The GST is a broad-based consumption tax levied on most goods and services in Australia, and on goods imported into Australia. It is largely modelled on European-style VAT/GST regimes.

GST is levied at a flat rate of ten per cent. It is paid at each step along the chain of transactions involving the goods or services until the end-user is reached. The GST is imposed on ‘taxable supplies’, which includes virtually all activities involving the supply of goods, services and other things. Entities making taxable supplies will receive a credit for the GST paid on supplies it has received (‘input tax credit’).

Entities carrying on an enterprise with an annual turnover of A$75,000 or above must register for GST. Entities with an annual turnover under this amount may choose to register for GST.

Exports and some other goods and services, including food (as defined), health, education and international transport are GST-free. A GST-free supply is not subject to GST. However, the supplier is able to claim an input tax credit for GST incurred in providing the good or service.

Financial supplies, residential rent, and some other goods and services are input taxed. Where goods or services are input taxed, no GST is payable on the supply. However, the supplier is not entitled to claim an input tax credit for GST incurred in providing the good or service.

All of the GST revenue raised by the Commonwealth is channelled to the Australian States and Territories, although this position is currently under negotiation. No alteration to the GST rate of ten per cent or the GST base can be made unless each State and Territory agrees to the change (as well as both Houses of the Commonwealth Parliament).

Fringe benefits tax (FBT)
FBT is imposed upon employers under the Fringe Benefits Tax Assessment Act 1986 (Cth) on the taxable value of fringe benefits provided to their employees, and the value of those benefits is not taxed in the hands of the employees. Fringe benefits include a wide range of entitlements, such as company cars, expense payments, interest free or low interest loans, living away from home allowances, accommodation, car parking and entertainment. The FBT tax rate (currently 46.5 per cent) is applied to the sum of the taxable values of all fringe benefits multiplied by a gross-up factor (where the provider is entitled to credits for GST paid) of 1.8692. Employers are required to pay the annual self-assessed FBT in quarterly instalments based on a March 31 year end. With some exceptions, the amount of FBT paid is fully deductible from the employer’s assessable income.

As a general rule, if the cost of FBT is charged against an employee’s salary package, the provision of fully taxed fringe benefits has the same after tax result as paying salary to an employee who then purchases their own benefits (and bears the GST on those purchases). The use of salary packaging using fringe benefits mainly advantages employees who pay tax at the highest marginal rate. Provision of fringe benefits may not be the most tax efficient way to remunerate employees who are not in the highest marginal tax bracket. However concessions with some types of fringe benefits can make the provision of those fringe benefits an attractive way to package an employee’s salary. It is important that the effects of FBT are understood and properly factored into salary packaging agreements at the outset.

Superannuation
Australian employers are required by law to provide a prescribed minimum level of superannuation support for each of their employees. These superannuation contributions are generally tax deductible. Where the required superannuation contributions are not made, a non-deductible superannuation guarantee charge is imposed. For the 2013–2014 fiscal year, the compulsory superannuation contribution rate is 9.25 per cent of the payroll. The Government has announced its intention to increase this rate to 12 per cent and this will be phased in by July 2021.

The superannuation guarantee charge can apply where salary is paid to a non-resident for work done in Australia, but a prescribed exception applies to certain overseas executives.

Customs & excise duties
Customs duty is a federal tax which is levied on a range of imported goods at rates prescribed in the applicable legislation. The applicable legislation conforms to general international practice in relation to customs duty.

Excise duty is also a federal tax and is levied on a narrow range of products, such as oil, petroleum, alcohol and tobacco.

Stamp duties
State and Territory Governments impose stamp duties at varying rates on certain specified types of documents and transactions. Traditionally, stamp duty has been imposed on instruments brought into existence to evidence
the implementation of transactions such as purchase agreements, conveyances of property and transfers of shares. Duty legislation has since been widened to require a stamp dutiable written record of transactions that cause a change in the beneficial ownership of certain types of property where no written document would otherwise be brought into existence.

The stamp duty legislation of each State and Territory contains a list of instruments and transactions on which duty is chargeable, specifying the relevant rates. The amount of duty is sometimes fixed, but in most cases an ad valorem rate of duty is imposed, that is, calculated by reference to the ‘dutiable value’ of the transaction. In most cases, the ‘dutiable value’ will be the greater of the consideration paid for the transaction and its market value.

In New South Wales and South Australia, duty is charged on the transfer of unlisted shares at the rate of 0.6 per cent of the dutiable value, but most States have abolished stamp duty on the transfer of shares. However, all States and Territories impose duty (referred to as ‘landholder duty’) on certain transfers of interests in companies and trusts that hold land in Australia. For transfers of interests in land, all States and Territories impose duty at a progressive scale of rates, which varies from jurisdiction to jurisdiction. The highest rate is currently 6.75 per cent of the dutiable value. Some States and Territories also impose duties on transfers of various categories of business asset. New South Wales is now the only State to impose mortgage duty where instruments securing loan advances are executed. Duty may also be payable in respect of various other transactions and documents such as declarations of trust. Many States and Territories provide relief from duty (usually on application to the relevant authority) where transfers of property that would otherwise be subject to duty, are made between members of a corporate group.

The parties to a dutiable instrument must lodge the instrument for stamping within a limited time period to avoid penalties. The rights under a dutiable instrument are only enforceable when the applicable State Revenue Office has duly stamped the relevant instrument.

**Land tax**

Land tax is an annual tax imposed by each of the States and Territories (except the Northern Territory) on the total unimproved value of land located in that State or Territory. The rates vary from jurisdiction to jurisdiction and are generally imposed on a progressive rate scale. Some exemptions from land tax are provided, such as a principal place of residence exemption and an exemption for land used for primary production, subject to satisfying a number of requirements.

**Rates**

A wide range of rates are levied by local governments and government utilities for the provision of services.

**Payroll tax**

Payroll tax is payable in each State or Territory by employers whose Australian salary and wages exceed a specified monthly or annual exemption threshold (current annual thresholds vary from A$550,000 per annum in Victoria to A$1,750,000 per annum in the Australian Capital Territory). The tax rate varies in the different jurisdictions from, currently, 4.75 per cent in Queensland to 6.85 per cent in the Australian Capital Territory, of the total value of salary, wages and benefits paid by an employer.
Consumer protection and competition regulation

Overview

The principal legislation which is designed to promote competition and protect consumers in Australia is the Competition and Consumer Act 2010 (Cth) (CCA). The CCA is federal legislation with a very broad application. Prior to January 1, 2011 it was known as the Trade Practices Act 1974.

The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing the CCA. The ACCC is generally regarded as one of the most rigorous competition regulators in the world.

Scope and application of the CCA

The CCA is the legislative vehicle for competition and consumer protection law in Australia.

The CCA regulates the way in which people carry on business and interact with competitors, customers, suppliers and the public generally. It applies to corporations, partnerships, sole traders, individuals and the Commonwealth.

The CCA contains broad provisions regulating:

- anti-competitive practices (restrictive trade practices)
- consumer protection
- price surveillance and access to essential services and natural monopolies.

The CCA also has a degree of extra-territorial application, with some parts applying to conduct engaged in outside Australia by:

- bodies corporate incorporated or carrying on business within Australia or
- Australian citizens or
- persons ordinarily resident within Australia.

The ACCC

The ACCC is responsible for promoting competition and fair trade in markets and enforcing the CCA. It also regulates infrastructure services of national importance. The objectives of the ACCC are to:

- improve competition and efficiency in markets
- promote competitive pricing wherever possible
- foster adherence to fair trading practices in well-informed markets
- assist consumers who have suffered loss or damage as a result of breaches of the CCA to recover compensation or damages.

The ACCC has wide powers to investigate possible breaches of the CCA and to take enforcement action. The ACCC vigorously and publicly enforces compliance with the CCA.

On April 15, 2010, new civil penalties, enforcement powers and options for consumer redress were made available to the ACCC. The ACCC’s enforcement powers now include investigation powers, powers to initiate criminal proceedings, and access to a range of civil orders and remedies.

National consumer protection regime – the ACL

The CCA embodies the national consumer protection regime, known as the Australian Consumer Law (ACL). The ACL is set out in Schedule 2 of the CCA. The ACL commenced on January 1, 2011. It replaced 20 separate national, State and Territory consumer protection laws.

The ACL is divided into two broad categories of protections for consumers:

- general consumer protections
- specific consumer protections.

The general consumer protection provisions set standards for business conduct in the marketplace. These include prohibitions on misleading or deceptive conduct and unconscionable conduct in addition to protecting consumers against unfair contract terms in standard form consumer contracts.
The specific consumer protections prohibit certain forms of business conduct that have been identified as being likely to take advantage of consumers. These provisions prohibit certain false or misleading representations made in the supply or advertising of goods or services, regulate certain sales practices and consumer transactions, and set out a national scheme for statutory consumer guarantees and product safety, product liability, product information and product standards.

The ACL is administered and enforced jointly by the ACCC and the State and Territory consumer protection agencies, but with the ACCC taking a lead role in coordinating enforcement activity.

The ACCC has extensive powers to enforce the ACL. These include:

- banning orders – which ban individuals from managing corporations
- substantiation notices – which require traders to substantiate claims they make about products they promote
- infringement notices – which include penalties for less serious offences
- seeking and obtaining redress through the courts for consumers who are not included in a particular legal action
- public warning notices – which are published to warn the public about certain people’s breaches of the ACL.

With limited exceptions, any term of a contract that purports to exclude, restrict or modify the application of the consumer protection provisions of the ACL is void. In most instances, it is also unlawful to attempt to include any such term in a contract.

Section 18 of the ACL provides that persons must not ‘in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive’. Conduct will be misleading or deceptive if it induces or is capable of inducing error – there is no requirement to show fault or intention to mislead or deceive. As a result of the broad nature of the requirement, much commercial litigation involves claims based on section 18 of the ACL, and many investigations by the ACCC include claims based on a breach of section 18.

Unconscionable conduct
The ACL includes a general prohibition on persons (including companies and individuals) from engaging in unconscionable conduct in connection with the supply or possible supply of goods or services to another person.

The concept of unlawful unconscionable conduct generally requires the presence of more oppressive conduct than hard commercial dealing or the mere enforcement of normal contractual rights, even if the consequences of such dealings or the enforcement of those commercial rights may be quite serious for the affected party.

The ACL sets out certain factors that a court may consider when determining whether conduct was ‘unconscionable’ in the context of consumer and business transactions. Those factors include, but are not limited to, the relative bargaining strengths of the parties, whether certain conditions are reasonably necessary to protect either party’s legitimate interests, the extent to which a party’s conduct towards another is consistent with its conduct in similar transactions, and whether undue influence or pressure or unfair tactics were used by either party.

Consumer guarantees
The ACL implies certain statutory consumer guarantees into consumer contracts for the supply of goods and services. Manufacturers and suppliers must comply with these statutory consumer guarantees.

These consumer guarantees apply regardless of any separate warranty or guarantee that may be provided by the supplier or manufacturer, and cannot be excluded. Any provision that purports to limit or exclude the implied guarantees will be void.

The application of the statutory consumer guarantee provisions is wide – they apply to ‘consumer contracts’ for the sale of goods or services. Consumer contracts are contracts where the value of the transaction is less than A$40,000 or where the goods or services are of a kind ordinarily acquired for personal, domestic or household use or consumption (no maximum monetary value applies in these cases).
The statutory consumer guarantees are not confined to household consumer contracts, they also apply to business consumer contracts. However the provisions do not apply where the goods or services have been bought for resale, or for use in the manufacture or production of other goods or services.

In relation to goods, the statutory consumer guarantees include:

- a guarantee as to title
- a guarantee as to undisturbed possession
- a guarantee that goods correspond with any description, sample or demonstration model of the product
- a guarantee that the goods are of ‘acceptable quality’
- a guarantee that repair and spare parts facilities will be reasonably available for goods for a reasonable period
- a guarantee that the goods are reasonably fit for any purpose which the customer has made known to the supplier before the purchase.

In relation to services, the statutory consumer guarantees include:

- a guarantee that the services will be rendered with due care and skill
- a guarantee that, where the purpose is made known, the services and any product resulting from the services will be reasonably fit for that purpose
- a guarantee that the services will be supplied within a reasonable time if time is not otherwise specified in a contract or agreed between the consumer and supplier.

Warranties against defects

The ACL has special application to warranties against defects (also called manufacturer’s warranties).

The ACL includes a specific obligation on suppliers and manufacturers to comply with any given warranty against defects. A promise about what the supplier or manufacturer will do if something goes wrong, can be a warranty against defects.

In addition, the ACL prescribes certain information that must be supplied with the warranty against defects. Specifically, the consumer must be informed that he or she has other statutory rights for defective products, in addition to the given warranty. This additional information must be supplied on any document that purports to give a warranty against defects – including warranty documents, packaging and labelling.

A warranty against defects is provided in addition to the consumer guarantees and does not limit or replace them.

Product liability

The ACL gives consumers a statutory right to take legal action for compensation for loss or damage suffered because of a defective product.

Loss and damage includes damages for personal injury and also damages for economic loss caused by damage to other goods or land.

Action can be taken against the manufacturer or importer of the defective product. In certain circumstances the consumer may also bring an action against the retailer (where the identity of the manufacturer is unknown).

The test used to determine whether a product is defective is based on what the public at large is entitled to expect of the product.

The ACL permits claims to be made not only by the person who purchased the product, but also by anyone who suffered loss as a result of a defective product.

Unfair contract terms

The ACL includes a specific prohibition on “unfair contract terms” in standard form consumer contracts.

The ACL does not prohibit or prevent businesses from using standard form contracts. The purpose of the prohibition on ‘unfair contract terms’ is to protect consumers who are ‘at the mercy’ of businesses who are in a stronger bargaining position.

These provisions only apply to standard form consumer contracts – typically contracts that are offered to consumers on a ‘take it or leave it’ basis (for example, terms applying to membership agreements or contracts for telecommunications services). Terms in a standard form consumer contract are open to review against a test of ‘fairness’. ‘Unfair terms’ will be void.

Typical examples of unfair contract terms are ones that permit the supplier to unilaterally change key elements of the contract, limit the rights of the consumer or penalise only the consumer (not the supplier) for breaching the contract. However, the circumstances of inclusion must be considered in determining whether or not a contract term is unfair.
Sales practices
The ACL regulates a number of different sales practices which businesses commonly engage in, including:

- unsolicited supplies:
  - it is unlawful to request payment for goods or services supplied to a consumer who has not agreed to buy or receive them
  - it is unlawful to send unsolicited credit cards or debit cards to consumers

- unsolicited consumer agreements (door to door sales)
- pyramid schemes
- lay-by agreements
- referral selling
- harassment and coercion in relation to supply of goods or services and payment for those goods or services.

In addition, businesses are required to provide proof of transaction for all sales of goods or services (A GST tax invoice is proof of transaction).

National competition regulation
The CCA contains various provisions aimed at deterring practices which are anti-competitive (in that they restrict free competition in the Australian market). It is important that businesses understand their rights and obligations in all trading contexts and, in particular, when dealing with competitors, wholesalers, suppliers and other businesses.

The anti-competitive practices provisions are conceptually similar to the United States of America’s anti-trust laws and the European Union’s competition laws.

Some restrictive trade practices are prohibited outright irrespective of their effect on competition. These are:

- price fixing, bid rigging, preventing restricting or limiting output, and market sharing (cartel conduct)
- resale price maintenance
- third line forcing of products/services.

The CCA also conditionally prohibits:

- imposing restraints on how or where a customer or supplier can conduct its business
- mergers/acquisitions
- other contracts, arrangements or understandings, where there is, or is likely to be a resulting substantial lessening of competition.

Cartel Conduct
Price fixing is a common form of cartel conduct in which competitors make an arrangement to fix, control or maintain price. Price is not limited to dollars and cents. ‘Price’ includes discounts, rebates, allowances and credit terms. The ACCC actively pursues corporations that it believes may have entered into a price fixing arrangement. Price fixing arrangements have attracted the highest penalties under the CCA.

Discussions between competitors on future commercial strategies (including pricing, capacity, promotions etc.) are strictly prohibited. Any invitations (written or verbal) from competitors to join in such discussions must be rejected and a record of such rejection should be kept on file.

Businesses can nevertheless adapt commercial strategies to market changes and follow a leader on price. However, there should be no contact with competitors on such matters.

Misuse of market power
Where a corporation has a substantial degree of market power, the CCA prohibits it from taking advantage of that power to:

- eliminate or damage a competitor
- prevent the entry of a competitor into a particular market or
- prevent a person from engaging in competitive conduct.

Predatory pricing has recently been the focus of significant legislative attention in Australia and may constitute a misuse of market power under the CCA in certain circumstances.

Anti-competitive mergers and acquisitions
The CCA prohibits a corporation from directly or indirectly acquiring shares in a body corporate or corporation, or any assets of a body corporate or corporation if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.
The market, for the purposes of assessing the competitive effects, is any market in a State, Territory or region of Australia.

These provisions extend to the acquisition of:

- shares in Australian corporations
- Australian businesses
- shares or assets of an international company that has Australian operations or supplies into Australia
- Australian intellectual property such as trademarks
- plant and equipment.

Notification of a proposed merger or acquisition is voluntary. However, where the merger or acquisition is likely to raise competition concerns, it should be notified to the ACCC in advance of completion.

The threshold for notification is:

- the products of the merger parties are either substitutes or complements
- the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market/s.

This threshold is indicative only. Mergers or acquisitions that meet this threshold may not necessarily have the prohibited anti-competitive effect and it is possible that mergers that do not meet this threshold may still raise competition concerns. Each transaction should be assessed with the benefit of professional advice on a case by case basis.

The CCA sets out a non-exhaustive list of factors to consider when assessing the competitive effect of a merger or acquisition including the height of barriers to entry, the level of concentration in the market, the extent of countervailing power and the level of import competition.

**Authorisation and notification**

The ACCC has authority to authorise certain conduct (such as exclusive dealing, resale price maintenance, third line forcing and dual listed company arrangements) that would otherwise be prohibited by the CCA. Misuse of market power cannot be authorised.

An authorisation provides an exemption from legal proceedings for the relevant conduct. In broad terms, an exemption will only be granted where the anti-competitive conduct in question is outweighed by an accompanying public benefit. Authorised conduct will not breach the CCA.

The ACCC also administers the notification provisions of the CCA, which confer legal immunity from prosecution for exclusive dealing and collective bargaining on companies which notify the ACCC of such conduct.

**Anti-dumping**

The Customs Tariff (Anti-Dumping) Act 1975 (Cth) and Part XVB of the Customs Act 1901 (Cth) are intended to protect Australian industry from unfair competition where:

- goods are imported into Australia at prices which are lower than their normal value in the country of export
- goods are imported into Australia which have been produced or exported with the benefit of certain kinds of government assistance (ie, a subsidy).

Where it has been established that dumped or subsidised products have caused, or threaten to cause, material injury to an Australian industry producing like goods, the Minister can impose a customs duty on the imported goods to offset the price advantage caused by the dumping or subsidisation.

**Consequences of breaching the CCA**

The ACCC will often seek financial penalties for breaches of the CCA. These penalties can be substantial. The monetary penalties vary depending on what division of the CCA is contravened and whether it is a criminal or civil contravention.

For example, where a breach of the competition provisions of the CCA is established, a corporation can be liable for penalties up to whichever is the greatest of:

- A$10 million or
- ten times the value of the benefit that the offending party has obtained or
- ten per cent of the annual turnover of the offending party’s corporate group.

Penalties of up to A$500,000 or jail terms of up to 10 years can be imposed on individuals for a breach of the competition provisions of the CCA.

In addition to ordering the payment of substantial monetary penalties, the courts have wide powers to:
• grant injunctive relief
• order corrective advertising
• make divestiture and voiding orders in relation to mergers
• freeze money or assets
• disqualify a person from managing corporations
• make other necessary orders.

Legal proceedings for breaches of the CCA can also be brought by private parties, including competitors, who have suffered harm as a consequence of the breach. Claims can include damages for loss of income and loss of profit.

Monetary penalties for contraventions of the ACL may be imposed of up to A$220,000 for individuals and up to A$1.1 million for corporations for serious matters where court action is necessary.

The ACCC has the power to impose infringement notices for less serious breaches of the ACL, which attract penalties of up to A$6,600 for corporations and up to A$1,320 for individuals for each offence. Such penalties can aggregate over multiple contraventions to significantly greater amounts.

Breaches of the CCA are often unintentional. However, it is not a defence to claim that the breach was a mistake or that the person did not know that the conduct would breach the CCA (the person’s intention is, however, relevant in the case of criminal contraventions).

In addition to hefty financial penalties and court orders, the effects of non-compliance can include negative publicity (including public warning notices that can be published by the ACCC), diversion of management time and costs and time associated with ACCC investigations or litigation.

**Anticipated future developments**

**Price signalling**
Laws prohibiting anti-competitive price signalling and information disclosures in relation to banking activities were introduced in Australia by regulation in June 2012. Private disclosure of pricing information to competitors is now prohibited where the disclosure is not in the ordinary course of business. Both public and private disclosure of information relating to price, capacity or commercial strategy is also prohibited where the disclosure has the purpose of substantially lessening competition. Certain exceptions apply, including for private disclosures between parties in a joint venture and disclosures to an acquirer or supplier in relation to an acquisition of shares or assets. While at present, these laws only apply to banking activities, there is scope in the regulations for them to be extended in the future to other sectors of the economy and the ACCC has alluded to this possibility.

**Focus of the ACCC**
It is anticipated that the ACCC will continue to give ACL issues, particularly unconscionable conduct provisions and false or misleading representations, a high degree of priority as the ACCC continues to test its powers under the CCA and seeks to ensure the effective operation and application of the regime. The ACCC has recently identified online consumer issues, consumer guarantees, product safety and credece claims in the food industry as its particular priorities in the consumer sector.

Financial penalties for anti-competitive behaviour are expected to continue to increase. The ACCC is also likely to be on the lookout for an opportunity to prosecute a serious case of cartel conduct under the yet to be tested new criminal cartel provisions under the CCA.

When the carbon price was introduced into Australia, the ACCC was directed by the Australian government to make it a priority to investigate and, where appropriate, initiate proceedings against businesses which engaged in practices concerning the impact of a carbon price that contravened the ACL. With the repeal of the carbon price now imminent, the ACCC is likely to be vigilant in ensuring that businesses implement any changes to their communications and operations necessitated by the repeal.

The powers accorded the ACCC under the CCA mean that it is likely to be strategic rather than reactive. The Chairman of the ACCC has indicated that priority will be given to those areas which have the greatest potential for consumer detriment or where market structures need the most support. The ACCC appears set to litigate, and appeal, more frequently, even in areas where the law is unclear and its success is not assured, suggesting a tougher enforcement approach. The ACCC’s most recent Annual Report reinforces this message, stating that “unsuccessful cases will not deter the ACCC from taking enforcement action, including litigation where appropriate.” It has therefore never been more important for businesses to ensure that they are proactive in remaining CCA compliant.
Real estate

**Torrens title**

Most land in Australia is registered under a system of ownership known as the ‘Torrens title’ system. The essential foundation of this system is a prioritisation of interests in land by chronology of public registration, not acquisition. On registration, the registered proprietor holds its interest subject to any prior registered interests but free from any interest which is not registered. The Torrens title system is not just a system for registration that allows searches to be undertaken to determine land ownership, but also a system that establishes indefeasibility of title by registration.

The Torrens title system provides title that is guaranteed by the State, meaning that in certain circumstances recognised by legislation, compensation is payable for the loss of an interest in land.

Property law in Australia is State and Territory based. There is no uniform property legislation in Australia, although there are a number of similarities in approach to property law throughout the States and Territories. The two main categories of legislation are legislation establishing and regulating a Torrens title system and legislation dealing with general property matters.

Each State has its own register maintained by a government authority (usually known as the ‘Titles Office’). There are differences in the administration of each Titles Office, however they all share the same fundamental principle – that legal title or ownership is determined by the act of registration at the Titles Office.

There are a number of different forms of title within the Torrens title system; for example, strata title and community title. Each State has its own legislation regulating the different types of title and each State takes a slightly different approach to the types of title.

**Old system title**

While the vast majority of land in Australia is registered under the Torrens title system, there are still some areas of land which have not yet been converted to Torrens title, mainly:

- land owned by the Commonwealth of Australia
- land owned by a particular State or Territory
- land which has been the subject of a Crown Grant by the State and for which the title is evidenced by deed (referred to as old system land) – these deeds are recorded at the Titles Office in the General Registry of Deeds. The majority of this type of land is rural land or urban land which has been rarely transferred or dealt with.

It is rare for commercial property transactions in Australia to involve land held under old system title.

**Native title**

Native title arises as a result of the recognition, under Australian common law, of Indigenous rights and interests in land according to traditional Indigenous laws and customs. Native title may continue to exist in areas such as vacant crown land, reserve lands, parks, forests, beaches and other waters not privately owned.

Native title cannot be claimed over certain areas, including:

- residential freehold
- farms held in freehold
- pastoral or agricultural leases that grant exclusive possession
- residential, commercial or community purpose leases
- public works like roads, schools or hospitals.

If native title rights and non-native title rights are in conflict, the native title rights must concede priority to the non-native title rights. Native title cannot take away someone else’s valid rights.

Native title rights may be a potential issue for investments in vacant land, mining interests in remote areas, or infrastructure development, especially where the investment relies on a government sale or grant.

If a native title claim exists or has been registered over land, investors will need to follow procedural requirements under the relevant native title legislation and negotiate agreements with the claimants or native title holders regarding issues such as access sharing and compensation.
Leasehold interests

Leasehold interests in freehold land are recognized in Australia, with the most common form being fixed term leases. Commercial leases deal with the rights of the landlord and the obligations of the tenant in comprehensive detail.

Privately held land in the Australian Capital Territory is leasehold land, as title to all land in the Australian Capital Territory is held by the Commonwealth Government. The Commonwealth Government grants landholders in the Australian Capital Territory Torrens Title Crown Leases, generally for terms of 99 years.

Duty of disclosure

New South Wales, Victoria and South Australia have legislation which requires a seller to provide certain information relating to the land before a Contract for Sale of Land is entered into. For instance, in New South Wales the following documents must be attached to a Contract for Sale of Land:

- a search report on the certificate of title and a copy of a deposited plan
- copies of all easements, restrictions on use and positive covenants
- a planning (permitted land use) certificate
- a sewerage/drainage diagram.

Some States also have statutory warranties. For instance, in New South Wales the seller warrants that the land is not subject to any ‘adverse affectation’. An example of an adverse affectation is a proposal to widen a road which impacts part of the property.

Notwithstanding that warranties are given, a buyer should still carry out its own due diligence in order to be assured of the suitability of the land to the buyer’s purpose.

Formalities

The process of buying and selling Torrens title land in Australia can conveniently be categorized into four phases as follows:

- Pre-exchange – a buyer will often undertake due diligence prior to exchange, particularly where a commercial or industrial property is concerned. The due diligence period often takes place during a period of exclusivity which has been agreed with the seller, after which the buyer decides either to go ahead and exchange, or to withdraw from discussions. In States and Territories where disclosure material is not attached to the contract for sale, the buyer will need to obtain additional searches and other information during the pre-exchange phase

- Exchange – standard form contracts are used in all jurisdictions in Australia, although the standard form is often amended significantly. ‘Special Conditions’ are appended, and the contents and complexity of the Special Conditions will vary, depending upon the nature and value of the transaction. On exchange of contracts, the buyer usually pays a ten per cent deposit. The deposit is held by the seller’s agent or the seller’s lawyer. The deposit is usually invested at interest pending completion.

- Post exchange – following exchange the buyer usually arranges for stamp duty to be paid. The parties also obtain additional information relating to adjustments (for example, council rates) which need to take place on completion and their lawyers prepare draft completion statements.

- Completion – completion usually takes place 4-6 weeks after exchange of contracts, or it can take place within an agreed period of time from the date certain conditions precedent have been satisfied. Payments which are required to be made at completion are usually made by bank cheque. It is important for the buyer’s lawyer to arrange lodgment at the Titles Office of the transfer form immediately following completion.

Should a buyer borrow part of the purchase price under a mortgage loan transaction, the mortgagee’s lawyer can be expected to take control of the title and of lodgment of the transfer form at the Titles Office.

FIRB approval

As discussed under the heading Proposals in the chapter on ‘Foreign investment policy’, various proposals involving an acquisition of Australian urban land must be notified to the Foreign Investment Review Board (FIRB) and approved by the Treasurer before they can be completed. Australian urban land is any land that is not wholly and exclusively used for carrying on a business of primary production, and includes:
Foreign investment in Australia

- residential real estate
- commercial real estate
- accommodation facilities.

**Residential real estate**

Residential real estate means all land and housing (new and second hand) that can be used for residential purposes, including vacant land, hobby farms and rural residential blocks. Residential real estate does not include commercial real estate or rural land.

**Commercial real estate**

Commercial real estate includes vacant and developed property that is not for residential purposes, such as offices, factories, warehouses, hotels, restaurants, shops, and other land that does not meet the definition of rural land, such as vacant land for forestry plantation or mining operations.

**Accommodation facilities**

Accommodation facilities that are commercial in nature (e.g., hotels, motels, hostels and guesthouses) are considered to be developed commercial real estate. Individual dwellings within these properties will either be considered developed commercial real estate (where the dwelling is under the management of the accommodation facility operator) or residential real estate (where the dwelling is not under the management of the accommodation facility operator).

**Australian urban land corporations/trusts**

Any interest acquired in an Australian urban land corporation or trust is regarded as an acquisition of an interest in Australian urban land and requires FIRB approval. A corporation or trust is regarded as an Australian urban land corporation or trust if it holds more than 50 per cent of its assets in Australian urban land.

**Rural land**

Rural land is land that is used wholly and exclusively for carrying on a business of primary production (e.g., commercial farming). To be a business of primary production, the business must be substantial and have a commercial purpose or character and not merely be carried on as a hobby or for recreation purposes. Primary production for the purpose of the rural land definition does not include vacant land (even if it is zoned rural), hobby farms, rural residential blocks or land used for stock agistment or mining. There are a number of factors that will be considered to determine a business’s commercial purpose or character. A primary production business should also meet the following criteria:

- the value of the business’s Australian urban land should be less than 50 per cent of its total assets
- the land on which the business is being conducted should be zoned rural and not residential.

Rural land is not regarded as being urban real estate and is not subject to the same notification requirements as the acquisition of Australian urban land. However, the acquisition of an interest in rural land associated with a primary production business is still subject to the same notification requirements and monetary thresholds that apply to the acquisition of Australian companies or business assets.

**Interest in Australian urban land**

Foreign persons should notify FIRB in advance for approval before acquiring an interest in Australian urban land unless they fall within an exempt category. Foreign persons or corporations may however enter into agreements to acquire an interest in Australian urban land which are conditional upon FIRB approval being obtained prior to completion of the transaction. In such cases FIRB notification can follow after entering into the agreement. These types of conditional agreements are commonly used in commercial transactions involving foreign persons or corporations and are generally accepted by Australian sellers. An ‘interest’ includes:

- buying real estate
- obtaining or agreeing to enter into a lease or licence giving rights to occupy Australian urban land where the term of the lease or licence (including any extension) is reasonably likely to exceed five years
- financing or profit sharing arrangements.
Environmental regulation

Proper management of environmental liabilities is a major concern for investors in Australia, not only because of the public interest which environmental issues can generate but also because environmental laws are complex and penalties for breach are severe. The ‘environment’ is a broad concept which embraces not only the control of waste, hazardous substances, noise, air, soil and water pollution and the protection of human health as well as natural ecosystems, plants and animals, but also the control and development of the built environment, including the preservation of aesthetic elements and items of man-made heritage.

An investor proposing to invest in Australia may encounter environmental regulation at three jurisdictional levels, and in some cases a proposed development may require approvals, consents, authorisations and licences from all three levels.

Federal controls of the environment

The Australian Constitution sets out specific powers in relation to areas that the Federal Government may regulate. Although it does not contain a specific power in relation to the environment, other powers, such as the external affairs power and the power to enter into treaties, have been used to create Federal environmental legislation.

In this way, the Federal Government exercises control over:

- Australia’s carbon pricing legislation
- environmental impact assessment of Federal Government projects
- exports of specific substances
- export and import of certain hazardous wastes
- foreign investments
- areas of world heritage and the ‘national estate’.

The centrepiece of the Federal environmental regime is the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act). The EPBC Act shifts the trigger for Commonwealth involvement in Environmental Impact Assessments (EIA) away from indirect and environmentally irrelevant matters (such as decisions on foreign investment approval, export control and funding) which were formerly relied on, to matters of ‘national environmental significance’.

Under the EPBC Act, an EIA is required where activities or proposals may have a significant impact on a matter of national environmental significance. Further, where the EIA indicates that an activity or a proposal is likely to have a significant impact on a matter of national environmental significance, an approval may be required under the EPBC Act. Matters of national environmental significance include:

- declared World Heritage areas
- National Heritage places
- declared RAMSAR wetlands (where the term RAMSAR follows the adoption of the international Ramsar Convention on Wetlands signed in Ramsar, Iran, in 1971)
- listed threatened species and ecological communities
- listed migratory species and whales
- nuclear activities
- Commonwealth marine areas and the Great Barrier Reef Marine Park
- coal seam gas developments and large coal mining developments with significant impacts on water resources.

Activities or proposals on Commonwealth land having or likely to have a significant impact on the environment are also subject to EIA and approval requirements under the EPBC Act.

More recently, the Federal Government has sought to regulate greenhouse gas emissions and energy efficiency and has introduced schemes which require large emitters or users of energy to measure and report on these aspects of their operation, and in some cases to pay for their greenhouse gas emissions and explore opportunities to improve energy efficiency.

For example, the Federal Government administers The Clean Energy Act 2011 (Cth) which established carbon emissions trading scheme in Australia which commenced on July 1, 2012. This Act and related legislation require that corporations (which meet threshold criteria) pay for their
greenhouse gas emissions by obtaining and surrendering carbon permits annually. Related amendments to the Federal fuel tax and fuel excise legislation also require that certain transport corporations and entities pay a ‘proxy carbon price’ for the greenhouse gas emissions generated from their fuel used in domestic transport. However, following a change of Federal government as a result of elections in September 2013, the new Federal government has committed to abolishing the carbon emissions trading scheme with effect from July 1, 2014. The new government intends to introduce a ‘Direct Action Plan’ to respond to carbon emissions, but at the time of publication little detail is available about this policy.

The Federal Government administers the National Greenhouse and Energy Reporting Act 2007 (Cth). This Act requires certain corporations (which meet threshold criteria) to register and report on annual greenhouse gas emissions, energy consumption, and energy production. Failure to register or provide annual reports can result in penalties of up to A$220,000. This Act also provides the baseline data for the operation of the carbon pricing mechanism.

**States and Territories**

The main power to regulate environmental matters resides with the State and Territory Governments.

Environmental legislation covering environmental liability and penalties at the State and Territory level mainly covers the following matters:

- pollution prevention and control, including the licensing of activities, projects and developments with environmental impacts
- flora and fauna conservation, and species and habitat protection
- land use planning and building and development control
- waste control and management, including contaminated land management
- natural resources exploitation and management
- conservation of built and cultural heritage
- contamination of land and groundwater
- clean-up or remediation
- the storage, handling and transport of dangerous goods and the regulation of hazardous materials.

In many Australian jurisdictions, legislation also imposes duties on polluters and owners of land to report environmental incidents and to notify regulators of sites which are contaminated. It is important to note that while Commonwealth laws generally apply uniformly in all States and Territories, each State and Territory has its own environmental legislation and State and Territory environmental laws differ in regard to the extent of environmental liabilities, licensing requirements, notification obligations in the case of environmental incidents, and the severity of penalties. There are also differences in the enforcement strategies adopted by regulatory authorities in each jurisdiction.

**Environmental licensing**

Activities involving pollution emissions must generally be licensed by government authorities (such as the Environmental Protection Agency (EPA)) in each State. Licence conditions typically require monitoring of emissions and waste discharges, and the submission of annual returns (including disclosures of non-compliances) which must be verified by a senior executive. Environmental licences and permits are usually personal to the entity which is carrying out the licensed activity, and the transfer of a licence or permit to a new owner of the business is not automatic.

Significant penalties apply in all jurisdictions for failure to comply with licence conditions or for making false or misleading statements in licence annual returns.

There is a move in some States and Territories to implement risk based licensing. Under such a licensing system, licence holders in respect of sites assessed as higher risk, and poor environmental performers, would pay higher licence fees relative to licensees whose sites are assessed as lower risk and those who are good environmental performers.

**Offences and enforcement**

State and Territory pollution control legislation creates various criminal offences, with significant maximum penalties for serious environmental offences. For example, in New South Wales the maximum penalties for the most serious environmental offences are A$5 million for corporations and A$1 million and/or up to seven years imprisonment for individuals, plus additional daily penalties for continuing offences.
At the Commonwealth level, maximum fines of A$8.5 million may be imposed on corporations and A$850,000 on individuals under the EPBC Act. Individuals can face up to ten years imprisonment for some offences under the EPBC Act.

Importantly, in some jurisdictions, failure to hold required licences, consents or permits, non-compliance with their conditions and other breaches of environmental law can lead to criminal penalties and a range of court orders that can force a business to stop operating.

Courts also have the power to makes orders requiring restoration work and for the prevention of environmental harm, and additional orders:

• for recovery of costs, expenses and compensation
• reclaiming monetary benefits gained as a result of the unlawful activity or project
• requiring publication of the environmental offence in national newspapers, or to certain classes of persons, or in an annual report
• requiring enhancement of environmental compliance such as an order requiring a director to attend environmental compliance training.

Personal liability of directors and managers

Under environmental legislation of the Commonwealth and in most States and Territories, directors, managers and persons 'concerned in management' of a corporation can be held liable for the environmental offences of that corporation. These provisions which fix directors and other officers across the Commonwealth, States and Territories with liabilities, whether or not they were knowing participants in offences, are currently the subject of significant adjustment, including in relation to attribution of fault for environmental offences.

For example, amendments to environmental legislation in New South Wales mean that in most instances, directors and managers are no longer automatically deemed liable for offences committed by their corporation, though they can be prosecuted as an accessory to an offence (eg, if they aided or abetted the commission of the offence). This means that in order to be held personally liable, it must be demonstrated that the director or manager:

• knew or ought reasonably to have known that the offence would be or is being committed
• failed to take all reasonable steps to prevent or stop the offence being committed.

Similar reforms are in place or expected in other Australian jurisdictions.

However, the reforms have not been implemented across all environmental offences. For example, in New South Wales directors or managers are still presumed to be personally liable for certain more serious offences. The director or manager bears the burden of proving that they were not in a position to influence the conduct of the corporation in relation to the offence and that they used all due diligence to prevent the corporation committing the offence.

These provisions are not only of concern to directors, managers and persons 'concerned in management', but also to lenders who, in certain circumstances, might be regarded as a person 'concerned in management'.

Environmental notices and orders

Various State and Territory authorities have legislative powers to serve notices or orders on land owners, occupiers or persons who have caused or are causing pollution. Orders can include investigation and clean-up orders, and restraining orders, including a charge on property subject to restraining orders.

Investigation and clean-up notices/orders can also be made in respect of contaminated land and groundwater. For example, in New South Wales, 'preliminary investigation orders' and 'management orders' (requiring, amongst other things, site remediation) can be issued under the Contaminated Land Management Act 1997 (NSW) against the polluter, owner, or 'notional owner' of the land (which includes a mortgagee in possession). Such notices can be a concern to lenders who may want to enforce a security and can see its value being eroded by clean-up costs.

Remediation of contamination can be very costly and time consuming.

The relevant environmental authority is also entitled under most Acts to carry out the clean-up itself and recover the costs from the person who caused the pollution, or in some cases, the owner or occupier. Most State and Territory legislation also allows for official measures to be taken to prevent pollution.

In most Australian jurisdictions it is not possible for a polluter to 'contract out' of liability for land contamination by passing on the liability to a purchaser.
Most State and Territory legislation provides for acceptance and enforcement of environmental assurances by corporations. For example, an environmental offender can be required to provide a financial assurance, of a form and amount as specified by the environmental authority, to carry out a specified work or program for the restoration or enhancement of the environment.

In addition to statutory remedies, it may be possible for persons affected by land pollution to recover damages and seek other remedies through civil court action in relation to harm suffered by reason of some environmental impact of an operation (the torts of nuisance and negligence are relevant).

Environmental audits

Environmental auditing has become an important tool for assessing environmental performance and introducing pollution reduction measures. Generally, most levels of governments in Australia encourage corporations to conduct voluntary environmental audits so that they can better understand and improve their environmental performance. In some circumstances the environmental authorities may require an environmental audit to be carried out and that the audit report to be provided to the regulator. It is also possible that an environmental licence will include a condition that requires the licence holder to conduct mandatory environmental audits on a regular basis. In this case, the licence condition will usually specify the purpose or scope of the audit and the required degree of detail of the investigation. To ensure that mandatory environmental audits are properly carried out, relevant legislation imposes strict liability offences relating to the provision of late, or false or misleading information.

One of the risks in conducting environmental audits voluntarily is that the information may be used in evidence against the corporation in any future prosecutions. There is a growing trend among the State and Territory Governments to give some protection to voluntary audits in order to encourage corporations to be proactive. For example, in New South Wales certain environmental audits that are conducted solely for voluntary reasons (but not, for example, in connection with monitoring that is required to be undertaken in compliance with a licence condition) are ‘protected’ documents and may not be used for environmental regulatory compliance purposes.

Local government, town planning and development

All State and Territory Governments have land use and town planning legislation which regulates development through statutory planning schemes and which provides for environmental impact assessment for proposed developments or projects. Land use planning and development may be controlled by all levels of government; however, for most projects, control is predominantly at the local government level. There is an ongoing focus on identifying ways to streamline the environment protection and land use planning process and incorporating public participation in this process.

Local government authorities (Councils) are established and regulated by State and Territory legislation. States are divided into local government regions over which Councils have jurisdiction to act as the approval authority for matters such as:

- building and town planning approval
- land subdivision and development
- certain approval requirements, such as connection to a Council’s water supply system
- local roads and other infrastructure services
- other miscellaneous services.

The powers and responsibilities of Councils are set out in special local government and related legislation. For most business activities, the Council will be the major approval authority in respect of town planning, building and development approvals.

However, when the development is of a particular size, nature, investment value or significance, a State or Territory Minister will often assume the role of an approval authority. This is often the case with major infrastructure and mining projects, for some industrial, commercial and residential developments, and sometimes for developments in environmentally sensitive areas such as coastal regions.

Town planning legislation provides the framework within which planning approvals are granted by approval authorities. There may be several approval authorities involved whose consent or concurrence is required, particularly for projects with a significant environmental impact (such as mining projects). In some States, environmental and other approvals are integrated into a centralised system, and a central approval authority orchestrates consultation with other bodies (such as the EPA, those dealing with flora and fauna conservation, soil and land management and water authorities).
The granting of an approval involves an assessment of applicable planning and development controls (land-use zoning, building height limits and floor space ratios) and of the likely environmental impacts of the proposal. The criteria to be considered by an authority are usually set out in specific legislation or regulations. Depending on the size and nature of the project, the assistance of specialists in areas including heritage, native title, flora, fauna, water, soil, air, noise, traffic, stormwater etc. may be necessary. The proponent of a project must comply with rules concerning prescribed documentation and environmental impact assessment. Legislation also sets out whether public exhibition of a proposed development is required, and will also provide for rights of appeal to courts or tribunals. In some situations, third parties also have a right of appeal.

Land use/town planning permits and approvals usually contain conditions which regulate the manner in which a development can be carried out, and may impose restrictions on hours of operation, traffic/parking and deliveries, and noise levels.

As with environmental pollution legislation, significant maximum penalties apply for offences under planning legislation. For example in New South Wales the maximum penalties under the Environmental Planning and Assessment Act 1979 (NSW) are A$1.1 million, with additional penalties for ongoing offences. In some circumstances failure to comply with planning laws or a breach of permit conditions can lead to remedies being obtained to stop using premises, close down operations, demolish buildings etc.

Environmental litigation

There are several specialist courts and tribunals in Australia that have jurisdiction over land and environment issues, ranging from appeals on land use and planning approval issues, pollution and environmental licence prosecutions, and valuation of land cases. For example, New South Wales has a specialist Land and Environment Court to deal with these and other issues relating to the environment. It hears appeals by dissatisfied proponents of development as well as objections of other members of the public with appropriate standing to appeal against the grant of approval.

In New South Wales, legislation makes it possible for any person to bring a matter before the Land and Environment Court alleging a breach of environmental or planning laws, and to seek orders to restrain the alleged breach. These ‘open standing’ provisions can be used by environmental or community action groups and also by commercial competitors, to challenge development.

Commercial issues

An investor who wishes to engage in any activity having a potentially significant environmental impact may need to obtain approvals from all three levels of government (or be satisfied that existing licences or approvals are held and adequate, and if appropriate can be transferred to a new operator).

This means that before undertaking any significant investment in Australia, an investor must consider what approvals may be required for the project, the adequacy of any existing approvals and the environmental implications. Any transaction involving an acquisition of land will require an assessment to be made of the potential risk of environmental liability arising from site contamination. In many cases, lending banks will require an environmental audit to be obtained to assess the potential risk before transaction finance is approved.

Investors ought also to be aware that environmental authorities in some jurisdictions can require a financial assurance to be provided before an environmental protection licence is issued to allow the business to operate where:

- there is a degree of risk of environmental harm associated with the activities under the licence or
- remediation work may be required because of activities under the licence or
- the holder, former holder or proposed holder of the licence has a poor environmental record.

Remediation of contamination may be required if there are health or environmental risks from the contamination either before or as part of development and building approval. The cost of remedying contamination can be very high and owners and occupants may be required to effect the clean-up.

All share and business acquisitions, land sales and purchases, commercial leases, mortgages or other securities should be reviewed to ensure that potential environmental liabilities, including planning issues, are identified before the deal is done. To some extent, these matters can be dealt with or provided for by negotiating warranties and indemnities to minimise the risk or by conducting an environmental risk assessment and making appropriate financial provision before the transaction proceeds, or both.
Lender liability

Lenders have a potential exposure under the environmental legislation in most States, particularly if they take possession of secured assets or if they can or do exercise some control over the business. In some States there has been an attempt to limit the scope of lender liability in cases where a bank acts solely as a lender, but lenders will always need to consider environmental liabilities when there is some act of default by a borrower or when a mortgagee takes possession.

Before lending, lenders should ensure that a borrower has made an adequate assessment of the environmental risks associated with a project, and may require specific warranties, indemnities and undertakings to be given in relation to such risks.
Mining and petroleum

Australia is a mineral rich country which encourages foreign investment in the mining and petroleum industries.

Access to minerals and petroleum

Minerals and petroleum

A foreign interest that is considering investing in Australia’s resources industry must become familiar with how the Commonwealth and State and Territory Governments regulate access to, and exploration for, minerals and petroleum.

Regulation of exploration and production in respect of minerals and petroleum located onshore, and offshore up to the three nautical mile boundary, is the responsibility of each of the States and the Northern Territory and each has its own statutory regime. These vary significantly in form, but not in substance, between each jurisdiction.

The regulation of exploration and the production of minerals and petroleum located offshore beyond the three nautical mile boundary is the responsibility of the Commonwealth. Special offshore arrangements apply under treaty in the Timor Gap between Australia and Timor-Leste (formerly known as East Timor).

A title issued by the relevant State, Territory or Commonwealth authority is required before exploration or production activities can commence.

Uranium

Legislation that applies to all other mining activities in Australia also applies to uranium mining. However, additional regulations exist at the Commonwealth level and in most States and Territories. This regulatory framework governs various stages in the mining process, from exploration to the sale of the uranium. The regulations range from the requirement to hold special permits to a complete prohibition on uranium mining in some States.

Whilst there are prospects for significant growth in uranium mining in Australia, it is a politically sensitive issue. The main political parties hold differing views on uranium mining and nuclear energy generally and therefore the industry is subject to sovereign risk considerations.

Coal seam methane

Coal seam methane (CSM) is a naturally occurring methane gas in coal seams and can be used for the same purposes as conventional natural gas.

The CSM industry is relatively new in Australia. The exploration and production of CSM is regulated in different ways by the Commonwealth, States and Territories, depending on whether it is treated as a mineral or petroleum. The potential environmental impacts of the emerging CSM industry continue to be the subject of debate. CSM activities which have, or are likely to have, an impact on a matter of national environmental significance will require approval under Commonwealth environmental laws.

Royalties, taxes and duties

Mineral and petroleum royalties and excise duties are administered and collected under both State and Commonwealth legislation. Royalties onshore projects are levied and retained by the State Government whilst the offshore royalty regime is covered by both State and Commonwealth legislation.

Mineral Resources Rent Tax

The Mineral Resources Rent Tax (MRRT) commenced on July 1, 2012 and applies to profits from iron ore and coal extracted in Australia, as well as gas extracted as a necessary incident of coal mining.

Notably, new investment is eligible for an immediate write off, rather than depreciation over a number of years. This allows mining projects to access the deductions immediately, and means a project will not pay any MRRT until it has made enough profit to pay off its upfront investment.

After a change in Commonwealth Government on September 7, 2013, the current Government has said that it will repeal the MRRT, effective from July 1, 2014.

Petroleum Resource Rent Tax

The Petroleum Resource Rent Tax (PRRT) applies to onshore and offshore oil and gas projects. The PRRT is a secondary tax based on a project’s profitability, and applies to all petroleum products from a project (ie, crude oil, natural gas, LPG condensate, but not value-added products, such as LNG). PRRT applies to petroleum operations in the North West Shelf, but not the Joint Petroleum Development Area between Australia and Timor-Leste.

There are various tax deductions available in respect of mining and petroleum operations for exploration and prospecting expenditure and certain capital expenditure.
Carbon pricing
Legislation was passed on November 8, 2011 creating a pricing mechanism for carbon emissions. Since July 1, 2012, a fixed price has been placed on carbon dioxide equivalent emissions responsible for global warming and climate change, starting at A$23 per tonne.

The current carbon pricing legislation has far reaching implications for the Australian mining and petroleum sectors, such as increasing the cost of goods and services.

The National Carbon Offset Standard (NCOS) was introduced in July 2010 to provide certainty and consistency with respect to the general principles and requirements for calculating and recording the carbon footprint of a product or organisation. A carbon offset is a reduction or removal of emissions, which can be purchased by companies to offset the emissions they generate. Carbon offsets can be used to offset emissions voluntarily or to meet regulatory requirements.

The current Commonwealth Government has said that it will repeal the carbon pricing legislation.

Native title, Aboriginal heritage and land rights

Native title
Anyone who is considering investing in Australia’s mineral and petroleum industry must understand the impact of native title.

Native title is the recognition under Australian law that some Aboriginal people have pre-existing rights and interests over certain lands and waters that date back to the time of European arrival in Australia.

On January 1, 1994, the Native Title Act 1993 (Cth) commenced as a response to the decision of the High Court of Australia in Mabo v Queensland No 2 in which the Court held that some Aboriginal people held native title rights over part of their traditional lands and waters.

Broadly speaking, the Native Title Act 1993 (Cth) (as amended) provides a legislative scheme to, among other things:

• recognise and protect native title rights and interests
• provide a future act regime to ensure that ‘future acts’ that may affect native title rights and interests are valid (such as the grant of a mining tenement)

• grant native title holders certain procedural and compensation rights.

All States and the Northern Territory have complementary native title legislation.

Aboriginal heritage
There are also laws governing the impact of mineral and petroleum exploration and development on aboriginal heritage. These laws provide for the protection and preservation of places and objects that are significant to Aboriginal people.

Each State and Territory has its own aboriginal heritage legislation which usually provides that it is an offence to destroy, damage or interfere with an ‘Aboriginal site’ without the prior consent of the relevant Minister.

Health, safety and environment

Health and safety
Currently, the health and safety regulatory regimes for resources related activities differ depending on the location, type of activity being undertaken and the particular commodity (ie, minerals, coal etc.) involved.

The Commonwealth, and each State and Territory, legislates separately in relation to health and safety matters.

Broadly speaking, health and safety laws are based on the control of risks to health or safety, and require businesses to assure the health and safety of workers and other persons who can be affected by the conduct of their business.

Businesses that breach health and safety laws may incur penalties of up to A$3 million, per offence (depending on the jurisdiction in which the offence occurs).

Additionally, each of the statutory regimes governing health and safety across the Australian jurisdictions has provisions which can make individuals involved with the management of corporate entities personally and criminally liable for breaches committed by the entity. The consequences of personal liability include criminal conviction, pecuniary penalties of up to A$600,000 and up to five years imprisonment (depending on the jurisdiction in which the offence occurs).

The Commonwealth, and each State and Territory, has set up government regulatory bodies, under their respective legislative regimes, that enforce the relevant health and safety laws.
Amongst other legislation, offshore activities are predominantly regulated by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*(Cth) (OPGGS Act). The OPGGS Act includes offence provisions with penalties (ranging from financial penalties to imprisonment) to ensure compliance with legislative obligations and facilitate the safe, effective and efficient functioning of the offshore petroleum regime. The OPGGS Act is enforced by the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA), as the regulator of the Australian offshore petroleum industry.

**Environment**

Environmental protection is a high priority in Australia. The Commonwealth, State and Territory governments have departments responsible for ensuring the protection of the environment, monitoring compliance with environmental and planning laws and managing competing land uses.

Environmental legislation generally requires close monitoring and self-regulation in the form of written proposals or environmental plans being submitted to the relevant government department prior to activities commencing. In the event of non-compliance with the applicable legislation, the relevant department has wide enforcement powers that range from civil penalties and administrative remedies, to criminal prosecution, depending on the severity of the contravention.

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1 This legislative regime is currently undergoing review and amendment and has expanded to incorporate well integrity and environmental obligations.
**Intellectual property**

Australia has been a WTO member state since 1995 and is largely compliant with its obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights.

As with most WTO member states, the principal forms of intellectual property in Australia are trade marks, copyright, patents, designs, circuit layouts and plant breeder’s rights. The protection of intellectual property is regulated at a federal level.

**Trade marks**

Trade marks may be protected by registration under the *Trade Marks Act 1995* (Cth).

A trade mark is a sign used to distinguish goods or services dealt with or provided in the course of trade by one person, from goods or services dealt with or provided by other persons. A trade mark can be not only a word or a symbol but also a shape, colour, sound or scent.

As is common throughout most WTO countries, the Trade Marks Register is divided into a number of different classes of goods and services. An application for registration of a trade mark must state the class or classes in respect of which the application is made as well as a detailed description of the goods or services in respect of which the applicant intends to use the trade mark.

An application for registration of a trade mark must be made by the owner of the mark. It is not necessary for an applicant to have used a trade mark in Australia prior to making an application for registration. However, the applicant must intend to use the trade mark in Australia.

Once filed, an application is examined by a Trade Marks examiner to determine whether there are any grounds on which the application should be rejected. The most common grounds for rejection are that the trade mark:

- is not capable of distinguishing the owner’s goods or services from those of other traders within the marketplace
- is substantially identical or deceptively similar to a trade mark, to a mark or marks which have already been applied for or are registered in respect of similar or closely related goods.

Normally, an application takes four to six months to be examined. This process can be expedited in certain circumstances.

Applications for registration of marks generally take priority according to the date on which the application was filed.

The application will be accepted if there are no Examiner objections or any objections are overcome.

The registration of a mark may be opposed by any interested person within two months of acceptance on various grounds, including where:

- it is substantially identical with or deceptively similar to another registered trade mark
- it is substantially identical with or deceptively similar to a trade mark which, although not registered, has acquired a reputation in Australia
- the applicant is not the owner or
- it is not capable of distinguishing goods or services.

Where a person has made an application for registration of a trade mark in a country which is a signatory to the Paris Convention for the Protection of Industrial Property, that person may claim priority for registration in Australia from the date the application was made in the Convention Country, provided that the application for registration in Australia is made within six months of the initial application.

Australia is a party to the Madrid Protocol, which allows an application for international registration, based on an existing Australian application or registration, covering designated member countries, to be filed in Australia. Similarly, Australia can now be designated in an international application filed in another member country.

Registration of a trade mark generally gives the owner the right to the exclusive use of the mark in relation to the goods or services in respect of which it is registered. This right extends throughout Australia unless a specific geographical restriction has been imposed.

Unlike other forms of intellectual property – such as patents, copyright and designs – trade mark registration is indefinite, provided that renewal fees are paid and the
mark has not become generic or descriptive thus making it vulnerable to challenge. Trade mark registration needs to be renewed every ten years.

In Australia, trade marks may also be protected under the general law of ‘passing off’ or under competition and consumer law even where the mark has not been registered. A mark will only be so protected where the ‘owner’ has established a reputation in the mark. Passing off occurs where another trader uses the mark in such a way as to suggest that its goods or services are the goods or services of the owner and such a use causes damage to the business or goodwill of the owner, which damage may be the subject of a claim for compensation. The Competition and Consumer Act 2010 (Cth) prohibits conduct that is misleading or deceptive or likely to mislead or deceive, which may apply to the use of a mark by a person other than the owner.

Copyright

Copyright resides in original literary, dramatic, musical and artistic works as well as sound recordings, cinematograph films, television and sound broadcasts and published editions of works under the Copyright Act 1968 (Cth). Computer programs in source code and object code are protected as literary works. Lists, tables and databases of generally available information (such as customer information) may be protected as copyright works, provided that there is sufficient independent intellectual skill and effort exercised in the selection and arrangement of the information.

The author of the work is generally the owner of copyright. However, there are some exceptions, such as works created in the course of employment by employees where the copyright is generally owned by their employer. In Australia, no formalities are required for the subsistence of copyright and there is no system of registration for copyright works.

Australia provides protection to copyright material made or published in countries which are parties to international treaties on copyright, though the protection may be more limited than that given to material created by Australian nationals.

The duration of copyright depends on the category of work or other subject matter. Generally, copyright will be for the duration of the life of the author plus 70 years after the end of the year in which the author died. In relation to sound recordings and cinematograph films the period is 70 years from publication of the recording or film.

With some exceptions, depending on the nature of the work, copyright generally gives the owner the exclusive right to reproduce the work, to publish the work, to perform the work in public, to communicate the work to the public (that is, to electronically transmit or make the material available online), or to make an adaptation of the work as well as to authorise another person to do any of these things. Copyright also confers the exclusive right to enter into a commercial rental arrangement with respect to a computer program, sound recording, literary, musical or dramatic work.

Authors of copyright works also have ‘moral rights’ in relation to the work. Principally, this gives the author a right to have the work correctly attributed to him or her and the right to not have the work subjected to derogatory treatment. Only individuals can have moral rights. These rights cannot be waived, but the author may consent to particular treatment of the work. In most cases an assignment of copyright in a work will not be sufficient as a moral rights consent. Moral rights consent should be provided for separately.

The Copyright Act 1968 (Cth) includes a number of compulsory licences, for example in relation to copying by educational institutions, recording of musical works and broadcasting of sound recordings or causing them to be heard in public. Royalties are generally payable at reasonable rates. The Copyright Tribunal has been established, amongst other things, to fix royalty rates in respect of compulsory licences and to arbitrate in disputes in relation to terms of compulsory licences. There are a number of exemptions to the operation of the Copyright Act 1968 (Cth); for example, in relation to some copying by a library.

There are a number of ‘collecting societies’ in Australia, which control the statutory or voluntary licensing of certain rights in copyright works.

Patents

Registration of patents is effected under the Patents Act 1990 (Cth). A standard patent protects an invention from use by others for a period of 20 years, with extension of the term available in limited circumstances. Since April 15, 2013, legislative amendments have increased the threshold set for the grant of a patent, bringing Australian standards more closely in line with those that apply internationally. An invention must be novel and not obvious. In broad terms, an invention may be a product or a process, which produces a particular new result. A specific, substantial and credible use for the invention must be disclosed in the
patent application. Research and experimental activities are exempt from patent infringement.

If a person believes they have made an invention, it is important to get advice before disclosing it to the public, as disclosure will destroy the opportunity to obtain a patent. In Australia, the first person to file an application for a patent (provided that person is, or derives rights from, the true inventor or inventors) will obtain the exclusive right to exploit the invention.

It is possible to oppose the grant of a standard patent or to seek to have a patent revoked.

Australia is a party to the Paris Convention for the Protection of Industrial Property and the Patent Cooperation Treaty which facilitate international applications.

There is a second tier registration system for ‘innovation patents’, which have a term of eight years. This form of patent is designed to be easy to obtain and it is possible to make applications online with IP Australia. The level of protection offered by an innovation patent is substantially less than that offered by a standard patent. There is no examination of the innovation patent prior to grant other than a ‘formalities check’, unless an examination is requested by the proprietor or a third party, or if the commissioner decides to examine the patent. If the owner wishes to enforce its rights, it is necessary to have the patent examined and certified. A lower inventive threshold than for standard patents applies. An innovation patent may be opposed by an interested party after it has been examined and certified.

Patents may be assigned or licensed by the registered owner.

Designs

The Designs Act 2003 (Cth) regulates the registration and ownership of design rights. Registrable designs are features of shape, configuration, pattern or ornamentation that are to be applied to a product. It is the response intended to protect designs for mass produced, commercial products.

In order for a design to be registrable, it must be new or original, in the sense that it has not been previously registered, published or used in Australia.

The maximum term of protection of a design is ten years from the date of the application for registration.

The proprietor of a design may assign or license it.

Circuit layouts and integrated circuits

The Circuit Layouts Act 1989 (Cth) (CLA) provides protection for electronic layouts for integrated circuits (or semiconductor chips). The protection is similar to, but separate from, that provided by copyright legislation.

The CLA protects original electronic layouts made or first commercially exploited by an Australian or an Australian corporation in Australia or in certain specified foreign countries whose nationals are given protection under the CLA including the United States, the countries of the European Union, Japan, Canada, Norway and Switzerland.

The person who makes an eligible layout is the first owner of the rights in relation to it (EL Rights), except that where the layout is made by an employee during employment, the employer will be the first owner of the EL Rights.

The EL Rights include the exclusive right to copy the layout (or a substantial part of it) in a material form, to make an integrated circuit in accordance with the layout (or a substantial part of it) and to exploit the layout (or a substantial part of it) commercially in Australia.

Plant breeder’s rights

The Plant Breeder’s Rights Act 1994 (Cth) (PBRA) provides protection to the breeders of new varieties of plants.

The PBRA grants breeders of plant varieties and ‘essentially derived varieties’ the right to:

- produce or reproduce propagating material, or condition that material for the purposes of propagation
- offer propagating material for sale
- sell, import or export propagating material or
- stock propagating material for the above purposes.

Rights are also granted in certain circumstances in respect of material harvested from propagating material and/or products made from harvested material.

The right to apply for a grant of a plant breeder’s right under the PBRA belongs to the breeder of the plant, and where such right is granted it is the breeder that must authorise the exercise of any of the rights associated with the grant.

Protection is granted in the case of trees and vines for 25 years and in all other cases for 20 years.
E-commerce and privacy

To enhance the growth of e-commerce in Australia, the Commonwealth, State and Territory Governments have worked together to introduce uniform legislation which confers the same legal status on electronic transactions as that given to transactions (commercial or non-commercial) which use paper documents. The Commonwealth Government first passed the *Electronic Transactions Act 1999* (Cth) (ETA) in 1999. State and Territory Governments subsequently agreed to enact mirror legislation (Uniform Electronic Transactions Scheme).

The Commonwealth ETA applies in relation to Commonwealth laws. The State and Territory legislation operates in relation to those spheres of law (such as contract law) that are outside the constitutional reach of the Commonwealth ETA.

The most salient features of the Uniform Electronic Transactions Scheme can be summarised as follows:

- A transaction is not invalid just because it takes place by electronic means rather than by using paper
- Legal obligations relating to documents being in writing, signature and production or retention of documents can be satisfied by wholly electronic means, provided some relatively simple requirements are met.

Amending legislation to align the Uniform Electronic Transactions Scheme with the United Nations Convention on the *Use of Electronic Communications in International Contracts 2005* is in the process of being enacted throughout Australia. The ETA was amended in 2011, and the States and Territories have enacted similar amending legislation. The amendments clarify the method for calculating the time and place of dispatch and receipt of electronic communications, as well as the determination of a party’s location in an electronic environment and the use of automated message systems for contract formation. In particular, if no confirmation or correction screen is displayed to an online consumer, then the consumer who makes an ‘input error’ can have the online contract altered.

Legislation or transactions that are exempt from all or some of the provisions of the Uniform Electronic Transactions Scheme are listed in regulations enacted under the relevant Commonwealth, State or Territory Acts. *The Electronic Transaction Regulations 2000* (Cth) currently exempt or partially exempt 157 Commonwealth Acts and Regulations from the ETA’s operation. The equivalent State and Territory legislation also contains provisions excluding a number of State and Territory laws from the operation of the Scheme.

The Uniform Electronic Transactions Scheme presents an opportunity for business to re-engineer systems to take advantage of the many efficiencies available through the use of wholly digitised information processing systems in all areas of their endeavours.

Electronic signatures and digital certificates

The need for electronic systems that can validate both the identity of the author of an electronic communication and the integrity of the contents of that communication is partly addressed by the Uniform Electronic Transactions Scheme and also by administrative decisions made by the Commonwealth Government.

The Uniform Electronic Transactions Scheme means that legal requirements for a signature can generally be satisfied, in the case of an electronic communication, if:

- A method is used to identify the person and to indicate the person’s approval of the information communicated
- Having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated
- The person to whom the signature is required to be given consents to that method.

Significantly, these provisions do not specify that a particular technology or proprietary standard must be used (other than in certain circumstances, where the recipient is a Commonwealth entity). The language of the Uniform Electronic Transactions Scheme is deliberately ‘technology-neutral’ to ensure that specific technologies are not implicitly endorsed or entrenched.

While the Commonwealth Government has directed all Commonwealth Government entities to accept electronic signatures and other authentication devices from persons who wish to use such technology when communicating with those entities, the Scheme provides that persons who intend to transact with Commonwealth entities electronically (for example lodging electronic tax returns with the Australian Taxation Office) must comply with the particular technology requirements of the relevant Government entity.
In 1998, the Commonwealth Government endorsed an overall framework called ‘Gatekeeper’ (Gatekeeper Framework) which provides standards for the use of encryption tools known as ‘keys’ issued in the form of public key infrastructure (PKI) digital certificates by accredited authorities.

In September 2006, the Australian Government Information Office (AGIMO) released the Gatekeeper PKI Framework. The Framework is designed to make the application of PKI less complex and more affordable for business and government agencies by aligning the Gatekeeper Framework with the way they conduct their day to day activities.

**Privacy Act 1988 (Cth)**
The Privacy Act 1988 (Cth) (Privacy Act) provides a regime for the protection of personal information (information about a person whose identity is apparent) held by:

- Commonwealth public service agencies
- credit providers and credit reporting agencies
- entities that collect Tax File Numbers
- since 2001, a large proportion of the private sector in Australia.

All private sector businesses (with some exceptions, such as enterprises with an annual turnover of less than A$3 million and political parties) are currently required to comply with ten legislated privacy principles called the National Privacy Principles (NPPs), or a code of conduct which imposes obligations which are overall at least equivalent to those in the principles. Acts done in the course of journalism or with respect to employee records are generally exempt from the requirements of the NPPs. Separate Information Privacy Principles (IPPs) under the Privacy Act apply in relation to Commonwealth public sector agencies.

Recently passed amendments to the Privacy Act will introduce significant changes to Australia’s privacy regime, including the replacement of the NPPs and IPPs with a new set of 13 Australian Privacy Principles (APPs). These amendments take effect on March 12, 2014. The APPs will apply to any business that must currently comply with the NPPs as well as to Commonwealth public service agencies.

**Current legal requirements**
Organisations covered by these provisions need to carefully consider how they collect, use and disclose personal information. The requirements include obligations to:

- Collect only that information that is necessary for an organisation’s functions and to do so only by lawful and fair means.
- Ensure that the people from whom information is collected (the ‘data subjects’) have a reasonable likelihood of knowing the purpose for which the information is sought, the identity of the organisation and how to contact it, the fact that the data subject can gain access to the information, the types of organisations to which the information is usually disclosed, any law that requires that the information be collected, and the consequences for the data subject if the information is not provided.
- Refrain from the use and disclosure of information for purposes other than the primary purpose of collection, except in specified circumstances, including when the secondary use is consented to or the purpose is related to the primary purpose, and the individual would reasonably expect the type of use or disclosure. Special provisions are also made for the use of health information.
- Only use information for direct marketing (that is to the person supplying it) without prior consent if a prominent and free opportunity to opt out of further communications is provided with each communication. Use of sensitive information like racial or ethnic origin, or political beliefs, for direct marketing purposes without consent is prohibited.
- Take reasonable steps to make sure that the information the organisation collects, uses and discloses is accurate, complete and up-to-date and that such information is protected from misuse, loss, and unauthorised access, modification and disclosure.
- Publish clearly expressed policies on the organisation’s management of personal information and, on request, take reasonable steps to let a person know what sort of information it holds, for what purposes and how it collects, holds, uses and discloses that information.
- Provide reasonable access to information held about a data subject to that data subject unless limited exceptions are present.
Take reasonable steps to correct information which a data subject is able to establish is incorrect, incomplete or out-of-date. If the organisation does not agree that the information is incorrect, incomplete or out-of-date, it may be required to take reasonable steps to associate a statement of the data subject’s claims with the information.

Provide reasons for a denial of access or refusal to correct.

Wherever lawful and practicable, provide an option allowing individuals to not identify themselves when entering transactions with the organisation.

Strictly limit the collection of sensitive information without consent from data subjects.

Limit the transfer of personal information outside Australia to only those recipients that the organisation reasonably believes are subject to obligations which effectively uphold the same principles as those detailed above contained in the Privacy Act.

The most effective way for private sector organisations to manage their responsibilities is to establish and maintain a ‘culture of compliance’ throughout the organisation. To achieve this, regular and comprehensive auditing of personal information handling practices, together with training and real-time monitoring of compliance, will go a long way to ensuring an organisation’s obligations are met and to satisfy consumers and other stakeholders that the organisation is a safe and responsible business.

In November 2010, the Office of the Privacy Commissioner was integrated into the newly established Office of the Australian Information Commissioner (OAIC). The OAIC was established as part of reforms to national freedom of information law and brings together functions in relation to freedom of information, privacy and information policy. The executive structure of the OAIC includes the Australian Information Commissioner, the Privacy Commissioner and the Freedom of Information Commissioner.

Changes from March 12, 2014

As mentioned above, a range of amendments to the Privacy Act will take effect on March 12, 2014. These changes were made in response to a comprehensive review and report by the Australian Law Reform Commission released in May 2008, which recommended 295 changes to improve Australia’s privacy regulatory framework.

The new APPs introduce four key changes to the existing NPPs:

- additional requirements for privacy policies and collection statements
- new provisions dealing with unsolicited personal information
- further restrictions on using personal information for direct marketing
- additional provisions dealing with cross-border disclosure of personal information.

Privacy policies

APP 1 lists the prescribed matters that must be addressed in an organisation's privacy policy. There are additional requirements relating to complaints handling procedures and offshore disclosure of personal information.

Collection of unsolicited personal information

APP 4 contains an entirely new requirement relating to unsolicited personal information. Where an organisation receives unsolicited personal information (for example, through a social media platform), it must determine within a reasonable period whether that personal information could have been collected lawfully under APP 3 (which deals with the collection of solicited personal information). If not, then the unsolicited personal information must be destroyed or de-identified.

Direct marketing

One of the key new changes, set out in APP 7, is the introduction of strict rules on how personal information can be used for direct marketing. Since the Spam Act 2003 (Cth) and Do Not Call Register Act 2006 (Cth) continue to apply to electronic communications (such as commercial emails and SMSs) and marketing telephone calls, respectively, the new direct marketing rules in APP 7 will apply mainly to direct marketing by ordinary mail.

Currently, under the NPPs, an organisation that collects personal information for the primary purpose of direct marketing may use and disclose the personal information for that purpose. In contrast, APP 7 does not distinguish between primary and secondary purposes of collection.
Instead, under APP 7.1, the use and disclosure of personal information for the purpose of direct marketing is prohibited unless one of the exceptions set out in APP 7 applies. This prohibition applies regardless of the purpose for which the personal information was originally collected. There are two relevant exceptions under APP 7:

- The prohibition in APP 7.1 does not apply where personal information is collected from an individual (and not a third party) and the individual would reasonably expect the information to be used for direct marketing. Even if this exception applies, an organisation would still need to include a simple and easy opt-out mechanism.

- The prohibition in APP 7.1 does not apply to a range of alternatives in circumstances where the individual would not expect the information to be used for direct marketing. In this case, the organisation must satisfy a number of conditions, including an obligation to ensure that each direct marketing communication includes a prominent notice about the opt-out mechanism.

Another new provision is that individuals may request the source of an organisation’s information about them. This is an important change, and organisations must ensure that they retain a record of where an individual’s personal information is collected. This may be a challenge for record systems that do not readily record or allow for this item of information. The obligation will also apply to all existing records of personal information.

**Cross-border disclosure of personal information**

Another significant change to the Privacy Act comes in a tightening of the rules on cross-border data flows. APP 8, which replaces NPP 9, requires an organisation to ensure that, before disclosing personal information to an overseas recipient, it takes such steps as are reasonable in the circumstances to ensure that the recipient does not breach the APPs in relation to that information.

The concept of ‘reasonable’ is intended to be flexible and adjust to each organisation’s individual circumstances. The reasonable steps used by many organisations are the imposition of contractual obligations between themselves and the overseas recipient (who could be a data processor or a provider of outsourcing or cloud-computing services).

The ‘reasonable steps’ requirement under APP 8.1 will apply unless the organisation can take advantage of one of the exceptions in APP 8. The main exceptions are:

- the organisation reasonably believes (after making enquiries) that the overseas recipient is subject to laws that protect information in a substantially similar way to the APPs and there are ways for the individual to take steps to enforce those laws or

- the individual consents to the cross border disclosure after being informed that his or her consent means APP 8.1 will not apply. Previously, a simple consent was enough and did not require any preliminary explanation to the individual of the circumstances.

An important change in APP 8 is the change in terminology from ‘transfer’ to ‘disclosure’. This change means that organisations will need to consider whether, even if the information is stored in Australia, a disclosure has been made to an overseas entity if that entity can access the information that is being stored in Australia.

**Other important changes**

On top of the introduction of the new APPs there have also been several other important amendments, including:

- an increase of the Information Commissioner’s powers to conduct assessments of whether personal information is held by an entity, make determinations about the acts and practices of an organisation (including whether compensation is due to individuals who have suffered loss or damage as a result of interference with privacy), accept enforceable undertakings by entities that they will take or refrain from taking specified action, and apply for civil penalty orders for serious or repeated interferences with privacy of up to A$340,000 for individuals and A$1.7 million for corporations

- a new and detailed credit reporting regime. The impact of these changes on organisations will vary greatly, depending on the manner and extent to which credit or credit reporting services are provided.

**Spam Act 2003 (Cth)**

The Spam Act 2003 (Cth) was developed to respond to the increasing problems caused by unsolicited commercial electronic messages (spam). Under the Act:

- electronic messages include email, instant messaging and SMS, but not voice calls from standard telephone services.
• commercial electronic messages are electronic messages that offer, advertise or promote goods, services, land or other business and investment opportunities. They do not include information notices or other electronic messages which do not have a commercial purpose.

In order to comply with the provisions of the Act, commercial electronic messages generally must:

• only be sent with the express or implied consent of the recipient
• accurately identify the sender of the message
• contain a functional unsubscribe facility.

The Australian Communications and Media Authority (ACMA) is responsible for enforcement of the Act. It can issue formal warnings, issue infringement notices or initiate court proceedings. The Federal Court also has the power to order an individual or corporation that has infringed the Act to pay compensation to the recipient if the recipient can prove that loss or damage was caused as a result of infringement of the Act. The Court has the power to impose significant financial penalties on a corporation that breaches the Act. These penalties can vary significantly, based on the record of the corporation in complying with the Act and the nature and extent of the offence. Corporations can be liable to pay up to A$340,000 for the first contravention, while the Court has the power to impose penalties of A$1.7 million on corporations that have repeatedly breached the Act.

There have been several high profile cases involving breaches of the Spam Act, which serve as a reminder to ensure regulatory compliance. For example, in 2009 and 2010, fines totalling more than A$24 million were imposed on a group of companies and individuals engaged together in an SMS spam scheme. The complicated scheme involved establishing fake dating website profiles to obtain mobile telephone numbers of genuine dating website users. These mobile phone numbers were then sent messages from people pretending to want to chat via a ‘Safedivert’ service with a view to meet and form a relationship with the recipient. Users who responded to the messages were charged approximately A$5 per message.

ACMA has made it clear that it is committing considerable resources to the ongoing enforcement of the Spam Act.

Cybercrime legislation

In an effort to develop a co-ordinated national approach to combat the offences committed using computers, the Attorneys-General of the Commonwealth, States and the Territories have met since 1995 to address the need for a uniform model criminal law in relation to computer crime.

The outcome of these meetings is a series of recommendations contained in a document called the Model Criminal Code (MCC). The MCC has been released with the intention that the various Commonwealth, State and Territory governments will enact mirror legislation consistent with the MCC recommendations with respect to combating computer offences.

Legislation has been enacted in the Commonwealth, New South Wales, Victoria, the Australian Capital Territory and South Australia to meet the MCC requirements. The Northern Territory law is also loosely based on this model.

The State and Territory legislation relates to offences in the respective State or Territory, but does not apply to offences falling within the ambit of the Commonwealth legislation, being offences which:

• involve a Commonwealth computer (one owned, leased or operated by a Commonwealth entity) or
• are committed using the telecommunications services – which fall within the Commonwealth’s jurisdiction.

The Commonwealth legislation has a broad application and includes conduct which takes place:

• wholly outside Australia but is committed by an Australian citizen or company or
• wholly or partly in Australia or on an Australian aircraft or ship.

The Commonwealth legislation creates a number of offences in relation to the unauthorised access to or modification of data and the impairment of communications.
Registration of domain names

Domain names in the Australian domain namespace use the suffix .au to signify a connection with Australia. Australian domain names are currently regulated by auDA (.au Domain Administration Ltd). auDA’s role is to manage the .au domain namespace, develop and implement domain name policies, accredit and license registrars and represent the .au namespace internationally.

Entities and individuals which meet the relevant eligibility criteria can currently register Australian domain names under the following second level ‘open’ domains (that is, open to the general public, subject to eligibility criteria):

- com.au for commercial entities
- net.au for commercial entities
- id.au for individuals who are Australian citizens or residents
- asn.au for incorporated associations, political parties, trade unions, sporting and special interest clubs
- org.au for charities and non-profit organisations.

The following second level domains are ‘closed’ to the general public and are only available to entities within a defined sector:

- edu.au for educational institutions
- gov.au for government entities
- csiro.au for the Commonwealth Scientific and Industrial Research Organisation

The policies for allocation of domain names vary for each second level domain.

The summary below refers to the policies relating to eligibility for the allocation of com.au and net.au domain names only. Currently, com.au and net.au domain names are the only Australian domain names that may be used for commercial purposes. In order to be eligible registrants must meet one of the following criteria:

- an Australian registered company
- a foreign company registered to trade in Australia
- an Australian partnership or sole trader
- an entity trading under a registered business name in any Australian State or Territory
- an incorporated association in a State or Territory
- the owner of an Australian registered trade mark
- an applicant for an Australian registered trade mark or
- a commercial statutory body under the law of the Commonwealth or a State or Territory.

A com.au or net.au domain name must:

- exactly match, or be an acronym or abbreviation of, the registrant’s company or trading name, organisation or association name or trademark or
- be otherwise closely and substantially connected to the registrant.

Further, there is a reserved list of domain names for which registration is prohibited, for example, domain names that include such words as ‘Olympics’ and ‘Commonwealth’. There are also special restrictions on the use of Australian place names or their abbreviations.

A com.au or net.au domain name is issued on a ‘first come, first served’ basis for an initial period of two years and thereafter may be renewed for further terms of two years. There are no restrictions on the number of com.au or net.au domain names that an eligible entity may hold.

A registrant has an exclusive licence to use a domain name, but does not own the domain name. Prior to 2008 there were policies in place that restricted the ability of a registrant to transfer a .au domain name licence, permitting transfers generally only as part of an asset sale or corporate restructure. However, a new transfer policy became effective on June 1, 2008 that effectively freed up and streamlined the transfer process, therefore potentially reducing the cost of transferring domain names and introducing greater transparency in the market for .au domain names. The key features of the policy are:

- a person will not be able to register an .au domain name for the sole purpose of resale
- a registrant may offer its domain name for sale or transfer by any means (including listing the domain name on brokerage rights, advertising or contacting a prospective buyer)
the transfer will be processed by a standard transfer form

the parties to the transfer will be asked to disclose the sale method and the price to auDA on a voluntary and confidential basis for the purpose of collecting statistics.

Some commentators initially expressed concern that the new policy would encourage ‘cybersquatting’; that is, where a person registers a famous brand name as a domain name in the hope of later selling it to the brand owner, thereby driving up the prices of domain names on the open market. However general law about passing off and fraudulent misuse of intellectual property remains available to restrain misuse of trading names and auDA’s existing policy setting out the eligibility criteria for registration of .au domain names will continue to apply. These policies have assisted in limiting the market for domain names to legitimate businesses, thus reducing the risk of cybersquatting. In any event, notwithstanding the old transfer policy, a secondary market for domain names existed in practice. The relaxation of the transfer policy has not significantly affected prices of .au domain names on the open market.

A domain name licence may be revoked if the licensee breaches the relevant licence conditions. Disputes in relation to licences of com.au or net.au domain names may be resolved through the dispute resolution process set out in the auDA Dispute Resolution Policy, which is an adaptation of the Internet Corporation for Assigned Names and Numbers (ICANN) administered Uniform Dispute Resolution Policy. Alternatively, disputes may be resolved by legal proceedings.

In 2011 ICANN decided to significantly expand the range of generic top level domain names (gTLDs), enabling organisations to replace generic domain names such as .com and .org with their own chosen extension. ICANN has called this the ‘biggest change to the Internet since its inception’ and claims that additional gTLDs will enhance competition, innovation and choice in the domain name space.

In 2012 ICANN released the list of applications for gTLDs which included 40 applications by Australian organisations. Among the Australian applications were applications by the State of Victoria and the State of New South Wales for the strings ‘MELBOURNE’ and ‘SYDNEY’ respectively. Corporations that have lodged applications include iiNet (for ‘IINET’), the Australian Football League (for ‘AFL’), Telstra (for ‘TELSTRA’) and Australia Post (for ‘AUSPOST’). Three of the four major Australian banks have also lodged applications – the Commonwealth Bank for ‘CBA’, ‘COMMBANK’ and ‘NETBANK’, ANZ Bank for ‘ANZ’, and the National Australia Bank for ‘NAB’ and ‘UBANK’.

The applications are being dealt with by ICANN in batches with the first four gTLDs released in October 2013. The first gTLDs released are in non-Latin scripts. This is the first time that non-Latin characters have been allowed in generic top level domains. ICANN is expected to continue releasing gTLDs steadily over the next few years.

The applications for geographic gTLDs are particularly interesting for companies looking to invest or set up businesses in Australia. These companies may consider registering a domain name with a geographically based gTLD (such as CompanyName.Melbourne) to denote location specific branches of their enterprises.
Employment and industrial relations

Labour law in Australia is based on a system of legislation, awards, enterprise agreements and employment contracts.

Historically, the relevant legislation and industrial instruments have co-existed at a State and Federal level. However, there is now in place a unitary federal system of labour law for most employees in Australia.

On July 1, 2009 the *Fair Work Act 2009* (Cth) (FW Act) came into effect. The FW Act applies to most employees other than certain state government employees.

Minimum statutory employment standards

The National Employment Standards (NES) contained in the FW Act set out minimum terms and conditions of employment that apply to all ‘national system employees’ (in all States and Territories except for Western Australia this generally means all employees other than state government employees. Employers that are not ‘constitutional corporations’ (such as partnerships and individuals) and their employees in Western Australia remain covered by their state workplace relations laws). These minimum standards or ‘guarantees’ are:

- Maximum weekly hours of work – no employee can be asked to work more than 38 hours a week, plus reasonable additional hours. Reasonable additional hours will be determined by factors such as the industry, the role, the level of remuneration, whether the employee has family responsibilities, etc.

- Annual leave – 20 days’ paid annual leave per year (plus an additional week for shift workers as defined by a Modern Award or enterprise agreement). Casual employees are not entitled to annual leave. Annual leave is cumulative and paid out upon termination.

- Parental leave – 52 weeks’ unpaid parental leave after 12 months of continuous service with an employer.

  At present, all employees (including certain eligible casual employees) are entitled to 12 months’ unpaid parental (maternity, paternity or adoption) leave on the completion of 12 months’ continuous service.

  If both parents in an employee couple are eligible to take leave, only three weeks’ leave can be taken concurrently at the time of the birth or placement of the child. Following any period of concurrent leave, each parent may take their entitlement to unpaid parental leave if the employee has responsibility for the care of the child.

  The total of all periods of leave must not exceed 52 weeks, unless the employer agrees. Paid sick leave cannot be taken while an employee is on parental leave, except by agreement with the employer. An employee may request extension of the period of parental leave for an additional 52 weeks and this may only be refused on reasonable business grounds

  An employee absent on parental leave is entitled to return to the job held immediately before going on leave. If such a job no longer exists, and other jobs are available, the employee must be given a job which is in pay and status suitably similar to the one held before going on leave. An employer may be liable for an offence for not providing a suitable position. It is also an offence under the FW Act and under anti-discrimination legislation for an employer to dismiss an employee because they are pregnant or have taken parental leave.

  Where an employee is not entitled to parental leave, for example, a short-term casual employee or an employee with less than 12 months’ service, the employer remains bound by the State and Federal anti-discrimination legislation and must ensure that the pregnant or child-caring employee is not subjected to unlawful discrimination.

  Many employers choose to offer their employees some sort of paid parental leave. In addition, as of January 1, 2011, eligible employees may be entitled to government funded paid parental leave. While the payment is funded by the Government, it is unlawful for an employer to amend any paid parental leave policy that existed at the time the Government scheme was introduced to take into account or off-set the Government funded amount.

- Personal/carer’s leave – ten days’ paid personal leave.

  Casual employees are not entitled to paid personal/carer’s leave. Personal/carer’s leave is cumulative but it is not paid out upon termination.

  Employees can take part or all of the personal leave entitlement to care for ill or injured members of their immediate family or household. As part of the NES, employees are also entitled to an additional two days’ unpaid leave where required for genuine caring purposes and family emergencies if paid carer’s leave is exhausted.

- Personal/carer’s leave – ten days’ paid personal leave.

  Casual employees are not entitled to paid personal/carer’s leave. Personal/carer’s leave is cumulative but it is not paid out upon termination.
• Two days’ paid compassionate leave (or unpaid for casual employees) per occasion that an immediate family or household member suffers a life threatening injury or illness or dies.

In relation to personal/carer’s leave and compassionate leave, an employer may request reasonable evidence of the absence.

• The right to request flexible working arrangements – an employee may request a change in their working arrangements from their employer if they require flexibility because they:
  — are the parent, or have responsibility for the care, of a child who is of school age or younger
  — are a carer (within the meaning of the Carer Recognition Act 2010 (Cth))
  — have a disability
  — are 55 or older
  — are experiencing violence from a member of their family or
  — provide care or support to a member of their immediate family or household who requires care or support because they are experiencing violence from their family.

Employers can only refuse the request on reasonable business grounds.

• Community service leave – an entitlement to be absent from work to engage in prescribed community service activities such as jury service and emergency service duties. If an employee (other than a casual employee) is performing jury service, the employer must pay the employee the difference between their ordinary rate of pay and what they received as jury service pay.

• Long service leave – an entitlement to long service leave in accordance with the relevant State legislation until the government develops a national long service leave regime.

Long service leave entitlements, which are in addition to annual leave, differ across the States. For example, in New South Wales, the entitlement is two months’ paid leave for each ten years of service with pro rata payment arrangements in certain circumstances on termination after five years of continuous service.

• Public holidays – employees are entitled to public holidays declared by State and Territory Governments. The NES also protect an employee’s right to refuse to work on a public holiday if the refusal is reasonable.

• Notice of termination and redundancy – the FW Act contains minimum periods of notice – the FW Act contains minimum periods of notice that must be applied to employees. The notice periods are as follows:

<table>
<thead>
<tr>
<th>Years of Service</th>
<th>Period of Notice</th>
</tr>
</thead>
<tbody>
<tr>
<td>More than 1 year but not more than 3 years</td>
<td>1 week</td>
</tr>
<tr>
<td>More than 3 years but not more than 5 years</td>
<td>3 weeks</td>
</tr>
<tr>
<td>More than 5 years</td>
<td>4 weeks</td>
</tr>
</tbody>
</table>

The FW Act also requires that an additional week’s notice be given to employees over 45 years of age who have two or more years of continuous service.

The NES introduced a statutory entitlement to redundancy as set out in the following table:

<table>
<thead>
<tr>
<th>Continuous service</th>
<th>Redundancy pay entitlement</th>
</tr>
</thead>
<tbody>
<tr>
<td>At least 1 year but less than 2 years</td>
<td>4 weeks</td>
</tr>
<tr>
<td>At least 2 years but less than 3 years</td>
<td>6 weeks</td>
</tr>
<tr>
<td>At least 3 years but less than 4 years</td>
<td>7 weeks</td>
</tr>
<tr>
<td>At least 4 years but less than 5 years</td>
<td>8 weeks</td>
</tr>
<tr>
<td>At least 5 years but less than 6 years</td>
<td>10 weeks</td>
</tr>
<tr>
<td>At least 6 years but less than 7 years</td>
<td>11 weeks</td>
</tr>
<tr>
<td>At least 7 years but less than 8 years</td>
<td>13 weeks</td>
</tr>
<tr>
<td>At least 8 years but less than 9 years</td>
<td>14 weeks</td>
</tr>
<tr>
<td>At least 9 years but less than 10 years</td>
<td>16 weeks</td>
</tr>
<tr>
<td>At least 10 years</td>
<td>12 weeks</td>
</tr>
</tbody>
</table>

For the purposes of the above table, service is deemed to have commenced on January 1, 2010 unless the employee had a pre-existing entitlement to redundancy under a contract or award.
• The Fair Work Information Statement – is a fact sheet that must be given to all new employees. It outlines prescribed information about an employee’s rights and entitlements at work, including the NES, Modern Awards, agreement making, freedom of association and the role of the Fair Work Commission (FWC).

Modern Awards and workplace agreements

On January 1, 2010, 130 new Modern Awards commenced operation and together with the NES, they provide a safety net of minimum terms and conditions of employment. Modern Awards replace the previous state based awards and apply to all national system employees who are covered by the coverage provisions.

Modern Awards cover the following subject matters (amongst other matters):

• minimum rates of pay
• hours of work
• overtime and penalty rates
• allowances
• leave, leave loading
• consultation, representation and dispute settling procedures.

Modern Awards apply to an employee on the basis of the industry in which an employee works, or on the basis of their occupation.

In circumstances where the classifications in the relevant industry award are not sufficiently broad to cover an employer’s entire workforce, one or more occupational Modern Awards may apply to the employer in respect of those employees who do not fall within the scope of the industry award.

If a particular employee does not fall within the classifications of any Modern Award, then that employee is ‘award-free’.

If an employee is ‘award free’ the employer is largely free to negotiate the rates of pay and other terms of employment under contracts of employment, subject to the NES.

If an employer does not comply with an award obligation, for example, the obligation to pay penalty rates, but pays the employee a salary in excess of the award rate of pay, then the additional salary can be applied and off-set against the award-under payment.

An employer may enter into an Enterprise Agreement with a group of its employees. The Enterprise Agreement must be entered into through the process laid out in the FW Act, which includes good faith bargaining and a majority of the employees who vote must agree to the Enterprise Agreement. An Enterprise Agreement may modify or exclude award provisions that would otherwise apply to the employees. However, it must be shown that the employees are better off overall under the Enterprise Agreement than they would be under the relevant Modern Award. In order to become operative, Enterprise Agreements must be lodged with and approved by the FWC.

Employers and employees cannot agree to opt out of the minimum terms and conditions enshrined in the NES.

Certain award or enterprise agreement provisions can also be modified or excluded through the use of individual flexibility arrangements (IFA). IFAs can only be used to modify provisions that regulate arrangements for when work is performed, overtime rates, penalty rates, allowances and leave loading. Again, however, the employee must be better off overall under the IFA than under the award or enterprise agreement. Currently, an IFA may be terminated by giving 28 days’ notice.

Other employee entitlements

Superannuation

Under Federal ‘superannuation guarantee’ legislation, employers who fail to provide the minimum prescribed rate of superannuation for each employee are obliged to pay a ‘superannuation guarantee charge’ plus a penalty. The charge and penalty are not tax deductible, while normal superannuation contributions are tax deductible. Accordingly, most employers pay the minimum amounts of superannuation on behalf of employees to avoid the penalties and ensure the payments are tax deductible.

From July 1, 2013, the prescribed minimum contribution rate of superannuation is 9.25 per cent of an employee’s ‘ordinary time earnings’, up to a specified ‘ceiling’. This will gradually increase, reaching 12 per cent by 2019. Contributions are usually made quarterly. Compliance with the prescribed minimum rate of employer support is measured on a quarterly basis. If the required percentage of payroll has been paid to a complying superannuation fund within 30 days of the end of each quarter then an employer is able to deduct the amount paid, otherwise if
payment is late the deduction will be lost. An employer has
30 days after the end of each relevant quarter to satisfy the
prescribed rate of employer support. In the same way that
individuals assess their own income tax, employers must
self-assess their own compliance with the superannuation
guarantee legislation. If a superannuation guarantee charge
is payable, a return must be lodged with the Australian
Taxation Office.

Employees are able to access the superannuation fund
upon retirement or when they reach a nominated age.

Employers are, subject to certain limited exceptions,
required to pay the superannuation contributions to a fund
of the employee’s choice or to a fund stipulated in any
applicable industrial instrument. If the employee is able to
choose a fund, but does not, the employer may then pay the
contributions into the employer’s nominated default fund.

Discrimination
Care must be taken when advertising for, recruiting,
determining the terms of employment of and ultimately
terminating employees’ employment. Legislation prohibits
discrimination before, during and on termination of
employment on certain grounds including:

• sex
• race
• age
• religion
• disability
• membership or non-membership of a union
• responsibilities as a carer.

Adverse action
The FW Act has introduced new general protections
provisions which aim to protect workplace rights,
avoid workplace discrimination and protect freedom of
association. Employers must not take ‘adverse action’
against employees and contractors if they have or exercise a
workplace right.

‘Workplace right’ is defined very broadly and may include
an entitlement at law or under an award or industrial
agreement, or the right to make a complaint regarding the
employee’s employment. It also includes engaging in lawful
industrial activity.

Adverse action is also defined broadly to be any prejudicial
treatment, including dismissal or refusal to employ
someone, or discriminating against someone on a
prohibited basis.

If an employee alleges that they have been subjected to
unlawful adverse action, the onus will be on the employer
to prove that the adverse action was not taken because the
employee exercised a workplace right.

Adverse action applications are open to all employees,
contractors and prospective employees so long as the claim
is brought within the time limit. Claims relating to dismissal
must be made to the FWC within 21 days after the dismissal
took effect and claims relating to all other aspects of
employment must be made within six years of the adverse
action (see below).

Dismissal
When dismissing certain types of employees in Australia it
is essential that an employer act fairly. As a general rule the
employer must ensure that (amongst other things):

• it had a valid reason for the termination
• the employee was notified of any employer concerns as
to the employee’s capacity or conduct
• the employee was given an opportunity to defend him or
herself against the allegations
• the decision to terminate was not harsh in all of the
circumstances.

If an employer breaches these obligations, an eligible
employee (for example, an employee covered by an award
or earning less than the cap, currently A$129,300) can
challenge the termination of their services in an unfair
dismissal claim against an employer. Certain employees
are excluded from the unfair dismissal laws. For example,
employees whose employment is terminated in the first six
months of employment and highly-paid employees whose
employment is not covered by an award or workplace
agreement are unable to make an unfair dismissal
application.

Unfair dismissal claims are heard in the FWC. The FWC is
structured to hear industrial matters quickly and at low
cost. For an unfair dismissal claim, a successful employee
may be awarded reinstatement (potentially with back
pay), or if that is not practicable, compensation (up to six
months’ pay capped at 50 per cent of the unfair dismissal
cap). For an adverse action claim, if the matter does not
settle in the FWC, it is heard in the Federal Court or the
Federal Circuit Court. There is no maximum compensation
cap.
Employees may also challenge the termination of their employment on the basis that the termination was based on a prohibited or unlawful reason, or because the employer failed to give the necessary notice of termination. These grounds include many of the discrimination grounds identified previously, as well as certain temporary absences from work due to illness or injury and termination in relation to union-related activities.

These statutory remedies are in addition to contractual remedies that an employee could obtain in the courts in relation to breaches of employment contracts.

**Contractors**

Certain contractors who perform work in Australia are covered by the *Independent Contractors Act 2006* (Cth) and have the right to sue for compensation due, for example, to unfairness in the terms or operation of their contractor agreement, unfair conduct by the principal, or in relation to ‘sham’ contractor arrangements where the contractor is, in law, an employee. In addition, companies who engage sham contractors are liable to prosecution under the FW Act and penalties can be imposed on the companies and also on any individual who participated in the relevant conduct. Classifying workers incorrectly as contractors rather than employees can also lead to liabilities including penalties for tax, non-payment of superannuation contributions and workers compensation premiums and the like. As a result, legal advice should be sought when entering into and drafting contractor agreements and before terminating the engagement of contractors, to minimise the risk of claims of illegal conduct.

**Workers’ compensation**

It is compulsory for all employers in Australia to take out workers’ compensation insurance to cover injuries or illnesses suffered by employees at work. The level of workers’ compensation premiums is determined by the industry in which the employer operates, the level of risk associated with that industry and the State or Territory whose law applies.

**Purchasing a business**

If a purchaser acquires a business as an on-going concern and decides to offer employment to some or all of the existing employees, the employees’ accrued service related entitlements, including annual leave, long service leave and sick leave, may be transferred or ‘carried across’ to the purchaser. This poses a number of legal issues that may influence the amount the purchaser is prepared to pay for the business. If the purchaser does not offer employment to the affected employees, or does so on less favourable terms than applied previously, then the employees may be entitled to a redundancy payment from the seller of the business. Under the FW Act, a purchaser may ‘inherit’ the conditions of any industrial and workplace agreement that applies to the employees. The industrial instrument will continue to apply to the transferring employees and also may apply to any new employees that the purchaser employs to perform the same or similar work to that performed by the transferring employees. Proper due diligence will expose these matters prior to purchase and give the purchaser opportunity to take their ramifications into account.

**Unions and industrial action**

Trade union membership in Australia is in decline. Recent studies suggest that union membership is currently around 18 per cent. The level of union involvement will depend largely on the industry sector and the size of the organisation.

Businesses are not required to give preference to union members. Provisions requiring compulsory unionism are outlawed. Conversely, it is unlawful to discriminate against employees on the basis they are or are not members of a union.

Australian employees have a limited right to strike or take other industrial action. Under the current Federal system, there are restrictions on the right to take industrial action. The FWC has powers to direct (for example) that industrial action should stop or not occur. These directions are enforceable by injunction. Further restrictions include:

- FWC powers to suspend or terminate protected industrial action where there is a significant economic harm to the employer or any of the employees or where the protected industrial action would endanger the life or welfare of the population or part of it.

- FWC power to suspend protected industrial action where the FWC is satisfied that it would be appropriate taking into account whether the suspension would assist in resolving the matters at issue, the duration of the action, and whether the suspension would be contrary to the public interest.
Bullying

From January 1, 2014, amendments to the FW Act will allow a worker who believes that they have been bullied to apply to the FWC for an order to stop the bullying. The provision is not limited to employees but extends to contractors, labour hire personnel and persons engaged under other workplace arrangements.

The FWC will be required to commence dealing with an application for an order to stop bullying within 14 days after an application and may make any orders it considers appropriate to stop the bullying, other than an order for the payment of a monetary amount. Before making an order, the FWC must be satisfied that the worker would otherwise continue to be bullied.

Breach of such orders may lead to penalties of up to A$10,200 for an individual or A$51,000 for a body corporate.
Occupational health and safety/ Work health and safety

Occupational health and safety (OHS), now commonly known as work health and safety (WHS) (following the enactment of WHS legislation across most of Australia) involves management of the workplace environment, personnel, plant, substances and activities so that risks to health, safety and well-being are eliminated or minimised. Although primarily directed towards the protection of workers, OHS/WHS legislation also takes into account the safety and welfare of others who may be adversely affected by an organisation’s activities, including customers and other visitors to a site, as well as passers-by and the surrounding community.

Each Australian state and territory has specific legislation which imposes broad general duties on employers or those who engage workers, occupiers of premises, employees and contractors, manufacturers, designers, importers and suppliers of plant and substances.

In July 2008, the Council of Australian Governments signed the Inter-Governmental Agreement for Regulatory and Operational Reform in OHS, committing to develop and implement harmonised OHS laws across Australia’s Federal and eight State and Territory jurisdictions. One of the objectives of the drive towards a national uniform OHS legislative framework is to reduce the burden of regulatory compliance for businesses operating nationally.

Laws based on a model Work Health and Safety Act (model WHS Act) commenced operation in New South Wales, Queensland, Northern Territory and the Australian Capital Territory on January 1, 2012 and commenced in Tasmania and South Australia on January 1, 2013. The laws do not operate nationally. Each state or territory jurisdiction is required to enact separate legislation that mirrors the model WHS Act. The remaining States (Victoria, and Western Australia) have not yet confirmed the extent to which they will introduce the WHS Act, or when, with the Victorian Government having stated that it does not intend to do so. Legislation in Victoria and Western Australia follows the same principles and has similar key features to the WHS Act. Key features of the WHS Act not present in Victoria and Western Australia include a shift from the employer-employee relationship to a broader basis for duties, obligations and rights, the imposition of a positive duty on company officers to exercise due diligence and a significant increase in monetary penalties.

In this chapter we refer to the requirements under the model WHS Act, noting they are the higher standard and are expected to soon apply throughout Australia, noting differences with requirements in the remaining States where these are significant.

Primary duty of care

Although the language differs from State to State, OHS/WHS legislation generally requires businesses, to ensure, so far as is reasonably practicable, the health, safety and welfare of their workers (eg, employees, contractors, labour hire, volunteers) and other people whose health and safety may be adversely affected by the company’s business activities.

Under the model WHS Act, a Person Conducting a Business or Undertaking (PCBU) (which includes corporations that conduct a business) has a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers engaged or caused to be engaged by the PCBU and workers whose work activities are influenced or directed by the PCBU. The PCBU also has a duty to ensure that other persons, such as visitors or members of the public, are not put at risk from work carried out as part of the conduct of the business.

The duty of care imposed by OHS/WHS legislation on employers or PCBUs in Australia can be summarised as the obligation to ensure so far as is reasonably practicable:

- provision and maintenance of safe plant, structures and systems of work
- arrangements for ensuring safety and the absence of risks to health in connection with the use, handling, storage and transport of plant, structures and substances
- provision of information, instruction, training and supervision to employees and workers
- maintenance of the workplace in a condition that is safe and without risks to health;
- provision and maintenance of means of access and egress from the workplace which are safe and without risks to health
- provision and maintenance of a working environment that is safe, without risks to health and which provides adequate facilities at work for the welfare of employees and workers
• that the health of workers and conditions at the workplace are monitored to prevent illness or injury of workers arising from the conduct of the business

‘Reasonably practicable’ is defined as being what a business is reasonably able to do in the circumstances.

**Other specific duties**

In addition to the general or primary duties of care under OHS/WHS legislation, there are specific duties over the following range of issues:

• design, manufacture and supply of plant and substances, and construction, installation and commissioning activities

• consultation with workers and consultation, co-operation and co-ordination of activities with other businesses

• notification of workplace incidents

• hazardous processes, such as spray painting, abrasive blasting, welding, electroplating and lead processes

• use, handling and storage of hazardous substances

• transport and storage of dangerous goods

• work in confined spaces

• manual handling

• occupational noise

• plant safety

• major hazard facilities

• certification for people operating certain types of equipment (such as cranes) and undertaking certain types of work (such as the removal of asbestos).

Although provisions relating to these duties currently differ from State to State, national uniformity has already been achieved in several areas through the development of National Standards, which have been used as the basis for drafting regulations at the State and Territory level.

**Director and officer liability**

In all jurisdictions, directors, officers or persons concerned with the governance of a company may be held personally liable for breaches by the company of OHS/WHS legislation.

For example, section 27 of the model WHS Act places a positive duty on an officer to exercise due diligence to ensure the company complies with its duties under the Act.

An ‘officer’ is defined by reference to the Corporations Act 2001 (Cth) and includes:

• both executive and non-executive directors, company secretaries and other office holders

• persons who make or participate in making decisions that affect the whole or a substantial part of the business

• those on whose wishes or instructions the directors are accustomed to act (eg, a holding company in relation to a subsidiary)

• persons who can significantly affect the financial standing of the company.

Under the model WHS Act, an officer can be liable for an offence, whether or not the company has been convicted or found guilty of an offence. At present, the liability of directors and officers in Victoria and Western Australia is narrower, arising only where the company has committed a breach that is attributable to a failure on the part of the officer.

**Due diligence**

The concept of due diligence is not new in the context of OHS/WHS legislation. However, the model WHS Act now defines due diligence. The duty is aimed at engaging those who manage the company, to ensure that appropriate resources are available and allocated to health and safety requirements.

As defined in the model WHS Act, due diligence includes taking reasonable steps:

• to acquire and keep up-to-date knowledge of work health and safety matters

• to gain an understanding of the operations of the business and generally of the hazards and risks associated with those operations
Foreign investment in Australia

- to ensure the business has appropriate processes and resources to eliminate or minimise risks to health and safety
- to ensure that the business has appropriate processes for receiving information regarding incidents, hazards and risks and processes for considering and responding to that information
- to ensure that the business has and implements processes for complying with work health and safety duties or obligations.

An officer may meet the due diligence requirements of the model WHS Act in some respects by ‘proper reliance’ on information or advice received from others in the company or from external experts and advisors. However, an officer cannot delegate his or her duty and reliance on the advice of others must be reasonable. An officer should take positive, informed and proactive steps to verify that health and safety risks in the business have been addressed by appropriate and qualified people, that appropriate reporting and systems are in place and that adequate funds and resources have been allocated to those functions.

Penalties

A breach of OHS/WHS legislation is a criminal offence. Penalties for breaches are severe and include imprisonment. The maximum penalty for a breach by a company under the model WHS Act, where the conduct is reckless and exposes a person to risk of death, serious injury or illness, is A$3 million per offence. The maximum penalty for an officer is A$600,000 or five years imprisonment or both.

Similar, though less severe, penalty provisions exist in the remaining States and Territories. For example, the maximum penalty for a breach of the Victorian Occupational Health and Safety Act 2004,(Vic) is more than A$1.25 million for the company and more than A$250,000 or five years imprisonment or both for a natural person.

It is contrary to public policy in Australia to enforce an indemnity (eg, insurance) for criminal penalties or for a company to indemnify an officer or employee for the consequences of their criminal conduct. While an insurer or other person may indemnify an offender for a penalty, the offender cannot enforce an indemnity and a court has recently refused to discount a fine because the fine would be paid by an insurer. The level of fine paid by an insurer will be relevant to premium.

Investors acquiring a business in Australia should ensure that some assessment is made of the OHS/WHS performance of the business prior to acquisition, particularly in view of the potential that exists for personal liability. OHS/WHS liabilities will remain with the company and will not expire upon acquisition. However, a breach by a director or officer will remain the personal liability of the individual. Investors should make an independent assessment of the adequacy of a company’s OHS/WHS compliance systems and work safety record before making an acquisition.
Immigration

The Migration Act 1958 (Cth) and the Migration Regulations 1994 (Cth) provide detailed rules for immigration control in Australia. All non-citizens who wish to conduct business in Australia must have a visa to enter Australia or to remain in Australia. The Department of Immigration and Citizenship (DIAC) administers the mandatory visa regime within the framework of broader migration programs.

If employers want to employ someone in Australia who is not an Australian citizen, there are a number of different visas that the individual may apply for. One of the more common visas is the sub-class 457 visa, which is an employer sponsored (skilled) visa for up to four years. The employer sponsoring the employee must be an approved business and can only sponsor someone for this visa if they cannot find an Australian citizen or permanent resident to do the skilled work.

The relevant legislation in Australia prohibits a person who is not a registered migration agent from giving ‘immigration assistance’. The Migration Act defines ‘immigration assistance’ as relevantly, if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist another person by:

- preparing, or helping to prepare, a visa application or cancellation review application or
- advising the other person about a visa application or cancellation review application or
- preparing for proceedings before a court or review authority in relation to a visa application or cancellation review application or
- representing the other person in proceedings before a court or review authority in relation to a visa application or cancellation review application.

Our firm is not a registered migration agent and does not presently advise in relation to aspects of immigration law. However, we have affiliations with specialists in immigration law and are happy to give referrals. If you would like a referral to an immigration specialists in Australia, please either phone or email your Norton Rose Fulbright Australia contact, or get in touch directly with Tim Woodforde on +61 (0)2 9330 8303 or by email at tim.woodforde@nortonrosefulbright.com.

Further assistance regarding the conduct of Registered Migration Agents may be sought from the Migration Agents Registration Authority at www.mara.gov.au.
Foreign investment in Australia

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