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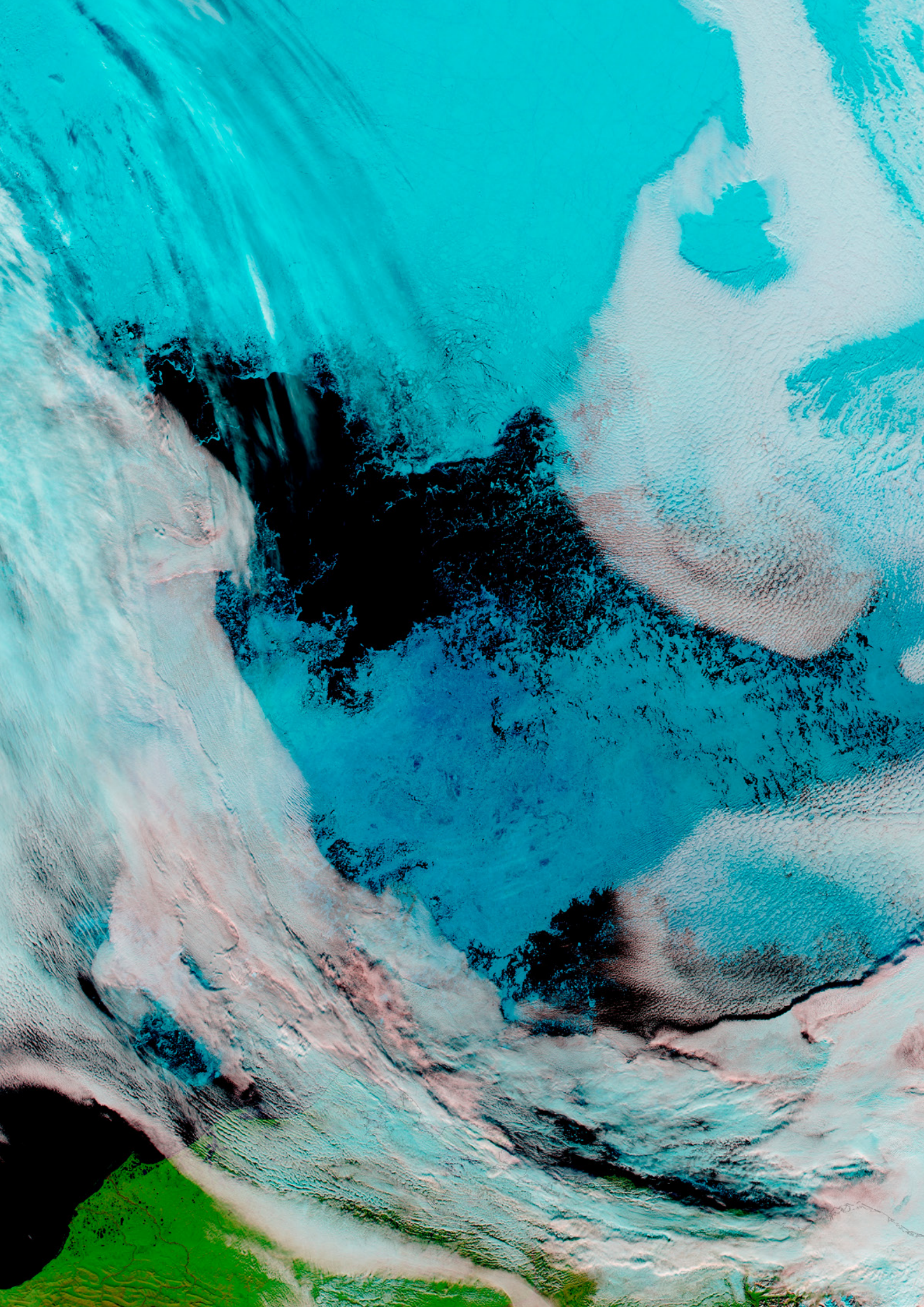
In alliance with Linklaters

Doing business and investing in Australia



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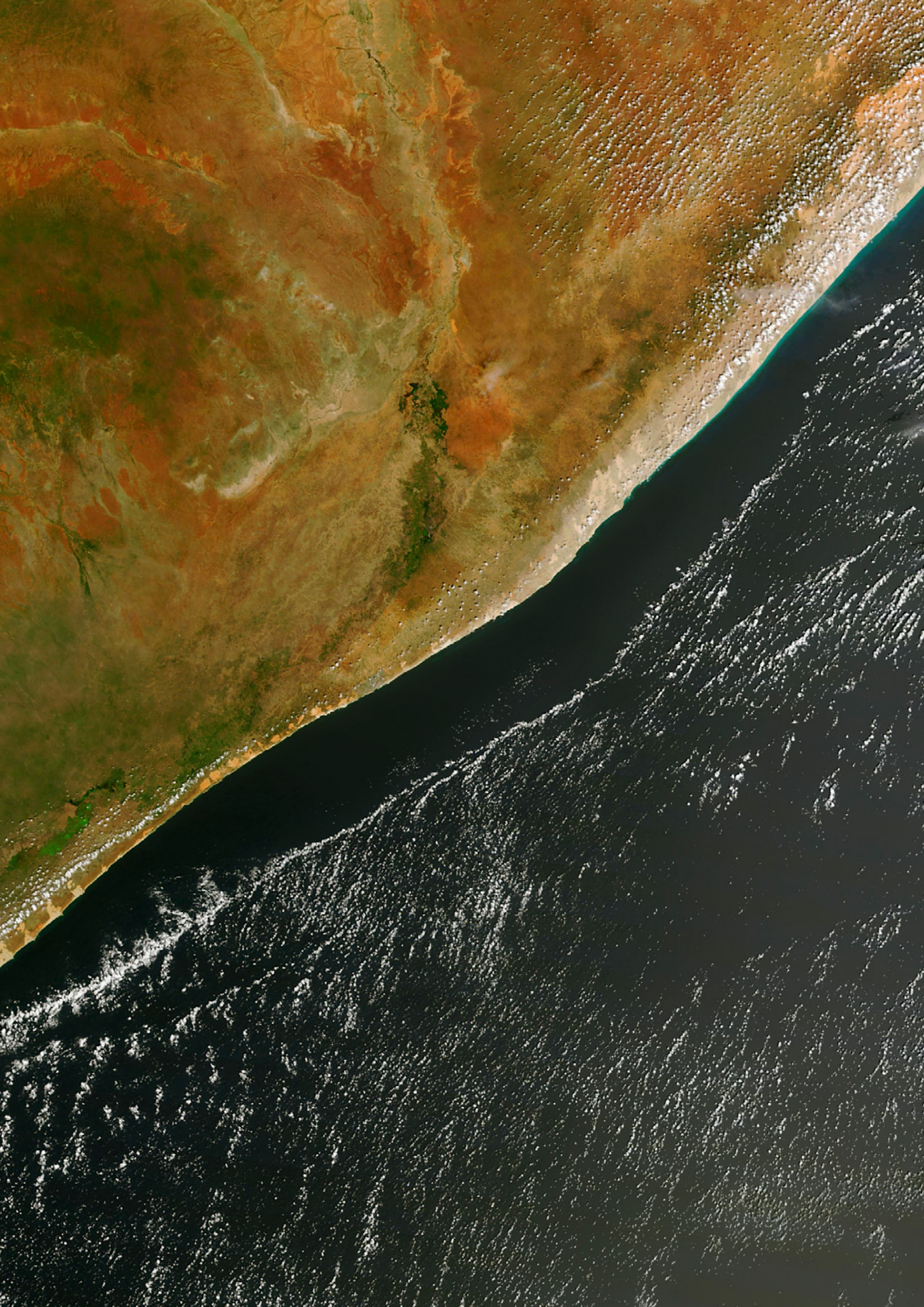


A world of opportunity

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

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

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

Allens is a leading international law firm with a long and proud heritage of shaping the future for our clients, our people and the communities in which we work.

From playing a pioneering role in the development of legislation and regulatory frameworks, to acting on numerous 'firsts' across a range of industry and community issues, it is in our DNA to make a difference and help shape what our world looks like.

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

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

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

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

This guide is current as of March 2025.

Global recognition

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

- **Australian Law Firm of the Year**
  Chambers Asia Pacific Award 2023
- **Ranked as a Band One firm in 19 practice areas**
  Chambers Asia Pacific 2025
- **Ranked as Tier One firm in 16 practice areas**
  The Legal 500 Asia Pacific 2025
- **Financial Services M&A Legal Adviser of the Year**
  Mergermarket Australia M&A Awards 2024
- **Best Provider to Power and Utilities across all professions**
  Beaton Client Choice Award 2023
- **Energy, Mining and Utilities M&A Legal Adviser of the Year**
  Cross-border M&A Legal Adviser of the Year
  Mergermarket Australia M&A Awards 2023
- **M&A deal of the year**
  Australasian Law Awards 2023
- **Ranked in Most Innovative Companies list 2018-2023**
  Highest ranked law firm on the list for Australia and New Zealand 2019, 2020, 2021, 2023
  The Australian Financial Review and Boss Magazine
- **No 1 in M&A League tables 2024**
  Ranked first in announced and completed deals (by value) with any involvement in Australia and New Zealand
  LSEG (formerly Refinitiv)

  Ranked first in announced deals (by value) in Australasia
  Mergermarket

  Ranked first in announced deal (by volume) for Australia or New Zealand
  Bloomberg
- **No 1 in banking and finance league tables 2024**
  Ranked first in Asia Pacific (excluding Japan) – borrower lead counsel by deal count
  Ranked first in Asia Pacific (excluding Japan) – lender lead legal adviser by value
  Bloomberg

  Ranked first in Asia Pacific (excluding Japan) – lead bank legal counsel
  Ranked first in Australia – lead bank legal counsel
  Debtwire

  Ranked first in Asia Pacific – project finance legal adviser by value and deal count (four consecutive years)

  Ranked first in Australia and New Zealand – project finance legal adviser by value and deal count
  Infralogic Infrastructure League Tables
- **M&A Legal Adviser of the Year 2022**
  Mergermarket Australia M&A Awards 2022
- **Best Law & Related Services Firm (>$200m)**
  Beaton Client Choice Award 2021
- **The Employer of Choice for Gender Equality**
  (20th consecutive time we have been awarded this citation)
  Workplace Gender Equality Agency 2024

Australia at a glance

An attractive Australia

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

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

An ideal investment destination

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

A strategic location

Australia has a multicultural population and workforce, with about 28% of Australians having been born overseas and about 5.8 million Australians speaking a language other than English at home.[1]

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

Growing sectors

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

1 Cultural diversity of Australia.

Government and legal system

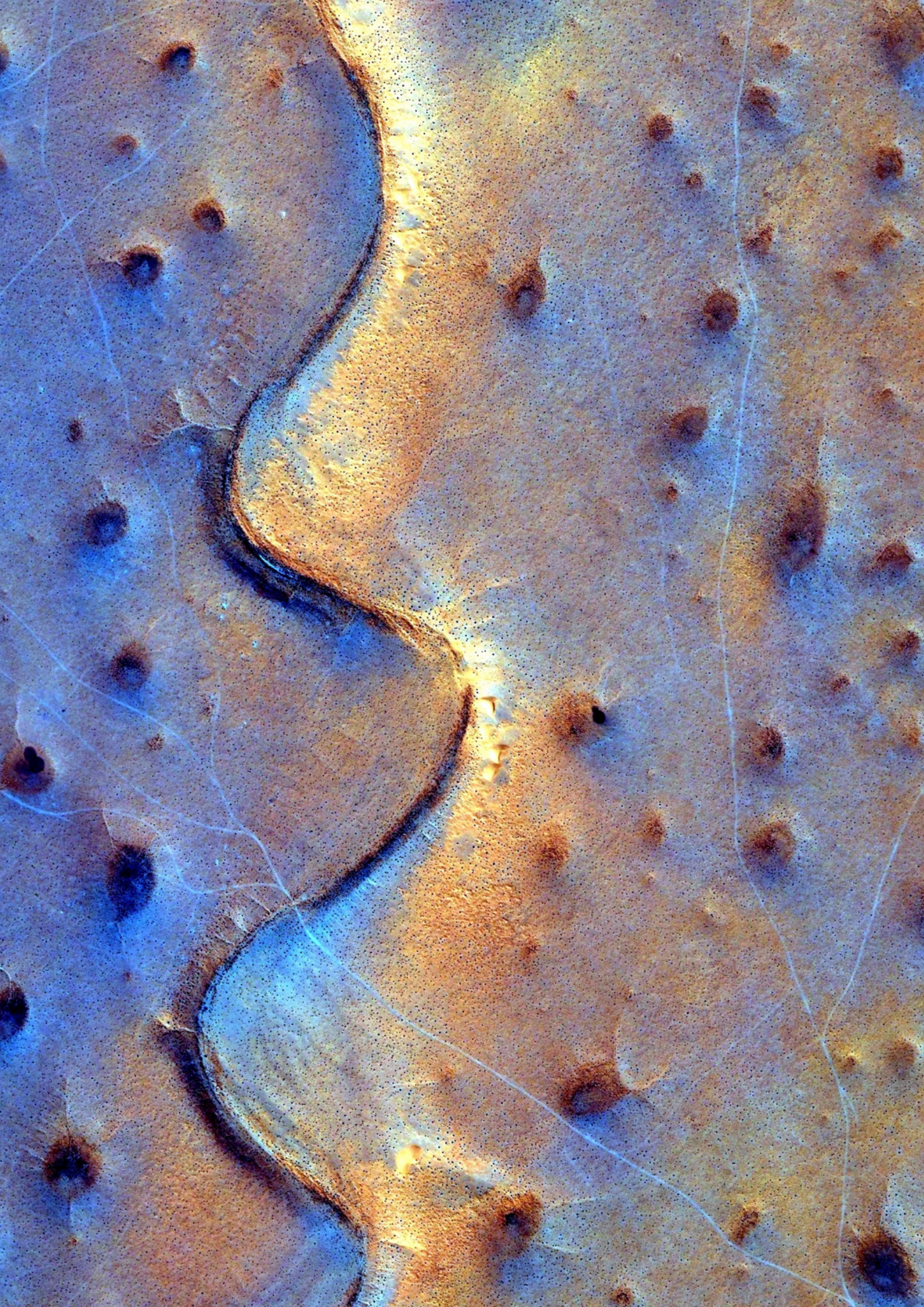
Australia boasts a robust and stable democracy with a federal system of government based on the United Kingdom's Westminster system and comprising three tiers of government:

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

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

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

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



Setting up a business in Australia

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

Australian companies

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

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

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

Establishing a new Australian subsidiary

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

Sole trader

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

Joint venture

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

Partnership

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

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

Trading trust

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

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

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

Registering as a foreign company

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

Acquiring a business in Australia

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

Asset v share purchases

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

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

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

Relevant legislation when acquiring a new company

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

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

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

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

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

Further information relating to the ACCC and the Competition and Consumer Act can be found in the section on Australian Competition and Consumer Act.

Takeover legislation

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

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

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

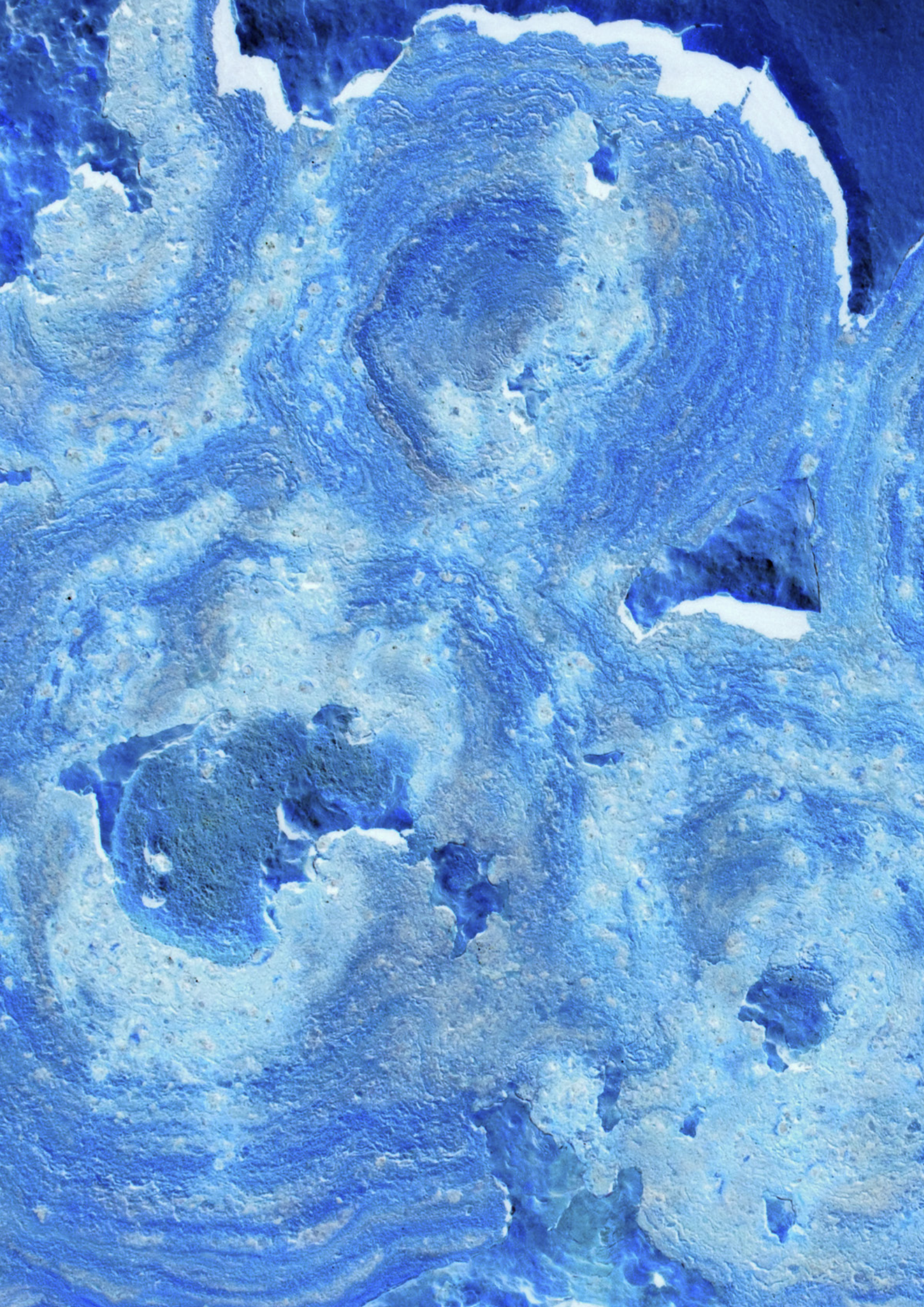
The Australian Takeovers Panel, an independent peer review body that regulates takeovers in Australia, is charged with resolving any takeover disputes that arise.

Schemes of arrangement

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

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

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



Foreign investment regulation

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

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

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

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

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

Applications for foreign investment approval are submitted to FIRB.

When approval is required

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

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

- a direct interest (generally 10% plus) in a target's securities or in the assets of a business if the target operates, or the business is, a 'national security business' (generally being a business which is involved in or connected with a 'critical infrastructure asset', telecommunications, defence or a national intelligence community (of either Australia or a foreign country), or their supply chains) – in such cases a nil monetary threshold applies; or
- a substantial interest (20% plus) via the issue or transfer of securities if the target is:
  - an Australian company carrying on an Australian business;
  - an Australian unit trust; or
  - a holding entity of either of them,

where the target is valued above the following thresholds:

Investor	Threshold	How calculated
Agreement country investors – An entity that is an enterprise or national of an 'FTA Country' (Canada, Chile, China, Hong Kong, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, South Korea, United Kingdom, USA and Vietnam) but excluding: ■ acquisitions by their subsidiaries incorporated elsewhere, including an Australian subsidiary; ■ foreign government investors (who are subject to more stringent rules – see below); and ■ acquisitions of targets in sensitive sectors (which include media, telecommunications, transport and various military applications).	A$1,464 million, indexed annually	The higher of: ■ the total asset value for the entity; and ■ the total value of the issued securities of the entity
Agreement country investors – where the target is carrying on a sensitive business (which includes media, telecommunications, transport and various military applications) but excluding: ■ acquisitions by their subsidiaries incorporated elsewhere, including an Australian subsidiary; and ■ foreign government investors (who are subject to more stringent rules – see below).	A$339 million, indexed annually	
Foreign persons who are not agreement country investors or foreign government investors (the latter being subject to more stringent rules – see below).	A$339 million, indexed annually	

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

- **Foreign government investors:** There are different rules for investments by a foreign government investor compared with private investors. Foreign government investors are subject to more rigorous screening than other investors – all foreign government investors acquiring a direct interest (which is generally 10% but may be less depending on the circumstances) in an Australian entity require FIRB approval and there is no monetary threshold that applies before FIRB approval is required. Many commercial investors that operate independently are counted as foreign government investors – not only sovereign wealth funds and state owned enterprises, but also many entities that have part government ownership upstream.
- **Agribusiness:** All foreign persons (other than those noted below) acquiring a direct interest (which is generally 10% but may be less depending on the circumstances) in an agribusiness for consideration of A$73 million or more (including the value of any existing investment in that agribusiness) must obtain FIRB approval before proceeding. An agribusiness entity is one that:
  - derives earnings from carrying on one or more businesses in a prescribed class of agricultural businesses that represent more than 25% of the entity's EBIT; or
  - uses assets in carrying on one or more such businesses and the value of the assets exceeds 25% of the total asset value of the entity.

  However, this A$73 million threshold does not apply to enterprises or nationals of USA, Chile or New Zealand. They are instead subject to the A$1,464 million threshold noted in the above table.

- **Media sector:** Any acquisition by a foreign person of a direct interest (which is generally 10% but may be less depending on the circumstances) in an Australian media business requires FIRB approval.
- **Land-rich entities:** Any acquisition by a foreign person of securities in an Australian land corporation or trust (being a corporation or trust where interests in Australian land account for more than 50% of the entity's total assets) requires FIRB approval where the applicable land monetary threshold is exceeded, except acquisitions of less than 10% in an Australian land corporation or trust where there is no influence over management or policy (and, in the case of an unlisted Australian land corporation or trust, where that corporation or trust does not carry on a business of investing in established dwellings). The applicable land monetary threshold depends on the type of land interests that the Australian land corporation or trust has. For instance, a nil monetary threshold applies if there is any interest in 'national security land' (generally land which is defence premises or where it is publicly known (or could be known upon the making of reasonable enquiries) that a national intelligence agency has an interest in the land), but a A$339 million threshold often applies if there are interests in only developed commercial land, or another threshold could instead apply depending on the type of land in which interests are held.
- **Indian investors in non-sensitive service businesses:** Any acquisition by an Indian investor (other than one which is a foreign government investor) of interests in non-sensitive service businesses are subject to a A$547 million threshold.

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

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

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

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

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

Assessment of the national interest (for all foreign investors)

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

- **National security:** The extent to which investments affect the Australian Government's ability to protect the strategic and security interests of Australia.
- **Competition:** Whether a proposed investment may result in an investor gaining control over market pricing or production of a good or service in Australia.
- **Taxation:** How much risk a potential foreign investment poses to Australia's tax revenue. This includes an examination of the transaction, its context, and the broader tax compliance history of the investor and its related parties.
- **Other Australian Government policies:** Investments must also be consistent with the Government's wider policy objectives – for example, in relation to matters such as environmental impacts.
- **Impact on the economy and the community:** What level of Australian participation will remain after the proposed investment occurs, and what will be the consequences for employees, creditors and other stakeholders.
- **Character of the investor:** The extent to which the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision.

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

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

The Policy indicates that the Government will have regard to:

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

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

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

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

Fees and timing

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

The rules regarding the determining of FIRB fees are complex. The fee in any given case will depend on a range of factors, including: the type of target, the value of the transaction, the type of transaction, whether the application is for a no-objection notification or an exemption certificate, or whether the special fee adjustment rules apply. In general terms, the fee for any single business-related application for a no objection notification under the mandatory FIRB approval triggers can range from A$4,300 up to A$1,171,600. In many cases the higher the transaction value the higher the fee subject to a fee cap of A$1,171,600.[2]

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

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

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

However, the Government has publicly stated, in its Foreign Investment Policy document, that it is streamlining consultation and assessment processes for foreign investment proposals, to enable low-risk capital to flow quickly. The Government has stated that, as part of a stronger risk-based approach, this process will be informed by consideration of the investor (who), the target of their investment (what), and the structure of the transaction (how). To support this, Treasury has adopted a new performance target of processing 50% of investment proposals within the 30-day statutory decision period from 1 January 2025.

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

2 Significantly higher application fees apply for the acquisition of established dwellings. The higher the acquisition price the higher the fee, subject to a fee cap of A$3,514,800.

Register of foreign ownership of Australian assets

Since 1 July 2023, the FATA has required foreign persons who:

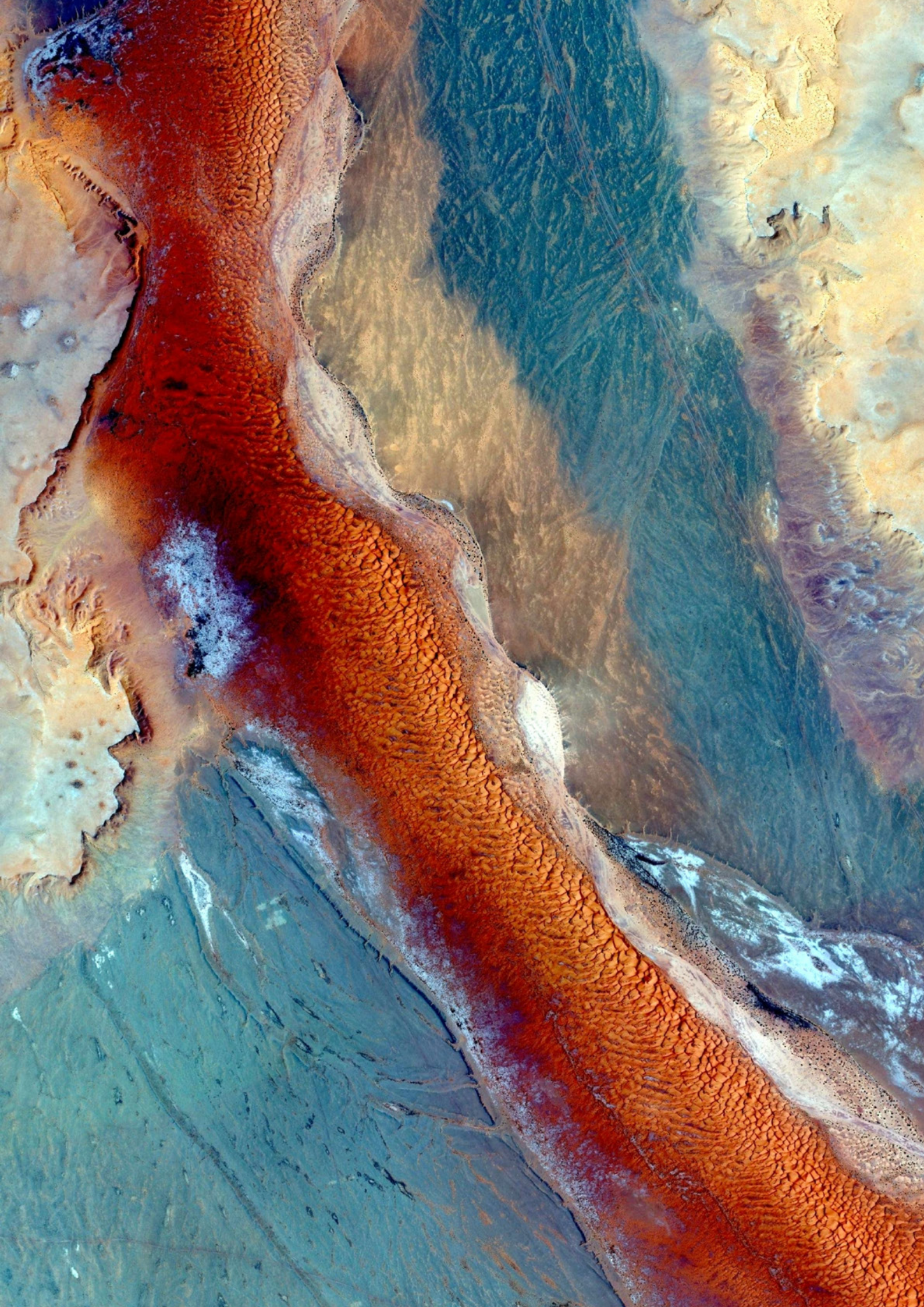
- acquire certain types of interests in Australian land, exploration tenements and water interests (in each case irrespective of whether FIRB approval is required for such acquisitions); or
- acquire interests in Australian entities and businesses where FIRB approval is required for such acquisitions,

to notify the Registrar (being the Australian Taxation Office (***ATO***)) of the Register of Foreign Ownership of Australian Assets (the ***Register***) of such acquisitions, within 30 calendar days of each such acquisition.

Subsequent changes – including disposals of relevant assets, changes in the nature of the relevant land in which a foreign person has an interest and changes of five percentage points or more of a foreign person's interest in a relevant entity or business – also need to be notified to the Registrar, in each case within 30 calendar days of the relevant change.

In addition, a person who becomes a foreign person is required to notify the Registrar of certain types of existing interests in Australian land, exploration tenements and water interests, as though the person acquired those interests on the day it became a foreign person. Also, a person who becomes a foreign person is required to notify the Registrar of existing interests in an entity or business where that person would have needed FIRB approval to acquire that interest if they had acquired the interest on the day they became a foreign person.

Acquisitions which are wholly exempt from the FATA are not subject to the Register notification requirements.



Financial system

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

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

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

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

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

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

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

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

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

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

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

Tax regime

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

Income Tax

General overview

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

Australia has established income tax treaties with a plurality of jurisdictions and has ratified (and enacted into domestic law) the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (also known as the Multilateral Instrument), which enables jurisdictions to modify their existing bilateral tax treaties to better address multinational anti-avoidance and more effectively resolve tax disputes.

Which entity is appropriate?

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

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

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

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

Consolidated groups

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

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

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

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

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

Tax losses

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

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

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

Funding the investment

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

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

However, the amount of interest that is deductible may be limited under 'thin capitalisation' rules where an entity has at least A$2 million of debt deductions on an associate inclusive basis. The thin capitalisation rules have recently been amended in material respects, and the new rules generally apply to income years starting on or after 1 July 2023. Under those new rules, an entity who is a 'general class investor' must choose, for each income year, one of the following three tests:

- **Fixed Ratio Test:** An entity may claim net debt deductions up to 30% of its Tax EBITDA. Debt deductions denied under the Fixed Ratio Test in a particular income year may be carried forward over a 15 year period (subject to certain integrity rules).
- **Group Ratio Test:** An entity in a sufficiently leveraged group may claim net debt deductions in excess of the amount permitted under the fixed ratio test based on a ratio of the group's profits after adding back certain expenses.
- **Third Party Debt Test:** Debt deductions which are not attributable to third party debt, or which do not satisfy certain other conditions, are disallowed.

The thin capitalisation rules contain different tests for other entities that are 'financial entities' and 'authorised deposit institutions' (or 'ADIs').

Under the new thin capitalisation regime, the Australian Government has also recently introduced 'debt deduction creation rules' which are intended to disallow debt deductions to the extent that they are incurred in relation to debt creation schemes that lack genuine commercial justification. The deductibility of interest on certain debt will be limited when, broadly, such debt is used to finance an acquisition from, or make certain payments to, certain related parties ('associate pairs'). The debt deduction creation rules apply to income years starting on or after 1 July 2024.

Withholding tax

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

Dividends paid by an Australian resident company to a non-resident shareholder are generally subject to dividend withholding tax at a rate of 30%. This rate is reduced under Australia's tax treaties – in some cases to zero. Australia operates an imputation system of company taxation under which shareholders in an Australian resident company may be entitled to a credit for tax paid by the company. Under that system, Australian resident companies that pay income tax can record credits equal to the tax paid to their 'franking accounts', and when they pay dividends they can allocate 'franking credits' to those dividends. Resident shareholders who receive dividends with franking credits allocated to them (ie, 'franked dividends') are generally entitled to a credit against their own tax liability for those franking credits. Where franked dividends are paid to a non-resident shareholder, no dividend withholding tax is payable to the extent that the dividend is franked. Thus, fully franked dividends are not subject to dividend withholding tax. Also, no dividend withholding tax is payable where dividends are paid out of certain non-Australian source income (referred to as 'conduit foreign income').

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

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

Purchasers of direct or indirect interests in Australian real property and mining rights (***TARP***) are required to pay 15% of the total transaction consideration to the Commissioner of Taxation in the form of a non-final withholding tax, unless an exemption applies. This withholding tax applies to all sales of TARP, and sales of certain 'non-portfolio' interests in entities with an underlying value principally attributable to TARP, unless an exemption applies.

Transfer pricing

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

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

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

Multinational Anti-Avoidance Law

The Multinational Anti-Avoidance Law (***MAAL***) applies to 'significant global entities', which are, broadly, members of groups with global annual revenue of A$1 billion or more. Broadly, the MAAL may apply where the following requirements are met:

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

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

Diverted profits tax

The diverted profits tax (***DPT***) is aimed at significant global entities with Australian income of A$25 million or more that divert profits from Australia through transactions with related parties in lower tax jurisdictions where the arrangements lack economic substance.

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

- having regard to certain specified matters, it would be (objectively) concluded that one of the persons who entered into or carried out the scheme or any part of it did so for a principal purpose, or for more than one principal purpose that includes a purpose, of enabling the relevant taxpayer (either alone or with others) to obtain an Australian tax benefit or to both obtain an Australian tax benefit and reduce one or more foreign tax liabilities;
- a foreign entity that is an associate of the relevant taxpayer entered into, carried out or is otherwise connected with the scheme or any part of it; and
- it is reasonable to conclude that the sufficient foreign tax or sufficient economic substance tests (described below) do not apply:
    - The sufficient foreign tax test applies where, broadly, the total increases in foreign income tax that will result (or may reasonably be expected to result) from the scheme for a foreign entity (either the taxpayer or an associate) that is one of the persons who has entered into, carried out or is connected with the scheme, equals or exceeds 80% of the reduction in the amount of Australian tax payable due to the tax benefit (reduced by any amount the relevant taxpayer must withhold as a result of withholding tax applicable to the tax benefit).
    - The sufficient economic substance test will apply if, broadly, the profit made as a result of the scheme by each entity that entered into, carried out or is otherwise connected with the scheme or part of it reasonably reflects the economic substance of its activities in connection with the scheme (provided its role is not merely minor or ancillary).

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

The DPT base amount for each tax benefit is either:

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

The ATO has released administrative guidance on the DPT in the form of a Law Companion Ruling (***LCR***), a PCG and a Law Administration Practice Statement (***PSLA***). The LCR provides guidance on the principal purpose, sufficient foreign tax and sufficient economic substance tests. The PCG provides details on the ATO's compliance and engagement approach in relation to DPT and also contains practical examples of the application of the sufficient foreign economic substance test. The PSLA outlines the internal procedures the ATO will follow before and after issuing a DPT assessment.

Hybrid mismatch rules

Australia has enacted legislation to broadly implement the OECD BEPS Action 2 recommendations with respect to neutralising hybrid mismatches.

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

OECD BEPS Pillar 2

Australia has recently implemented the OECD's Pillar Two framework, which establishes a 15% global minimum tax rate for large multinational enterprises (***MNEs***) with annual global revenues of EUR 750 million or more.

Australia's 'Income Inclusion Rule' and 'Domestic Minimum Tax' will apply to income years commencing on or after 1 January 2024, and the 'Undertaxed Profits Rule' will apply to income years commencing on or after 1 January 2025. These measures aim to prevent profit shifting to low-tax jurisdictions and ensure that large businesses pay at least the minimum level of tax in each country where they operate.

Where an entity falls short of the minimum level, top-up tax is due and payable on the last day of the 15th month after the end of the fiscal year (extended to the last day of the 18th month in the transitional year). Interest and penalties may apply on unpaid amounts.

Capital gains tax

Non-residents are taxed on capital gains arising from the disposal of Australian real property, CGT assets using in carrying on a business through an Australian permanent establishment, certain 'non-portfolio' interests in entities the assets of which, directly or indirectly, consist principally of real property in Australia (known as 'indirect Australian real property interests'), or options to acquire such assets. Interests in both Australia and non-resident entities can be indirect Australian real property interests if the underlying assets of the entity whose interests are being disposed of directly or indirectly consist principally of real property in Australia.

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

As part of the 2024–25 Budget, the Australian government has announced its intention to amend the foreign resident capital gains tax regime to:

- clarify and broaden the types of assets on which foreign residents are subject to capital gains tax;
- amend the time at which the determination of whether an entity's underlying assets principally consist of real property in Australia to a 365-day testing period; and
- require foreign residents disposing of shares and other membership interests exceeding $20 million in value to notify the ATO prior to the transaction being executed.

The amendments, if passed, will apply to CGT events starting on or after 1 July 2025.

Stamp duty

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

Stamp duty is primarily a tax on the acquisition of certain types of property, which depending on the jurisdiction, includes land, goods acquired with land and businesses (see also the discussion on investing in Real Estate below). Stamp duty is generally imposed on the purchaser.

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

In addition to imposing duty on direct acquisitions of land, each State and Territory also imposes 'landholder duty' on the acquisition of interests in companies and trusts that hold Australian land. The landholder duty rules vary between the different States and Territories with the applicable regime depending on the location of the property (see also the discussion on investing in Real Estate below).

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

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

Some States also impose additional duty on foreign purchasers of residential property (with the surcharge ranging up to 9%). The surcharge also applies under the landholder duty regimes.

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

Goods and services tax

Australia has a 10% goods and services tax (***GST***). It is similar to many value added tax (or ***VAT***) and GST regimes in other jurisdictions. Irrespective of residence, an entity is liable to pay GST in Australia on 'taxable supplies'. Broadly speaking, a taxable supply is a 'supply' that:

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

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

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

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

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

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

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

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

Australian Competition and Consumer Act

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

A new merger regime

Parliament has passed amendments to the CCA, which will give effect to a new mandatory and suspensory merger regime for transactions closing or completing on or after 1 January 2026, with transitional arrangements coming into effect from 1 July 2025.

This means the existing informal merger filing process and merger authorisation process will be phased out.

New merger authorisations and informal clearance applications under the existing regime cannot be made after 30 June 2025 and 31 December 2025 respectively. Merger parties will be able to voluntarily notify acquisitions under the new regime from 1 July 2025. This guide addresses both the existing and new regimes. However, at the time of publication, a significant amount of detail about the new regime had not yet been published. Accordingly, Allens encourages you to take advice on the application of the Australian merger control regime to any transactions being contemplated.

The new regime will apply to transactions completing on or after 1 January 2026, even if signed before this date. If merger parties seek informal merger clearance or apply for a merger authorisation under the existing regime, and the ACCC has not cleared the transaction by 31 December 2025, parties may have to restart the process under the new regime and will not be able to complete or close their transactions until the ACCC grants formal clearance if the transaction is required to be notified under the new rules. Businesses should therefore carefully plan their timelines to avoid having to restart the process under the new regime partway through a transaction.

What kind of mergers are caught?

Existing regime

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

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

- the actual and potential level of import competition in the market;
- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- the nature and extent of vertical integration in the market.

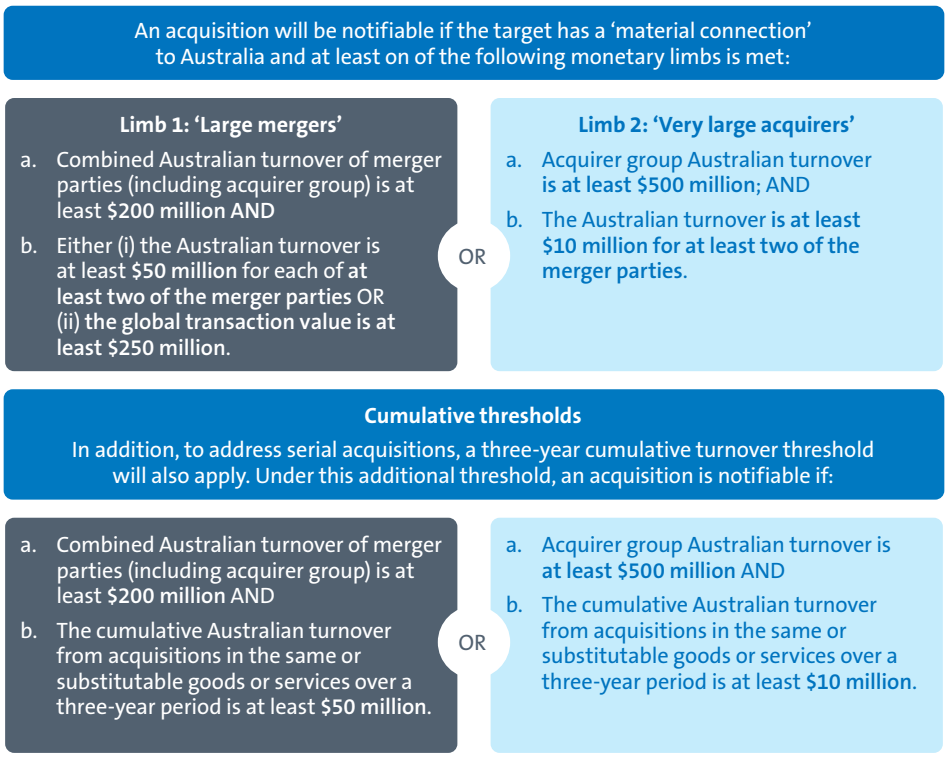
New regime

Certain types of acquisitions that meet the notification thresholds must be notified to the ACCC and cannot complete without clearance. This includes acquisitions of:

- shares in the capital of a body corporate or corporation;
- any assets of a person or corporation; or
- any other acquisition the Minister, following consultation and by legislative instrument, determines should be notifiable.

Acquisitions of partnerships, units in a unit trust and interests in a managed investment scheme will also be caught.

Acquisitions must be notified if the target is incorporated or carrying on business in Australia and the notification thresholds – the monetary thresholds and control test – are met. The Treasurer also has the ability to designate acquisitions that must be notified.



Acquisitions that meet the above monetary thresholds must be notified where they result in the acquirer gaining control or practical influence over the business. In this context, 'control' is the capacity to determine the outcome of decisions regarding the target's financial and operating policies.

Certain acquisitions are exempt from notification, including:

- acquisitions of shares in listed entities and other bodies corporate under Chapter 6 of the Corporations Act if the acquisition does not result in a person's voting power in that entity increasing to more than 20% or increasing from a starting point that is above 20% and below 100%; and
- acquisitions of assets in the ordinary course of business other than those involving land and patents.

Section 50 will remain in place but will only apply to transactions that are not notified.

At the time of publication, rules and guidance on how turnover should be calculated under the new regime had not yet been published.

Are foreign to foreign mergers caught?

Existing regime

Section 50A of the CCA expressly deals with acquisitions that occur outside Australia before 1 January 2026. Where such an acquisition results in the acquirer obtaining a controlling interest in a corporation in Australia, the Attorney-General, the ACCC or any other person may apply to the Australian Competition Tribunal (the ***Tribunal***) to determine the effect of the acquisition on the relevant market in Australia. If the Tribunal is satisfied that the acquisition of a controlling interest in the Australian corporation would have the effect or likely effect of substantially lessening competition in any market in Australia, and the acquisition would not result, or not be likely to result, in such a public benefit that the acquisition should be disregarded, the Tribunal may make a declaration accordingly. A declaration requires the Australian corporation, at the end of six months after a declaration is made (or up to 12 months if extended by the Tribunal), to cease carrying on business in the market to which the declaration relates.

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

Section 50A does not apply to an acquisition that is put into effect on or after 1 January 2026 or notified to the ACCC under the new regime during the transitional period.

New regime

A foreign merger will be caught if the target is carrying on business in Australia and the notification thresholds outlined above are met.

Is notification of mergers compulsory?

Existing regime

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

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

New regime

Notification will be compulsory for certain types of mergers and acquisitions closing or completing on or after 1 January 2026, where the notification thresholds outlined above are met and no exemption or waiver applies. An acquisition will be suspended where it is required to be notified to the ACCC but has not been, or where the acquisition has been notified but there has not been a final determination by the ACCC. An acquisition also cannot be put into effect where 12 months has lapsed since the ACCC's determination that the acquisition may proceed. If these types of transactions are attempted to be put into effect, they will be void. The other consequences of implementing before clearance are outlined below.

How can parties seek merger clearance?

Existing regime

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

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

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

New regime

Under the new regime, there will be one process by which parties can seek clearance for transactions from the ACCC. The ACCC is expected to consult on process guidelines for the new review process, in advance of the new regime coming into effect in mid-2025.

A confidential review process will be able to be requested for certain hostile takeover bids and a notification waiver process will be available to allow the ACCC to waive the notification requirement on a case-by-case basis.

The ACCC will assess the acquisition against a new and expanded 'substantial lessening of competition test' of whether an acquisition, in all the circumstances, will lead to an effect, or likely effect, of creating, strengthening or entrenching a substantial degree of power in the market. It is expected that the ACCC will have regard to similar factors as contained in section 50(3). The ACCC can consider the cumulative effect of all acquisitions put into effect by the merger parties within three calendar years of the date the merger filing was lodged, whether those prior acquisitions were individually notifiable or not. The ACCC may also clear an acquisition which may otherwise be anti-competitive on the basis of public benefit.

Are there deadlines for filing or sanctions for not filing?

Existing regime

As there is no mandatory filing requirement under the CCA for the parties to a proposed merger to notify the ACCC, there are no deadlines or sanctions for not filing. However, where the ACCC finds a contravention of section 50, the ACCC may seek a Federal Court injunction to prevent a merger from proceeding, or orders for divestiture or financial penalties, or both. Other persons, including competitors, can also bring Federal Court proceedings in relation to a completed merger seeking damages or divestiture or both.

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

New regime

Any transaction that meets the notification thresholds referred to above and will be put into effect on or after 1 January 2026, must be notified to the ACCC and cannot complete without ACCC clearance. As outlined below, the ACCC may take between 15 days to over four months (or even longer) from the date of filing to make a determination. Applications should be filed sufficiently in advance of the proposed merger completion date to account for the likely time it will take the ACCC to conduct its review, having regard to the complexity of the transaction and the issues likely to be raised. The ACCC has indicated that filing parties will need to engage in a period of 'prenotification' discussions with the ACCC to ensure that sufficient information is provided with the filing for the ACCC to conduct its review of the transaction.

A failure to notify or implementing before ACCC clearance will void the transaction and may result in pecuniary penalties of up to $50 million, three times the benefit of the contravening conduct or 30% of Australian group turnover.

What are the waiting periods?

Existing regime

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

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

New regime

The statutory timelines within which the ACCC must make a determination on notified acquisitions are:

- **For phase 1 review:** up to 30 business days after the acquisition has been notified. Alternatively, if no issues are identified, a 'fast-track' determination may be made after 15 business days.
- **For phase 2 review:** if a determination is not made during phase 1 and the ACCC is satisfied the notification could have the effect or likely effect of substantially lessening competition, the ACCC has up to an additional 90 business days to complete its review.

If the ACCC does not make a determination within the set timeframe and no applicable extension periods apply, the acquisition is automatically deemed approved. However, the ACCC can extend the review periods under certain circumstances, including to consider a commitment or undertaking offered by the notifying party, where the notifying party responds to requests for information after the due date, where an extension is granted for the notifying party to respond to a section 155 notice, and if the ACCC becomes aware of a material change of fact. In addition, these timelines do not include pre-notification discussions with the ACCC, which take place before the review period above commence.

Is there a process for review of ACCC decisions?

Existing regime

- Parties dissatisfied with the outcome of an ACCC informal merger review process have the option to apply to the Federal Court for a declaration that the transaction does not substantially lessen competition.
- For merger authorisations, both the merger parties and third parties can apply for a merger authorisation decision to be reviewed by the Tribunal. In reviewing an ACCC determination decision, the Tribunal cannot generally have regard to material that was not referred to in the ACCC's reasons for making the determination or given to the ACCC in connection with the making of the determination. However, the Tribunal can request certain information, including to clarify the information given to the ACCC in connection with the making of the determination, and grant leave to consider material not in existence at the time the ACCC made its determination. The Tribunal must make its decision within 90 days, or 120 days if the Tribunal has regard to new material, and may extent that period in certain circumstances. Judicial review of Tribunal decision is also available in the Federal Court.

New regime

Both merger parties and third parties can apply for the ACCC's determination to be reviewed by the Tribunal. The Tribunal cannot generally have regard to material that was not before the ACCC when making its determination. However, the Tribunal can seek further information, documents and evidence in certain circumstances, including where the notifying party was not given reasonable opportunity to make submissions to the ACCC in respect of new information relevant to the ACCC's determination.

The Tribunal must make its decision in relation to a review of an ACCC determination between 45 and 90 days after the ACCC's determination and may extend this period twice in certain circumstances: once for up to 60 days, and once for up to 90 days. Judicial review of Tribunal decisions will be available in the Federal Court.

Real estate

Jurisdictional overview

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

Main types of property ownership

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

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

Due diligence

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

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

Legal due diligence generally includes:

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

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

Planning consents and environmental approvals

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

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

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

Refer to the section on Environmental and planning approvals for more information about environmental approvals.

Holding costs and periodic taxes

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

- **council rates** – generally based on the capital improved value (value of land and buildings) or unimproved value (land only) of the property, the rates contribute towards the cost of running the council and community services (eg garbage collection and disposal, development, repair and maintenance of community centres, libraries, parks and gardens and local roads). Each council imposes a different rate for calculating the rates payable;
- **water rates** – relating to the installation, repair and maintenance of water assets (but excluding water consumption charges – which are typically paid by the occupier of the property); and
- **land tax** – annual tax at the rate of 1.5% to 2.67% (depending on the jurisdiction) calculated by reference to the unimproved or site value of a property. A number of jurisdictions levy an additional surcharge on foreign owners of land. The current foreign owner surcharge rates are as follows:
  - New South Wales: 5% on residential land only;
  - Victoria: 4% on any type of land;
  - Queensland: 3% on any type of land;
  - Tasmania: 2% on residential land only; and
  - Australian Capital Territory: 0.75% on residential land only.

In Victoria, from 1 July 2023, land that is rezoned by the government and as a result, has a value uplift of at least $100,000, is subject to windfall gains tax (***WGT***). The rate of WGT is determined by the value of the uplift, with a maximum marginal rate of 62.5% on the uplift above $100,000.

Commercial and industrial properties in Victoria may also be subject to the Commercial and Industrial Property Tax (***CIPT***). Refer to the section below on *Stamp duty and GST in Australian real estate transactions* for further information.

Stamp duty and GST in Australian real estate transactions

Duty (also known as stamp duty or transfer duty) is payable by a purchaser on a transfer of land with the amount of duty payable generally calculated on the greater of:

(a) the market value of the property; and

(b) the GST-inclusive consideration (the price paid, inclusive of sales tax or GST).

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

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

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

If the landholder is a private (ie, unlisted) entity, duty is generally triggered by the acquisition of a >50% interest or, where a >50% interest is already held, an increase in that interest.[3] Where the landholder is a listed entity, duty is typically not triggered unless there is an acquisition of at least a 90% interest.

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

In Victoria, from 1 July 2024, commercial and industrial property will incur stamp duty for the final time when it is next sold or transacted. After ten years from that transaction, the property will transition to the CIPT regime, which imposes a 1% annual tax on the unimproved value of the land. CIPT will be payable in addition to land tax.

3 The threshold under the New South Wales and Victoria duty regimes is 20% for private trusts, and there is potentially no threshold for private trusts under the Queensland duty regime.

Jurisdiction	Stamp duty rates and landholder threshold	Additional surcharges and premiums
New South Wales	General stamp duty rate: **5.5%** (for properties in excess of $1,212,000, with tiered concessional rates applying up to $1,212,000) Listed landholder duty rate*: **5.5%** Landholder threshold: **$2,000,000**	Additional **9% surcharge** applies to foreign purchasers of **residential property** (no surcharge on listed landholder acquisitions) Premium rate of 7% applies to the transfer of residential property if the value exceeds $3,636,000
Victoria	General stamp duty rate: **6.5%** (for properties in excess of $2,000,000, with tiered concessional rates applying up to $2,000,000) Listed landholder duty rate*: **0.65%** Landholder threshold: **$1,000,000**	Additional **8% surcharge** applies to foreign purchasers of **residential property** (including listed landholder acquisitions)
Queensland	General duty rate: **5.75%** (for properties in excess of $1,000,000, with tiered concessional rates applying up to $1,000,000) Listed landholder duty rate*: **0.575%** Landholder threshold: **$2,000,000**	Additional **8% surcharge** applies to foreign purchasers of **residential property** (concessional 0.8% for listed landholder acquisitions)
South Australia	General stamp duty rate: **5.5%** (for properties in excess of $500,000, with tiered concessional rates applying up to $500,000) Listed landholder duty rate*: **0.55%** Landholder threshold: **$0** (ie, any property ownership will result in an entity being considered a landholder) The general rate (above) applies to residential and primary production land only	Additional **7% surcharge** applies to foreign purchasers of **residential property** (including listed landholder acquisitions)
Western Australia	General stamp duty rate: **5.15%** (for properties in excess of $725,000, with tiered concessional rates applying up to $725,000) Listed landholder duty rate*: **5.15%** Landholder threshold: **$2,000,000**	Additional **7% surcharge** applies to foreign purchasers of **residential property** (including listed landholder acquisitions)
Tasmania	General stamp duty rate: **4.5%** (for properties in excess of $725,000, with tiered concessional rates applying up to $725,000) Listed landholder duty rate*: **0.45%** Landholder threshold: **$500,000**	Additional **8% surcharge** applies to foreign purchasers of **residential property** Additional **1.5% surcharge** applies to foreign purchasers of **primary production property** (including listed landholder acquisitions) (excluding commercial residential properties)
Northern Territory	General stamp duty rate: **5.95%** (for properties in excess of $5,000,000, with tiered concessional rates applying up to $5,000,000) Listed landholder duty rate*: **5.95%** Landholder threshold: **$500,000**	No additional surcharges or premiums apply
Australian Capital Territory	General duty rate: **5.0%** Listed landholder duty rate*: N/A Landholder threshold: **$1,600,000** The general rate (above) applies to commercial land transactions. Different rates apply to non-commercial land transactions (eg, residential, primary production and home business properties)	No additional surcharges or premiums apply

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

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

Refer to the section on Tax regime for further details on taxes and duties.

Foreign Investment Approval

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

Land type	Approval required for acquisition of freehold interest (ie, outright ownership)?
Agricultural land	Yes, if the aggregate of the acquisition consideration for the interest in the Australian land and the total value of the interests in any Australian agricultural land held by the foreign person and their associates exceeds A$15 million, subject to the following qualifications: ■ if the foreign person is a US, Chile or New Zealand entity, FIRB approval is only required if the value of the interest in the land exceeds A$1,464 million; and ■ if the foreign person is a Thai entity, FIRB approval is only required if the value of the interest in the interest in the land exceeds A$50 million and is wholly and exclusively used for a primary production business.
Mining or production tenement	Yes, regardless of value.[4]
Residential land	
(a) Established dwellings	(a) Yes, regardless of value.
(b) New dwelling	(b) Yes, regardless of value. It is possible to apply for a new dwelling exemption certificate which enables foreign persons to acquire new dwellings in a new residential development without the need for individual foreign persons to obtain separate FIRB approval to acquire such new dwellings. Such exemption certificates are often granted to residential property developers.
(c) For redevelopment of established dwellings	(c) Yes, regardless of value. Approvals, if granted, will often be subject to conditions such as a requirement to build within a certain timeframe and to increase the housing stock.
Commercial land	
(a) Vacant commercial land	(a) Yes, regardless of value.
(b) Non-sensitive developed land	(b) Yes, if the value of the interest in the land exceeds A$339 million.[5] [6]
(c) Sensitive developed land (eg, defence, telecommunications, nuclear, airport land)	(c) Yes, if the value of the interest in the land exceeds A$73 million.

Refer to the section on Foreign investment regulation for further details on foreign investment regulation.

4 If the foreign person is a US, Chile or New Zealand entity, FIRB approval is only required if the value of the interest in the land exceeds A$1,464 million.
5 If the foreign person is a US, Chile or New Zealand entity, FIRB approval is only required if the value of the interest in the land exceeds A$1,464 million.
6 If the foreign person is an Indian entity (and is not a foreign government investor) seeking to acquire non-sensitive land for the supply of services, FIRB approval is only required if the value of the interest in the land exceeds A$547 million.

Sustainability and ESG in the Australian real estate market

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

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

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

Structuring the acquisition of real estate in Australia

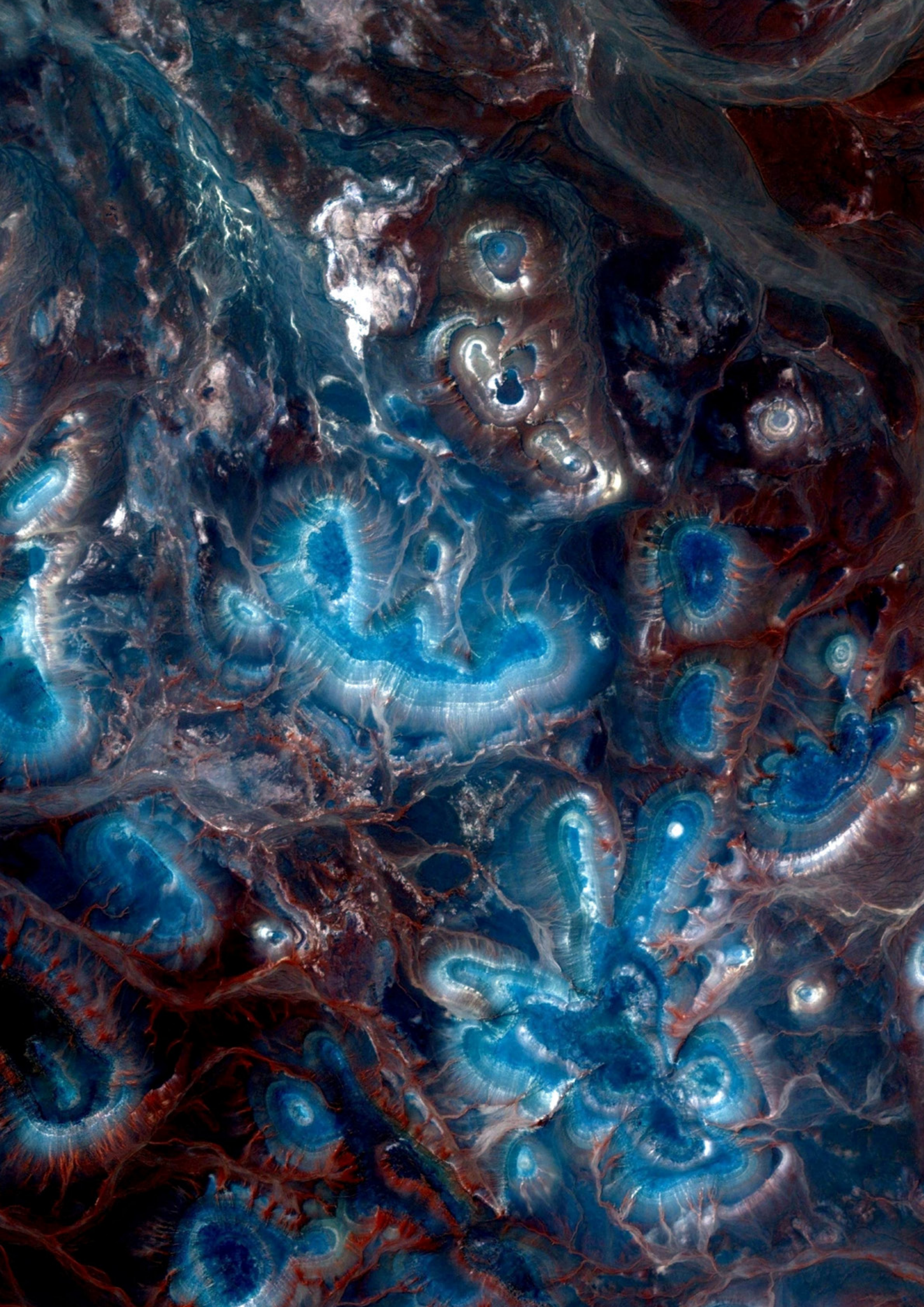
There are various ways to acquire real estate in Australia:

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

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

We can provide guidance on:

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



Environmental and planning approvals

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

In this part, we address the following topics:

(a) the requirement to obtain environmental approvals at both the Commonwealth and State/Territory levels for development, in certain circumstances;

(b) the requirement to obtain planning approvals at the State and local levels, in certain circumstances, for the use and development of land;

(c) the requirement to obtain subsidiary environmental and planning permits, licences or approvals at the State and local levels in certain circumstances relating to, for example, native vegetation removal, dangerous goods or water resources;

(d) regulation and remediation of contaminated land; and

(e) greenhouse gas and energy reporting.

Each of these topics is addressed in turn.

Environmental Approvals

Commonwealth

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

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

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

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

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

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

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

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

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

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

As at February 2025, new legislation to replace the EPBC Act has been discussed by the Federal government. However, these 'nature positive' reforms have been formally shelved by the current Government until after the 2025 Federal election. It is expected, however, that any new legislation will have significant transitional provisions to authorise any lawful activities which were commenced under the EPBC Act.

State/Territory

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

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

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

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

Planning / Land Use Approvals

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

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

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

Each zone then sets out the types of uses that:

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

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

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

Subsidiary Approvals

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

Contaminated Land

Land contamination is regulated at the State/Territory level.

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

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

Greenhouse Gas and Energy Reporting

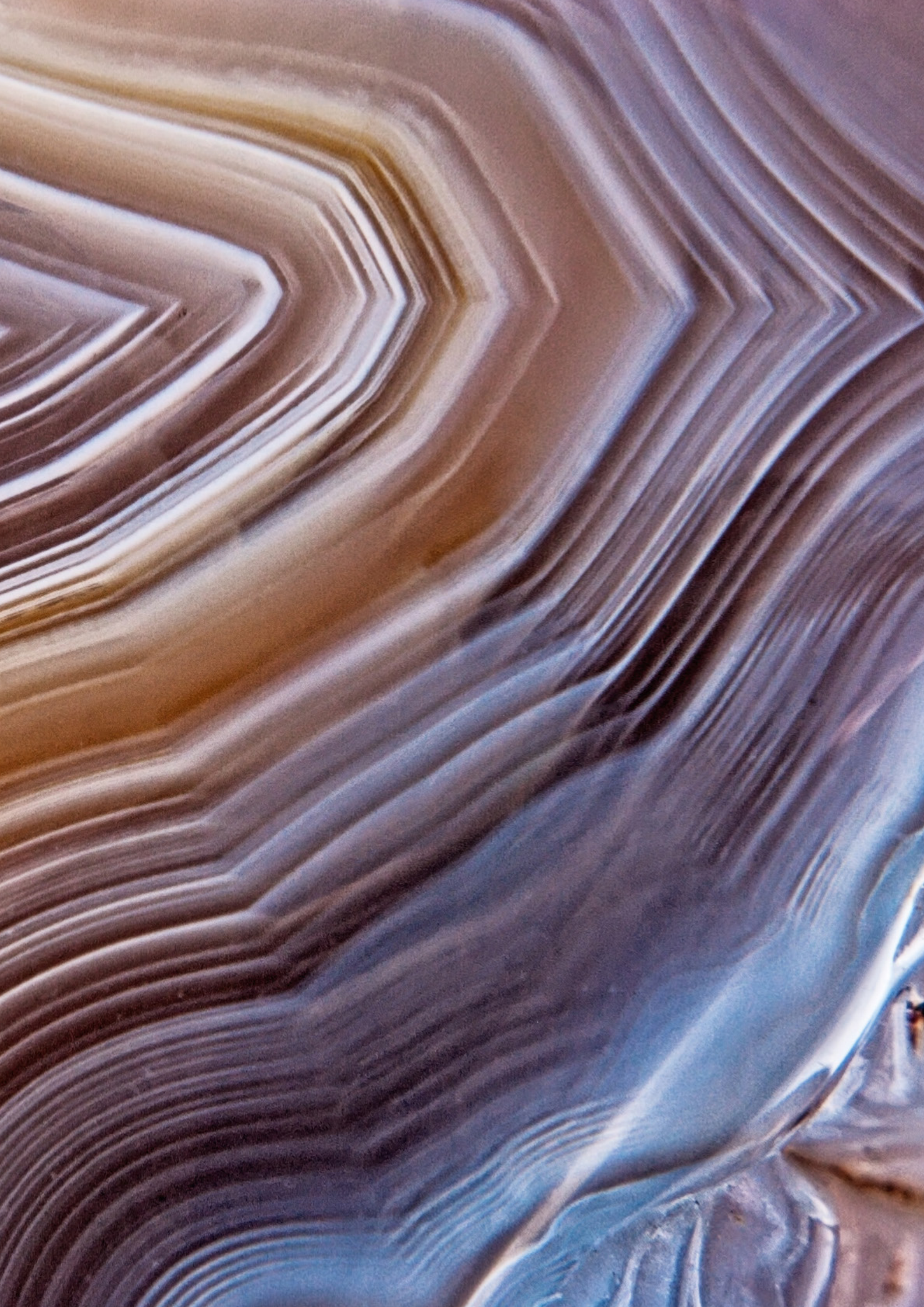
The National Greenhouse and Energy Reporting (***NGER***) scheme is a uniform national framework for the reporting of emissions and energy consumption and production by Australian corporations. Established under the *National Greenhouse and Energy Reporting Act 2007* (Cth), NGER requires corporations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

Closely aligned with the reporting obligations under the NGER scheme, is the 'safeguard mechanism', which is given effect by the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (***Safeguard Mechanism***). The Safeguard Mechanism applies to facilities with annual scope 1 emissions greater than 100,000 tonnes of CO_2 equivalent, and requires responsible emitters to apply for, and comply with an annualised emissions limit at their facility (ie, a 'baseline').

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

As of 1 July 2023, the Safeguard Mechanism was amended to:

- slowly reduce prescribed baselines each year in order to help Australia reach National emissions targets;
- introduce a safeguard mechanism credit for facilities that achieve emissions lower than their prescribed baseline;
- provide allowances for 'trade-adjusted' baselines for facilities in certain industries in order to not unduly disadvantage certain emitters;
- allow responsible emitters to 'borrow' emissions from a future year's baseline; and
- introduce the concept of 'new' versus 'existing' facilities, depending on whether the facility was emitting before 1 July 2023. 'New' facility baselines will be set at international best practice levels, while 'existing' facility baselines will be calculated using a declining facility-specific emissions baseline to transition to industry best practice emissions intensity by 2030.



Resources sector

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

Sector regulation

Mining sector

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

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

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

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

Oil and gas sector

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

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

Key issues

Project structuring

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

Foreign investment approval

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

Taxes and royalties

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

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

Environment, native title and cultural heritage

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

Native title describes the land rights of Aboriginal and Torres Strait Islander peoples under traditional laws and customs. Where a resources project takes place on land affected by native title, project participants must follow the procedures of the *Native Title Act 1993* (Cth). This may involve compliance with the 'future acts' regime, negotiations with native title holders or claimants and, in some cases, a project may require a more broad ranging Indigenous Land Use Agreement before it can proceed. In addition, projects affecting sites of cultural heritage must follow certain requirements. There is the risk of delays if significant areas of cultural heritage are identified, so it is important to assess this early in any project.

Infrastructure

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

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

Industry specific reporting obligations

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

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

Anti-bribery laws

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

Both Australia's domestic and foreign bribery offences were recently amended following the passage of the *Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024* (Cth) which amended the Commonwealth *Criminal Code Act 1995* (Cth) (***Code***). The amendments commenced on 8 September 2024.

The amendments are designed to overcome existing challenges to establishing the criminal liability of body corporates that engage in wilful blindness with respect to misconduct by associates, and are intended to incentivise businesses to implement and maintain measures to prevent foreign bribery from occurring.[7]

Prohibited conduct

Failure to prevent offence

As part of the amendments, Australia has introduced a new corporate offence of failing to prevent foreign bribery by associates. This follows the introduction of numerous 'failure to prevent' offences in the United Kingdom (including in relation to foreign bribery and tax evasion).[8] The failure to prevent offence will apply where:[9]

- an 'associate' of a body corporate;
- commits foreign bribery;
- for the 'profit or gain' of the body corporate.

The offence is one of absolute liability, meaning the body corporate does not need to have been involved in, authorised or permitted the offence to be liable. It will be a defence, however, if the body corporate can demonstrate that it had 'adequate procedures' in place to prevent the commission of foreign bribery offences (see below).

The key concept of 'associate' captures all officers, employees, agents, contractors, subsidiaries, other controlled entities, and any person who performs services for or on behalf of the body corporate. The concept of 'profit or gain' is undefined in the legislation, however, Parliamentary materials suggest that bribery for the benefit of a foreign subsidiary should always be construed as for the benefit of an Australian parent, whether or not an identifiable financial or non-financial benefit flows back to the parent. Given the breadth of these concepts, there is a real risk that the conduct of overseas partners or subsidiaries could create exposure to the offence for an Australia company.

Bribery of a foreign public official

Following the amendments, under the Code, it is a criminal offence to provide, offer or promise to provide a benefit (monetary or non-monetary) to another person (or to cause a benefit to be provided, offered or promised) with the intention of improperly influencing a foreign public official (***FPO***) in order to obtain or retain business or a business of personal advantage.

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

The amendments have addressed what were previously seen as impediments to successful prosecutions. Key amendments include the following:

7 Explanatory Memorandum to the *Crimes Legislation Amendment (Combatting Foreign Bribery) Act Bill 2023* (Cth), p. 3 [7].
8 Australian Law Reform Commission, 'Final report: Corporate Criminal Responsibility', ALRC Report 136 (April 2020) [7.66].
9 *Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024* (Cth), s 70.5A(1).

- replacing the concept of giving a benefit that is 'not legitimately due,' with the concept of 'improperly influencing' the relevant official. In relation to the concept of 'improper,' certain factors must be disregarded, including custom, official tolerance, and the insignificance of value. Conversely, several factors must be considered, such as the identity of the recipient, the nature of the benefit, the manner of provision, proportionality to the benefit, the lack of legal obligation, bookkeeping practices, diligence, and the nature of the advantage received; and
- extending the provisions to cover bribery intended to obtain a personal, non-business advantage.

Bribery of an Australian public official

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

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

Conduct related to bribery

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

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

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

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

Extraterritorial application of Australian anti-bribery laws

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

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

Application of anti-bribery laws to companies

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

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

As noted above, the new failure to prevent offence is a corporate offence with absolute liability.

Available defences for breaches of anti-bribery laws

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

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

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

'Adequate procedures' defence

A company will have a complete defence to the corporate offence of failing to prevent foreign bribery by an associate if it can prove that it had in place 'adequate procedures' designed to prevent associates committing foreign bribery.

Proportionality and effectiveness underpin the notion of 'adequate' anti-bribery and corruption compliance systems.

- 'Proportionality' means compliance measures should be appropriate and tailored to the actual risks faced by an organisation, considering its size, nature, geographical reach and complexity of operations. Proportionality requires companies with higher foreign bribery risk to establish more extensive measures than companies with a low-risk profile.
- 'Effectiveness', on the other hand, means the implemented procedures should work in practice and not just on paper. The five primary indicators of 'effectiveness' are:
  - a robust culture of integrity within the company;
  - a clear tone from the top, including demonstrated pro-compliance conduct by senior management and boards;
  - a strong anti-bribery compliance function or functional equivalent;
  - effective risk assessment and due diligence procedures; and
  - careful and proper use of third parties, including suppliers or consultants

The Commonwealth Attorney General has published guidance regarding what constitutes adequate procedures. The guidance is framed around the following six principles:

- 'Fostering a control environment to prevent foreign bribery'
- 'Responsibilities of top-level management'
- 'Risk assessment'
- 'Communication and training'
- 'Reporting foreign bribery'
- 'Monitoring and review'

Legal consequences for breaches of anti-bribery laws

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

- for an individual, the maximum penalty is 10 years' imprisonment, a fine of A$3.3 million, or both (per offence); and
- for a company, the maximum penalty is the greater of A$33 million, three times the value of the benefit attributable to the offence, or, if the court cannot determine the value of that benefit, 10% of the company's annual turnover (and any body corporate related to the company), for the 12 months up to the end of the month in which the conduct constituting the offence occurred.

In addition to criminal penalties, any benefits obtained from foreign bribery may be forfeited to the Australian government under the *Proceeds of Crime Act 2002* (Cth).

In the 2023 The *King v Jacobs Group* case, the High Court held that the phrase 'value of the benefit' should be construed as the total money received for performance of the contract (ie, the gross benefit, with no deductions for costs incurred by the company in performance of the contract). This decision may lead to more severe penalties for foreign bribery in future.

Bribery of State or Territory public officials and secret commissions also result in fines and imprisonment. The maximum penalties that may be imposed for private sector bribery vary between the states and territories.

The enforcement culture for anti-bribery laws

Transparency International characterises Australia as a 'moderate' foreign bribery enforcement jurisdiction. Transparency International's 2024 Corruption Perceptions Index (the ***2024 CPI***) ranks Australia 10th of 180 countries. Australia's ranking has improved two points since the 2023 index. However, the 2024 CPI report indicates that high-scoring countries, including Australia, need to do more to address transnational forms of corruption.

The OECD facilitates a peer review process to assess states' implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In 2017, the OECD welcomed a marked increase in Australia's foreign bribery enforcement (***OECD December 2017 Report***), but recommended that Australia proactively pursue foreign bribery criminal charges where appropriate. A follow-up report released in 2019 (***OECD 2019 Follow-Up Report***) recorded concern about 'continued low levels' of foreign bribery enforcement in Australia. There were subsequently several high-profile arrests of senior corporate officers in relation to foreign bribery investigations (both at state and federal level). As a result, an addendum to the 2019 OECD Follow-Up Report published in 2021 (***OECD 2021 Addendum Report***) considered that Australia had

partially implemented its recommendation that the Commonwealth Director of Public Prosecutions (***CDPP***) engage in proactive enforcement of foreign bribery offences.

A further follow-up report released in 2023 (***OECD 2023 Follow-Up Report***) recommended that Australia increase the potential for detecting foreign bribery through its anti-money laundering system, and pursue confiscation of bribe payments and their proceeds.

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

The AFP and CDPP are responsible for the investigation and prosecution of foreign corruption offences. On occasion, ASIC and other federal government departments also assist the AFP to investigate foreign bribery (for example, ASIC has indicated that it may investigate an accusation of foreign bribery against a company where the accusation involves a possible contravention of the Corporations Act, such as, a breach of directors' duties).

Internationally, the AFP is a member of the International Foreign Bribery Taskforce, the International Anti-Corruption Coordination Centre, and regularly works with foreign enforcement authorities, including those of the UK and the US. Domestically, the AFP has extensive cross-agency partnerships, including as a participant in the Serious Financial Crime Taskforce.

The passage of the *National Anti-Corruption Commission Act 2022* (Cth) extended protections for public and private sector employees established through the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth). Public and large proprietary companies have now been required to have a compliant whistleblower policy for a number of years, and it is hoped that increased awareness around whistleblower protections will encourage whistleblowers to report misconduct (including reports relating to bribery and corruption).

Anti-corruption commissions have now been established in all jurisdictions. The National Anti-Corruption Commission (***NACC***) commenced operation in July 2023, and has already received thousands of referrals. The NACC is empowered to investigate companies if they engage in conduct that (either directly or indirectly) does or could adversely affect the honest or impartial exercise of any public official's powers or the performance of their duties or functions. The NACC also has far-reaching investigatory powers that override protections for legal professional privilege and the privilege against self-incrimination. As of February 2025, the NACC:[10]

- is conducting 34 preliminary investigations;
- is conducting 31 corruption investigations, including nine joint investigations;
- is overseeing or monitoring 14 investigations by other agencies;
- has five matters before the court; and
- has 560 referrals pending assessment..

10 NACC, 'Weekly update on the work of the Commission – 19 February 2025' (19 February 2025) <https://www.nacc.gov.au/news-and-media/weekly-update-work-commission-19 february-2025>.

Privacy laws

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

Privacy legislation

Key concepts

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

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

The Federal Government has been undertaking a review of the Privacy Act since December 2019. During this time, the Attorney-General's Department engaged in stakeholder feedback and consultation, namely through the release of an issues paper in late 2020 and a discussion paper in late October 2021 (***AG Discussion Paper***). The review culminated in the *Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022* being passed in December 2022 (***2022 Privacy Act Amendment***) and the release of the Privacy Act Review Report 2022 on 16 February 2023 (***Privacy Act Review Report***).

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

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

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

On 28 September 2023, the Federal Government released its response to the Privacy Act Review Report (***Government Response***), which indicated that it has 'agreed' or 'agreed in-principle' with the majority of the 116 proposals.

The proposed 'agreed' and 'agreed in-principle' changes include:

- providing consumers (including children and people experiencing vulnerability) with greater transparency, control and protections in relation to their personal information, such as improved quality of information available to individuals about how information is collected and used, improving individuals' control over personal information including a right of erasure of personal information, and additional obligations placed on entities, such as a new fair and reasonable test to underpin the handling of personal information;
- including greater certainty with respect to the scope of personal information that should be protected to respond to a broader range of circumstances, including targeting of individuals based on information that relates to them but may not uniquely identify them, and the recalibration of current exemptions from the Privacy Act (including the small business, employee records, and journalism exemptions); and
- strengthening of the enforcement of privacy obligations, including by granting the OAIC additional powers and expanded enforcement powers, establishing a new tort for serious invasions of privacy and enhanced court powers, and reducing reporting and regulatory complexity.

In practice, the Government is implementing privacy reforms in tranches, focusing initially on the items it has indicated it 'agrees to' (38 proposals), while conducting further engagement and impact assessments on the 'agreed in-principle' items (68 proposals).

The *Privacy and Other Legislation Amendment Act 2024* (Cth) (***2024 Privacy Act Amendment***) received Royal Assent on 10 December 2024. It implemented 23 of the 25 legislative proposals that were 'agreed' to by the Government, including:

- reforms affecting information handling practices regarding use of automated decision-making, overseas data flows, and security of personal information;
- increased penalties and developments in enforcement powers for the OAIC, Federal Court and Minister;
- the development of a Children's Online Privacy Code to address online privacy for children and simplifying processes for developing additional privacy codes; and
- new avenues of individual action through new offences regarding a statutory tort for serious invasions of privacy, and two new 'anti-doxxing' offences (these anti-doxxing offences are enshrined in the federal Criminal Code).[11]

The remaining proposals signalled as 'agreed' or 'agreed in-principle' are expected to be introduced in a second tranche of legislative reform, though the timing for such reform remains unknown.

The following paragraphs set out the current position under the existing Privacy Act.[12]

Privacy policy

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

Collection

An entity 'collects' personal information only if the entity collects the personal information for inclusion in a record or generally available publication. An entity collecting personal information about an individual is required to take reasonable steps to provide notice to the individual before, at or as soon as practicable after the time of collection of personal information. The

11 Some amendments to the Privacy Act have legislated grace periods. The statutory tort for serious invasions of privacy is due to commence on 10 June 2025 (unless earlier by Proclamation) and the reform affecting automated decision-making has a grace period of 24 months. Additionally, an independent review of the doxxing regime and the development and registration of the Children's Online Privacy Code is to take place within 24 months of Royal Assent. The other amendments commenced when Royal Assent was received.

12 For the avoidance of doubt, the overview in this section of this guide may be outdated to the extent the Privacy Act is further amended to take into account further proposals in in the Privacy Act Review Report.

notice must address a number of matters, including the purposes of collection, typical disclosures, whether the information will be disclosed outside Australia. Individuals must also be told that they can find information about accessing, correcting data and making a complaint in the entity's privacy policy. This requirement applies even if personal information is collected indirectly from another entity rather than from the individual concerned.

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

Use and disclosure

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

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

Direct marketing

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

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

Cross-border disclosure

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

Consent

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

Open and transparent management of personal information

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

Exemptions

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

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

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

Extra-territorial operation of the Privacy Act

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

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

Prior to the 2022 Privacy Act Amendment, the Privacy Act would only apply to entities carrying on a business in Australia if the information was collected or held by the entity in Australia before or at the time of the act or practice. Changes to the Privacy Act mean that all acts or practices of organisations that carry on business in Australia will be subject to the Privacy Act, even if the organisation does not collect or hold information in Australia, and even if those acts or practices relate to data subjects outside of Australia.

The Attorney General's Department has acknowledged in the Privacy Act Review Report that this new extra-territorial provision is very broad and has noted that an additional provision (to be introduced by further reforms) is required to clarify that extra-territorial operation is dependent on some form of 'Australian link'. The Government also 'agrees' in its Government Response that further consultation on the extra-territorial provisions of the Privacy Act is required to determine if an additional requirement that personal information is connected to Australia is necessary to narrow the current scope. As many of the most significant proposed changes have been left for future tranches of reform and given the widespread implications of this issue, we expect that this will be considered in future reform discussion.

Government-related identifiers

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

Credit reporting

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

Email and telephone marketing

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

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

Notifications of data breaches

The Privacy Act imposes an express obligation on entities to notify the OAIC, affected individuals and at risk individuals in the event of an 'eligible data breach'. An 'eligible data breach' refers to any unauthorised access, disclosure or loss of information that a 'reasonable person' would 'likely' conclude to result in serious harm to an individual. In the event an entity becomes aware that an eligible data breach may have occurred, it must as soon as is practicable, provide a copy of a statement to the OAIC setting out the details of the breach. It must subsequently notify any individuals affected by or at risk of being affected by the eligible data breach. The Minister also has the power to make 'eligible data breach declarations' to prevent or reduce a risk of harm arising from unauthorised access to or disclosure of personal information.

Legal consequences for breaches of privacy laws

The Privacy Commissioner has the power to undertake investigations (either in response to complaints made by individuals or on its own initiative), to make determinations, issue compliance notices, to audit organisations, to accept enforceable undertakings, to develop and register binding privacy codes. The OAIC and Federal Court have additional powers to issue declarations requiring organisations to take steps to redress, prevent and reduce loss or damage resulting from contraventions of the Privacy Act, where these are found to have occurred either in the course of an OAIC investigation or civil penalty proceedings in the Federal Court. Other enforcement-related amendments include changes to the OAIC's monitoring and investigation powers (bringing them into closer alignment with existing powers of other federal regulators). We see these changes as reflective of the OAIC's increasing enforcement maturity.

Individuals may complain to the Privacy Commissioner and commence proceedings for injunctions only.

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

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

The 2024 Privacy Act Amendment (enacted in December 2024) introduced:

- a new mid-range civil penalty provision (up to 2,000 penalty units, currently $660,000 – with a times five multiplier for body corporates) for general interferences with privacy, where the act or practice does not amount to a 'serious' interference;
- new powers for the OAIC to issue infringement notices (imposing civil penalties of up to 200 penalty units, currently $66,000 – with a times five multiplier for body corporates) for prescribed breaches of the APPs and the mandatory data breach notification obligations; and
- from June 2025 (or earlier by Proclamation), a statutory right of action for individuals through a tort for intentionally or recklessly intruding upon a person's seclusion or misusing information that relates to them in circumstances where a reasonable expectation of privacy exists. The threshold of this tort is where the invasion of privacy is 'serious' and the individual's privacy outweighs any countervailing public interest; and
- two new 'anti-doxxing' offences added to the Criminal Code. The first offence carries a maximum penalty of six years' imprisonment and deals with the doxxing of an individual. The second, which carries a maximum penalty of seven years' imprisonment, covers the doxxing of members of a group (eg distinguishable on the basis of race, religion, sexual orientation and certain other identified characteristics).

Under the Spam Act and Do Not Call Register Act, a flexible range of civil sanctions, including warnings, enforceable undertakings, court-ordered penalties of up to A$3.13 million for corporations and infringement notices (with penalties calculated by reference to the volume of contravening messages sent per day), are available to the regulator, the Australian Communications and Media Authority (***ACMA***). ACMA takes an active approach to Spam Act compliance, evident from its compliance priorities for 2024-2025 (including the enforcement of e-marketing unsubscribe rules), significant increase in the use of investigation notices, and from the increasing volume and penalties arising from enforcement action.

The enforcement culture for privacy laws

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

As noted above, the 2022 Privacy Act Amendment and 2024 Privacy Act Amendment resulted in major changes to the penalties regime under the Privacy Act, in the wake of increased scrutiny of organisations' privacy practices and a growing consensus that Australia's privacy legislation has fallen behind global norms. These amendments indicate that the Privacy Act will be enforced more strictly going forward and into the future.

According to the OAIC's 2023-24 Annual Report, the Office received 3,215 complaints, closed 3,104 privacy complaints and handled 10,476 privacy enquiries in the year ending 30 June 2024.

The OAIC issued 12 privacy determinations in 2023-24. Where it found interferences with privacy, the remedies included declarations of interferences of privacy, requiring the respondent to take specified steps to not repeat or continue interferences of privacy, requiring the respondent to update policies and procedures, requiring the respondent to destroy personal information, requiring the respondent to prepare an incident response plan and information security program (and engage an independent expert to review implementation of such plans and programs), requiring the respondent to apologise in writing to the complainant, requiring the respondent to assess and report on compliance with the Privacy Act as well as compensation (ranging from A$1,500 to A$3,000).

During the same period, the OAIC commenced seven Privacy Commissioner-initiated investigations, closed six privacy assessments and received 1,012 notifications of data breaches from organisations.

Two organisations entered into enforceable undertakings in 2024. Under the first enforceable undertaking, the OAIC accepted assurances of uplifts to security and privacy practices, including data retention and handing and processes for assessment and audits. Under the second enforceable undertaking, the OAIC accepted a payment of A$50 million to provide redress for eligible individuals affected and representations regarding increased privacy posture for permission processes, third-party app monitoring and enforcement of policies.

One organisation entered into an enforceable undertaking in 2023, which required, among other things, the respondent to enhance its information and cyber security and monitoring measures. This contrasts with the 2019-2022 years where no enforceable undertakings were entered into by organisations. Previously in the years preceding 2019-2022, two enforceable undertakings were entered into in the 2018-19 year, three in 2017-18, one in 2016-2017 and two in 2015-16. This relatively low overall level of enforceable undertakings is reflective of the OAIC's preference to issue determinations but contrasts with the higher level of undertakings accepted by the ACCC in relation to competition and consumer law issues. Among other things, enforceable undertakings typically require organisations to implement recommendations and rectify deficiencies identified in relation to whether their practices, procedures and systems are reasonable to protect the personal information they hold.

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Employment law

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

Minimum employment terms and conditions

The *Fair Work Act 2009* (Cth) (***Fair Work Act***) sets out 12 National Employment Standards (***NES***) that apply to all employees (with very limited exceptions and varied application depending on whether the employee is full-time, part-time or casual):

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

Modern awards

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

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

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

Employment contracts

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

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

Enterprise agreements

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

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

Labour hire

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

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

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

Since 1 November 2024, the FWC may make regulated labour hire arrangement orders requiring 'labour hire' employers to pay their employees no less than the full rate of pay that would be payable to those employees if the 'host' employer's industrial instrument applied to them. An application for an order may be made at any time. The FWC cannot make labour hire arrangement orders where it is not fair and reasonable to do so.

Flexible work arrangements

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

Since 6 June 2023, the FWC has had the power to arbitrate a dispute in relation to a flexible working arrangement. Employees must have made their request for a flexible working arrangement on or after 6 June 2023, have had their request refused or unanswered for more than 21 days since its submission, and attempted to resolve the dispute in discussions with their employer.

Protection of Vulnerable Workers

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

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

Accessorial liability

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

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

Casual employees

From 26 February 2025, casual employees may notify their employer that they believe they no longer meet the requirements of the definition of casual employee. The employer must respond within 21 days to this notification. If the employer accepts the notification, the employee's employment status changes to permanent employment. Employers are not required to accept this notification if there are fair and reasonable operational grounds to reject the notification.

Superannuation

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

From 1 July 2024, superannuation contributions are to be made at the rate of 11.5% of their 'ordinary time earnings', which is the remuneration that the employee regularly receives and includes performance bonuses that are referable to the results achieved in the employee's ordinary hours of work.

Superannuation contributions are capped at the 'maximum contribution base'. The maximum contribution base (which is set by the legislation) is the maximum ordinary time earnings per quarter on which employers must make contributions. For the financial year commencing on 1 July 2024, the maximum contribution base is A$65,070 per quarter.

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

The compulsory superannuation contribution rate is set to increase to 12% of ordinary time earnings on 1 July 2025. This is the last of the legislated incremental increases to the superannuation guarantee rate at this time.

'Payday Superannuation' is expected to commence from 1 July 2026, whereby employers will be required to make employees' superannuation guarantee contributions at the same time as paying their salary or wages.

Work health and safety

Employers, their directors, officers and managers, must comply with Work Health and Safety (***WHS***) legislation.

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

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

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

Workers' compensation insurance

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

Taxation of employees

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

Payroll tax

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

Discrimination

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

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

Termination of employment

The Fair Work Act contains laws governing the termination of the employment of employees who earn less than the high income threshold (this amount is indexed annually and from 1 July 2024, the amount is A$175,000) or who are covered by a modern award or an enterprise agreement. The dismissal of these 'protected' employees must be fair; that is, the dismissal must be for a valid reason, pursuant to a fair procedure, and must not be harsh, unjust or unreasonable in light of all relevant circumstances. If not, the FWC may order that the employee be reinstated and/or compensated.

Bullying

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

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

Sexual harassment

In addition to State-based legislation that makes sexual harassment unlawful, the Fair Work Act now contains laws governing sexual harassment at work. Similar to bullying, a worker can generally apply to the FWC for an order to stop sexual harassment and the FWC can make orders to prevent the worker from being sexually harassed at work. However, the FWC may also order payment of compensation or in respect of remuneration lost.

The *Sex Discrimination Act 1984* (Cth) also imposes a positive duty on employers to take reasonable and proportionate measures to eliminate as far as possible sex discrimination, sexual harassment, harassment on the grounds of sex, a hostile work environment and victimisation that relates to complaints made about these matters. The Australian Human Rights Commission now has powers to investigate and enforce compliance with this positive duty.

Visa requirements

Employers in Australia wishing to engage overseas workers to work in Australia on a temporary work visa should consult a migration law specialist regarding the relevant visa requirements and conditions.

Modern slavery

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

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

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

Whistleblowing

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

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

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

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

Reforms to employment law

There have been significant reforms to employment laws over the past three years, with the most recent including:

- a new definition of 'casual employee', which came into effect on 26 August 2024;
- a new definition of 'employee', which came into effect on 26 August 2024 and has implications for the classification of independent contractors, unless the individual earns more than the contractor high income threshold and opts out of the new definition;
- significantly higher penalties for contravening the Fair Work Act, which came into effect on 27 February 2024;
- new regulatory regimes for gig workers, and road transport employees, which came into effect on 26 August 2024; and
- a right for employees to disconnect outside their working hours, which came into effect on 26 August 2024 and allows an employee to refuse to respond to contact from their employer outside their working hours, unless the refusal is unreasonable;
- the criminalisation of wage theft, which came into effect on 1 January 2025 and attracts significant maximum penalties, such as the greater of $8.25 million or three times the underpayment amount for companies and 10 years' imprisonment for individuals; and
- new flexibility, consultation and dispute resolution model terms for enterprise agreements, which came into effect on 26 February 2025.

Intellectual property

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

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

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

Patents

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

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

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

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

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

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

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

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

Trade Marks

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

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

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

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

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

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

Designs

Designs for manufactured products can be registered under the *Designs Act 2003* (Cth). They can be two-dimensional or three-dimensional. To be registrable, the product's overall appearance resulting from its visual features, including shape,

configuration, pattern or ornamentation, must be new and distinctive. *The Designs Regulations 2004* (Cth) specify that certain designs cannot be registered, such as designs for medals, scandalous designs, and designs including the Australian flag.

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

Australia's design registration system has been under the close scrutiny of the Australian government, particularly since IP Australia conducted research in 2019 to identify the drivers behind innovation and what changes to design rights would benefit Australia. Key changes to the design legislation took effect in two tranches from September 2021 and March 2022 in order to combat some of the perceived inadequacies of the design legislation. These changes include the introduction of a 12 month grace period for certain publications or uses of a design that occur within the 12 months immediately before the priority date of a design application, provided that those publications or uses occurred on or after 10 March 2022. Publications of designs by foreign and international design offices are not eligible for this grace period.

The legislative changes also include a defence to design infringement for prior use which applies to designs that have a priority date on or after 10 March 2022 and which can provide protection to third parties who used the registered design (or a sufficiently similar design) before the registered design's priority date. This new prior use defence will continue to protect third parties from infringement claims even once the design has been registered. Accordingly, the grace period should only be relied upon as a last resort measure and thus it is important that design registrations be applied for before disclosing the relevant design. Moving forward, IP Australia has proposed to introduce further amendments to protect 'virtual designs', 'partial designs' and 'incremental designs'. Following a consultation process that closed in 2023 legislation to implement these proposals is expected to be introduced to parliament in late 2025.

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

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

Copyright

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

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

The threshold test for copyright protection in Australia is that the work must be original and that it must be in a material form. In relation to works, originality simply requires that the work originate from a human author and that some skill and labour be involved in devising or making the work. In relation to subject matter other than works, there is only a requirement that it is original in the sense that it must not have been a copy of a previous sound recording, cinematograph film, television broadcast

or published edition. Once this threshold requirement is met, copyright automatically subsists in the owner. The owner can transfer their rights to other parties, with the exception of moral rights, which are personal rights and not assignable. An author's moral rights consist of the right to attribution for a work (including the right against false attribution) and the right to protect the integrity of a work from derogatory treatment.

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

Plant Breeders' Rights

Plant varieties can be protected under the *Plant Breeders' Rights Act 1994* (Cth) and this form of protection is similar to UK 'plant breeders rights' or a US 'Plant Patent' because it is designed to enable plant breeders to apply for new varieties of plants they develop. Once registered the breeder receives monopoly rights for a term of 25 years for trees and vines, and 20 years for other plant varieties.

To be registrable, a 'new' or 'recently exploited' (meaning sold with the breeder's consent in Australia no more than 12 months, or overseas no more than four years (six years for trees and certain vines), before the application in Australia) plant variety must have characteristics that distinguish it from all other similar known varieties, and those distinguishing characteristics must be uniform across the variety and stable through generations. Once registered the plant breeders' right affords the owner the primary right to exclude others from doing a variety of acts in relation to 'propagating material' of the registered plant variety, such as seeds or grafts, these acts include producing, reproducing, conditioning, selling, importing, exporting and stocking of the material.

Circuit Layout Rights

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

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

Imports and exports control

Trade links

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

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

At the time of writing this latest update, the global trade environment, and Australia's response to it, are in a state of flux. The current position is dynamic and liable to change. The information in this section is valid as at February 2025.

Free trade agreements and bilateral investment treaties

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

Additionally, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (also known as the ***TPP-11*** or the ***CPTPP***) has come into force between the following countries: Australia, Canada, Japan, Mexico, New Zealand, Singapore, Vietnam, Peru, Malaysia, Chile and Brunei Darussalam. The United Kingdom has signed an accession protocol in July 2023 and it will come into force once all domestic processes of the CPTPP's original member have been completed. In November 2024, the CPTPP ministers agreed to commence the accession process for Costa Rica.

More broadly, negotiations between the UAE and Australia on the Comprehensive Economic Partnership Agreement (***CEPA***) concluded in September 2024 and the CEPA treaty was signed in November 2024. Negotiations continue in relation to the Pacific Alliance Free Trade Agreement, the Environmental Goods Agreement, the Australia-EU Free Trade Agreement, the Australia-Gulf Cooperation Council Free Trade Agreement and the Trade in Services Agreement.

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

Import control

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

Duties and taxes

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

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

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

Certain product-specific levies exist, including:

(a) the Wine Equalisation Tax – a 29% levy on wines and other alcoholic beverages; and

(b) the Luxury Car Tax – a 33% levy on certain motor vehicles with a value above a specified threshold.

Refer to the section on Tax regime for further details on taxes.

Tariff Concession System

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

Quarantine

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

Anti-dumping

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

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

Export control

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

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

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

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

Export control on dual use goods

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

Live export

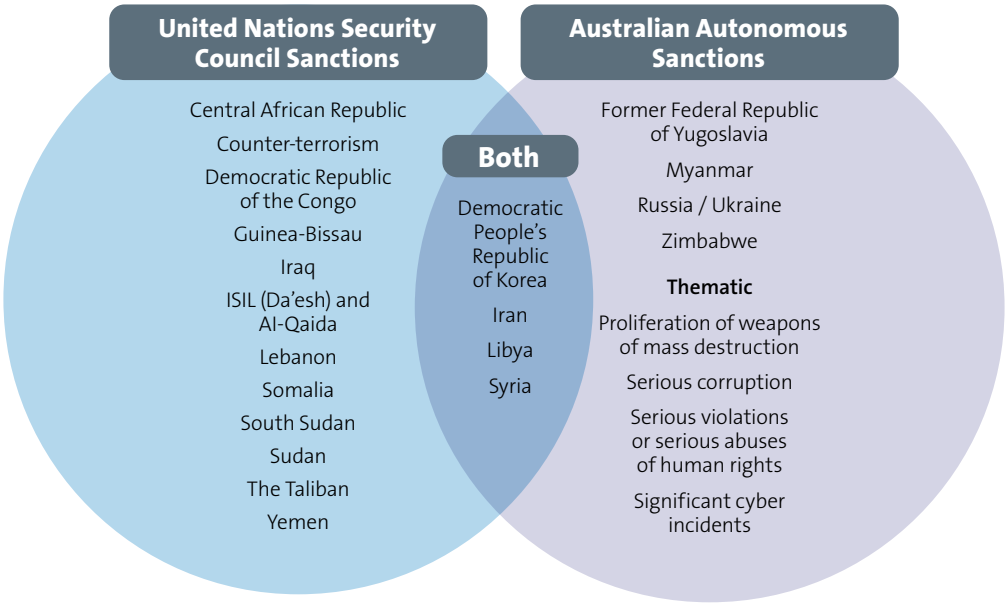
Live export from Australia is regulated by a comprehensive framework administered by the Department of Agriculture, Fisheries and Forestry (***Department***). The framework includes the requirement to comply with the Australian Standards for the Export of Livestock (***ASEL***) and the Exporter Supply Chain Assurance System (***ESCAS***). The ASEL covers the sourcing of export livestock, their management in registered premises, loading of livestock onto a vessel, management on board a vessel and standards for land and air transport. Arrangements to ensure exported animals are well treated during road, sea and air transportation are an important part of the ASEL. The ESCAS provides assurance on the humane treatment and handling of livestock in the importing country.

The live export trade has recently been a politically sensitive and fluid issue in Australia. In July 2024, the Australian Parliament passed laws to end live sheep exports by sea by 1 May 2028, with the Department to continue to regulate the export of live sheep during the transition to ensure compliance with all requirements, including animal welfare.

Trade sanctions

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

The sanction programs Australia implements as at the date of this publication (February 2025) are set out in the following diagram.



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

In October 2024, DFAT published a report (available here) confirming that the Australian Government had "reviewed Australia's sanctions laws to identify areas of reform to ensure sanctions law remained clear, fit for purpose and aligned with contemporary foreign policy objectives". The review recommended several areas for reform of Australia's sanctions laws including:

1 streamlining the legal framework to make the legislation easier to understand;

2 clarifying the scope of sanctions measures, as well as the meaning of certain terms (including 'asset', 'indirectly', 'for the benefit of' and 'owned and controlled');

3 improving the process for permit applications (for instance, providing guidance around whether the granting of a permit will be 'in the national interest'). Currently, the Minister for Foreign Affairs may grant a sanctions permit authorising an activity that would otherwise contravene an Australian sanction law. The Minister may attach conditions to any such sanctions permit.

4 adopting a humanitarian exemption for sanctions (for instance, to support the timely delivery of humanitarian aid);

5 reforming sanctions offences and enforcement (including the possibility of introducing civil penalties);

6 reviewing the mechanisms for sanctions designations and declarations (including removing the automatic expiry of autonomous sanctions listings every three years and the establishment of an independent advisory body to advise the Foreign Minister on sanctions decisions); and

7 improving the ASO's powers and regulatory functions

In December 2024, the ASO also published the Sanctions Compliance Toolkit and the Sanctions Risk Assessment Tool. The purpose of these guidance notes is to provide a structured approach to compliance with sanctions laws by outlining key principles, risk management strategies, and best practices that entities can adopt to mitigate the risk of contravening sanctions.

The guidance documents are the most substantive guidance that the ASO has provided to the general regulated population to date on sanctions laws, and sets out the steps that entities can take to demonstrate that they have taken reasonable precautions and exercised due diligence to avoid contravening the sanctions law (noting the reasonable precautions defence). The guidance is aligned with guidance from peer jurisdictions.

Please refer to the Australian Anti-bribery Laws section for information on Australia's anti-bribery regime.

Arbitration

Overview

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

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

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

There are a number of reasons for this:

- ***Enforcement:*** awards or decisions delivered by an arbitral tribunal are more easily enforced across multiple jurisdictions, compared to court judgments. Australia is a signatory to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (the ***New York Convention***), which has been ratified by approximately 170 countries,[13] and the Convention on the Settlement of Investment Disputes (the ***ICSID Convention***). This streamlines the enforcement of an Australian arbitral award in those 170 countries. In contrast, Australia has only a very limited number of arrangements with other countries to allow the enforcement of Australian Court judgments overseas. Generally speaking, the enforcement of an Australian Court judgment outside of Australia can be very difficult.
- ***Confidentiality:*** arbitration is conducted privately, and awards are generally confidential. In contrast the Australian Court system is founded on the principle of 'open justice' and most commercial Court disputes are open to the public. Consequently, arbitration provides a degree of confidentiality which is otherwise not available in proceedings before a court.
- ***Choice of decision maker:*** arbitration is a process by which an arbitral tribunal (usually consisting of one or three arbitrators) is appointed to hear the dispute and provide an award determining the rights and obligations of the parties. Unlike in the Court system the arbitrators tend to be appointed by the parties and often hold the technical expertise relevant to the substantive matters in dispute.
- ***Finality:*** arbitration is governed by the principles of finality, which means there are narrow grounds upon which an arbitration award (ie, a decision) can be appealed. This is compared to court proceedings which, following a decision, can potentially have at least two stages of appeal. This means that court proceedings may not be resolved as quickly as arbitration.

Australia has International and Domestic Arbitration Frameworks

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

International Arbitrations

International arbitration is governed by the *International Arbitration Act 1974* (Cth) (the ***IAA***). It was through the IAA that Australia enacted the New York Convention to which it acceded on 26 March 1975 (without reservations) and the *United Nations Commission on International Trade Law Model Law on International Commercial Arbitration 1985* with amendments as adopted in 2006 (the ***UNCITRAL Model Law***) (as its default procedural law for international arbitrations).The IAA applies to:

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

- disputes which are referred to arbitration pursuant to an arbitration agreement, generally in circumstances where the parties to the agreement have their place of business in different foreign States;
- international commercial arbitrations to which the UNCITRAL Model Law applies;
- investment treaty arbitrations; and
- applications seeking enforcement of 'foreign awards' (ie, awards made under an arbitration agreement in a country other than Australia to which the New York Convention applies).

Domestic Arbitrations

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

Domestic arbitration is governed by the Commercial Arbitration Acts as applicable in each State and Territory (the ***Uniform Arbitration Acts***).[14]

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

Australian Courts are Pro-Arbitration

Australia is a 'pro-arbitration' jurisdiction.

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

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

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

- stay court proceedings in favour of the parties' agreement to arbitrate disputes (and in the process construed the arbitration agreement with strict reference to the parties' intentions in accordance with the principle of party autonomy in arbitration);[15] and
- refusing applications challenging an arbitral award or resisting the enforcement of an arbitral award unless the very narrow grounds set out under the Model Law or New York Convention are established.

Additionally, under the IAA and the Uniform Arbitration Acts, Australian courts are provided broad powers to assist the arbitral process by making:

- interim orders preserving the status quo until the arbitration is completed (to prevent respondents from destroying evidence or hiding assets); and
- orders to assist in taking evidence, such as ordering subpoenas or supervising the expert evidence process.

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

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

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

Proportionate liability

Australia has various proportionate liability regimes which are given effect by State and Federal legislation. The regimes apply where there are multiple concurrent wrongdoers under 'apportionable claims'.[16] Broadly, the effect is to reduce a defendant's liability to the portion for which it is responsible.

So, for example, if a plaintiff suffers loss from concurrent wrongdoers A, B and C, under the various regimes it can only sue A for the portion of loss that A's conduct caused, B for the portion of loss that B's conduct caused and so on. The regimes prevent a situation where a plaintiff could, for example, sue A for all of the loss that is suffered due to A, B and C's conduct and leave it to A to seek contribution from B and C.

Recent High Court of Australia authority[17] ruled that Australia's proportionate liability regimes will apply to arbitration proceedings. Previously it had been assumed by many that the regimes did not apply to arbitration proceedings.

The rationale of the majority of the Court was that the parties' choice of law was of utmost importance and should be respected; and, proportionate liability schemes formed part of the applicable law (where they could not be contracted out of) and could be applied in the resolution of a dispute by arbitration.

This means that, when investing in Australia, some thought needs to be given as to the risk that apportionable claims might arise and what proportionate liability statute will apply. In some instances, it is open for parties to contract out of a proportionate liability regime in their arbitration agreement. In other instances it may be necessary to consider whether joinder and consolidation provisions in the relevant arbitration agreement or arbitral rules provide adequately for all necessary parties to be joined. Appropriate advice should be sought.

Arbitral Institutions

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

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

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

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

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

16 These are defined in the various statutes but include claims in negligence and claims for misleading and deceptive conduct under the Australian Consumer Law.
17 *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24.

Investor-State Arbitration

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

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

Australian-based companies have used ISDS to protect their investments overseas, while just one ISDS arbitration commenced against Australia by a foreign investor has been finalised. Australia is currently defending 4 ISDS claims recently brought by Zeph Investments, a Singaporean entity ultimately owned by Australian citizen, Mr Clive Palmer. The parties agreed to temporarily suspend proceedings in three of those arbitrations until the jurisdictional ruling is handed down in the first proceeding.

Recent developments indicate that on the whole Australia's pro-enforcement approach to arbitral awards extends to investor-State disputes.

- In *Eiser Infrastructure v Kingdom of Spain*,[18] the High Court of Australia decided that Spain was not immune from prosecution in relation to recognition and enforcement proceedings regarding an award following arbitration commenced pursuant to the ICSID Convention. The High Court's reasoning was that through entry into the ICSID Convention, Spain waived its immunity under Australia's *Foreign States Immunities Act 1985* (Cth) (***FSIA***) for the purposes of recognition and enforcement. The Court found, however, that execution is left entirely to be determined under domestic law. In Australia, the FSIA includes exceptions to immunity from execution, including in relation to commercial and immovable property
- An investor-State dispute and subsequent arbitral award was also the subject of *Republic of India v CCDM Holdings, LLC*,[19] a decision of the Full Court of the Federal Court of Australia, albeit that in that case recognition and enforcement was sought under the New York Convention. The proceeding concerned a dispute commenced pursuant to the India-Mauritius bilateral investment treaty. The Full Court found that India had not waived its immunity under the FSIA by becoming a party to the New York Convention. The decision turned on India's reservation that carved out non-commercial disputes (under the law of India) from the scope of its submission to the New York Convention. Various other countries have made similar commercial reservations. CCDM have appealed the decision to the High Court of Australia.

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

18 *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11
19 *Republic of India v CCDM Holdings, LLC* [2025] FCAFC 2

Tips on successfully implementing your investment strategy

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

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

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